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]

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1 Tomasic, R. 'The financial crisis and the haphazard pursuit of financial crime' (2011) Journal of Financial Crime, 18(1), 7–31, at 7.

2 Financial Crisis Inquiry Commission *Final report of the National Commission on the causes of the financial and economic crisis in the United States* (Financial Crisis Inquiry Commission: Washington DC, 2011) at xvi. For a useful summary of the Financial Crisis Inquiry Commission see Angelides, P. 'FICF and the crisis: preventing the next financial meltdown' (2012) UMKC Law Review, Summer, 80, 949–964.

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.[3] The lending practices of subprime lenders fuelled the flames of the worst economic crisis since the 1929 Wall Street Crash and subsequent Great Depression.[4] 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.[5] 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.[6] 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.[7] An 'alt-A' loan is used by debtors who generally have a good credit rating that contains some shortcomings.[8] Conversely, a 'subprime loan' is aimed at 'high-risk borrowers who

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[3] Edmonds, T., Jarrett, T. and Woodhouse, J. *Credit crunch time line* (House of Commons Library: London, 2010) at 1.

[4] *Ibid*.

[5] Ramirez, M. 'Criminal affirmance: going beyond the deterrence paradigm to examine the social meaning of declining prosecution of elite crime' (2013) Connecticut Law Review, February, 45, 865–931, at 875.

[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.

[8] Such shortcomings according to Messerschmitt could include an inability to 'verify their income or have high debt-to-income ratios'. See Messerschmitt, D. 'Overview of the subprime mortgage market' (2007) Review of Banking and Financial Law, Fall, 27, 3–11, at 3. Furthermore, US lenders also offered other high risk lending instruments, including 'No Income, No Jobs or Assets' loans, and exploding adjustable rate mortgages. See Jackson, K. 'The scandal beneath the financial crisis: getting a view from a moral–cultural mental model' (2010) Harvard Journal of Law and Public Policy, 33, 735–778, at 767 and Carrillo, J. 'Dangerous loans: consumer challenges to adjustable rate mortgages' (2008) Berkeley Business Law Journal, 5, 1–43. Also see Seitz, N., Gilsinan, J., Millar, J., Fisher, J., Harshman, E., Islam, M. and Yeager, F. 'Bank integrity: the case of subprime lending' (2009) Company Lawyer, 30(9), 271–276, at 272.

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

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[9] *Ibid*., at 3. For an excellent discussion of subprime loans see Bar-Gill, O. 'The law, economics and psychology of subprime mortgage contracts' (2009) Cornell Law Review, 93, Rev. 1073–1151. A subprime loan has been defined as 'mortgage loan to a borrower with sub-standard credit'. See *Henry v Lehman Commercial Paper, Inc*., 471 F.3d 977, 984 (9th Cir. 2006) as cited in Johnston, K., Greer, J., Biermacher, J. and Hummel, J. 'The subprime morass: past, present and future' (2008) North Carolina Banking Institute, March, 12, 125–139, at 125. A subprime borrower has been defined as 'borrowers displaying a high credit risk of delinquency'. See Dose, D. 'Subprime: price of infringements' (2008) International Business Law Journal, 4, 558–568, at 559. For a more detailed discussion of the definition see Department of Treasury, Office of Comptroller, Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision and National Credit Union Association 'Statement on subprime mortgage lending', 29 June 2007, available from http://www.occ.gov/news-issuances/news-releases/2007/nr-ia-2007-64a.pdf, accessed 5 March 2013.

[10] White, A. 'The case for banning subprime mortgages' (2008) University of Cincinnati Law Review, Winter, 77, 617–644, at 618. This is a view supported by Nguyen, T. and Pontell, H. 'Fraud and inequality in the subprime mortgage crisis' in Deflem, M. (ed.), *Economic crisis and crime* (Emerald: Bingley, 2011) at 12. For an interesting discussion of the problems associated with and the legality of subprime mortgages see Brescia, R. 'Tainted loans: the value of mass torts approach in subprime mortgage litigation' (2009) University of Cincinnati Law Review, 78, 1–79. Also see Financial Crisis Inquiry Commission above, n 2, at 70.

[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'.[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'.[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.[16] Secondly, a large collection of US mortgages were in the possession of banks in many different countries around the world,[17] and it soon became apparent that many of these mortgages were toxic, thus contributing to the spread of the financial crisis.[18]

The first evidence of the financial crisis appeared in April 2007, when New Century Financial, one of the US's largest subprime lenders,[19] announced it had outstanding liabilities of $100bn and had filed for bankruptcy protection.[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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[14] Securitisation is a financial practice that 'efficiently allows risk and capital [that] enables companies to access capital markets'. See Schwarcz, S. 'The future of securitisation' (2008) *Duke Public Law and Legal Theory Research Paper Series No. 223*¸ at 1 as cited in Gray, J. and Akseli, O. *Financial regulation in crisis? The role of law and the failure of Northern Rock* (Edward Elgar: Cheltenham, 2011) at 2.

[15] Bavoso, V. 'Financial innovation and structured finance: the case of securitisation' (2012) Company Lawyer, 34(1), 3–12, at 4.

[16] For a critical overview of securitisation see Macchiavello, E. 'Securitisation in microfinance and global financial crisis: innovation or Trojan horse?' (2013) Journal of International Banking Law and Regulation, 28(3), 109–122, at 113–114 and Nwogugu, M. 'Illegality of securitisation: bankruptcy issues and theories of securitisation' (2008) Journal of International Banking Law and Regulation, 23(7), 363–377.

[17] For an interesting discussion of the problems associated with subprime mortgages see White above, n 10.

[18] For an excellent discussion of the problems associated with toxic mortgages see Murdock, C. 'Why not tell the truth? Deceptive practices and the economic meltdown' (2010) Loyola University Chicago Law Journal, 41, 801–884.

[19] Linn, C. 'The way we live now: the case for mandating fraud reporting by persons involved in real estate closings and settlements' (2009) Journal of Financial Crime, 16(1), 7–27, at 10.

[20] See Cresswell, J. 'Mortgage lender New Century Financial files for bankruptcy', 2 April 2007, available from http://www.nytimes.com/2007/04/02/business/worldbusiness/02iht-loans.5.5118838.html, accessed 21 November 2012.

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

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[21] New York Times 'Bernanke: subprime hit could top \$100bn', 19 July 2007, available from http://money.cnn.com/2007/07/19/news/economy/bernanke/, accessed 21 November 2012.

[22] See Wearden, G., Teather, D. and Treanor, J. 'Banking crisis: Lehman Brothers files for bankruptcy protection', 15 September 2008, available from http://www.guardian.co.uk/business/2008/sep/15/lehmanbrothers.creditcrunch, accessed 21 November 2012. For a more detailed account of this see Estrada, E. 'The immediate and lasting impacts of the 2008 economic collapse – Lehman Brothers, General Motors and the secured credit markets' (2011) University of Richmond Law Review, 45, 1111–1142.

[23] Altman, J. 'A test case in international bankruptcy protocols: the Lehman Brothers insolvency' (2011) San Diego International Law Journal, 12, 463–495, at 464.

[24] For a damning indictment of the activities of Lehman Brothers see Valukas, A.R., Examiner In re Lehman Brothers Holding Inc., Report, Chapter 11 Case No. 08-13555, United States Bankruptcy Court for the Southern District of New York, available from http://www.distressedvolatility.com/2010/03/full-examiner-report-of-lehman-brothers.html, accessed 25 March 2013.

[25] See Lehman Brothers Holdings Inc., *Quarterly report* (Form 10-Q), 89 (31 May 2008), available from http://www.rns-pdf.londonstockexchange.com/rns/8436Z_1-2008-7-24.pdf, accessed 25 March 2013 as cited in Rosato, J. 'Down the road to perdition: how the flaws of Basel II led to the collapse of Bear Stearns and Lehman Brothers' (2011) Connecticut Insurance Law Journal, 17, 475–500, at 490.

