1. Introduction

The global financial crisis has revealed massive financial frauds and misconduct that have long been a part of our markets but have been submerged by the euphoria that has dominated these markets … white collar and corporate crimes have long been part of markets and are among the most difficult crimes for the legal system to deal with, let alone control. This is especially so where these crimes are of enormous proportions or involve some of the most powerful individuals or corporations in a society. Their seeming invulnerability to regulation is enhanced in boom times and this is further buttressed by powerful political forces supporting corporate risk taking. These political forces have served to muzzle or curtail the activities of enforcement agencies either directly, through the lack of adequate resources, or indirectly, by promoting ideologies which legitimise the minimal role of government in markets and a preference for industry self-regulation.¹

While the vulnerabilities that created the potential for crisis were years in the making, it was the collapse of the housing bubble – fuelled by low interest rates, easy and available credit, scant regulation, and toxic mortgages – that was the spark that ignited a string of events, which led to a full-blown crisis in the fall of 2008. Trillions of dollars in risky mortgages had become embedded throughout the financial system, as mortgage-related securities were packaged, repackaged, and sold to investors around the world. When the bubble burst, hundreds of billions of dollars in losses in mortgages and mortgage-related securities shook markets as well as financial institutions that had significant exposures to those mortgages and had borrowed heavily against them. This happened not just in the United States but around the world. The losses were magnified by derivatives such as synthetic securities.²

1.1 THE FINANCIAL CRISIS: AN INTRODUCTION

The most recent financial crisis is believed to have originated within the United States (US) subprime mortgage market. The lending practices of subprime lenders fuelled the flames of the worst economic crisis since the 1929 Wall Street Crash and subsequent Great Depression. It is important to emphasise that the threat of a financial crisis was originally outlined in 1998 by the then head of the Commodity Futures Trading Commission (CFTC) Brooksley Born. Furthermore, this was a view supported by the Federal Bureau of Investigation (FBI) when they asked President George Bush for additional agents and resources to tackle the forthcoming tsunami of mortgage fraud cases. The origins of the subprime crisis are to be found in the mortgages provided by subprime lenders, which included ‘prime loans’, ‘alt-A loans’ and ‘subprime loans’. A ‘prime loan’ is a financial instrument that is used by debtors with a good credit rating. An ‘alt-A’ loan is used by debtors who generally have a good credit rating that contains some shortcomings. Conversely, a ‘subprime loan’ is aimed at ‘high-risk borrowers who

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4 Ibid.
6 Ibid.
7 According to Mitchell, ‘lenders steered minorities into taking out subprime loans, though they may have qualified for prime loans that had much lower interest rates and more favourable terms for the borrower’. See Mitchell, T. ‘Growing inequality and racial economic gaps’ (2013) Howard Law Journal, Spring, 56, 849–890 at 884.
Introduction

typically have poor credit histories’.9 It is the latter of these loans that contributed towards the financial crisis. Subprime loans grew at an unprecedented level between 1994 and 2006, when the total amount of money via this financial instrument increased from $35bn to $600bn, accounting for a quarter of all US mortgages.10 In 2006 an additional 3m subprime loans were instigated, extending the total value of unsettled debt to $3tn.11 However, it is important to point out that the introduction of such legislation as the Fair Housing Act 1968 and the extended remit of the Civil Rights Act 1968 contributed towards the increased use of subprime loans.12 Despite the obvious merits of both pieces of legislation, the then available 30 year mortgages were still prohibitive to many borrowers, thus forcing them to use subprime lenders. When the subprime mortgage market spectacularly collapsed in the summer of 2007, what followed has simply been described as ‘the worldwide financial crisis’.13 The impact of the subprime mortgage crisis was hastened by the ‘repackaging’ or ‘rebranding’ and ‘selling’ of mortgage portfolios, a


11 Bar-Gill above, n 9, at 1073.

12 Nguyen and Pontell above, n 10, at 5.

13 Seitz et al above, n 8, at 271.
process referred to as ‘securitisation’.\textsuperscript{14} This process ‘aims to provide finance [for banks] by selling assets, by transforming a loan as a financial relationship into a tradable bond and therefore into a transaction’.\textsuperscript{15} Securitisation influenced the subprime mortgage crisis in two ways. First, the repackaging of mortgages made it extremely difficult, if not impossible, for investors to avoid ‘ill-advised’ or ‘unsuitable’ transactions.\textsuperscript{16} Secondly, a large collection of US mortgages were in the possession of banks in many different countries around the world,\textsuperscript{17} and it soon became apparent that many of these mortgages were toxic, thus contributing to the spread of the financial crisis.\textsuperscript{18}

The first evidence of the financial crisis appeared in April 2007, when New Century Financial, one of the US’s largest subprime lenders,\textsuperscript{19} announced it had outstanding liabilities of $100bn and had filed for bankruptcy protection.\textsuperscript{20} The early problems of the subprime market were acknowledged by then Federal Reserve Chairman, Ben Bernanke, who said that ‘the credit losses associated with subprime [loans] have come to

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\textsuperscript{17} For an interesting discussion of the problems associated with subprime mortgages see White above, n 10.


light and they are fairly significant ... some estimates are in the order of between $50bn and $100bn'.21 The subprime mortgage market affected Lehman Brothers, which filed for chapter 11 bankruptcy in 2008.22 Lehman Brothers was once described as ‘one of the largest financial services firms in the world ... [it] operated in over forty countries and had more than 650 legal entities outside of the US’.23 Essentially, Lehman Brothers did not raise sufficient capital to continue operating in response to rising interest rates and a rating reduction for its assets.24 This institution was severely criticised because of its highly leveraged operations before the financial crisis which resulted in a ‘debt-to-equity ratio’ of 32 to 1.25 Additionally, the US government was forced to intervene and rescue the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).26 Both of these institutions were created in 1938 by President

26 For an interesting commentary on the role of both of these institutions see Reiss, D. ‘The role of the Fannie Mae/Freddie Mac duopoly in the American housing market’ (2009) Journal of Financial Regulation and Compliance, 17(3), 336–348. It is important to note that both Fannie Mae and Freddie Mac were the subject of intense criticism prior to the outbreak of the most recent financial crisis in 2007. See for example Krehely, K. ‘Government sponsored enterprises:
Roosevelt as part of the New Deal legislation to ‘serve as mortgage lenders for consumers and potential home buyers’. They are both government sponsored enterprises, which according to Carnell are ‘federally chartered, privately owned, privately managed financial institutions that have only specialized lending and guarantee powers and that bond market investors perceive as implicitly backed by the federal government’. Lavargna took the view that the key role of government sponsored enterprises ‘lies in the “securitization” of primary loans. The enterprises buy loans from primary lenders, pool the loans into portfolios, and then sell the portfolios to investors and others in the capital markets’. However, it soon became apparent that Fannie Mae and Freddie Mac were heavily exposed by the subprime mortgage market. For example, both institutions accounted for 34 per cent of subprime loans and 59 per cent of ‘Alt-A’ loans.

