An Examination of Post-Crisis Financial Markets Litigation

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Financial institutions have absorbed regulatory fines and litigation expenses well in excess of $190 billion since 2009, with annual costs reaching a peak of approximately $54 billion for the large U.S. and European banks in 2014 alone, before tapering off in 2015 and 2016. As can be seen in Exhibit 1, the European banks were somewhat later to the game in provisioning for litigation costs.

The majority of these costs were borne in conjunction with issues pertaining to residential mortgages and related securitized products. For the most part, mortgage-related cases are being settled with far greater frequency than new ones are being filed. But while new mortgage cases against the banks are drawing to a close, there has been a slew of separate cases filed against the large banks. Many of these cases concern potential misconduct in the construction or striking of financial markets benchmarks or rate settings—spanning interest rate, foreign exchange (FX), and commodities markets—and are cast as forms of anticompetitive conduct, which carry with them the threat of treble damages under antitrust law.

Other major probes include those into whether the large banks have colluded to hamper the movement of derivatives trading onto exchange-like platforms, as well as investigations of exchanges and brokerage houses in the execution of order flow and the creation of preferential order types, in a world increasingly dominated by high-frequency trading (HFT) firms.

There has also been a vigorous concentration by U.S. regulators on investment funds and, in particular, the proper application of their pricing policies and charging of fees.

FINANCIAL CRISIS MATTERS

It has been nearly 10 years since credit markets began to seize up in 2007, eventually escalating into a full-blown panic and financial crisis that caused the deepest recession since the Great Depression. Amid the economic damages wrought by the financial crisis, investors suffered tremendous losses on their mortgage-related investments.

Hundreds of large-scale lawsuits have been filed in the United States, primarily focusing on the mortgage lending process itself, or the construction or sale of securitized products (e.g., RMBS, CDOs, ABCP, SIVs) backed by allegedly error-ridden mortgages or mortgage documents. These cases were often either dismissed or settled out of court. The large U.S. banks were the most regular defendants in these mortgage-related actions.

Mortgage originators and deal sponsors (including divisions of the large U.S. banks) also faced significant litigation concerning mortgage repurchases, or "put-backs." As part

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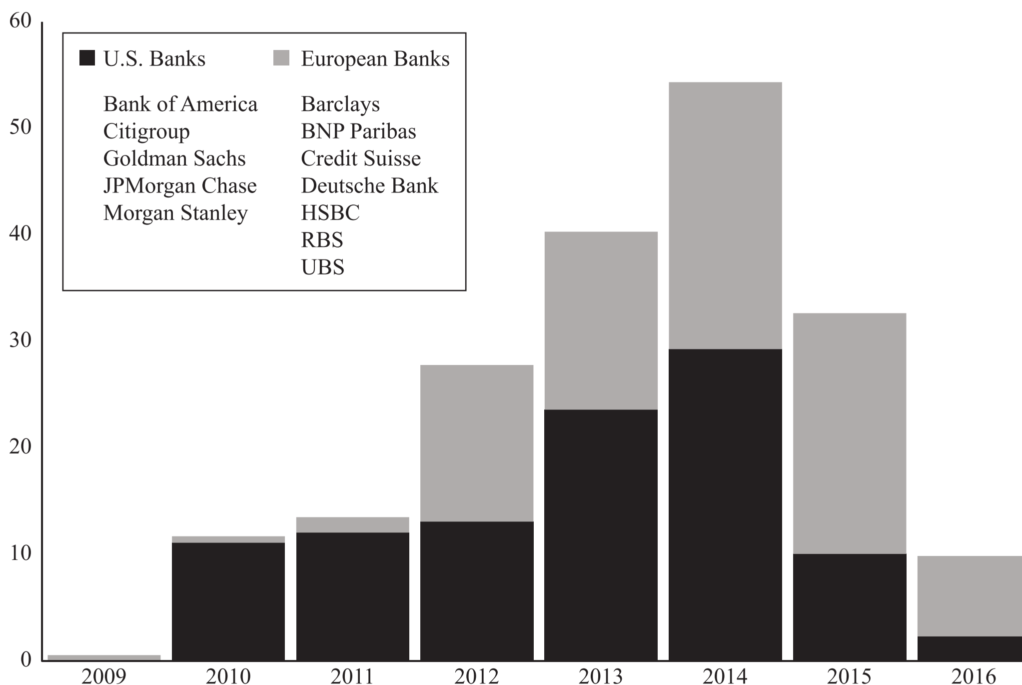
Exhibit 1