[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'.[27] 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'.[28] 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'.[29] 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.[30] This is a view supported by Reiss, who stated that 'the two firms [Fannie Mae and Freddie Mac] had a much greater exposure to the disastrous "Alt-A" subsector than they

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a discussion of the federal subsidy of Fannie Mae and Freddie Mac' (2002) North Carolina Banking Institute, 6, 519–544 and Strickland, J. 'The proposed regulatory changes to Fannie Mae and Freddie Mac: an analysis' (2004) Northern Carolina Banking Institute, 8, 267–287.

[27] Patel, A. 'The bailout of Fannie Mae and Freddie Mac' (2008) Review of Banking and Financial Law, 28, 21–30, at 22.

[28] Carnell, R. 'Handling the failure of a government-sponsored enterprise' (2005) Washington Law Review, 80, 565–642, at 570 as cited in Reiss above, n 26, at 337.

[29] Lavargna, C. 'Government-sponsored enterprises are "too big to fail" balancing public and private interests' (1993) Hastings Law Journal, 44, 991–1083, at 999.

[30] Marshall, J. *US Congressional debates on the financial crisis: key players, policy and future regulation – House of Commons Research Paper 09/58* (House of Commons Library: London, 2009) at 21. A former officer of Fannie Mae stated that this organisation 'guarantee[s] or hold[s] 10.5m nonprime loans worth $1.6tn – one in three of all subprime loans, and nearly two in three of all so-called Alt-A loans, often called "liar loans"'. The New York Times reported that Edward Pinto, a former chief credit officer at Fannie Mae, stated that Fannie Mae and Freddie Mac participated in 'an orgy of junk mortgage development' which resulted in them becoming 'vast repositories of subprime and similarly risky loans'. See Browning, L. 'Ex-officer faults mortgage giants for "orgy" of nonprime loans', 9 December 2008, available from http://www.nytimes.com/2008/12/10/business/10fannie.html, accessed 25 March 2013.

had previously let on'.[31] By the middle of 2007 Fannie Mae and Freddie Mac experienced combined losses of $190bn,[32] which resulted in a US government bailout of $1.4tn.[33] 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'.[34] Other institutions which suffered during the early part of the financial crisis included American International Group (AIG), then the world's largest insurance company.[35] AIG was heavily involved in the trade of derivatives[36] and as a result faced significant liquidity problems due to heavy losses in credit default swaps.[37] 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.[38] 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.[39] AIG's

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[31] Reiss, D. 'Fannie Mae and Freddie Mac and the future of federal housing finance policy: a study of regulatory privilege' (2011) Alabama Law Review, 62, 907–955, at 931.

[32] Squire, R. 'Shareholder opportunism in a world of risky debt' (2010) Harvard Law Review, 123, 1151–1213, at 1191.

[33] *Ibid*.

[34] Reiss above, n 31 at 931.

[35] For a more detailed discussion of the collapse of AIG see Selvarajah, P. 'The AIG bailout and AIG's prospects for repaying government loans' (2010) Review of Banking and Financial Law, 29, 363–371 and Silva, Y. 'The "too big to fail" doctrine and the credit crisis' (2008) Review of Banking and Financial Law, 28, 115–131.

[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.

[37] For an excellent and detailed discussion of credit default swaps see Smith, M. 'The legal nature of credit default swaps' (2010) Lloyd's Maritime and Commercial Law Quarterly, August, 3, 386–410.

[38] See Smith, A. 'Stocks slump on AIG, housing', 17 September 2008, available from http://money.cnn.com/2008/09/17/markets/stockswatch/index.htm, accessed 25 March 2013.

[39] Karnitschnig, M., Solomon, D., Pleven, L. and Hilsenrath, J. 'U.S. to take over AIG in $85 billion bailout; central banks inject cash as credit dries up', 16 September 2008, available from http://online.wsj.com/article/SB122156561931242905.html, accessed 25 March 2013. Also see Securities and Exchange Commission 'Credit agreement between American International Group and Federal Reserve Bank of New York', 22 September 2008, available from http://www.sec.gov/Archives/edgar/data/5272/000095012308011496/y71452exv99w1.htm,

exposure at the height of the financial crisis was $169bn,[40] and it was not until 2012 that the company managed to repay all of its outstanding liabilities to the US government.[41] Bear Stearns, then the fifth largest investment bank in the US,[42] 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.[43] It is interesting to note that prior to its takeover by the government and JP Morgan, Bear Stearns shares were trading at $170.[44] 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'.[45] Therefore, the total losses arising from the subprime crisis exceeded $600bn.[46] 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

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accessed 25 March 2013. For an interesting discussion of the takeover of AIG see Rosemeyer, M. 'Is the government's takeover of AIG constitutionally permissible?' (2009) Entrepreneurial Business Law Journal, 4, 243–266.

40 Squire above, n 32, at 1187.

41 Tracer, Z. 'AIG stock sale repays bailout as U.S. Government profits', 11 September 2012, available from http://www.bloomberg.com/news/2012-09-11/aig-stock-prices-at-32-50-share-as-treasury-cuts-stake.html, accessed 28 March 2012.

42 Nikolić, B. 'Rise and fall of regulatory state in financial markets' (2013) Journal of International Banking Law and Regulation, 28(1), 1–8 at 1. For a more detailed discussion of the collapse of Bear Sterns see Ben-Ishai, S. and Lubben, S. 'A comparative study of bankruptcy as bailout' (2011) Brooklyn Journal of Corporate, Financial and Commercial Law, 6, 79–101.

43 Sorkin, A. and Thomas Jnr, L. 'JP Morgan acts to buy ailing Bear Sterns at huge discount', 16 March 2008, available from http://www.nytimes.com/2008/03/16/business/16cnd-bear.html?_r=0, accessed 25 March 2013. For a more detailed commentary on the collapse of Bear Stearns see Broughman, A. 'The collapse of Bear Stearns, or: skinny dipping on the street' (2010) Ohio Northern University Law Review, 36, 191–213 and Reinhart, V. 'A year of living dangerously: the management of the financial crisis' (2011) Journal of Economic Perspectives, 25(1), 71–90, at 76–79.

44 Sorkin, A. 'JP Morgan pays $2 a share for Bear Stearns', 17 March 2008, available from http://www.nytimes.com/2008/03/17/business/17bear.html?_r=0, accessed 7 October 2013.

45 Rosato above, n 25, at 490.

46 Patterson, L. and Koller, C. 'Diffusion of fraud through subprime lending' in Deflem, M. (ed.), *Economic crisis and crime* (Emerald: Bingley, 2011) at 26.

mortgage foreclosures'.[47] 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.[48]

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'.[49] 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.[50] 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'.[51] It approached the financial crisis by utilising four mechanisms.[52] First, it reduced US interest rates.[53] Secondly, the Federal Reserve introduced a 'Term Auction Facility' to increase access to short-term liquidity.[54] 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'.[55] 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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47 Barak, G. 'The flickering desires for white collar crime studies in the post-financial crisis: will they ever shine brightly?' (2013) Western Criminology Review, 13(3), 61–71, at 63.

48 Button, M. 'Editorial: fraud, corruption and the financial crisis' (2011) International Journal of Law, Crime and Justice, 29, 137–139 at 137.

49 Choi, J. and Papaioannou, M. 'Financial crisis and risk management: reassessing the Asian financial crisis in light of the American financial crisis' (2010) East Asia Law Review, Summer, 5, 442–466, at 455.

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.

54 For a brief explanation see Federal Reserve 'Term Auction Facility', n/d, available from http://www.federalreserve.gov/newsevents/reform_taf.htm, accessed 23 September 2013.