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had previously let on'. By the middle of 2007 Fannie Mae and Freddie Mac experienced combined losses of $190bn, which resulted in a US government bailout of $1.4tn. Reiss added that ‘these two sectors were rife with predatory lending practices, Fannie and Freddie may be seen as complicit with these practices even though they did not engage in them directly’. Other institutions which suffered during the early part of the financial crisis included American International Group (AIG), then the world’s largest insurance company. AIG was heavily involved in the trade of derivatives and as a result faced significant liquidity problems due to heavy losses in credit default swaps. In September 2008, AIG’s shares slumped by 19 per cent on the New York Stock Exchange. This was followed by a further 61 per cent crash in share prices. Therefore, the US government was forced to intervene and agreed to lend AIG $85bn in exchange for an 80 per cent stake of the company. AIG’s

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33 Ibid.
34 Reiss above, n 31 at 931.
36 A derivative can be defined as a ‘legally binding agreement whose values are derived from the value of an underlying commodity, financial instrument or reference rate’. See Malkawi, B. ‘Financial derivatives between Western legal tradition and Islamic finance: a comparative approach’ (2011) Journal of International Banking Law and Regulation, 26(6), 276–284, at 276.
exposure at the height of the financial crisis was $169bn, and it was not until 2012 that the company managed to repay all of its outstanding liabilities to the US government. Bear Stearns, then the fifth largest investment bank in the US, also benefited from emergency funding and it was jointly purchased by the government and JP Morgan at a 93 per cent discount, a meagre $2 per share. It is interesting to note that prior to its takeover by the government and JP Morgan, Bear Stearns shares were trading at $170. Rosato took the view that ‘JP Morgan acquired Bear Stearns in a federally orchestrated and assisted effort to save the financial markets from imminent peril’. Therefore, the total losses arising from the subprime crisis exceeded $600bn. The total losses of the financial crisis are explicitly illustrated in the following quote from Barak: ‘[the] Wall Street debacle accounted for more than $20tn in lost wealth … cost some 20m workers their jobs worldwide … domestically, cost taxpayers $700bn in TARP bailouts funds … and between 2007 and the end of 2012, cost 4m American households their homes [due] to
mortgage foreclosures’. The International Monetary Fund (IMF) estimated that the cost of the financial crisis between 2008 and 2009 was $11.9tn, or 20 per cent of annual global output.

The initial US response to the financial crisis was led by the Federal Reserve and the Department of Treasury. The reactions of both institutions were described as ‘swift and substantial’ and ‘focused first on providing liquidity in the financial sector’. Nevertheless, as the impact of the financial crisis deepened their responses broadened to protect levels of financial stability and to prevent the depreciation of the dollar.

The Federal Reserve ‘played a major role in addressing liquidity problems by providing a number of avenues for financial institutions to receive short term loans using collateral that the market would not accept at such generous rates’. It approached the financial crisis by utilising four mechanisms. First, it reduced US interest rates. Secondly, the Federal Reserve introduced a ‘Term Auction Facility’ to increase access to short-term liquidity. Under this scheme the Federal Reserve auctioned funds for deposit taking institutions ‘against the wide variety of collateral that can be used to secure loans’. Thirdly, it announced the ‘Terms Securities Lending Facility’, a weekly loan service that ‘promoted liquidity in Treasury and other collateral markets and thus fostered the

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50 Ibid.
51 Marshall above, n 30, at 3.
52 Ibid., at 13.
53 For a rationale for maintaining low interest rates since the dawn of the financial crisis see Federal Reserve ‘Why are interest rates being kept at a low level?’, n/d, available from http://www.federalreserve.gov/faqs/money_12849.htm, accessed 23 September 2013.
functioning of financial markets more generally’. Under this scheme $200bn of Department of Treasury’s securities were auctioned to increase the bank liquidity levels. The fourth scheme introduced by the Federal Reserve was the enforced takeover of Bear Stearns. The first legislative measure introduced to tackle the problems associated with the financial crisis was the Economic Stimulus Act 2008. President George Bush stated that the Act is:

large enough to have an impact – amounting to more than $152bn this year [2008], or about 1 percent of GDP. The Bill provides temporary tax incentives for businesses to make investments in their companies so that we create new jobs … the Bill provides individual tax relief in the form of tax rebates.

The principal objective of the Economic Stimulus Act 2008 was to stimulate the economy. In order to achieve this objective, the Act contained three particular objectives. First, to provide tax rebates for low income families amounting to $266m. Secondly, it aimed to encourage businesses to invest in qualifying property. Thirdly, it was designed to increase the loan limits for Fannie Mae, Freddie Mac and the Federal Housing Administration. The second legislative instrument introduced and signed by President George Bush was the Emergency Economic Stabilization Act 2008. The preamble to the Act outlined its aims as ‘to provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and

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protecting taxpayers’. After signing the Act President George Bush stated that it seeks to ‘address this problem [the financial crisis] head on by providing a variety of new tools to the government – such as allowing us to purchase some of the troubled assets, and creating a new government insurance program that will guarantee the value of others’. The most significant and perhaps controversial aspect of this Act was the creation of the Troubled Asset Relief Program (TARP). The Emergency Economic Stabilization Act 2008 was described as the ‘most significant economic intervention by the federal government in the financial system since the Great Depression’. It provided the Secretary of the Department of Treasury with approximately $700bn to purchase mortgages and other assets which had prevented financial institutions, families and small companies from accessing credit. Essentially, the Act ‘injected capital into troubled financial institutions by purchasing preferred stock’. The next legislative measure was the American Recovery and Reinvestment Act 2009, or ‘stimulus’ or ‘stimulus package’ Act, which provided $787bn of federal funding. The Act had five objectives: to preserve and create jobs and promote economic recovery; to assist those most impacted by the recession; to provide investments needed to increase economic efficiency by spurring technological advances in science and health; to invest in transportation, environmental protection

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64 Public Law 110–343.
67 This would include for example ‘banks, savings associations, credit unions, security brokers or dealers, and insurance companies’. Ghosh and Mohamed, ibid.
70 Fairfax above, n 60, at 1596.
71 American Recovery and Reinvestment Act 2009, s. 3(a)(1).
72 American Recovery and Reinvestment Act 2009, s. 3(a)(2).
73 American Recovery and Reinvestment Act 2009, s. 3(a)(3).
and other infrastructure that will provide long-term economic benefits;\textsuperscript{74} and to stabilise State and local government budgets, in order to minimise and avoid deductions in essential services and counterproductive state and local tax increases.\textsuperscript{75} President Barack Obama stated that the Act was the ‘beginning of the first steps to set our economy on a firmer foundation, paving the way to long-term growth and prosperity’ and described it as the ‘most sweeping economic recovery package in our history’.\textsuperscript{76} The American Recovery and Reinvestment Act 2009 was described by one commentator as ‘one of the most massive and far-reaching pieces of legislation in American history’.\textsuperscript{77} Additionally, the Dodd–Frank Wall Street Reform Act 2012, ‘a broad-ranging financial market reform’,\textsuperscript{78} was signed by President Barack Obama in response to the problems caused by the subprime crisis.\textsuperscript{79} It aimed to reduce the frequency of bailouts for financial firms.\textsuperscript{80} Furthermore, the Dodd–Frank Wall Street Reform Act altered the responsibility of existing regulatory bodies such as the Financial Stability Oversight Council (FSOC) and the Securities and Exchange Commission (SEC).\textsuperscript{81}