Annual Litigation Expenses ($ billions)



Sources: PF2 Securities, Bloomberg LP, company filings.

of any residential mortgage-backed security (RMBS) deal, the deal sponsor or depositor of mortgages into the RMBS trusts often makes representations and warranties (R&Ws) as to the nature and quality of mortgages underlying the securitization. According to the terms of the governing documents, if certain loans are subsequently found to be in breach of the R&Ws, the trustee, on behalf of the trust, would be able to put back the loans to the sponsor, at par or cost. Litigation often proceeded to the degree that originators or sponsors neglected or refused to repurchase the noncompliant loans.

The mortgage-related cases soon came to include alleged misconduct in the servicing of mortgage loans and the implementation of foreclosure processes by the banks and mortgage servicers. Bank of America and others were accused, among other things, of fraudulently modifying mortgage documents (presumably to allow for the foreclosure on nonpaying borrowers' homes), making what the Department of Justice (DOJ) called "a practice of repeated false attestation of information in affidavits," popularly known as "robosigning." (DOJ [2012]). Settlements on these issues have resulted in costs and expenses in the tens of billions of dollars, but part of the cost of the settlements was absorbed by investors in RMBS trusts, to the degree that modifications (credited relief) were made, in a suboptimal fashion, to loans held by RMBS trusts.

There were also significant shareholder complaints, including in relation to disclosures made by the big banks about their mortgage-related portfolios, or in association with their financial crisis-related mergers and acquisitions.

The DOJ continues to pursue crisis-era matters. In December 2016, the DOJ reached settlements with Deutsche Bank and Credit Suisse for $7.2 billion and $5.3 billion, respectively; it filed suit against Barclays at the end of 2016; and reached a $3.8 billion settlement with RBS, which is reportedly forthcoming.

During and after the crisis, it became clear that many RMBS deals were significantly exposed to loans that violated the R&Ws, and disputes arose as to the putting-back of these noncompliant mortgages. Often, the deal sponsor or depositor disagreed as to their alleged noncompliance, or felt that the put-back request had not been asserted on a timely basis.

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Many of the lawsuits filed by the RMBS trustees to compel the put-backs were judged to have been filed too late, with the rulings in *ACE Securities Corp. v. DB Structured Products, Inc.* being instructive.[1] Time-barred in their pursuit of redress from deal sponsors, RMBS investors turned their attention to the RMBS trustees.[2] The central premise of the ensuing complaints is that the trustees allegedly neglected to fulfill their duties to the beneficiaries of the RMBS trusts, failing to pursue put-back claims on a timely basis. Several cases argue that the trustees negligently or intentionally ignored investor requests to act on their behalf. One such case (*Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of America, NA et al.*) settled in 2015, with the court approving a $69 million settlement (roughly 2.1% of damages sought). Several cases are ongoing, with a headline risk number of approximately $331 billion in remaining damages (Bloomberg Intelligence [2017]).

The shortcomings in the processes applied by the large credit rating agencies were crucial in laying the groundwork for the financial crisis. In February 2015, S&P settled with the DOJ and states for $1.5 billion; in January 2017, Moody's settled for $864 million.

ANTITRUST PROBES

Benchmarks and Rate Settings—Interest Rates (LIBOR, EURIBOR, TIBOR, Yen LIBOR, Swiss LIBOR, SIBOR, BBSW).

> **New York Regional Manager:** "If possible, we need in NY 1mo libor as low as possible next few days.… tons of pays coming up overall.… thanks!"
> **U.S. Dollar LIBOR Submitter:** "Will do our best [NY Regional Manager]. I'll coordinate the overnight in the same way as we did last week with [New York U.S. Dollar Trader 1] tomorrow."
> (CFTC [2010]).

Scrutiny of the London Interbank Offered Rate, or LIBOR, was the first of a medley of investigations into misconduct in the construction of financial benchmarks. Probes into the construction of similar benchmarks, such as EURIBOR and SIBOR, would follow.