55 Federal Reserve 'Press Release', 21 December 2007, available from http://www.federalreserve.gov/newsevents/press/monetary/20071212a.htm, accessed 8 August 2012.

functioning of financial markets more generally'.[56] 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.[57] 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.[58]

The principal objective of the Economic Stimulus Act 2008 was to stimulate the economy.[59] In order to achieve this objective, the Act contained three particular objectives. First, to provide tax rebates for low income families amounting to $266m.[60] Secondly, it aimed to encourage businesses to invest in qualifying property.[61] Thirdly, it was designed to increase the loan limits for Fannie Mae, Freddie Mac and the Federal Housing Administration.[62] The second legislative instrument introduced and signed by President George Bush was the Emergency Economic Stabilization Act 2008.[63] 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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56 Federal Reserve 'Term Securities Lending Facility', n/d, available from http://www.federalreserve.gov/monetarypolicy/tslf.htm, accessed 8 August 2012.

57 Federal Reserve 'Press Release', 14 March 2008, available from http://www.federalreserve.gov/newsevents/press/monetary/20080314a.htm, accessed 8 August 2012.

58 The White House 'President Bush signs H.R. 5140, the Economic Stimulus Act of 2008', 13 February 2008, available from http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080213-3.html, accessed 23 September 2013.

59 Deeds, J. 'The flawed logic of congress in the Economic Stimulus Act of 2008' (2010) Journal of Law and Family Studies, 12, 299–313, at 302.

60 Economic Stimulus Act 2008, §101. See Fairfax, L. 'The legal origins of theory in crisis' (2009) Brigham Young University Law Review, 1571–1617, at 1590.

61 Economic Stimulus Act 2008, §102–03.

62 Economic Stimulus Act 2008, §201–02.

63 Emergency Economic Stabilization Act of 2008, Public Law 110–343.

protecting taxpayers'.[64] 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'.[65] 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'.[66] It provided the Secretary of the Department of Treasury with approximately $700bn to purchase mortgages and other assets which had prevented financial institutions,[67] families and small companies from accessing credit.[68] Essentially, the Act 'injected capital into troubled financial institutions by purchasing preferred stock'.[69] The next legislative measure was the American Recovery and Reinvestment Act 2009, or 'stimulus' or 'stimulus package' Act, which provided $787bn of federal funding.[70] The Act had five objectives: to preserve and create jobs and promote economic recovery;[71] to assist those most impacted by the recession;[72] to provide investments needed to increase economic efficiency by spurring technological advances in science and health;[73] to invest in transportation, environmental protection

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64 Public Law 110–343.

65 The White House 'President Bush discusses Emergency Economic Stabilization Act of 2008', 3 October 2008, available from http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081003-11.html, accessed 5 August 2013.

66 Anderberg, K. and Epstein, J. 'Transatlantic developments' (2008) Compliance Officer Bulletin, October, 60, 1–40, at 38. However, it is important to note that the Act has been heavily criticised. See for example Ghosh, S. and Mohamed, S. 'The troubled asset relief program (TARP) and its limitations: an analysis' (2010) International Journal of Law and Management, 52(2), 124–143.

67 This would include for example 'banks, savings associations, credit unions, security brokers or dealers, and insurance companies'. Ghosh and Mohamed, *ibid*.

68 For a more detailed discussion of this Act see Ruby, J. 'Sound of fury, confused alarms, and oversight: congress, delegation, and effective responses to financial crises' (2010) Harvard Journal on Legislation, 47, 209–252.

69 Paez, G. 'LTCM and other major hedge fund failures: part 2' (2009) Journal of International Banking Law and Regulation, 24(6), 304–312, at 309.

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;[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.[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'.[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'.[77] Additionally, the Dodd–Frank Wall Street Reform Act 2012, 'a broad-ranging financial market reform',[78] was signed by President Barack Obama in response to the problems caused by the subprime crisis.[79] It aimed to reduce the frequency of bailouts for financial firms.[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).[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.[82] Further losses attributed to the subprime market were

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[74] American Recovery and Reinvestment Act 2009, s. 3(a)(4).

[75] American Recovery and Reinvestment Act 2009, s. 3(a)(5).

[76] President Barack Obama 'Remarks upon signing the American Recovery & Reinvestment Act', 17 February 2009, available from http://www.presidentialrhetoric.com/speeches/02.17.09.html, accessed 27 March 2013.

[77] Rappis, J. 'Tax aspects of the American Recovery and Reinvestment Act of 2009: on the road to recovery?' (2009) Wisconsin Lawyer, 82, 10–14, at 10.

[78] Engert, A. 'Transnational hedge fund regulation' (2010) European Business Organization Law Review, 11(3), 329–378, at 353. For a brief analysis of the Act see Scott, H. 'A general evaluation of the Dodd–Frank US financial reform legislation' (2010) Journal of International Banking Law and Regulation, 25(10), 477–480.

[79] Yeager, F., Seitz, N., Islam, M., Harshman, E., Gilsinan, J., Fisher, J. and Millar, J. 'US legislation designed to improve corporate governance: an exploration' (2012) Company Lawyer, 33(1), 25–32, at 25.

[80] Scott, H. 'The competitive impact of financial regulatory reform' (2011) Journal of International Banking Law and Regulation, 26(11), 527–530, at 528.

[81] Barfield, R., Du Plessis, S. and Fell, P. 'Basel III – implications for risk management and supervision' (2011) Compliance Officer Bulletin September, 89, 1–26, at 23.

[82] BBC 'Sub-prime crisis to cost IKB $1bn', 3 September 2007, available from http://news.bbc.co.uk/1/hi/business/6976517.stm, accessed 21 November 2012. In July 2007 IKB received an €8.1bn bailout from KfW, a state owned

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

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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.

[83] Reuters, 'Timeline: UBS investment bank mishaps and upheavals', 15 September 2007, available from http://mobile.reuters.com/article/topNews/idUSTRE78E2FM20110915, accessed 21 November 2012. The losses increased to 10bn francs. See Reuters 'UBS writes off $10 billion in subprime losses', 12 October 2007, available from http://www.msnbc.msn.com/id/22180574/ns/business-real_estate/t/ubs-writes-billion-subprime-losses/; BBC News 'Timeline: sub-prime losses' 19 May 2008, available from http://news.bbc.co.uk/1/hi/business/7096845.stm, accessed 21 November 2012.

[84] BBC News, *ibid.*

[85] This has been referred to as the 'Euro zone debt crisis'. See Buchheit, L. and Mitu Gulati, G. 'The Eurozone debt crisis: the options now' (2013) Capital Markets Law Journal, 8(1), 54–61.

[86] BBC News 'Timeline: the unfolding eurozone crisis', 13 June 2012, available from http://www.bbc.co.uk/news/business-13856580, accessed 11 March 2013. It is important to note that there were still concerns about the levels of debt in Portugal, Spain and the Republic of Ireland. See BBC News 'Greece's debt reaches 300bn euros', 10 December 2009, available from http://news.bbc.co.uk/1/hi/business/8406665.stm, accessed 26 February 2013. The impact of the high levels of debt in Greece was also felt in other EU Member States including France. See for example Gonon, F. 'Greece and Armageddon' (2011) European Lawyer, 109, 5.

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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[87] BBC News 'Europe's PIGS: country by country', 11 February 2011, available from http://news.bbc.co.uk/1/hi/business/8510603.stm, accessed 26 February 2013. For an interesting discussion of the impact of the crisis in Greece see Quintin, Y. 'Alis…da in wonderland or Greek tragedy? The dynamics of credit default swaps and the "voluntary" Greek restructuring of 2011/2012' (2012) International Business Law Journal, 2, 277–291.

[88] Prime Minister's Office 'Prime Minister's speech', 2 May 2010, available from http://www.primeminister.gov.gr/english/2010/05/02/meeting-of-cabinet-prime-ministers-speech/, accessed 26 February 2013.

[89] BBC News 'Irish Republic 85bn euro bail-out agreed', 20 November 2010, available from http://www.bbc.co.uk/news/world-europe-11855990, accessed 26 February 2013.

[90] Seyad, S. 'The impact of the proposed banking union on the unity and integrity of the European Union's single market' (2013) Journal of International Banking Law and Regulation, 28(3), 99–108, at 104.

[91] BBC News 'Portugal's 78bn euro bail-out is formally approved', 17 May 2011, available from http://www.bbc.co.uk/news/business-13408497, accessed 26 February 2013.

