

## Increasing Corporate Penalties and Risk Management (Update to “Seven Corporate Sins as a Source of Government Revenue and Economic Stimulus”)<sup>1</sup>

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### Introduction

Soft commodity prices, divergent monetary policies across major economies, high unemployment rates and weak world trade have all conspired to slow down global economic recovery over the past seven years. Consequently, governments have had to cut spending as future revenues remain uncertain. This has led governments to look for new sources of revenues. One unconventional source of revenue that governments have pursued has been fines and settlements levied by regulatory authorities for corporate malfeasance.

The purpose of this paper is to show that governments are becoming increasingly more aggressive in investigating and punishing corporate malfeasance. This has resulted in larger and more frequent fines which now account for a significant portion of government revenue. This paper examines recent fines that have been levied by regulatory agencies for violations of any of the seven ‘corporate sins’ of: corruption and bribery, money-laundering, sanctions-breaking, conspiracy, tax evasion, misuse of client property, and mistreatment of customers.

To avoid stiff fines, corporations must remain ever vigilant and maintain robust compliance programs. Furthermore, many of the ‘corporate sins’ discussed in this paper can result in claims against directors and officers directly. Recent cases have given regulators more experience in prosecuting directors and officers and growing international cooperation has provided regulators with greater access to information to assist in their prosecutions. Consequently, directors, officers and their insurers should think critically about their business

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<sup>1</sup> This paper is an update to “*seven corporate sins as a source of government revenue and economic stimulus*” by Frank Palmay and Candice Chan-Glasgow (April 2013).

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operations to ensure that they have not committed, or are about to commit, any ‘corporate sins.’

## Part I – Increasing Regulatory Aggressiveness

### Background

The global financial crisis wreaked havoc on world economies. During the crisis and the ensuing recession, governments deployed large fiscal packages to stimulate their economy leading to dramatic increases in public indebtedness. In the U.S. and U.K. alone, governments sunk U.S. \$7 trillion into financial institutions.<sup>3</sup> Governments are now faced with paying down the debt incurred during the crisis in addition to challenges from an uneven economic recovery and obstacles such as aging populations or declining commodity prices. As such, governments have turned to new and innovative methods to raise funds including prosecuting civil actions more frequently than ever before, levying larger and more frequent fines for corporate malfeasance, and creating incentive programs for corporate whistleblowers.<sup>4</sup>

### Rising Regulatory Aggressiveness

Since the financial crisis of 2009, there has been a clear trend towards larger fines for corporate malfeasance. As can be seen from the below sample of major fines in the U.S., since 2012, U.S. regulators have been able to levy over \$10 billion of fines annually from only five cases a year.

Year	Entity	Fine
2012-2013	British Petroleum	\$4 billion
	HSBC	\$1.9 billion
	GlaxoSmithKline	\$3 billion
	UBS	\$1.5 billion
	Standard Charter	\$667 million
		Total: \$11.067 billion

<sup>3</sup> Augusto Lopez-Claros, “Policy Research Working Paper 6805 - Fiscal Challenges after the Global Financial Crisis – A Survey of Key Issues” The World Bank Development Economics Global Indicators Group (March 2014).

<sup>4</sup> Gary S Lichtenberg and Ariel A Neuman, “United States: white-collar criminal defence” GIR Insight (September 2014).

Year	Entity	Fine
2013-2014	JP Morgan Johnson and Johnson Deutsche Bank SAC Capital Royal Bank of Scotland	\$13 billion \$2.2 billion \$1.9 billion \$1.8 billion \$610 million <sup>5</sup>  Total: \$19.51 billion
2014-2015	Bank of America Toyota BNP Paribas Credit Suisse Alstom S.A.	\$16.65 billion \$1.2 billion \$8.9 billion \$2.6 billion \$772 million  Total: \$30.122 billion

Furthermore, governments have taken proactive steps to support increasing regulatory aggressiveness by enacting tougher legislation on white collar crime and awarding broader investigatory and penalty powers to regulatory agencies. For example, the U.K. enacted its own version of the *Foreign Corrupt Practices Act* ("FCPA"), the *UK Bribery Act*, which came into effect on July 1, 2011. Additionally, in April 2013, the U.K. overhauled its financial regulatory system by separating the Financial Services Authority ("FSA") into the Prudential Regulation Authority and Financial Conduct Authority in order to have better oversight over market conduct in the financial services industry and prudential regulation of financial institutions. Similarly, the U.S. enacted the *Foreign Account Tax Compliance Act* ("FATCA") to grant the Internal Revenue Service ("IRS") broader investigatory powers in pursuing tax evaders.

Evidence of U.S. government's aggressiveness can be seen by how the U.S. deployed the *False Claims Act* in 2014 to recover an all-time record of \$5.69 billion (and an aggregate recovery since 2009 of \$22.75 billion)<sup>6</sup>, the lifting of the three year hiring freeze at the U.S. Attorney's Office in 2014,<sup>7</sup> and comments by the chairwoman of the SEC in 2013 that certain defendants will no longer be allowed to settle actions without admitting or denying wrongdoing. Additionally, U.S. regulatory agencies are employing increasingly more aggressive tactics in their investigations, which were previously reserved for pursuing organized crime and

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<sup>5</sup> Please note that this fine was split between U.S. and UK regulators.

<sup>6</sup> Office of Public Affairs, "*Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014*" Department of Justice (November 20, 2014).

<sup>7</sup> *Supra*, note 4.

sophisticated narcotics cases. For example, the investigation into senior Petro-Tiger executives for FCPA violations led to the general counsel wearing a wire to record future conversations.<sup>8</sup>

Lastly, as corporations become increasingly global, regulators have begun to cooperate on an international scale. The LIBOR scandal prompted regulators to work together to investigate the depth of the benchmark manipulation. This led to the discovery of manipulation of other benchmark rates including foreign exchange rates. Another area where regulators are working together is in cross-border tax enforcement. This has been facilitated by the recent U.S. enactment of the FATCA.

Overall, it has become apparent that there is a clear trend towards increasing regulatory aggressiveness and larger penalties for violations of 'corporate sins'.

## Part II –Examples of Regulatory Penalties

Below are examples of recent regulatory penalties levied against corporations. A more comprehensive and descriptive list of recent regulatory penalties can be found in Appendix I.<sup>9</sup> These recent penalties have been arranged according to each 'corporate sin' to give the reader a sense of the magnitude and aggressiveness with which regulators will pursue organizations for each 'corporate sin.'

### Sin #1: Corruption and Bribery

There has been a number of high profile cases recently where companies accused of corruption or bribery were fined by regulatory agencies. Despite a slowdown in the number of bribery cases concluded globally since 2011, overall, the number of bribery cases concluded has increased dramatically since 2000.<sup>10</sup> Similarly, despite a slowdown since 2011, the total amount imposed in combined monetary sanctions for bribery cases globally has also increased dramatically since 2000.<sup>11</sup>

The largest penalties for corruption and bribery have been imposed by the United States government under the FCPA, but other governments have also levied large fines for corruption and bribery under equivalent legislation, such as UK's *Bribery Act, 2010* and Canada's *Corruption of Foreign Public Officials ("CFPOA") Act*. Under the anti-bribery legislation, the

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<sup>8</sup> John F. Savarese, "*White Collar and Regulatory Enforcement: What to Expect in 2015*" Harvard Law School Forum on Corporate Governance and Financial Regulation (February 5, 2015).

<sup>9</sup> Please note that some of the case descriptions are highly similar or identical to the descriptions provided in this section of the paper.

