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Regulating the “Too Big to Jail” Financial Institutions

Jerry W. Markham[†]

INTRODUCTION

In the wake of the Financial Crisis of 2008 (Financial Crisis), scarcely a week has passed without government regulators announcing another multi-billion-dollar settlement with one or more members of a small group of large multinational banks. Those banks include the Bank of America Corp. (BoFA), JPMorgan Chase & Co. (JPMorgan), Wells Fargo Bank, N.A. (Wells Fargo), Goldman Sachs Group Inc. (Goldman Sachs), Morgan Stanley, Citigroup Inc. (Citigroup), UBS AG (UBS), Deutsche Bank AG (Deutsche Bank), Credit Suisse Group AG (Credit Suisse) Barclays Plc (Barclays), HSBC Bank USA NA (HSBC), and the Royal Bank of Scotland Group Plc (RBS).¹

A horde of state, federal, and even foreign regulators have been jointly demanding these massive payouts. Those regulators include the Department of Justice (DOJ), Securities & Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), Office of the Comptroller of the Currency (OCC), Federal Reserve Board (Fed), Federal Deposit Insurance Corporation (FDIC), Treasury Department (Treasury), Financial Crimes Enforcement Network (FinCEN), Federal Housing Finance Agency (FHFA), National Credit Union Administration (NCUA), Department of Housing and Urban Development (HUD), Federal Trade Commission (FTC), Federal Energy Regulatory Commission (FERC), Office of Foreign Assets Control (OFAC), and Department of Labor (DOL). State attorneys general, from forty-nine states, plus the District of Columbia, and even local municipal prosecutors and state

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¹ See, e.g., *Fine Times*, *ECONOMIST* (July 4, 2014), <https://www.economist.com/blogs/graphicdetail/2014/07/daily-chart-3> [<https://perma.cc/H3CP-SSB4>] (setting forth a table identifying large banks paying the largest amount of post-Financial Crisis fines).

pension fund administrators also participated in many of these settlements. Particularly active at the state level were attorneys general from New York (NYAG) and the New York Superintendent of Financial Services (NYSFS). Foreign regulators joining in these settlements include the U.K. Financial Conduct Authority (FCA) and regulators from Switzerland, Netherlands, and the European Union.²

By the end of 2016, the costs associated with those settlements for the sixteen largest banks collectively totaled more than \$320 billion.³ To put that number in perspective, it is approximately equal to the combined annual expenditures of the state governments of New York, New Jersey, and Illinois.⁴ The staggering amount of these settlements, and the broad array of charges brought by multiple regulators for the same conduct would seemingly suggest that the large banks are so completely corrupt that they should be put out of business. However, exactly the opposite occurred. As this article will describe, these settlements were carefully structured to avoid any interference with the banks' business models. In addition, high-level executives at those banks were given immunity from prosecution as a part of the settlements.⁵ Only lower-level officers

² See Jerry W. Markham, *Regulating the Moneychangers*, 18 U. PA. J. BUS. L. 789, 848–63 (2016) [hereinafter *Regulating the Moneychangers*] (describing the role of several of those regulators).

³ Ben McLannahan, *Banks' Post-Crisis Legal Costs Hit \$300bn*, FIN. TIMES (LONDON) (June 7, 2015), <https://www.ft.com/content/debe3f58-0bd8-11e5-a06e-00144feabdc0> [https://perma.cc/7NRK-CP47]; see also Gavin Finch, *World's Biggest Banks Fined \$321 Billion Since Financial Crisis*, 49 SEC. REG. & L. REP. (BNA) 395 (Mar. 6, 2017); Karen Freifeld, Arno Schuetze & Kathrin Jones, *Deutsche Bank Agrees to \$7.2 billion Mortgage Settlement With U.S.*, REUTERS (Dec. 22, 2016 8:35 PM), <http://www.reuters.com/article/us-deutsche-bank-mortgages-settlement-idUSKBN14C041> [https://perma.cc/82VP-MWHV] [hereinafter *Settlement With U.S.*]. That number is also much understated because litigation and compliance costs total additional billions of dollars. In addition, "corporate monitors" are often required to be employed by the regulators for purposes of monitoring future compliance. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 174–78 (2014) (describing the use of such monitors). These functionaries add tens of millions of dollars in costs to the settling party. Steven Davidoff Solomon, *In Corporate Monitor, A Well-Paying Job But Unknown Results*, N.Y. TIMES (Apr. 15, 2014, 6:33PM), <https://dealbook.nytimes.com/2014/04/15/in-corporate-monitor-a-well-paying-job-but-unknown-results/> [https://perma.cc/3Y8T-BCJX].

⁴ *Total State Expenditures*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 10 2016), <http://www.ncsl.org/research/fiscal-policy/total-state-expenditures.aspx> [https://perma.cc/8ME8-87D6]. That amount of money would buy more than 10 million cars at \$30,000 each or more than 1.5 million homes valued at \$200,000 each. *How Much is 300 Billion?* RESEARCH MANIACS, <http://researchmaniacs.com/Numbers/Billions/How-much-is-300-billion.html> [https://perma.cc/NQ4N-BA8X].

⁵ "When the dust settled on the 2008 financial crisis, not a single top Wall Street executive went to prison." Ben Protess & Matt Apuzzo, *Justice Department Toughened Approach on Corporate Crime, But Will That Last?* N.Y. TIMES (Jan. 12, 2017), <https://www.nytimes.com/2017/01/12/business/dealbook/justice-department-corporate-crime.html> [https://perma.cc/RA5N-3D2Z].

and traders were prosecuted criminally, but the government has had a surprising lack of success even in those prosecutions.⁶

Critics have charged, not without justification, that these payouts were really just “official larceny” on a grand scale.⁷ This article will show that those settlements generated lurid headlines but had no real consequences for bank executives and served only to bolster the reputation of regulators. While sparing executives, the settlements imposed a massive and seemingly random tax on the assets of innocent shareholders, a tax that Congress did not levy. Equally innocent employees were laid off by the tens of thousands in order to recover the costs of the settlements.

This article advocates an alternative to the duplicative and ineffective regulatory system that now exists to punish large banks. Part I traces the history of efforts to punish white-collar crime and how that effort led to the development of the present “too big to jail” regulatory model.⁸ Part II describes the cases brought against the large banks in the wake of the Financial Crisis of 2008 and their settlements with multiple regulators who failed to prevent the misconduct in the first place and who approved settlements that did little to deter future abuses. Part III proposes an alternative to the existing “functional” regulatory model in the form of a single regulator

⁶ Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J.F. 33, 44–45 (2016) (noting that individuals who were prosecuted “were typically low-level employees; perhaps as a result, these individual prosecutions generally resulted in fairly low sentences for those that received any jail time.” (footnotes omitted)). As described later in this article, several lower-level traders were acquitted, had their convictions reversed or the government dropped charges. See *infra* note 69 and accompanying text.

⁷ *Barack's Last Bank Bash: Former Villains are Now Victims in a Final Round of Official Larceny*, WALL ST. J., Dec. 26, 2016, at A16, <http://www.wsj.com/articles/baracks-last-bank-bash-1482793373> [<https://perma.cc/VB2P-TBVS>]. As another critic noted, large fines do not:

measure the agencies' effectiveness at deterring misconduct. “They collect fines from huge corporations but does that really change corporate behavior and attitudes? The CEO signs off on the settlement, stays on board without consequences or jumps out of the plane with his golden parachute, and its business goes on as usual at the top with a directive to the subordinates to find another way to make more money to pay the next fine without regard to how that's done!”

Antoinette Gartrell, *DOJ: Top Fine Collector Among Federal Agencies*, 48 SEC. REG. & L. REP. 2218 (BNA) (Dec. 15, 2016).

⁸ See generally Garrett, *supra* note 6; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), <https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?mcubz=0> [<https://perma.cc/82W3-KU4Y>] (describing the development of financial crime prosecutions in recent decades and comparing them to prosecutions in the wake of the Financial Crisis of 2008).

that would replace the host of government agencies now swarming over the banks. This article concludes that the burden of fines for financial crimes should be shifted from shareholders and employees to the actual wrongdoers, including senior executives.

I. HOW THE TOO BIG TO JAIL MODEL WAS DEVELOPED

This Part traces the history of so-called white-collar prosecutions and early concerns that business executives were being immunized from prosecution on the basis of their economic class. Although this attitude changed over the years, prosecutors discovered that proving criminal culpability by executives in large companies, for activities that were carried out by subordinate lower-level employees, was difficult. Still later, prosecutors created "task forces" composed of multiple regulators that proved effective in prosecuting financial crimes by executives at small financial institutions. That model, however, did not solve the problem of proving violations by executives at larger banks. Those executives were often separated by several layers of management from the actual wrongdoers, therefore making it difficult to prove criminal intent.⁹ Nevertheless, the threat of prosecution remains and large financial institutions can lose their business licenses (e.g., banking and broker-dealer registrations) even where only lower-level employees actually committed crimes. This led to the creation of the present too big to jail model in which large settlements make regulators look tough, while immunizing executives from prosecution and preserving their institutions' business licenses.

A. *Class Distinctions and Crime*

Professor Edwin H. Sutherland appears to have coined the phrase "white-collar" crime in an address before the American Sociological Society in 1939.¹⁰ Sutherland attacked the then conventional wisdom that persons with low socio-economic status committed a higher incidence of crimes than wealthy businessmen. Sutherland argued that crime statistics

⁹ See Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1134 (2016) (describing problems in the prosecution of large public companies and stating: "If nearly all publicly held corporations are bound to become corporate criminals in the technical sense, our legal system ought to have a better system defining ex ante which failures deserve condemnation and which ones do not.").

¹⁰ Edwin H. Sutherland, *White-Collar Criminality*, Address Before the American Sociological Society (Dec. 1939), in 5 AM. SOCIO. REV. 1 (1940).

were skewed because white-collar criminals were rarely prosecuted.¹¹ He asserted that “[t]he most powerful group in medieval society secured relative immunity by ‘benefit of clergy,’ and now our most powerful groups secure relative immunity by ‘benefit of business or profession.’”¹² Sutherland also noted that crimes of the upper class were usually handled administratively through the imposition of civil sanctions, rather than imprisonment, as was the case for so-called lower class crimes.¹³

In support of his claims of white-collar immunity, Professor Sutherland cited a number of financiers who had been prominently attacked in the press for financial abuses in the 1920s.¹⁴ Most of the individuals Sutherland identified, however, were charged with criminal offenses, committed suicide or were ruined financially or both, and he missed the mark. For example, Richard Whitney, a highly visible leader of the New York Stock Exchange, was imprisoned for several years after he was convicted by New York prosecutors of stealing funds to support his speculations.¹⁵ Samuel Insull, who was the head of a vast network of utility companies based in Chicago that collapsed in the wake of the Stock Market Crash of 1929, was indicted, but was acquitted of federal mail and wire fraud charges.¹⁶ Another Sutherland target, Albert Fall, Secretary of

¹¹ *Id.* at 1–2.

¹² *Id.* at 9.

¹³ *Id.* at 2 (identifying those individuals). Professor Sutherland stated that white-collar crimes:

differ principally in the implementation the criminal laws which apply to them. The crimes of the lower class are handled by policeman, prosecutors, and judges, with penal sanctions in the form of fines, imprisonment, and death. The crimes of the upper class either result in no official action at all, or result in suits for damages in civil courts, or are handled by inspectors, and by administrative boards or commissions, with penal sanctions in the form of warnings, orders to cease and desist, occasionally the loss of a license, and only in extreme cases by fines or prison sentences. Thus, the white-collar criminals are segregated administratively from other criminals, and largely as a consequence of this are not regarded as real criminals by themselves, the general public, or the criminologists.

Id. at 7–8.

¹⁴ Professor Sutherland also cited the “robber barons” of the nineteenth century as examples of wealthy businessmen committing economic crimes on a grand scale without consequence. *Id.* at 2, 8. However, at the time of their depredations, there was little regulation of business. See JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES VOLUME 1: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS (1492–1900) 251–65 (2002) (describing the actions of the Robber Barons).

¹⁵ See generally MALCOLM MCKAY, IMPECCABLE CONNECTIONS: THE RISE AND FALL OF RICHARD WHITNEY (2013) (describing Whitney’s background and crimes).

¹⁶ See generally JOHN F. WASIK, THE MERCHANT OF POWER: SAM INSULL, THOMAS EDISON, AND THE CREATION OF THE MODERN METROPOLIS (2006) (describing the rise and fall of Insull’s empire).

the Interior, was convicted of the bribery charges that were at the center of the Teapot Dome scandal.¹⁷

An action brought by the DOJ against the General Electric Company (GE) in the 1960s provides a better case study on why prosecutions of complex white-collar abuses have varied from ordinary, street-level crime.¹⁸ GE and several other large electrical supply companies were charged with criminal participation in a massive price-fixing conspiracy.¹⁹ Fifty-two employees at those companies were also indicted, including a GE manager with direct links to the president and the chairman of GE.²⁰ Ordinarily, antitrust charges were settled by

¹⁷ *Teapot Dome Scandal*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Teapot-Dome-Scandal> [<https://perma.cc/E78X-325D>]. Harry F. Sinclair and Edward L. Dohney, who were alleged to have paid the bribes, were acquitted of conspiracy and bribery charges. However, Sinclair was jailed on contempt charges. *Id.* Another Sutherland example, Charles E. Mitchell, the head of the National City Bank in the 1920s, now Citigroup, was indicted for tax evasion but was acquitted by a jury. Nevertheless, Mitchell was forced to pay \$1 million to the IRS over those charges. JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR (1900–1970) 182 (2002) [hereinafter FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR]. Other Sutherland targets included Wilbur Foshay, the head of another utility empire, but Foshay was convicted and jailed on criminal charges. Foshay was freed after his fifteen-year sentence was commuted by President Franklin Roosevelt and was later pardoned entirely by President Harry Truman. Britt Aamodt, *Foshay Built Utilities Empire and Minneapolis' Tallest Building, But Lost It All*, MINNPOST (Dec. 10, 2013), <https://www.minnpost.com/mnopedia/2013/12/foshay-built-utilities-empire-and-minneapolis-tallest-building-lost-it-all> [<https://perma.cc/5DYH-9UVD>]. Other executives cited by Sutherland were ruined financially or committed suicide. For example, the Van Sweringen brothers, who were railroad magnates from Cleveland Ohio, were bankrupted by the Great Depression and died in poverty, not having been charged with a crime. FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR, *supra*, at 176. Alexandre Stavisky, a French financier who created a widely publicized scandal involving the sale of worthless bonds, either committed suicide or was murdered after his wrongdoing was discovered. *Stavisky Affair*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Stavisky-Affair> [<https://perma.cc/66FN-4BYW>]. Ivan Krueger, the infamous Swedish businessman who controlled a vast financial empire and a monopoly over the sale of matches, also committed suicide when his businesses collapsed in the 1930s. *See generally* FRANK PORTNOY, THE MATCH KING: IVAR KREUGER, THE FINANCIAL GENIUS BEHIND A CENTURY OF WALL STREET SCANDALS (2009) (questioning the magnitude of Krueger's alleged wrongdoing). Another Sutherland target, Phillip Musica, was convicted of fraud, but was pardoned by President William Howard Taft. Musica went on to commit other fraud, including a massive swindle at McKesson & Robbins, a pharmaceutical company. Musica committed suicide after his thefts from that company were discovered. FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR, *supra*, at 211.

¹⁸ This conspiracy was uncovered after officials of the Tennessee Valley Authority (TVA) complained to the DOJ that they had received identical sealed bids from electrical companies who were supposed to be competing for TVA contracts. William H. Andrews, Book Review, 39 IND. L.J. 170, 170 (1963) (reviewing JOHN HERLING, THE GREAT PRICE CONSPIRACY (1962)).

¹⁹ *Id.* at 173, 179.

²⁰ *Id.*

pleas of *nolo contendere*.²¹ In this case, however, U.S. Attorney General William P. Rogers asked the district court to reject such pleas because of the egregiousness of the conduct, which the court did.²² Nevertheless, the indictment of the GE manager was subsequently dropped after problems developed with the proof of his involvement.²³ GE then agreed to enter guilty and *nolo contendere* pleas on the condition that the government exonerate its board of directors and top executives. This was done through a declaration by the DOJ that it had no proof that the board and upper level GE executives had knowledge of, or engaged in, the conspiracies.²⁴ In exchange, GE agreed to pay what was then a record penalty of \$7,470,000.²⁵

As will be seen, the outcome in the GE case is similar to the model used in the post-Financial Crisis cases. The DOJ made headlines by bringing the case against GE, but soon realized that proving charges against senior managers would be difficult. Moreover, destroying the company would have served no useful purpose. To the contrary, GE shareholders would have lost their investment in this very valuable and viable enterprise, GE suppliers would have suffered grave losses, and thousands of employees would have lost their jobs, destroying families and whole communities in the process. In the end, the government got its headlines, GE executives were exonerated, and GE continued its business unhindered.

B. *The SEC Settlement Model Sets the Stage for Too Big to Jail*

The federal securities laws enacted in the 1930s broadly criminalized misconduct on Wall Street. Initially, however, prosecutions under those statutes largely ignored the large financial institutions and their executives. Instead, criminal

²¹ In such a plea, the defendant agrees to a conviction but does not admit the charges. *Nolo Contedere*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nolo_contendere [<https://perma.cc/WMW9-T8H4>].

²² WILLIAM M. MCCLENAHAN & WILLIAM H. BECKER, *EISENHOWER AND THE COLD WAR ECONOMY*, 175 (2011).

²³ *Government: The Price Fixing Case*, TIME (May 5, 1961), <http://content.time.com/time/magazine/article/0,9171,872362,00.html> [<https://perma.cc/3TBZ-YP8T>].

²⁴ MCCLENAHAN & BECKER, *supra* note 22, at 176–79; Andrews, *supra* note 18, at 176.

²⁵ Thomas Carvlin, *G.E. Will Pay U.S. Record \$7,470,000 in Price Fixing Plot*, CHI. TRIB., July 28, 1962, at 7, <http://archives.chicagotribune.com/1962/07/28/page/85/article/g-e-will-pay-u-s-record-7-470-000-in-price-fixing-plot> [<https://perma.cc/2BM6-5G7H>]. Individual defendants at G.E. and other companies were fined, but only seven actually went to jail and then only for thirty days, and the sentences of the others were suspended. *Electrical Price Fixing Stirs Inquiry*, CQ ALMANAC, <https://library.cqpress.com/cqalmanac/document.php?id=cqal61-879-29203-1371699> (last visited Dec. 3, 2016).

prosecutions focused on individuals who were looting public companies. They included Eddie Gilbert, who stole almost \$2 million from E.L. Bruce & Co. to meet margin calls from his speculations.²⁶ Other such high-profile fraudsters included Serge Rubenstein, Lowell McAfee Birrell, Alexander L. Guterma, and Earl Belle. They collectively looted seventy-five corporations, causing investor losses of some \$100 million, but were given prison sentences of only a few years when convicted.²⁷

The Securities and Exchange Commission (SEC) became more of an activist regulator after it criminalized insider trading in 1961.²⁸ The SEC's rise was accompanied by an increasing interest in Wall Street crimes by the DOJ. Several prominent Wall Street traders were prosecuted criminally in the 1980s, including Ivan Boeskey, who publicly and infamously extolled the virtues of greed.²⁹ Drexel Burnham Lambert (Drexel), one of the largest brokerage firms in United States and a leader in underwriting "junk bonds" (i.e., risky, high interest rate bonds) to finance mergers, was sanctioned by the SEC and indicted on various criminal charges. The

²⁶ Gilbert fled to Brazil, which had no extradition treaty with the United States, but eventually returned to the United States and was imprisoned for two years. FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR, *supra* note 17, at 295.

²⁷ *Id.* at 295. Serge Rubenstein was murdered. Michael Thomas Barry, *Murder of Serge Rubenstein—1955*, CRIME MAG. (Jan. 27, 2013), <http://www.crimemagazine.com/murder-serge-rubinstein-1955> [<https://perma.cc/K3AR-EPA7>]. Lowell McAfee Birrell fled to Cuba and then to Brazil, but returned to the United States after Brazil agreed to an extradition treaty with the United States. Birrell was then convicted of securities fraud and was sentenced to two years in prison. FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR, *supra* note 17, at 295; Lloyd Duhaime, *Law's Hall of Shame: Lowell Birrell*, DUHAIME (Nov. 24, 2009), <http://www.duhaime.org/LawMuseum/LawArticle-1118/Lowell-Birrell.aspx> [<https://perma.cc/5S93-Y84A>]. Alexander L. Guterma was indicted and tried to flee the country, but was arrested, convicted and served a five-year prison term. Gene Smith, *Guterma, a Financier Who Lost an Empire*, N.Y. TIMES (Apr. 9, 1977), <http://www.nytimes.com/1977/04/09/archives/guterma-a-financier-who-lost-an-empire.html> [<https://perma.cc/M8DC-WNKZ>]. Earl Belle fled to Brazil but later returned to the United States where he was convicted of embezzlement and served twenty-two months in prison. Brian O'Neill, *Remembering a Pro at Conning*, PITT. POST-GAZETTE (July 3, 2008, 6:45AM), <http://www.post-gazette.com/opinion/brian-oneill/2008/07/03/Remembering-a-pro-at-conning/stories/200807030356> [<https://perma.cc/CB57-ZA9E>].

²⁸ That crime was made up out of whole cloth through an SEC administrative decision that was issued in connection with the settlement of a case that was not subject to appeal. In re Cady Roberts & Co., 40 S.E.C. 907, 912, 915 (1961). Previously, insider trading had not been viewed as violation of federal law or even common law except in extraordinary cases. In *Goodwin v. Agassiz*, 186 N.E. 659 (Mass. 1933), a state high court held there was no private right of action for insider trading on an exchange. However, in face-to-face transactions, involving special circumstances some courts imposed liability for failure to disclose inside knowledge. *Strong v. Repide* 213 U.S. 419, 430–31, 434 (1909). Interestingly, when the Securities Exchange Act of 1934 was adopted, Congress enacted only a limited prohibition on insider trading in the form of a bar on insiders from making short-term profits. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 16, 48 Stat. 881, 896 (codified as amended at 15 U.S.C. § 78p (2012)).

²⁹ See generally JAMES B. STEWART, *DEN OF THIEVES* (1991) (describing those scandals).

criminal charges related to the activities of Michael Milken, a junk bond trader for the firm. As a result, Drexel Burnham pleaded guilty to criminal charges and was fined \$650 million. Milken also pleaded guilty to criminal charges, was sent to prison, and fined \$600 million.³⁰ No criminal charges were brought against senior management at Drexel, but the charges brought against Drexel badly crippled the firm, and it declared bankruptcy several months later. Some 5,000 employees lost their jobs as a result.³¹

A few years later, E.F. Hutton & Co., a prominent broker-dealer on Wall Street pleaded guilty to a 2,000-count indictment involving an elaborate check-kiting scheme.³² The firm was fined \$2 million and ordered to pay millions more in restitution to the banks it had defrauded.³³

Because of grants of immunity from prosecution that were thought necessary to gain cooperation in breaking the case, no individuals were charged. The U.S. Attorney General also sought to justify the lack of indictments for senior management by claiming that the scheme was a corporate enterprise in which executives did not benefit directly.³⁴ In any event, the charges against the firm badly damaged its business.³⁵

Despite these high-profile prosecutions, the SEC was criticized for being lax in its enforcement efforts.³⁶ Only rarely were senior executives ever charged with misconduct and, when charged, sanctions were relatively light. In a rare case sanctioning an executive, in 1991, John Gutfreund, the chief

³⁰ Milken was initially sentenced to ten years in prison, but that sentence was later reduced. JERRY W. MARKHAM, *A FINANCIAL HISTORY OF THE UNITED STATES: FROM THE AGE OF DERIVATIVES INTO THE NEW MILLENNIUM (1970–2001)* 126 (2002).