[92] Minder, R. 'Portugal agrees to a $116 billion bailout', 3 May 2011, available from http://www.nytimes.com/2011/05/04/business/global/04portugal.html?_r=0, accessed 26 February 2013.

[93] CNN 'Italian Cabinet OKs 47 billion-euro austerity package', 30 June 2011, available from http://articles.cnn.com/2011-06-30/world/italy.austerity.measures_1_austerity-package-finance-minister-giulio-tremonti-pierluigi-bersani?_s=PM:WORLD, accessed 26 February 2013.

[94] Hawles, A. 'Italy downgrade adds to eurozone contagion fears', 20 September 2011, available from http://www.guardian.co.uk/business/2011/sep/20/italy-downgrade-eurozone-contagion-fear, accessed 26 February 2013. For a more detailed discussion of CRAs see McVea, H. 'Credit rating agencies, the subprime mortgage debacle and global governance: the EU strikes back' (2010) International and Comparative Law Quarterly, 59(3), 701–730.

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

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[95] Allen, K. 'Quantitative easing boosted by £75bn by Bank of England', 6 October 2011, available from http://www.guardian.co.uk/business/2011/oct/06/quantitative-easing-75bn-bank-of-england, accessed 26 February 2013.

[96] BBC News 'UK loses top AAA credit rating for first time since 1978', 23 February 2013, available from http://www.bbc.co.uk/news/business-21554311, accessed 26 February 2013.

[97] BBC News 'Fitch downgrades UK credit rating to AA+', 19 April 2013, available from http://www.bbc.co.uk/news/business-22219382, accessed 7 October 2013.

[98] BBC News 'Europe markets follow Asia's down after Cyprus bailout deal', 18 March 2013, available from http://www.bbc.co.uk/news/business-21823432, accessed 18 March 2013. For a more detailed discussion of the impact of the bailout in the UK see BBC News 'Why Cyprus's rescue matters to us', 16 March 2013, available from http://www.bbc.co.uk/news/business-21812853, accessed 18 March 2013.

[99] BBC News 'Northern Rock gets bank bailout', 13 September 2007, available from http://news.bbc.co.uk/1/hi/business/6994099.stm, accessed 21 November 2012.

[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.[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.[104] Following the announcement of the emergency funding, thousands of Northern Rock customers famously queued to withdraw their savings from the failing institution,[105] which saw the bank's shares drop by 40 per cent.[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.[107] In February 2008, HM Treasury Select Committee published

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[103] *Ibid*., at 31. According to the FSA stress testing is 'an important element in firms' planning and risk management processes, helping them to identify, analyse and manage the risks within their businesses'. See Financial Services Authority 'Stress testing', n/d, available from http://www.fsa.gov.uk/about/what/international/stress_testing, accessed 4 February 2012. For a more detailed discussion of stress testing see Financial Services Authority *Stress and scenario testing – feedback on CP08/24 and final rules* (Financial Services Authority: London, 2009) and Dunbar, K. 'Forecasting and stress testing the risk-based capital requirements for revolving retail exposures' (2012) Journal of Banking Regulation, 13(3), 249–263.

[104] For a detailed discussion about the tripartite authorities and their role in financial regulation in the United Kingdom see Clayton, N. 'Many hands make light work: the tripartite arrangement as part of the legislative reforms to banking legislation in the UK – a spectrum of views from a spectrum of institutions' (2010) Law and Financial Markets Review, 4(4), 366–393. For an excellent discussion of how the regulatory agencies and government responded to the financial crisis in the United Kingdom see Singh, D. 'UK approach to financial crisis management' (2011) Transnational Law and Contemporary Problems, 19, 868–922 and Brown, E. 'A comparison of the handling of the financial crisis in the United States, the United Kingdom and Australia' (2010) Villanova Law Review, 55, 509–574.

[105] See for example Thelwell, E. 'Northern Rock customers queue for cash as crisis hits high street', 14 September 2007, available from http://www.telegraph.co.uk/finance/markets/2815686/Northern-Rock-customers-queue-for-cash-as-crisis-hits-high-street.html, accessed 8 December 2012.

[106] See generally Ryder, N. 'An unhappy coupling' (2008) New Law Journal, 158(7319), 609.

[107] HM Treasury 'Northern Rock plc deposits', 9 October 2007, available from http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/press_104_07.htm, accessed 28 February 2013. For a more detailed discussion see Singh, D. and LaBrosse, J. 'Northern Rock, depositors and deposit insurance coverage: some critical reflections' (2010) Journal of Business Law, 2, 55–84.

its damning report into the collapse and nationalisation of Northern Rock.[108] This was followed by the publication of the FSA's own review of its supervision of Northern Rock.[109] The government introduced the Banking (Special Provisions) Act 2008 that resulted in the nationalisation of Northern Rock.[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.[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.[112] The Labour government announced that it had recapitalised Lloyds TSB, HBOS and RBS.[113] In order to protect these banks, the Asset Protection Scheme (APS) was created by HM Treasury

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108 HM Treasury Select Committee above, n 101.

109 The report identified several weaknesses in its approach, including insufficient administrative engagement with Northern Rock, weak managerial oversight of its supervision, deficient resources supervising the bank and 'lack of intensity by FSA in ensuring that all available risk information was properly utilised to inform its supervisory actions'. See Richards-Carpenter, P., Sautter, E., Hayes, A., Kynoch, N., Stark, P., Baker, M., Dehra, S., Rosser, S., Plange, V. and Ali, M. 'Annual review for 2008' (2008/2009) Compliance Officer Bulletin December/January 62, 1–38, at 3. Also see Financial Services Authority *The supervision of Northern Rock: a lessons learned review* (Financial Services Authority: London, 2008).

110 S.I. 2008/432.

111 For a more detailed commentary on the Act see Singh, D. 'The UK Banking Act 2009, pre-insolvency and early intervention: policy and practice' (2011) Journal of Business Law, 1, 20–42.

112 See HM Treasury 'Bradford & Bingley plc', 29 September 2007, available from http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/press_97_08.htm, accessed 8 December 2012 and HM Treasury 'Government guarantee arrangements: Bradford & Bingley plc', 29 September 2008, available from http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/press_98_08.htm, accessed 13 August 2012. For a more detailed discussion see Bates, C., Gibbons, K., Gray, R., Machin, J., Motani, H. and Plews, T. 'Bradford and Bingley plc: break-up under the Banking (Special Provisions) Act 2008' (2008) Financial Regulation International, November, 1–4.

113 The Chancellor of the Exchequer (Mr. Alistair Darling), HC Deb, 13 October 2008, c539–42, available from http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081013/debtext/81013-0003.htm#0810132000002, accessed 8 December 2012. It is important to note that each of these measures required approval from the EU under its competition law regime. See for example Ed. 'RBS measure and restructuring plan approved' (2010) EU Focus, 33–34.

to improve levels of confidence in the UK banking sector by limiting its losses and by supporting its economic revival.[114] In light of these problems the Financial Services Act received Royal Assent on 8 April 2010,[115] which provided the FSA with a new financial stability statutory objective,[116] new powers relating to the salary structure of the financial services sector,[117] rules relating to 'living wills',[118] the prohibition of short selling,[119] a widening of the circumstances in which it may utilise its investigative powers,[120] an extension of its enforcement powers,[121] a series of consumer protection improvements[122] and new powers to force the assembly of information by authorised firms.[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),[124] and the creation of the Prudential

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114 HM Treasury 'The Asset Protection Scheme', n/d, available from http://www.hm-treasury.gov.uk/apa_aps.htm, accessed 2 December 2012.

115 For a more detailed discussion of the provisions of the Financial Services Act 2010 see Willmott, N., McGowan, P., Ghusn, M., Brocklehurst, V., Aikens, R., Bailey, S., Scodie, M., Palmer, J., Whorton, R. and Gold, A. 'Equipping the modern regulator: assessing the new regulatory powers under the Financial Services Act 2010' Compliance Officer Bulletin, July/August, 78, 1–28.

