

The Conman and the Sheriff: SEC Jurisdiction and the Role of Offshore Financial Centers in Modern Securities Fraud*

Congress founded the Securities and Exchange Commission (SEC) in 1934 in the wake of the greatest financial collapse in history. More than seventy years later, the SEC, charged by Congress with a mandate to preserve the national public interest through fair and honest markets, remains a critical force in policing U.S. markets. But while the scope and authority of the SEC's power has expanded over time, so too have the crimes it seeks to prevent. Over the last five years, a carousel of large, international frauds by well-known and well-regarded financiers undermined the integrity of global securities markets and international cooperation in market enforcement. Specifically, these crimes, perpetrated by rogue financiers like Bernard Madoff and Sir Allen Stanford, have cost investors in the Americas and beyond billions of dollars. In light of these inventive frauds, no simple solution can prevent all forms of financial crime; however, this Note advocates an expansion of SEC authority to place a substantial hurdle in the way of these clandestine conmen in the hopes of stripping them of a primary tool—the use of offshore financial centers (OFCs).

To prevent conmen from avoiding SEC jurisdiction and capitalizing on self-interested local regulation in OFCs, this Note encourages Congress to grant the SEC the authority to initiate investigations on foreign soil—with prior consent from foreign regulators—when it perceives a substantial threat to investors in the United States. To support such an expansion of authority, this Note first provides a primer on OFCs and their use by international fraudsters, drawing from three recent case studies of securities fraud. Then, this Note will explain the expansion of SEC authority while addressing both the inefficiencies in the SEC's current cooperative model and the precedent for such an expansion of authority—Title III of the USA PATRIOT Act. Finally, this Note will apply the SEC's expanded jurisdiction to the three case studies discussed earlier to demonstrate how this new approach can prevent the types of frauds that threaten the integrity of U.S. markets and the national public interest.

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I. Enhancing SEC Jurisdiction to Combat International Fraud—An Introduction

In light of persistent technological innovation and the integration of global markets, the Securities and Exchange Commission (SEC) must adapt constantly to new challenges threatening its domain.¹ As the recent financial crisis again demonstrates, the effects of adverse market conditions in one nation can cause unforeseeable damage across the world.² Moreover, given the speed of modern transactions, where money deposited in Omaha before breakfast can be in London for tea and in Hong Kong by dinner, regulators often have trouble keeping pace with increasingly complex, rapid communications.³ Amidst this changing economic and regulatory landscape, a new villain has emerged to challenge the SEC: the international fraudster or conman.⁴ Recently, these conmen, like Sir Allen Stanford and Bernard Madoff, have dominated the press with the exploits of their multi-billion-dollar frauds.⁵ To impede the proliferation of international conmen, this Note will investigate the role that offshore financial centers (OFCs) play in modern cons and offer a possible mechanism by which the SEC may be able to mitigate the damage done by fraudsters.

Specifically, the manner in which conmen utilize OFCs in their frauds often raises red flags that something is amiss, giving regulators an

1. See Luis A. Aguilar, Comm'r, SEC, Speech by SEC Commissioner: Empowering the Markets Watchdog to Effect Real Results (Jan. 10, 2009) (transcript available at <http://sec.gov/news/speech/2009/spch011009laa.htm>) (discussing the importance of developing “a more efficient and modern regulatory structure . . . to address new technologies, globalization, and new innovative financial products and services”).

2. See David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1024 (2008) (addressing the argument that “if the federal government did not bail out Fannie or Freddie, it could lead to an international financial crisis that could be greater than those posed by the 1994 Mexican peso collapse, the 1997 East Asian ‘flu’ and the 1998 Russian bond default”).

3. See Tom McGinty & Kara Scannell, *SEC Plays Keep-Up in High-Tech Race*, WALL ST. J., Aug. 20, 2009, at C1 (“[T]he [SEC] is outmatched by the traders and market venues with technology that is remaking the trading world.”); cf. *Strengthening the S.E.C.'s Vital Enforcement Responsibilities: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 5 (2009) (statement of Richard J. Hillman, Managing Director, Fin. Mkts. & Cmty. Inv., Gov't Accountability Office), available at <http://www.gao.gov/new.items/d09613t.pdf> (admonishing the SEC's “burdensome system for internal case review” that slows enforcement actions).

4. See, e.g., ARTHUR HERZOG, *VESCO: FROM WALL STREET TO CASTRO'S CUBA, THE RISE, FALL, AND EXILE OF THE KING OF WHITE COLLAR CRIME*, at xv (2003) (noting that in the 1970s, financier Robert Vesco was accused of stealing roughly \$250 million, thus placing him “at the pinnacle of white collar thieves”).

5. See, e.g., Alyssa Abkowitz, *The Investment Scam-Artist's Playbook: Bernie Madoff and R. Allen Stanford's Tactics May Suggest a Formula on How to Get Mixed Up in a Massive Government Fraud Case*, CNNMONEY.COM, Feb. 25, 2009, http://money.cnn.com/2009/02/25/news/madoff_stanford_playbook.fortune/index.htm?postversion=2009022516 (discussing the similarities of the two cases).

opportunity to stop a fraud before it escalates.⁶ However, despite the prevalence of these indicators, the SEC cannot act peremptorily to halt a growing fraud because it is unable to rely on foreign regulators in these OFCs,⁷ and it lacks the authority to initiate unilateral investigations within foreign borders.⁸ As a result, conmen engage in OFC-based activity to avoid SEC jurisdiction and capitalize on self-interested local regulation,⁹ placing substantial hurdles in the way of the SEC's enforcement efforts. In order to overcome these obstacles and the SEC's reliance on foreign regulators—who often appear complicit in the frauds¹⁰—Congress should grant the SEC the authority to initiate investigations on foreign soil when it perceives a substantial threat to investors in the United States without waiting for approval from foreign regulators.

After a brief primer on OFCs in Part II, this Note will investigate three recent frauds employing OFCs in Part III, noting the existence of red flags in each instance. Then, in Part IV, this Note will present an argument for expanding the SEC's authority to foreign soil while addressing the inefficiencies of the SEC's current cooperative model and the notion that this expansion is not without precedent in light of Title III of the USA PATRIOT Act.¹¹ Finally, in Part V, this Note will apply the solution developed in the previous Part to the three case studies discussed in Part III, demonstrating the potential of an expanded investigative right to overcome the jurisdictional benefits of OFCs to conmen, before concluding.

6. See *infra* sections III(A)(3), III(B)(3), III(C)(3) (identifying the red flags that appeared in each case study).

7. See *infra* subsections III(A)(2)(b)–(c) (describing how the close relationship between the conman and the local regulatory authority made the latter an unreliable partner for SEC investigations).

8. See Securities Exchange Act of 1934 § 21(a)(2), 15 U.S.C. § 78u(a)(2) (2006) (granting the SEC authority to assist a foreign government in a securities investigation *if* that foreign government requests assistance).

9. See *infra* subpart II(B) (explaining the incentives that lead OFCs to avoid meaningful regulation).

10. See *Alleged Stanford Financial Group Fraud: Regulatory and Oversight Concerns and the Need for Reform: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 9 (2009) (statement of Onnig H. Dombalagian, George Denégre Assoc. Professor of Law, Tulane Univ.), available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9f74be50-89f5-4e07-b9ef-f9aa542f9df6 (contending that evidence suggests that Stanford likely procured the complicity of the Antiguan regulator responsible for oversight of Stanford's operations to hinder the SEC's investigation).

11. USA PATRIOT Act, Pub. L. No. 107-56, tit. 3, 115 Stat. 272, 296–342 (2001) (codified as amended in scattered titles of U.S.C.).

II. A Primer on Offshore Financial Centers

A. An Operational Definition

Much of the current scholarship on offshore financial centers focuses on providing an operational definition of what constitutes an OFC.¹² From this literature, three common characteristics emerge. First, OFCs direct their business toward nonresidents.¹³ In particular, laws in OFCs are designed to encourage the export of financial services to higher regulation nations in exchange for capital.¹⁴ As a result, these regions “provide[] financial services to nonresidents on a scale that is incommensurate with the size and the financing of [their] domestic econom[ies].”¹⁵

Second, to encourage this exchange, OFCs present favorable regulatory environments relative to higher regulation nations like the United States.¹⁶ These favorable conditions include flexible incorporation and licensing standards, low government supervision, robust secrecy laws, a lack of physical-presence requirements, and extensive use of special-purpose vehicles and trusts without government review.¹⁷

Third, OFCs offer “low- or zero-taxation schemes” on business and investment income for nonresidents.¹⁸ This characteristic exemplifies the notion that OFCs systematically create an economic climate that favors foreign capital, as many of the advantages granted to foreigners are not extended to locals.¹⁹

12. See, e.g., Ahmed Zoromé, *Concept of Offshore Financial Centers: In Search of an Operational Definition* 26 (Int'l Monetary Fund, Working Paper No. 07/87, 2007), available at <http://www.imf.org/external/pubs/ft/wp/2007/wp0787.pdf> (listing various definitions of OFCs found in a survey of the literature).

13. See GUNTER DUFEY & IAN H. GIDDY, *THE INTERNATIONAL MONEY MARKET* 37 (1978) (defining offshore banking as attracting nonresident borrowers and lenders with sparse or flexible regulation and taxation on the banking industry); R.B. JOHNSTON, *THE ECONOMICS OF THE EURO-MARKET: HISTORY, THEORY AND POLICY* 18 (1982) (adding that territories with active offshore banking industries are also distinguished by a level of banking business that far exceeds the needs of the local market); Ian McCarthy, *Offshore Banking Centers: Benefits and Costs*, *FIN. & DEV.*, Dec. 1979, at 45, 45–46 (emphasizing ease of entry and low license fees, taxes, and levies as characteristic of successful offshore banking centers).

14. See Zoromé, *supra* note 12, at 6 (noting “the intrinsic feature of the OFC phenomenon, which is its *raison d’être*—the provision of financial services to nonresidents, namely, exports of financial services” (emphasis omitted)).

15. *Id.* at 7 (emphasis omitted) (citation omitted).

16. McCarthy, *supra* note 13, at 47.

17. See *infra* notes 31–32 and accompanying text. See generally Zoromé, *supra* note 12. It is worth noting that, while not always individually dangerous, these elements can be more potent when used collectively.

18. Zoromé, *supra* note 12, at 4.

19. See *ORG. FOR ECON. CO-OPERATION & DEV., HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE* 26–28 (1998), available at <http://www.oecd.org/dataoecd/33/1/1904184.pdf> (describing “ring-fencing”—either preventing residents from benefitting from tax advantages or preventing advantaged nonresidents from participating in the domestic market—as a key factor in identifying harmful preferential tax regimes typical of tax havens).

Taking these three factors together, one can consider an OFC to be a region that offers favorable regulatory standards to nonresidents, including low tax and transparency burdens, in an effort to attract foreign capital. The key corollary to this definition is that OFCs willfully undercut foreign regulations to attract capital, creating an opportunity for residents in higher regulation countries to move operations to regions with lower standards.²⁰ To any conman, the advantages of doing business in an OFC become clear: low regulation and high secrecy decrease the likelihood that home-country regulators, like the SEC, will be able to detect suspicious behavior, much less investigate with enough diligence to bring an enforcement action.

Despite the commonality of certain OFC indicators, not all OFCs are the same; a particular dichotomy essential to understanding OFCs deserves attention. In the world of OFCs, two subgroups emerge: nations like Switzerland, which have high regulatory standards but evince high secrecy laws that frustrate foreign regulators,²¹ and nations like the Seychelles, which function purely as a regulatory façade.²² It is particularly telling that the latter group is the one more likely to be targeted by international fraudsters, as evidenced by the case studies.²³ As a result, this group will be subject to greater scrutiny under the model proposed in Part IV.

B. Inadequate Incentives to Self-Regulate

An alternative model to the one advocated in this Note centers on self-regulation by OFCs. Rather than granting the SEC unilateral authority to investigate beyond U.S. borders, the model rests on the notion that the SEC can cooperate with local regulators that police themselves. Given the definition of OFCs presented in the preceding subpart, this model is inherently nonfunctional. Two particularly compelling forces underlie the inefficacy of the self-regulation model.

20. See DUFÉY & GIDDY, *supra* note 13, at 38 (“Thus a government can often legislate (or better, delegislate) its country into financial prominence, if it wishes to do so.”).