³¹ Kurt Eichenwald, *The Collapse of Drexel Burnham Lambert; Drexel Symbol of Wall S. Era, Is Dismantling; Bankruptcy Filed*, N.Y. TIMES, Feb. 14, 1990, at D4, <http://www.nytimes.com/1990/02/14/business/collapse-drexel-burnham-lambert-drexel-symbol-wall-st-era-dismantling-bankruptcy.html?pagewanted=all> [<https://perma.cc/2PPF-YN2M>].

³² Check kiting is “the practice of utilizing the time it takes for a check to clear as a form of interest-free credit, [which] is illegal.” Ugo Nardi, *How Banks Use to Spot Check Kiting*, AM. BANKER (May 24, 2013 9:00AM), <https://www.americanbanker.com/opinion/how-banks-used-to-spot-check-kiting> [<https://perma.cc/5W3N-L4H3>].

³³ See generally DONNA SAMMONS CARPENTER & JOHN FELONI, *THE FALL OF THE HOUSE OF HUTTON* (1989) (describing that scheme) [hereinafter *FALL OF THE HOUSE OF HUTTON*].

³⁴ Ronald J. Ostrow, *E.F. Hutton Guilty in Bank Fraud: Fined \$2 Million for Scheme Similar to ‘Check Kiting,’* L.A. TIMES (May 3, 1985), http://articles.latimes.com/1985-05-03/news/mn-11827_1_hutton-branch [<https://perma.cc/X62G-MPBA>].

³⁵ See generally *FALL OF THE HOUSE OF HUTTON*, *supra* note 33 (describing the background of the firm and its failure).

³⁶ A best-selling book entitled *Eagle on the Street* was highly critical of the SEC’s efforts to lessen regulation after the appointment by President Ronald Reagan of John Shad, a businessman, to head that agency. DAVID. A VISE & STEVE COLL, *EAGLE ON THE STREET*, *passim* (1991).

executive officer (CEO) at Salomon Brothers, was charged by the SEC with failing to report promptly to regulators that a trader at the firm had massively manipulated the Treasury bond market. In a settlement with the SEC, in which he did not admit guilt, Gutfreund was fined \$100,000 and was barred from serving as the CEO of any broker-dealer firm. In contrast, Paul Mozer, the employee conducting the manipulative trades, was convicted of criminal charges. He was imprisoned for four months and paid a \$1 million civil penalty.³⁷

C. *The S&L Crisis Prosecutions*

Prosecutors aggressively charged executives with criminal misconduct in the savings and loan industry (S&Ls) scandals that arose in the 1980s. In the process, a new regulatory model was created in which the DOJ assembled a task forces of prosecutors, in order to manage the cooperation of interested government agencies and prosecute widespread financial abuses by executives at S&Ls. That model was successful in prosecuting a large number of S&L executives. The next Section of the article, however, shows that the model exposed some flaws when applied to executives at large companies after the collapse of the Enron Corporation in 2001.

A collapse of real estate values and the failure of over 700 S&Ls led to the exposure of widespread abuses by S&L executives.³⁸ A Bank Fraud Working Group composed of officials from the DOJ, Treasury, and the OCC was created in order to coordinate the investigations of those executives.³⁹ A

³⁷ Keith Bradsher, *Former Salomon Trader to Pay \$1.1 Million Fine*, N.Y. TIMES (July 15, 1994), <http://www.nytimes.com/1994/07/15/business/former-salomon-trader-to-pay-1.1-million-fine.html> [<https://perma.cc/X2ZD-DH5C>].

³⁸ *Two Financial Crises Compared: The Savings and Loan Debacle and the Mortgage Mess*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/interactive/2011/04/14/business/20110414-prosecute.html> [<https://perma.cc/LC23-X5D6>].

³⁹ This Group was renamed as the Interagency Bank Fraud Enforcement Working Group (BFWG) in 1984. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, U.S. SENATE: BANK AND THRIFT CRIMINAL FRAUD (1993), <https://www.gao.gov/assets/160/152972.pdf> [<https://perma.cc/G78V-S3GP>]; U.S. DEPT. OF JUSTICE, FRAUD SECTION ACTIVITIES REPORT: FISCAL YEARS 2004 AND 2005 (2006) [hereinafter ACTIVITIES REPORT], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/actrp0405.pdf> [<https://perma.cc/TL2P-SS7K>]. That working group was followed by others, including the Securities and Commodities Fraud Working Group:

This group, chaired by the Fraud Section, provides a forum for enforcement groups to exchange information on developing trends, new laws and regulations, and law enforcement issues and techniques. Membership includes not only federal securities and commodities law enforcement and regulatory agencies but also enforcement representatives from securities and commodities exchange and broker/dealer organizations.

special prosecution task force called “Texcon” was assembled to prosecute a large number of S&L related crimes that had occurred in the Dallas, Texas area.⁴⁰ Another task force called Thriftcon also prosecuted S&L related crimes in the Dallas area. Thriftcon grew to include ninety-four FBI agents and 150 law enforcement personnel from DOJ and Treasury. Similar task forces were created in twenty other large cities.⁴¹

Some 1,100 individuals were charged with “major” crimes in their roles at failed S&Ls. Of that number, 839 were convicted.⁴² Those S&L prosecutions evidenced an aggressive stance in indicting and convicting white-collar executives employed at those institutions. Unlike the GE case, however, the S&Ls where the prosecuted executives worked were usually bankrupt. Consequently, their jailing could cause no further damage to the economy, shareholders, employees, or suppliers.

D. *The Enron Era Scandals*

The government’s aggressive approach toward enforcement actions against white-collar criminals at S&Ls ratcheted up after the spectacular failure of the Enron Corporation (Enron) in October 2001. Enron, an energy and commodity-trading firm, was the seventh largest company in the United States when it declared bankruptcy. Its failure revealed that Enron executives had been cooking its books by wildly overstating its revenue and assets. These revelations set off a firestorm in the press and in Congress, who called for

ACTIVITIES REPORT, *supra*, at 4.

⁴⁰ CORPORATE CRIME: CONTEMPORARY DEBATES 203–04 (Frank Pearce & Lauren Snider, eds., 1995).

⁴¹ *Id.*

⁴² *Two Financial Crises Compared*, *supra* note 38. Among the high-profile prosecutions from those scandals was Don Dixon, the head of Vernon Savings & Loan in Texas. The failure of that institution cost taxpayers \$1.3 billion. WHITE-COLLAR CRIME RECONSIDERED 197 (Kip Schlegel & David Weisburd eds., 1992). Dixon was given a five-year prison sentence for looting that S&L, using its funds for such things as a beach house, jet aircraft, and a two-week culinary tour of France. JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS: FROM ENRON TO REFORM 317 (2005) [hereinafter FROM ENRON TO REFORM]. Another high-flier prosecuted by the DOJ was Charles Keating, the head of the Lincoln Savings & Loan, in Irvine, California. Lincoln’s failure cost taxpayers \$3.4 billion. Keating was alleged to have looted over \$35 million from that institution. He was imprisoned for four and a half years before his state and federal convictions were overturned on appeal. Keating then agreed to plead guilty to fraud charges and was sentenced to time already served. Robert D. McFadden, *Charles Keating, 90, Key Figure in ‘80s Savings and Loan Crisis, Dies*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-90.html> [https://perma.cc/38X4-KBTX].

immediate investigation.⁴³ Using the S&L model, a Corporate Fraud Task Force was formed in 2002 to investigate Enron and its executives.⁴⁴ As the result of investigations of Enron related activities by the Corporate Task Force, criminal charges were filed against thirty-six individuals, including twenty-seven former company executives. Eighteen of those executives either pleaded guilty or were convicted after trial.⁴⁵

Accounting fraud and other financial scandals spread to other firms after Enron's failure. By March of 2004, the DOJ had indicted hundreds of executives caught up in the financial scandals at Enron and other companies and over 500 of whom were convicted.⁴⁶ Included in the executives convicted were 214 CEOs and presidents, 53 chief financial officers, 129 vice presidents and 23 corporate attorneys. Unfortunately, the successes of the Corporate Fraud Task Force were marred by the hardball tactics used by the DOJ to obtain convictions.⁴⁷ This included threatening and indicting relatives in order to force guilty pleas from executives, pressuring companies to waive attorney client privileges, and seeking to prevent companies from paying the attorney fees of employees.⁴⁸

In another exercise of extreme bad judgment, the DOJ indicted Enron's accounting firm, Arthur Andersen LLP.⁴⁹ That firm was subsequently convicted of mail and wire fraud for the destruction of Enron records that the government thought might be relevant to its investigation of Enron.⁵⁰ The Supreme Court reversed the firm's conviction, rejecting the DOJ's prosecution theory for its mail and wire fraud charges. The Supreme Court's exoneration, however, came too late to save

⁴³ FROM ENRON TO REFORM, *supra* note 42, at 67, 91–94.

⁴⁴ Initially, this task force was composed of the DOJ, SEC, CFTC, but was gradually expanded to include dozens of regulators. FROM ENRON TO REFORM, *supra* note 42, at 109–10.

⁴⁵ Press Release, Dep't of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007), https://www.justice.gov/archive/opa/pr/2007/July/07_odag_507.html [<https://perma.cc/7CEE-84XG>].

⁴⁶ JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS (2004–2006) 33 (2011) [hereinafter FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS]; Alexei Barrionuevo & Kurt Eichenwald, *The Enron Verdict: The Overview; Tough Justice For Executives in Enron Era*, N.Y. TIMES, May 27, 2006, at C4, <http://query.nytimes.com/gst/fullpage.html?res=9C05E2D91E3EF934A15756C0A9609C8B63&pagewanted=all> [<https://perma.cc/99PU-EJTP>].

⁴⁷ FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS, *supra* note 46, at 33.

⁴⁸ FROM ENRON TO REFORM, *supra* note 42, at 108–18; FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS, *supra* note 46, at 59–62.

⁴⁹ See *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 702 (2005) (describing that indictment).

⁵⁰ *Id.* at 707–08.

the firm.⁵¹ Its business was destroyed and some 28,000 Arthur Andersen employees lost their jobs.⁵²

This was certainly a black eye for the government. There was much criticism of the government's overreaching in the Arthur Andersen case. As the *Economist* asserted, "prosecutors should reserve the criminal prosecution of service firms such as accountants, banks and insurance firms, which depend on government licenses to stay in business, to only the most egregious cases. After all, the SEC and other agencies already have a powerful sanction in civil lawsuits."⁵³ Such criticism caused the DOJ to seek alternatives to criminal sanctions, which led to the use of deferred prosecution agreements and large fines. Financial service firms readily consented to that change in approach, as the Arthur Andersen indictment sent a clear and ominous message to financial service firms and their executives (i.e., settle with the government or face destruction of their business).

E. Energy Price Manipulations

The collapse of Enron also resulted in an investigation of its energy trading practices in the California electricity market. Those investigations were conducted by, among others, the California Attorney General, DOJ, CFTC and FERC. The California Attorney General boasted that his office recovered more than \$3.3 billion from energy trading firms for abusive trading practices uncovered in these investigations.⁵⁴ FERC assessed fines that totaled over \$4 billion for energy trading on bankrupt Enron as well as five other firms.⁵⁵ Several Enron traders were indicted and pleaded guilty to criminal charges for manipulating electricity prices.⁵⁶

The energy price manipulations also gave rise to an aggressive prosecutorial stance by the CFTC. Between 2002 and 2009, the CFTC brought actions charging false reporting and attempted manipulation against forty-two energy-trading firms, many of whom had been the target of FERC charges. Thirty-one individuals were also charged, but almost all of these defendants were traders, not senior level executives. The

⁵¹ *Id.*

⁵² FROM ENRON TO REFORM, *supra* note 42, at 206–12.

⁵³ *Reversed and Remanded: The Supreme Court's Quashing of the Accounting Firm's Conviction Sends an Important Signal*, *ECONOMIST* (June 2, 2005), <http://www.economist.com/node/4033351> [<https://perma.cc/3SQD-JQ4C>].

⁵⁴ JERRY W. MARKHAM, LAW ENFORCEMENT AND THE HISTORY OF FINANCIAL MARKET MANIPULATION 271 (2014) [hereinafter LAW ENFORCEMENT].

⁵⁵ *Id.* at 272.

⁵⁶ *Id.* at 271.

CFTC assessed penalties that totaled over \$430 million, which were extraordinary amounts for this small agency.⁵⁷ These penalties were set through settlements in which the respondents neither admitted nor denied the charges.⁵⁸ One CFTC case actually went to trial and a jury found the defendant guilty of attempted manipulation, but the court set that verdict aside because of the inadequacy of the government's evidence.⁵⁹

The CFTC joined forces with the DOJ, and they jointly brought an energy price manipulation action against BP America, which the company settled for approximately \$303 million.⁶⁰ No executives were indicted, but the BP traders that conducted those trades were indicted on manipulation charges. The United States Court of Appeals for the Fifth Circuit dismissed the case because the trading was determined not to be subject to CFTC regulations and did not meet requirements of the mail and wire fraud statutes under which the defendants had been indicted.⁶¹

In another case, the DOJ indicted Reliant Energy (Reliant) and four of its traders on Commodity Exchange Act manipulation charges. The DOJ settled those charges after the United States Court of Appeals for the Ninth Circuit affirmed a decision by the lower court that would have made the charges difficult to prove.⁶² Reliant and its traders then entered into a deferred prosecution agreement pursuant to which Reliant was fined \$22 million.⁶³ Reliant also paid \$50 million to settle FERC charges over its energy trading practices, and it paid \$445 million to settle claims brought by state attorneys general.⁶⁴ Reliant additionally settled SEC charges, which asserted that its trading practices had artificially inflated revenues reported to shareholders.⁶⁵

F. Late Trading Scandals

Another Enron-era scandal further exposed the difficulty facing a regulator of deciding between a settlement with a large financial services firm or trying to prove criminal

⁵⁷ FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS, *supra* note 46, at 210.

⁵⁸ LAW ENFORCEMENT, *supra* note 54, at 276–77.

⁵⁹ U.S. Commodity Futures Trading Comm'n v. Dizon, 594 F.3d 408 (5th Cir. 2010).

⁶⁰ LAW ENFORCEMENT, *supra* note 54, at 284.

⁶¹ United States v. Radley, 632 F.3d 177, 179 (5th Cir. 2011).

⁶² United States v. Reliant Energy Servs. Inc., 188 F. App'x 629, 630 (9th Cir. 2006).

⁶³ LAW ENFORCEMENT, *supra* note 54, at 283.

⁶⁴ *Id.* at 281–82.

⁶⁵ FROM ENRON TO REFORM, *supra* note 42, at 232.

charges, even against lower-level employees. This case arose from so-called “late trading” by hedge funds and other professional traders in the shares of mutual funds operated by large financial firms.⁶⁶ The courts dismissed several suits brought by the SEC over that activity, but that agency was able to collect over \$4.6 billion in civil penalties in cases that were settled without admitting or denying the charges.⁶⁷

The SEC and the New York Attorney General (NYAG) brought late trading charges against BofA, eventually settling for \$675 million, but no executives were charged.⁶⁸ The NYAG indicted an BofA employee conducting the trades; he was ultimately acquitted of most of the charges. The remaining counts, on which the jury deadlocked, were later dropped. After that defeat, the NYAG dismissed similar charges brought against a trader for the Canadian Imperial Bank of Commerce. That bank had earlier paid \$125 million to settle charges over that conduct.⁶⁹

G. *The Financial Analysts Settlement*

Still another scandal arising during the Enron era became the prototype for the too big to jail model used after the Financial Crisis of 2008. That case was called the “analysts scandal” because it involved stock analysts who worked for large Wall Street investment banks who were charged with issuing false financial reports in order to aid the firms’ investment banking operations.⁷⁰ Ten large investment banks agreed to a collective settlement with several regulators, including the SEC and the NYAG, which totaled \$1.4 billion,

⁶⁶ Late trading allowed those traders to buy mutual fund shares after their closing price was set and after the traders were able to observe an improvement in value after the close by following trading in correlated markets. See generally Jerry W. Markham, *Mutual Fund Scandals—A Comparative Analysis of the Role of Corporate Governance in the Regulation of Collective Investments*, 3 HASTINGS BUS. L.J. 67, 89 (2006) (describing this practice).

⁶⁷ FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS, *supra* note 46, at 400.

⁶⁸ Josh Friedman, *FleetBoston, BofA to Pay \$675 Million*, L.A. TIMES (Mar. 16, 2004), <http://articles.latimes.com/2004/mar/16/business/fi-mutual16> [<https://perma.cc/EQN7-3LEH>].

⁶⁹ Reuters & Bloomberg News, *Charges Against Former CIBC Exec Are Dropped*, L.A. TIMES (Nov. 22, 2005), <http://articles.latimes.com/2005/nov/22/business/fi-wrap22.2> [<https://perma.cc/9YKG-T4UU>]; see also Reuters, *Former BofA Broker Acquitted on 29 Counts*, L.A. TIMES (June 10, 2005), <http://articles.latimes.com/2005/jun/10/business/fi-sihpol10> [<https://perma.cc/6XKL-FSQN>].

⁷⁰ FROM ENRON TO REFORM, *supra* note 42, at 400–20.

an amount that drew substantial interest in the press. No executives were charged.⁷¹

The settling firms included Citigroup, Goldman Sachs, Morgan Stanley, UBS, Deutsche Bank, and Bear Stearns, which was later acquired by JPMorgan during the Financial Crisis.⁷² Those firms, along with several other large banks, would become the “usual suspects” for massive settlements after the Financial Crisis. The financial analysts settlement also became the model for settlements with regulators in the aftermath of the Financial Crisis where large, headline-grabbing fines would be imposed without any admission of wrongdoing on the part of the investment banks. In exchange, the banks would keep their franchise and senior executives would be given immunity from prosecution.

Although this article focuses on the application of this model of big fines to large banks and financial services, that approach has been applied to other business sectors, such as the GE case described above.⁷³ This model was also used in the 1998 massive tobacco settlement, in which tobacco manufacturers agreed to pay the states \$246 billion over a twenty-five year period.⁷⁴ In another instance, BP paid \$4 billion to settle criminal charges over the Deepwater Horizon oil spill.⁷⁵ In just one week at the end of the Obama administration, automobile manufactures and pharmaceutical companies, as well as the large banks and others, agreed to pay a total of \$20 billion to settle DOJ charges.⁷⁶ For example, Volkswagen agreed to pay

⁷¹ Two prominent analysts, Henry Blodget of Merrill Lynch and Jack Grubman of Salomon Smith Barney, which was owned by Citigroup, were barred from the industry, but no senior officials were charged with any crime. Associated Press, *Regulators Finalize \$1.4 Billion Wall St. Settlement*, N.Y. TIMES (Apr. 28, 2003 2:46 PM), <http://www.nytimes.com/2003/04/28/business/regulators-finalize-14-billion-wall-st-settlement.html> [<https://perma.cc/RFQ8-2WKL>]. Especially controversial was the involvement of Grubman with Sandy Weill, the head of Citigroup. Weill was on the board of AT&T and was seeking AT&T's business for Citigroup. In order to induce Grubman to upgrade his recommendations on AT&T, Weill had Citigroup make a \$1 million donation to an elite preschool program in order to obtain the admittance of Grubman's children to the program. FROM ENRON TO REFORM, *supra* note 42, at 407–08.

⁷² FROM ENRON TO REFORM, *supra* note 42, at 416.

⁷³ See *supra* notes 18–25 and accompanying text.

⁷⁴ *15 Years Later, Where Did All the Cigarette Money Go?* NAT'L PUB. RADIO (Oct. 13, 2013, 5:52 PM), <http://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go> [<https://perma.cc/WS5B-FXHV>].

⁷⁵ Steven Mufson, *BP Settles Criminal Charges for \$4 Billion in Spill; Supervisors Indicted on Manslaughter*, WASH. POST (Nov. 15, 2012), https://www.washingtonpost.com/business/economy/bp-to-pay-billions-in-gulf-oil-spill-settlement/2012/11/15/ba0b783a-2f2e-11e2-9f50-0308e1e75445_story.html?utm_term=.7438e5688634 [<https://perma.cc/C28F-XTY4>]. (two rig supervisors indicted for manslaughter and a vice president indicted for lying to government about the intensity of the spill).

⁷⁶ Aruna Viswanatha, *Obama Administration Races to Finish Probes, Wring Payouts From Firms*, WALL ST. J. (Jan. 18, 2017), <https://www.wsj.com/articles/obama->

approximately \$4.3 billion in fines to settle DOJ charges over its emission scandal so that it could continue in business.⁷⁷ Takata, the nearly bankrupt manufacturer of faulty airbags, reached a \$1 billion dollar settlement with regulators.⁷⁸

II. THE FINANCIAL CRISIS SETTLEMENTS

A. *The Crisis*

The Financial Crisis was triggered by a bubble in the housing market that had been spurred by low interest rates and lax standards for mortgage lending. The Federal Reserve Board (the Fed) burst that bubble when it raised interest rates on seventeen consecutive occasions between 2004 and 2006.⁷⁹ A worldwide panic ensued after Lehman Brothers, a giant global investment bank, declared bankruptcy.⁸⁰ Additional large banks that nearly failed, or were rescued, during the Financial Crisis included: Bear Stearns, Merrill Lynch, Wachovia Bank, Washington Mutual, Countrywide Financial Group, and the American International Group. Other major institutions were threatened as well, including Citigroup, Morgan Stanley and Goldman Sachs.⁸¹ There was much concern that, if those

administration-races-to-finish-probes-wring-payouts-from-firms-1484792587 [https://perma.cc/HY6V-D4W8].

⁷⁷ Press Release, Dep't of Justice, Office of Pub. Affairs, Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six> [https://perma.cc/A4KG-YH9V]. DOJ indicted six executives at Volkswagen over this scandal. Protes & Apuzzo, *supra* note 5. Fiat Chrysler was also being targeted. Steven Overly & Brady Dennis, *EPA: Fiat Chrysler Software Enabled Emissions Cheating*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/news/innovations/wp/2017/01/12/epa-fiat-chrysler-used-software-to-cheat-on-emissions-tests/?utm_term=.25bc87f016f1 [https://perma.cc/LXV6-SASC].

⁷⁸ Apparently, this larger fine was based on a theory that the company had to be destroyed before it could be saved through an acquisition by another company. Three Takata executives were also indicted as criticism mounted of DOJ failure to indict executives. Hiroko Tabuchi & Neal E. Boudette, *3 Takata Executives Face Criminal Charges Over Exploding Airbags*, N.Y. TIMES, (Jan. 13, 2017), https://www.nytimes.com/2017/01/13/business/takata-airbag-criminal-charges.html?_r=0 [https://perma.cc/3ZNB-JFGX].

⁷⁹ See Jerry W. Markham, *The Subprime Crisis—Some Thoughts on a “Sustainable” and “Organic” Regulatory System*, 4 FLA. INT'L U. L. REV. 381, 390–91 (2009) (describing these interest rate hikes and their effects).

⁸⁰ Edmund L. Andrews, *In Fed Rate Cut, Fears of Long Recession*, N.Y. TIMES, (Jan. 6, 2009), <http://www.nytimes.com/2009/01/07/business/economy/07fed.html> [https://perma.cc/NYA8-AH6Z].