The impact of the financial crisis was also felt in Europe when IKB Industriebank posted losses of £475m due to its exposure to the US subprime market.\textsuperscript{82} Further losses attributed to the subprime market were

\textsuperscript{74} American Recovery and Reinvestment Act 2009, s. 3(a)(4).
\textsuperscript{75} American Recovery and Reinvestment Act 2009, s. 3(a)(5).
Introduction

reported by UBS, which wrote off 4.2bn Swiss francs in October 2007.83 By May 2008 the main credit losses linked to the subprime market had reached a then unprecedented scale. For example, Citigroup announced losses of $40.7bn, UBS $38bn, Merrill Lynch $31.7bn, HSBC $15.6bn, Bank of America $14.9bn, Morgan Stanley $12.6bn, Royal Bank of Scotland (RBS) $12bn, JP Morgan Chase $9.7bn, Washington Mutual $8.3bn, Deutsche Bank $7.5bn, Wachovia $7.3bn, Credit Agricole $6.6bn, Credit Suisse $6.3bn, Mizuho Financial $5.5bn, Bear Stearns $3.2bn and Barclays $3.2bn.84 The effect of the subprime market was also felt by nation states.85 For example, in December 2008 the European Union (EU) agreed a series of financial packages and measures aimed at bolstering growth to counteract the problems associated with the financial crisis. The problems were exacerbated in April 2009, when the EU ordered France, Spain, Greece and the Republic of Ireland to reduce their budgetary deficits.86 Furthermore, there were still concerns about the German bank. See Maximilian, J. ‘The sub-prime crisis, the credit squeeze and Northern Rock: the lessons to be learned’ (2008) Journal of Financial Regulation and Compliance, 16(1), 19–34, at 20. For a more detailed discussion of the impact of the subprime crisis on IKB see Kaal, W. and Painter, R. ‘Initial reflections on evolving standards: constraints on risk taking by directors and officers in Germany and the United States’ (2010) Seton Hall Law Review, 40, 1433–1485.


84 BBC News, ibid.


levels of debt in Portugal, Spain and the Republic of Ireland.87 In May 2010, the EU and IMF announced that it had agreed a €110bn financial package to rescue Greece,88 which was soon followed by an €85bn bailout for the Republic of Ireland.89 In response to the continuing debt problems, the euro zone established a permanent bailout fund, the European Stability Mechanism, which is the ‘euro zone’s rescue fund [that] will be able to recapitalise struggling banks directly’.90 Portugal was the next EU state to receive emergency liquidity from the EU, which totalled €78bn.91 In June 2011 Greece received a second financial bailout from the euro zone totalling €96.3bn.92 In the same month Italy introduced an austerity based budget of €50bn,93 but this did little to dissuade Standard and Poor from reducing Italy’s credit worthiness from A+ to A.94 In October 2011, the Bank of England provided £75bn into the

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Introduction

United Kingdom’s (UK’s) economy via quantitative easing.\(^95\) However, this in addition to the austerity measures introduced by the Coalition government since 2010 had little impact and in February 2013 the UK lost its AAA rating by Moody’s for the first time since 1978.\(^96\) This decision was soon followed by a decision by the Fitch credit rating agency (CRA) to also downgrade the UK to AA+ in April 2013.\(^97\) In March 2013, the IMF and EU announced that they wanted all bank customers in Cyprus to pay a levy in return for a €10bn bailout.\(^98\)

In the UK the first victim of the financial crisis was Northern Rock, which was granted emergency funding by the Bank of England,\(^99\) as the lender of last resort.\(^100\) Interestingly, only two months prior to securing the emergency funding, Northern Rock declared it had ‘continued to expand its business at a rapid rate … [and] its loans to customers underwent a net increase of £10.7bn’.\(^101\) Furthermore, it announced an increase in its interim dividend of 30.3 per cent.\(^102\) Nonetheless, the Financial Services Authority (FSA) expressed concerns about the bank’s


\(^{100}\) For an excellent discussion of the role of central banks as lenders of last resort see Lastra, R. ‘Lender of last resort, an international perspective’ (1999) International and Comparative Law Quarterly, 48(2), 340–361.

\(^{101}\) HM Treasury Select Committee The run on the Rock (HM Treasury Select Committee: London, 2008) at 14.

\(^{102}\) Ibid., at 25.
financial position following its stress testing in May 2007.\textsuperscript{103} Subsequently, evidence presented to the HM Treasury Select Committee suggested that in August 2007 the Bank of England, HM Treasury and the FSA were fully aware of Northern Rock’s financial predicament prior to its collapse.\textsuperscript{104} Following the announcement of the emergency funding, thousands of Northern Rock customers famously queued to withdraw their savings from the failing institution,\textsuperscript{105} which saw the bank’s shares drop by 40 per cent.\textsuperscript{106} In response, HM Treasury announced that it had increased the levels of the Financial Services Compensation Scheme (FSCS) to guarantee 100 per cent of the first £35,000 of customers’ savings.\textsuperscript{107} In February 2008, HM Treasury Select Committee published

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its damning report into the collapse and nationalisation of Northern Rock.\textsuperscript{108} This was followed by the publication of the FSA’s own review of its supervision of Northern Rock.\textsuperscript{109} The government introduced the Banking (Special Provisions) Act 2008 that resulted in the nationalisation of Northern Rock.\textsuperscript{110} This was followed by the Banking Act 2009 which introduced the Special Resolution Regime for failing banks; established the bank insolvency order and a new bank administration order.\textsuperscript{111} It soon transpired that Northern Rock was not isolated as other UK financial institutions faced similar problems. For example, the retail business of Bradford & Bingley was purchased by Santander while its mortgage and loans were nationalised.\textsuperscript{112} The Labour government announced that it had recapitalised Lloyds TSB, HBOS and RBS.\textsuperscript{113} In order to protect these banks, the Asset Protection Scheme (APS) was created by HM Treasury.
to improve levels of confidence in the UK banking sector by limiting its losses and by supporting its economic revival.\textsuperscript{114} In light of these problems the Financial Services Act received Royal Assent on 8 April 2010,\textsuperscript{115} which provided the FSA with a new financial stability statutory objective,\textsuperscript{116} new powers relating to the salary structure of the financial services sector,\textsuperscript{117} rules relating to ‘living wills’,\textsuperscript{118} the prohibition of short selling,\textsuperscript{119} a widening of the circumstances in which it may utilise its investigative powers,\textsuperscript{120} an extension of its enforcement powers,\textsuperscript{121} a series of consumer protection improvements\textsuperscript{122} and new powers to force the assembly of information by authorised firms.\textsuperscript{123} These measures were amended by the Financial Services Act 2012, a Coalition government statutory measure that resulted in the ‘rebranding’ of the FSA to the Financial Conduct Authority (FCA),\textsuperscript{124} and the creation of the Prudential


\textsuperscript{116} Financial Services Act 2010, s. 1.

\textsuperscript{117} Financial Services Act 2010, ss. 4–6.


\textsuperscript{120} Financial Services Act 2010, ss. 9–13.

\textsuperscript{121} Financial Services Act 2010, ss. 9–13.

\textsuperscript{122} Financial Services Act 2010, ss. 14–17.

\textsuperscript{123} Financial Services Act 2010, ss. 18–19.