21. Despite being listed on the Organisation for Economic Cooperation and Development’s (OECD) “grey list” of substandard tax regulators, the Financial Stability Forum elects not to classify Switzerland as an OFC based on its cooperation with the SEC and other foreign regulators. FIN. STABILITY FORUM, REPORT OF THE WORKING GROUP ON OFFSHORE CENTRES 14 (2000), available at http://www.financialstabilityboard.org/publications/r_0004b.pdf [hereinafter FSF REPORT]. But see ORG. FOR ECON. CO-OPERATION & DEV., A PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD (2009), available at <http://www.oecd.org/dataoecd/38/14/42497950.pdf> (“grey” listing Switzerland); *Swiss Bank Refuses US Tax Request*, BBC NEWS, May 1, 2009, <http://news.bbc.co.uk/2/hi/business/8028174.stm> (discussing the Swiss bank UBS’s efforts to hide behind its nation’s secrecy laws to avoid furnishing evidence in conjunction with a pending tax-evasion investigation in the United States).

22. See, e.g., INT’L MONETARY FUND, COUNTRY REPORT NO. 04/381, SEYCHELLES: REVIEW OF FINANCIAL SECTOR REGULATION AND SUPERVISION 14–16 (2004), available at <http://www.imf.org/external/pubs/ft/scr/2004/cr04381.pdf> (discussing the “urgent need” for the Seychelles to upgrade its banking regulations to meet the Basel standards).

23. See *infra* Part III.

First, at a national level, OFCs stand to lose far more than they can gain by enhancing regulations. The Cayman Islands, for example, relies heavily on its financial-services sector, which is predicated on low regulations of foreign capital:

Forty years ago the Cayman Islands were on the verge of economic extinction. There was no room in the modern world for an island that made rope and caught turtles and whose wetlands prevented any agriculture. Today the standard of living is the highest in the Caribbean, surpassing the United States and Britain. There is virtually no unemployment. Only the beautiful alliance of capital and state has made this possible.²⁴

Conversely, the only tangible benefit from complying with foreign regulation is avoiding public shaming.²⁵ Thus, at a national level, OFCs lack an adequate incentive or substantial threat to forgo the wealth benefit of low regulation.

This conflict is replicated at the individual-actor level. In particular, domestic political pressure tends not to incentivize endorsing greater regulation.²⁶ Moreover, given the sizable role that the financial-services industry plays in many local economies, it is unlikely that voters in an OFC will forgo increased domestic liquidity out of concern for the potential negative externalities caused by their regulations in other countries.²⁷ This bias ultimately manifests itself in local politicians who support low regulations to bring greater liquidity to their communities. Taken together, the national and private-actor interests in maintaining low regulations imply that efforts to control the fraudulent use of OFCs cannot occur through enhanced self-regulation by the OFCs themselves. Instead, if the SEC is to meaningfully monitor the effects of OFC-based behavior on the U.S. markets, it will have to do so on its own initiative.

24. WILLIAM BRITAIN-CATLIN, OFFSHORE: THE DARK SIDE OF THE GLOBAL ECONOMY 8 (2005). Similarly, in the British Virgin Islands, “[t]he revenue from registering foreign companies has paid for a community college and a hospital.” Ben Fox, *Islands Resent Crackdown of Tax Havens by G-20*, ABC NEWS, Apr. 3, 2009, <http://abcnews.go.com/International/wireStory?id=7247748>.

25. *Cf., e.g.*, Press Release, Org. for Econ. Co-operation & Dev., Four More Countries Commit to OECD Tax Standards (Apr. 7, 2009), available at http://www.oecd.org/documentprint/0,3455,en_2649_34487_42521280_1_1_1_1,00.html (announcing that four previously blacklisted countries—Costa Rica, Malaysia, Philippines, and Uruguay—had committed to improving their respective tax standards following a public shaming by the OECD).

26. *Cf., e.g.*, Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 127–28 (2009) (observing that administrative agencies, like financial regulators, are subject to domestic political pressures sometimes allowing “concerned parties [to] succeed in convincing legislatures to override agency rules . . . or even to radically restructure or consolidate agencies”).

27. See BRITAIN-CATLIN, *supra* note 24, at 8 (acknowledging the effect of importing financial services on the unemployment level and standard of living in the Cayman Islands).

C. Current Examples of OFCs

In 2000, the Financial Stability Forum (FSF) identified a list of OFCs based on the level of technical assistance offered by these regions in support of international securities-law enforcement and the extent of their financial regulations.²⁸ Nations that demonstrated an unwillingness to improve their low standards were more likely to be relegated to the FSF's OFC list, presented in Table 1 below.²⁹

Table 1: Countries Classified as "Financial Centres with Significant Offshore Activities" by the FSF³⁰

Andorra	British Virgin Islands	Lebanon	St. Kitts & Nevis
Anguilla	Cayman Islands	Liechtenstein	Niue
Antigua	Cook Islands	Macau	Panama
Aruba	Costa Rica	Malta	St. Lucia
Bahamas	Cyprus	Marshall Islands	St. Vincent
Bahrain	Gibraltar	Mauritius	Samoa
Barbados	Guernsey	Monaco	Seychelles
Belize	Isle of Man	Nauru	Turks & Caicos Islands
Bermuda	Jersey	Netherlands Antilles	Vanuatu

The FSF conducted various surveys of both OFCs and traditional, onshore financial centers to better determine the key characteristics, issues, and motivations associated with OFCs. The FSF determined that OFCs are used "to maximize profits in low tax regimes," to create special-purpose vehicles (SPVs) to issue securitized products like asset-backed securities, to hide assets from seizure and repatriation, to avoid tax-related disclosures, and to launder money.³¹ Ultimately, the FSF concluded that regulatory exploitation in OFCs developed from inadequate due diligence in licensing and monitoring corporations and SPVs, inadequate disclosure rules, inadequate

28. FSF REPORT, *supra* note 21, at 9.

29. *Id.*

30. *Id.* at 14 tbl.1. Only twenty-five of the thirty-seven countries responded to the survey, but the FSF did not disclose which did or did not, so the full list is included here.

31. *Id.* at 10.

information sharing between the OFCs and investors, inadequate enforcement capital and personnel, excessive secrecy laws, and an “[a]bsence of political will to improve the quality of supervision.”³² Significantly, each of the nations implicated in the case studies discussed below appears on the FSF’s list of OFCs, and each embodies the characteristics of high secrecy and low monitoring of corporate activity, making them attractive tools in any con.

III. The Conmen: Case Studies from the Post-Enron Era

Modern securities-fraud cases are as diverse as the personalities of those who perpetrate them. However, as the case studies will demonstrate, many frauds rely on the obscurity of OFCs to effect material elements of the crime. Capitalizing on the SEC’s jurisdictional limitations and the lack of transparency promulgated by local regulators, fraudsters are able to engage in brazen techniques to defraud investors. The three case studies will demonstrate that, while the scale and techniques of fraud vary, certain red flags tied to activities in OFCs can be detected, giving the SEC the opportunity to shut down a fraud before it escalates. At a minimum, increased authority for the SEC would make it far more difficult for the fraudsters to effect their crimes by shedding greater transparency on their offshore activities, ultimately decreasing the ability of conmen to successfully engage in fraudulent practices.

A. *Sir Robert Allen Stanford*

This tournament is unique in so many ways, not only because of the prizes up for grabs but also for the different elements that we are going to add to the game that will make it even more exciting. I don’t want to reveal too much[,] but I hope everyone will come out and see what we have in store.³³

1. *The Con.*—According to the SEC, Allen Stanford and Antigua-based³⁴ Stanford International Bank, Ltd. (SIB) engaged in a two-pronged effort to defraud investors of over \$8 billion.³⁵ The first aspect involved the sale of allegedly low-risk certificates of deposit (CDs) to investors, professing returns at twice the market rate.³⁶ In particular, the SEC alleges that SIB

32. *Id.* at 12–13.

33. *Stanford Ups the Ante*, CRICINFO.COM, March 31, 2006, <http://www.cricinfo.com/pakistan/content/story/242809.html>.

34. Julie Creswell et al., *Fraud Parade: \$8 Billion Case Is Next in Line*, N.Y. TIMES, Feb. 18, 2009, at A1.

35. Complaint at 4, SEC v. Stanford Int’l Bank, Ltd., No. 3:09-CV-298-N (N.D. Tex. Feb. 16, 2009) [hereinafter *Stanford Complaint*].

36. *See id.* at 1 (explaining that Stanford promised “high return rates that exceed[ed] those . . . offered by traditional banks”); *see also* Matthew Goldstein, *The Pressure Mounts on Stanford*, BUSINESSWEEK, Feb. 16, 2009, http://www.businessweek.com/investing/wall_street_

misled investors into believing the CDs were safer than they actually were in three ways.

First, SIB claimed to re-invest “client funds primarily in ‘liquid’ financial instruments.”³⁷ However, “a substantial portion of the bank’s portfolio was placed in illiquid investments, such as real estate and private equity,” increasing the risk faced by investors without disclosure.³⁸ Second, SIB claimed to monitor “the portfolio through a team of 20-plus analysts.”³⁹ But in actual fact, the SEC alleges that only “two people—Allen Stanford and [CIO] James Davis”—were monitoring the multibillion-dollar portfolio.⁴⁰ Finally, the SEC asserts that SIB, to pacify investor concerns, claimed that the firm was “subject to yearly audits by Antiguan regulators.”⁴¹ However, “the Antiguan regulator responsible for oversight of the bank’s portfolio, the Financial Services Regulatory Commission, [did] not audit SIB’s portfolio or verify the assets SIB claim[ed] in its financial statements.”⁴² The cumulative effect of these misrepresentations was the cultivation of an \$8.4 billion portfolio predicated on erroneous information and overinflated estimations of investment returns.⁴³

The second element of Stanford’s massive fraud involved more than \$1 billion in sales of a “proprietary mutual fund wrap program” based on materially false historical-performance data.⁴⁴ This program allegedly enabled Stanford to recruit financial advisers “to re-allocate their clients’ assets to SIB’s CD program.”⁴⁵

Collectively, Stanford’s fraud centered on his ability to mislead investors into believing that the too-good-to-be-true returns on the CDs offered by SIB were both real and secure, while in fact investor proceeds were placed in speculative, unsecure investments.⁴⁶ Through his con, Stanford convinced his investors—most of whom lived in the United States,

news_blog/archives/2009/02/the_pressure_mo.html (commenting that the professed returns on Stanford’s high-yield CDs were “twice the market average”); Bill Zielinski, *Stanford Financial Is Next Hedge Fund Investigated*, SEEKING ALPHA, Feb. 16, 2009, <http://seekingalpha.com/article/120791-stanford-financial-is-next-hedge-fund-investigated> (explaining that Stanford proffered “tantalizing” interest rates nearly twice the rates offered on average (4.5% instead of 2% for one-year CDs and 7.03% instead of 3.9% for five-year CDs)).

37. Stanford Complaint, *supra* note 35, at 3.

38. *Id.* at 3–4.

39. *Id.* at 3.

40. *Id.* at 4.

41. *Id.* at 3.

42. *Id.* at 4.

43. *Id.* at 8–9.

44. *Id.* at 4.

45. *Id.* at 5.

46. See Ray Hennessey, *Fraud at Stanford Was Suspected as Early as 2002*, FOXBUSINESS.COM, May 6, 2009, <http://www.foxbusiness.com/story/markets/industries/government/fraud-stanford-suspected-early/> (quoting an unnamed insider who claimed that “investor proceeds [were] being directed into speculative investments like stocks, options, futures, currencies, real estate and unsecured loans”).