<sup>10</sup> See Appendix II: Figure 1.

<sup>11</sup> See Appendix II: Figure 2.

proceeds from the fines go directly to government accounts. For example, under the FCPA, fines and penalties for corruption and bribery are paid to the United States Department of Justice (“DOJ”) and the United States Securities and Exchange Commission (“SEC”).

From 2002 to 2014, the DOJ and SEC imposed some \$4.4 billion in fines related to FCPA violations. The three largest FCPA financial settlements alone have resulted in about \$2.15 billion in fines and penalties. These include fines against: Siemens AG (\$800 million),<sup>12</sup> Alstom S.A. (\$772 million) and KBR, Inc. and Halliburton Co. (\$579 million), whose cases are described in more detail below.

### *Siemens AG*

Over a span of 6 years, Siemens AG paid \$805 million in corrupt payments to foreign officials across the globe to secure advantageous business contracts. As a result of a DOJ and SEC investigation, Siemens AG and three of its subsidiaries pled guilty in December 2008 to violations of the FCPA and agreed to pay a combined \$450 million fine to the DOJ. Siemens AG further agreed to pay a \$350 million disgorgement of profits to the SEC. The \$800 million in combined penalties is the largest FCPA monetary sanction levied on a single company to date. The company also agreed to pay €395 million to settle charges by the Munich Public Prosecutor’s Office, on top of the €201 million it had already paid in connection with similar charges. Furthermore, seven former executives were prosecuted for their involvement in the bribery with two being convicted and fined, three settling their case and two having their case dismissed.<sup>13</sup>

### *Alstom S.A.*

In a long-running scheme, Alstom S.A. (“Alstom”) made corrupt payments of more than \$75 million to government officials and employees to secure \$4 billion in power, grid and transportation projects for state-owned entities around the world, resulting in a profit to Alstom of approximately \$300 million.<sup>14</sup> After an investigation, Alstom pled guilty on December 22, 2014 to violating the FCPA and agreed to pay a \$772 million fine.

### *KBR, Inc. and Halliburton Co.*

Kellogg Brown & Root LLC (“KBR”) made over \$180 million in corrupt payments to Nigerian officials to secure \$6 billion in construction contracts over a ten year period. On February 11, 2009, KBR pled guilty to bribing Nigerian government officials and agreed to a \$402 million

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<sup>12</sup> These figures do not include the €596 million Siemens AG also paid to the German authorities.

<sup>13</sup> Russ Syan, “*Archive for the ‘Siemens Argentina Enforcement Action’ Category*” FCPA Professor (February 10, 2014).

<sup>14</sup> Office of Public Affairs, “*Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges*” Department of Justice (December 22, 2014).

criminal fine payable to the DOJ. In addition, Haliburton Co. & KBR's parent companies reached a settlement with the SEC to pay \$177 million in disgorgement of profits.

## Sins #2 and 3: Money-Laundering & Sanctions-Breaking

Two other corporate sins recently in the news are money-laundering and sanctions-breaking. The examples below are a few of the recent financial settlements in the area, totaling over \$10 billion in penalties and forfeitures.

### *BNP Paribas*

On June 30, 2014, BNP Paribas entered a guilty plea for conspiring to violate the *International Emergency Economic Powers Act* ("IEEPA") and *Trading with the Enemy Act* ("TWEA") by processing billions of dollars of transactions through U.S. financial institutions on behalf of Sudanese, Iranian and Cuban entities subject to U.S. economic sanctions for terrorism or genocide.<sup>15,16</sup> In particular, U.S. authorities found that BNP Paribas facilitated transactions from and to sanctioned countries by stripping information from wire transfers so they could pass through the U.S. financial system without raising any flags. It is estimated that more than \$190 billion in transactions were concealed between 2002 and 2012.<sup>17</sup> As a result, U.S. enforcement officials fined BNP Paribas an unprecedented \$8.97 billion. Additionally, U.S. authorities imposed an additional penalty by suspending the bank's ability to make dollar payments to its New York customers. Interestingly, approximately \$2.24 billion is set to go to the New York's Department of Financial Services as a civil penalty.<sup>18</sup>

### *HSBC*

On December 11, 2012, the DOJ announced that it had reached a settlement agreement with HSBC Holdings and HSBC Bank USA. As part of the settlement, HSBC admitted to having an ineffective anti-money laundering program that allowed \$881 million of drug money in Mexico and Colombia to be laundered through the U.S. financial system. It also admitted to facilitating approximately \$660 million in transactions with the economically sanctioned countries of Iran, Cuba, Sudan, Libya and Burma. The settlement includes a \$1.92 billion fine, comprised of a \$1.256 billion forfeiture and \$665 million in civil penalties to various U.S. regulators.

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<sup>15</sup> Office of Public Affairs, "*BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions*" Department of Justice (June 30, 2014).

<sup>16</sup> Michael Stothard and Martin Arnold, "*BNP Paribas made ethical and legal mistakes, says chairman*" Financial Times (February 15, 2015).

<sup>17</sup> Joseph Ax and Aruna Viswanatha, "*France's BNP to pay \$9 billion in U.S. sanctions case, face dollar-clearing ban*" Reuters (June 30, 2014).

<sup>18</sup> Ibid.

### *ING Bank N.V.*

On June 12, 2012, ING Bank N.V. reached an agreement with the Office of Foreign Assets Control (“OFAC”) and a deferred prosecution agreement with the DOJ and the New York County District Attorney’s Office to violating the IEEPA and TWEA. From the early 1990s until 2007, the bank illegally facilitated more than \$2 billion in transactions through the U.S. financial system on behalf of Cuban and Iranian entities. Transactions with these economically sanctioned countries were contrary to the IEEPA and the TWEA. As a result, ING Bank N.V. was required to forfeit \$619 million to the government authorities.

## Sin #4: Conspiracy

Two major global scandals have occurred recently regarding conspiracies to rate fix that have implicated a number of multi-national banks and generated billions for governments worldwide through fines.

### *The LIBOR Scandal*

The London Interbank Offered Rate (“LIBOR”) scandal was thrust into the spotlight in 2012. The scandal involved banks manipulating the LIBOR rate from 2005 through 2009 to profit from trades or to appear more creditworthy. LIBOR underpins \$360 trillion of loans and financial contracts and rigging the rates have affected millions of consumers and the amount of interest they paid during this time.

On June 27, 2012, Barclays announced that it would pay \$453 million in fines to regulators in the U.S. and U.K. for its involvement in the scandal. On December 19, 2012, UBS became the second bank to admit to wrongdoing in the scandal and announced that it would pay a \$1.5 billion fine to regulators in the U.S., U.K., and Switzerland. On February 6, 2013, The Royal Bank of Scotland (“RBS”) was fined \$610 million by U.S. and U.K. regulators, although it received a slight discount (30%) because it agreed to settle at an early stage of the investigation. Furthermore, on December 4, 2013, the EU antitrust regulator fined six financial institutions (Deutsche Bank, RBS, Citigroup, Société Générale, JP Morgan, and brokerage RP Martin) U.S. \$2.3 billion for rigging financial benchmarks (including LIBOR, the Tokyo interbank offered rate and the euro area equivalents).<sup>19</sup>

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<sup>19</sup> Reuters, “*Libor scandal: EU slaps six banking giants with \$2.3 billion fine, biggest penalty yet for rigging lending benchmarks*” National Post (December 4, 2013).