\textsuperscript{124} The FCA has been referred to by some commentators as the ‘son of the FSA’. See Anon. ‘Reform of financial regulation gathers pace with son of FSA’ (2011) Company Law Newsletter, 297, 103.
Introduction

Regulation Authority (PRA)\textsuperscript{125} and Financial Policy Committee (FPC)\textsuperscript{126} that is housed within the Bank of England.\textsuperscript{127}

1.2 RATIONALE

One of the most important questions that has been addressed by many commentators since the outbreak of the financial crisis is what variables contributed or caused the largest financial crisis since the Great Depression and Wall Street Crash?\textsuperscript{128} The FSA stated that ‘the origins of the greatest post-war financial crisis can be traced back to a combination of macroeconomic factors and financial market developments. The resulting exuberance in pricing credit and volatility risk developed into a self-reinforcing cycle, exacerbated by a failure to develop appropriate macro-prudential policy responses.’\textsuperscript{129} In particular, the FSA identified six factors it felt contributed to the financial crisis, including the macroeconomic imbalances increasing complexity of the securitised credit model; rapid extension of credit and falling credit standards; property price booms; increasing leverage in the banking and shadow banking system; underestimation of bank and market liquidity risk, and a self-reinforcing cycle of irrational exuberance.\textsuperscript{130} The Department of Treasury stated that there were five factors that contributed towards the financial crisis, including a breakdown in underwriting standards for subprime mortgages; a significant erosion of market discipline; flaws in CRAs; risk management weaknesses at some large US and European financial institutions; and ineffective regulatory policies.\textsuperscript{131} Additionally, the Federal Reserve concluded that there were five factors that contributed towards the financial crisis. These were a generalised run on global assets, credit-driven growth, the US subprime mortgage crisis, the rapid increase in securitisation and the failure to price risk appropriately.

\begin{itemize}
\item For a brief discussion see Walker, G. ‘Prudential Regulation Authority’ (2011) Financial Regulation International, October, 7–11.
\item For a further discussion of this point see Chapter 2.
\item Financial Services Authority Financial risk outlook 2009 (Financial Services Authority: London, 2009) at 5.
\item Ibid., at 7–12.
\end{itemize}
The financial crisis and white collar crime

financial institutions; the dependence of many financial systems on short-term funding; a vicious cycle of mark-to-market losses driving fire sales of asset backed securities; the realisation that financial firms around the world were pursuing similar (flawed) business models and were subject to similar risks; and global swings in risk aversion supported by instantaneous worldwide communications and a shared business culture.\textsuperscript{132} Other well documented factors include the subprime mortgage crisis,\textsuperscript{133} weak banking regulation,\textsuperscript{134} high levels of consumer debt,\textsuperscript{135} toxic debts,\textsuperscript{136} securitisation,\textsuperscript{137} deregulation of banking legislation,\textsuperscript{138} ineffective macroeconomic policies,\textsuperscript{139} weak credit regulation,\textsuperscript{140} deregulation of consumer credit legislation,\textsuperscript{141} self-regulated


\textsuperscript{133} See for example European Commission Report of the High-Level Group on Financial Supervision in the EU (European Commission: Brussels, 2009) and Singh and LaBrosse above, n 107.

\textsuperscript{134} Hutchins, A. ‘Flip that prosecution strategy: an argument for using RICO to prosecute large-scale mortgage fraud’ (2011) Buffalo Law Review, 59(1), 293 at 306.


\textsuperscript{137} For a critical discussion of securitisation see Nwogugu, M. ‘Securitisation is illegal: racketeer influenced and corrupt organisations, usury, antitrust and tax issues’ (2008) Journal of International Banking Law and Regulation, 23(6), 316–332.


\textsuperscript{140} Choi and Papaioannou above, n 49, at 443.

\textsuperscript{141} See for example the impact of the decision in Marquette National Bank of Minneapolis v First Omaha Service Corp 439 U.S., at 299. For a more detailed discussion of the impact of this case on the deregulation of the consumer credit market in the US see Schaefer, E. ‘The Credit Card Act of 2009 was not enough: a national usury rate would provide consumers with the protection they need’ (2012) University of Baltimore Law Review, Summer, 41, 741–767.
CRAs and the culture of banking practices. It is not the purpose of this monograph to review in detail each of the factors that have contributed towards the financial crisis, but to add to the existing literature by recognising the importance of the previously under-researched factor: white collar crime.

It is acknowledged that many factors created the perfect economic environment that was partly fuelled by and then exploited by white collar criminals. This is a view supported by Huisman, who stated that ‘misconduct in the financial industry is widely seen as having triggered the credit crunch that has pushed the world into an economic crisis’. The National Public Survey on White Collar Crime reported that 70 per cent of people believe that white collar crime contributed towards the financial crisis. It has also been reported that there have been increases in white collar crime since the start of the financial crisis in 2008. For example, this includes insurance fraud, credit card fraud, business

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142 See European Commission above, n 133.
143 See Tomasic above, n 1.
144 Huisman, W. ‘White-collar crime and the economic crisis’ (2012/2013) Newsletter of the European Society of Criminology, 11, at 8. This is a view supported by Gee, who stated that ‘there is considerable evidence that fraud was a major cause of the recession, with widespread sale of financial securities based on sub-prime mortgages, which were known to be worthless’. See Gee, J. ‘Fraud 2009 bad, 2010 better?’ (2010) Computer Fraud and Security, 2010, February, 2, 13–15, at 13. However, it is important to acknowledge that not all commentators agree with the contention that white collar crime was an important variable that contributed towards the financial crisis. See for example Gill, M. ‘Fraud and recessions: views from fraudsters and fraud managers’ (2011) International Journal of Law, Crime and Justice, 39, 204–214.
fraud and reported fraud by CIFAS. However, it is very important to note that it is very difficult to accurately determine levels of white collar crime, let alone increases that are associated with a financial crisis. Huisman argued that an increase in white collar crime emanating from the financial crisis is largely attributed towards accounting fraud. Other commentators, such as Nguyen and Pontell, asserted that prevalent mortgage fraud is associated with the financial crisis. The link between the financial crisis and white collar crime is clearly illustrated by an increase in the related enforcement actions of the SEC, the CFTC, the FBI, the Department of Justice, the FSA, the FCA and the Serious Fraud Office (SFO). For example, since the start of the financial crisis the SEC has charged 161 companies and individuals, including 66 senior corporate officials, with related offences and 37 individuals have either been barred from acting as company directors or suspended from doing so. In addition it has imposed penalty orders of $1.53bn, enforced disgorgement orders totalling $800m and obtained $400m compensation for affected investors. The total amount of penalties amounts to $2.73bn.