⁸¹ See JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION (2006-2009) 524–70 (2011) [hereinafter FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION] (describing those bailouts).

institutions failed, the economy could collapse completely, resulting in a Great Depression such as the one that occurred in the 1930s.⁸²

In order to avert a complete financial meltdown, the federal government pushed through several bailout programs, including the Troubled Asset Relief Program (TARP).⁸³ Although those bailouts proved to be a very lucrative investment for the government, they sparked much populist resentment around the country against the large banks.⁸⁴ Congress responded with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which imposed massive amounts of regulation on Wall Street financial services firms.⁸⁵ Fueled by the press and populist sentiment, regulators also went on a banker-bashing spree, where the bankers “were called public enemies. They were strung up in effigy during protests in London and New York. Their behavior spurred an outcry that changed the politics of the West.”⁸⁶

As the next Section shows, the initial focus of those actions was on residential mortgage security abuses, which were thought to be at the heart of the causes of the Financial Crisis. Numerous regulators obtained billions of dollars in settlements in those cases from large banks. Although those cases charged widespread and egregious fraud by the

⁸² For example, the chairman of the Fed asserted that:

As a scholar of the Great Depression, I honestly believe that September and October 2008 was the worst financial crisis in global history, including the Great Depression. If you look at the firms that came under pressure in that period . . . only one . . . was not at serious risk of failure So out of maybe the [thirteen] . . . of the most important financial institutions in the United States, [twelve] were at risk of failure within a period of a week or two.

FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 354 (2011) (omission in original) (quoting Ben Bernake, Closed Door Session with the Financial Crisis Inquiry Commission (Nov. 17, 2009)), <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<https://perma.cc/CHM2-68EZ>].

⁸³ FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 561–65 (describing this crisis and the TARP bailout).

⁸⁴ “In all, through TARP and other efforts, taxpayers injected \$426.35 billion into banks and auto companies. The sale of stock and interest payments [alone] brought in \$441.7 billion” for the government. Jonathan Weisman, *U.S. Declares Bank and Auto Bailouts Over and Profitable*, N.Y. TIMES (Dec. 19, 2014), <https://www.nytimes.com/2014/12/20/business/us-signals-end-of-bailouts-of-automakers-and-wall-street.html> [<https://perma.cc/A9MB-UYQS>].

⁸⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 114 Stat. 1376.

⁸⁶ Edward Robinson, *What Happened to Banker Bashing*, BLOOMBERG MKTS., (Mar. 24, 2017), <https://www.bloomberg.com/news/articles/2017-03-24/finance-is-no-longer-the-enemy-as-bankers-come-in-from-the-cold> [<https://perma.cc/D8Q3-4G7E>].

companies, no senior executives were prosecuted. The DOJ also had only mixed success in prosecuting even lower-level employees. Nevertheless, this model was thereafter applied to other financial sectors including auction rate securities, tax shelters, the setting of benchmark interest rates, foreign currency exchange rate benchmarks, money laundering and embargo violations, trading practices, account opening procedures and even to recordkeeping requirements. In order to demonstrate how this regulatory model has been abused, the next Section details at length the prosecutions and settlements in each of those categories. A review of those cases provides strong, indeed, mind-numbing evidence that “the too big to fail” model was deliberately formulated and that it intentionally immunizes senior executives from criminal prosecution in exchange for large settlements.

B. Mortgage Related Prosecutions Arising from the Financial Crisis

1. The Financial Fraud Enforcement Task Force

In 2008, the newly inaugurated Obama administration created a Financial Fraud Enforcement Task Force for Residential Mortgage-Backed Securities (RMBS Task Force) in the aftermath of the Financial Crisis.⁸⁷ The RMBS Task Force was comprised of representatives from “dozens of state and federal agencies.”⁸⁸ They included representatives from the DOJ and several of its U.S. Attorneys’ Offices, FBI, SEC, HUD, FHFA, Fed, Recovery Accountability and Transparency Board,

⁸⁷ Press Release, Dep’t of Justice, U.S. Att’y’s Office, District of Conn., Indictment Charges Former Cantor Fitzgerald RMBS Trader with Securities Fraud (Dec. 9, 2016), <https://www.justice.gov/usao-ct/pr/indictment-charges-former-cantor-fitzgerald-rmbs-trader-securities-fraud> [<https://perma.cc/Q95A-HPYW>]. The Department of Justice described RMBS as follows:

Residential Mortgage-Backed Securities (RMBS) are collections of mortgages and home equity loans, which are grouped together and sold as packages between and among banks, money managers, pension funds and others. Investors in RMBS receive payments on a monthly basis. Those payments are based on the extent to which homeowners, who had originally taken out the mortgages or loans, repaid their lenders. The payments to RMBS investors continue until the homeowners repay their mortgage debt, refinance or default. Unlike stocks that trade on the New York Stock Exchange or the NASDAQ, RMBS are not publicly traded on an exchange and pricing information is not publicly available. Instead, buyers and sellers of RMBS use broker-dealers, like Cantor Fitzgerald, to execute individually negotiated transactions.

Id.

⁸⁸ *Id.*

FinCEN, and state attorneys general's offices.⁸⁹ The RMBS Task Force appeared to be an effort to reprise the Enron Corporate Fraud Task Force.

The large number of indictments of executives that followed the S&L crisis and the Enron era scandals were not present in the RMBS cases. It is not completely clear why it is the case, but it is likely that the difficulty of prosecuting executives requires so many government resources that the game was not thought to be worth the candle. This would be especially true if the government were to have another debacle such as the Arthur Andersen case that is described above.⁹⁰ This difficulty was underscored after the DOJ received a major setback in one of its first prosecutions arising from RMBS abuses.

In that case, two Bear Stearns hedge fund managers were charged with fraud for falsely advising investors that their investments in funds holding RMBS were safe and for secretly selling personal holdings before disclosure of the funds' collapse. A jury acquitted the defendants of all charges "in what legal experts called a setback for prosecutors hoping for easy victories in this era of bailouts and foreclosures."⁹¹ The two managers settled parallel civil claims brought by the SEC on the eve of a civil trial for a total of \$1 million. The judge hearing the case called this settlement "chump change" in light of the \$1.8 billion in losses suffered by investors in the funds the defendants managed.⁹² There were only a handful of other indictments involving RMBS fraud, and only traders were the targets of those indictments.⁹³

⁸⁹ *Id.*

⁹⁰ See, *supra* notes 49–51 and accompanying text.

⁹¹ Zachery Kouwe & Dan Slater, *2 Bear Stearns Fund Leaders Are Acquitted*, N.Y. TIMES (Nov. 10, 2009), <http://www.nytimes.com/2009/11/11/business/11bear.html?mcubz=1> [<https://perma.cc/T3YA-73P5>].

⁹² Jessica Dye, *Two Former Bear Stearns Managers Settle SEC Case*, REUTERS (Feb. 13, 2012, 12:31 PM), <http://www.reuters.com/article/us-bearstearns-fundmanagers-idUSTRE81C1EI20120213> [<https://perma.cc/4KFD-TU9G>].

⁹³ A senior trader at the RBS pleaded guilty to criminal charges relating to his conduct in misstating prices paid for RMBS. Another trader at that bank pleaded guilty to similar charges concerning collateralized loan obligations. Cara Salvatore, *Ex-RBS Supervisor Pleads Guilty To Securities Fraud*, LAW360 (Dec. 21, 2015, 11:31 PM), <http://www.law360.com/articles/740628/ex-rbs-supervisor-pleads-guilty-to-securities-fraud> [<https://perma.cc/9ZGG-RKW8>]. Three traders at Nomura Holdings Inc. were indicted in 2015 for misstating RMBS prices and were scheduled to be tried in 2017. Press Release, Dep't of Justice, U.S. Atty's Office, Dist. of Conn., Indictment Charges 3 Former Nomura RMBS Traders with Multiple Fraud and Conspiracy Offenses, (Sept. 8, 2015), <https://www.justice.gov/usao-ct/pr/indictment-charges-3-former-nomura-rmbs-traders-multiple-fraud-and-conspiracy-offenses> [<https://perma.cc/8UJ7-5MFB>]. Jesse Litvak, a mortgage-bond trader at Jefferies & Co. was convicted of fifteen counts of fraud. Chris Dolmetsch, *Ex-Jefferies Trader Gets 2 Years for Lying on Prices, Again*, BLOOMBERG MKTS. (Apr. 26, 2017, 5:32 PM), <https://www.bloomberg.com/news/articles/2017-04-26/ex-jefferies-trader-gets-2-years-for-lying-about-bond-prices> [<https://perma.cc/>

Among the RMBS settlements one notable one was for \$25 billion and was agreed to by the five largest mortgage lenders in the country, including BofA, JPMorgan and Wells Fargo. The regulators that brought the action were DOJ, HUD and forty-nine state attorneys general.⁹⁴ Citigroup separately paid \$7 billion to settle mortgage related claims brought by DOJ, FDIC, and the states of California, New York, Illinois, Massachusetts, and Delaware.⁹⁵ OCC and the Fed settled mortgage related claims brought against, among others, BofA, Citibank, JPMorgan, Morgan Stanley, Goldman Sachs, and Wells Fargo. The settlements in those actions totaled about \$9 billion.⁹⁶

The combined list of other mortgage-related settlements is even more staggering. Citibank agreed to pay OCC \$793 million to settle OCC claims over mortgage abuses.⁹⁷ Absent criminal convictions, the wide variation in amount of settlements described below makes it difficult to assess any differences in culpability by these major institutions. JPMorgan paid \$275 million to settle Fed charges over

N6L7-5EX4]. That verdict was overturned on appeal. He was convicted in a subsequent trial on one of ten counts. Erik Larson & Chris Dolmetsch, *Ex-Jefferies Bond Trader Convicted on One of 10 Fraud Counts*, BLOOMBERG MKTS. (Jan. 27, 2017, 12:38 PM), <https://www.bloomberg.com/news/articles/2017-01-27/ex-jefferies-bond-trader-is-convicted-on-1-of-10-fraud-counts> [https://perma.cc/L99A-WTYF]. In December 2016, a managing director at Cantor Fitzgerald was indicted for mortgage abuses and was awaiting trial as of this writing. Nate Raymond, *Ex-Cantor Fitzgerald Mortgage Bond Trader Indicted in U.S. for Fraud*, REUTERS (Dec. 9, 2016, 12:36 PM), <http://www.reuters.com/article/us-cantor-ftzgerld-court-idUSKBN13Y261> [https://perma.cc/66SV-7VBF].

⁹⁴ Press Release, Dep't of Justice, Office of Pub. Affairs, Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses, (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [https://perma.cc/LNW5-FKVV]; Danielle Douglas, *Big Banks Finish Paying \$20 Billion in Mortgage Settlement, Report Says*, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/business/economy/big-banks-finish-paying-20-billion-in-mortgage-settlement-report-says/2014/03/18/32062d92-aded-11e3-96dc-d6ea14c099f9_story.html?utm_term=.3228f094ddb2 [https://perma.cc/S4D9-UVKY].

⁹⁵ Press Release, Dep't of Justice Office of Pub. Affairs, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages, (July 14, 2014), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement> [https://perma.cc/M8BZ-4NXE].

⁹⁶ Press Release, Fed. Reserve Bd., Federal Reserve Board Reaches Agreements in Principle With Goldman Sachs and Morgan Stanley to Provide \$557 Million in Payments and Other Mortgage Assistance to Borrowers, (Jan. 16, 2013), <https://www.federalreserve.gov/newsevents/press/bcreg/20130116a.htm> [https://perma.cc/F8FV-W38A]; Joint Press Release, Fed. Reserve Bd., OCC and Federal Reserve Reach Agreement With HSBC to Provide \$249 Million in Payments and Assistance, (Jan. 18, 2013), <https://www.federalreserve.gov/newsevents/press/bcreg/20130118b.htm> [https://perma.cc/4YX4-TXDX].

⁹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL INSTITUTIONS: PENALTY AND SETTLEMENT PAYMENTS FOR MORTGAGE-RELATED VIOLATIONS IN SELECTED CASES 6 (2016), <http://www.gao.gov/assets/690/680960.pdf> [https://perma.cc/885Z-G8SQ] [hereinafter FINANCIAL INSTITUTIONS: PENALTY AND SETTLEMENT PAYMENTS].

mortgage servicing and foreclosure issues.⁹⁸ JPMorgan paid another \$55 million to settle DOJ charges that independent brokers it used to acquire mortgages discriminated on racial lines in setting the borrowers' interest rates.⁹⁹ Wells Fargo paid \$1.2 billion to settle claims brought by DOJ and HUD over mortgage origination problems.¹⁰⁰ Wells Fargo also agreed to pay a minimum of \$175 million to settle DOJ claims that it discriminated on the basis of race in directing borrowers into more expensive mortgages.¹⁰¹ Wells Fargo earlier paid \$85 million to the Fed to resolve claims that bank employees had improperly steered prime residential borrowers into more expensive subprime loans. This was the largest fine ever imposed by the Fed over consumer lending practices.¹⁰²

BofA agreed to pay a further \$16.65 billion in another RMBS settlement, which was "the largest civil settlement with a single entity in American history."¹⁰³ The settlement resolved actions by various U.S. Attorney offices, SEC, FDIC, HUD, and attorneys general from several states. BofA paid another \$335 million to settle a suit brought by DOJ charging that Countrywide Financial, a mortgage company BofA had rescued during the Financial Crisis, discriminated on the basis of race in making mortgages.¹⁰⁴ BofA entered into several other settlements, including \$108 million to settle FTC charges over mortgage practices.¹⁰⁵ BofA and its CEO Ken Lewis also agreed to pay \$25 million to settle charges brought by the NYAG over disclosures concerning losses at the bank's Merrill Lynch unit. The settlement barred Lewis from acting as an officer or

⁹⁸ *Id.*

⁹⁹ Renae Merle, *JPMorgan Settles Federal Mortgage Discrimination Suit for \$55 Million*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/business/wp/2017/01/18/justice-department-sues-jpmorgan-chase-for-mortgage-discrimination/?utm_term=.2d64fedcdc5a [<https://perma.cc/VFA6-XQ9A>].

¹⁰⁰ FINANCIAL INSTITUTIONS: PENALTY AND SETTLEMENT PAYMENTS, *supra* note 97, at 6.

¹⁰¹ Ruth Simon & Alan Zibel, *Wells Fargo Settles Lending-Bias Cases*, WALL ST. J. (July 12, 2012, 2:19 PM), <https://www.wsj.com/articles/SB10001424052702304373804577522740578702890> [<https://perma.cc/J3PK-WR7S>].

¹⁰² Ben Rooney, *Fed Hits Wells Fargo With \$85 Million Fine*, CNN MONEY (July 20, 2011, 5:21 PM), http://money.cnn.com/2011/07/20/news/companies/wells_fargo_fined/ [<https://perma.cc/P5YS-YMP8>].

¹⁰³ Press Release, Dep't of Justice, Office of Pub. Affairs, Bank of America to Pay \$16.65 Billion in Historic DOJ Settlement for Financial Fraud Leading up to and During the Financial Crisis, (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading> [<https://perma.cc/FYE6-TM39>].

¹⁰⁴ *Bank of America and the Financial Crisis*, N.Y. TIMES (Aug. 21, 2014), http://www.nytimes.com/interactive/2014/06/10/business/dealbook/11bank-timeline.html#time33_8794 [<https://perma.cc/ZPZ2-6UDJ>].

¹⁰⁵ *Id.*

director of a public company for three years. This was one of the few Financial Crisis related bank cases that were directed at a senior level manager, but still no criminal charges were brought.¹⁰⁶

Goldman Sachs agreed to pay \$5.06 billion to settle claims made by DOJ over its lending practices in the run up to the Financial Crisis.¹⁰⁷ Morgan Stanley paid \$2.6 billion to settle RMBS claims brought by the DOJ.¹⁰⁸ HSBC agreed to pay \$470 million to settle mortgage related claims made by DOJ, HUD, and forty-nine state attorneys general, plus the District of Columbia. The CFPB, a regulator created by Dodd-Frank Act in 2010, joined the joint regulatory actions against the large banks by participating in this settlement.¹⁰⁹

It was reported in the press that DOJ was demanding \$14 billion from Deutsche Bank in October 2016, as the amount needed to settle its Financial Crisis related mortgage practices. A leak of that demand caused a sharp drop in the value of the bank's stock because it raised concerns that such a large fine would deplete the bank's capital and threaten its viability.¹¹⁰ Thereafter, Deutsche Bank settled with DOJ for \$7.2 billion.¹¹¹ At the same time, Credit Suisse agreed to pay \$5.3 billion to settle DOJ demands over mortgage issues.¹¹² The individual

¹⁰⁶ In the settlement, Lewis neither admitted nor denied the charges, and BofA paid the \$10 million in the settlement for which Lewis was responsible. It was also reported that Lewis settled because he had no further interest in working for a public company. Andrew Dunn, *Bank of America, Ken Lewis Agree to \$25 Million Settlement in Merrill Lynch Case*, CHARLOTTE OBSERVER (Mar. 26, 2014, 5:16 PM), <http://www.charlotteobserver.com/news/business/banking/article9107189.html> [https://perma.cc/UB4Q-V8AR].

¹⁰⁷ Suzanne Barlyn, *Goldman Sachs to Pay \$5 Billion in U.S. Justice Dept Mortgage Bond Pact*, REUTERS (Apr. 12, 2016, 11:16 AM), <http://www.reuters.com/article/us-goldman-sachs-mbs-settlement-idUSKCN0X81TI> [https://perma.cc/EH9J-B3T7].

¹⁰⁸ Press Release, Dep't of Justice, Office of Pub. Affairs, *Morgan Stanley Agrees to Pay \$2.6 Billion Penalty in Connection with Its Sale of Residential Mortgage Backed Securities* (Feb. 11, 2016), <https://www.justice.gov/opa/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage-backed> [https://perma.cc/SK9R-9RKY].

¹⁰⁹ Press Release, Dep't of Justice, Office of Pub. Affairs, *Justice Department Reaches \$470 Million Joint State-Federal Settlement with HSBC to Address Mortgage Loan Origination, Servicing and Foreclosure Abuses*, (Feb. 5, 2016), <https://www.justice.gov/opa/pr/justice-department-reaches-470-million-joint-state-federal-settlement-hsbc-address-mortgage> [https://perma.cc/3QBM-F4CN].

¹¹⁰ Jenny Strasburg & Aruna Viswanatha, *Deutsche Bank, U.S. DOJ Continue to Discuss Mortgage-Securities Settlement*, WALL ST. J. (Oct. 2, 2016, 11:16 PM), <http://www.wsj.com/articles/deutsche-bank-u-s-doj-continue-to-discuss-mortgage-securities-settlement-1475440468> [https://perma.cc/J23Z-8MDY].

¹¹¹ *Settlement With U.S.*, *supra* note 3.

¹¹² Jenny Strasburg, Max Colchester & Devlin Barrett, *Deutsche Bank, Credit Suisse Reach Multibillion Settlements Over Toxic Securities*, WALL ST. J. (Dec. 23, 2016), <http://www.wsj.com/articles/deutsche-bank-agrees-to-settlement-over-residential-mortgage->

traders involved in these cases generally avoided criminal prosecution. However, a Credit Suisse trader working in New York was given thirty months of prison time for concealing the bank's losses in mortgage-backed securities.¹¹³

Barclays refused to settle RMBS charges and was sued by DOJ.¹¹⁴ Several other large banks were still under investigation, including RBS, Wells Fargo, UBS, and HSBC for possible additional demands.¹¹⁵ RBS announced in January 2017 that it was reserving a further \$3.8 billion in anticipation of mortgage related settlements. This addition increased RBS's reserve account for mortgage related litigation costs to a total of \$8.4 billion.¹¹⁶

2. FHFA Actions

More billions were grabbed from the large banks through settlements in cases brought by the FHFA on behalf of Fannie Mae and Freddie Mac, both of which were public companies taken over by the federal government during the Financial Crisis.¹¹⁷ BofA agreed to pay \$9.5 billion to settle such claims.¹¹⁸ BofA and one of its employees were also found guilty by a jury of misleading Fannie Mae and Freddie Mac over the quality of mortgages originated by Countrywide Financial, which was acquired by BofA at the outset of the Financial Crisis.¹¹⁹ BofA and was ordered to pay \$1.27 billion as damages. That decision was overturned on appeal because the defendants were found only to be in breach of contract promises, which did not amount to fraud.¹²⁰

backed-securities-1482458858 [https://perma.cc/8R2H-TD7Z] [hereinafter *Deutsche Bank Agrees to \$7.2 billion Mortgage Settlement*].

¹¹³ William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/> [https://perma.cc/QYX3-MD2M].

¹¹⁴ *Deutsche Bank Agrees to \$7.2 billion Mortgage Settlement*, *supra* note 112.

¹¹⁵ *Settlement With U.S.*, *supra* note 3.

¹¹⁶ Chad Bray, *R.B.S. Adds \$3.8 Billion to Mortgage Inquiry Provisions as Rivals Settle*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/business/dealbook/rbs-banks-britain-us-lawsuit-mortgage.html?_r=0 [https://perma.cc/5SG8-9MFP].

¹¹⁷ See FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 520-23 (describing that takeover).

¹¹⁸ John Kell, *Bank of America to Pay \$9.5 Billion to Resolve FHFA Claims*, WALL ST. J. (Mar. 26, 2014), <http://www.wsj.com/articles/SB10001424052702303779504579463751775159682> [https://perma.cc/RWS6-ABWK].

¹¹⁹ See FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 476-80 (Describing that acquisition).

¹²⁰ *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 652-55 (2d Cir. 2016).

In yet another action, JPMorgan agreed to pay \$5.1 billion to settle claims brought by the FHFA.¹²¹ Goldman Sachs agreed in a settlement with FHFA to repurchase mortgage bonds valued at \$3.15 billion that it had sold to Fannie Mae and Freddie Mac. The bonds were said to be worth about \$1.2 billion less than that repurchase price.¹²² Deutsche Bank agreed to pay \$1.93 billion to settle Fannie Mae and Freddie Mac related claims;¹²³ Wells Fargo agreed to pay \$1.32 billion to FHFA;¹²⁴ Morgan Stanley agreed to pay \$1.25 billion;¹²⁵ UBS agreed to pay \$885 million;¹²⁶ Citigroup paid \$968 million;¹²⁷ Credit Suisse paid \$885 million;¹²⁸ and HSBC agreed to pay \$550 million.¹²⁹ RBS agreed to pay \$5.3 billion to settle FHFA mortgage claims.¹³⁰ These and other settlements obtained by FHFA totaled over \$18 billion.¹³¹

¹²¹ Devlin Barrett, Dan Fitzpatrick & Nick Timiraos, *J.P. Morgan Settles With FHFA*, WALL ST. J. (Oct. 25, 2013, 8:04 PM), <http://www.wsj.com/articles/SB10001424052702303615304579157931846055864> [https://perma.cc/JKV2-VXHN].

¹²² Nate Raymond & Jonathan Stempel, *Goldman Sachs, U.S. Agency in Mortgage Settlement Worth \$1.2 Billion*, REUTERS (Aug. 22, 2014, 8:05 PM), <http://www.reuters.com/article/us-goldman-fhfa-idUSKBN0GM1VN20140822> [https://perma.cc/Z93R-VKC8].

¹²³ Nick Timiraos, *Deutsche Bank to Pay \$1.93 Billion to Resolve FHFA Claims*, WALL ST. J. (Dec. 20, 2013, 11:37 AM), <http://www.wsj.com/articles/SB10001424052702303773704579270082457979334> [https://perma.cc/AUG6-QGSY].