There have been two focal points in the investigations of potential LIBOR manipulation. The first is *rate suppression*: The defendant banks arguably understated their actual borrowing costs in a manner akin to false advertising. Lower borrowing costs indicate to the market that your fellow banks see you as more creditworthy and, by implication, that the rest of the market should see you as a credible counterparty, too. With that in mind, several banks allegedly lowered their LIBOR submissions to decrease the likelihood of appearing weak, which would have raised their borrowing costs or even put their funding lines at risk altogether.[3]

The second form of alleged misconduct concerns the banks' *pursuit of illicit trading profits*. Depending on its trading book positions, a bank may have a financial interest in seeing a higher or lower LIBOR setting. Importantly, to be most effective in pushing the rate, traders would allegedly 1) instruct submitters from their own bank to report a high or low submission—or even make the submission themselves—and 2) coordinate or collude with traders at other banks to mark their submissions in the same direction. The collusion allegedly took place in chat room conversations (on the Bloomberg terminal), with choice quotes being released publicly by supervision authorities.

LIBOR-related fines issued by regulators worldwide have now surpassed $10 billion, but the class action (*In re: LIBOR-Based Financial Instruments Antitrust Litigation*) had been held up by a seminal ruling. In March 2013, Judge Buchwald dismissed several of the claims, notably the antitrust claims, severely limiting remaining potential damages. In May 2016, however, the U.S. Court of Appeals for the Second Circuit vacated her ruling, reviving plaintiffs' antitrust claims. To date, only Barclays has settled with the class, in the amount of $120 million; the settlement was preliminarily approved by the court in December 2016.

In the United States and United Kingdom, at least six former traders (from Barclays, Citigroup, Rabobank, and UBS) have been convicted of fraud, while another has pleaded guilty. In all, 20 former traders currently face criminal charges in the United States or United Kingdom.

In many ways similar to LIBOR as a tool, Australia's Bank Bill Swap Rate (BBSW) presents another area of interest for regulators and plaintiffs. The Australian Securities and Investments Commission (ASIC) has suggested that $20 trillion of financial products may be affected by BBSW's alleged manipulation, and it has accused Australia & New Zealand Bank (ANZ),

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National Australia Bank (NAB), and Westpac of rigging the rate. A fourth Australian bank, Commonwealth Bank of Australia (CBA), reportedly remains under investigation. Previously, ASIC reached settlements with BNP, RBS, and UBS over their BBSW submissions.

In August 2016, investors filed a class action in the United States against Australian and global banks over alleged BBSW rigging. The case is *Dennis v. JPMorgan Chase & Co. et al.* Two of the plaintiffs on the BBSW case, hedge funds Sonterra Capital and FrontPoint, also filed suit in the United States against 20 banks over alleged manipulation of the Singapore Interbank Offered Rate (SIBOR) and the Singapore Swap Offer Rate (SOR). The case is *FrontPoint Asian Event Driven Fund v. Citibank N.A. et al.*

In July 2013, the International Organization of Securities Commissions (IOSCO) published its "Principles for Financial Benchmarks," in response to revelations and regulatory post-mortems of LIBOR manipulation and their interpretation that the then-current system was susceptible to manipulation. IOSCO's report sought to "articulate policy guidance and principles for Benchmark-related activities that will address conflicts of interest in the Benchmark-setting process, as well as transparency and openness when considering issues related to transition." (IOSCO [2013]) In April 2016, the European Parliament [2016] passed a law that "aims to clean up the benchmark-setting process, improve transparency, and prevent conflicts of interest like those that led to the LIBOR rigging scandals of recent years."

Around the same time, the United Kingdom's Hogg Tendering Advisory Committee for LIBOR recommended that the British Bankers Association (BBA) be replaced as administrator of LIBOR, choosing ICE Benchmark Administration (IBA) to begin administering LIBOR as of February 1, 2014.[4] On its website, ICE touts its advantages:

> "As the new, independent administrator, IBA has introduced new surveillance systems and statistical analysis techniques which subject the submissions to much closer scrutiny. These compare the data provided by the panel banks with related markets, their own submission history and that of other panel banks. These tighter checks and controls will enable us to identify potential errors, manipulation and collusion, which will be escalated to the FCA."[5]

ISDAFIX

As part of the discovery process accompanying the LIBOR investigations, regulators and the DOJ delved into the telephone, email, and instant message records of the various banks' traders. They reportedly uncovered a second point of potential interest-rate setting misconduct—in the "fixing" of ISDAFIX.