Abramowitz and Sack took the view that:

Enforcement statistics from the SEC reveal a constant steady uptick in enforcement actions. Fiscal years 2011 and 2012 brought the highest numbers ever for the agency, with 735 and 734 total actions in those respective years. In the SEC’s 2012 annual report, Chairwoman Mary Schapiro noted that in connection with the financial crisis, the SEC has filed actions against 117 entities and individuals

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(in 80 actions) including more than 50 CEOs, CFOs and other senior corporate officers, and obtained over $2.2 billion in monetary relief.\textsuperscript{153}

Specific instances of enforcement action pursued by the SEC include Goldman Sachs agreeing to pay $550m to reconcile SEC charges related to subprime mortgage collateralised debt obligation\textsuperscript{154} and CR Intrinsic agreeing to pay $600m to settle insider trading charges.\textsuperscript{155} The CFTC has been heavily involved in the manipulation of the London inter-bank offered rate (LIBOR) by banks in the UK and US and has fined Barclays $200m,\textsuperscript{156} UBS $700m,\textsuperscript{157} RBS $325m\textsuperscript{158} and ICAP $65m.\textsuperscript{159} Abramowitz and Sack took the view that:


\textsuperscript{159} Commodities Futures Trading Commission ‘CFTC charges ICAP Europe Limited, a subsidiary of ICAP plc, with manipulation and attempted manipulation of
A similar upward trend has been documented at the CFTC. Fiscal year 2011 brought record highs with 99 enforcement actions, the highest tally in the agency’s history and a 74 percent increase over the prior year, and more than 450 new investigations opened. In fiscal year 2012, the agency filed 102 enforcement actions and opened 350 new investigations.\(^{160}\)

Additionally, the Department of Justice announced that RBS Securities Japan Limited, a wholly owned subsidiary of RBS, pleaded guilty to wire fraud and its role in influencing the Japanese yen LIBOR.\(^{161}\) As part of a deferred prosecution agreement it has agreed to pay a $50m fine. Additionally, RBS Securities Japan Limited agreed to pay a $100m penalty to the Department of Justice.\(^{162}\) Similarly, the FBI has seen a significant increase in its enforcement and investigative activities towards white collar crime, especially mortgage fraud, since the start of the financial crisis.\(^{163}\) For example, at the time of writing the FBI is investigating 1,954 allegations of mortgage fraud, approximately 70 per cent of which exceed $1m; it made 1,079 indictments and secured 1,026 convictions in 2012, approximately $13bn was lost and there are 141 open investigations.\(^{164}\) The increase in mortgage fraud is illustrated by also examining the number of mortgage fraud related suspicious activity reports (SARs) filed by the Financial Crimes Enforcement Network (FinCEN) with the US Financial Intelligence Unit.\(^{165}\) In 2010, FinCEN received 70,472 mortgage loan fraud SARs, a 4 per cent increase from yen Libor’, 25 September 2013, available from http://www.cftc.gov/PressRoom/PressReleases/pr6708-13, accessed 8 October 2013.

\(^{160}\) Abramowitz and Sack above n 153, at 2.


\(^{162}\) Ibid.


In 2011, FinCEN reported that 92,028 mortgage loan fraud SARs had been reported, an increase of 31 per cent from 2010. The link between the financial crisis, subprime lending and mortgage fraud was also acknowledged by Patterson and Koller, who stated:

The subprime mortgage products and processes that were made available in the 1990s, however, increased the population of potential offenders, increased temptation and suitable targets, and increased the ease at which motivated individuals could take advantage of the opportunities to commit crime. As such, it was not necessarily the routine of the housing/mortgage industry that was problematic, it was the actual category of subprime products that created an environment rich with white collar crime and opportunity.

We have also seen increased enforcement activities of regulatory agencies in the UK since the start of the financial crisis in 2007. The FSA adopted what it refers to as a ‘credible deterrence’ approach towards its then financial crime statutory objective. In 2007, the FSA imposed a total of £5.3m of financial sanctions on firms and individuals. A year later, it reported that the figure had increased to £22.7m. In 2009 the total amount of financial sanctions imposed by the FSA had risen to £35m. The figures for 2010 and 2011 illustrated an increase to £89.1m but then a fall to £66.1m. 2012 represented the largest amount of financial

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167 Ibid.
168 Patterson and Koller above, n 46, at 33. This is a view supported by Barnett, H. ‘The securitization of mortgage fraud’ in Deflem, M. (ed.), Economic crisis and crime (Emerald: Bingley, 2011) at 67–68.
sanctions imposed by the FSA, totalling a staggering £311.5m. Prior to its merger into the FCA, by April 2013 the FSA had imposed fines totalling £135.8m and it would have been on course to exceed its figure from 2012. These figures since 2011 have been influenced by the imposition of a series of record fines due to the LIBOR scandal. This includes, for example, the £59.5m fine on Barclays, the £160m fine on UBS and the £87.5m fine on RBS. It is important to note that the FCA has continued to use the ‘credible deterrence’ strategy by virtue of the Financial Services Act 2012. It has been suggested by one commentator that the:

FCA intends to pursue the policy of credible deterrence as vigorously as (if not more so than) the FSA has done. This will mean even higher penalties against high-profile targets, both firms and individuals. There has been a continuing trend of imposing significant, exemplary sanctions against senior individuals in the market, particularly in the context of market conduct cases.

An example of the FCA continuing the credible deterrence policy is the financial sanctions it has imposed since the LIBOR scandal. For instance, in September 2013 the FCA fined ICAP Europe Limited £14m over its role in the LIBOR scandal. Since April 2013, the FCA has imposed

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financial penalties totalling approximately £202m,\(^{182}\) and the largest financial sanction imposed by the FCA was £137.6m on JP Morgan.\(^{183}\)

Additionally, there has been an increase in the enforcement activities of the SFO, which was created as a result of the influential recommendations of the Roskill Report and the implementation of the Criminal Justice Act 1987.\(^{184}\) The SFO is an independent government department that investigates and prosecutes serious, complex fraud and corruption.\(^{185}\) The SFO was heralded as the UK’s answer to the FBI, due to its combined investigative and prosecutorial powers. However, the SFO has led a troubled life and is perceived by many commentators as a failing organisation. Its reputation has been tarnished by several high profile failures, including for example Guinness,\(^{186}\) Blue Arrow,\(^{187}\) Maxwell,\(^{188}\) Levitt\(^{189}\) and Azil Nadir.\(^{190}\) More recently, the SFO has been in the headlines for its handling of the bribery allegations against BAE Systems and its abandonment of the investigation into arms sales in Saudi Arabia.\(^{191}\)

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\(^{184}\) Criminal Justice Act 1987, s. 1(1).


The weaknesses of the SFO have been highlighted by several reports, including the de Grazia Review and the HM Crown Prosecution Service Inspectorate in 2008 and 2012. More recently, the SFO has been severely criticised over its poor handling of the Tchenguiz brothers’ investigation. However, it is important to note that the SFO has increased the frequency of its investigations and prosecutions against its tainted track record. For example, in its 2006/2007 Annual Report the SFO noted that since 2001 it had achieved a conviction rate of 61 per
cent. However, this figure had increased to 71 per cent by 2006/2007. In its next Annual Report, the conviction rate had increased to 68 per cent. In 2009, the SFO achieved an impressive conviction rate of 91 per cent. However, this figure fell to 84 per cent in 2010 and 73 per cent in 2011. The regulatory performance of the SFO has been assisted by the introduction of the Bribery Act 2010. Under the Act the SFO, or ‘chief prosecutors of offences under the Bribery Act’, have been provided with additional prosecutorial powers by the creation of several new offences. These include for example offering, promising or providing a bribe, requesting, agreeing to receive or accepting a bribe, bribery of foreign public officials and failure of commercial organisations to prevent bribery.