Venezuela, Ecuador, and Mexico⁴⁷—that his firm was capable of extraordinary returns, while stripping them of billions of dollars, much of which cannot be located.⁴⁸

2. *The OFC Element.*—Antigua played a significant role in Stanford's fraud in three principal ways. First, the financier capitalized on the island's lack of transparency to institute and execute his suspicious business model with virtually no oversight.⁴⁹ Second, he cultivated close links with the local community, placing him beyond the reproach of local regulators and politicians.⁵⁰ Third, by basing his operation outside of the SEC's jurisdiction, Stanford was able to expand his fraud while the SEC was left clamoring for local assistance from Antiguan regulators.⁵¹

a. Low Transparency Regarding Investment Sources and Inadequate Verification by Local Auditors.—Stanford took advantage of Antigua's low level of supervision to implement two aspects of his fraud that were intended to deceive investors into believing that his investments were safe and successful: his business model and his local auditor. First, Stanford's fraud was predicated on his ability to raise constant investments from the public without having to prove that his alleged returns were real. By establishing a bank in Antigua and issuing CDs predominantly to Latin American investors,⁵² who value low transparency,⁵³ Stanford was able to claim twice-market returns without having to provide proof to American investors and regulators.⁵⁴

To the extent that proof of his model's fiscal viability was requested to satisfy investors, Stanford was able to take advantage of a local auditor that would not be vetted by American authorities. Since the institution of the Public Company Accounting Oversight Board (PCAOB),⁵⁵ which requires accounting firms that participate in audits of SEC-reporting companies to

47. Neil Roland, *Alleged "Massive Fraud" at Stanford Financial Exposes Regulatory Gaps—Again*, FIN. WK., Feb. 17, 2009, <http://www.financialweek.com/apps/pbcs.dll/article?AID=/20090217/REG/902179991/1049/COMPLIANCE>.

48. Marie Colvin, *\$8bn "Missing" from Allen Stanford's Offshore Bank*, TIMES ONLINE, Feb. 22, 2009, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article5780591.ece.

49. See *infra* subsection III(A)(2)(a).

50. See *infra* subsection III(A)(2)(b).

51. Cf. Hennessey, *supra* note 46 (explaining that the SEC had difficulty obtaining information due to Antiguan confidentiality laws).

52. Roland, *supra* note 47.

53. See *Latin Investors Could Be Big Madoff Losers*, MSNBC.COM, Dec. 29, 2008, <http://www.msnbc.msn.com/id/28423227> (discussing the secrecy premium valued by Latin American investors).

54. See Roland, *supra* note 47 (“[T]he Stanford Group Co. investment advisers did not register with the SEC for many years, precluding potential inspection by regulators . . .”).

55. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, tit. 1, sec. 101(a), 116 Stat. 745, 750 (codified at 15 U.S.C. § 7211(a) (2006)) (establishing the PCAOB).

register with the PCAOB and adhere to its rules and inspections,⁵⁶ the SEC has been forced to rely significantly on foreign regulators to monitor local auditors.⁵⁷ When relying on foreign regulators, the PCAOB has employed a “sliding scale approach”: its rules permit varying degrees of reliance on the home country” depending on how independent that regulator is.⁵⁸ In determining independence, the PCAOB considers “the home country system’s funding arrangements, transparency measures, and track record.”⁵⁹ However, in the interest of administrative feasibility, the PCAOB must rely on the representations of local regulators, particularly with respect to determining transparency and funding.⁶⁰

Therefore, to the extent that a fraudster would want to deceive the PCAOB and SEC, she mainly would have to mislead a local regulator into accepting the audit information as accurate. As will be demonstrated shortly, in light of the close relationship between Stanford and the Antiguan political community, the fraudster’s “burden” of convincing local regulators becomes increasingly facile when the regulators are socially and financially integrated with the fraudster.

According to Stanford’s SEC filings, SIB’s auditor was the Antiguan branch of St. John’s-based C.A.S. Hewlett & Co.⁶¹ However, employees at Hewlett’s office have no knowledge of working on any Stanford accounts.⁶² The prevailing suspicion among the SEC and Hewlett employees is that the auditor’s now-deceased former CEO Charlesworth Hewlett—if anyone—would be the only party with any “possible knowledge of a relationship to Stanford.”⁶³ Moreover, the firm itself, a ten-person operation working out of a residential neighborhood, appeared to be “an unlikely operation to manage books for an \$8 billion enterprise.”⁶⁴ Insufficient auditing proves material in light of Stanford’s gross financial misrepresentations. In one case, for instance, SIB purchased 1,587 acres in Antigua for \$63.5 million.⁶⁵ Months later, this real estate was valued on SIB’s books at \$3.2 billion.⁶⁶ Clearly a

56. 15 U.S.C. §§ 7212–7214.

57. See Roberta S. Karmel, *The EU Challenge to the SEC*, 31 *FORDHAM INT’L L.J.* 1692, 1704 n.54, 1708 (2008) (discussing the SEC’s reliance on foreign regulators when unable to subject foreign auditors to PCAOB’s standards and reliance on foreign regulators as a key element in moves to harmonize American and foreign regulatory systems).

58. Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 *HARV. INT’L L.J.* 447, 487 (2008).

59. *Id.* at 488.

60. *Id.*

61. Jason Szep, *At Small Antigua Accounting Firm: Who’s Stanford?*, *REUTERS*, Feb. 19, 2009, <http://www.reuters.com/articlePrint?articleID=USN1951126620090219>.

62. *Id.*

63. *Id.*

64. *Id.*

65. Anna Driver & Chris Baltimore, *Stanford Vastly Overstated Assets: U.S. Receiver*, *REUTERS*, Apr. 23, 2009, <http://www.reuters.com/articlePrint?articleId=USTRE53M5PJ20090423>.

66. *Id.*

local auditor on a small island ought to have been aware of local land values, particularly given the magnitude of the discrepancy.

b. Stanford's Relationship with the Local Community Disincentivizes Investigation.—A disconcerting undertone begins to emerge from the wreckage of Stanford's activities in Antigua—regardless of ability, the nation did not appear willing to question the conman's success. This unwillingness was linked to Stanford's prominent role in the Antiguan community. While Stanford “was just another wealthy financier” in Texas, in Antigua “he was lord of an influential financial fief, decorated with a knighthood, courted by government officials and basking in the spotlight of sports and charity events on which he generously showered his fortune.”⁶⁷ Thus, where Stanford was successful, so was the island.

Stanford's prominence in Antigua is evident in his holdings, which included “a newspaper, two banks, two restaurants, a spectacular cricket stadium that bears his name, a cricket tournament that turns players into millionaires, and some of the best real estate in the nation,” in addition to his “theme-park-like” headquarters located “yards from V.C. Bird International Airport.”⁶⁸ Not only were the people of Antigua enamored with Stanford for bringing thousands of jobs⁶⁹—and international cricket—to the island, but the government itself had suspicious entanglements with the financier. During the late 1990s, amidst an international crackdown on offshore banking, Stanford came to Antigua's aid by advocating the creation of a domestic regulatory board to improve the nation's image.⁷⁰ Stanford, owner of the largest bank regulated by the board, influenced the initiative and financed the entire operation,⁷¹ epitomizing the proverbial conundrum: “*Quis custodiet ipsos custodes?*”⁷²—colloquialized as “Who shall watch the watchmen?”⁷³ As a result of his efforts, however, Antigua was removed from the financial watch list in 2001, enabling it to avoid public shaming and higher scrutiny under the PCAOB's sliding-scale analysis.⁷⁴

Given Antigua's financial stake in Stanford's operation at a national level and Stanford's connection to the personal interests of leading Antiguan, the nation appears incapable of second-guessing the suspicious

67. Creswell et al., *supra* note 34.

68. Jacqueline Charles, *Billionaire Stanford's Troubles Cause a Headache on Antigua*, MCCLATCHY, Feb. 22, 2009, <http://www.mcclatchydc.com/world/v-print/story/62615.html>.

69. *See id.* (noting fears that Stanford's downfall may cost Antigua thousands of jobs).

70. *See* Creswell et al., *supra* note 34 (attributing the creation of the board, in part, to Stanford's role as an adviser to Antigua's prime minister).

71. *Id.*

72. JUVENAL, DECIJ JUNII JUVENALIS ET A. PERSII FLACCI SATIRAE 139 (Arthur John Maclean ed., Whittaker & Co. 2d ed. 1867) (n.d.).

73. ALAN MOORE, WATCHMEN, epigraph (2005).

74. *See* Creswell et al., *supra* note 34 (describing how Antigua's removal from the watch list highlighted its apparent reform efforts).

business practices of its favorite son. Even in the face of public upheaval in the United States, Antigua's former Prime Minister came to the financier's defense.⁷⁵ The robust nexus between Stanford and Antigua's financial interests is perhaps nowhere more evident than in the nation's unwillingness to assist SEC investigators looking into Stanford's dealings before the fraud became public, as is discussed below. By currying favor among the local community with the proceeds of his fraudulent conduct, Stanford created a systemic regulatory advantage for himself, placing himself beyond reproach from the only regulators capable of reaching him abroad.

c. Fraud Flourishes Beyond the SEC's Jurisdiction.—Finally, Stanford was able to play on the SEC's lack of independent jurisdiction in Antigua to execute his fraud and hide assets after the fraud became public.⁷⁶ In 2005, following a series of whistle-blowers drawing attention to Stanford's suspicious returns,⁷⁷ the SEC initiated an enforcement investigation.⁷⁸ However, because of the lack of reliability of Antiguan regulators, the SEC did not receive sufficient information to bring charges for four years.⁷⁹

During this period, the fraud ballooned from \$3.8 billion in 2005 to \$8.4 billion in 2009.⁸⁰ Moreover, if a fraudster were to learn from a local regulator that the SEC was investigating her company, she might be more inclined to make risky or speculative investments to cover the asset deficiency on corporate balance sheets. Alternatively, realizing that the proceeds from fraud are reaching a terminal point, the fraudster may elect to ship her assets to another OFC in an effort to bury the funds even farther away from SEC jurisdiction. The latter problem currently manifests itself in the Stanford

75. See Charles, *supra* note 68 (“Stanford has done a reasonable job for the people of this country, and you don’t have nothing [sic] to be ashamed of,” former Prime Minister Lester Bird said “If he’s done something wrong, let the law take its course. But when we brought him here, he helped to develop this nation.”).

76. See Michael Sallah & Rob Barry, *As Feds Closed In, Allen Stanford Scrambled to Keep Fraud Secret, Money Flowing*, MIAMIHERALD.COM, Dec. 6, 2009, <http://www.miamiherald.com/business/v-fullstory/story/1368018.html> (detailing Stanford’s creative attempts to destroy financial records and disguise his company’s assets).

77. See Hennessey, *supra* note 46 (detailing a series of fraud allegations dating back to 2002).

78. *Cf. id.* (quoting SEC spokesman John Nester, who stated, “The SEC was unable to obtain detailed information about the offshore CDs in part because of complicating factors involving jurisdiction, including whether CDs issued by a foreign bank are securities covered by the federal securities laws . . . and the application of Antiguan laws governing confidentiality . . .”).

79. See Hennessey, *supra* note 46 (quoting an SEC official who acknowledged “significant regulatory obstacles” that delayed the filing of a fraud report until 2009, though the investigation began in 2005); *cf.* Clifford Knauss, *Antigua Dismisses Regulator Charged in Stanford Case*, N.Y. TIMES, June 24, 2009, at B2 (discussing the events surrounding a top Antiguan regulator being investigated for helping to cover up the Stanford fraud).

80. Stanford Complaint, *supra* note 35, at 8.

drama, as the proceeds from the fraud appear to have been dispersed from SIB in the final months before the scandal became public knowledge.⁸¹

3. *Red Flags*.—From the still-settling dust of Stanford's fraud, a series of red flags emerge, providing a guide for what triggers might warrant SEC investigation under the model advocated by this Note.

a. The Business Model.—Stanford's business model and compensation scheme were premised on the ability to produce twice-market returns.⁸² However, upon viewing the low-risk, liquid instruments allegedly utilized by Stanford, such returns would appear "unsustainable."⁸³ Moreover, the professed returns themselves were admittedly "improbable," particularly where SIB produced identical returns of 15.71% in 1995 and 1996.⁸⁴ However, the SEC's inability to verify local data and the false representations by the local auditor⁸⁵ made a proper investigation of these claims more difficult.

b. Suspicious Oversight.—SIB relied on a small, foreign auditor in a nation where the financier was known to be prominently involved in the community.⁸⁶ Ultimately, Stanford would use the auditor to feign the veracity of his returns and deceive investors.⁸⁷ Additionally, SIB's seven-member board lacked sufficient independence.⁸⁸ For example, the board included both Stanford's father and a childhood friend, who, following a stroke in 2000, "[could]n't string seven words together."⁸⁹ Disclosure of the purported auditor—a small, residential operation monitoring a multibillion-dollar investment conglomerate⁹⁰—and a board beholden to its CEO ought to have independently, and certainly collectively, drawn substantial regulatory attention.