ISDAFIX is a benchmark swap rate used, among other things, to determine the settlement of interest rate swap futures and interest rate swap options (i.e., "swaptions"), as well as coupon rates on commercial mortgage-backed securities (CMBS).[6]

The alleged manipulation of ISDAFIX differs from allegations made about LIBOR. Whereas LIBOR is determined by surveying panel banks, ISDAFIX is calculated based on dealer quotes, submitted in response to a "reference point" set by the benchmark administrator,[7] itself based on trades and executable quotes leading up to the fixing window.

To move the ISDAFIX rate in its favor, a bank could, for example, flood the market with executions, bids, and offers just before the 11:00 a.m. fixing window to influence the "reference point" used by ICAP and Thomson Reuters, a process known as "banging the close." Alleged collusion among different banks' traders amplified these moves during the ISDAFIX rate-setting window.

The plaintiffs sought to demonstrate that the ISDAFIX participants were acting in concert, drawing attention in their complaint to the surprising conformity among members in their submissions of ISDAFIX levels, in contrast to the disparity of their opinions at other times of the day. See Exhibit 2.

To date, the CFTC has levied ISDAFIX-related fines to Barclays ($115 million), Citigroup ($250 million), Goldman Sachs ($120 million), and RBS ($85 million). The agency continues to investigate other banks. Meanwhile, private litigation is proceeding, with most claims (including antitrust claims) from the consolidated class action complaint surviving the motion to dismiss phase. In 2016, 8 of the 15 co-defendants settled with the class for a total of $380 million, agreeing, as part of the settlement, to provide further "confirmatory discovery" to the class' counsel. The case is *Alaska Electrical Pension Fund v. Bank of America Corporation et al.*

As with LIBOR, responsibility for ISDAFIX has since moved from an industry trade group, in this case the International Swaps and Derivatives Association (ISDA), to IBA, which has renamed the benchmark the ICE Swap Rate.

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Exhibit 2

Comparison of Agreement: ISDAFIX and Market Price

Maturity [A]	Number of Instances Where RBS and JPMorgan Submit Interest Rate Market Prices Within 2 Minutes of Each Other [B]	Percentage of Instances from Column [B] Where Market Prices Match [C]	Percentage of Days that RBS and JPMorgan Contribute Matching ISDAFIX Submissions and for Which They Also Submit Interest Rates Prices Within 2 Minutes of Each Other [D]	Number of Days from January 2009 through December 18, 2012 Where Both RBS and JPMorgan Contribute ISDAFIX Submissions [E]	Percentage of Matching ISDAFIX Submissions from Column [E] [F]
1Y	n/a	n/a	n/a	163	93.9%
2Y	19	21.1%	100.0%	163	97.5%
3Y	24	0.0%	100.0%	163	95.1%
4Y	1	0.0%	100.0%	163	91.4%
5Y	18	0.0%	100.0%	163	93.9%
6Y	n/a	n/a	n/a	163	93.3%
7Y	12	25.0%	100.0%	163	90.2%
8Y	n/a	n/a	n/a	163	91.4%
9Y	n/a	n/a	n/a	163	92.6%
10Y	21	23.8%	100.0%	163	87.1%
15Y	n/a	n/a	n/a	163	91.4%
20Y	n/a	n/a	n/a	163	91.4%
30Y	n/a	n/a	n/a	163	93.9%

Source: Consolidated Amended Class Action Complaint, Alaska Electrical Pension Fund v. Bank of America Corporation et al.

Benchmarks—Foreign Exchange

The FX market has been a central concern for bank defendants, with exorbitant fines and settlements already well in excess of $12 billion, as seen in Exhibit 3.

Four banks have pleaded guilty to DOJ charges; global regulatory and supervisory authorities have fined banks a combined $10 billion for manipulating FX markets, and the private action has resulted in over $2 billion in disclosed settlements.

The primary focal point has been trades executed at, or based on, the WM/Reuters (WMR) Fix—a series of benchmark foreign exchange rates relied upon by investors and corporations transacting in foreign currencies. Currencies are traded globally 24 hours a day, but the WMR Fix is somewhat analogous to a closing price on a stock exchange.