¹²⁴ Jonathan Stempel, *Wells Fargo Agrees to \$541 Million Settlement*, REUTERS (Dec. 30, 2013, 9:16 AM), <http://www.reuters.com/article/us-wellsfargo-fanniemae-idUSBR E9BT0F420131230> [https://perma.cc/HY6J-8UBK] [hereinafter *Wells Fargo Agrees to \$541 Million Settlement*].

¹²⁵ Justin Baer & Nick Timiraos, *Morgan Stanley To Pay \$1.25 Billion in Mortgage-Backed Case*, WALL ST. J. (Feb. 4, 2014, 5:03 PM), <http://www.wsj.com/articles/SB10001424052702303942404579363251382914582> [https://perma.cc/5BKS-4MGF].

¹²⁶ Jonathan Gould & Nate Raymond, *Deutsche Bank to Pay \$1.9 Billion to Settle U.S. Mortgage Case*, REUTERS (Dec. 20, 2013, 8:25 AM), <http://www.reuters.com/article/us-deutschebank-suit-idUSBRE9BJ0OP20131220> [https://perma.cc/PQ6Y-EFVV].

¹²⁷ *Wells Fargo Agrees to \$541 Million Settlement*, *supra* note 124.

¹²⁸ Nate Raymond & Silke Koltowitz, *Credit Suisse to Pay \$885 Million in FHFA Mortgage Fraud Case*, REUTERS (Mar. 21, 2014, 2:09 PM), <http://www.reuters.com/article/us-credit-suisse-idUSBREA2K1NY20140321> [https://perma.cc/7DTU-CVQC].

¹²⁹ Joe Light & Justin Baer, *HSBC to Pay \$550 Million to Settle FHFA Suit*, WALL ST. J. (Sept. 12, 2014, 6:12 PM), <http://www.wsj.com/articles/hsbc-to-settle-fhfasc-claims-over-mortgage-bonds-1410539966> [https://perma.cc/5FFD-K8NS] [hereinafter *HSBC to Pay \$550 Million to Settle FHFA Suit*].

¹³⁰ Max Colchester, *RBS Agrees to \$5.5 Billion Settlement Over Sale of Mortgage Securities During Crisis*, WALL ST. J. (July 12, 2017, 10:38 AM), <https://www.wsj.com/articles/rbs-agrees-to-5-5-billion-settlement-over-sale-of-mortgage-securities-during-crisis-1499864581> [https://perma.cc/28TG-9WJA].

¹³¹ *HSBC to Pay \$550 Million to Settle FHFA Suit*, *supra* note 129. This number subsequently grew to exceed \$20 billion. *Federal Housing Finance Agency v. Nomura Holding America, Inc.*, 873 F.3d 85, 97 (2d Cir. 2017).

3. NCUA Accusations

The National Credit Union Administration (NCUA), an independent federal agency that supervises federal credit unions, blamed several other large investment banks for the failure of five large wholesale credit unions. The NCUA accused those banks of misrepresenting the risks of \$50 billion of mortgage-backed securities they sold to the credit unions.¹³² RBS settled NCUA mortgage claims for \$1.1 billion.¹³³ BofA paid \$165 million in a settlement with NCUA.¹³⁴ UBS Group AG agreed to pay \$445 million, and Credit Suisse Group AG paid \$400 million to settle mortgage claims brought by the NCUA. NCUA additionally sued Goldman Sachs and JPMorgan for sales of mortgage-backed bonds to credit unions that the NCUA claimed were “destined to perform poorly.”¹³⁵ The NCUA suit against Goldman Sachs sought \$491 million and was subsequently settled.¹³⁶ JPMorgan settled with the NCUA for \$1.4 billion.¹³⁷

4. SEC Civil Claims

The SEC also brought claims against the large banks in connection with their mortgage activities. For example, the SEC sued Goldman Sachs and one low-level employee for misleading German banks on the risks of gambling in U.S. residential mortgages. These charges made worldwide headlines, which resulted in a drop in stock prices, including a fall of 13 percent in Goldman’s stock price.¹³⁸ Goldman settled the charges brought against the firm by the SEC for a then

¹³² E. Scott Reckard, *U.S. Sues Goldman Sachs in Credit Union Failures*, L.A. TIMES (Aug. 10, 2011), <http://articles.latimes.com/2011/aug/10/business/la-fi-goldman-credit-unions-20110810> [https://perma.cc/2CYQ-GG2Y].

¹³³ Nate Raymond, *RBS to pay \$1.1 Billion to Resolve Some of its U.S. Mortgage Claims*, REUTERS (Sept 27, 2016, 7:25 PM), <http://www.reuters.com/article/us-royal-bank-scot-lawsuit-idUSKCN11X2O8> [https://perma.cc/X529-SLZF].

¹³⁴ REUTERS, *Bank Will Pay Credit Unions \$165 Million in a Settlement*, N.Y. TIMES (Apr. 2, 2013), <http://www.nytimes.com/2013/04/03/business/bank-of-america-to-pay-165-million-to-settle-with-credit-unions.html> [https://perma.cc/JZ4J-TY5T].

¹³⁵ Liz Rappaport & Ruth Simon, *Feds Sue Bankers Over Fall in Bonds*, WALL ST. J. (June 21, 2011), <http://www.wsj.com/articles/SB10001424052702304070104576397590007402016> [https://perma.cc/M4VZ-EEWW].

¹³⁶ Bonnie Eslinger, *Goldman Sachs to Settle NCUA’s \$491M Securities Suit*, LAW360, (June 6, 2016, 10:32 PM), <https://www.law360.com/articles/804325/goldman-sachs-to-settle-ncua-s-491m-securities-suit> [https://perma.cc/3E9Q-WRHF].

¹³⁷ NCUA, *NCUA to Receive More than \$1.4 Billion in JPMorgan Chase Settlement*, (Nov. 19, 2013), <https://www.ncua.gov/newsroom/Pages/NW20131119JPMorganChase.aspx> [https://perma.cc/7QBP-462T].

¹³⁸ Jerry W. Markham, SEC v. Goldman Sachs & Co.—*Serious Fraud or Just More Banker Bashing?* 30 FUTURES & DERIVATIVES L. REP. 7, 8 (2010).

record \$550 million. The employee was found guilty of fraud after a civil jury trial on the SEC charges, and he did not appeal that decision.¹³⁹ No Goldman executives were charged with any wrongdoing.

Citigroup agreed to pay \$75 million to settle SEC charges involving that bank's concealment of losses from subprime mortgage holdings during the Financial Crisis.¹⁴⁰ Citigroup also agreed to pay the SEC \$285 million to settle charges that were similar to those brought against Goldman Sachs.¹⁴¹ The Citigroup employee in charge of the deal was acquitted by a jury of the SEC's charges, however, apparently because of the jurors' annoyance with the fact that no senior Citigroup executives were charged.¹⁴² The SEC was again embarrassed after it dropped claims against an employee of JPMorgan Chase, who was charged with misleading investors in a manner that resembled the charges brought against Goldman Sachs. Nevertheless, JPMorgan paid \$153.6 million to settle charges over the offering at issue in that case.¹⁴³ JPMorgan paid the SEC another \$296 million to settle further mortgage-related issues. No individuals were charged in the latter action.¹⁴⁴

¹³⁹ See, e.g., Susanne Craig & Ben Portess, *Former Trader is Found Liable in Fraud Case*, N.Y. TIMES (Aug. 1, 2013, 3:36 PM), <http://dealbook.nytimes.com/2013/08/01/former-goldman-trader-is-found-liable-in-mortgage-deal/> [<https://perma.cc/XXG2-J3BS>]; Nate Raymond, *Ex-Goldman Trader Tourre Won't Appeal SEC Fraud Case Verdict*, REUTERS (May 27, 2014, 4:32 PM), <https://www.reuters.com/article/us-goldmansachs-sec-tourre/ex-goldman-trader-tourre-wont-appeal-sec-fraud-case-verdict-idUSKBN0E72JG20140527> [<https://perma.cc/A8M7-T8C5>].

¹⁴⁰ Randall Smith & Matthias Rieker, *Citi Pays for Subprime Feint*, WALL ST. J. (July 30, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703578104575397302459792766> [<https://perma.cc/7XBD-GNRD>].

¹⁴¹ Jean Eaglesham & Suzanne Kapner, *Citigroup to Pay \$285 Million to Settle Fraud Charges*, WALL ST. J. (Oct. 20, 2011), <http://www.wsj.com/articles/SB10001424052970204618704576640873051858568> [<https://perma.cc/27A7-AMC7>].

¹⁴² Jason M. Breslow, *Too Big to Jail? The Top 10 Civil Cases Against the Banks*, PUB. BROAD. SERV. (Jan. 22, 2013), <http://www.pbs.org/wgbh/frontline/article/too-big-to-jail-the-top-10-civil-cases-against-the-banks/> [<https://perma.cc/RL2D-JPUQ>]. Among the senior mortgage managers at Citigroup that were not charged was an individual who became the Secretary of the Treasury in the Obama administration. *The Wells Fargo Standard*, WALL ST. J. (Sept. 23, 2016, 6:56 PM), <http://www.wsj.com/articles/the-wells-fargo-standard-1474671409> [<https://perma.cc/B67Y-23ZT>].

¹⁴³ Jonathan Stempel & Sarah N. Lynch, *JPMorgan to Pay \$153.6 Million in SEC Fraud Case*, REUTERS (June 21, 2011, 1:49 PM), <http://www.reuters.com/article/us-jpmorgan-sec-settlement-idUSTRE75K5A420110621> [<https://perma.cc/V6PV-EW6H>].

¹⁴⁴ Nate Raymond, *SEC Drops Lawsuit Against Executive in Financial Crisis Case*, REUTERS (Nov. 16, 2012, 9:45 PM), <http://www.reuters.com/article/sec-steffelin-idUSL1E8MH08F20121117> [<https://perma.cc/762N-GQZZ>].

Morgan Stanley agreed to pay \$275 million to settle SEC claims over its mortgage-backed bond activities.¹⁴⁵ RBS agreed to pay the SEC \$154 million to settle such charges.¹⁴⁶ UBS agreed to pay the SEC about \$50 million to settle claims that it misled investors on the dangers of mortgage-backed securities.¹⁴⁷ BofA paid \$150 million to settle SEC charges over disclosures relating to its rescue of Merrill Lynch during the Financial Crisis;¹⁴⁸ \$131 million to settle SEC charges over Merrill Lynch's selection of mortgages for RMBS;¹⁴⁹ and another \$245 million to settle further SEC charges over such disclosures.¹⁵⁰ Wells Fargo agreed to pay \$6.5 million to settle SEC charges over failing to disclose the risks of mortgage investments to customers.¹⁵¹ Barclays and two of its traders settled SEC charges that they misled customers and charged excessive and undisclosed markups on mortgage-backed securities sold to customers. The bank was censured and ordered to return \$15.5 million to customers from the profits from the transactions.¹⁵²

A few non-banks were also hit with massive fines for their activities in the mortgage market before the Financial Crisis. In a settlement was with DOJ, nineteen states and the District of Columbia, Standard & Poor's, the credit-rating agency, agreed to pay around \$1.4 billion to settle claims that it had improperly rated RMBS.¹⁵³ Moody's, another credit rating

¹⁴⁵ Tom Huddleston, Jr., *Morgan Stanley Agrees to \$275 million mortgage settlement*, FORTUNE (July 24, 2014), <http://fortune.com/2014/07/24/morgan-stanley-agrees-to-275-million-mortgage-settlement/> [<https://perma.cc/3ML5-3V2D>].

¹⁴⁶ Associated Press, *Royal Bank of Scotland to Pay \$154 Million in Settlement With SEC Over US Loans*, CANADIAN BUSINESS (Nov. 7, 2013), <http://www.canadianbusiness.com/business-news/royal-bank-of-scotland-to-pay-154-million-in-settlement-with-sec-over-us-loans-investigation/> [<https://perma.cc/EUU7-6YAL>].

¹⁴⁷ Jonathan Stempel, *UBS to Pay \$49.8 Million to Settle SEC Fraud Charges over CDO*, REUTERS (Aug. 6, 2013, 12:42 PM), <http://www.reuters.com/article/us-ubs-sec-settlement-idUSBRE9750TS20130806> [<https://perma.cc/UL82-8SV5>].

¹⁴⁸ *Bank of America and the Financial Crisis*, *supra* note 104.

¹⁴⁹ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Merrill Lynch with Misleading Investors in CDOs (Aug. 6, 2013), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540492377> [<https://perma.cc/RXQ9-78E9>].

¹⁵⁰ Press Release, U.S. Sec. & Exchange Commission, Bank of America Admits Disclosure Failures to Settle SEC Charges (Aug. 21, 2014), <https://www.sec.gov/news/press-release/2014-172> [<https://perma.cc/3GC5-SL27>].

¹⁵¹ Press Release, U.S. Sec. & Exchange Commission, SEC Charges Wells Fargo for Selling Complex Investments Without Disclosing Risks (Aug. 14, 2012), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483776> [<https://perma.cc/KG3Q-FZDU>].

¹⁵² *In re Barclays Capital Inc.*, Exchange Act Release No. 34-80560, 2017 WL 1548262 (May 1, 2017).

¹⁵³ Aruna Viswanatha & Karen Freifeld, *S&P Reaches \$1.5 billion Deal with U.S., States Over Crisis-Era Ratings*, REUTERS (Feb. 3, 2015, 8:28 AM), <https://www.reuters.com/article/us-s-p-settlement/sp-reaches-1-5-billion-deal-with-u-s-states-over-crisis-era-ratings-idUSKBN0L71C120150203> [<https://perma.cc/68RQ-Q6V2>].

agency, agreed to pay \$864 million to settle similar claims brought by DOJ and twenty-one state attorneys general and the District of Columbia.¹⁵⁴

C. Auction Rate Securities Settlements

Another breakdown during the Financial Crisis that gave rise to even more massive payouts involved so-called “auction rate” securities. These are money market investments that are, in effect, long-term bonds that pay short-term interest rates. Interest rates on these securities were periodically reset through Dutch-style auctions held by the issuing bank.¹⁵⁵ The auctions for these instruments failed during the Financial Crisis, and some \$330 billion of auction rate securities were outstanding.¹⁵⁶

This massive market failure attracted a wolf pack of forty-nine state regulators who forced the large banks to repurchase over \$61 billion of these securities.¹⁵⁷ For example, UBS agreed to repurchase nearly \$9 billion of auction rate securities,¹⁵⁸ Credit Suisse repurchased \$550 million, plus a fine of \$15 million,¹⁵⁹ and Citigroup repurchased \$19.5 billion, plus a fine of \$100 million.¹⁶⁰ In another action, Citigroup and

¹⁵⁴ Associated Press, *Moody's to Pay \$864 Million to Settle Inquiry Into Inflated Ratings*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/business/moodys-inflated-ratings-inquiry.html> [<https://perma.cc/6NRC-4SEG>].

¹⁵⁵ As one source notes:

Auction Rate Securities (ARS) are debt securities that are sold through a dutch auction. A dutch auction is public offering auction structure in which the price of the offering is set after taking in all bids and determining the highest price at which the total offering can be sold. In a dutch auction, investors place a bid for the amount they are willing to buy in terms of quantity and price. In this type of auction, an ARS is sold at an interest rate that will clear the market at the lowest yield possible. This ensures that all bidders on an ARS receive the same yield on the debt issue. The interest rate is reset periodically.

Auction Rate Securities (ARS), FINRA, <https://www.finra.org/arbitration-and-mediation/auction-rate-securities-ars> [<https://perma.cc/Z5YZ-3MYJ>].

¹⁵⁶ See FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 486–90 (describing the auction rate market and its failure).

¹⁵⁷ Jonathan Stempel, *BofA Must Face Fraud Lawsuit by Tudor Perini Over Debt Sales*, REUTERS (Nov. 21, 2016, 5:57 PM), <http://www.reuters.com/article/us-bankofamerica-tutorperini-idUSKBN13G21E> [<https://perma.cc/8EB4-8UJK>].

¹⁵⁸ Liz Rappaport & Randall Smith, *UBS to Pay \$19 Billion as Auction Mess Hits Wall Street*, WALL ST. J. (Aug. 9, 2008, 11:59 PM), <http://www.wsj.com/articles/SB121820203736224137> [<https://perma.cc/3BB8-YHEZ>].

¹⁵⁹ Joanna Chung, *Credit Suisse Settles in ARS Case*, FIN. TIMES (London) (Sept. 16, 2008), <https://www.ft.com/content/05072afa-8434-11dd-bf00-000077b07658> [<https://perma.cc/8WN8-V5HH>].

¹⁶⁰ Erin Marie Daly, *Wachovia, Citi to Buy Back \$4.7B in Calif. ARS Deal*, LAW360 (Mar. 31, 2009, 12:00 AM), <https://www.law360.com/articles/94605/wachovia-citi-to-buy-back-4-7b-in-calif-ars-deal> [<https://perma.cc/DL56-P5VX>].

Wachovia Securities, a bank unit that had been rescued by Wells Fargo during the Financial Crisis, agreed to a payout to California investors \$4.7 billion,¹⁶¹ and \$880 million to Michigan investors.¹⁶² Wachovia Securities also agreed to repurchase some \$9 billion in auction rate securities in a settlement with state regulators.¹⁶³ Wachovia Securities additionally agreed in a settlement with the SEC to repurchase more than \$7 billion in auction rate securities.¹⁶⁴

In another settlement with state regulators, Wells Fargo agreed to return up to \$1.4 billion in funds held by customers in auction rate securities.¹⁶⁵ BofA agreed to repurchase \$4.7 billion of auction rate securities in a settlement with the SEC, NYAG, and other state regulators.¹⁶⁶ BofA additionally reached a settlement with the State of California to repurchase \$3 billion of auction rate securities sold in that state and agreed to pay a fine of \$50 million to various state regulators.¹⁶⁷ BofA's Merrill Lynch unit, a product of the 2008 crises and subsequent bank aggregation, agreed to buy back some \$10 billion in auction rate securities.¹⁶⁸

Other large banks on the list of usual suspects also had to pay up. Morgan Stanley agreed to repurchase \$4.5 billion of auction rate securities, plus penalties of \$35 million. JPMorgan agreed to return \$3 billion to investors and pay penalties of \$25 million.¹⁶⁹ Goldman Sachs agreed to buy back \$1.5 billion in auction rate securities and pay a \$22.5 million penalty.¹⁷⁰

¹⁶¹ *Id.*

¹⁶² FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 489.

¹⁶³ Carey Gillam, *Wachovia Settles Auction-Rate Securities Probe*, REUTERS (Aug. 15, 2008), <http://www.reuters.com/article/us-auctionrate-wachovia-idUSN1529836120080815> [https://perma.cc/F8VU-J4Z2].

¹⁶⁴ Press Release, U.S. Sec. & Exch. Comm'n, SEC Finalizes ARS Settlement to Provide \$7 Billion in Liquidity to Wachovia Investors (Feb. 5, 2009), <https://www.sec.gov/news/press/2009/2009-17.htm> [https://perma.cc/Q3XR-D44P].

¹⁶⁵ Shelly Banjo, *Wells Fargo Settles Auction-Rate Case*, WALL ST. J. (Nov. 19, 2009, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704533904574544093311484348> [https://perma.cc/BA4D-E5FP].

¹⁶⁶ Marcy Gordon & Business Writer, *Bank of America, RBC Settle Auction-Rate Securities Case*, ABC NEWS, <http://abcnews.go.com/Business/story?id=5990333&page=1> [https://perma.cc/V7KT-QSY].

¹⁶⁷ Tina Peng, *Calif. Regulator, BofA Units Settle ARS Claims*, LAW360 (June 8, 2009), <http://www.law360.com/articles/105422/calif-regulator-bofa-units-settle-ars-claims> [https://perma.cc/25KH-FQWY].

¹⁶⁸ Walter Hamilton, *Citi, Merrill to Buy Back Investments*, L.A. TIMES (Aug. 8, 2008), <http://articles.latimes.com/2008/aug/08/business/fi-citigroup8> [https://perma.cc/7JJ9-NAHQ].

¹⁶⁹ Gillam, *supra* note 163.

¹⁷⁰ Eric Dash, *Three Banks Settle Cases over Bonds*, N.Y. TIMES (Aug. 21, 2008), <http://www.nytimes.com/2008/08/22/business/22auction.html> [https://perma.cc/592S-M8LE].

Deutsche Bank agreed to buy back \$1 billion of those securities and pay a \$15 million fine.¹⁷¹

In a rare instance of charges being brought against higher-level employees, the NYAG charged two supervisors at UBS with insider trading.¹⁷² Those defendants sold auction rate securities out of their personal portfolios before the public became aware of the auction rate problems. One of those executives, agreed to forgo \$6 million in compensation and to pay a \$500,000 fine.¹⁷³ The other UBS executive agreed to pay a fine of \$2.75 million to settle such charges. Yet, these prosecutions were not inconsistent with the “too big to jail” treatment of executives at large banks.¹⁷⁴ First, there was no jail time or even criminal charges for the executives. Second, the misconduct involved personal trading. Otherwise, only relatively low-level traders were prosecuted in the auction rate securities abuses. For example, one UBS broker pleaded guilty to criminal charges and another was convicted after a jury trial.¹⁷⁵ Two brokers at Credit Suisse were convicted or pleaded guilty to criminal charges.¹⁷⁶

D. Tax Shelters

Like the Enron era scandals, the mortgage investigations spread into other areas. In one attack, DOJ targeted foreign banks offering tax shelters to wealthy Americans. Those investigations followed the “too big to jail” model in that large settlements were reached without high-level executive culpability. In 2009, UBS settled civil and criminal charges over that bank’s tax shelter programs for \$780 million. In exchange for that payment, UBS was allowed

¹⁷¹ *Id.*

¹⁷² Press Release, N.Y. State Office of the Att’y General, Attorney General Cuomo Announces \$6.5 Million Insider Trading Settlement With Ubs Top Executive David Aufhauser, (Oct. 7, 2008), <https://ag.ny.gov/press-release/attorney-general-cuomo-announces-65-million-insider-trading-settlement-ubs-top> [<https://perma.cc/4TZV-SPE4>].

¹⁷³ Lynnley Browning, *Ex-UBS Counsel to Pay \$6.5 Million to Settle Auction-Rate Trading Case*, N.Y. TIMES (Oct. 7, 2008), <http://www.nytimes.com/2008/10/08/business/08ubs.html> [<https://perma.cc/4QV4-HF2B>].

¹⁷⁴ Chad Bray, *Former UBS Executive in Settlement With Cuomo*, WALL ST. J. (Feb. 19, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703315004575073430919601098> [<https://perma.cc/25HX-AYR8>].

¹⁷⁵ Randall Smith, *UBS to Pay \$81 million in Auction-Rate Case*, WALL ST. J. (Aug. 5, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704017904575409332774283668> [<https://perma.cc/U5SS-FR99>].