### *The Forex Scandal*

Following the LIBOR scandal, another scandal came to light involving many of the same major banks as the LIBOR scandal. The banks were caught colluding from 2008 to 2013 to manipulate exchange rates.

As a result of this scandal, regulators hit six major banks with fines totaling approximately \$4.3 billion. Specifically, JP Morgan Chase and Citigroup each paid \$1.0 billion, UBS \$799 million, Royal Bank of Scotland \$634, HSBC \$618 million, and Bank of America \$250 million to regulators in the United States, Great Britain and Switzerland. Interestingly, five of the banks received a 30% discount on their fines by regulators for settling early. Additionally, the U.S. Office of the Comptroller of the Currency ordered the same five banks to pay an extra \$1.48 billion and the Swiss regulator FINMA ordered UBS to pay \$139 million.

### Sin #5: Tax Evasion

This section will focus on the fines and penalties against multi-national financial institutions who have aided corporations or individuals with evading tax. This issue has become a government priority lately, particularly for the IRS which is focused on offshore tax evasion. For example, FATCA gives the IRS new powers to increase compliance by U.S. taxpayers concealing assets overseas, and the U.S. recently issued new rules to make it tougher for corporations to evade U.S. tax through a 'corporate inversion.'<sup>20</sup> Below is a list of some of the more recent charges and penalties against financial institutions and a brief discussion on the Lichtenstein Disclosure Facility.

Recently, a number of Swiss Banks have been fined for tax evasion or are currently under investigation for tax fraud. For example, On May 19, 2014, Credit Suisse pled guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS.<sup>21</sup> Similarly, in January 2013, Swiss bank Wegelin closed down after pleading guilty to assisting Americans evade taxes on \$1.2 billion over a period of almost ten years and accepting a \$57.8 million fine.<sup>22</sup> Other banks that have had crackdowns or are under investigation recently include UBS and Julius Baer.

HSBC has been in the spotlight for tax evasion. In 2008, a former HSBC employee copied the account information of more than 100,000 customers of the Swiss branch of HSBC and

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<sup>20</sup> Dave Johnson, "[Obama issues rules to crack down on overseas corporate tax evasion](#)" Occupy.com (September 25, 2014).

<sup>21</sup> Office of Public Affairs, "[Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns](#)" Department of Justice.

<sup>22</sup> "[Swiss Bank Wegelin to Close after US Tax Evasion Fine](#)" (4 January 2013).



subsequently sold it to the French government resulting in the exposure of rampant tax evasion at HSBC. Recently, HM Revenue and Customs issued a statement that since April 2010, the British government managed to secure £135 million in tax, interest and penalties from people on the HSBC list. Another result of these activities coming to light is tax payers making voluntary disclosure to avoid penalties and possible prosecutions. This provides an additional source of revenue to governments.

Additionally, foreign nations around the world have put Lichtenstein under pressure to disclose tax evaders following the 2008 Lichtenstein bank LGT affair where an employee copied banking information of 5,800 clients and sold the information to German authorities. As a result of the affair and subsequent international pressure the Liechtenstein Disclosure Facility (“LDF”) plan was reached in 2009 in the United Kingdom. Under this plan, Britons who have unpaid U.K. tax liabilities from assets or investments in Liechtenstein bank accounts can “legitimize” their previous actions by coming forward and paying reduced penalties. The LDF runs from September 1, 2009, until April 5, 2016. As of June 2012, over 2,400 people have registered under the LDF and have paid back £363 million in taxes. HM Revenue and Customs estimates that up to £3 billion will be paid back under the LDF.<sup>23</sup>

## Sin #6: Misuse of client property

This ‘corporate sin’ relates to the handling of unclaimed property. Misuse of client property keeps assets from the government and prevents governments from being able to disburse the assets back to its citizens.

### *U.S. Death Register*

States, federal agencies and other organizations in the United States are holding over \$58 billion in unclaimed property. Of that total, about \$41.7 billion is being held by various states.<sup>24</sup> According to the Pension Benefit Guaranty Corp., over \$300 million in pension benefits is owed to beneficiaries and the average unclaimed pension benefit is \$9,100.<sup>25</sup> If disbursed to the rightful beneficiaries, this large amount of unclaimed property could act as an economic stimulus by putting additional money into the hands of consumers. Where the money is not claimed by the entitled beneficiaries, it acts a source of revenue for the state. For example, unclaimed property is Delaware’s third largest source of revenue. Between 2009 and 2012, Delaware raised \$1.24 billion in revenue from unclaimed property.<sup>26</sup>

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<sup>23</sup> “£3bn Due in Liechtenstein Tax Plan” The Telegraph (12 June 2012).

<sup>24</sup> Melanie Hicken, “\$58 Billion Unclaimed: Is Some of it Yours?” CNN Money (27 January 2013).

<sup>25</sup> Ibid.

<sup>26</sup> Vipal Monga, “Unclaimed? Delaware Gets It” The Wall Street Journal (29 January 2013).

States periodically conduct audits to ensure companies are in compliance with the unclaimed property rules. In 2010, CA Technologies Inc. made a \$17.6 million settlement payment to Delaware to resolve matters arising from an audit. Similarly, in 2012, as a result of an audit, Staples paid Delaware almost \$9 million.<sup>27</sup> On April 22, 2011, California announced a “landmark” settlement with insurer John Hancock. The settlement requires John Hancock to seek out the beneficiaries of more than \$20 million in death benefits and to pay the state three percent compounded interest on the value of the held amounts from 1995, or from the policy holder’s death, whichever is later.<sup>28</sup> This was the first settlement arising from the 21 state audits that began in 2008. On October 22, 2012, Florida successfully reached a \$25 million settlement with AIG for unclaimed life insurance accounts. In April 2012, MetLife reached a settlement to seek out owners of life insurance policies worth \$438 million, and to gradually remit this money to the state if it is unable to locate the beneficiaries.

## Sin #7: Mistreatment of Customers

The seventh and final corporate sin relates to the mistreatment of customers by various financial, insurance and automotive corporations. Consequently, these corporations have been forced to pay billions in fines to regulators and consumer class actions.

### *U.S. Mortgage Scandal*

In February 2012, a \$25 billion settlement was reached between 49 state attorneys, the federal government and Ally/GMAC, Bank of America, Citi, JPMorgan Chase and Wells Fargo relating to robo-signing and wrongdoing in mortgage servicing. On January 7, 2013, the U.S. Federal Reserve announced that the Office of the Comptroller of the Currency and the Federal Reserve Board had reached an agreement with ten mortgage servicing companies for \$3.3 billion in cash payments and \$5.2 billion in other assistance to borrowers for deficient practices in mortgage loan servicing and foreclosure processing. The participating mortgage servicers to this agreement include: Aurora, Bank of America, Citibank, JPMorgan Chase, MetLife Bank, PNC, Sovereign, SunTrust, U.S. Bank, and Wells Fargo. On January 16, 2013, it was announced that similar agreements were reached with Goldman Sachs and Morgan Stanley for \$232 million in direct payments and \$325 million in other assistance. On January 18, 2013, it was announced that an agreement was reached with HSBC for \$96 million in direct payments and \$153 million in other assistance. On August 21, 2014, Bank of America agreed to pay \$16.65 billion to settle government accusations that it sold toxic mortgage loans. This is the

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<sup>27</sup> Ibid.