116 Financial Services Act 2010, s. 1.

117 Financial Services Act 2010, ss. 4–6.

118 Financial Services Act 2010, s. 7. For a brief account see Raaijmakers, G., Silverentand, L., Rank, P. and Noome, M. 'Living wills for banks' (2011) Financial Regulation International, May, 16–19 and Financial Services Authority 'Speech by Thomas F. Huertas, Director, Banking Sector, FSA and Vice Chairman, CEBS, Wharton School of Management, University of Pennsylvania Philadelphia', 16 February 2010, available from http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2010/0212_th.shtml, accessed 7 October 2013.

119 Financial Services Act 2010, s. 8. For a more detailed commentary see Moosa, I. 'The regulation of short selling: a pragmatic view' (2012) Journal of Banking Regulation, 13(3), 211–227 and Juurikkala, O. 'Credit default swaps and the EU Short Selling Regulation: a critical analysis' (2012) European Company and Financial Law Review, 9(3), 307–341.

120 Financial Services Act 2010, ss. 9–13.

121 Financial Services Act 2010, ss. 9–13.

122 Financial Services Act 2010, ss. 14–17.

123 Financial Services Act 2010, ss. 18–19.

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.

Regulation Authority (PRA)[125] and Financial Policy Committee (FPC)[126] that is housed within the Bank of England.[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?[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.'[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.[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.[131] Additionally, the Federal Reserve concluded that there were five factors that contributed towards the financial crisis. These were a generalised run on global

[125] For a brief discussion see Walker, G. 'Prudential Regulation Authority' (2011) Financial Regulation International, October, 7–11.

[126] See for example Hill, C. 'Fund management update' (2013) Compliance Officer Bulletin, March, 104, 1–36, at 28.

[127] For a more detailed discussion see Brown, A. and Rice, B. 'Financial Services Act 2012' (2013) Company Secretary's Review, 36(21), 166–167.

[128] For a further discussion of this point see Chapter 2.

[129] Financial Services Authority *Financial risk outlook 2009* (Financial Services Authority: London, 2009) at 5.

[130] *Ibid*., at 7–12.

[131] Department of Treasury 'President's Working Group on Financial Markets, policy statement on financial markets developments', 13 March 2008, available from http://www.treasury.gov/resource-center/fin-mkts/Documents/pwgpolicystatemktturmoil_03122008.pdf, accessed 14 August 2012.

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.[132] Other well documented factors include the sub-prime mortgage crisis,[133] weak banking regulation,[134] high levels of consumer debt,[135] toxic debts,[136] securitisation,[137] deregulation of banking legislation,[138] ineffective macroeconomic policies,[139] weak credit regulation,[140] deregulation of consumer credit legislation,[141] self-regulated

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[132] Kamin, S.B. and DeMarco, L.P. *How did a domestic housing slump turn into a global financial crisis?*, Board of Governors of the Federal Reserve System International Finance Discussion Papers No. 994, January 2010, p. 6.

[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.

[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.

[135] See generally Dickerson, M. 'Over-indebtedness, the subprime mortgage crisis, and the effect on US cities' (2009) Fordham Urban Law Journal, 36, 395–425.

[136] Arsalidou, D. 'The banking crisis: rethinking and refining the accountability of bank directors' (2010) Journal of Business Law, 4, 284–310, at 292.

[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.

[138] The arguments on the relationship between the financial crisis and banking deregulation relate to the impact of several pieces of legislation, including the Graham–Leach–Bailey Act 1999, the Depository Institutions Deregulation and Monetary Control Act 1980 and the Garn St Germain Depository Institutions Act 1982. See Levitin, A. 'The crisis without a face: emerging narratives of the financial crisis' (2009) University of Miami Law Review, 63, 999–1010, at 1004.

[139] Gevurtz, G. 'The role of corporate law in preventing a financial crisis: reflections on in re Citigroup Inc shareholder derivative litigation' (2010) Pacific McGeorge Global Business and Development Law Journal, 23, 113, at 3.

[140] Choi and Papaioannou above, n 49, at 443.

[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[142] and the culture of banking practices.[143] 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'.[144] 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.[145] 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,[146] credit card fraud,[147] 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.

145 Nationwide White Collar Crime Centre *National public survey on white collar crime* (Nationwide White Collar Crime Centre: Fairmont, 2011) at 20.

146 Rayner, G. 'Families turning to insurance fraud to beat credit crunch', 25 December 2008, available from http://www.telegraph.co.uk/finance/financialcrisis/3949048/Families-turning-to-insurance-fraud-to-beat-credit-crunch.html, accessed 28 March 2013.

147 BBC News 'Credit crunch fuels fraud cases', 30 April 2008, available from http://news.bbc.co.uk/1/hi/business/7375091.stm, accessed 28 March 2013. In this report the BBC cited figures from the UK fraud prevention service CIFAS. See for example CIFAS '2007 fraud trends', January 2008, available from http://www.cifas.org.uk/secure/contentPORT/uploads/documents/Press%20Release/2008/A%20-%202007%20Fraud%20Trends.pdf, accessed 28 March 2013.

fraud[148] and reported fraud by CIFAS.[149] 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.[150] Other commentators, such as Nguyen and Pontell, asserted that prevalent mortgage fraud is associated with the financial crisis.[151] 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.[152] 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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[148] Masters, B. 'Corporate fraud rises to £1.2bn', 19 January 2009, available from http://www.ft.com/cms/s/0/344179e6-e5c9-11dd-afe4-0000779fd2ac.html#axzz2OpRGItRM, accessed 28 March 2013.

[149] See generally CIFAS *Fraudscape – depicting the UK's fraud landscape* (CIFAS: London, 2013). The increase in fraud associated with the financial crisis was also supported by CIFAS 'Fraud trends and recession go hand in hand', n/d, available from www.cifas.org.uk/default.asp?edit_id=899-5, accessed 19 October 2013 and Fraud Advisory Panel *11th annual review 2008/2009* (Fraud Advisory Panel: London, 2009) and Price Waterhouse Cooper *Fraud in a downturn* (Price Waterhouse Cooper: London, 2008).

[150] Huisman, Q.W. 'Corporate crime and crisis: causation scenarios' in Deflem, M. (ed.), *Economic crisis and crime* (Emerald: Bingley, 2011) at 111. For a more detailed discussion of accounting fraud see Velikonja, U. 'Leverage, sanctions, and deterrence of accounting fraud' (2011) UC Davis Law Review, 44, 1281–1345.

[151] Nguyen, T. and Pontell, H. 'Mortgage origination fraud and the global economic crisis' (2010) Criminology and Public Policy, 9(3), 591–612, at 592.

[152] Securities and Exchange Commission 'SEC enforcement actions addressing misconduct that led to or arose from the financial crisis', 1 September 2013, available from http://www.sec.gov/spotlight/enf-actions-fc.shtml, accessed 7 October 2013.

(in 80 actions) including more than 50 CEOs, CFOs and other senior corporate officers, and obtained over $2.2 billion in monetary relief.[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[154] and CR Intrinsic agreeing to pay $600m to settle insider trading charges.[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,[156] UBS $700m,[157] RBS $325m[158] and ICAP $65m.[159] Abramowitz and Sack took the view that:

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[153] Abramowitz, E. and Sack, J. 'Why so few prosecutions connected to the financial crisis?' (2013) New York Law Journal, 250(46), 1–3, at 2.

[154] Securities and Exchange Commission 'Goldman Sachs to pay record $550 million to settle SEC charges related to subprime mortgage CDO', 15 July 2010, available from http://www.sec.gov/news/press/2010/2010-123.htm, accessed 6 March 2013. A collateralised debt obligation has been defined as a 'debt instrument that allows investors with differing risk appetites to invest in a broad range of debt instruments that would normally reside on bank balance sheets'. See Alexander, K. 'The nature of modern credit markets' in Alexander, K. and Dhumale, R. (eds) *Research handbook on international financial regulation* (Edward Elgar: Cheltenham, 2012) at 11.