It is interesting to note that the increased enforcement activity of both the FSA and SFO could be associated with an announcement by the Coalition government of the creation of the single Economic Crime

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197 Ibid., at 4.
204 Bribery Act 2010, s. 1.
205 Bribery Act 2010, s. 2.
206 Bribery Act 2010, s. 6.
207 Bribery Act 2010, s. 7.
Agency (ECA) in its Coalition Agreement. The government stated that ‘we take white collar crime as seriously as other crime and we are determined to simplify the confusing and overlapping responsibilities in this area in order to improve detection and enforcement’. The government acknowledged that the regulatory structure then in place was unworkable due to conflicting priorities, overlapping roles and ineffective outcomes. However, the formation of the ECA was obstructed by differences of opinion within the Coalition government over its remit and the reaction of both the SFO and FSA. The most significant factor that prevented its creation was the uncertainty over its ownership. It is to the bemusement of the author that HM Treasury, which managed the FSA and administered the UK’s anti-money laundering and counter-terrorist financing policies, was not considered for this role. The ECA was to be managed by the Home Office, which hoped to end the UK’s ‘piecemeal’ attitude towards tackling financial crime. However, the Home Office mistakenly expected that the ‘initial elements’ of the agency would be in place by the middle of 2011. In a soap opera-like twist, the Home Office decided against creating the ECA, and turned its attention to establishing the broader National Crime Agency (NCA), the objective of which was to tackle organised crime, fraud, and cyber crime, maintain border protection, and protect children and young people. The NCA is divided into four Command areas: Organised Crime Command, Border Policing Command, Economic Crime Command, and the Child Exploitation and Online Protection Centre. The Home Office envisions the

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212 Ibid.

role of the Economic Crime Command to ‘ensure a coherent approach to
the use of resources focussed on economic crime across the full range of
agencies deploying them’.214 Furthermore, the Economic Crime Com-
mand will ‘maintain an overview’ of a wide range of economic crime
agencies, including the City of London Police and SFO.215

1.3 DEFINITIONS

The most recent financial crisis has been referred to by many commen-
tators, especially those in the media, as the ‘Credit Crunch’. It would
seem a very easy term to define, and it could be interpreted as ‘a severe
shortage of money or credit’216 or where ‘creditors become reluctant to
lend money to businesses or individuals’.217 However, the phrase ‘Credit
Crunch’ has attracted numerous interpretations and a degree of uncer-
tainty as to its origin. For example, it has been claimed that the term was
first used in 1966 to describe the restrictive credit conditions when
financial institutions were reluctant to offer credit to borrowers.218 It has
also been said that the term can be traced to the Roman Republic in
88BC.219 The term ‘Credit Crunch’ has been defined as ‘unexplained
sluggishness in the economy and that it should be reserved for a situation
of widespread non-price rationing of credit’.220 It has also been referred
to as a period of time where interbank lending stops and it becomes more

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214  Ibid., at 20.
215  Home Office above, n 211, at 20.
216  BBC News ‘Credit crunch enters the lexicon’, 3 July 2008, available from
219  Brown, M. ‘First credit crunch traced back to Roman republic’, 28
28/credit-crunch-roman-republic-lecture, accessed 1 February 2013. Also see
University of Oxford ‘World’s first credit crunch?’, 27 November 2008, available from
220  Peek, J. and Rosengren, E. Crunching the recovery: bank capital and the
Bank of Boston, 151–186.
difficult to obtain and offer credit facilities. The term ‘Credit Crunch’ has been frequently used by economists, who have also offered a variety of definitions, resulting in further uncertainty as to ‘what constitutes a credit crunch’. For example, Bernanke and Lown defined it as ‘a significant leftward shift in the supply curve for bank loans, holding constant both the safe real interest rate and the quality of potential borrowers’. According to Clair and Tucker ‘the phrase “credit crunch” has been used in the past to explain curtailment of the credit supply in response to both … a decline in the value of bank capital and … conditions imposed by regulators, bank supervisors, or banks themselves that require banks to hold more capital than they previously would have held’. The Council of Economic Advisers offered the following definition of ‘Credit Crunch’: ‘when the supply of credit is restricted below the range usually identified with prevailing market interest rates and the profitability of investment projects’. Writing in 1980, Wojnilower characterised a credit crunch as ‘cyclically significant retardations or reductions in credit and aggregate demand occur only when there is an interruption in the supply of credit’. Other terms that are synonymous with the ‘Credit Crunch’ are ‘financial crises’ and ‘banking crises’. According to Reinhart and Rogoff a banking crisis depends on the occurrence of two events. First, there must be ‘bank runs that lead to the closure, merging or takeover by the public sector of one or more
financial institutions’.228 Secondly, there must be ‘large scale government assistance of an important financial institution (or group of institutions) that mark the start of a string of similar outcomes for other financial institutions’.229 Another term associated with a ‘Credit Crunch’ is a ‘Credit Squeeze’, which, according to Mizen, is a ‘milder version of a full-blown credit crunch … [which] we observed in 2007 and early 2008’.230

The term ‘white collar crime’ has become synonymous with Professor Edwin Sutherland, who has been described as the ‘most influential American criminologist of his day’.231 He used the term in his 1939 presidential lecture to the American Sociological Society.232 He defined ‘white collar crime’ as ‘a crime committed by a person of respectability and high social status in the course of his occupation’.233 In his seminal paper, Sutherland stated that:

The present-day white-collar criminals, who are more suave and deceptive than the ‘robber barons’, are represented … [by] many other merchant princes and captains of finance and industry, and by a host of lesser followers. Their criminality has been demonstrated again and again in the investigations of

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229 Ibid.
233 Sutherland, E. *White collar crime* (Dryden: New York, 1949) 9, as cited in Wilson, S. ‘Collaring the crime and the criminal? Jury psychology and some criminological perspectives on fraud and the criminal law’ (2006) Journal of Criminal Law, 70(1), 75–92, at 79. This is a view supported by Gottschalk, who stated that ‘the most economically disadvantaged members of society are not the only ones committing crime. Members of the privileged socio-economic class are also engaged in criminal behaviour. The types of crime may differ from those of the less privileged classes, such as lawyers helping criminal clients launder their money, executives bribing public officials to achieve public contracts, or accountants manipulating balance sheet to avoid taxes’. Gottschalk, P. ‘Executive positions involved in white-collar crime’ (2011) Journal of Money Laundering Control, 14(4), 300–312, at 302. For a more detailed commentary on the definitions of white collar crime see Simpson, S. ‘White collar crime: a review of recent developments and promising directions for future research’ (2013) Annual Review of Sociology, 39, 309–331, at 310–313.
land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiverships, bankruptcies, and politics.\textsuperscript{234}

One of the most important parts of this definition is that white collar crime is committed by people of a high social standing, a view supported by Benson and Simpson, who stated that ‘criminal behaviour by members of the privileged socioeconomic class is labelled white-collar crime’.\textsuperscript{235} Kempa described white collar crime as a ‘wide concept that speaks generally to illegal behaviour that takes advantage of positions of professional authority and power – or simply the opportunity structures available within business – for personal or corporate gain’.\textsuperscript{236} Friedrichs stated that white collar crimes are ‘the large scale illegalities … committed on behalf of major financially privileged statuses, including violations of banking Acts, bribery, fraud, tax evasion, money laundering, insider trading, predatory lending, and other deceptive practices’.\textsuperscript{237} Sutherland’s definition has been described as his ‘most famous and controversial legacy’.\textsuperscript{238} However, Green suggested that the interpretation of the term is ‘deeply contested’, and that the definition provided ‘was famously vague and inconsistent’.\textsuperscript{239} Furthermore, Bookman argued that Sutherland’s definition of white collar crime was too narrow.\textsuperscript{240} This was a view supported by Leong, who noted that:

\textsuperscript{234} Sutherland above, n 232 at 2.
\textsuperscript{237} Friedrichs, D. \textit{Trusted criminals: white collar crime in contemporary society} (Wadsworth Cengage Learning: Belmont, 2010) at 190.
\textsuperscript{239} Green above, n 231 at 3. For a more detailed discussion of the problems associated with the definition of white collar crime see Gilligan, G. ‘The problem of, and with, financial crime’ (2012) Northern Ireland Legal Quarterly, 63(4), 495–508.
the definition of white-collar crime is criticised for being too narrow as it does not include the differential associations between the ‘upperworld’ of corporations and the ‘underworld’ of criminal organisations. At the same time, it is criticised for being too broad as an all-encompassing category. In fact, the distinction between organised crime or ‘business in crime’ and the activities of white-collar offenders blurs, and organised crime often uses and abuses legitimate corporate enterprises.241

Further criticism over the definition afforded by Sutherland was offered by Podgor, who stated that ‘the bottom line is that throughout the last 100 years no one could ever figure it [white collar crime] out’.242 Friedrichs stated that by the 1970s there were two ‘core types of white collar crime [that] have been widely recognised: corporate crime and occupational crime’.243 Soothill went so far as to argue that ‘there have been long-standing doubts and debates about whether these misbehaviours [white collar crime] can be considered to count as crime’.244 Brody and Kiehl correctly asserted that the most significant limitation of Sutherland’s definition is that it has not endured the progress and advancement of white collar crime to retain its status as the conventional definition. They concluded that ‘many scholars continue to redefine and develop a more useful and working definition of the term’.245 White collar crime has also been referred to as ‘financial crime’, ‘economic crime’ and ‘illicit finance’.246

In the UK financial crime is defined as ‘any offence involving fraud or dishonesty; misconduct in, or misuse of information relating to, a financial market; or handling the proceeds of crime’.247 Graham stated

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246 For a general discussion of these different types of white collar crime see Harrison, K. and Ryder, N. The law relating to financial crime in the United Kingdom (Ashgate: Farnham, 2013).
247 Financial Services and Markets Act 2000, s. 6(3). Friedrichs defined ‘financial crime’ as ‘large-scale illegality that occurs in the world of finance and financial institutions’. See Friedrichs above, n 237, at 9.
that there are two elements to this definition. First, ‘there must be an
offence, which is defined in clause 6(4) to include an act or omission
which would be an offence if it had taken place in the UK. This
definition therefore includes financial crimes committed abroad provided
they would be offences were they to have taken place in the UK.’248
Secondly, ‘there are limitations to the “offence” definition, since not all
offences constitute “financial crime” … “proceeds of crime” is not
defined … this phrase is likely to be interpreted to include proceeds of
crimes committed abroad’.249 Fleming noted that ‘financial crime as
defined by FSMA relates to a broad and potentially indistinct range of
offences’.250 The FBI has provided a broad definition of ‘financial
crime’, which includes corporate fraud, commodities and securities fraud,
mortgage fraud, healthcare fraud, financial institution fraud, insurance
fraud, mass marketing fraud and money laundering.251 Definitions of the
term ‘financial crime’ have also been presented by academics. For
example, Gottschalk states that it is ‘a crime against property, involving
the unlawful conversion of property belonging to another to one’s own
personal use and benefit’, stating that it is often ‘profit driven … to gain
access to and control over property that belonged to someone else’.252

Now that the main terms have been defined, it is necessary to outline
and justify why the US and UK have been selected as case studies for
this monograph.

1.4 WHY THE UNITED STATES OF AMERICA?

The US presents an interesting case study for this monograph. This is
because, for example, the origins of the financial crisis can be traced to
its subprime mortgage sector, which has been heavily linked to a

248 Graham, T. ‘Financial Services and Markets Bill: investigations and
enforcement in the context of the financial crime objective’ (2000) Journal of
249 Ibid.
250 Fleming, M. FSA’s Scale & Impact of Financial Crime project (phase
one): Critical Analysis Occasional Paper Series 37 (Financial Services Author-
251 Federal Bureau of Investigation ‘Financial crimes report to the public’,
available from http://www.fbi.gov/stats-services/publications/financial-crimes-
report-2010-2011/financial-crimes-report-2010-2011#Financial, accessed 21
March 2012.
Crime 17(4), 441–458, at 441.
significant increase in mortgage fraud. The association between the subprime mortgage market and fraud was identified by Podgor, who stated that:

The subprime market was out of control and because it was not sufficiently monitored there were instances of fraud. In some instances, the frauds that were eventually prosecuted had caused enormous losses. The high loss figures may have been due in part to the length of time that these frauds had gone undetected.253

Since the start of the financial crisis in 2007, there have been several high profile white collar crimes that have either emanated from it or been exposed by it. These include the Ponzi related frauds committed by Bernard Madoff and Allen Stanford and the rampant increase in mortgage fraud. One of the key questions that commentators have asked is how were both Madoff and Stanford able to avoid detection for so many years? Therefore, an excellent opportunity exists to review the performance of the SEC, FBI and other US regulatory agencies in light of these regulatory mishaps.254 Furthermore, US regulatory agencies such as the SEC and FBI have instigated numerous investigations and prosecutions and imposed record financial penalties for the illegal activities of firms that have contributed towards the financial crisis. However, it is also important to stress that these agencies, along with the Department of Justice, have failed to secure any high profile Wall Street related criminal convictions for the alleged culprits.

Another reason why the US was selected for this research is that there has been a dramatic rethink of its white collar crime policy since the start of the financial crisis. This is partly due to the diversion by President George Bush of resources and staff from white collar crime agencies to the ‘War on Terror’ following the terrorist attacks in September 2001. As will be explained in this monograph, this decision was to have a detrimental and catastrophic impact on the initial regulatory and enforcement response to white collar crime during the financial crisis. This was dramatically reversed by President Obama, who signed the Fraud Enforcement Recovery Act 2009, which resulted in a significant increase in funding for the Department of Justice and other related agencies to

tackle white collar crime associated with the financial crisis.\textsuperscript{255} Additionally, President Obama authorised the creation of the Financial Fraud Enforcement Task Force, which aimed to ‘hold accountable those who helped bring about the last financial crisis, and to prevent another crisis from happening’.\textsuperscript{256}

The final reason why the US was selected as a case study relates to its response to previous financial crises where white collar crime was a contributory factor. This includes, for example, the robust stance illustrated during the Savings and Loans Crisis and the response to the collapse of Enron and WorldCom. This assists in determining if the policies adopted since the 2007 financial crisis are similar and effective.