81. Driver & Baltimore, *supra* note 65.

82. See Matthew Goldstein & David Polek, *Are These CD Rates Too Good to Be True?*, BUS. WK., Feb. 23, 2009, at 22, 22 (questioning the "supposedly super-safe" CDs offered by Stanford that returned twice the market average).

83. Andy Meek, *Stanford Receiver Details Findings*, MEMPHIS DAILY NEWS, Apr. 24, 2009, <http://www.memphisdailynews.com/editorial/Article.aspx?id=42138>.

84. Stanford Complaint, *supra* note 35, at 2.

85. See *supra* notes 52–66 and accompanying text.

86. See *supra* notes 61–69 and accompanying text.

87. See *supra* notes 61–66 and accompanying text.

88. Marie Colvin & Dominic Rushe, *\$12.6bn Has Disappeared from Texan Mogul's Offshore Bank*, THE AUSTRALIAN, Feb. 23, 2009, <http://www.theaustralian.com.au/news/bn-disappears-from-moguls-bank/story-e6frg6tf-1111118931577>.

89. Henry Blodget, *Stanford Bank's Very Independent Board of Directors*, BUS. INSIDER, Feb. 20, 2009, <http://www.businessinsider.com/stanford-financials-independent-board-of-directors-2009-2>.

90. See *supra* note 64 and accompanying text.

c. Where There's Smoke: Whistle-blowers and Other Investigations.—In 2002, an accountant in Mexico alerted the SEC to potential disparities in Stanford's business model.⁹¹ The accountant alleged that his mother, a Stanford investor, had received little information regarding the actual performance of SIB CDs.⁹² In particular, the accountant expressed concerns regarding the twice-market returns alleged by SIB.⁹³ In 2003, an unknown insider claimed that Stanford was perpetuating a "massive Ponzi scheme," noting that the CDs were marketed as safe despite being linked to speculative investments.⁹⁴ Additionally, the insider claimed that SIB had not received a "legitimate audit" in seventeen years.⁹⁵ A second whistle-blower came forward two years later to allege that "the CDs were 'simply a hedge fund.'"⁹⁶ Finally, in 2007, FINRA, the broker-dealer regulator, fined the Stanford Group \$20,000 "for failing to adequately state the risks involved in the CD investments or to disclose that an affiliation between the broker-dealer and the bank could pose a conflict of interest."⁹⁷ Although these individual claims may be little more than efforts by disgruntled employees to undermine SIB's reputation separately, they collectively form a reasonable level of suspicion as to the veracity of Stanford's business model. Moreover, the weight of the allegations takes even greater force in light of the dubious consistency and high returns Stanford claimed to achieve.

d. Fraudster's Relationship with OFC.—Aside from exercising dual citizenship—a documented indicator of financial crime⁹⁸—with Antigua,⁹⁹ Stanford had a variety of suspicious links to the people and government of Antigua.¹⁰⁰ Most notably, Stanford exercised control over the creation of Antigua's regulatory framework,¹⁰¹ providing him with the opportunity to condition a favorable regulatory environment. As a result, the local government had inadequate incentives to regulate Stanford on its own

91. Hennessey, *supra* note 46.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. David Scheer & Alison Fitzgerald, *Allen Stanford Accused of "Massive, Ongoing" Fraud*, BLOOMBERG.COM, Feb. 17, 2009, <http://www.bloomberg.com/apps/news?pid=20670001&sid=aELwAubcAvR8>.

98. *Cf.* Stephen Gray, *Second Citizenships: What's on the Market*, in LEGAL ISSUES IN OFFSHORE FINANCIAL SERVICES 41, 41 (Rose-Marie B. Antoine ed., 2004) ("Individuals[] who are concerned with divorce, bankruptcy, government expropriation, violent personal creditors, unwarranted government investigation, and repressive local government[] want the security of a second passport . . .").

99. Scheer & Fitzgerald, *supra* note 97.

100. *See supra* notes 67–74 and accompanying text.

101. *See supra* notes 70–74 and accompanying text.

initiative and to assist the SEC in its investigations, rendering local regulation ineffective.

B. Samuel Israel III and Daniel E. Marino

For the past seven years, I have committed a fraud of a great magnitude.¹⁰²

If there is a hell I will be there for eternity.¹⁰³

1. The Con.—Unlike many cons, Bayou Management’s CEO Sam Israel and CFO Dan Marino founded their hedge fund without any apparent intent to defraud investors.¹⁰⁴ After two initial years of investment losses, however, the duo initiated the fraud that would cost investors more than \$450 million.¹⁰⁵

The fraudulent conduct centered on issuing false statements regarding the firm’s performance to cover up mounting losses and lure investors. According to a complaint filed by the Commodities Futures Trading Commission (CFTC), the nation’s predominant commodities regulator, Israel and Marino “misappropriated customer funds, acquired funds through false pretenses, engaged in unauthorized trading, and misrepresented material facts to actual and prospective investors.”¹⁰⁶ These misrepresentations extended to the “rates of return the hedge funds earned, the value of assets under management, and the existence and identity of the accounting firms that had purportedly audited the hedge funds.”¹⁰⁷ Israel and Marino began misreporting financial data in 1998, two years after the fund’s inception.¹⁰⁸ Realizing they could not withstand a genuine audit, the hedge fund fired its existing auditor and replaced it with Richmond-Fairfield Associates, a sham auditor constructed by the two conmen.¹⁰⁹

102. Katherine Burton & Rob Urban, *Bayou Fraud Exposes Tale of Lies, Drugs, Violence*, BLOOMBERG.COM, Oct. 27, 2005, <http://www.bloomberg.com/apps/news?pid=71000001&refer=&sid=aq3TjcUbSyX0>.

103. Gretchen Morgenson, *What Really Happened at Bayou*, N.Y. TIMES, Sept. 17, 2005, at C1.

104. See Press Release, U.S. Attorney’s Office S.D.N.Y., Chief Executive Officer of Bayou Funds Sentenced to 20 Years in Federal Prison for Massive Investor Fraud (Apr. 14, 2008), available at <http://www.usdoj.gov/usao/nys/pressreleases/April08/israelsamuelsentencepr.pdf> (reporting that Israel admitted that he and Marino hatched a scheme to lie to investors only after two years of sustained losses).

105. *Id.*

106. Press Release, Commodity Futures Trading Comm’n, Hedge Fund Operator Bayou Management, Its Employees Samuel Israel III and Daniel E. Marino, and Accounting Firm Richmond Fairfield Associates, Are Charged with Misappropriation and Fraud in an Action Brought by U.S. Commodity Futures Trading Commission (Sept. 29, 2005), available at <http://cftc.gov/opa/enf05/opa5121-05.htm>.

107. *Id.*

108. Kathleen E. Lange, *The New Antifraud Rule: Is SEC Enforcement the Most Effective Way to Protect Investors from Hedge Fund Fraud?*, 77 FORDHAM L. REV. 851, 851 (2008).

109. *Id.* at 852.

Over seven years, the firm would take in nearly \$450 million of investments, relying on repeated misstatements regarding the firm's performance that were rubber-stamped by the phony auditor.¹¹⁰ Despite the fictitious returns, Israel and Marino took fees on the trades, expanding their personal wealth at the expense of their investors.¹¹¹ The fraud would continue until the Arizona Attorney General detected a high volume of asset transfers between the United States, Europe, and Asia and froze the assets while they were briefly under U.S. jurisdiction, ultimately tracing the funds to a partnership established by the two conmen.¹¹²

2. *The OFC Element.*—While Bayou Management began as a legitimate hedge fund, it quickly turned fraudulent and made use of OFCs in two significant ways. First, the fraudsters created a series of offshore entities in the Cayman Islands and the Isle of Man to engage in high-risk, speculative investments that would not be disclosed to American investors in the hopes of raising real assets to replace the fictitious ones.¹¹³ Second, recognizing their inability to cover their mounting losses and fearing exposure, the duo began hiding assets in obscure offshore partnerships, presumably to avoid seizure and repatriation.¹¹⁴ It was during this latter stage that the Arizona Attorney General detected a high volume of international transfers and exposed the fraud.

a. *Using OFC Secrecy to Replace Fictitious Assets with Real Ones.*—Israel and Marino established seven offshore accounts in the Cayman Islands to solicit funds from foreign investors.¹¹⁵ The money in these accounts was used to offset mounting losses in the United States.¹¹⁶ The duo “routinely” transferred money raised in offshore accounts into the Bayou

110. See Jenny Anderson, *A Modest Proposal to Prevent Hedge Fund Fraud*, N.Y. TIMES, Oct. 7, 2005, at C6 (“[Bayou’s] auditor, Richmond-Fairfield Associates, was a fake accounting firm created to produce false audits of Bayou. Bayou Securities was the broker-dealer through which trades were made to create real commissions for Bayou’s principals, who used them as compensation on top of 20 percent incentive fee they made on their fraudulent returns.”); David Elman, *Bayou Sinks into Chapter 11*, DAILY DEAL, June 1, 2006, LEXIS, News Library, DADEAL File (“Marino formed accounting firm Richmond-Fairfield Associates CPA PLLC to approve the false financial statements, which enabled Bayou to attract new investors.”).

111. See Burton & Urban, *supra* note 102 (noting that Israel and Marino collected \$23.3 million dollars in fictitious trade fees, while the former rented Donald Trump’s house and the latter purchased several new luxury cars).

112. *Id.*

113. See Complaint at 7–8, CFTC v. Bayou Mgmt., No. 05 Civ. 8374 (S.D.N.Y. Sept. 29, 2005) [hereinafter Bayou Complaint] (relating the creation of four “successor” entities to Bayou Management that facilitated the fraudulent scheme); Burton & Urban, *supra* note 102 (relating the high-frequency trades that ultimately destroyed the value of the assets under the fund’s supervision).

114. See *infra* notes 126–30 and accompanying text.

115. Complaint at 4–5, SEC v. Samuel Israel III, No. 05 Civ. 8376 (S.D.N.Y. Sept. 29, 2005) [hereinafter Israel Complaint].

116. *Id.* at 5.

funds.¹¹⁷ The same fund was liquidated later that year, and the investment proceeds were redistributed into four separate successor funds.¹¹⁸ Functionally, this series of transfers and liquidations enabled Israel and Marino to raise money while generating sufficient obscurity to move the funds as they deemed necessary without leaving the proverbial paper trail.

In the meantime, Israel and Marino established IM Partners under their exclusive ownership and financed their new endeavor with the proceeds from the successor funds.¹¹⁹ Through IM Partners, the two conmen entered a series of high-risk private placements in the United States and abroad, which they never disclosed to investors, in the hopes of generating real assets to replace the fictitious ones on Bayou's books.¹²⁰ The duo relied on the strong secrecy laws of the Isle of Man and the Cayman Islands to protect the anonymity of their investments as IM Partners.¹²¹ For example, the partnership invested in two companies based out of the Isle of Man, Kycos Ltd. and Debit Direct Ltd., both of which liquidated within a year of receiving IM Partners' investment, without having to provide any disclosure of the failures to investors.¹²²

Additionally, Israel and Marino invested in a prime bank investment (PBI) scheme,¹²³ where investors are told that the fund is able to access a "supposedly secret market for the world's prime banks" that guarantees huge returns.¹²⁴ IM Partners invested Bayou's last \$150 million into a PBI scheme based out of the Isle of Man.¹²⁵ Had investors been aware of these speculative offshore investments, they would likely have withdrawn their investments and brought suits against the two conmen for failing to disclose

117. *Id.* at 4–5.

118. *Id.* at 5, 7.

119. See Burton & Urban, *supra* note 102 (speculating that as much as \$40 million from the Bayou funds ended up in IM Partners).

120. See Rob Urban & Katherine Burton, *Bayou Group Investors Seek to Recover More than \$100 Million*, BLOOMBERG.COM, Sept. 30, 2005, <http://www.bloomberg.com/apps/news?pid=10000103&sid=aHAoQBN1TF9s> (reporting that IM Partners invested in a range of questionable projects, including an offshore financial-services firm and film productions).