<sup>28</sup> Jacob Roper, “*Controller Reaches Settlement with Insurer John Hancock*” Controller Betty T. Yee, California State Controller’s Office (April 22, 2011).

largest settlement ever reached between the U.S. and a single company.<sup>29</sup> Overall, the relief to borrowers and direct payments to government bodies from lawsuits over mortgages, foreclosures and fire-sale deals totals almost \$127 billion.<sup>30</sup>

#### *U.K. Payment Protection Insurance*

Payment protection insurance (PPI) policies insure against the risk that a borrower is unable to make loan repayments if he/she becomes ill or unemployed. The FSA found that PPI policies were widely inappropriately sold. To cover claims for the inappropriately sold PPI policies, £18.5 billion has already been paid out to consumers since 2011<sup>31</sup> and £24 billion is currently set aside by banks and building societies.<sup>32</sup> According to some estimates, total compensation for all claims could be as much as £40 billion.<sup>33</sup>

#### *Automotive defects*

On March 19, 2014, Toyota Motor Corporation ("Toyota") entered into a deferred prosecution agreement with the DOJ where it admitted to misleading U.S. consumers by concealing and making deceptive statements about two safety issues affecting its vehicles, each of which resulted in unintended accelerations. Consequently, the DOJ imposed a \$1.2 billion dollar fine, the largest ever on an automotive corporation and also imposed an independent monitor to review and assess its policies regarding safety-related public statements. This penalty followed the National Highway Traffic Safety Administration's (NHTSA) penalty of \$66 million.

Similarly, General Motors Co. was fined \$35 million by the NHTSA over how it handled the recall of 2.59 million small cars over faulty ignition switches, which is linked to at least 13 fatalities.<sup>34</sup> Additionally, Honda Motor Co. just agreed to pay a record \$70 million in fines for failing to tell the U.S. government about warranty claims and more than 1,700 injuries and deaths linked to potential defects in its cars.<sup>35</sup>

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<sup>29</sup> Christina Rexrode and Andrew Grossman, "*Record Bank of America Settlement Latest in Government Crusade*" The Wall Street Journal (August 21, 2014).

<sup>30</sup> *Ibid.*

<sup>31</sup> Financial Conduct Authority, "*monthly PPI refunds and compensation*," (March 3, 2015).

<sup>32</sup> Matt Scuffham and Mark Potter, "*Complaints over mis-sold loan insurance by British banks decline*" Reuters (January 27, 2015).

<sup>33</sup> Lisa Bachelor, "*Banks Seek PPI Claims Deadline*" The Guardian (18 January 2013).

<sup>34</sup> Jeff Plungis and Tim Higgins, "*GM to Pay Record \$35 Million Fine Over Handling of Recall*" BloombergBusiness (May 16, 2014).

<sup>35</sup> Jeff Plungis, "*Honda Fined Record \$70 Million for underreporting Injuries*" Bloomberg Business (January 8, 2015).

## Part III – Risk Management

In light of increasing regulatory aggressiveness worldwide, corporations must enhance their current risk management programs. Companies need to be pro-active in dealing with 'corporate sins' and focus on prevention and detection of violations. Once a company is charged, complying with an investigation can become a huge burden. For example, Wal-Mart's internal inquiry into FCPA violations cost \$439 million over two years (2013-2014)<sup>36</sup> and Avon's internal FCPA inquiry has cost \$339.7 million over four years (2009-2012).<sup>37</sup> To prevent charges, companies should develop an effective risk management program. An effective risk management program is composed of two parts: (1) a strong compliance program, and (2) a strong 'tone from the top.'

A strong compliance program is key to the prevention of 'corporate sin' charges. In the event of charges, the "existence and effectiveness of [a] corporation's pre-existing compliance program" is one of nine factors that the DOJ considers in determining whether to charge a corporation for an FCPA violation and what penalty to impose.<sup>38</sup> Similarly, the United States federal sentencing guidelines allow for lower fines against companies with effective compliance programs. Key factors in an effective compliance program are: (1) written policies, procedures and guidelines, (2) training and education, and (3) effective oversight with quick responses to detected offenses. The last point requires that companies create oversight positions, such as a chief compliance officer, and that personnel in these positions be given meaningful authority. Furthermore, it is important that companies continue to upgrade their compliance programs to respond to changing circumstances.

In Canada, one seminal sentencing decision for violations of the CFPOA<sup>39</sup> is *R v. Griffiths Energy International*.<sup>40</sup> This case summarizes a number of mitigating factors the courts will consider when deciding penalties under the CFPOA. In *Griffiths*, the company paid a bribe of \$2 million to a corporate entity owned by the wife of a foreign ambassador. Of importance is the court's statement that "Griffiths has instituted an effective, comprehensive and robust anti-

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<sup>36</sup> David Voreacos and Renee Dudley, "*Wal-Mart Says Bribe Probe Cost \$439 Million in Two Years*" Bloomberg Business (March 26, 2014).

<sup>37</sup> Jaclyn Jaeger, "*Analysis: The Rising Costs of FCPA Investigations*" Compliance Week (March 4, 2013).

<sup>38</sup> Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, "FCPA – A Resource Guide to the U.S. Foreign Corrupt Practices Act" Department of Justice, Securities Exchange Commission (November 14, 2012), online: <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> at page 62.

<sup>39</sup> Corruption of Foreign Public Official Act, SC 1998 c 34.

<sup>40</sup> *R v Griffiths Energy International*, [2013] AJ No 412.

corruption program such that it is unlikely that there will be any repetition of such conduct<sup>41</sup> ... These are very significant mitigating factors."<sup>42</sup> Therefore, it appears that one mitigating factor the Canadian courts will take into account when determining sentencing in a white-collar criminal case is an effective compliance program.

The tone from the top refers to the expectations created by management and the board regarding compliance. Part of setting the tone requires that both management and the board adhere to the same written policies, procedures and guidelines as the other employees of the corporation. Furthermore, management and the board should be required to have compliance training and education. This will show employees that management holds itself to the same standards it holds the employees. Lastly, principled performance should be rewarded. Ethical employees should be rewarded for honest behavior and reporting compliance violations.<sup>43</sup>

Lastly, it is important to remember that directors and officers may be held personally liable. In many of the previous examples directors and officers were charged with civil and criminal penalties. For that reason it is important that directors and officers be provided with insurance and an indemnification agreement. Directors and officers insurance protect directors and officers acting in the scope of their managerial duties against the consequences of actual or alleged wrongful acts. However, it is important to remember that these policies contain exclusion policies for fraudulent, criminal or intentional non-compliant acts.

One suggestion is for directors and officers to enter into an indemnification agreement. An indemnification agreement is a contract entered into between the corporation and a director or officer. Directors and officers should consider a separate indemnification agreement because unlike directors and officers insurance which can be withdrawn or ceased by the corporation, an indemnification agreement cannot be altered without the consent of both parties.

## Conclusion

Overall, there is increasing evidence that regulators are becoming more aggressive and penalties for 'corporate sins' are growing dramatically. Consequently, corporations need to enhance their compliance programs and directors, officers and insurers must look at how best to protect themselves.

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<sup>41</sup> *Supra*, note 39, at 19.

<sup>42</sup> *Ibid*, at 21.

<sup>43</sup> "*Tone at the top: The first ingredient in a world-class ethics and compliance program*" Deloitte (2014).