¹⁷⁶ *Tracking Financial Crisis Cases*, N.Y. TIMES (Feb. 2, 2012), <http://www.nytimes.com/interactive/business/financial-crisis-cases.html> [<https://perma.cc/P9LA-ZW3P>].

to continue its U.S. banking operations.¹⁷⁷ A senior banker at UBS was indicted for his role in managing the tax shelter program. He was extradited to the United States, but, in an embarrassment to the DOJ, a jury acquitted him of all charges after only one hour of deliberations.¹⁷⁸

Charges were brought by DOJ against Deutsche Bank for its tax shelter program. That bank agreed to pay \$553.6 million and admitted criminal wrongdoing in order to settle those charges.¹⁷⁹ Once again, in exchange for that payment, the bank was allowed to continue its U.S. operations. Criminal charges were also brought against several accountants at the large accounting firm of KMPG. They were charged with aiding tax evasion through complex tax shelter programs. A federal judge dismissed charges against thirteen of those defendants because of prosecutorial misconduct. Two KPMG accountants and a lawyer were convicted of charges.¹⁸⁰

Credit Suisse paid \$2.6 billion to settle tax evasion charges and to keep its banking license in the U.S.¹⁸¹ A few employees at Credit Suisse were indicted for their roles in the tax shelter programs. Three of those individuals pleaded guilty to criminal charges, but two were not given jail time in light of their cooperation.¹⁸² The third is awaiting sentencing. Five other Credit Suisse employees who were indicted were fugitives as of the date of this writing.¹⁸³

¹⁷⁷ David S. Hilzenrath & Zackary A. Goldfarb, *UBS to Pay \$780 million Over U.S. Tax Charges*, WASH. POST (Feb. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/18/AR2009021802541.html> [<https://perma.cc/XE7Z-XR8N>].

¹⁷⁸ Compounding that embarrassing loss for the government was the fact that the banker did not put on any witnesses in his defense. Andrew Grossman, *Acquittal Deals U.S. a Blow in Tax-Cheat Crackdown*, WALL ST. J. (Nov. 3, 2014), <http://www.wsj.com/articles/former-ubs-executive-acquitted-on-tax-conspiracy-charge-1415057280> [<https://perma.cc/J2FR-5HSL>].

¹⁷⁹ Chad Bray, *Deutsche Punished on Bogus Shelters*, WALL ST. J. (Dec. 22, 2010), <http://www.wsj.com/articles/SB10001424052748703581204576033761692111074> [<https://perma.cc/8RYE-U6GZ>].

¹⁸⁰ *Id.*

¹⁸¹ Andrew Grossman, John Letzing & Devlin Barret, *Credit Suisse Pleads Guilty in Criminal Tax Case*, WALL ST. J. (May 19, 2014), <http://www.wsj.com/articles/SB10001424052702304422704579571732769356894> [<https://perma.cc/BY3C-YZ69>].

¹⁸² Joel Schectman, *Two Ex-Credit Suisse Bankers Avoid Jail Time in Tax Evasion Case*, WALL ST. J. (Mar. 27, 2015), <http://www.wsj.com/articles/two-ex-credit-suisse-bankers-avoid-jail-time-in-tax-evasion-case-1427474709> [<https://perma.cc/ZXZ3-B82N>].

¹⁸³ David Voreacos, *Ex-Credit Suisse Banker Pleads Guilty in Tax Evasion Case*, BLOOMBERG (June 22, 2016, 5:13 PM), <http://www.bloomberg.com/news/articles/2016-06-22/ex-credit-suisse-banker-bergantino-pleads-guilty-in-tax-case> [<https://perma.cc/R3FF-RDV8>].

E. *The Benchmark Interest Rate Cases*

In another attack on the large banks, multiple regulators charged them with manipulating the London Interbank Offered Rate (Libor) and other interest rate benchmarks.¹⁸⁴ The settlements in those cases totaled some \$9 billion.¹⁸⁵ This new round of fines came with the addition of even more regulators demanding payoffs. They included the FCA and authorities from the European Union, Switzerland and the Netherlands. For example, UBS agreed to pay civil and criminal fines totaling \$1.5 billion to settle interest rate manipulation claims. Those claims were brought by DOJ, CFTC, FCA, and Swiss financial services regulators.¹⁸⁶

A UBS subsidiary in Japan pleaded guilty to a criminal charge in manipulating the Libor benchmark rate.¹⁸⁷ And in the company's New York Office, UBS entered into a non-prosecution agreement deferring criminal penalties, provided that no further U.S. criminal violations occurred for the following two years.¹⁸⁸ A UBS trader, who had also worked at Citigroup, was convicted of conspiracy to defraud charges in London and was sentenced to eleven years in prison.¹⁸⁹

¹⁸⁴ As one source notes:

Libor has been called the world's "most important number," and it dominates the interest-rate swap market and syndicated loan market, and powerfully influences residential and commercial mortgages. The British Bankers Association (BBA)'s website states that Libor is the primary benchmark for short-term interest rates globally, and is used as the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges. At least [one estimate of] \$350 trillion worth of contracts reference Libor.

Eosa M. Abrantes-Metz, Gabriel Rauterberg, & Andrew Verstein, *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 378–79 (2013) (footnotes omitted).

¹⁸⁵ Jeffrey Vögeli & Hugo Miller, *Deutsche Bank Libor Damage Goes Beyond Record \$2.5 Billion Fine*, BLOOMBERG (Apr. 23, 2015, 1:50 PM), <http://www.bloomberg.com/news/articles/2015-04-23/deutsche-bank-libor-damage-goes-beyond-record-2-5-billion-fine> [<https://perma.cc/YD4Q-UVCP>].

¹⁸⁶ Press Release, U.S. Dep't of Justice, Office of Public Affairs, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), <https://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor> [<https://perma.cc/SQ47-JZR9>].

¹⁸⁷ *Id.*

¹⁸⁸ David Enrich & Jean Eaglesham, *UBS Admits Rigging Rates in 'Epic' Plot*, WALL ST. J. (Dec. 20, 2012, 7:17 AM), <http://www.wsj.com/articles/SB10001424127887324407504578188342618724274> [<https://perma.cc/8663-QFRF>].

¹⁸⁹ Margot Patrick, *Former Libor Trader Tom Hayes Gets Prison Sentence Cut to 11 Years*, WALL ST. J. (Dec. 21, 2015, 11:56 AM), <http://www.wsj.com/articles/former-trader-tom-hayes-gets-prison-sentence-cut-to-11-years-1450708815> [<https://perma.cc/L79E-6V4R>].

However, a jury acquitted six traders charged with aiding that individual.¹⁹⁰

In another interest rate manipulation case, Deutsche Bank paid \$2.5 billion to settle charges brought by DOJ, CFTC, NYSFS, and FCA.¹⁹¹ Deutsche Bank agreed to pay an additional \$220 million to settle claims brought by forty-five states over its Libor activities.¹⁹² European Union regulators also fined six large financial institutions \$2.32 billion for manipulative activity relating to benchmark interest rates. Those firms included JPMorgan, Citigroup, Deutsche Bank, RBS, and Société Générale S.A.¹⁹³ RBS agreed to pay \$612 million to settle interest rate manipulation charges brought by the CFTC, DOJ, and FCA.¹⁹⁴ The Dutch Rabobank agreed to pay \$1.07 billion and its CEO resigned in a settlement with U.S., British, and Dutch regulators.¹⁹⁵ Five Rabobank traders were charged with crimes in the United States over their Libor activities. Another two traders went to trial and were convicted. However, the United States Court of Appeals for the Second Circuit vacated those verdicts because of the improper use by the government of compelled testimony in London that violated the defendants' Fifth Amendment rights, proving once again the difficulty of proving complex financial crimes even against lower-level traders.¹⁹⁶ Undaunted, the DOJ subsequently indicted two

¹⁹⁰ Chad Bray, *Former Barclays Traders Sentenced in Libor-Rigging Case*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/business/dealbook/former-barclays-traders-sentenced-in-libor-rigging-case.html?_r=0 [https://perma.cc/RZM6-AZBQ] [hereinafter *Former Barclays Traders Sentenced in Libor Rigging Case*].

¹⁹¹ Ben Protess & Jack Ewing, *Deutsche Bank to Pay \$2.5 Billion Fine to Settle Rate-Rigging Case*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/business/dealbook/deutsche-bank-settlement-rates.html> [https://perma.cc/8P7Y-H6NV].

¹⁹² Erik Larson, *Over U.S. States' Libor Probes*, 49 SEC. REG. & L. REP. (BNA) 1723 (Oct. 30, 2017).

¹⁹³ Vanessa Mock & David Enrich, *EU Fines Financial Institutions Over Fixing Key Benchmarks*, WALL ST. J. (Dec. 4, 2013, 7:46 PM), <http://www.wsj.com/articles/SB10001424052702303471004579165293824297108> [https://perma.cc/SJ5F-BNAW].

¹⁹⁴ Danielle Douglas, *Royal Bank of Scotland to Pay \$612 Million to Resolve Libor Case*, WASH. POST (Feb. 6, 2013), https://www.washingtonpost.com/business/economy/rbs-to-pay-612m-to-resolve-libor-case/2013/02/06/2c0cc42c-6fd3-11e2-aa58-243de81040ba_story.html?utm_term=.47ad0f814b1a [https://perma.cc/NX8H-GAS2].

¹⁹⁵ David Enrich & Jenny Strasburg, *Rabobank is Fined, CEO is Out in Libor Settlement*, WALL ST. J. (Oct. 29, 2013, 4:42 PM), <http://www.wsj.com/articles/SB10001424052702303471004579165293824297108> [https://perma.cc/9UVX-C5MJ]; Nate Raymond, *Ex-Rabobank Traders Get U.S. Prison Terms for Libor Manipulation*, REUTERS (Mar. 10, 2016), <http://www.reuters.com/article/us-rabobank-libor-idUSKCN0WC2XV> [https://perma.cc/5RZK-3B4S].

¹⁹⁶ *United States v. Allen*, 864 F.3d 63, 101 (2d Cir. 2017). Another Rabobank trader pleaded guilty and was given no jail time because of his cooperation with investigators. Christian Berthelsen, *Ex-Rabobank Trader Who Told of 'Libor Time' Avoids Prison*, 48 SEC. REG. & L. REP. (BNA) 2187 (Nov. 21, 2016). Another cooperating Rabobank trader was given time-served and another who pleaded guilty was given three months of jail time. Y. Peter King, *Ex-Rabobank Trader Dodges Jail Time for*

Société Générale traders, charging that they manipulated Libor submissions.¹⁹⁷

Barclays settled interest rate manipulation claims brought by the CFTC, DOJ and FCA for \$453 million and admitted violations.¹⁹⁸ Two Barclays traders were acquitted of criminal charges over these activities.¹⁹⁹ The chairman of Barclays, Marcus Agius, and its CEO, Robert Diamond, resigned and waived their bonuses, but did not face any criminal charges.²⁰⁰ In another settlement, Barclays paid \$100 million to settle interest rate benchmark charges that were brought by forty-three states and the District of Columbia.²⁰¹

Lloyds Banking Group PLC agreed to pay \$370 million to U.S. and U.K. authorities to settle charges over its alleged interest rate manipulations.²⁰² Goldman Sachs, RBS, Barclays and Citigroup agreed to pay a total of \$570 million to settle claims brought by the CFTC charging attempted manipulation of the ISDAfix, a global interest rate benchmark.²⁰³ In one rather unique action, the FDIC sued Barclays, RBS, Deutsche Bank, Rabobank, UBS and others in a London court charging manipulation of the Libor index. This was unusual because the U.S. government regulators do not often seek relief in foreign courts. Moreover, a U.S. court had previously dismissed claims brought by the FDIC against those banks for lack of

Fixing Libor, LAW360 (Nov. 14, 2016), <https://www.law360.com/articles/862353/ex-rabobank-trader-dodges-jail-time-for-fixing-libor> [<https://perma.cc/2RTA-66KW>].

¹⁹⁷ Austen Hufford, *Two Bankers Indicted in Libor-Manipulation Case*, WALL ST. J. (Aug. 24, 2017), <https://www.wsj.com/articles/two-bankers-indicted-in-libor-manipulation-case-1503611202> [<https://perma.cc/7QXM-ZDEC>].

¹⁹⁸ Barclays was charged with attempting to manipulate those benchmark rates by providing artificially low quotes during the Financial Crisis. Barclays engaged in this conduct in order to aid other positions. The bank was also concealing the fact that it was paying higher interest rates than other large banks, which would call its financial stability into question. LAW ENFORCEMENT, *supra* note 54, at 340.

¹⁹⁹ *Former Barclays Traders Sentenced in Libor-Rigging Case*, *supra* note 190.

²⁰⁰ *Id.*; Mark Scott & Michael J. De La Merced, *Chairman of Barclays Resigns*, N. Y. TIMES (July 1, 2012), <https://dealbook.nytimes.com/2012/07/01/chairman-of-barclays-is-expected-to-resign/> [<https://perma.cc/G7XY-QRKF>].

²⁰¹ Jill Treanor, *Barclays Bank Reaches \$100m US Settlement Over Libor Rigging Scandal*, GUARDIAN (Aug. 9, 2016), <https://www.theguardian.com/business/2016/aug/08/barclays-libor-100m-us-settlement> [<https://perma.cc/U7RA-FBZD>].

²⁰² Andrew Khouri, *British Bank Lloyds to Pay \$370 Million to Settle Libor Probes*, L.A. TIMES (July 28, 2014), <http://www.latimes.com/business/la-fi-lloyds-libor-20140728-story.html> [<https://perma.cc/G3ZJ-PSK9>].

²⁰³ Matthew Leising, *Rate Benchmark Scandal Hits \$570 Million in Fines as RBS Settles*, BLOOMBERG (Feb. 3, 2017, 11:41 AM), <https://www.bloomberg.com/news/articles/2017-02-03/rbs-pays-85-million-to-settle-cftc-s-isdafix-manipulation-case> [<https://perma.cc/SYQ6-Y6CJ>].

jurisdiction, which would seemingly evidence a lack of U.S. interest in the matter.²⁰⁴

F. Foreign Exchange Manipulations

In yet another round of massive fines, the large banks were charged with manipulating foreign exchange rate benchmarks and defrauding institutional clients in foreign exchange transactions.²⁰⁵ The regulatory fines arising from those charges totaled nearly \$15 billion.²⁰⁶ In one such action, several large banks agreed to pay \$4.3 billion to settle claims that they manipulated foreign currency exchange rates and misused customer order information. The settling banks were Citigroup, JPMorgan, UBS, RBS, HSBC, and BofA.²⁰⁷ This settlement was reached with the CFTC, OCC, FCA, and the Swiss Financial Market Supervisory Authority.²⁰⁸ A South African antitrust regulator also charged that these and other large banks had manipulated foreign currency transactions in the rand.²⁰⁹ Citigroup paid \$5.4 million to settle charges brought by that regulator.²¹⁰

The DOJ and the Fed reached a separate settlement over foreign currency with UBS, Barclays, Citigroup, JPMorgan, BofA, and RBS. That settlement collectively totaled

²⁰⁴ Caroline Binham & Barney Thompson, *FDIC Sues Barclays, RBS and Other Banks Over Libor*, FIN. TIMES (London) (Aug. 17, 2017), <https://www.ft.com/content/46d51cbe-8360-11e7-a4ce-15b2513cb3ff> [<https://perma.cc/6C9B-YLKL>].

²⁰⁵ See generally *Regulating the Moneychangers*, *supra* note 2 (describing the foreign exchange market and its regulation).

²⁰⁶ See Chiara Albanese, David Enrich & Katie Martin, *Citigroup, J.P. Morgan Take Brunt of Currencies Settlement*, WALL ST. J. (Nov. 12, 2014), <http://www.wsj.com/articles/banks-reach-settlement-in-foreign-exchange-rigging-probe-1415772504> [<https://perma.cc/NWV6-WR4A>]; Michael Corkery & Ben Protess, *Rigging of Foreign Exchange Market Makes Felons of Top Banks*, N.Y. TIMES (May 20, 2015), <http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html> [<https://perma.cc/FN7Q-GF6U>] (describing those settlements).

²⁰⁷ A single trader at HSBC Holdings Plc was convicted of criminal charges for trading in advance of customer orders. Lananh Nguyen & Patricia Hurtado, *HSBC Trader's Conviction Will Echo Through \$5 Trillion FX Market*, 49 SEC. REG. & L. REP. (BNA) 1727 (Oct. 30, 2017).

²⁰⁸ Suzi Ring, Liam Vaughan & Jesse Hamilton, *Citigroup, JPMorgan Pay Most in \$4.3 Billion FX Rig Cases*, BLOOMBERG (Nov. 12, 2014), <https://www.bloomberg.com/news/articles/2014-11-12/banks-to-pay-3-3-billion-in-fx-manipulation-probe> [<https://perma.cc/KDD8-8RD4>].

²⁰⁹ Renee Bonochris & Mike Cohen, *JPMorgan to HSBC Face Fines in S.African Rand-Rigging Probe*, BLOOMBERG (Feb. 15, 2017, 9:34 AM), <https://www.bloomberg.com/news/articles/2017-02-15/south-africa-to-prosecute-banks-for-collusion-on-forex-trading> [<https://perma.cc/XSR2-6J77>].

²¹⁰ Renee Bonorchis, *Citigroup Agrees to \$5.4M Fine to Settle Rand Collusion*, 49 SEC. REG. & L. REP. (BNA) 367 (Feb. 27, 2017).

\$5.6 billion.²¹¹ Except for Barclays, these same banks had been parties to the earlier \$4.3 billion settlement over currency abuses. Barclays agreed with DOJ to plead guilty to criminal antitrust violations in connection with currency manipulation claims.²¹² It also agreed to pay a total of \$2.4 billion to settle claims brought by the CFTC, Fed, FCA, and NYSFS.²¹³ Barclays was further found to have breached its Libor manipulation non-prosecution agreement through its foreign currency trading and was fined \$60 million.²¹⁴ That bank was allowed to continue its business in the United States, and no senior executives at the bank were charged with wrongdoing. Only a small number of traders were indicted.²¹⁵

Citicorp, JPMorgan, Barclays, and RBS pleaded guilty to conspiring to manipulate the price of dollars and euros in the foreign currency exchange market. They agreed to pay criminal fines to the DOJ of more than \$2.5 billion. UBS agreed to plead guilty to manipulating benchmark interest rates. UBS paid an additional \$203 million criminal penalty after it was found to have breached its earlier non-prosecution agreement settling the benchmark interest rate claims.²¹⁶

Another action involving allegedly fraudulent currency rates quotes was brought against the Bank of New York Mellon (BONY) by the DOJ, DOL, SEC, NYAG,²¹⁷ and the Florida Attorney General.²¹⁸ BONY settled those state and federal claims, and related class actions, for \$714 million.²¹⁹ Deutsche Bank agreed to pay \$157 million to settle claims by the Fed that it engaged in manipulative foreign exchange activities and

²¹¹ Gina Chon et al., *Six Banks Fined \$5.6bn Over Rigging of Foreign Exchange Markets*, FIN. TIMES (May 20, 2015), <https://www.ft.com/content/23fa681c-fe73-11e4-be9f-00144feabdc0> [<https://perma.cc/3CNB-TZKH>].

²¹² Press Release, U.S. Dep't of Justice, Office of Public Affairs, *Five Major Banks Agree to Parent-Level Guilty Pleas*, (May 20, 2015) [hereinafter *Five Major Banks Agree to Parent Level Guilty Pleas*], <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> [<https://perma.cc/4WNQ-ME2U>].

²¹³ Michael Corkery & Ben Protess, *Rigging of Foreign Exchange Market Makes Felons of Top Banks*, *supra* note 206.

²¹⁴ Chon et al., *supra* note 211.

²¹⁵ Press Release, U.S. Dep't of Justice, Office of Public Affairs, *Three Former Traders for Major Banks Indicted in Foreign Currency Exchange Antitrust Conspiracy*, (Jan. 10, 2017), <https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy> [<https://perma.cc/79XZ-W5XS>].

²¹⁶ *Five Major Banks Agree to Parent-Level Guilty Pleas*, *supra* note 212.

²¹⁷ Reuters, *BNY to Pay \$714 Million to Settle Foreign Exchange Cases*, FORTUNE (Mar. 19, 2015), <http://fortune.com/2015/03/19/bny-mellon-settlement-exchange/> [<https://perma.cc/TV52-9HGV>] [hereinafter *BNY to Pay \$714 Million*].

²¹⁸ Press Release, Fla. Office of the Att'y General, Attorney General Pam Bondi Announces \$28 Million Settlement with Bank of New York Mellon, (Nov. 1, 2013), <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/B342E613410013CA85257C160065FCD8> [<https://perma.cc/56BN-RGKB>].

²¹⁹ *BNY to Pay \$714 Million*, *supra* note 217.

other improper trading practices.²²⁰ BNP Paribas agreed to pay \$246 million to settle Fed charges over manipulative activities of its currency traders. That bank also agreed to pay another \$350 million to settle such charges that were brought by the NYSFS.²²¹ Credit Suisse agreed to pay \$135 million to settle NYSFS to settle charges over its foreign exchange operations.²²²

In another case, State Street Bank and Trust Co. agreed to pay \$382 million to settle foreign currency claims brought by the DOJ, SEC, and Department of Labor (DOL). DOL was becoming a surprising addition to the list of regulators demanding payoffs from the large banks. The DOL's basis for its seat at the table in this settlement was a claim that the banks deceived Employee Retirement Income Security Act of 1974 (ERISA) protected retirement account custody clients "when providing them with indirect foreign currency exchange . . . services."²²³ And as recently as 2017, Wells Fargo remained under investigation for overcharging clients in currency trades.²²⁴

G. *Money Laundering and Financial Embargoes*

As regulatory attacks against large banks continued to expand into other areas, money laundering and financial embargo violations became fashionable. JPMorgan paid \$2.6 billion to settle money laundering charges brought by DOJ and OCC. That action involved the bank's handling of accounts for Bernie Madoff that were a part of his massive Ponzi scheme, however, no individuals at JPMorgan were charged with wrongdoing.²²⁵ BONY agreed to pay \$210 million to settle

²²⁰ Jesse Hamilton, *Deutsche Bank is First Bank Busted for Breaking Volcker Trading Rule*, BLOOMBERG (Apr. 20, 2017), <https://www.bloomberg.com/news/articles/2017-04-20/deutsche-bank-fined-157-million-by-fed-over-chat-rooms-volcker> [https://perma.cc/5G5K-QYEC].

²²¹ Jesse Hamilton, *BNP Paribas Fined \$246 Million by Fed Over Currency Manipulation*, 49 SEC. REC. & L. REP. (BNA) 1187 (July 24, 2017).

²²² Greg Farrell, *Credit Suisse Pays \$135 Million to Settle New York FX Probe*, BLOOMBERG (Nov. 13, 2017, 2:05 PM), <https://www.bloomberg.com/news/articles/2017-11-13/credit-suisse-pays-135-million-to-settle-new-york-fx-probe> [https://perma.cc/W8FB-QAS2].

²²³ Press Release, U.S. Dep't of Justice, Office of Public Affairs, *State Street Bank to Pay \$382 Million to Settle Allegations of Fraudulent Foreign Currency Exchange Practices*, (July 26, 2016), <https://www.justice.gov/opa/pr/state-street-bank-pay-382-million-settle-allegations-fraudulent-foreign-currency-exchange> [https://perma.cc/Y335-3Y7Y].

²²⁴ Emily Glazer, *Wells Fargo, Chasing Bonuses, Overcharged Hundreds of Clients*, WALL ST. J. (Nov. 27, 2017, 7:50 PM), <https://www.wsj.com/articles/wells-fargo-bankers-chasing-bonuses-overcharged-hundreds-of-clients-1511830230> [https://perma.cc/DKU6-CQEL].