121. See generally LEWIS D. SOLOMON & LEWIS J. SARET, ASSET PROTECTION STRATEGIES § 9.04, at 553–60 (2009 ed. 2008) (summarizing the bank-secrecy laws of the Cayman Islands); ORG. FOR ECON. CO-OPERATION & DEV., BEHIND THE CORPORATE VEIL: USING CORPORATE ENTITIES FOR ILLICIT PURPOSES 68 (2001), available at <http://www.oecd.org/dataoecd/0/3/43703185.pdf> (noting that Isle of Man tax authorities are not empowered to collect information to assist foreign investigations).

122. Burton & Urban, *supra* note 102.

123. Israel Complaint, *supra* note 115, at 9.

124. Judy Nichols, *Fast Work in Arizona Halts Fraud, Freezes \$100 Million*, ARIZ. REPUBLIC, Dec. 11, 2005, <http://www.azcentral.com/arizonarepublic/business/articles/1211bayou11.html>. In most PBIs, the fund wires the investments through a series of entities before claiming to have lost the funds at the hands of the financial institutions handling the transfers. *Id.* Investors, stripped of their cash, generally are advised then to pursue settlement claims with the highly lucrative financial institutions, rather than litigate with the allegedly insolvent fund. *Id.*

125. Israel Complaint, *supra* note 115, at 9.

the redistribution of their finances and the initiation of new, high-risk investments.

b. Hiding Assets in Undisclosed Offshore Partnerships.—According to Arizona Assistant Attorney General Cameron Holmes, Israel had an alternative objective for engaging in high-risk offshore investments: “He was creating a disappearing act with the money.”¹²⁶ IM Partners began transferring the fund’s remaining assets through a series of bank accounts in foreign cities, including London, Hamburg, and ultimately Hong Kong.¹²⁷ During this attempt to “layer”¹²⁸ the assets and place them beyond the reach of U.S. investors, the Arizona Attorney General, who had been investigating a separate fraud case, received notice that a bank in Pennsylvania had rejected a suspicious transfer from a Hong Kong bank.¹²⁹ Ultimately, these funds were linked to Israel’s “last big trade”—his effort to hide his remaining assets.¹³⁰

3. *Red Flags.*—Unlike Stanford, who had a deep connection with the OFC he exploited as part of his fraud, Israel and Marino employed their OFC connections with less sophistication. Namely, the duo used the easy licensing and low oversight standards in the Cayman Islands and the Isle of Man to establish an undisclosed partnership beyond the SEC’s jurisdiction and engage in speculative trading.

a. Offshore Partnership.—Low licensing standards form one of the principal advantages of an OFC.¹³¹ Fraudsters see these low standards, accompanied by little direct government supervision, as an ideal means to establish a vehicle to carry their ill-gotten proceeds.¹³² As a result, Israel and Marino were able to establish IM Partners without any questions regarding how the organization was financed.¹³³

b. Undisclosed, Speculative Investing.—Due to the high levels of secrecy in most OFCs, these nations do not require notice to investors when a

126. Burton & Urban, *supra* note 102 (quoting Arizona Assistant Attorney General Cameron Holmes).

127. *Id.*

128. See Alison S. Bachus, *From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering After September 11, 2001*, 21 ARIZ. J. INT’L & COMP. L. 835, 844 (2004) (describing the role of layering, where dirty money is cycled through a series of financial transactions to clean it, as the second of three steps in money laundering).

129. Burton & Urban, *supra* note 102.

130. *Id.*

131. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 121, at 28–29 (noting that many jurisdictions have light registration requirements for partnerships, thereby opening the way for persons to anonymously hold assets and to frustrate creditors’ claims).

132. *Id.*

133. See *supra* notes 115–22 and accompanying text.

company is engaged in high-risk trading, despite representations to the contrary.¹³⁴ Accordingly, nations that have reputations as breeding grounds for speculative investments, like the Cayman Islands,¹³⁵ should naturally be regarded with greater suspicion. Thus, the nation itself, in addition to the nature of the investment, functions as a red flag to indicate to regulators that repeated investments in the same jurisdiction may involve unusual, undisclosed risk-taking.

c. Suspicious Auditor.—Finally, the use of a small, local, unknown auditor¹³⁶ to oversee an international operation with the reputation of Bayou Management, in which some of the world’s premier hedge funds had invested,¹³⁷ ought to have raised suspicions.

C. *Bernard Madoff*

It’s all just one big lie.¹³⁸

1. *The Con.*—Of the conmen discussed in this Note, Bernard Madoff without argument is the most famous—or, more properly, infamous. His alleged \$65 billion¹³⁹ Ponzi scheme¹⁴⁰ transcended geographic borders, from local pension funds in Fairfield to the world’s largest financial institutions,

134. See Lynnley Browning, *A Hamptons for Hedge Funds*, N.Y. TIMES, July 1, 2007, at C1 (writing on the competition among OFCs to attract secretive hedge funds and other investors).

135. See *id.* (reporting that the Cayman Islands has become the preferred home to hedge funds due to the jurisdiction’s lax tax and regulatory regime and stiff secrecy laws).

136. See Burton & Urban, *supra* note 102 (noting that one of the conmen had invented a phony auditor whose name—Richmond-Fairfield Associates—reflected his daily commute between Richmond and Fairfield counties).

137. Tremont Capital Management, “a well-respected funds manager,” invested in Bayou Management from 2000 to 2002. Morgenson, *supra* note 103. Tremont Group Holdings would go on to invest \$3.3 billion in Bernie Madoff’s Ponzi scheme. Lynnley Browning, *Madoff Spotlight Turns to Role of Offshore Funds*, N.Y. TIMES, Dec. 31, 2008, at B1.

138. Jonathan Lopez, *Bernard Madoff: A Con Man for Our Times*, U.S. NEWS & WORLD REP., Mar. 16, 2009, <http://www.usnews.com/articles/opinion/2009/03/16/bernard-maddoff-a-con-man-for-our-times.html>.

139. The widely cited \$65 billion figure is inaccurate, yet informative. This value reflects the “stated value of all the account statements of every Madoff account holder” as of Nov. 30, 2008. James Bandler & Nicholas Varchaver, *How Bernie Did It*, FORTUNE, May 11, 2009, at 50, 70. The actual amount invested in Madoff’s fraudulent scheme is “closer to \$20 billion.” *Id.* at 71. Nevertheless, this amount constitutes one of the largest frauds in history.

140. A Ponzi scheme’s success relies on its ability to attract multiple levels of investors. The proceeds derived from subsequent investments are used to satisfy prior investments, creating a false impression of high, consistent returns and inducing further investment. Over the course of several rounds, the player orchestrating the Ponzi scheme—Madoff in this case—can take a commission on each alleged “trade,” which is little more than siphoning off a piece of a subsequent victim’s investment. For a historical explanation of the scheme’s origins, as well as various examples, see MITCHELL ZUCKOFF, *PONZI’S SCHEME* (2005).

such as Banco Santander and HSBC.¹⁴¹ In many ways, the scale of Madoff's fraud epitomizes the ambition and arrogance of the modern con artist. Unlike Bayou Management's Israel and Marino, Madoff ran a fraudulent operation from start to a well-publicized end.¹⁴² Even the legitimate wing of Madoff's investment empire was repeatedly funded through his illegitimate proceeds.¹⁴³ Additionally, the fraud lasted decades, while Madoff himself expanded his empire by trading on his professed success as an investor¹⁴⁴ and his reputation as a business leader. He was a chairman of NASDAQ, a leading voice on SEC-sponsored industry panels, and an expert witness for Congress.¹⁴⁵

Eventually however, declining market conditions during the financial crisis of 2008 prompted many investors to seek withdrawals of their supposedly secure Madoff investments to offset losses elsewhere in the market.¹⁴⁶ Realizing he could not return the alleged assets to his investors, as they had been fraudulently recycled to perpetuate his Ponzi scheme, Madoff decided to confess and face the consequences in December 2008.¹⁴⁷

2. *The OFC Element.*—OFCs factored into Madoff's schemes in a variety of ways. First, Madoff capitalized on the high secrecy laws of OFCs to establish offshore feeder funds to recruit foreign investors, who formed the majority of his stakeholders.¹⁴⁸ Second, Madoff may have used OFCs as tax havens to avoid paying taxes on the commissions he earned from fictitious trading.¹⁴⁹ In conjunction with this activity, Madoff may have tried to hide assets abroad to avoid detection by American regulators.

a. *Offshore Feeder Funds.*—The use of offshore funds hinges on the ability to generate unverifiable amounts of capital, which can either be distributed to new investors to encourage them to invest larger amounts or be

141. See *Madoff's Victim List*, WSJ.COM, Mar. 6, 2009, http://s.wsj.net/public/resources/documents/st_madoff_victims_20081215.html (providing a list of Madoff's defrauded investors around the world).

142. See Lopez, *supra* note 138 (quoting Madoff's admission that his entire operation was "all just one big lie").

143. See Bandler & Varchaver, *supra* note 139, at 64 ("Madoff's illegal investment business was indeed subsidizing his legal trading operation.").

144. On paper, Madoff's investments blossomed from nearly \$7 billion in 2000 "to as much as \$50 billion by the end of 2005." *Id.* at 66.

145. James Bandler & Nicholas Varchaver, *How Bernie Did It*, FORTUNE, Apr. 30, 2009, <http://money.cnn.com/2009/04/24/news/newsmakers/madoff.fortune/index.htm?postversion=2009042405>.

146. Bandler & Varchaver, *supra* note 139, at 69.

147. *Id.*

148. See Taina Rosa, *Scandal Prompts Crackdown*, LATIN FIN., May 1, 2009, <http://www.latinfinance.com/ArticlePrint.aspx?ArticleID=2188873> (recognizing significant investments in Madoff's feeder funds by Argentine and Mexican investors).

149. James Doran, *Madoff Probe Focuses on Tax Havens*, GUARDIAN (U.K.), Dec. 28, 2008, at 1.

used as purported collateral to acquire entirely new investors. The strong secrecy laws of OFCs play a critical role in providing the necessary obscurity.¹⁵⁰ Many Latin American investors are drawn to secretive investments, as it enables them to avoid disclosing the true depth of their wealth.¹⁵¹ As a result, many investors choose to invest in a fraudster's offshore fund through their own offshore entities. In the Madoff case, for example, the Fairfield Greenwich Group fund of funds invested \$7.4 billion in Madoff's fund—much through offshore entities.¹⁵² Fraudsters, such as Madoff, often play on the ability of offshore funds to avoid the normal rules, regulations, and tax consequences associated with economic activity in higher regulation regions to attract these secretive investors.¹⁵³

Additionally, the true extent of funds raised offshore is rarely known in these highly secretive regions.¹⁵⁴ The advantage is apparent in a Madoff-type scenario, when the fraudster does not want investors to have knowledge of the true value or source of real assets invested in the firm at any time. Rather, the fraudster can manipulate investors by convincing them that the numbers he alleges are accurate.

b. Tax Shelters and Hidden Assets.—The role of OFCs as tax shelters is well documented¹⁵⁵ and beyond the scope of this Note, which focuses on the use of OFCs in cases of fraud. However, avoiding tax payments may have contributed to Madoff's selection of particular nations in which he could establish his feeder funds. In particular, selling foreign investors on low-tax regimes may have induced them to participate in his unique fund.¹⁵⁶

Moreover, Chief Deputy Frank DiPascali—Madoff's right-hand man in orchestrating his fraud—confessed to years of editing the financial returns investors gained from the Madoff fund to offset any gains or losses those investors suffered in other investments to assist them in avoiding higher

150. See *supra* subpart II(A).

151. See *Latin Investors Could Be Big Madoff Losers*, *supra* note 53 (citing the “private nature of Latin American fortunes” as a reason that many of Madoff's Latin American investors are reluctant to come forward).

152. Browning, *supra* note 137.

153. Jonathan Kent, *Fraudsters Go Offshore for Business, Warns Asset Recovery Specialist*, ROYAL GAZETTE, Apr. 30, 2009, <http://www.royalgazette.com/siftology.royalgazette/Article/article.jsp?articleId=7d94f2b3003000b§ionId=65>; see also Browning, *supra* note 137 (“Nearly all hedge funds, including funds of funds, operate affiliates and partnerships offshore. Such havens offer low tax rates and light regulation. Offshore havens also help fund managers to defer or avoid American taxes on their personal profits by channeling the earnings through offshore affiliates.”).

154. See, e.g., Bandler & Varchaver, *supra* note 139, at 70 (describing investigators' difficulty in locating Madoff's assets in offshore locations).