## Appendix - Index of Cases

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## Alphabetical List of Cases

### *Alstom S.A. – Corruption and Bribery*

Alstom S.A. (Alstom) is a global transportation and power company headquartered in France. According to admissions, executives and employees of Alstom entities paid bribes to government officials and falsified books and records in connection with power, grid and transportation projects for state-owned entities around the world including Indonesia, Egypt, Saudi Arabia, the Bahamas and Taiwan. In total, Alstom paid more than \$75 million to secure \$4 billion in projects around the world resulting in a profit of approximately \$300 million.<sup>44</sup>

On December 22, 2014, Alstom pled guilty to violating the FCPA by falsifying its books and records and failing to implement adequate internal controls. Furthermore, Alstom Network Schweiz AG, Alstom's Swiss subsidiary pled guilty to conspiring to violate the anti-bribery provisions of the FCPA. Alstom's two other subsidiaries, Alstom Power Inc. and Alstom Grid Inc. entered into deferred prosecution agreements, with both admitting to conspiring to violate the FCPA anti-bribery provisions.<sup>45</sup> The result is that U.S. regulators levied a massive fine on Alstom of \$772 million at a time when it was selling most of its power business to General Electric Co. causing concerns amongst shareholders about which entity would pay for the fine.

### *Automotive Companies – Mistreatment of Customers*

On March 19, 2014, Toyota Motor Corporation (Toyota) entered into a deferred prosecution agreement with the DOJ where it admitted to misleading U.S. consumers by concealing and making deceptive statements about two safety issues affecting its vehicles, each of which resulted in unintended accelerations. Consequently, the DOJ imposed a \$1.2 billion dollar fine, the largest ever on an automotive corporation, and also imposed an independent monitor to review and assess its policies regarding safety-related public statements. In addition, the NHTSA imposed a penalty of \$66 million.

Similarly, General Motors Co. was fined \$35 million by the NHTSA over how it handled the recall of 2.59 million small cars over faulty ignition switches, which is linked to at least 13 fatalities.<sup>46</sup> Additionally, in 2015, Honda Motor Co. agreed to pay a record \$70 million in fines for failing to tell the U.S. government about warranty claims and more than 1,700 injuries and deaths linked to potential defects in its cars.<sup>47</sup>

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<sup>44</sup> *Supra*, note 13.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Supra*, note 34.

<sup>47</sup> *Supra*, note 35.

### *Barclays – Money Laundering & Sanctions Breaking*

On August 18, 2010, Barclays and the DOJ reached a settlement over allegations that the bank facilitated \$500 million in transactions with banks in the sanctioned countries of Cuba, Iran, Libya, Sudan, and Burma. Barclays admitted to violating the sanctions and concealing these actions over a ten-year period. As part of the settlement, Barclays agreed to forfeit \$149 million to the United States and \$149 million to the New York County District Attorney's Office. Barclays also entered into a settlement agreement with OFAC under which Barclays will pay the OFAC \$176 million.

### *BNP Paribas – Money Laundering & Sanctions Breaking*

On June 30, 2014, BNP Paribas entered a guilty plea for conspiring to violate the IEEPA and TWEA by processing billions of dollars of transactions through U.S financial institutions on behalf of Sudanese, Iranian and Cuban entities subject to U.S. economic sanctions for terrorism or genocide.<sup>48, 49</sup> In particular, U.S. authorities found that BNP Paribas facilitated transactions from and to sanctioned countries by stripping information from wire transfers so they could pass through the U.S. financial system without raising any flags. It is estimated that more than \$190 billion in transactions were concealed between 2002 and 2012.<sup>50</sup>

As a result, U.S. enforcement officials fined BNP Paribas an unprecedented \$8.97 billion. Additionally, U.S authorities suspended the bank's ability to make dollar payments to its New York customers. Interestingly, approximately \$2.24 billion is set to go to the New York's Department of Financial Services as a civil penalty.<sup>51</sup>

### *Credit Suisse – Money Laundering & Sanctions Breaking*

Credit Suisse was accused of facilitating monetary transactions from the sanctioned countries of Iran and Sudan. It was alleged that the bank actively took measures to hide customer names, bank names and addresses from the payment information to avoid detection. The matter was resolved by an agreement reached with the DOJ on December 16, 2009 which resulted in Credit Suisse paying a fine of \$536 million to the DOJ and to the New York County District Attorney's Office.

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<sup>48</sup> *Supra*, note 14.

<sup>49</sup> *Supra*, note 15.

<sup>50</sup> *Supra*, note 16.

<sup>51</sup> *Ibid*.



### *Forex Scandal – Conspiracy*

Following the LIBOR scandal, another scandal arose involving many of the same major banks as the LIBOR scandal. This time, the banks were caught colluding, for at least a decade, to manipulate exchange rates. The foreign exchange market is a massive market where almost \$5.3 trillion worth of currency is traded daily.<sup>52</sup> According to the Financial Conduct Authority, the misconduct was carried on from 2008 until 2013, more than a year after the first LIBOR settlement.

As a result of this scandal, regulators hit six major banks with fines totaling approximately \$4.3 billion. Specifically, JP Morgan Chase and Citigroup each paid \$1.0 billion, UBS \$799 million, RBS \$634, HSBC \$618 million, and Bank of America \$250 million to regulators in the United States, Great Britain and Switzerland. Interestingly, five of the banks received a 30% discount on their fines by regulators for settling early. Additionally, the U.S. Office of the Comptroller of the Currency ordered the same five banks to pay an extra \$1.48 billion and the Swiss regulator FINMA ordered UBS to pay \$139 million.

### *HSBC – Money Laundering & Sanctions Breaking*

On December 11, 2012, the DOJ announced that it had reached a settlement agreement with HSBC Holdings and HSBC Bank USA. As part of the settlement, HSBC admitted to having an ineffective anti-money laundering program that allowed \$881 million of drug money in Mexico and Colombia to be laundered through the U.S. financial system. It also admitted to facilitating approximately \$660 million in transactions with the economically sanctioned countries of Iran, Cuba, Sudan, Libya and Burma. The settlement included a \$1.92 billion fine, comprised of a \$1.256 billion forfeiture and \$665 million in civil penalties to various U.S. regulators.

### *HSBC Client List – Tax Evasion*

In 2008, a former HSBC employee copied the account information of more than 100,000 customers of the Swiss branch of HSBC and subsequently sold it to the French government resulting in the exposure of rampant tax evasion at HSBC. The list was shared internationally by the French government in a mounting international tax case against HSBC. Specifically, the list shows that HSBC's Swiss banking arm helped thousands of clients, including international criminals, corrupt businessmen, politicians and celebrities avoid paying taxes in schemes dating back to 2005.<sup>53</sup>

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<sup>52</sup> *Supra*, note 18.

<sup>53</sup> Lizzie Dearden, "*HSBC leaks: Email from whistleblower to HMRC 'proves' authorities were told of tax evasion*" The Independent (February 13, 2015).

Recently, HM Revenue and Customs issued a statement that since April 2010, the British government managed to secure £135 million in tax, interest and penalties from people on the HSBC list. However, only one case was prosecuted by the Crown Prosecution Service out of investigations of over 1000 account holders.<sup>54</sup> Despite this, European authorities are continuing to investigate the extent of HSBCs assistance in tax fraud.

#### *ING Bank N.V. – Money Laundering & Sanctions Breaking*

On June 12, 2012, ING Bank N.V. reached an agreement with the OFAC, and a deferred prosecution agreement with the DOJ and the New York County District Attorney's Office to violating the IEEPA and TWEA. From the early 1990s until 2007, the bank illegally facilitated more than \$2 billion in transactions through the U.S. financial system on behalf of Cuban and Iranian entities. Transactions with these economically sanctioned countries were contrary to the IEEPA and the TWEA. As a result, ING Bank N.V. was required to forfeit \$619 million to the government authorities.