[155] Securities and Exchange Commission 'CR Intrinsic agrees to pay more than $600 million in largest-ever settlement for insider trading case', 15 March 2013, available from http://www.sec.gov/news/press/2013/2013-41.htm, accessed 18 March 2013.

[156] Commodities Futures Trading Commission 'CFTC orders Barclays to pay $200 million penalty for attempted manipulation of and false reporting concerning LIBOR and Euribor benchmark interest rates', 27 June 2012, available from http://www.cftc.gov/PressRoom/PressReleases/pr6289-12, accessed 12 August 2013. Also see Gensler, G. 'Libor, naked and exposed', 6 August 2012, available from http://www.nytimes.com/2012/08/07/opinion/libor-naked-and-exposed.html?_r=3&ref=opinionpiecesaboutlibor&, accessed 12 August 2013.

[157] Commodities Futures Trading Commission 'CFTC orders UBS to pay $700 million penalty to settle charges of manipulation, attempted manipulation and false reporting of LIBOR and other benchmark interest rates', 19 December 2012, available from http://www.cftc.gov/PressRoom/PressReleases/pr6472-12, accessed 12 August 2013.

[158] Commodities Futures Trading Commission 'CFTC orders The Royal Bank of Scotland plc and RBS Securities Japan Limited to pay $325 million penalty to settle charges of manipulation, attempted manipulation, and false reporting of yen and Swiss franc LIBOR', 6 February 2013, available from http://www.cftc.gov/PressRoom/PressReleases/pr6510-13, accessed 12 August 2013.

[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

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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.

[161] Department of Justice 'RBS Securities Japan Limited agrees to plead guilty in connection with long-running manipulation of Libor benchmark interest rates', 6 February 2013, available from http://www.justice.gov/opa/pr/2013/February/13-crm-161.html, accessed 8 February 2013.

[162] *Ibid*.

[163] Fisher, L. 'Target marketing of subprime loans: racialised consumer fraud and reverse redlining' (2009) Journal of Law and Policy, 18, 121–155, at 144.

[164] Federal Bureau of Investigation 'Mortgage fraud', n/d, available from http://www.fbi.gov/about-us/investigate/white_collar/mortgage-fraud/mortgage_fraud, accessed 6 March 2013.

[165] For a more detailed discussion on the role of the Financial Crimes Enforcement Network see Ryder, N. *Money laundering – an endless cycle? A comparative analysis of the anti-money laundering policies in the United States of America, the United Kingdom, Australia and Canada* (Routledge Cavendish: Abingdon, 2012) at 49–52.

2009.[166] In 2011, FinCEN reported that 92,028 mortgage loan fraud SARs had been reported, an increase of 31 per cent from 2010.[167] 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.[168]

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.[169] In 2007, the FSA imposed a total of £5.3m of financial sanctions on firms and individuals.[170] A year later, it reported that the figure had increased to £22.7m.[171] In 2009 the total amount of financial sanctions imposed by the FSA had risen to £35m.[172] The figures for 2010 and 2011 illustrated an increase to £89.1m[173] but then a fall to £66.1m.[174] 2012 represented the largest amount of financial

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[166] Financial Crimes Enforcement Network *Mortgage loan fraud update suspicious activity report filings from January 1–December 31 2010* (Financial Crimes Enforcement Network: Washington DC, 2011) at 2.

[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.

[169] Financial Services Authority 'Delivering credible deterrence', speech by Margaret Cole, Director of Enforcement, FSA, Annual Financial Crime Conference, 27 April 2009, available from http://www.fsa.gov.uk/library/communication/speeches/2009/0427_mc.shtml, accessed 8 March 2013.

[170] Financial Services Authority 'FSA fines table 2007', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2007, accessed 8 March 2013.

[171] Financial Services Authority 'FSA fines table 2008', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2008, accessed 8 March 2013.

[172] Financial Services Authority 'FSA fines table 2009', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2009, accessed 8 March 2013.

[173] Financial Services Authority 'FSA fines table 2010', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2010, accessed 8 March 2013.

[174] Financial Services Authority 'FSA fines table 2011', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2011, accessed 8 March 2013.

sanctions imposed by the FSA, totalling a staggering £311.5m.[175] 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.[176] 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,[177] the £160m fine on UBS[178] and the £87.5m fine on RBS.[179] 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.[180]

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.[181] Since April 2013, the FCA has imposed

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175 Financial Services Authority 'FSA fines table 2012', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2012, accessed 8 March 2013.

176 Financial Services Authority 'FSA fines table 2013', n/d, available from http://www.fsa.gov.uk/about/press/facts/fines/2013, accessed 8 March 2013.

177 Financial Services Authority 'Barclays fined £59.5m for significant failings in relation to LIBOR and EURIBOR', 27 June 2012, available from http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml, accessed 8 February 2013.

178 Financial Services Authority 'UBS fined £160m for significant failings in relation to LIBOR and EURIBOR' 19 December 2012, available from http://www.fsa.gov.uk/library/communication/pr/2012/116.shtml, accessed 8 February 2013.

179 Financial Services Authority 'RBS fined £87.5m for significant failings in relation to LIBOR', 6 February 2013, available from http://www.fsa.gov.uk/library/communication/pr/2013/011.shtml, accessed 8 February 2013.

180 Travers Smith Regulatory Investigations Group 'FSA enforcement action: themes and trends' (2012) Compliance Officer Bulletin, May, 96, 1–30, at 2.

181 Financial Conduct Authority 'ICAP Europe Limited fined £14 million for significant failings in relation to LIBOR', 25 September 2013, available from http://www.fca.org.uk/news/list?ttypes=&yyear=&ssearch=ICAP, accessed 7 October 2013.

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

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182 Financial Conduct Authority 'Fines table 2013', 1 October 2013, available from http://www.fca.org.uk/firms/being-regulated/enforcement/fines, accessed 7 October 2013.

183 Financial Conduct Authority 'JPMorgan Chase Bank N.A. fined £137,610,000 for serious failings relating to its Chief Investment Office's "London Whale" trades', 19 September 2013, available from http://www.fca.org.uk/news/jpmorgan-chase-bank-na-fined, accessed 8 October 2013.

184 Criminal Justice Act 1987, s. 1(1).

185 Serious Fraud Office 'Who we are', n/d, available from http://www.sfo.gov.uk/about-us/who-we-are.aspx, accessed 11 March 2013.

186 For a more detailed discussion see Sarker, R. 'The trials and errors of the Guinness four' (1995) Journal of Financial Crime, 3(1), 86–88 and Page, F. 'Defining fraud: an argument in favour of a general offence of fraud' (1997) Journal of Financial Crime, 4(4), 287–308.

187 For a more detailed discussion of this case see Cohen, H. 'What place does the criminal law have in the regulation of securities markets after the Blue Arrow trials?' (1992) Journal of International Banking Law, 7(10), 420–422 and Kirk, D. 'Blue Arrow: the SFO on trial' (1992) International Company and Commercial Law Review, 3(10), 331–333.

188 For a more detailed discussion see Sarker, R. 'Maxwell: fraud trial of the century (case comment)' (1996) Company Lawyer, 17(4), 116–117 and Honess, T. 'Juror competence in processing complex information: implications from a simulation of the Maxwell trial' (1998) Criminal Law Review, November, 763–773.

189 For a more detailed discussion see Sarker, R. 'The Serious Fraud Office – quo vadis?' (1995) Company Lawyer, 16(2), 56–61.

190 For a more detailed discussion see Gallagher, J., Lauchlan, J. and Steven, M. 'Polly Peck: the breaking of an entrepreneur?' (1996) Journal of Small Business and Enterprise Development, 3(1), 3–12.