155. See, e.g., BRITAIN-CATLIN, *supra* note 24, at 35 (discussing the role of tax shelters in a variety of high-profile cases).

156. See Patti S. Spencer, *Beware of the Dirty Dozen*, INTELLIGENCER J., Apr. 27, 2009, at B8 (discussing the allure of “hiding income offshore” for tax reasons).

taxes.¹⁵⁷ In this way, DiPascali used the secretive offshore Madoff funds to cover up fraudulent activity in other investments. Additionally, Madoff himself may have “sent large sums of money to offshore accounts in the Caribbean and Europe” from his New York Mellon Bank account over time to hide assets from the IRS and SEC.¹⁵⁸

3. *Red Flags*.—Three red flags emerge from the debris of Madoff’s fraud. First, he relied heavily on offshore vehicles to sustain his investments. Second, he had been the subject of repeated SEC inquiries. Finally, like Stanford, Israel, and Marino, Madoff employed a suspicious auditor.

a. *Reliance on Offshore Investments*.—Madoff’s Ponzi scheme relied on a constant stream of new investors. To recruit new investors—particularly those who wished to keep the nature and extent of their investments secret—Madoff relied heavily on his offshore feeder funds to attract Latin American investors.¹⁵⁹ Moreover, “the use of multiple jurisdictions to carry out trades” creates jurisdictional problems for suspicious regulators, enabling a fraudster “to transfer enormous sums of money and perhaps do it under the radar.”¹⁶⁰ Thus, not only did the offshore funds create an aura of secrecy, which Madoff manipulated to attract foreign investors, but they also enabled him to transfer large sums of money without revealing the source or destination to regulators.

b. *Prior Investigations and Allegations*.—Madoff was known to the SEC not only as a successful investor but also as the subject of numerous prior SEC investigations. In 1992, the SEC interrogated Madoff as part of its investigation into Avellino & Bienes, an investment firm that had long worked with Madoff.¹⁶¹ Ironically, Madoff was able to assure the SEC that Avellino & Bienes had not participated in a Ponzi scheme, as alleged, and despite the fact that all of the fund’s money was in Madoff’s hands, no further investigation was pursued.¹⁶²

In 2001, two articles “raised serious questions about Madoff’s investment operation.”¹⁶³ In particular, one article noted that Madoff’s alleged returns made his fund one of the two largest hedge funds in the world at the time, yet few knew of its existence.¹⁶⁴ That article further questioned

157. Bandler & Varchaver, *supra* note 139, at 71.

158. Doran, *supra* note 149.

159. *See supra* notes 147, 150–53 and accompanying text.

160. Browning, *supra* note 137.

161. Bandler & Varchaver, *supra* note 139, at 64.

162. *Id.*

163. *Id.*

164. *Id.* The article was Michael Ocrant, *Madoff Tops Charts; Skeptics Ask How*, MAR/HEDGE, May 2001, available at <http://www.realclearmarkets.com/articles/MarHedge.pdf>.

the “improbability of Madoff’s smooth and steady 15% annual returns.”¹⁶⁵ The second article echoed the first, arguing that Madoff used his market-making operations to “subsidize[] and smooth[] his hedge-fund returns.”¹⁶⁶ This last claim, though denied by Madoff, turned out to be true.¹⁶⁷ Finally, in 2006, whistle-blower Harry Markopolos outright announced that Madoff had been running a Ponzi scheme.¹⁶⁸ In conjunction with this investigation, the SEC took a brief look at a number of feeder funds linked to Madoff investments but lacked the jurisdiction to go farther, ultimately electing not to pursue the matter beyond requiring Madoff’s firm to register as an investment adviser.¹⁶⁹

c. Suspicious Auditor.—Like Bayou Management and Stanford Financial, Bernie Madoff employed a little-known auditor to monitor his vast financial empire. In fact, Friebling & Horowitz, the alleged auditor, had not performed an audit since 1993 and had only one certified public accountant.¹⁷⁰ To compound matters, their inactivity was not a secret—the auditor had informed the American Institute of Certified Public Accountants of those facts fifteen years before the Madoff fraud became public.¹⁷¹

IV. Expanding the SEC’s Authority to Overcome Jurisdictional Limits and Deter Conmen

[O]ur commitment [is] to extending the reach of the securities laws to violators no matter where they hide.¹⁷²

As demonstrated in the previous Part, modern cons are capable of transcending geographic borders and growing radically in only a few years. However, these cons often trigger red flags through their use of OFCs, making them detectable before they grow out of hand. Unfortunately, the SEC’s current model of foreign reliance in combating fraud is outdated, permitting conmen to take advantage of the SEC’s limited reach and cooperation delays by hiding activity in low regulation OFCs. To overcome

165. *Id.*

166. Evin E. Arvedlund, *Don’t Ask, Don’t Tell: Bernie Madoff Is So Secretive, He Even Asks Investors to Keep Mum*, BARRON’S, May 7, 2001, available at <http://online.barrons.com/article/SB989019667829349012.html>.

167. Bandler & Varchaver, *supra* note 139, at 64.

168. *Id.* at 65.

169. *Id.* Incidentally, Madoff’s registration as an investment adviser coincided with a widespread initiative among hedge funds to register under the Investment Advisors Act of 1940 as a result of a change in the SEC’s regulations (this change was later struck down in the *Goldstein* case). See *Goldstein v. SEC*, 451 F.3d 873, 874 (D.C. Cir. 2006) (holding that the SEC had failed to justify the change in its interpretation under the relevant statute).

170. Alyssa Abkowitz, *Madoff’s Auditor . . . Doesn’t Audit?*, CNNMONEY.COM, Dec. 19, 2008, <http://money.cnn.com/2008/12/17/news/companies/madoff.auditor.fortune/index.htm>.

171. *Id.*

172. Christopher Cox, Chairman, SEC, Remarks at the American Securitization Forum (June 7, 2006) (transcript available at <http://www.sec.gov/news/speech/2006/spch060706cc.htm>).

the hurdle that OFCs pose to timely investigation—in the modest hope of making the international fraudster’s con at least slightly more difficult to execute—this Note advocates expanding the SEC’s authority to conduct investigations in foreign territories under particular circumstances.

A. Expanding SEC Authority

1. Source of Authority and Enforcement.—As a federal agency, the SEC’s authority is subject to its legislative mandate from Congress.¹⁷³ Accordingly, “the nature and scope of the SEC’s authorized activities are determined by statute and are subject to subsequent congressional override and judicial review.”¹⁷⁴ In order to expand the SEC’s jurisdiction, the agency will require an endorsement to that effect by Congress.

In particular, Congress should grant the SEC authority to prohibit financial services linked to any nation that does not grant the SEC the right to initiate investigations into local threats that have the potential for adversely and substantially impacting the security of U.S. financial markets. A failure to grant the SEC investigative privileges would result in a “blacklisted” designation, which would then prevent any company linked to that region from engaging¹⁷⁵ the U.S. financial markets. Recognizing the extensive links that companies currently have to OFCs, the investigative requirement would be instituted through a series of graduated benchmarks, ultimately resulting in the investigative right described forthwith.

2. The Logistics—When, Where, and for How Long?—Certain qualifications must be placed on the investigative right. These limitations pertain to the scope of the investigation permitted, including access and duration, the triggers that warrant investigation, and the right of particular nations to be exempted from the requirement.

a. Scope.—In order to institute the investigative right in a manner that balances the SEC’s enforcement interest and local sovereignty, the SEC will have to agree to access and duration limitations. SEC access will have to be limited to the particular matter under investigation. Accordingly, the SEC would have to notify local regulators of the specific nature of the SEC’s pending investigation before initiating the inquiry. Additionally, the SEC

173. See Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 *FORDHAM J. CORP. & FIN. L.* 225, 253 (2005) (“As a general matter, agency rulemaking is substantively and procedurally subsidiary to legislative rulemaking. In a real sense, it represents a delegation of lawmaking authority by the legislature to the regulatory authority, with the process resulting in regulations having the force of law.”).

174. *Id.* at 254–55.

175. “Engaging” the market would involve activities designed to solicit funds in the United States, including sales, advertising, and trading. Moreover, listing on any U.S. exchange would be prohibited for any company connected to a blacklisted nation.

may exempt certain industries on a case-by-case basis to avoid encroaching on local security interests.

With respect to duration, the SEC ought to agree to a maximum period of occupation with each nation before instituting the program based on the nature of the matter under investigation for two reasons. First, the global community is unlikely to tolerate any measure that resembles a foreign occupation, even if confined to specific markets. A reasonably well-defined time limit would enable the SEC to mitigate claims that it is capturing the sovereignty of foreign nations. Additionally, durational limits would benefit the SEC, in that the extent of their diligence would be protected by time limitations—only so many rocks can be overturned in a specified period.

The objective of the investigative right is to permit the SEC to research particular concerns in the hopes of combating international fraud before those crimes threaten the integrity of global markets. Limiting the scope of this right balances the value of threatening potential fraudsters and diligently executing the SEC's responsibilities against the costs of undermining local sovereignty.

b. Triggers.—By agreeing to predetermined triggers, the SEC would limit the scope of its investigative authority to an internationally acceptable level, as well as put local regulators and potential fraudsters on notice regarding particular activity that would be targeted. The types of events that would trigger an investigation mirror the red flags discussed earlier in the case studies.

These factors include a business model articulating unusual¹⁷⁶ returns, suspicious auditing services, registration in known tax shelters,¹⁷⁷ credible whistle-blower allegations, repeated SEC investigations, a reliance on off-shore feeder funds to induce foreign investment, and a significant nexus between a principal at the company and an offshore government. Although an individual red flag may be insufficient to trigger an investigation, an accumulation of such flags could activate scrutiny. Thus, the focus would turn to patterns of conduct, rather than individual events. For example, where a fraudster reports unusual returns, a high volume of foreign investment, and significant contacts with an offshore government, an investigation should be triggered.

176. The term “unusual” would be determined by context—a task that exceeds the scope of this Note. However, the case studies provide some guidance into a preliminary understanding of what might constitute unusual returns. Stanford's consistent twice-market returns and Madoff's high returns in the face of a crumbling financial landscape, for example, seem unusual in that they exceed any reasonably anticipated returns.

177. The OECD recently provided an analysis of the world's most suspicious tax standards. See *ORG. FOR ECON. CO-OPERATION & DEV.*, *supra* note 21. As a result, a number of nations have committed themselves to improving their tax standards. See *supra* note 25.

c. Exempted Nations.—The SEC ought to employ a sliding-scale analysis to determine which nations must comply with its investigative-right requirement. This sliding-scale assessment resembles the PCAOB approach discussed earlier,¹⁷⁸ however, it would be based on the SEC’s determination of local-regulator independence and would account for a nation’s willingness to grant the SEC investigative authority. As discussed in the juxtaposition of Switzerland and the Seychelles in subpart II(A),¹⁷⁹ OFCs vary widely in their regulatory schemes and purported uses. Nations with a track record of fraudulent exploitation, like the Cayman Islands, ought to grant the SEC greatest deference, while intermediate deference may be more appropriate for a nation like the Isle of Man, which has demonstrated a willingness to comply with higher regulation.¹⁸⁰ Finally, nations like India and China, which offer less regulation than the United States but still present sophisticated regulatory regimes, ought to be granted complete exemption.

Naturally, a nation’s political capital in global affairs will play into its exempted status. In the case of Switzerland, for example, the nation may be exempted based on its prominence in world markets, under the justification that the Swiss maintain high regulations despite their robust secrecy laws.¹⁸¹ This justification distinguishes a prominent global player like the Caymans, which may have a strong global presence, but also has a weak regulatory structure with respect to foreign capital.¹⁸²

B. Current Model of Foreign Reliance Ineffective

Given the robust incentives against self-regulation, offshore regulators generally make poor partners in combating fraud.¹⁸³ To that end, the principal advantage of widening the SEC’s net is the ability to overcome the lack of self-regulation offshore. Unfortunately, the SEC’s current landscape of international cooperation in securities enforcement relies exclusively on assistance from local regulators.

The SEC widely touts empirical evidence that international cooperation in securities enforcement is working.¹⁸⁴ Undoubtedly, the volume of

178. See *supra* notes 56–60 and accompanying text.

179. See *supra* notes 21–22 and accompanying text.

180. See Mark D. Ferbrache, *Offshore Financial Centers*, FBI L. ENFORCEMENT BULL., Feb. 2001, available at http://findarticles.com/p/articles/mi_m2194/is_2_70/ai_72299785 (“The consensus of these reviews [of the Channel Islands and the Isle of Man] found that the Islands have a well-regulated financial industry, money laundering legislation in place, and a demonstrated willingness to cooperate with and provide assistance to foreign authorities.”).