An American company with a large pending payment to a German supplier might arrange in advance to pay the WMR spot rate for its EUR. At that point, the bank has a financial incentive to make EUR more expensive: to raise the EUR/USD rate.

The mechanics of the alleged manipulation were similar to those of ISDAFIX, in which banks would try to "bang the close" to move an exchange rate in their favor, depending on their trading book positions and customer orders. Traders across different banks allegedly colluded by sharing confidential customer order information and coordinating their trading around the WMR Fix. They set up electronic chat rooms to facilitate their collusion, using names such as "The Cartel," "The Bandits' Club," "One Team, One Dream," and "The Mafia."

Back in 2015, the DOJ wrested guilty pleas from financial institutions, but more recently it has focused its attention on individual employees. The DOJ has criminally charged three former FX traders with manipulating FX markets and is reportedly preparing cases against other "cartel" members; two traders have pleaded guilty. Meanwhile, three banks (Bank of America, BNP Paribas, and UBS) have settled with Canadian claimants, for a total of $12 million, in a case similar to the U.S. case; the remaining co-defendants have yet to settle.

In September 2016, a new class of U.S. plaintiffs comprised of investors with *indirect* FX exposure, via mutual funds and ETFs (exchange-traded funds), filed a private action. Defendants filed their motion to dismiss in January 2017.

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Exhibit 3
FX Settlements—Benchmark Investigations/Cases

	U.S. Regulators					Int'l Regulators			Private Litigation		
Defendant	**CFTC**	**DOJ**	**Federal Reserve**	**NY DFS**	**OCC**	**FINMA (Swiss)**	**ACCC/ ASIC (Australia)**	**FCA (U.K.)**	**USA**	**CAN**	**Total**
ANZ							7				**7**
Bank of America			205		250				188	5	**648**
Bank of Tokyo Mit.									Ongoing	Ongoing	
Barclays	400	650	342	485				451	384	Ongoing	**2,712**
BNP Paribas									115	3	**118**
CBA							2				**2**
Citigroup	310	925	342		350			511	402	Ongoing	**2,840**
Credit Suisse									Ongoing	Ongoing	
Deutsche Bank									Ongoing	Ongoing	
Goldman Sachs									135	Ongoing	**135**
HSBC	275							343	285	Ongoing	**903**
JPMorgan Chase	310	550	342		350			352	105	Ongoing	**2,009**
Macquarie							4				**4**
Morgan Stanley									Ongoing	Ongoing	
NAB							2				**2**
RBC									Ongoing	Ongoing	
RBS	290	395	274					344	255	Ongoing	**1,558**
Société Générale									Ongoing	Ongoing	
Standard Chartered									Ongoing	Ongoing	
UBS	290		342			139		371	141	4	**1,287**
TOTAL	1,875	2,520	1,847	485	950	139	15	2,372	2,010	12	**12,225**

Note: Figures in USD millions.

In December 2016, Australia's Federal Court imposed penalties against ANZ (approximately $7 million) and Macquarie (approximately $4 million) after the banks admitted to "attempted cartel conduct" in their daily submissions for the Association of Banks in Singapore Malaysian Ringgit (ABS MYR) Fixing Rate.

As with LIBOR and ISDAFIX, the methodology for the WMR FX fixes has since been changed, as of December 2014, to make it more robust. One significant change is the widening of the calculation window from one minute to five minutes. In April 2016, Thomson Reuters acquired responsibility for the WMR fixes from State Street subsidiary The World Markets Company. Thomson Reuters publicizes that its "published and transparent calculation methodology is fully aligned with the IOSCO Principles for Financial Benchmarks" (Thomson Reuters [2014]).

Other FX Matters

While issues concerning alleged FX *benchmark* manipulation have garnered the bulk of regulatory attention, the FX market has not been without other controversies.

The New York Department of Financial Services (NY DFS) settled unrelated claims with Barclays, for $150 million, regarding questionable procedures Barclays implemented through its electronic FX trading platform, including its implementation of "Last Look."