²²⁵ Patricia Hurtado, Greg Farrell & Hugh Son, *JPMorgan to Pay \$2.6 Billion Over Madoff Scheme Lapses*, BLOOMBERG (Jan. 8, 2014, 12:00 AM), <https://www.bloomberg.com/news/articles/2014-01-08/jpmorgan-to-pay-2-6-billion-over-madoff-scheme-lapses>.

similar claims brought by the NYAG and DOL.²²⁶ JPMorgan paid OFAC \$88.3 million to settle embargo violation charges.²²⁷ JPMorgan also agreed to pay \$264 million to settle Foreign Corrupt Practice Act charges by the SEC, Fed, and DOJ. The bank was charged with bribing Chinese officials to gain business by hiring their children to work at units of the bank.²²⁸

BNP Paribas SA agreed to pay almost \$9 billion to settle charges by DOJ over the bank's dealings with countries embargoed by the United States (i.e., Cuba, Iran and Sudan). That bank was also subjected to a one-year bar on certain U.S. dollar dealings. This was a rare instance in which a settling bank's business activities were restricted.²²⁹ HSBC paid \$1.9 billion to settle charges of money laundering for drug dealers.²³⁰ Standard Chartered agreed to pay \$667 million to settle money laundering charges involving Iran that were brought by the NYSFS, DOJ, Fed, and OFAC.²³¹ Further evidencing these redundancies of multiple regulatory actions, a local prosecutor in New York City was even a participant in the settlement.²³²

Money laundering settlements with various regulators additionally included the following: Ing Bank NV \$619 million; Lloyds TSB Group PLC \$567 million; Credit Suisse \$536 million; ABN AMRO Holding NV/RBS Group PLC \$500 million; and Barclays \$298 million.²³³ Deutsche Bank agreed to pay \$425 million to the NYSFS and \$204 million to the FCA to

www.bloomberg.com/news/articles/2014-01-07/jpmorgan-to-pay-2-6-billion-over-madoff-lapses [https://perma.cc/DX2D-7BZG].

²²⁶ Dan Stumpf, *Bank of New York Mellon Unit to Pay \$210 Million in Madoff Settlement*, WALL ST. J. (Nov. 13, 2012, 1:25 PM), <http://www.wsj.com/articles/SB10001424127887324735104578116822082757346> [https://perma.cc/VPJ8-XSU5].

²²⁷ Kevin Roose, *JPMorgan to Pay \$88.3 Million for Sanctions Violations*, N.Y. TIMES (Aug. 25, 2011, 6:29 PM), <http://dealbook.nytimes.com/2011/08/25/jpmorgan-to-pay-88-3-million-for-sanctions-violations/> [https://perma.cc/KZ4L-5BC4].

²²⁸ *JPMorgan to Pay \$264 Million to Resolve China Hiring Probe: SEC, DoJ*, REUTERS (Nov. 17, 2016, 11:08 PM), <http://www.reuters.com/article/us-jpmorgan-settlement-idUSKBN13C1Z8> [https://perma.cc/DJW5-WE3E].

²²⁹ Devlin Barrett, Christopher M. Matthews & Andrew R. Johnson, *BNP Paribas Draws Record Fine for 'Tour de Fraud': BNP Admits to Filing False Business Records and Conspiracy*, WALL ST. J. (June 30, 2014, 9:17 PM), <http://www.wsj.com/articles/bnp-agrees-to-pay-over-8-8-billion-to-settle-sanctions-probe-1404160117> [https://perma.cc/G2NE-RRYU].

²³⁰ Aruna Viswanatha & Brett Wolf, *HSBC to Pay \$1.9 Billion U.S. Fine in Money-Laundering Case*, REUTERS (Dec. 11, 2012, 12:45 AM), <http://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211> [https://perma.cc/TK5K-SN7H].

²³¹ David Benoit, *Standard Chartered's Fine Tally Runs to \$667 Million*, WALL ST. J. (Dec. 10, 2012, 11:15 AM), <http://blogs.wsj.com/deals/2012/12/10/standard-chartered-fine-tally-runs-to-667-million/> [https://perma.cc/SR53-M2MC].

²³² *Id.*

²³³ Isabella Steger, *Tallying Up U.S. Regulators' Money Laundering Fines*, WALL ST. J. (Aug. 15, 2012, 3:05 AM), <http://blogs.wsj.com/deals/2012/08/15/tallying-up-u-s-regulators-money-laundering-fines/> [https://perma.cc/6YP8-VPLK].

settle money laundering charges over \$10 billion from equity trades that were transferred to Russia.²³⁴ Société Générale agreed to pay \$1.1 billion to settle claims brought by Libya that the bank had paid bribes to obtain business from the Libyan Investment Authority. A similar suit brought against Goldman Sachs was dismissed by a court in London.²³⁵

The NYSFS imposed a \$567 million fine on the Bank of Tokyo-Mitsubishi UFJ for handling funds from countries that were embargoed by the U.S. government. That bank originally agreed to a fine of \$250 million. That penalty was increased by \$315 million after the NYSFS concluded that the bank had acted in bad faith. The NYSFS charged that the bank had submitted a consultant's report to the NYSFS that understated the seriousness of the conduct. A few individual employees were also forced to resign and were banned from working for banks in New York.²³⁶ No financial scandal would be complete without a BofA settlement. However, it had to pay only a comparatively paltry \$16.5 million to settle OFAC charges that it was laundering money for drug dealers.²³⁷

H. *Trading and Recordkeeping Practices*

The “too big to jail” regulatory model expanded into still other sectors of finance in the wake of the Financial Crisis of 2008. One fruitful area for regulatory attacks against the large banks involved their trading practices. For example, JPMorgan experienced a \$6.2 billion loss in May 10, 2012, from trading by an employee in London. That employee was dubbed the “Whale” because of the size of his trades. The Whale escaped criminal charges because of his purported cooperation with the government’s investigation. Although JPMorgan suffered the trading loss, it agreed to pay \$920 million and admitted to wrongdoing in order to settle SEC, OCC, Fed, and FCA charges

²³⁴ Jenny Strasburg, *Deutsche Bank to Pay Nearly \$630 Million to Settle Probes Into Russian Trades*, WALL ST. J. (Jan. 31, 2017) <https://www.wsj.com/articles/deutsche-bank-to-pay-nearly-630-million-to-settle-probes-into-russian-trades-1485850471> [<https://perma.cc/WV8U-2TDE>].

²³⁵ Noemie Bissierbe, *Société Générale Settles With Libya*, WALL ST. J. (May 5, 2017), <http://www.foxbusiness.com/features/2017/05/05/soci-t-g-n-rale-settles-with-libya-wsj.html> [<https://perma.cc/U45S-WLYZ>].

²³⁶ Press Release, N.Y. Dep’t of Fin. Serv., NYDFS Announces Bank of Tokyo Mitsubishi UFJ to Pay Additional \$325 Million Penalty for Misleading Regulators, Individual Bank Employees Will Resign and Accept Bans, (Nov. 18, 2014), <http://www.dfs.ny.gov/about/press/pr1411181.htm> [<https://perma.cc/HJ4C-KAP7>].

²³⁷ Evan Weinberger, *BofA To Pay \$16.5M To Settle Alleged Sanctions Violations*, LAW360 (July 24, 2014, 11:59 AM), <http://www.law360.com/articles/560675/bofa-to-pay-16-5m-to-settle-alleged-sanctions-violations> [<https://perma.cc/T2GL-4U4M>].

over this fiasco.²³⁸ JPMorgan also admitted to engaging in reckless manipulative activity and paid a \$100 million fine to the CFTC.²³⁹ Two of the Whale's supervisors were indicted in the United States. Those individuals were indicted on the basis of claims made by the Whale, but the indictments were dropped after prosecutors began to doubt the Whale's credibility.²⁴⁰

JPMorgan agreed to pay out \$389 million to settle charges brought by the CFPB and OCC over improper billing practices.²⁴¹ BofA agreed to pay \$772 million to settle claims brought by CFPB over its credit card practices.²⁴² Citibank agreed to pay \$700 million in a settlement with CFPB over such practices.²⁴³ HSBC paid \$35 million to settle similar OCC charges.²⁴⁴ JP Morgan and Assurant Inc. agreed to pay \$300 million to settle claims that they over-charged borrowers for homeowners' insurance.

Wells Fargo paid \$185 million to settle charges that its employees had created some two million accounts without customer authorization in order to meet cross-selling goals. Those claims were brought by the CFPB, OCC, and the City and County of Los Angeles.²⁴⁵ An internal OCC investigation

²³⁸ Dawn Kopecki, *JPMorgan Pays \$920 Million to Settle London Whale Probes*, BLOOMBERG (Sept. 20, 2013, 12:00 AM), <https://www.bloomberg.com/news/articles/2013-09-19/jpmorgan-chase-agrees-to-pay-920-million-for-london-whale-loss> [<https://perma.cc/2BEM-GHBS>].

²³⁹ Aruna Viswanatha, *JPMorgan to Pay \$100 Million in Latest 'London Whale' Fine*, REUTERS (Oct. 16, 2013, 3:17 PM), <http://www.reuters.com/article/us-jpmorgan-cftc-idUSBRE99F0JW20131016> [<https://perma.cc/C3H9-7VQ4>].

²⁴⁰ Rebecca Davis O'Brien, *U.S. Drops Case Against 'London Whale' Traders*, WALL ST. J. (July 21, 2017, 7:36 PM), <https://www.wsj.com/articles/u-s-drops-case-against-london-whale-traders-1500679130> [<https://perma.cc/2TYX-S53Z>]. The SEC also dropped its civil charges brought against those individuals. Rebecca Davis O'Brien, *SEC to Drop Civil Charges Against Two Ex-J.P. Morgan 'London Whale' Traders*, WALL ST. J. (Aug. 18, 2017, 4:19 PM), <https://www.wsj.com/articles/sec-to-drop-civil-charges-against-two-ex-j-p-morgan-london-whale-traders-1503087593> [<https://perma.cc/PFW6-3ZV4>].

²⁴¹ Carter Dougherty and Jesse Hamilton, *JPMorgan to Pay \$389 Million Over Regulators' Card Add-On Claims*, BLOOMBERG (Sept. 19, 2013, 1:37 PM), <https://www.bloomberg.com/news/articles/2013-09-19/jpmorgan-to-pay-389-million-over-regulators-card-add-on-claims> [<https://perma.cc/VC7D-XKLX>].

²⁴² Alan Zibel, *Bank of America to Pay \$772 Million Over Credit-Card Practices*, WALL ST. J. (Apr. 9, 2014, 4:51 PM), <http://www.wsj.com/articles/SB10001424052702303873604579491462886530876> [<https://perma.cc/YGF5-DWWM>].

²⁴³ *CFPB Orders Citibank to Pay \$700 Million in Consumer Relief for Illegal Credit Card Practices*, CONSUMER FIN. PROT. BUREAU (July 21, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/> [<https://perma.cc/4XBM-KJDK>].

²⁴⁴ Jeff Bater, *OCC Fines HSBC Bank \$35 Million over Credit Card Add-Ons*, BLOOMBERG (Apr. 14, 2016), <https://www.bna.com/occ-fines-hsbc-n57982069866/> [<https://perma.cc/W9A5-SLU3>].

²⁴⁵ Deon Roberts & Rick Rothacker, *Wells Fargo Is Fined \$185M for 'Widespread Illegal Practices' in Account Openings*, MIAMI HERALD (Sept. 8, 2016, 3:58 PM), <http://www.miamiherald.com/news/nation-world/national/article100670802.html> [<https://perma.cc/XFH2-G2TA>].

found that the OCC missed numerous red flags and ignored whistleblower claims concerning Wells Fargo sales practices over a period of six years.²⁴⁶ Incredibly, DOL was also investigating whether Wells Fargo had breached overtime restrictions by having employees work long hours to meet sales goals.²⁴⁷ The Wells Fargo CEO forfeited approximately \$41 million in compensation. Another Wells Fargo executive was required to forfeit \$19 million in options awards.²⁴⁸ No executives were indicted.²⁴⁹

Goldman Sachs paid \$10 million to settle claims by the State of Massachusetts that it had illegally passed information from Goldman analysts to favored customers, information not shared with other customers.²⁵⁰ Citigroup agreed to pay \$30 million to Massachusetts in order to settle a claim that one of its analysts leaked negative information about Apple stock to four investment firms. Only one year before that settlement, Citigroup had paid a mere \$2 million to settle state regulator claims for the improper disclosure of research on Facebook's initial public offering.²⁵¹

Any doubts whether a giant holdup of the large banks was underway was put to rest by additional post-Financial

²⁴⁶ Kate Berry, *OCC Missed Several Chances to Spot, Fix Wells Fargo Sham Accounts*, AM. BANKER (Apr. 19, 2017, 4:40 PM), <https://www.americanbanker.com/news/occ-repeatedly-missed-chances-to-spot-fix-wells-fargo-sham-accounts> [<https://perma.cc/7ZXJ-54RQ>].

²⁴⁷ Emily Glazer, *Wells Fargo Investigation Hampered by Outside Attorney Citing a Trump Tie, Labor Department Claims*, WALL ST. J. (Jan. 6, 2017, 6:19 PM), <http://www.wsj.com/articles/wells-fargo-investigation-hampered-by-outside-attorney-citing-a-trump-tie-labor-department-claims-1483646713> [<https://perma.cc/397W-ET2P>].

²⁴⁸ *Wells Fargo CEO Forfeits \$41 Million in Stock Awards Amid Sales Scandal*, CHI. TRIB. (Sept. 27, 2016, 7:25 PM), <http://www.chicagotribune.com/business/ct-wells-fargo-scandal-20160927-story.html> [<https://perma.cc/N2X6-Z9GB>]; see also Reuters, *Wells Fargo Claws Back Millions From Former Executives Over Accounts Scandal*, FORTUNE (Apr. 10, 2017), <http://fortune.com/2017/04/10/wells-fargo-clawback-stumpf-tolsted/> [<https://perma.cc/ZN6D-7D3H>]. Wells Fargo also settled a class action lawsuit over this conduct for \$142 million. Kartikay Mehrotra, *Wells Fargo \$142 Million Fake-Account Accord Satisfies Judge*, 49 SEC. REG. & L. REP. (BNA) 831 (May 22, 2017).

²⁴⁹ The OCC was also investigating Wells Fargo for improper activities connected with forcing consumers seeking automobile loans to buy unneeded insurance for their cars and improper fees in connection with residential mortgage applications. Gretchen Morgenson & Emily Glazer, *Wells Fargo is Dubbed a Repeat Offender and Faces New Wrath from Its Regulator*, WALL ST. J. (Nov. 29, 2017, 11:07 AM), <https://www.wsj.com/articles/wells-fargo-is-dubbed-a-repeat-offender-and-faces-new-wrath-from-its-regulator-1511951402> [<https://perma.cc/LLJ5-YHRD>].

²⁵⁰ Liz Moyer, *Goldman Fined \$10 Million By Massachusetts Over Research 'Huddles'*, INVESTORSHUB (June 9, 2011, 11:12 AM), <http://www.advn.com/nyse/StockNews.asp?stocknews=GS&article=48010767> [<https://perma.cc/M2TP-FEY7>].

²⁵¹ Svea Herbst-Bayliss, *Citigroup Fined \$30 Million After Analyst Sent Report to SAC, Others*, REUTERS (Oct. 3, 2013, 2:55 PM), <http://www.reuters.com/article/us-citigroup-massachusetts-idUSBRE9920I820131003> [<https://perma.cc/UJL2-NADA>].

Crisis cases zealously brought by the CFTC against the large banks. For example, that agency penalized JPMorgan some \$120 million in eight separate actions that charged such things as failing to disclose conflicts of interest, failing to supervise processing of trading fees, failing to segregate customer funds, exceeding speculative limits, and making recordkeeping errors.²⁵² Morgan Stanley paid a total of over \$20 million to the CFTC to settle six separate actions for such things as recordkeeping errors, exceeding position limits, and non-competitive trades.²⁵³

²⁵² Richard Hill, *J.P. Morgan to Pay \$900K for Alleged Supervisory Failures*, 49 SEC. REG. & L. REP (BNA) 126 (Jan. 16, 2017); *see also* Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders JPMorgan Ventures Energy Corp. and JPMorgan Chase Bank, N.A. to Pay a \$225,000 Penalty for Inaccurate Large Trader Reports for Physical Commodity Swaps Positions (Mar. 23, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7347-16> [<https://perma.cc/GZS6-988X>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders JPMorgan Chase Bank, N.A. to Pay \$100 Million for Failure to Disclose Conflicts of Interest (Dec. 18, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7297-15> [<https://perma.cc/LE74-38JT>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Morgan Stanley & Co. LLC to Pay a \$300,000 Civil Monetary Penalty for Violations of Customer Protection Rule for Cleared Swaps and Related Supervision Failures (Aug. 6, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7209-15> [<https://perma.cc/2LKK-G7NQ>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Charges J.P. Morgan Securities LLC with Repeatedly Submitting Inaccurate Large Trader Reports and Imposes a \$650,000 Civil Monetary Penalty (July 29, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr6968-14> [<https://perma.cc/H3L5-YGSY>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders JP Morgan Chase Bank, N.A. to Pay \$600,000 Civil Monetary Penalty for Violating Cotton Futures Speculative Position Limits (Sept. 27, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6369-12> [<https://perma.cc/3C39-3EXN>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders JPMorgan Chase Bank, N.A. to Pay a \$20 Million Civil Monetary Penalty to Settle CFTC Charges of Unlawfully Handling Customer Segregated Funds (Apr. 4, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6225-12> [<https://perma.cc/T92Q-SKLY>]; Press Release, U.S. Commodity Futures Trading Comm'n, J.P. Morgan Securities LLC Agrees to Pay \$140,000 Penalty for Confirming the Execution of a Prearranged Trade on the CBOT (Mar. 8, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6198-12> [<https://perma.cc/D6KT-QJPP>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Sanctions J.P. Morgan Futures, Inc. \$300,000 for Failing to Properly Segregate Customer Funds and Failing to Timely Report the Under-segregation to the CFTC (Sept. 9, 2009), <http://www.cftc.gov/PressRoom/PressReleases/pr5713-09> [<https://perma.cc/UM7P-83Q8>].

²⁵³ Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Fines Morgan Stanley Smith Barney for Supervision and Records Failures Relating to Its "Know Its Customer" Procedures (Sept. 15, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr6998-14> [<https://perma.cc/V22Z-EKC2>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Morgan Stanley Smith Barney LLC to Pay \$490,000 to Settle Charges Relating to Rules and Regulations Pertaining to Segregated and Secured Amount Funds (Mar. 27, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr6894-14> [<https://perma.cc/L5Z4-EFLM>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Morgan Stanley Capital Group Inc. to Pay \$200,000 Penalty for Violating Soybean Meal Futures Speculative Position Limits (Mar. 24, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr6889-14> [<https://perma.cc/VUE9-WBCQ>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Morgan Stanley Smith Barney LLC to Pay \$200,000 for Supervision Violations (Oct. 22, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6395-12> [<https://perma.cc/Q7G9-E6J8>];

Goldman Sachs paid \$8.5 million to settle two CFTC cases charging employee supervision failures.²⁵⁴ In another settlement, Goldman Sachs paid the CFTC \$1.5 million for failing to supervise a rogue trader who put \$8.3 billion in “e-mini” futures without authorization.²⁵⁵ Citigroup paid \$550,000 to settle CFTC charges over recordkeeping violations.²⁵⁶ Citigroup paid \$25 million to settle CFTC charges that its traders had engaged in the prohibited trading practice of “spoofing.”²⁵⁷ In another case, the Bank of Tokyo-Mitsubishi agreed to pay only \$600,000 to settle CFTC spoofing charges.²⁵⁸

Barclays paid the CFTC \$1.8 million to settle three cases charging recordkeeping errors and supervision failures.²⁵⁹ Deutsche Bank paid \$5.5 million to settle two cases involving

Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders Morgan Stanley & Co. LLC to Pay \$5 Million Civil Monetary Penalty for Unlawful Noncompetitive Trades (June 5, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6270-12> [<https://perma.cc/X68W-X3G4>]; Press Release, U.S. Commodity Futures Trading Comm’n, Morgan Stanley Capital Group, Inc. to Pay a \$14 Million Civil Penalty to Settle CFTC Charges that the Company Concealed a Large Block Crude Oil Trade (Apr. 29, 2010), <http://www.cftc.gov/PressRoom/PressReleases/pr5816-10> [<https://perma.cc/FJF8-H9KL>].

²⁵⁴ Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders Goldman, Sachs & Co., a Commission Registrant, to Pay \$1.5 Million for Supervision Failures (Dec. 7, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6450-12> [<https://perma.cc/QE99-9LN3>]; Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders Goldman Sachs Execution & Clearing, L.P., a Registered Futures Commission Merchant, to Pay \$7 Million for Supervision Failures in Handling Accounts it Carried (Mar. 13, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6206-12> [<https://perma.cc/QAC2-RNW4>].

²⁵⁵ Stewart Bishop, *Goldman Fined \$1.5M Over Trader’s Hidden \$8B Position*, LAW360 (Dec. 7, 2012), <http://www.law360.com/articles/399919/goldman-fined-1-5m-over-trader-s-hidden-8b-position> [<https://perma.cc/Z3LV-GD85>].

²⁵⁶ *Citigroup to Pay a Fine for Swap Data Reporting Violations-U.S. CFTC*, REUTERS (Sept. 25, 2017, 5:54 PM), <http://www.reuters.com/article/uk-citigroup-cftc/citigroup-to-pay-a-fine-for-swap-data-reporting-violations-u-s-cftc-idUKKCN1C02FP> [<https://perma.cc/4QFR-TA8F>].

²⁵⁷ Spoofing is the entry of an order to purchase or sell a futures contract with the intent to cancel the order before it can be executed. Philip Stafford, *Citigroup Pays \$25 M to Settle US ‘Spoofing’ Charges*, FIN. TIMES (London) (Jan. 19, 2017), <https://www.ft.com/content/aa943ab4-de60-11e6-9d7c-be108f1c1dce> [<https://perma.cc/L82V-L9CF>].

²⁵⁸ Alexander Osipovich, *Japanese Bank Fined \$600,000 for ‘Spoofing’ U.S. Futures Markets*, WALL ST. J. (Aug. 7, 2017, 4:42 PM), <https://www.wsj.com/articles/japanese-bank-fined-600-000-for-spoofing-u-s-futures-markets-1502138523> [<https://perma.cc/Q6HP-RJ9D>].

²⁵⁹ Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders United Kingdom-Based Barclays Bank PLC to Pay \$500,000 for Recordkeeping Violations (Sept. 22, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7452-16> [<https://perma.cc/JZK3-UVMN>]; Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders Barclays Capital, Inc. to Pay \$800,000 for Supervision Failures (Aug. 4, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7419-16> [<https://perma.cc/3YRZ-JLN7>]; Press Release, U.S. Commodity Futures Trading Comm’n, CFTC Orders London-Based Barclays Bank PLC to Pay a \$560,000 Penalty for Inaccurate Large Trader Reports for Physical Commodity Swaps Positions (July 6, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7401-16> [<https://perma.cc/7J9E-K5ST>].

reporting errors and treatment of customer funds.²⁶⁰ BofA's Merrill Lynch unit paid a total of some \$1.5 million to settle CFTC claims that it misstated exchange fees and violated speculative trading limits.²⁶¹ In another settlement with the CFTC, Merrill Lynch was fined \$5 million for recordkeeping violations.²⁶² UBS paid a comparatively paltry \$180,000 to settle two CFTC cases variously charging speculative trading limit violations and reporting failures.²⁶³

In one remarkable case, the CFTC required restitution of \$1 billion in a settlement with MF Global Inc., a giant futures commission merchant that had misused customer funds before declaring bankruptcy.²⁶⁴ The CEO of the firm settled charges of failure to supervise the activities that led to those violations for \$5 million and agreed not to accept any further supervisory positions in firms regulated by the CFTC.²⁶⁵ Since the former CEO was seventy years old and personally wealthy from his days as head of Goldman Sachs, this did not seem to be much of an imposition.²⁶⁶

²⁶⁰ Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Deutsche Bank Securities Inc. to Pay \$3 Million to Settle Charges of Improper Investment of Customer Segregated Funds, Reporting and Recordkeeping Violations, and Supervision Failures (Dec. 22, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr7089-14> [<https://perma.cc/7ZQB-UKYG>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Deutsche Bank AG to Pay a \$2.5 Million Civil Monetary Penalty for Swaps Reporting Violations and Related Supervision Failures (Sept. 30, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7255-15> [<https://perma.cc/A98T-58SP>].