181. See *supra* note 21 and accompanying text.

182. See BRITAIN-CATLIN, *supra* note 24, at 21–22 (“Cayman companies are creatures endowed with quite incredible rights that make them equivalent to, but distinct from, real, living people. . . . [O]nly in the radical companies of Cayman does capitalism find true freedom and power.”).

183. See *supra* subpart II(B).

184. See, e.g., Office of Int’l Affairs, SEC, International Enforcement Assistance, http://sec.gov/about/offices/oia/oia_crossborder.shtml (last modified Jan. 20, 2010) (“In fiscal year

international assistance has increased, but substantial evidence indicates that it is not “working.” Currently, the SEC’s main method of expanding its jurisdiction to foreign soil involves the use of Memoranda of Understanding (MOUs).¹⁸⁵ Pursuant to the specific terms of an MOU, the SEC may have the right to assist a foreign regulator in investigating a fraud that has occurred.¹⁸⁶ These agreements are insufficient mechanisms to address the problem of international fraud because they still require the local regulator to grant the SEC access after the fact. Where a local regulator does not want the SEC to be involved, the SEC has no choice but to stand down. Even if the SEC receives assistance, a vitriolic fraud may have expanded and infected markets around the globe. Moreover, the nonbinding nature of MOUs underlines their fundamental inefficiency. In particular, nonbinding agreements, like the IOSCO MMOU, offer no incentive comparable to the economic benefits of aiding fraudulent actors.¹⁸⁷ In addition, the MOUs embody the SEC’s “ad hoc and incremental approach” to upgrading its “national-based regulatory approach” to the modern, global marketplace.¹⁸⁸ As a result, the SEC adapts too slowly to changing market conditions. Notably, it took the SEC nearly twenty years to negotiate an MOU whereby

2008, the SEC made 594 requests to foreign authorities for enforcement assistance and responded to 414 requests from foreign authorities.”); *see also* Emily Chasan, *SEC’s Cox Urges Global Regulators to Cooperate More*, REUTERS, Nov. 18, 2008, <http://www.reuters.com/article/idUSN1827001920081118> (“In the past year the SEC has made 556 requests of foreign regulators for assistance with SEC enforcement investigations, and in turn foreign regulators have made 454 requests from the SEC.”).

185. The SEC is currently party to over thirty separate memoranda of understanding. *See* Office of Int’l Affairs, SEC, Cooperative Arrangements with Foreign Regulators, http://sec.gov/about/offices/oia/oia_cooparrangements.shtml (last modified Jan. 20, 2010) (listing the various MOUs to which the United States is a party). Most of these agreements are bilateral; however, the SEC is party to the International Organization of Securities Commissions (IOSCO) MMOU, which has been signed by nearly fifty nations. *See* Int’l Org. of Sec. Comm’ns, List of Signatories to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (May 2002), http://www.iosco.org/library/index.cfm?section=mou_siglist (listing the IOSCO MMOU signatories).

186. There are five types of MOUs. In increasing order of technical cooperation, they are enforcement cooperation, regulatory cooperation, technical assistance, terms of reference for bilateral dialogues, and mutual recognition. *See* Office of Int’l Affairs, *supra* note 184 (describing each MOU by type). Only the last provides a mechanism for asset freezing and repatriation, which is a critical element of international cooperation in securities enforcement. To date, only one mutual-recognition MOU exists—between the SEC and the Australian Securities and Investments Commission. Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to the Enforcement of Securities Laws, SEC-Austl. Sec. & Invs. Comm’n, Aug. 25, 2008, *available at* http://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/enhanced_enforcement_mou.pdf [hereinafter U.S.–Austl. MOU]; Christopher Cox, Chairman, SEC, Speech at the SEC International Enforcement Institute: The Importance of International Enforcement Cooperation in Today’s Markets (Nov. 7, 2008) (transcript available at <http://www.sec.gov/news/speech/2008/spch110708cc.htm>).

187. *See* Verdier, *supra* note 26, at 117 (“Other initiatives by IOSCO, such as its failed effort to establish global capital standards for securities firms, point to the limits of informal cooperation when domestic interests clash.”).

188. Edward F. Greene & Omer S. Oztan, *The Attack on National Regulation: Why We Need a Global Framework for Domestic Regulation*, 4 CAP. MARKETS L.J. 6, 9, 23 (2009).

the SEC could secure an agreement featuring an asset-freeze-and-repatriation clause.¹⁸⁹ This failing is particularly relevant in the fraudster scenario, where common use OFCs to create jurisdictional limits that slow the SEC's response. Furthermore, when a fraudulent actor ingratiates himself with a foreign government, as in the Stanford case, the SEC is unlikely to receive the regulatory invitation it desires.

Moreover, international coordination in securities enforcement among high-regulation nations does not appear promising. The G-20, composed of the world's most economically developed nations, has attempted to engage in a meaningful dialogue to impede the proliferation of low-regulation offshore financial industries.¹⁹⁰ However, the G-20 appears fixated on the role of OFCs as tax havens¹⁹¹ rather than vehicles of securities fraud. While the G-20's recognition of prominent OFCs as a threat to global market integrity is a promising sign, it falls short of recognizing the effect of OFC-based securities fraud on global capital markets. As a result, the United States cannot rely on unsatisfying international efforts to increase offshore tax regulations in combating domestic securities fraud.

Nevertheless, in conjunction with an investigative mechanism like the kind advocated in this Note, MOUs may become increasingly relevant because they can describe the type of documentation and procedures that a foreign regulator must follow to make the SEC's investigation more efficient.¹⁹² Most importantly, reinforcing the SEC's MOU initiative with a firm investigative right would overcome the slow, market-trailing philosophy

189. See U.S.–Austl. MOU, *supra* note 186 (providing for the freezing of assets and repatriation on August 25, 2008); Michelle Grattan, *Bilateral Deal Will Simplify Trading of Australian Shares in the US*, AGE (Austl.), Mar. 31, 2008, at 1 (indicating that this MOU was under negotiation for “some years”); Press Release No. 2008-52, SEC, SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S.–Australia Mutual Recognition Talks (Mar. 29, 2008), available at <http://www.sec.gov/news/press/2008/2008-52.htm> (explaining that the partnership between the Australia Securities and Investment Commission and the SEC has been developed over “two decades”).

190. See Jonathan Wiseman, *G-20 to Set New Rules for Tax Havens Under Regulatory Shake-Up*, WSJ.COM, Mar. 30, 2009, http://online.wsj.com/article_email/SB123825462934465293-lMyQjAxMDI5MzI4MzIyNTMOWj.html (“The 20 largest economic nations in the world are expected to produce a new set of rules for oversight, transparency and conduct for offshore tax havens . . . as part of a broader effort to overhaul the regulatory structure of the world economy . . .”).

191. Cf., e.g., *OECD Names and Shames Tax Havens*, BBC NEWS, Apr. 3, 2009, <http://news.bbc.co.uk/2/hi/7980848.stm> (“G20 leaders agreed to take sanctions against tax havens using the OECD list as its basis.”).

192. See, e.g., Memorandum of Understanding Regarding Cooperation, Consultation and the Provision of Technical Assistance, SEC-Sec. & Exch. Bd. of India, Mar. 6, 1998, available at http://www.sec.gov/about/offices/oia/oia_bilateral/india.pdf (establishing some initial procedural mechanisms by which the SEC and SEBI can assist one another in investigating potential securities fraud). For an example of this MOU in practice, see *The Fraud at Satyam Is an Accident*, REDIFF.COM, Jan. 10, 2009, <http://in.rediff.com/money/2009/jan/10satyam-the-fraud-at-satyam-is-an-accident.htm>, discussing the cooperative efforts between the SEC and SEBI following the \$1.4 billion Satyam Computer Services, Ltd. fraud case.

of SEC enforcement abroad and create a binding requirement to embrace SEC authorities.

C. Existing Precedent

Although the investigative right advocated in this analysis would be the greatest expansion of SEC authority to date, it is a proposal with precedent. Specifically, the development of the PATRIOT Act as a tool to combat international money laundering and the grant of expanded authority to the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) establish a foundation for the SEC to request enhanced authority to fulfill its mandate from American investors.

1. The SEC Mandate.—In a globalized world of high-speed technology,¹⁹³ the SEC must upgrade its enforcement efforts to handle the pace of modern transactions—and modern frauds—to honor its congressional mandate.¹⁹⁴ This mandate is embodied in the Securities Exchange Act of 1934,¹⁹⁵ which charges the SEC with the authority to maintain “fair and honest markets . . . vital to the national public interest of the United States.”¹⁹⁶ Moreover, the SEC believes that its purpose is to “protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.”¹⁹⁷ To fulfill its purpose, the SEC must be able to protect investors by providing transparency to the fullest extent permitted by Congress. Moreover, markets wrought by fraud threaten the nation's security and public interest. In particular, the recent financial crisis has demonstrated the sensitivity of global markets and the role that fraud can play in causing market volatility.¹⁹⁸ Deterring fraudulent conduct by comen is not only a necessity to maintain market integrity and fiscal security, but it is a requirement of the SEC's mandate from Congress. Congress should recognize that expanding the SEC's preemptive investigatory powers abroad will go a long way towards vitiating the Commission's “weaker” overseas presence.¹⁹⁹

193. Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31, 36 (2007).

194. *Id.* at 42.

195. Ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. (2006)).

196. Tafara & Peterson, *supra* note 193, at 43.

197. SEC, 2004–2009 STRATEGIC PLAN 4 (2009), available at <http://sec.gov/about/secstratplan0409.pdf>.

198. See Amitai Aviram, *Counter-cyclical Enforcement of Corporate Law*, 25 YALE J. ON REG. 1, 5 (2008) (“Downward trends are perceived very frequently to involve fraud and to be caused by fraud.”); see also CHARLES P. KINDLEBERGER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 165–202* (2005) (discussing the role of fraud in economic panics and crashes).

199. See Tafara & Peterson, *supra* note 193, at 48–49 (claiming that the SEC is hesitant to permit overseas firms to access U.S. financial markets due to its supposedly weaker ability to supervise foreign activities).

This argument becomes even more significant in light of Congress's recent criticism of the SEC's handling of the Madoff and Stanford crises.²⁰⁰ Given Congress's ongoing exploration of whether the SEC needs to upgrade its funding and policing practices,²⁰¹ the political climate is ripe for an evaluation of the SEC mandate in light of a more integrated, faster paced global economy.

2. *House Committee Suggestions from 1990.*—The current crisis would not be the first time Congress has radically recommended that the SEC upgrade its international cooperative model. In 1988, the House Committee on Government Operations widely criticized the SEC's handling of financial-crime cases tied to suspicious foreign activity.²⁰² The report recommended that the SEC, instead of entering nonbinding MOUs with suspicious nations, should “obtain congressional authority to prohibit securities trading from states that will not enter into an MOU.”²⁰³ Additionally, the report advocated granting “expanded long arm jurisdiction to the Commission . . . [, which] would authorize the Commission's service of subpoenas outside the United States while respecting the sovereignty of foreign states.”²⁰⁴ At the time, Congress rejected endorsing a “waiver-by-conduct” model²⁰⁵ under concerns that it could lead to an “extraterritorial application of United States laws, which would eventually hinder international cooperation.”²⁰⁶ The motivation behind this rejection was a flight-of-capital concern based around a suspicion that the model would motivate foreign investors to withdraw from the U.S. markets and invest elsewhere, crippling America's financial industry.²⁰⁷

In many ways this concern seems outdated. First, markets have integrated beyond their 1987 levels.²⁰⁸ Fraud in the United States

200. See Rachelle Younglai, *Congress to Examine SEC Enforcement Unit: Source*, REUTERS, Apr. 16, 2009, <http://www.reuters.com/article/idUSTRE53F6HM20090416> (discussing a scheduled subcommittee hearing on the SEC's handling of the Madoff case and “whether the agency has enough resources to properly police the markets”).

201. *Id.*; see also *infra* notes 228–29 and accompanying text.