#### *KBR, Inc. and Halliburton Co. – Corruption and Bribery*

KBR, a subsidiary of KBR, Inc., is a global engineering company based in Houston, Texas. The SEC alleged that in 1994, former CEO of KBR Inc., Albert "Jack" Stanley, and other members of a four-company joint venture, met with Nigerian government officials to arrange corrupt payments. These payments were disguised in the company's records as contracts between agents in the United Kingdom and Japan. Over \$180 million was funneled to Nigerian officials in this manner, including \$5 million in cash to a Nigerian political party.

Halliburton Co. owned KBR during the relevant periods of bribery until it spun off the company in April 2007. On February 11, 2009, KBR pled guilty to bribing Nigerian government officials to obtain \$6 billion of construction contracts. The 10-year scheme spanned the globe, involving companies in Europe, the United States, Japan and Nigeria. KRB agreed to a \$402 million criminal fine payable to the DOJ and parent companies KRB Inc. and Halliburton reached a settlement with the SEC to pay \$177 million in disgorgement of profits.

In related prosecutions, the other members of the joint venture, Technip S.A., Snamprogetti Netherlands B.V., and JGC Corporation, were fined \$240 million, \$240 million and \$218.8 million, respectively. Factoring in the prosecutions against these entities and individuals associated with them, the total of the penalties, disgorgements and forfeitures resulting from this foreign bribery case was over \$1.2 billion.

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<sup>54</sup> *"Statement by HMRC on tax evasion and the HSBC Suisse data leak"* HM Revenue & Custom (February 14, 2014).

### *LIBOR Scandal – Conspiracy*

The LIBOR scandal was thrust into the spotlight in 2012. The scandal involved banks manipulating the LIBOR rate from 2005 through 2009 to profit from trades or to appear more creditworthy. LIBOR underpins \$360 trillion of loans and financial contracts and rigging the rates have affected millions of consumers and the amount of interest they paid during this time.

On June 27, 2012, Barclays announced that it would pay \$453 million in fines to regulators in the U.S. and U.K. for its involvement in the scandal. On December 19, 2012, UBS became the second bank to admit to wrongdoing in the scandal and announced that it would pay a \$1.5 billion fine to regulators in the U.S., U.K., and Switzerland. On February 6, 2013, RBS was fined \$610 million by U.S. and UK regulators, although it received a slight discount (30%) because it agreed to settle at an early stage of the investigation. Furthermore, on December 4, 2013, the EU antitrust regulator fined six financial institutions (Deutsche Bank, RBS, Citigroup, Société Générale, JP Morgan, and brokerage RP Martin) U.S. \$2.3 billion for rigging financial benchmarks (including LIBOR, the Tokyo interbank offered rate and the euro area equivalents).<sup>55</sup>

### *2008 Liechtenstein Tax Affair – Tax Evasion*

On March 11, 2008, Liechtenstein police authorities posted a notice that it had issued an international arrest warrant for Heinrich Kieber, who was suspected of selling a compact disc (“CD”) with stolen banking information. Mr. Kieber worked for Liechtenstein bank LGT and copied banking information of about 5,800 clients around the world who were using these accounts to evade taxes. German authorities confirmed that they had paid an informant over €4 million for the CD and are thought to have created Mr. Kieber a new identity and given him protection. The banking information has also been sold to authorities in the United States, Australia and other countries around the world.

As a result of Mr. Kieber’s disclosure, it was revealed that billions had been placed in Liechtenstein based banks and trusts to avoid paying taxes. Consequently, other countries put pressure on Liechtenstein to discuss tax avoidance issues. One of the most important results of this pressure is the LDF plan reached in 2009 in the United Kingdom. Under this plan, Britons who have unpaid U.K. tax liabilities from assets or investments in Liechtenstein bank accounts can “legitimize” their previous actions by coming forward and paying reduced penalties. The LDF runs from September 1, 2009, until April 5, 2016. As of June 2012, over 2,400 people

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<sup>55</sup> *Supra*, note 18.

have registered under the LDF and have paid back £363 million in taxes. HM Revenue and Customs estimates that up to £3 billion will be paid back under the LDF.<sup>56</sup>

### *Siemens AG – Corruption and Bribery*

Siemens AG is Europe's largest engineering conglomerate. The DOJ and SEC charged the German based company under the FCPA with securing business contracts by bribing foreign officials. According to the court documents, Siemens AG began falsifying its corporate books in the early 1990s.<sup>57</sup> The company's bribery spanned the globe; corrupt payments were made in the Americas, the Middle East, Europe, Asia and Africa. Siemens AG was listed on the New York Stock Exchange in March 2001 and from then until 2007, made \$1.36 billion in payments, of which \$805 million were corrupt payments to foreign officials. From September 1998 to 2007, Siemens Argentina paid Argentine officials to secure an advantage in their bid for a \$1 billion national identity card contract.

Other Siemens AG subsidiaries were also involved in the rampant bribery. From late 2001 until about May 2007, Siemens Venezuela paid about \$18.8 million to Venezuelan officials to assist them in obtaining business contracts. Similarly, from May 2001 to August 2006, Siemens Bangladesh made payments of about \$5.3 million to Bangladeshi officials to secure an advantage during a project bidding. From 2000 to 2002, subsidiaries of Siemens paid around \$1.7 million in kickbacks to the Iraqi government in order to earn \$80 million in contracts resulting in collective profits of about \$38 million for Siemens France, Siemens Turkey, Osram Middle East and GTT.

In December 2008, Siemens AG and three of its subsidiaries, pled guilty to violations of the FCPA and agreed to pay a combined \$450 million fine to the DOJ. Siemens AG further agreed to pay a \$350 million disgorgement of profits to the SEC. The \$800 million in combined penalties is the largest FCPA monetary sanction levied on a single company to date. The company also agreed to pay €395 million to settle charges by the Munich Public Prosecutor's Office, on top of the €201 million it had already paid in connection with similar charges.

After the record breaking monetary settlement in 2008, on December 31, 2011, the SEC and the DOJ charged seven former executives for their involvement in the national identity card scheme. By 2014, two former Siemens executives were fined (with one having to pay the largest individual civil penalties in FCPA history), three had settled and two had their cases

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<sup>56</sup> *Supra*, note 23.

<sup>57</sup> Until 1999, in Germany, bribes paid abroad were not criminal and were tax deductible. Siemens AG utilized these tax write-offs in the early 1990s.

dismissed. One executive was required to pay \$524,000 as a fine, with an additional penalty of \$316,452 and \$97,505 in disgorgement and interest.<sup>58</sup>

### *Standard Chartered Bank – Money Laundering & Sanctions Breaking*

On December 10, 2012, Standard Chartered Bank reached a settlement agreement with OFAC, the Board of Governors of the Federal Reserve System, the DOJ and the New York County District Attorney's Office for facilitating \$200 million in transactions which otherwise should have been rejected, stopped or blocked for investigation by OFAC, with Iran, Sudan, Libya, and Burma between 2001 and 2007, and were contrary to the IEEPA. As a result, the company was fined a total of \$867 million. The settlement agreement includes a forfeiture of \$227 million.

Additionally, the bank reached an agreement with the New York State Department of Financial Services in August 2012 for a civil penalty of \$340 million in relation to allegations that the bank had illegally hidden 60,000 transactions with Iran worth \$250 billion over nearly a decade.<sup>59</sup> Furthermore, on August 19, 2014 the Superintendent of Financial Services announced an additional \$300 million penalty against Standard Chartered Bank due its failures to remediate anti-money laundering compliance problems required in the 2012 settlement with the New York State Department of Financial Services. This brings the company's total penalties to \$867 million.