Arabia.[191] The weaknesses of the SFO have been highlighted by several reports, including the de Grazia Review[192] and the HM Crown Prosecution Service Inspectorate in 2008[193] and 2012.[194] More recently, the SFO has been severely criticised over its poor handling of the Tchenguiz brothers' investigation.[195] 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

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191 For a more detailed discussion see Williams, S. 'The BAE/Saudi Al-Yamamah contracts: implications in law and public procurement' (2008) International and Comparative Law Quarterly, 57(1), 200–209 and Rose, C. 'Legislative comment: the UK Bribery Act 2010 and accompanying guidance: belated implementation of the OECD Anti- Bribery Convention' (2012) International and Comparative Law Quarterly, 61(2), 484–499. The decision by the SFO to terminate its investigation into the sale of arms in Saudi Arabia was subject to a judicial review and the Queen's Bench Divisional Court determined that the decision was unlawful. See *The Queen on the application of (1) Corner House Research (2) Campaign Against Arms Trade v The Director of the Serious Fraud Office (Defendant) and BAE Systems Plc (Interested Party),* Claim No. CO/1567/2007, High Court of Justice, Queen's Bench Division, Administrative Court, 18 April 2007. However, this decision was overturned on appeal by the House of Lords. See *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60, 30 July 2008, para. 11. For a more detailed discussion of this case and the related legal issues see Yihdego, Z. 'Arms trade and public controls: the right to information perspective' (2008) Northern Ireland Legal Quarterly, 59(4), 379–394; Spencer, J. 'Fiat justicia, ruatque concordia cum Arabe?' (2008) Cambridge Law Journal, 67(3), 456–458 and Roberts, A. 'Prosecution: director of SFO – lawfulness of decision to discontinue prosecution' (2009) Criminal Law Review, 1, 46–49.

192 de Grazia, J. *Review of the Serious Fraud Office – final report* (Serious Fraud Office: London, 2008).

193 HM Crown Prosecution Service Inspectorate *Review of the Fraud Prosecution Service* (HM Crown Prosecution Inspectorate: London, 2008).

194 HM Crown Prosecution Service Inspectorate *Report of the Attorney General on the inspection of the Serious Fraud Office* (HM Crown Prosecution Service Inspectorate: London, 2012).

195 See for example Neate, R. 'Tchenguiz brothers seek millions from Serious Fraud Office', 3 December 2012, available from http://m.guardian.co.uk/business/2012/dec/03/tchenguiz-brothers-millions-damages-sfo, accessed 18 March 2013, Russel, J. 'Tchenguiz brothers launch damages case against SFO', 2 December 2012, available from http://www.telegraph.co.uk/finance/financial-crime/9717240/Tchenguiz-brothers-launch-damages-case-against-SFO.html, accessed 18 March 2013.

cent.[196] However, this figure had increased to 71 per cent by 2006/2007.[197] In its next Annual Report, the conviction rate had increased to 68 per cent.[198] In 2009, the SFO achieved an impressive conviction rate of 91 per cent.[199] However, this figure fell to 84 per cent in 2010 and 73 per cent in 2011.[200] The regulatory performance of the SFO has been assisted by the introduction of the Bribery Act 2010.[201] Under the Act the SFO, or 'chief prosecutors of offences under the Bribery Act',[202] have been provided with additional prosecutorial powers by the creation of several new offences.[203] These include for example offering, promising or providing a bribe,[204] requesting, agreeing to receive or accepting a bribe,[205] bribery of foreign public officials[206] and failure of commercial organisations to prevent bribery.[207]

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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196 Serious Fraud Office *Annual Report 2006/2007* (Serious Fraud Office: London, 2007) at 4.

197 *Ibid*., at 4.

198 Serious Fraud Office *Annual Report 2007/2008* (Serious Fraud Office: London, 2008) at 5.

199 Serious Fraud Office *Annual Report 2009/2010* (Serious Fraud Office: London, 2010) at 2.

200 Serious Fraud Office *Annual report and accounts 2011/2012* (Serious Fraud Office: London, 2012) at 6.

201 A full detailed commentary on the Bribery Act 2010 is beyond the scope of this monograph. For a more detailed analysis see Wells, C. 'Who's afraid of the Bribery Act 2010?' (2012) Journal of Business Law, 5, 420–431; Yeoh, P. 'The UK Bribery Act 2010: contents and implications' (2012) Journal of Financial Crime, 19(1), 37–53 and Rose, C. 'The UK Bribery Act 2010 and accompanying guidance: belated implementation of the OECD Anti-Bribery Convention' (2012) International and Comparative Law Quarterly, 61(2), 484–499.

202 Breslin, B., Ezickson, D. and Kocoras, J. 'The Bribery Act 2010: raising the bar above the US Foreign Corrupt Practices Act' (2010) Company Lawyer, 31(11), 362–369, at 362.

203 For an excellent discussion on the enforcement of the Bribery Act 2010 see Monteith, C. 'The Bribery Act 2010: part 3: enforcement' (2011) Criminal Law Review, 2, 111–121.

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.[208] 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'.[209] 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.[210] 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.[211] However, the Home Office mistakenly expected that the 'initial elements' of the agency would be in place by the middle of 2011.[212] 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.[213] The Home Office envisages the

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[208] See HM Government *The Coalition: our programme for government* (HM Government: London, 2010) at 9. The proposal to create the Economic Crime Agency was first mooted by an excellent report by Jonathan Fisher QC. See Fisher, J. *Fighting fraud and financial crime – a new architecture for the investigation and prosecution of serious fraud, corruption and financial market crimes* (Policy Exchange: London, 2010).

[209] HM Treasury 'George Osborne, Chancellor of the Exchequer. Speech at The Lord Mayor's Dinner for Bankers and Merchants of the City of London, at Mansion House 16 June 2010', available from www.hm-treasury.gov.uk/press_12_10.htm, accessed 26 June 2010.

[210] See for example Palmer, A. and Ryder, N. 'The Economic Crime Agency' (2011) Financial Regulation International, April, 1–3.

[211] Home Office, Press Release, 'Home Office to take lead on economic crime', 17 January 2011, available from http://www.homeoffice.gov.uk/media-centre/news/economic-crime, accessed 23 October 2011.

[212] *Ibid*.

[213] Home Office *The National Crime Agency – a plan for the creation of a national crime-fighting capability* (London: Home Office, 2011).

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 Command 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 commentators, 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 uncertainty 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 http://news.bbc.co.uk/1/hi/business/7487608.stm, accessed 21 November 2012.

[217] Financial Times Lexicon, n/d, available from http://lexicon.ft.com/Term?term=credit-crunch, accessed 21 November 2012.

[218] Owens, R. and Schreft, S. 'Identifying credit crunches' (1995) Contemporary Economic Policy, 13(2), 63–76.

[219] Brown, M. 'First credit crunch traced back to Roman republic', 28 November 2008, available from http://www.guardian.co.uk/business/2008/nov/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 http://www.ox.ac.uk/media/news_releases_for_journalists/081127.html, accessed 1 February 2013.

[220] Peek, J. and Rosengren, E. Crunching the recovery: bank capital and the role of bank credit. *Conference Series [Proceedings]* (1992). Federal Reserve Bank of Boston, 151–186.

difficult to obtain and offer credit facilities.[221] The term 'Credit Crunch' has been frequently used by economists,[222] who have also offered a variety of definitions, resulting in further uncertainty as to 'what constitutes a credit crunch'.[223] 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'.[224] 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'.[225] 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'.[226] 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'.[227] 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

[221] Elliot, L. 'Credit crisis – how it all began', 5 August 2008, available from http://www.guardian.co.uk/business/2008/aug/05/northernrock.banking, accessed 8 February 2013.

[222] Wojnilower, A.M. 'The central role of credit crunches in recent financial history' (1980) Brookings Papers on Economic Activity, 2, 277–339, at 287.

[223] Clair, R. and Tucker, P. 'Six causes of the credit crunch (or, why is it so hard to get a loan?)' (1993) Federal Reserve Bank of Dallas Economic Review, 1–19, at 1.

[224] Bernanke, B.S. and Lown, C.S. 'The Credit Crunch,' (1991) Brookings Papers on Economic Activity, 2, 205–247. This definition has been criticised by some commentators. See for example Clair and Tucker *ibid*., at 2.

[225] Clair and Tucker, *ibid*.