202. In fact, the report was titled “Problems with the SEC's Enforcement of U.S. Securities Laws in Cases Involving Suspicious Trades Originating from Abroad,” and it blasted the SEC's policy of relying on MOUs to monitor international securities violations. See John T. Thomas, Note, *Icarus and His Waxen Wings: Congress Attempts to Address the Challenges of Insider Trading in a Globalized Securities Market*, 23 VAND. J. TRANSNAT'L L. 99, 129–30 (1990) (summarizing the House Committee's suggestions). For the actual report, see H.R. REP. NO. 100-1065 (1988).

203. Thomas, *supra* note 202, at 129.

204. *Id.*

205. The “waiver-by-conduct” model treats investment in U.S. securities markets as tacit consent to disclose trade-related information, regardless of the protection of foreign law. John M. Fedders et al., *Waiver by Conduct—A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. MARKET L. 1, 25 (1984).

206. Thomas, *supra* note 202, at 130.

207. *Id.*

208. See Kuntara Pukthuanthong & Richard Roll, *Global Market Integration: An Alternative Measure and Its Application 1* (Jan. 10, 2009) (unpublished manuscript, on file at <http://papers.ssrn>).

substantially affects foreign markets²⁰⁹—increasing the likelihood that greater regulation in the United States would be appreciated in other sophisticated financial markets. Moreover, as foreign markets have become more robust, they have become more susceptible to fraud as domestic investors seek arbitrage opportunities that transcend national boundaries. Second, the anticipated flight of capital, though empirically unclear, may not be as severe as one may have perceived in the past for two reasons. First, investors may feel greater confidence in markets with higher regulation, particularly after the well-publicized frauds of recent months. Second, the United States may have to sacrifice a portion of its collective wealth to protect the integrity of its markets—embodying the no-gain-without-pain philosophy.

3. *The PATRIOT Act.*—In response to the terrorist attacks of 9/11, Congress passed the PATRIOT Act, which included a section dedicated to expanding the Treasury Secretary’s “long-arm jurisdiction” in pursuing money launderers.²¹⁰ Specifically, the International Money Laundering Abatement and Financial Anti-terrorism Act of 2001²¹¹ (IMLA or Title III) recognized the propensity for “criminals . . . to avoid using traditional [U.S.] financial institutions . . . [and to] move large quantities of currency . . . [which] can be smuggled out of the United States.”²¹² Functionally, the Treasury Secretary has the right to subpoena “any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank.”²¹³ As a result, foreign “financial institutions will be required to submit to the jurisdiction which can exert the most pressure on the financial institution to comply with their laws,” granting U.S. courts the authority to try potential money launderers.²¹⁴ Additionally, foreign banks are now required to maintain “identifying information,” including names and addresses of depositors.²¹⁵ IMLA also grants legal immunity to financial

com/sol3/papers.cfm?abstract_id=1108487) (discussing the “marked increase in measured integration” despite flawed measurement techniques in global markets).

209. See, e.g., *Latin America Takes Action over Local Stanford Companies*, ASSOCIATED FOREIGN PRESS, Feb. 19, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5jojnWFEWfP4cS3JskYJ7P-tPY2Q> (discussing the repercussions of the Stanford debacle on Latin America, with a particular focus on bank runs in response to the fraud).

210. USA PATRIOT Act, Pub. L. No. 107-56, tit. 3, 115 Stat. 272, 296–342 (2001) (codified as amended in scattered titles of U.S.C.).

211. *Id.* tit. 3, sec. 301 (codified as amended at 31 U.S.C. § 5301 note (2006)).

212. 31 U.S.C. § 5332 (2006).

213. *Id.* § 5318.

214. Evan Metaxatos, *Thunder in Paradise: The Interplay of Broadening United States Anti-Money Laundering Legislation and Jurisprudence with the Caribbean Law Governing Offshore Asset Preservation Trusts*, 40 U. MIAMI INTER-AM. L. REV. 169, 183 (2008).

215. 31 U.S.C. § 5318.

institutions that voluntarily disclose suspicious transactions;²¹⁶ however, this type of disclosure is unlikely in a highly secretive region like the Cayman Islands that places a premium on confidentiality. As a result, the provision fails where it is most needed. Nevertheless, IMLA represents a significant expansion of the Treasury Secretary's power to enforce anti-money-laundering laws.²¹⁷

Although IMLA's coverage of money laundering differs substantively from securities fraud, the former is often a part of the layering efforts to hide proceeds from the latter. Moreover, Congress's willingness to act in the face of a recognized threat to American security demonstrates its capacity to authorize an agency, in the face of new developments in the international arena, to take on a greater role in preserving the national public interest.

Furthermore, despite the fact that the investigative right articulated in this Note goes farther than IMLA in encroaching on foreign sovereignty, the justification remains the same—the SEC's mandate to protect the national public interest extends to providing financial security through open and fair markets. A failure to provide these protections results not only in potential market inefficiencies but also places the financial security of the nation and its citizens at risk.

V. Applying the Investigative Right to the Techniques of the Three Conmen

The investigative privilege advocated by this analysis is intended simultaneously to upgrade the SEC's enforcement power into a new era of technology and transactional speed while attempting to dissuade conmen from instigating frauds by making one of their tools less useful: the obscurity and regulatory inaccessibility of OFCs. Although hindsight can only take a regulator so far, applying the investigative right to the case studies discussed above demonstrates that, while the cons may not have been avoidable, they certainly would have been more difficult to execute in the manner by which they occurred.

A. *Sir Robert Allen Stanford*

The Stanford fraud would have been mitigated greatly through the SEC's enhanced investigative authority. First, the SEC had knowledge of whistle-blower claims tied to Stanford's unsustainable investment model and dubious auditor, prior investigations of suspicious activity, and an awareness

216. Metaxatos, *supra* note 214, at 184.

217. The role of FinCEN also has expanded the Treasury's ability to alert investors to potentially fraudulent moneymaking schemes. *See generally* Fin. Crimes Enforcement Network, U.S. Dep't of the Treasury, What We Do, http://www.fincen.gov/about_fincen/wwd (detailing FinCEN's authority to collect and analyze information from a large number of financial institutions).

of Stanford's pervasive relationship with Antiguan regulators.²¹⁸ Moreover, the Commission had this information in 2005, when the fraud was valued at \$3.8 billion.²¹⁹ Had the SEC entered Antigua directly, rather than relying on the self-interested regulator to produce information, the Commission likely would have detected the fraudulent auditing scheme—it was grossly apparent to anyone who simply visited the auditor's office²²⁰—thereby disarming a critical element used to falsify investor returns. Instead, the SEC was forced to rely on local regulators, costing investors another \$4.6 billion.²²¹

B. Samuel Israel III and Daniel E. Marino

Of the three studies analyzed herein, the Bayou fraud would have been the least susceptible to the investigative right; however, it still would have been materially affected. First, investigative authority alone may not overcome the high secrecy and involvement of offshore centers in committing fraud. For instance, even if the SEC suspected fraud based on Bayou's suspicious returns and radical decision to terminate operations in 2004,²²² it would have had a difficult time initially determining which OFC to investigate. Moreover, once an OFC had been identified, the SEC would have had to articulate a specific scope to their investigation with limited knowledge of the fraud. Nevertheless, through the signals identified by credible whistle-blowers,²²³ the SEC would have had some direction in determining which sectors to investigate. Ultimately, though the Bayou fraud may not have been avoided, the SEC could have instituted investigations that might have illuminated suspicious wire transfers between Bayou's bank accounts and IM Partners' accounts in obscure OFCs. Moreover, a threat of deeper investigation might have motivated the duo to utilize a legitimate auditor. This threat alone might have mitigated the desperate con employed by Sam Israel.

C. Bernard Madoff

The investigative right would have had an intermediate effect on Madoff's expansive fraud by significantly handicapping the fraudster's ability to employ offshore funds to raise and hide capital. Relying on whistle-blower allegations of a Ponzi scheme and an awareness that the Madoff business model relied heavily on foreign investment into its offshore feeder funds, the SEC could have initiated investigations in nations housing

218. See *supra* notes 91–101 and accompanying text.

219. See *supra* notes 77–80 and accompanying text.

220. See Szep, *supra* note 61 (highlighting the unreliability of Stanford's Antiguan auditors).

221. Stanford Complaint, *supra* note 35, at 8.

222. Burton & Urban, *supra* note 102.

223. See *id.* (discussing the activity of two potential whistle-blowers, Paul Westervelt and Greg Lopak, who noted potential securities-law violations at Bayou).

these funds.²²⁴ Moreover, the presence of regulators in Barbados and other OFCs employed by Madoff as part of his alleged asset-hiding scheme might have dissuaded the conman from attempting to bury funds rather than cycling them back to investors. In addition, investors concerned with hiding their own personal wealth might have elected not to invest in a fund that would be subject to such potential scrutiny. Ultimately, a single change cannot overcome a fraud in excess of \$20 billion; however, the threat of expanded jurisdiction might decrease the scale of a considered con or aid in the repatriation efforts following a con.

VI. Conclusion—The Obama Administration and Protecting the National Public Interest

If financial institutions won't cooperate with us, we will assume that they are sheltering money . . . and act accordingly.²²⁵

Over a half century since Bonnie and Clyde terrorized the American South,²²⁶ a new breed of con artist has emerged. Rather than blowing up bank vaults for a few thousand dollars, these individuals perpetrate frauds that cost investors billions. The tools of the trade have changed as well—from Tommy guns and plastic explosives to fake auditors and obscure offshore regulations.

The danger, however, remains the same. These con artists pose a threat to the national public interest, undermining the notion of fair and open markets with obscure avenues to hide clandestine activity. The sheriff in this scenario, charged with the mandate to promote fair disclosure, is the SEC. However, it currently lacks the ability to follow these conmen out of town, preserving the fraudster's ability to work around the SEC through nations that lack the impetus to prosecute financial fraud. In fact, these fringe players often appear complicit in the crimes, demonstrating the infeasibility of offshore self-regulation. As a result, the sheriff needs the authority to pursue these con artists in nearby towns, particularly those that appear to invite fraudulent conduct.

Given the Obama Administration's dedication to combating offshore tax havens,²²⁷ the SEC may have its best opportunity to push for greater offshore jurisdiction. Not only does the President seem open to tackling offshore tax havens, but Congress also recently investigated the SEC's ability to pursue

224. These nations include Barbados and several Latin American states. Rosa, *supra* note 148.

225. President Barack Obama, Remarks on International Tax Policy Reform (May 4, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-international-tax-policy-reform>).

226. See Fed. Bureau of Investigations, Famous Cases: Bonnie and Clyde, <http://www.fbi.gov/libref/historic/famcases/clyde/clyde.htm> (summarizing the infamous duo's criminal exploits in the 1930s).

227. See, e.g., Jackie Calmes & Edmund L. Andrews, *Obama Asks Curb on Use of Havens to Reduce Taxes*, N.Y. TIMES, May 5, 2009, at A1 (reporting on President Obama's speech on May 4, 2009).

fraudsters.²²⁸ Moreover, the SEC's own purpose and productivity is under scrutiny,²²⁹ leading to the creation of an entirely novel division focused for the first time on prospective regulation—the Division of Risk, Strategy, and Financial Innovation.²³⁰ Given the publicity, public outrage, and loss of confidence stemming from the acts of recent comen, the SEC has its best chance to advocate a greater role for itself in fulfilling its mandate to preserve the national public interest and to reestablish its credibility among critics.

Eight years ago, Congress recognized financial crime as a potential threat to the nation's security. Now Congress has the ability to take another step forward in preserving the integrity of American markets, and by extension, the security of American investors. Congress now has both the motive and the opportunity, so it should empower the sheriff to take down the conman.

—Nick S. Dhesi

228. See *S.E.C. Vows to Reorganize Unit to Head Off Fraud*, N.Y. TIMES, Sept. 11, 2009, at B5 (describing the inquiry into the SEC's failures).

229. See John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 714–17 (2009) (evaluating the merits of both the SEC and the Treasury and ultimately advocating regulatory consolidation); see also Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785, 796, 823 (2009) (responding to Coffee and Sale and concluding that whatever regulatory changes occur should “emphasize transparency and enforcement”).

230. Press Release, SEC, SEC Announces New Division of Risk, Strategy, and Financial Innovation (Sept. 16, 2009), available at <http://www.sec.gov/news/press/2009/2009-199.htm>.