²⁶¹ *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, CFTC No. 14-22, 2014 WL 4259211, at *2, *5, *6 (Aug. 26, 2014); Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Merrill Lynch Commodities, Inc. to Pay \$350,000 Civil Penalty for Violating Cotton Futures Speculative Position Limits (Dec. 7, 2011), <http://www.cftc.gov/PressRoom/PressReleases/pr6154-11> [<https://perma.cc/JW2K-W2A5>].

²⁶² Pete Schroeder, *Bank of America broker-dealer unit pay \$5 mln penalty to settle trading probes*, REUTERS (Sept. 22, 2017), <https://www.reuters.com/article/legal-us-usa-cftc-merrill/bank-of-america-broker-dealer-unit-pay-5-mln-penalty-to-settle-trading-probes-idUSKCN1BX2D0> [<https://perma.cc/H588-H4GX>].

²⁶³ Press Release, U.S. Commodity Futures Trading Comm'n, The CFTC Sanctions Swiss Firm \$130,000 for Exceeding Position Limits (Feb. 24, 2010), <http://www.cftc.gov/PressRoom/PressReleases/pr5783-10> [<https://perma.cc/RPQ4-AUHD>]; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Sanctions Four Commodity Pool Operators for Failing to File Timely Reports with the National Futures Association (Jan. 9, 2009), <http://www.cftc.gov/PressRoom/PressReleases/pr5596-09> [<https://perma.cc/TM9H-R7VQ>].

²⁶⁴ Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Charges MF Global Inc., MF Global Holdings Ltd., Former CEO Jon S. Corzine, and Former Employee Edith O'Brien for MF Global's Unlawful Misuse of Nearly One Billion Dollars of Customer Funds and Related Violations (June 27, 2013), <http://www.cftc.gov/PressRoom/PressReleases/pr6626-13> [<https://perma.cc/7JSJ-H7L4>]. (Ed. Note: The author was an expert witness in this matter).

²⁶⁵ *Jon Corzine to Pay USD5m for MF Global's Unlawful Use of Customer Funds*, HEDGEWEEK, <https://www.hedgeweek.com/2017/01/06/247305/jon-corzine-pay-usd5m-mf-global%E2%80%99s-unlawful-use-customer-funds> [<https://perma.cc/Q6X7-6XYN>].

²⁶⁶ Ben Protess, *In Tumult of Trump, Jon Corzine Seeks a Wall Street Comeback*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/business/dealbook/jon->

The SEC also brought a continuous stream of cases against the large banks in the wake of the Financial Crisis. For example, JPMorgan agreed to pay \$267 million to settle SEC charges, as well as \$40 million to the CFTC, over failure to disclose conflicts of interest in mutual fund sales.²⁶⁷ JPMorgan agreed to pay \$228 million and UBS agreed to pay \$160 million to settle SEC cases over bid rigging in municipal bond offerings.²⁶⁸ Wells Fargo paid \$148 million to DOJ and the SEC to settle charges over such bid rigging.²⁶⁹ BofA paid \$137 million to settle similar charges by state and federal prosecutors.²⁷⁰ BofA also paid \$415 million to settle SEC claims that its Merrill Lynch unit misused customer cash and securities to generate profits. That bank paid a further \$10 million to settle SEC charges that traders in the bank's Merrill Lynch unit were allowed to access orders being received from institutional investors. This allowed the traders to piggy-back those orders.²⁷¹ The bank executive charged by the SEC as being responsible for these alleged violations was not fined or suspended by the SEC in its settlement with the individual. Rather, that respondent was subjected only to a cease and desist order from future violations.²⁷² Merrill Lynch agreed to

corzine-wall-street-comeback.html [https://perma.cc/UC5U-6ZFB]; Jonathan Stempel, *Corzine in \$5 Million Settlement With US CFTC Over MF Global Collapse*, REUTERS (Jan. 5, 2017), <https://www.reuters.com/article/us-mfglobal-corzine/corzine-in-5-million-settlement-with-us-cftc-over-mf-global-collapse-idUSKBN14P251> [https://perma.cc/SX8P-WLF3]. An assistant treasurer at MF Global was also charged by the CFTC with aiding and abetting the firm's violations of CFTC rules governing the treatment of customer funds. She agreed to pay a \$500,000 civil penalty and to accept an eighteen-month bar from employment at a CFTC regulated firm. Stempel, *supra*.

²⁶⁷ Owen Davis, *JPMorgan Settles for \$307 Million Over Failure to Disclose Conflicts of Interest*, INT'L BUS. TIMES (Dec. 18, 2015), <http://www.ibtimes.com/jpmorgan-settles-307-million-over-failure-disclose-conflicts-interest-2232499> [https://perma.cc/S2AX-V28L].

²⁶⁸ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges J. P. Morgan Securities with Fraudulent Bidding Practices Involving Investment of Municipal Bond Proceeds (July 7, 2011), <https://www.sec.gov/news/press/2011/2011-143.htm> [https://perma.cc/Y64F-WBAA]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges UBS with Fraudulent Bidding Practices Involving Investment of Municipal Bond Proceeds (May 4, 2011), <https://www.sec.gov/news/press/2011/2011-105.htm> [https://perma.cc/9NU9-GYVT].

²⁶⁹ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Wachovia With Fraudulent Bid Rigging in Municipal Bond Proceeds (Dec. 8, 2011), <https://www.sec.gov/news/press/2011/2011-257.htm> [https://perma.cc/NRA4-CLPE].

²⁷⁰ Ben Protess, *Bank of America Pays \$137 Million to Settle Bid Rigging Charges*, N.Y. TIMES (Dec. 7, 2010), <https://dealbook.nytimes.com/2010/12/07/bofa-pays-137-million-to-settle-bid-rigging-charges/> [https://perma.cc/85ZG-YEA7].

²⁷¹ Jenny Strasburg & Aruna Viswanatha, *Bank of America to Pay \$415 Million to Settle SEC Probe*, WALL ST. J. (June 23, 2016), <http://www.wsj.com/articles/merrill-lynch-to-pay-415-million-to-settle-sec-accounts-probe-1466693817> [https://perma.cc/4S6R-E37C].

²⁷² Jesse Westbrook, *BofA Executive Spared Any Fine After Bank's \$415 Million Penalty*, 49 SEC. REG. & L. REP. (BNA) 1457 (Sept. 18, 2017).

pay the SEC \$13 million to settle claims that it failed to file reports of suspicious activities in customer accounts.²⁷³

Citigroup paid \$180 million to settle SEC claims for misleading investors about the safety of two hedge funds it was operating before the Financial Crisis.²⁷⁴ Citigroup paid an additional \$5 million to settle SEC charges over failing to protect the confidentiality of customer trading.²⁷⁵ In another settlement, Citigroup agreed to pay \$18.3 million to settle SEC claims involving systems errors that resulted in overbilling investment advisory clients. Citigroup also agreed in a settlement with the NYAG to repay those clients \$22.5 million. Morgan Stanley agreed to pay \$13 million to settle SEC charges over similar conduct.²⁷⁶ Citigroup and Morgan Stanley each agreed to pay about \$3 million to settle SEC charges over claims that they misled investors on the risks of trading a foreign currency product.²⁷⁷ Morgan Stanley agreed to pay \$8 million to settle SEC claims that it misled investors over investments recommended to advisory customers. In a rare instance, Morgan Stanley admitted to wrongdoing in that case, possibly because this was the second such case against the firm.²⁷⁸

Deutsche Bank paid the SEC \$55 million over claims that it misrepresented its financial results during the Financial Crisis.²⁷⁹ Deutsche Bank also agreed to pay more than \$40 million to settle claims by the SEC and NYAG that it misled

²⁷³ *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, Exchange Act Release No. 82382, Investment Advisors Act Release No. 4831, 2017 WL 6554178 (Dec. 21, 2017).

²⁷⁴ Press Release, U.S. Sec. & Exch. Comm'n, Citigroup Affiliates to Pay \$180 Million to Settle Hedge Fund Fraud Charges (Aug. 17, 2015), <https://www.sec.gov/news/pressrelease/2015-168.html> [<https://perma.cc/933N-JCDF>].

²⁷⁵ Michael Calia, *Citigroup Unit Pays Record Fine Over Alternative Trading System*, WALL ST. J. (July 25, 2014), <https://www.wsj.com/articles/citigroup-unit-settles-charges-over-subscriber-confidential-data-1406302178> [<https://perma.cc/338K-66DG>].

²⁷⁶ Gregory Mott, *SEC Fines Citigroup on Claims 60,000 Clients Were Overbilled*, BLOOMBERG (Jan. 26, 2017), <https://www.bloomberg.com/news/articles/2017-01-26/sec-fines-citigroup-on-claims-60-000-clients-were-overbilled> [<https://perma.cc/82V5-PLD7>].

²⁷⁷ *SEC Fines Citigroup, Morgan Stanley Over Forex Trading Program*, REUTERS (Jan. 24, 2017), <http://www.reuters.com/article/us-citigroup-morganstanley-sec-idUSKBN1582HM> [<https://perma.cc/Y34U-HJXK>].

²⁷⁸ Press Release, U.S. Sec. & Exch. Comm'n, Morgan Stanley Settles Charges Related to ETF Investments (Feb. 14, 2017), <https://www.sec.gov/news/pressrelease/2017-46.html> [<https://perma.cc/7RL8-DMTL>]; *Morgan Stanley to Pay \$8 Million to Settle SEC Charges*, REUTERS (Feb. 14, 2017), <http://www.reuters.com/article/us-morgan-stanley-usa-sec/morgan-stanley-to-pay-8-million-to-settle-sec-charges-idUSKBN15T29Z> [<https://perma.cc/QG4X-RWUJ>].

²⁷⁹ Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Deutsche Bank With Misstating Financial Reports During Financial Crisis (May 26, 2015), <https://www.sec.gov/news/pressrelease/2015-99.html> [<https://perma.cc/64TF-58MX>].

investors on the routing of their orders to dark pools.²⁸⁰ Goldman Sachs paid \$12 million to settle SEC claims that one of its employees improperly worked on a gubernatorial campaign in Massachusetts.²⁸¹

FERC was also back after the Financial Crisis, demanding additional hundreds of millions of dollars in payments from the large banks over charges of energy manipulations. JPMorgan agreed to pay FERC \$410 million for alleged manipulation of power markets in California and the Midwest from 2010 to 2012.²⁸² FERC ordered Barclays to pay a \$453 million fine for manipulating Western electricity prices during the period from November 2006 to December 2008.²⁸³

III. REFORM IS NEEDED

There is no question that the too big to jail regulatory model is now a centerpiece of financial regulation. The same large banks are being attacked by multiple regulators for the same conduct across a broad array of financial services in a never-ending stream of cases. For the most part, as this article has described in detail in Parts I and II, the only penalties in these actions have been large monetary settlements with the banks and criminal prosecution of only lower-level employees. These settlements make eye-popping headlines but punish no one except innocent shareholders, who must bear those costs, and employees who are laid off in order to return the banks to prosperity. This Part recommends abandonment of the “too big to jail” model in favor of one imposing personal responsibility on executives and creating a new single regulator.

²⁸⁰ Sarah N. Lynch, *Deutsche Bank to Pay More than \$40 million to Settle Dark Pool Cases*, REUTERS (Dec. 16, 2016), <http://www.reuters.com/article/us-deutsche-bank-settlement-idUSKBN145245> [https://perma.cc/6N8N-ELC3].

²⁸¹ That activity breached SEC “pay-to-play” rules, which prohibit the payment of benefits by brokerage firms to state officials who can direct municipal underwritings to the firm. Andrew Ackerman & Jessica Holzer, *Pay to Play’ Costs Goldman*, WALL ST. J. (Sept. 27, 2012), <http://www.wsj.com/articles/SB10000872396390443328404578022292515750144> [https://perma.cc/QM3K-6SZE].

²⁸² Brian Wingfield & Dawn Kopecki, *JPMorgan to Pay \$410 Million in U.S. FERC Settlement*, BLOOMBERG (July 30, 2013), <https://www.bloomberg.com/news/articles/2013-07-30/jpmorgan-to-pay-410-million-in-u-s-ferc-settlement> [https://perma.cc/X69S-ZHGG].

²⁸³ Press Release, Fed. Energy Regulatory Comm’n, FERC Orders \$453 Million in Penalties for Western Power Market Manipulation (July 16, 2013), <https://www.ferc.gov/media/news-releases/2013/2013-3/07-16-13.asp#.WGbVfLGZPUo> [https://perma.cc/EBD8-WLU8].

A. *The System Is Broken*

The failure to revoke the charters of larger banks is generally blamed on a “too big to fail (or jail)” economic concern (i.e., that putting large banks out of business could cause a global economic crisis). That is a valid consideration, as witnessed by the effects of the failure of Lehman Brothers in 2008 and the crisis that ensued. Nevertheless, such concerns do not respond to widespread criticism of the fact that no senior executives have been jailed in the wake of the Financial Crisis.²⁸⁴ Despite the payout of hundreds of billions of dollars in settlements by the banks they manage, no executives were charged with a crime.

The lack of more indictments is surprising in light of the billions of dollars paid by the large banks to settle regulators’ charges over RMBS abuses.²⁸⁵ If those abuses were actually of such a magnitude, surely the banks should have been put out of business. Moreover, the immensity of the fines would seem to indicate that senior management would have necessarily been involved or at least closed their eyes to the obvious, justifying their prosecution. Instead, the banks kept their charters and higher-level executives effectively gained immunity from civil and criminal charges through the payment of large corporate fines in settlements.²⁸⁶

The failure to prosecute executives at the too big to fail banks has “reinforced the perception of a divided U.S. justice system: One that treats the wealthy and influential with kid gloves and a second that has imprisoned more average citizens per capita than any other country on earth.”²⁸⁷ *The New York*

²⁸⁴ See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS, <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [<https://perma.cc/TB87-VKRE>].

²⁸⁵ Lynnley Browning, *Too Big to Tax: Settlements Are Tax Write-offs for Banks*, NEWSWEEK (Oct. 27, 2014), <http://www.newsweek.com/2014/11/07/giant-penalties-are-giant-tax-write-offs-wall-street-279993.html> [<https://perma.cc/J243-6Z27>]. See generally FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 391–408 (describing lending abuses).

²⁸⁶ A battle between editorial writers at the *Wall Street Journal* and the *New York Times* occurred over the reasons for the failure to prosecute senior executives. On the one hand, the *Wall Street Journal* editorial board asserted that there were no prosecutions of senior executives because “they haven’t committed any crimes.” On the other hand, a *New York Times* writer contends that, while there were crimes, they were not prosecuted for “mysterious and confounding” reasons. See William D. Cohan, *The Whale That Should Not Have Gotten Away*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/business/dealbook/the-whale-that-should-not-have-gotten-away.html?ref=dealbook> [<https://perma.cc/48TE-WZMK>] (objecting to the *Journal*’s position).

²⁸⁷ Rena Steinzor, *White Collar Crime Reset is Long Overdue*, 49 SEC. REG. & L. REP. (BNA) 160, 161 (Jan. 23, 2017).

Times even claimed that the 2016 Presidential election's outcome might have been due to the failure of the Obama administration to imprison any high ranking executives at the large banks.²⁸⁸ Evidence of popular sentiment that a crackdown on executives was needed was further demonstrated by a well-attended conference on white-collar crime in 2016 where speakers decried the lack of executive prosecutions. Bombastic attacks at that conference included a claim by one speaker that white-collar crime should be equated with rape.²⁸⁹

The criticism of the refusal to prosecute executives is driven by an assumption of their guilt even though there were no trials or even charges to determine culpability. Nevertheless, such an assumption is not entirely without logic. Why would the banks pay billions of dollars in settlements if massive fraud had not occurred? And, if the fraud was that massive, then how could it have been carried out without the knowledge of senior executives? These are all logical questions and assumptions, but there is more at play here than simple logic.

Financial crimes are complicated and difficult to prove. Complex financial transactions are often involved in these actions that look legitimate on their face and require financial sophistication to understand their workings, which prosecutors are wary of putting in front of a jury. Criminal intent on the part of executives is also difficult to prove because they are removed by several layers of management from the traders actually engaging in the alleged wrongdoing.²⁹⁰ Indeed, as described above, the government has had a notable lack of success in contested cases brought against even relatively low-level traders involved in the activities questioned by the government.

Even more difficult to prove would be cases brought against senior executives, who are insulated by several layers of management from the traders actually engaging in the misconduct. If forced to fight, the large banks and their executives could bring to bear massive resources to defend themselves in court. Losses in such high-profile cases would be

²⁸⁸ Gretchen Morgenson, *How Letting Bankers Off the Hook May Have Tipped the Election*, N.Y. TIMES (Nov. 11, 2016), http://www.nytimes.com/2016/11/13/business/how-letting-bankers-off-the-hook-may-have-tipped-the-election.html?_r=0 [<https://perma.cc/5VC8-LJJR>].

²⁸⁹ Anita Raghavan, *Law Enforcement 'Not Winning' War on White Collar Crime*, N.Y. TIMES (Sept. 6, 2016), <http://www.nytimes.com/2016/09/07/business/dealbook/law-enforcement-not-winning-war-on-white-collar-crime.html> [<https://perma.cc/PJ78-FS76>].

²⁹⁰ Gregory Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. L. REV. 335, 365 (2018) ("Simply put, the hierarchy and structure of corporations mean that most corporate acts occur at levels many steps removed from central management.").

harmful to the reputation of prosecutors; a government win could put a large bank out of business, but with serious adverse effects on shareholders, employees, and even the world economy.

Settlements imposing massive fines avoid those dangers and provide global headlines that bolster the careers of prosecutors and heighten the profile of their agencies. For example, Eliot Spitzer and Andrew Cuomo rode publicity from the cases they brought against the banks and other financial institutions as attorneys general to gain the governorship of New York.²⁹¹ The fact that the SEC and CFTC assessed fines totaling \$12.3 billion between 2005 and 2011 adds to the allegation that these fines are for publicity and not for effective enforcement. These eye-popping numbers make them look aggressive, but, notably, \$4.5 billion of that amount was never collected. Indeed, the CFTC collected only about 25 percent of the fines it assessed in settlements.²⁹² It seems that the deep pockets of the large banks are responsible for much of the settlement amounts that are actually collected.

The bank settlements have been further criticized for containing various gimmicks that allow the banks to reduce their payments. This includes provisions for “consumer relief” that often involved restructuring the banks’ own bad loans.²⁹³ The settlement funds were also being used to fund state and federal payouts that were outside the normal budget process. In New York, settlement funds received by the state from the large bank settlements were used, among other things, to build horse stables for the state fair with warm water washing stations, and to construct a concert stage and to provide rural Internet access.²⁹⁴ California was using settlement funds to shore up its underfunded state pension funds.²⁹⁵

Settlements obtained from the large banks have also been used by prosecutors to create “slush funds” for donations

²⁹¹ See FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81, at 703–04 (describing that background).

²⁹² LAW ENFORCEMENT, *supra* note 54, at 276.

²⁹³ Matthew Goldstein, *How ‘Consumer Relief’ After Mortgage Crisis Can Enrich Big Banks*, N.Y. TIMES (Mar. 17, 2017), https://www.nytimes.com/2017/03/17/business/dealbook/mortgage-crisis-consumer-relief.html?_r=0 [<https://perma.cc/P4UX-N6QZ>]; Gretchen Morgenson, *In a Mortgage-Crisis Settlement, Did a Bank Get off Easy?*, N.Y. TIMES, (Oct. 28, 2017), <https://www.nytimes.com/2017/10/27/business/credit-suisse-mortgage.html> [<https://perma.cc/EMP7-ZHSE>].

²⁹⁴ Christina Rexrode & Emily Glazer, *Big Banks Paid \$110 Billion in Mortgage-Related Fines. Where Did the Money Go?*, WALL ST. J. (Mar. 9, 2016), <http://www.wsj.com/articles/big-banks-paid-110-billion-in-mortgage-related-fines-where-did-the-money-go-1457557442> [<https://perma.cc/M5G2-ZL7S>] [hereinafter *Where Did the Money Go*].

²⁹⁵ *Id.*

to private non-profit, affordable housing advocates.²⁹⁶ Double credit was given for such donations against the banks' overall settlement obligations.²⁹⁷ The DOJ also deposits 3 percent of its settlement fines into an internal slush fund for uses unknown.²⁹⁸ In 2017, the Trump Administration began an investigation of the DOJ slush funds and ordered that the practice of requiring settlement payments to uninjured third parties be stopped.²⁹⁹ Apparently, the U.S. Attorney General did not like the allocation of these funds to opposing political groups.

Why do the banks so readily accede to these settlement demands? Senior executives at the large banks want to avoid career-ending indictments, years of litigation, and incarceration if charged and convicted. The large banks also face the loss of their franchise—through the revocation of their charters—if they are actually convicted of crimes, as was the case for Arthur Andersen. A settlement avoids those problems.

The large banks, with a few exceptions, were also allowed to settle the cases brought by regulators without admitting or denying the government's charges. Even for the few exceptional settlements that required the banks to plead guilty to charges, waivers were given from statutory disqualifications that follow criminal convictions so that the banks could continue their business as usual.³⁰⁰ Even admissions by the large banks in these settlements may be couched in ambiguity. For example, in the Wells Fargo settlement over the unauthorized creating of customer accounts, the bank publicly took "full responsibility"

²⁹⁶ For example, in one settlement with the government by BofA and Citigroup funds paid to community organizing groups was reported to have totaled \$3 billion. John Aldan Byrne, *Sessions Investigating 'Slush Fund' Used by Left-Wing Groups*, N.Y. POST (Aug. 5, 2017), <http://nypost.com/2017/08/05/sessions-investigating-slush-fund-used-by-left-wing-groups/> [<https://perma.cc/7SNA-LHNE>].

²⁹⁷ H.R. 5063, *Stop Settlement Slush Funds Act of 2016*, GOP.GOV, <https://www.gop.gov/bill/h-r-5063-stop-settlement-slush-funds-act-2016/> [<https://perma.cc/66LS-UYPJ>]; *Where Did the Money Go*, *supra* note 294. The DOJ's slush fund activities have been criticized because it has the effect of a tax that is used for purposes not appropriated by Congress. Legislation called the "Stop Settlement Slush Funds Act of 2016" has been introduced in Congress to forbid this practice. Bob Goodlatte, *Stop Settlement Slush Funds Act of 2016*, VOTESMART (Sept. 7, 2016), <https://votesmart.org/public-statement/1130345/stop-settlement-slush-funds-act-of-2016#>. WIERBLGZPeA [<https://perma.cc/R24F-D5YG>].

²⁹⁸ *Where Did the Money Go*, *supra* note 294.

²⁹⁹ Tom Schoenberg, *U.S. Ends Bank Penalty Practice Called 'Slush Fund' by GOP*, BLOOMBERG (June 7, 2017), <https://www.bloomberg.com/news/articles/2017-06-07/u-s-ends-bank-penalty-practice-called-slush-fund-by-gop> [<https://perma.cc/BHJ5-79KZ>]; Byrne, *supra* note 296.