[226] Council of Economic Advisers *Economic report of the President* (Government Printing Office, 1992) at 46.

[227] See Wojnilower above, n 222, at 278. Kliesen and Tatom took the view that 'the traditional notion of a credit crunch originally involved the process known as disintermediation, a decline in savings-type deposits at banks and savings and loans that result in a decline in bank lending'. See Kliesen, K. and Tatom, J. 'The recent credit crunch: the neglected dimensions' (1992) Federal Reserve Bank of St. Louis Review, 74(5), 18–36, at 1.

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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[228] Reinhart, C. and Rogoff, K. *This time is different – eight centuries of financial folly* (Princeton University Press: Princeton, 2009) at 10.

[229] *Ibid*.

[230] Mizen, P. 'The credit crunch of 2007–2008: a discussion of the background, market reactions, and policy responses' (2008) Federal Reserve Bank of St. Louis Review, 90(5), 531–567, at 531.

[231] Green, S. 'The concept of white collar crime in law and legal theory' (2004) Buffalo Criminal Law Review, 8, 1–34, at 3.

[232] See Sutherland, E. (1940) 'The white collar criminal', American Sociological Review, 5(1), 1–12, at 1.

[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.[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'.[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'.[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'.[237] Sutherland's definition has been described as his 'most famous and controversial legacy'.[238] However, Green suggested that the interpretation of the term is 'deeply contested', and that the definition provided 'was famously vague and inconsistent'.[239] Furthermore, Bookman argued that Sutherland's definition of white collar crime was too narrow.[240] This was a view supported by Leong, who noted that:

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[234] Sutherland above, n 232 at 2.

[235] Benson, M.L. and Simpson, S.S. *White-collar crime: an opportunity perspective*, Criminology and Justice Series (Routledge: New York, 2009), as cited in Gottschalk, P. 'Gender and white-collar crime: only four percent female criminals' (2012) Journal of Money Laundering Control, 15(3), 362–373, at 362. For an excellent commentary on whether white collar criminals are privileged see Buell, S. 'Is the white collar offender privileged?' (2014) Duke Law, 63(4), 823–889.

[236] Kempa, M. 'Combating white-collar crime in Canada: serving victim needs and market integrity' (2010) Journal of Financial Crime, 17(2), 251–264, at 252.

[237] Friedrichs, D. *Trusted criminals: white collar crime in contemporary society* (Wadsworth Cengage Learning: Bellmont, 2010) at 190.

[238] Wilson, G. and Wilson, S. 'Can the general fraud offence "get the law right"? Some perspectives on the "problem" of financial crime' (2007) Journal of Criminal Law, 71(1), 36–53, at 40.

[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.

[240] Bookman, Z. 'Convergences and omissions in reporting corporate and white collar crime' (2008) DePaul Business and Commercial Law Journal, 6, 347–392, at 355.

> 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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241 Leong, A. 'Definitional analysis: the war on terror and organised crime' (2004) Journal of Money Laundering Control, 8(1), 19–36, at 22.

242 Podgor, E. 'White collar crime: a letter from the future' (2007) Ohio State Journal of Criminal Law, 5, 247–255, at 247.

243 Friedrichs, D. 'Wall Street: crime never sleeps' in Will, S., Handelman, S. and Brotherton, D. (eds), *How they got away with it – white collar criminals and the financial meltdown* (Columbia University Press: New York, 2013) at 9.

244 Soothill, K. 'Blacklists and black sheep' (2010) Police Journal, 83(1), 5–10, at 10.

245 Brody, R. and Kiehl, K. 'From white-collar crime to red-collar crime' (2010) Journal of Financial Crime, 17(3), 351–364, at 351.

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

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[248] Graham, T. 'Financial Services and Markets Bill: investigations and enforcement in the context of the financial crime objective' (2000) Journal of International Financial Markets, 2(3), 88–93, at 88.

[249] *Ibid.*

[250] Fleming, M. *FSA's Scale & Impact of Financial Crime project (phase one): Critical Analysis Occasional Paper Series 37* (Financial Services Authority: London, 2009) at 2.

[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.

[252] Gottschalk, P. 'Categories of financial crime' (2010) Journal of Financial 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

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253 Podgor, E. 'White-collar-crime and the recession: was the chicken or egg first?' (2010) University of Chicago Legal Forum, 205–222, at 209–210.

254 For a general critique of the performance of the Securities and Exchange Commission during the Madoff case see Hardouin, P. 'The aftermath of the financial crisis' (2011) Journal of Financial Crime, 18(2), 148–161, at 149.

tackle white collar crime associated with the financial crisis.[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'.[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.[257] Additionally, KPMG reported that the extent of fraud in the UK had increased to a record high in 2011.[258] The UK provides a unique comparator to the US

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[255] For a more detailed discussion of the Fraud Enforcement and Recovery Act 2009 see Titolo, M. 'Retroactivity and the Fraud Enforcement and Recovery Act of 2009' (2011) Indiana Law Journal, Winter, 86, 257–302.

[256] Financial Crimes Enforcement Network 'Financial Fraud Enforcement Task Force', n/d, available from http://www.fincen.gov/fraudenftaskforce.html, accessed 18 March 2013. For a more detailed discussion of the Financial Fraud Enforcement Network see Ramirez, M. 'Prioritizing justice: combating corporate crime from task force a top priority' (2010) Marquette Law Review, 93, 971–1019.

[257] National Fraud Authority *Annual fraud indicator 2011* (National Fraud Authority: London, 2011) at 3. Interestingly, the figure in 2010 was £30bn. See National Fraud Authority *Annual fraud indicator 2010* (National Fraud Authority: London, 2010) at 3. Also see National Fraud Authority *Annual fraud indicator 2012* (National Fraud Authority: London, 2012) at 3.

[258] KPMG is one of the world's leading accountancy firms. KPMG 'Boom time for fraudsters as austerity bites', 30 January 2012, available from http://www.kpmg.com/uk/en/issuesandinsights/articlespublications/newsreleases/pages/fraud-barometer-boom-time-for-fraudsters-as-austerity-bites.aspx, accessed 18 March 2013. Also see Allen, K. 'Recession pushes white-collar crime to new

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.[259] 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.[260] 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,[261] integrity[262] and competition.[263] One issue that has not been included in the 2012 Act is the FSA's financial crime statutory objective.[264] 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

highs', 31 December 2009, available from http://www.guardian.co.uk/business/2009/dec/31/fraud-recession-kpmg-report, accessed 18 March 2013.

[259] Home Office, Press Release, 'Home Office to take lead on economic crime', 17 January 2011, available from http://www.homeoffice.gov.uk/media-centre/news/economic-crime, accessed 23 October 2011.

[260] For a more detailed discussion of the role of the FCA see Marshall, H., Leonard, C., Bibby, R.P., Paul, R. and Zahabi, E. 'Annual review 2012' (2013) Compliance Officer Bulletin, January, 102, 1–30.

[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'.[265] Furthermore, financial crime is also an important part of the FCA's integrity objective.[266] 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'.[267]

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.[268] 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.[269] 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'.[270]

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).

267 Travers Smith Regulatory Investigations Group above, n 180, at 6.

268 Brady, B. and Owen, J. 'Budget cuts killed off LIBOR inquiry', 1 July 2012, available from http://www.independent.co.uk/news/uk/politics/budget-cuts-killed-off-libor-inquiry-7901940.html, accessed 18 March 2013. Also see Russell, J. 'SFO given just £2m to enforce Bribery Act', 30 January 2011, available from http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8290808/SFO-given-just-2m-to-enforce-Bribery-Act.html, accessed 18 March 2013.

269 Serious Fraud Office above, n 200, at 7.

270 Rowley, E. 'Serious Fraud Office needs proper funding, warns Tchenguiz judge', 24 May 2012, available from http://www.telegraph.co.uk/finance/financial-crime/9288330/Serious-Fraud-Office-needs-proper-funding-warns-Tchenguiz-judge.htmlm, accessed 18 March 2013.

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 a 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.