### *Swiss Banks – Tax Evasion*

In 2009, the DOJ charged UBS with conspiring to defraud the United States by assisting 52,000 Americans evade taxes. It was alleged that UBS bankers frequently traveled to the United States in order to market their services and actively seek customers attempting to evade U.S. taxes. On February 18, 2009, UBS settled with the U.S. government for \$780 million for its role in assisting clients evade U.S. taxes. As part of the agreement, UBS agreed to reveal the identity of about 5,000 customers that the IRS believes are evading taxes. Also of note in this case is that Bradley Birkenfield, a former UBS employee, received a \$104 million whistleblower award for his role in uncovering the tax fraud. The award was paid out in early September 2012.<sup>60</sup> This landmark settlement marked the beginning of the IRS' crackdown on offshore tax evasion, which has since become more aggressive. This has led to UBS facing similar charges, this time over whether UBS helped Americans evade taxes through

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<sup>58</sup> *Supra*, note 12.

<sup>59</sup> "*Standard Chartered agrees settlement with New York regulator*" BBC (August 12, 2012).

<sup>60</sup> Interestingly, Mr. Birkenfield receive this award while still serving time in a federal correctional institution after pleading guilty to conspiracy to defraud the U.S.

investments banned in the U.S (specifically, bearer bonds). This investigation is currently ongoing.

In February 2012, the United States charged Wegelin, Switzerland's oldest private bank, with enabling American citizens to evade taxes in offshore bank accounts. The charges alleged that Wegelin actively recruited American clients, promising banking secrecy and that Wegelin discouraged clients from going forward to the IRS in exchange for reduced penalties. In early January 2013, it was reported that Wegelin would close down after pleading guilty to assisting Americans evade taxes on \$1.2 billion over a period of almost ten years. Wegelin was also fined \$57.8 million for its wrongdoing.<sup>61</sup>

Another 11 Swiss banks are also currently under investigation by the IRS, including Credit Suisse and Julius Baer. Credit Suisse settled with the U.S. Department of Justice, the New York State Department of Financial Services and the Federal Reserve by paying \$2.6 billion, in addition to a \$196 million penalty it paid to the New York deferral reserve. Julius Baer is expected to settle though it is unclear when.

#### *U.K. Payment Protection Insurance – Mistreatment of Customers*

PPI policies insure against the risk that a borrower is unable to make loan repayments if he/she becomes ill or unemployed. The FSA found that PPI policies were widely inappropriately sold, for example, misleading consumers into thinking PPI was mandatory, not explaining significant exclusions to the policy (many consumers purchased policies unsuited for them that would never pay out because of the exclusions) or adding policies to loans without the consumer's knowledge. The FSA responded by introducing Policy Statement 10/12 on August 10, 2010, to govern the handling of consumer complaints over the sale of PPI policies. The Policy Statement explains, among other things, when firms must review complaints from customers who have purchased PPI policies and flaws in sales practices. On April 20, 2011, the English High Court of Justice dismissed the British Bankers' Association's application for judicial review of the Policy Statement. Effectively, the decision confirms that consumers that were previously inappropriately sold PPI policies are to be financially compensated.

An estimated 34 million PPI policies have been sold since 2001. Barclays has about 3,400 employees to look after PPI claims, while Lloyds Banking Group has about 6,000, HSBC 600, and Royal Bank of Scotland 1,800.<sup>62</sup> Where a customer's claim for compensation cannot be dealt with in the eight-week regulatory deadline or where the consumer disagrees with the bank's decision, the case can be escalated to the Financial Ombudsman Service (FOS). The

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<sup>61</sup> *Supra*, note 22.

<sup>62</sup> Jill Treanor, "*Claims for Mis-sold Payment Insurance are Costing Banks Time as well as Cash*" *The Guardian* (16 November 2012).

FOS resolved about 90,000 of the claims it received in 2012 and expects to resolve 245,000 cases in 2013. The FOS has also increased the fees and levies it charges the banks for dealing with PPI complaints. This additional funding has allowed the FOS to hire an additional 1,000 caseworkers, many of whom will be working exclusively on PPI complaints.<sup>63</sup> The FOS receives up to 400 complaints an hour, agrees with the consumer about 70% of the time and awards an average of £2,750 in compensation. Recently, the FOS stated that between October and December of 2014 it received about 4,000 complaints a week regarding inappropriately sold PPI insurance.<sup>64</sup>

To cover claims for the inappropriately sold PPI policies, £18.5 billion has already been paid out to consumers<sup>65</sup> and £24 billion is currently set aside by banks and building societies.<sup>66</sup> According to some estimates, total compensation for all claims could be as much as £40 billion.<sup>67</sup> These funds can stimulate an economy by giving consumers additional income to spend, thereby increasing market demand. Assuming consumers choose to spend the money (as opposed to saving it), this banking scandal could provide a much-needed boost to the U.K. economy. In fact, in normal economic circumstances, a £15 billion injection into the U.K. economy could increase GDP by 0.1 to 0.2%.<sup>68</sup> During a recession, the increase to GDP could be as much as 0.7%.<sup>69</sup> Some commentators have predicted that these payments could provide Britain with an economic stimulus.

#### *U.S. Death Register – Misuse of Client Property*

States, federal agencies and other organizations in the United States are holding over \$58 billion in unclaimed property. Of that total, about \$41.7 billion is being held by various states.<sup>70</sup> According to the Pension Benefit Guaranty Corp., over \$300 million in pension benefits is owed to beneficiaries and the average unclaimed pension benefit is \$9,100.<sup>71</sup> If disbursed to the rightful beneficiaries, this large amount of unclaimed property could act as an economic stimulus by putting additional money into the hands of consumers. Where the

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<sup>63</sup> Lisa Bachelor, "*PPI Payouts Expected to Rocket in 2013*" The Guardian (10 January 2013).

<sup>64</sup> "*Complaints over mis-sold loan insurance by British banks decline*" Reuters (January 27, 2015).

<sup>65</sup> *Supra*, note 31.

<sup>66</sup> *Supra*, note 64.

<sup>67</sup> *Supra*, note 33.

<sup>68</sup> Norma Cohen, Sharlene Goff & Lucy Warwick-Ching, "*Bank Scandal has Silver Lining for UK*" Financial Times (6 August 2012).

<sup>69</sup> Larry Elliott, "*PPI Compensation Payments could Affect UK Economy*" The Guardian (7 August 2012).

<sup>70</sup> *Supra*, note 24.

<sup>71</sup> *Ibid.*



money is not claimed by the entitled beneficiaries, it acts a source of revenue for the state. For example, unpaid property is Delaware's third largest source of revenue and between 2009 and 2012 raised \$1.24 billion in revenue for the state.<sup>72</sup>

The precise rules vary by state, but generally, financial institutions are required to provide the state with unclaimed property if they are unable to locate the owner. The unclaimed property will always belong to the beneficiary; however, until and unless it is claimed, states can use the money to fund their operations.

States periodically conduct audits to ensure companies are in compliance with the unclaimed property rules. In 2010, CA Technologies Inc. made a \$17.6 million settlement payment to Delaware to resolve matters arising from an audit. Similarly, in 2012, as a result of an audit, Staples paid Delaware almost \$9 million.<sup>73</sup> On April 22, 2011, California announced a "landmark" settlement with insurer John Hancock. The settlement requires John Hancock to seek out the beneficiaries of more than \$20 million in death benefits and to pay the state three percent compound interest on the value of the held amounts from 1995, or from the policy holder's death, whichever is later.<sup>74</sup> This was the first settlement arising from the 21 audits the state began in 2008. On October 22, 2012, Florida successfully reached a \$25 million settlement with AIG for unclaimed life insurance accounts. In April 2012, MetLife reached a settlement to seek out owners of life insurance policies worth \$438 million, and to gradually remit this money to the state if it is unable to locate the beneficiaries.