³⁰⁰ David Henry & Sarah N. Lynch, *Update3-U.S. SEC Grants Waivers to Banks After Guilty Pleas*, REUTERS (May 20, 2015), <http://www.reuters.com/article/banks-forex-settlement-waivers-idUSL1N0YB1GA20150520> [<https://perma.cc/2M29-44Z8>]; *see also* Sean Forbes, *Banks Get Reason for Cheer Despite Naughty Affiliates*, 49 SEC. REG. & L. REP. (BNA) 32 (Jan. 2, 2017).

for the misconduct, but did not admit to the regulators' charges of fraud.³⁰¹ Such arrangements seek to prevent the settlement from being used as collateral estoppel by class action plaintiffs, which often piggyback on government charges. The absence of collateral estoppel allows the banks to more readily settle those class actions.³⁰²

The massive bank settlements usually contain provisions that allow the large banks to further temper their effects. The settlements are generally structured in a manner that allows much of the settlement amount to be treated as a deductible business expense. This substantially reduces the actual out-of-pocket costs of the settlements to the banks.³⁰³ Most of the post-Financial Crisis mortgage settlements amounts also contained provisions that required the banks to provide mortgage relief to consumers, providing another tax deduction for the banks.³⁰⁴

In sum, these large settlements produce media headlines, but are tempered by tax write-offs and are otherwise treated as a business expense. In exchange, the banks preserve their licenses and their executives are protected from prosecution. The result is that these prosecutions serve neither as a deterrent to future misconduct nor as punishment for culpable acts.

B. *The Functional Regulatory Model Is Not Functional*

Financial services regulation in the United States is conducted under a model called "functional" regulation. Under

³⁰¹ Michael Corkery, *Wells Fargo Offers Regret, But Doesn't Admit Misconduct*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/2016/09/10/business/dealbook/wells-fargo-apologizes-but-doesnt-admit-misconduct.html> [https://perma.cc/UH3W-TR94].

³⁰² Even so, the large banks are paying out more billions of dollars to settle such claims. For example, BofA agreed to a \$2.43 billion settlement of class action litigation over its disclosures concerning the acquisition of Merrill Lynch during the Financial Crisis. The plaintiffs' lawyers then sought \$177 million in attorney fees and costs from that settlement amount. BofA paid another \$600 million to settle a class action shareholder lawsuit brought by New York pension funds. *Bank of America and the Financial Crisis*, *supra* note 104. In June 2011, BofA agreed to pay an additional \$8.5 billion to settle claims brought by investors over mortgage-backed securities. Karen Freifeld, *Court Approves Bank of America's \$8.5 Billion Mortgage Settlement*, REUTERS (Jan. 31, 2014), <http://www.reuters.com/article/us-bankofamerica-mbs-settlement-idUSBREA0U1FH20140131> [https://perma.cc/A243-AX7P]. A class action involving claims of Libor manipulation was settled by Citigroup, Deutsche Bank, and HSBC Holdings for \$132 million in October 2017. Maria Armental, *Citigroup, Deutsche Bank, HSBC Agree to \$132 million Settlement in Libor Scandal*, WALL ST. J. (Oct. 13, 2017), <https://www.wsj.com/articles/citigroup-deutsche-hsbc-agree-to-132-million-settlement-in-libor-scandal-1507874502> [https://perma.cc/YV4F-J6QA].

³⁰³ Browning, *supra* note 285.

³⁰⁴ Deon Roberts, *Bank of America Could Get Tax Break on Part of \$16 Billion Mortgage Settlement*, CHARLOTTE OBSERVER (Aug. 15, 2014), <http://www.charlotteobserver.com/news/business/banking/article9151250.html> [https://perma.cc/NQ7U-8DWH].

this model one regulator is supposed to be responsible for regulating particular products in whatever market they are sold.³⁰⁵ For example, the SEC is tasked with regulating the offer and sale of securities, while the CFTC is assigned exclusive regulation of trading in futures contracts. As seen from the settlements announced in the aftermath of the Financial Crisis, however, this model of functional regulation has broken down completely. Multiple regulators at the federal level, and from the states and their municipalities, and even foreign governments, are regulating and massively fining the same conduct engaged in by the same small number of large banks.

This functional regulatory model does not serve well in a crisis. The Stock Market Crash of 1987 was a calamitous event that multiple functional regulators were unable to respond to or prevent.³⁰⁶ A Presidential Commission report on that event recommended consolidation of financial services regulation across markets for key regulatory requirements such as the regulation of trading in volatile markets and information systems.³⁰⁷ That recommendation was ignored. Instead, a Presidential Working Group (PWG) on Financial Market composed financial services regulators was created to coordinate regulation.³⁰⁸ It proved to be ineffective during the Financial Crisis of 2008 and served mostly to showcase the squabbling of its members with each other over how to deal with the crisis.³⁰⁹

Just prior to the Financial Crisis, the U.S. Department of the Treasury (Treasury) issued a report critical of the costs and effectiveness of functional regulation.³¹⁰ That report recommended the consolidation of financial services regulation by, among other things, creating a single business conduct regulator.³¹¹ As an interim step, the Treasury report urged the

³⁰⁵ *Regulating the Moneychangers*, *supra* note 2, at 848–63 (describing the functional regulation model and its breakdown).

³⁰⁶ See generally Jerry W. Markham & Rita McCloy Stephanz, *The Stock Market Crash of 1987—The United States Looks at New Recommendations*, 76 GEO. L.J. 1993 (1988) (describing that event).

³⁰⁷ PRESIDENTIAL TASK FORCE ON MKT. MECHANISMS, REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS vi (1988).

³⁰⁸ See generally Exec. Order No. 12631, 53 Fed. Reg. 9421 (Mar. 18, 1988), <https://www.archives.gov/federal-register/codification/executive-order/12631.html> [<https://perma.cc/G9YL-TVBD>] (executive order creating this group).

³⁰⁹ See FROM THE SUBPRIME CRISIS TO THE GREAT RECESSION, *supra* note 81 at 745, 486; FROM ENRON ERA SCANDALS TO THE SUBPRIME CRISIS, *supra* note 46, at 194 (describing some of those quarrels).

³¹⁰ U.S. DEPT. OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE (2008).

³¹¹ *Id.* at 139–44.

merger of the CFTC and SEC into a single agency.³¹² The Financial Crisis of 2008 derailed the implementation of the Treasury recommendation.

After the Financial Crisis, complaints were voiced by the SEC and others that the “Balkanized” financial services regulatory system had prevented effective regulation.³¹³ Instead of consolidated regulation, however, the Dodd-Frank Act only added more layers of regulation. It created a Financial Stability Oversight Council (FSOC) on which sit numerous state and federal financial services regulators. The FSOC is supposed to regulate large financial institutions that pose a systemic risk to the economy. In actuality, FSOC is only a more structured PWG and is unlikely to prove effective in preventing or dealing with future crises.³¹⁴ Dodd-Frank also added another redundant regulator, the CFPB.³¹⁵ This additional layer of regulation has only added more inefficiency and redundancy in regulation. In addition to the CFPB, overlapping investigations of the large banks are now being conducted at the federal level by an alphabet soup of regulators, including DOJ, SEC, CFTC, OCC, Fed, FDIC, Treasury, FinCEN, FHFA, NCUA, HUD, FTC, FERC, OFAC, and DOL.

The issue of consolidated business conduct needs to be revisited by both the Executive Branch and Congress.³¹⁶ As the Government Accountability Office (GAO) noted in 2016, fragmentation and overlap in the regulation of financial services “have created inefficiencies in regulatory processes, inconsistencies in how regulators oversee similar types of institutions, and differences in the levels of protection afforded

³¹² *Id.* at 106–11.

³¹³ DIANA B. HENRIQUES, A FIRST-CLASS CATASTROPHE: THE ROAD TO BLACK MONDAY, THE WORST DAY IN WALL STREET HISTORY 282 (2017).

³¹⁴ See generally Jerry W. Markham, *The Financial Stability Oversight Council—Risk Manager or Debating Society*, 33 J. FIN. TRANSFORMATION 3 (Dec. 2011) (describing the likelihood that FSOC will be ineffective); see also Donald N. Lamson & Hilary Allen, *The Financial Stability Oversight Council: Completely New or Déjà Vu?* BNA’S BANKING REP. (May 24, 2011), http://www.shearman.com/~media/files/newsinsights/publications/2011/05/financial-stability-oversight-council-all-new-or_/files/view-full-article-financial-stability-oversight-/fileattachment/fia0526110financialstabilityoversightcouncilalln_.pdf [<https://perma.cc/Q65N-QVGT>] (describing this body).

³¹⁵ See, e.g., *CFPB Takes Action Against Wells Fargo and JPMorgan Chase for Illegal Mortgage Kickbacks*, CFPB (Jan. 22, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-wells-fargo-and-jpmorgan-chase-for-illegal-mortgage-kickbacks/> [<https://perma.cc/MKH2-AQHA>].

³¹⁶ Unfortunately, the Trump Administration’s Treasury Department is only recommending that the CFTC and SEC harmonize their swap rules. The Treasury rejected proposals to merge the two agencies and apparently did not even consider the creation of a single regulator. U.S. DEPT OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS 127, 178 (2017).

to consumers.”³¹⁷ Reform is needed to stop this wasteful redundancy and the ongoing regulatory bank holdups. There can be no justification for expending taxpayer funds to fund investigations by multiple regulators of the same conduct by the same small number of large banks. By the same token, the banks should not be required to defend themselves against hordes of regulators investigating the same alleged misconduct.

If reform of the existing regulatory model is to be effective, regulation must be consolidated into a single regulator. That single regulator would be tasked with regulating, investigating, and sanctioning the abusive business conduct activities of financial institutions.

To avoid further unnecessary regulatory overlap, regulation at the state level also needs to be preempted. There is no justification for forty-nine state attorneys general, and other state connected institutions, including their pension funds (plus the District of Columbia), to be pursuing the same conduct by the same small number of banks. Indeed, as described above, even local prosecutors are now queuing up for handouts from the banks. Joint actions with foreign regulators are subject to the same criticism.

There is precedent for consolidating and moving regulatory jurisdiction from several regulators to a single regulator. In 2000, England combined the regulation of business conduct across all financial services into a single regulator, the Financial Services Authority (FSA). The FSA was much criticized for lax enforcement in the run up to the Financial Crisis and was split into two regulatory bodies in the wake of that event (i.e., the FCA and the Prudential Regulation Authority).³¹⁸ The FCA is responsible for policing abuses by all

³¹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-175, FINANCIAL REGULATION: COMPLEX AND FRAGMENTED STRUCTURE COULD BE STREAMLINED TO IMPROVE EFFECTIVENESS (2016), <https://www.gao.gov/assets/680/675400.pdf> [<https://perma.cc/9XFT-R7F8>]. The SEC under the Trump Administration has signaled that it is pulling back from its “broken windows” strategy of pursuing even minor violations. That agency has not indicated whether it will continue its too big to jail approach, but enforcement officials indicated that the agency would drop its nascent efforts to require admissions of wrongdoing in its settlement agreements. Dave Michaels, *SEC Signals Pullback From Prosecutorial Approach to Enforcement*, WALL ST. J. (Oct. 27, 2017), <https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200> [<https://perma.cc/ZM28-M7N5>]. The CFTC's collection of fines in the fiscal year ending September 30, 2017, totaled \$413 million, down from \$1.29 billion in the prior year. Gabriel T. Rubin, *CFTC Reports Steep Drop in Enforcement Actions and Fines*, WALL ST. J. (Nov. 22, 2017), <https://www.wsj.com/articles/cftc-reports-steep-drop-in-enforcement-actions-and-fines-1511384084> [<https://perma.cc/Y7QB-33AQ>]. These signals are hopeful, but the next administration is free to resume the too big to jail model unless the structural reforms recommended in this article are made.

³¹⁸ FSA, <http://www.fsa.gov.uk> [<https://perma.cc/V8Y3-92C4>].

financial institutions. That regulator has aggressively fulfilled that role in recent years.³¹⁹

Another example of consolidated regulation is the CFPB, which assumed responsibility under the Dodd-Frank Act for financial service regulations directed at protecting small consumers of credit. “The CFPB was created to provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace. Before, that responsibility was divided among several agencies.”³²⁰ That consolidation should be extended across all financial services, including the securities and commodity markets. To be sure, there has been much criticism of the CFPB’s lack of accountability.³²¹ In order to address that very valid concern, the new single regulator should be headed by a five-member commission appointed by the President, with the advice and consent of the Senate. This is the regulatory structure now used at the CFTC and SEC and has proved to be workable and could be readily adopted for a single regulator. The new single regulator, however, should also be accountable to DOJ. This will allow the single regulator and DOJ to coordinate decisions on whether violations should be prosecuted civilly or criminally, not both.

C. *Restrictions Need to Be Imposed on the New Single Regulator*

More restrictions are needed to stop the practice of imposing massive fines in exchange for preserving business licenses and executive immunity. A much-overlooked fact is that the costs associated with these monstrous payouts are borne in the first instance by the banks’ innocent shareholders. Those shareholders are the owners of the assets from which the settlements are paid.³²² Between 2008 and 2013, the litigation

³¹⁹ See David N. Kirk, *UK: Financial Conduct Authority Enforcement Performance*, MONDAQ (May 20, 2015), <http://www.mondaq.com/x/398644/White+Collar+Crime+Fraud/Financial+Conduct+Authority+Enforcement+Performance> [https://perma.cc/TPE7-W26P].

³²⁰ *About Us*, CFPB <http://www.consumerfinance.gov/about-us/the-bureau/> [https://perma.cc/44VA-2M9A].

³²¹ See, e.g., Ramesh Ponnuru, *Consumer Financial Protection Bureau Proves Its Critics Right*, AM. ENTERPRISE INST. (Feb. 25, 2016), <https://www.aei.org/publication/consumer-financial-protection-bureau-proves-critics-right/> [https://perma.cc/9BLA-SYAW]; see also *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (holding that the CFPB regulatory structure was unconstitutional as an agency unsupervised by the executive branch).

³²² In 2006, the SEC established settlement guidelines that required the agency to consider the effects of corporate penalties on shareholders, but that policy was abandoned in the wake of the Financial Crisis. Rob Tricchinelli, *High-Dollar*

expenses of the six largest banks reached a level of \$51 million per day, which was “more than all dividends paid to shareholders in the past five years” and enough to swallow all earnings by those banks in 2012.³²³ One \$13 billion settlement by JPMorgan was equal to over 60 percent of its profits in the prior year.³²⁴ Almost all of Barclays’ profits over a five-year period were eliminated as the result of fines and settlements.³²⁵ The \$7.2 billion dollar settlement by Deutsche Bank at the end of 2016³²⁶ resulted in its reporting a \$2 billion fourth quarter loss to shareholders.³²⁷

The employees of large banks are another group of innocents affected adversely by these massive settlements. In 2011, tens of thousands of employees at the large banks were laid-off in the wake of the Financial Crisis to compensate for revenue losses associated with regulatory actions. Wall Street firms eliminated more than 75,000 jobs. For example, in that year, BofA cut 30,000 positions, Citigroup eliminated 5,000 jobs, and Morgan Stanley laid off 4,000 employees.³²⁸ The layoffs continued in the following years. The four largest banks eliminated almost 30,000 jobs in 2012. JPMorgan laid off 17,000 employees in 2013.³²⁹ Goldman Sachs announced in 2016 that it was cutting 1,700 staff positions, bringing the overall reduction of the Goldman Sachs workforce to 10,000 employees in the years following the Financial Crisis.³³⁰ BofA

Enforcement Cases From SEC Could Dip Under New Leaders, 49 SEC. REG. & L. REP. (BNA) 14 (Jan. 2, 2017). Legislation has been introduced in Congress to require SEC economists to consider the effects of settlements on corporation shareholders. *Id.*

³²³ Donal Griffin & Dakin Campbell, *U.S. Bank Legal Bills Exceed \$100 Billion*, BLOOMBERG (Aug. 28, 2013), <https://www.bloomberg.com/news/articles/2013-08-28/u-s-bank-legal-bills-exceed-100-billion> [<https://perma.cc/WL5Z-97NZ>].

³²⁴ Nick Summers, *JPMorgan's \$13 Billion Settlement: Jamie Dimon is a Colossus No More*, BLOOMBERG (Oct. 28, 2013), <https://www.bloomberg.com/news/articles/2013-10-24/jpmorgans-13-billion-settlement-jamie-dimon-is-a-colossus-no-more> [<https://perma.cc/W4B7-SQ7K>].

³²⁵ Zeke Faux & Hugh Son, *Why Barclays CEO Staley Opted for War When Dimon Chose Surrender*, 49 SEC. REG. & L. REP. (BNA) 17 (Jan. 2, 2017).

³²⁶ See *supra* notes 111–112 and accompanying text (describing that settlement).

³²⁷ Silvia Amaro, *Deutsche Bank Posts \$2 Billion Loss in Fourth Quarter as Litigation Costs Weigh*, CNBC, (Feb. 2, 2017), <http://www.cnbc.com/2017/02/02/deutsche-banks-full-year-net-loss-narrows-to-146-billion-in-2016-versus-73-billion-in-2015.html> [<https://perma.cc/YN67-GXT9>].

³²⁸ Maureen Farrell, *Wall Street Prepares for More Layoffs*, CNN MONEY (Aug. 15, 2012), <http://money.cnn.com/2012/08/15/investing/wall-street-layoffs/> [<https://perma.cc/WSS7-SR6Z>].

³²⁹ Dan Fitzpatrick, *J.P. Morgan Pulls Belt Tight—Biggest U.S. Bank by Assets Plans to Cut 17,000 Jobs As Trend Accelerates*, WALL ST. J. (Feb. 27, 2013), <http://www.wsj.com/articles/SB10001424127887324338604578327983190210680> [<https://perma.cc/282M-GNGD>].

³³⁰ Stephen Gandel, *Goldman Sachs Announces Its Biggest Layoffs Since Financial Crisis*, FORTUNE (July 19, 2016), <http://fortune.com/2016/07/19/goldman-sachs-layoffs-3/> [<https://perma.cc/2C3V-YKYK>].

also announced in 2016 that it was planning to cut another 8,000 jobs.³³¹ Deutsche Bank announced shortly after its \$7.2 billion mortgage settlement in December 2016 that it was laying off several hundred employees.³³²

Despite the effect on shareholders and employees, the new single regulator will very likely be tempted to boost its image through the imposition of massive fines against the banks. That temptation should be removed. Responsibility for wrongdoing should be shifted from the shareholders and employees to individual managers. Therefore, restrictions on that regulator's ability to fine financial institutions are needed. Financial institutions should be spared from large regulatory fines, unless it is shown through an actual trial that widespread misconduct was authorized and conducted with the knowledge of top-level management. That is, there should be no fines on corporations unless senior executives have been prosecuted and found guilty of a crime in connection with their management responsibilities. Even then, corporate fines should be limited to a few million dollars, which should be sufficient to signal to the board of directors that increased oversight is needed, while preserving the assets of innocent shareholders. This limitation would also reflect the reality that large fines paid in settlements do not deter financial misconduct.

Restrictions on a single regulator are also needed to assure fairness in its civil actions that seek imposition of quasi-criminal penalties, such as fines and business bars. Among other things, the burden of proof should be increased. This will assure protection from assessing criminal-like sanctions using the comparatively low standard of proof in civil actions brought by the SEC and CFTC. The present preponderance of the evidence standard used in those civil proceedings should be increased to the beyond a reasonable doubt standard used in criminal cases. At the very least, a clear and convincing evidence test should be applied, rather than the existing "more likely than not" tests.³³³ This higher standard would reflect that

³³¹ Mike Snider, *Bank of America Plans More Job Cuts*, USA TODAY (June 15, 2016), <http://www.usatoday.com/story/money/2016/06/15/report-bank-america-plans-more-job-cuts/85918494/> [<https://perma.cc/WAF4-WLKY>].

³³² Jenny Strasburg, *Deutsche Bank Set to Slash Equities, Fixed-Income Jobs; CEO John Cryan Has Said Around 9,000 Employees To Go In Broad Cost-Cutting Drive*, WALL ST. J. (Feb. 3, 2017), <https://www.wsj.com/articles/deutsche-bank-set-to-slash-equities-fixed-income-jobs-1486122004> [<https://perma.cc/5MHN-2RAM>].

³³³ See Jerry W. Markham, *Regulating the U.S. Treasury Market*, 100 MARQ. L. REV. 185, 226 (2016) (discussing the preponderance of the evidence standard versus the clear and convincing standard in establishing violations) [hereinafter *Regulating the U.S. Treasury Market*].

disciplinary actions brought by financial services regulators are fraud based and punitive in nature. Such actions typically require higher standards of proof and intent than non-fraud and non-punitive actions.³³⁴

Additional restrictions on the single regulator are needed to prevent it from continuing existing regulatory abuses. A much-criticized practice at the SEC is the use of its internal administrative courts to sanction violations. Those proceedings are objectionable because the administrative law judges presiding over those proceedings work for the SEC and there is no jury trial available. The SEC is thus judge, jury, and prosecutor in these one-sided actions.³³⁵ The single regulator should be restricted from using such administrative proceedings to adjudicate violations.³³⁶

Still another area of concern for the creation of a single regulator are the costs associated with the adoption of business conduct rules for the financial institutions that it will regulate. There has been much criticism, and more than a few court cases finding, that such rules are being adopted by the SEC and other agencies without regard to the costs they impose.³³⁷ To avoid that concern, the single regulator should be required to conduct rigorous economic cost/benefit analyses before adopting any rules.³³⁸

CONCLUSION

It is time to end the “too big to jail” regulatory model in which large banks pay hundreds of billions of dollars to settle multiple charges brought in relation to the same conduct by a

³³⁴ For example, in *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680 (1980), the Supreme Court held that the SEC was required to prove scienter, and not mere negligence, in regulatory actions brought under its most broadly applied antifraud rule (17 C.F.R. § 240.10b-5). More recently, the Supreme Court held in *Kokesh v. Sec. & Exch. Comm'n*, 137 S. Ct. 1635 (2017), that SEC disgorgement remedies—a requirement that a defendant return ill-gotten gains—while remedial in nature, nevertheless acted as a “penalty” and was subject to the federal five-year statute of limitations for government actions seeking penalties (28 U.S.C. § 2462).

³³⁵ *Regulating the U.S. Treasury Market*, *supra* note 333, at 225–27 (proposing restrictions on internal administrative proceedings brought by a consolidated regulator).

³³⁶ The circuit courts are now split over the issue of whether agency ALJs should have the power to punish violators in administrative proceedings. See Rob Tricchinelli, *D.C. Cir. Deadlocks on Challenges to SEC Judges*, 49 SEC. REG. & L. REP. (BNA) 1058 (July 3, 2017) (describing these decisions).

³³⁷ See generally Rachel Benedict, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278 (2012) (article criticizing cases setting aside SEC rules on cost-benefit grounds).

³³⁸ See John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L. J. 882 (2015) (article discussing debates over cost benefit analysis).

host of state, federal, and even foreign regulators. The regulatory model applied in the post-Financial Crisis cases is neither effective nor appropriate. There is very little support by anyone for the reasoning behind this regulatory approach. As described above, many critics are concerned that the banks are charged with widespread fraud but are allowed to continue business as usual and no senior executives are jailed. Other critics charge that the settlements are simply a form of official larceny that the banks must accede to in order to retain their charters and that the settlements only hurt innocent shareholders and employees.

Regulation of financial services should be consolidated into a single federal regulator, and state regulation should be preempted. This would stop the multiple, duplicative regulatory actions that are now common for the large banks. This single regulator should also be restricted in its ability to levy large fines, even in a settlement, in the absence of demonstrated culpability at the executive level. These changes should remove the incentives continuation of the too big to jail regulatory model and focus the attention of regulators on those actually responsible for misconduct.