Last Look purports to work as a safeguard for dealers, protecting a dealer's electronic quote from being "picked off" by multiple parties simultaneously before the dealer has a chance to update its quote. But it also provides an avenue for the dealer itself to cherry-pick, or trade to its advantage, by filling those customer orders that it could work advantageously, while rejecting others

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that would cause the dealer to lose money on a trade. The controversial practice is still being probed by regulators, with the NY DFS having issued subpoenas to BNP Paribas, Credit Suisse, Deutsche Bank, Goldman Sachs, and Société Générale (SocGen). Private litigants sued Barclays and Deutsche Bank, before settling with Barclays in the amount of $50 million, pending court approval. A ruling is awaited on Deutsche Bank's March 2016 motion to dismiss. Following the regulatory and media scrutiny, many FX platforms have curtailed the Last Look practice.

Separately, in 2011 the DOJ charged Bank of New York Mellon (BNY) with fraud, claiming the custodial bank misled customers by telling them they were getting the best foreign exchange rates available, under the bank's "standing instruction" program, when in fact customers were getting disadvantageous prices (to BNY's benefit). BNY settled the charges for $714 million in March 2015, reaching joint agreements with the DOJ, the NY State Attorney General, the Department of Labor, and the Securities and Exchange Commission (SEC). BNY also settled with class action litigants for a combined total of $335 million as part of the $714 million settlement. In July 2016, State Street, a large rival custodial bank, settled similar charges with the same governmental agencies, as well as a consolidated class action, for $530 million combined, with $300 million apportioned to the investor class.

In a similar vein, American Depositary Receipt (ADR) investors sued BNY, Citigroup, and JPMorgan Chase for allegedly unfavorable FX conversions into U.S. dollars on foreign dividends received, before those dividends were distributed to ADR holders. An August 2016 court ruling trimmed some of the plaintiffs' claims.

Another area garnering scrutiny is front-running, in which a trader takes advantage of his knowledge of confidential customer order information to trade ahead of that order. The DOJ has criminally charged two former HSBC traders with front-running a multi-billion-dollar customer order associated with one of the customer's corporate divestitures (the customer is reported to be Cairn Energy). According to the DOJ, the HSBC traders established large positions in advance of the conversion and convinced the customer to transact at a less liquid time of day, which would result in larger market movements on sizable volume, thus enabling the traders to profit more handsomely from their alleged misconduct.

In a similar vein, the DOJ's 2015 Plea Agreement with RBS noted that "… in connection with the FX component of a single corporate transaction, RBS was guilty of trading ahead of a client transaction so as to artificially affect the price of a currency pair and generate revenue for the defendant, and to affect or attempt to affect FX rates, and in addition misrepresenting market conditions and trading to the client" (DOJ [2015]).

The Bank for International Settlements (BIS) is working on a global code of conduct for the FX markets, developing "a single set of global principles of good practice for the wholesale FX market." The final version is expected to be completed in May 2017. (BIS [2016]).

Benchmarks—Gold, Silver, Platinum, and Palladium

Regulators worldwide have been investigating potential misconduct in the striking of "fixes" in the precious metals arena, too. There are three private actions proceeding at this juncture: one pertaining to gold, one to silver, and one for platinum and palladium combined.

The alleged gold manipulation revolved around the London Gold Market Fixing, according to which five banks would meet via conference call twice a day to determine a benchmark price for gold.[8] Producers, end-users, and investors would then rely on or reference this benchmark price for physical gold, with some contracts being explicitly linked to the fix and spot prices and derivatives being directly or indirectly impacted. A similar process was used for silver, platinum, and palladium.

According to the private action complaints, due to the consultative nature of the prior fixing process, the banks were freely able to share customer order information with one another and collude as to the direction of the fixing rate (usually pushing the price downward, relative to the intraday trends). Furthermore, the fixing banks were able to communicate with their trading desks during the fixing process but before the public knew the results, creating yet further opportunities for profiteering.

Deutsche Bank settled late last year with plaintiffs in the gold and silver cases, for $60 million and $38 million, respectively, and agreed to cooperate with the plaintiffs' counsel in pursuing claims against the remaining defendants.[9]

In May 2014, Barclays paid a £26 million ($44 million) fine to the Financial Conduct Authority

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(FCA), "for failing to adequately manage conflicts of interest between itself and its customers as well as systems and controls failings, in relation to the Gold Fixing" (FCA [2014]). The failures referenced in the FCA settlement spanned the years from 2004 to 2013.