Recent settlements require insurers to determine if policyholders have died by regularly checking the Social Security's death database. They are also obligated to make efforts to locate beneficiaries and if the beneficiaries cannot be located, remit the unclaimed property to the state. This contrasts with the historical practice of paying out benefits only when a beneficiary makes a claim.

### *U.S. Mortgage Scandal – Mistreatment of Customers*

The U.S. subprime mortgage disaster that culminated in the 2008 financial crisis has resulted in numerous lawsuits and investigations into financial institutions. Some of the notable cases and financial settlements are outlined below.

In February 2012, a \$25 billion settlement was reached between 49 state attorneys, the federal government and Ally/GMAC, Bank of America, Citi, JPMorgan Chase and Wells Fargo. The \$25 billion will be used for relief to distressed borrowers and direct payments to

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<sup>72</sup> *Supra*, note 26.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Supra*, note 28.



participating states and the federal government. The five mortgage servicers were accused of robo-signing and wrongdoing in mortgage servicing between January 1, 2008, and December 31, 2011. The mortgage servicers signed foreclosure documents without the presence of a notary public and without determining whether the documents were factually correct.

On October 24, 2012, the United States sued Bank of America for \$1 billion, alleging that it sold toxic mortgage loans to the government mortgage agencies Fannie Mae and Freddy Mac. The lawsuit alleged that the scheme began at Countrywide Financial Corp. (Countrywide) in 2007 and was called "Hustle" because it was meant to speed up the processing of home loans. Bank of America purchased Countrywide in July 2008, and the scheme continued through 2009. On January 7, 2013, Fannie Mae announced that it had reached a settlement with Bank of America. As part of the settlement, Bank of America will pay Fannie Mae \$3.55 billion, repurchase loans plus accrued interest for approximately \$6.75 billion and make an additional \$1.3 billion payment for compensatory fee obligations.

On January 7, 2013, the U.S. Federal Reserve announced that the Office of the Comptroller of the Currency and the Federal Reserve Board had reached an agreement with ten mortgage servicing companies for \$3.3 billion in cash payments and \$5.2 billion in other assistance to borrowers. The participating mortgage servicers to this agreement include: Aurora, Bank of America, Citibank, JPMorgan Chase, MetLife Bank, PNC, Sovereign, SunTrust, U.S. Bank, and Wells Fargo. On January 16, 2013, it was announced that similar agreements were reached with Goldman Sachs and Morgan Stanley for \$232 million in direct payments and \$325 million in other assistance. On January 18, 2013, it was announced that an agreement was reached with HSBC for \$96 million in direct payments and \$153 million in other assistance. These agreements settled the enforcement actions against the mortgage servicers for deficient practices in mortgage loan servicing and foreclosure processing during 2009 and 2010. The mortgage servicers were accused of signing off on mortgage documents without actually reading them in order to foreclose on homes more quickly.

On August 21, 2014, Bank of America agreed to pay \$16.65 billion to settle government accusations that it sold toxic mortgage loans. This is the largest settlement ever reached between the U.S. and a single company.<sup>75</sup> Overall, the relief to borrowers and direct payments to government bodies from lawsuits over mortgages, foreclosures and fire-sale deals totals almost \$127 billion.<sup>76</sup>

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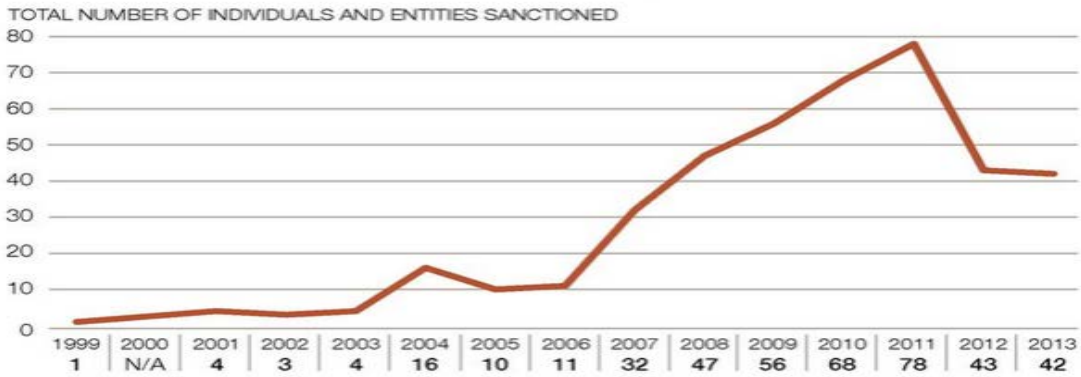
<sup>75</sup> *Supra*, note 29.

<sup>76</sup> *Ibid*.

Appendix II

Figure 1:<sup>77</sup>

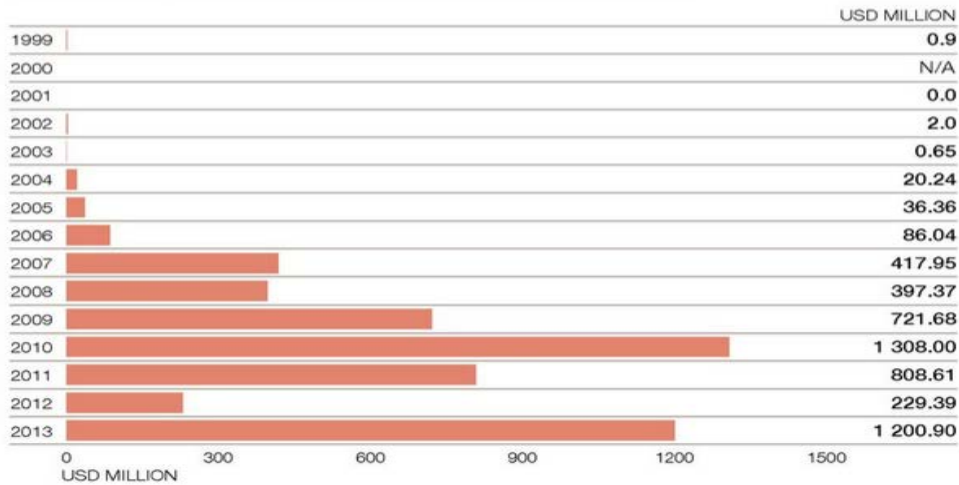
**Figure 1. Number of foreign bribery cases concluded per year**



Source: OECD analysis of foreign bribery cases concluded between 15/02/1999 and 31/12/2013

Figure 2:<sup>78</sup>

**Figure 7. Total amount imposed in combined monetary sanctions**



Source: OECD analysis of foreign bribery cases concluded between 15/02/1999 and 31/12/2013

by Frank Palmay and Jeffrey Nagashima, Student-At-Law

<sup>77</sup> OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, DOI.

<sup>78</sup> Ibid. Please note that these amounts are for cases which have been investigated prosecuted and reached a final law enforcement outcome for the specific crime of bribery of foreign public officials in international business transactions. As such, certain major FCPA cases have not yet been included in this data which is accurate to June 1, 2014.

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[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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