1.5 WHY THE UNITED KINGDOM?

As previously outlined in this chapter, the financial crisis has had a dramatic impact on the economic performance of the UK and adversely affected the performance of its banking sector. Evidence suggests that since the start of the financial crisis there has been a steady increase in the amount and instances of white collar crime. For example, the National Fraud Authority estimated that the extent of fraud in the UK increased from £38.4bn in 2011 to £73bn in 2012.\textsuperscript{257} Additionally, KPMG reported that the extent of fraud in the UK had increased to a record high in 2011.\textsuperscript{258} The UK provides a unique comparator to the US


\textsuperscript{257} National Fraud Authority \textit{Annual fraud indicator 2011} (National Fraud Authority: London, 2011) at 3. Interestingly, the figure in 2010 was £30bn. See National Fraud Authority \textit{Annual fraud indicator 2010} (National Fraud Authority: London, 2010) at 3. Also see National Fraud Authority \textit{Annual fraud indicator 2012} (National Fraud Authority: London, 2012) at 3.

due to the policy adopted by the Coalition government towards banking regulation and the prevention of white collar crime. The UK’s white collar crime strategy has significantly altered since publication of the Coalition Agreement in 2010. Initially, it anticipated amalgamating the SFO, the Office of Fair Trading and the FSA into a single financial crime agency, the ECA. The ECA was to be managed by the Home Office in an attempt to end the fragmented approach towards tackling financial crime. However, the Home Office decided against creating the ECA, and turned its attention to establishing the broader NCA. This reversal by the Home Office presents a new landscape towards the regulation and enforcement of white collar crime in the UK.

Another reason why the UK was chosen as a case study relates to the significant enforcement response to white collar crime associated with the financial crisis by the SFO and FSA. For example, the FSA has imposed a higher number of financial penalties since 2010, which have been largely based on the LIBOR scandal. Similarly, the SFO has also illustrated an increase in the number of prosecutions, especially in relation to mortgage fraud and the manipulation of LIBOR. An important factor that also needs to be taken into consideration is the impact of the Financial Services Act 2012 on banking regulation and white collar crime. In addition to replacing the ineffective FSA the Act also aimed to redress the regulatory and legislative deficiencies regarding certain types of white collar crime. The Financial Services Act 2012 provides that the FCA has a number of operational objectives, including, for example, consumer protection, integrity, and competition. One issue that has not been included in the 2012 Act is the FSA’s financial crime statutory objective. However, the Financial Services Act does state that the FCA, when discharging its general functions, must have regard to ‘the importance of taking action to minimize the extent to which it is possible for a business … to be used for a purpose of being


261 Financial Services Act 2012, s.1(C).

262 Financial Services Act 2012, s.1(D).

263 Financial Services Act 2012, s.1(E).

264 Financial Services and Markets Act 2000, s. 6.
connected with financial crime’. Furthermore, financial crime is also an important part of the FCA’s integrity objective. What is clear is that the FCA will continue to use the FSA’s ‘enforcement responsibilities’ and ‘it is clear that the FCA intends to pursue the policy of credible deterrence as vigorously as the FSA has done’.  

One of the most important reasons why the UK was selected as a case study is that the Coalition government has introduced and implemented a series of austerity cuts in the area of white collar crime enforcement, whereas the US government has increased funding. The budget of the SFO has been slashed by the Coalition government since the 2010 general election, which initially was seen to have prevented its investigation into the manipulation of LIBOR. In 2007/2008 its annual budget was £43.3m, in 2008/2009 it was £53.2m, yet the figure has now been reduced to £32.1m in 2013/2014 and £30.8m in 2014/2015. The problems associated with funding cuts were highlighted by Thomas LJ, who stated that more funding would allow the SFO to ‘deal with investigations with clarity’.

1.6 CONTENTS OVERVIEW

Chapters 2 and 3 of the monograph seek to add to the existing literature by identifying and commenting on the relationship between white collar crime and the 2007 financial crisis. It is not the intention of these chapters to reengage in a detailed commentary of the contributing variables, such as the subprime mortgage crisis, weak banking regulation, high levels of consumer debt, toxic debts, securitisation, ineffective

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265 Financial Services Act 2012, s. 1B(5).
266 Financial Services Act 2012, s.1(D)(2)(b).
269 Serious Fraud Office above, n 200, at 7.
Introduction

Macroeconomic policies, weak credit regulation, deregulation of consumer credit legislation, self-regulation of CRAs and the culture of banking practices. Therefore, the main area of discussion, debate and analysis is the association between the financial crisis and white collar crime. Chapter 2 identifies several factors that support the contention that this relationship is a significant factor as those previously documented. These variables include, inter alia, subprime mortgages, CRAs, predatory lending, mortgage fraud, Ponzi schemes and the 'Financial War on Terror'. The third chapter provides a detailed commentary on specific examples of white collar crime and how they contributed towards the financial crisis. In particular, the chapter concentrates on mortgage fraud, Ponzi schemes, market manipulation, misleading statements and the manipulation of LIBOR.

Chapters 4 and 5 seek to critically reflect on the responses in the US and UK towards white collar crime associated with the financial crisis. Chapter 4 begins by outlining and identifying the policies adopted in the US towards white collar crime since the start of the financial crisis. The first part of the chapter briefly outlines the initial measures introduced by President George Bush. The next part then offers a detailed analytical review of the legislative measures introduced to counteract the problems associated with the financial crisis. Some of the legislative measures include, for example, the Emergency Economic Stabilization Act 2008, the Housing and Economic Recovery Act 2008, the American Recovery and Reinvestment Act 2009, the Fraud Enforcement and Recovery Act 2009 and the Dodd–Frank Wall Street Reform Act 2012. The chapter then moves on to assess the regulatory response towards white collar crime emanating from the financial crisis. This involves an analysis of the functions of several federal regulatory agencies. The final part of Chapter 4 examines the law enforcement response to white collar crime and the financial crisis. This section is divided into two parts: criminal and civil sanctions. Particular reference is made to the use of deferred prosecution agreements, the increased use of financial sanctions by the SEC and CFTC, the instigation of civil fraud suits against CRAs and the lack of criminal proceedings.

The aim of the Chapter 5 of this monograph is to critically consider the response in the UK towards the relationship between white collar crime and the financial crisis. The chapter begins by seeking to identify the UK’s policy towards white collar crime since the start of the financial crisis. This is achieved by undertaking a detailed analytical review of the overabundance of policy review documents that have been commissioned by the former Labour and current Coalition governments. This section of the chapter highlights and critiques the meaningful policy disparities
between each of the two governments. This is clearly determined in three instances. The second part of the chapter outlines and critically considers the impact of the legislative responses towards the association between white collar crime and the financial crisis. Reference is made to the relevant statutory provisions of the Financial Services Act 2012, the Courts and Crime Act 2013 and the Financial Services (Banking Reform) Act 2013. The penultimate part of the chapter outlines and judiciously critiques the regulatory response to the association between white collar crime and the financial crisis. Particular attention is given to the role of the FSA, the SFO, the NCA and the FCA. The final part of the chapter critiques the enforcement of white collar crime during the financial crisis, and particular attention is drawn to the use of financial penalties, at the expense of instigating criminal proceedings.

Chapter 6 of the monograph draws together the findings and conclusions of the research and offers a commentary on the response to white collar crime originating from the financial crisis.