The London Bullion Market Association (LBMA) has since relinquished administration of the gold fixing to IBA in March 2015 and the silver fixing to Thomson Reuters and the Chicago Mercantile Exchange (CME) in August 2014. Administration of the platinum and palladium fixings moved from the London Platinum & Palladium Market (LPPM) to the London Metals Exchange (LME) in December 2014. Among other changes, the new methodologies removed the consultative nature of the earlier (and problematic) fixing processes, in favor of an auction-based system.

Other investigations and complaints have been filed regarding potential misconduct by the banks in the commodities markets, but they are largely idiosyncratic in the nature of the alleged misconduct. These include cases relating to the markets for zinc, wheat, electricity, aluminum, cotton, Brent crude oil, WTI crude oil, and multiple silver-related cases both unrelated to the fix. The first silver case (*In re: Commodity Exchange, Inc., Silver Futures and Options Trading Litigation*) alleged that JPMorgan manipulated silver prices downward in order to profit on a large short position and was dismissed. A second group of cases is, however, ongoing (e.g., *Shak v. JPMorgan Chase & Co. et al.*), in which silver futures traders argue that JPMorgan manipulated the market for silver futures contracts by engaging in uneconomic trading and pressuring COMEX employees responsible for daily settlements. The cases had been dismissed in June 2016, but the 2nd Circuit vacated that dismissal in February 2017.

Treasury Auctions

In June 2015, reports surfaced that the DOJ had turned its attention to banks' conduct surrounding Treasury auctions, on the heels of its probes into LIBOR, ISDAFIX, and FX manipulation.

The U.S. Treasuries market is often regarded as the deepest and most liquid bond market in the world. The Department of Treasury issues its new securities via an auction, in which participants bid for the new issue at hand. The new issue is then priced at the single lowest price (highest yield) that fills the offering amount.

There are now 23 primary dealers (designated by the Federal Reserve); they are required to make reasonable bids for a share of each new Treasury issue. Before the auction takes place, trading in the new issue begins in the so-called "when-issued" market, allowing customers to purchase the to-be-issued Treasuries from dealers before they are issued. Dealers later bid for a share of the new issuance at the auction. In this scenario, dealers can profit by selling high in the when-issued market and then buying low at the auction.

A month after reports of the DOJ's investigation, a class action (*In re: Treasury Securities Auction Antitrust Litigation*) was filed alleging that primary dealers were colluding to both artificially inflate prices in the when-issued market and artificially deflate prices at the auction. The alleged misconduct would result in supracompetitive profits for the dealers to the detriment of investors (who pay too much for securities in the when-issued market) and taxpayers (because the federal government's borrowing costs are higher due to deflated auction prices). Numerous cases have since been consolidated.

Credit Default Swaps and Interest Rate Swaps Antitrust Claims

In an effort to make financial markets more robust and transparent, the Dodd–Frank Act mandated that certain financial derivatives be centrally cleared and traded on electronic exchange-like platforms called swap execution facilities (SEFs). Some of these products, like credit default swaps (CDS) and interest rate swaps (IRS)—each individually mammoth markets[10]—were typically dealer-traded in OTC markets. Moving them to SEFs would severely dampen dealer trading revenues (for example, they may lose access to profits earned from intermediating trades), and dealers would lose many of the informational advantages they enjoyed by controlling the marketplace and the flow of product.

Buy-side firms—those most interested in moving swap trading away from dealers to potentially cheaper alternatives—have filed antitrust claims, arguing that the dealers colluded to thwart the movement of trading onto SEFs, agreeing (in accordance with their collective interests) to stay away from certain SEFs, despite each dealer's individual economic interest in participating on the SEFs.

The IRS and CDS antitrust cases have much in common, and generally rest on arguments that the dealers

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jointly boycotted competitive alternatives to the status quo, culminating in or perpetuating a market of artificially high bid–ask spreads. The CDS complaint argues, for example, that "Dealer defendants made billions of dollars in supracompetitive profits at the expense of the class by taking advantage of price opacity in the CDS market. These profits primarily came from the 'bid/ask spread' the dealer defendants enjoy on transactions with investors" (*In re: Credit Default Swaps Antitrust Litigation*, case no. 13-md-02476).

In September 2015, CDS dealers settled antitrust claims for $1.9 billion. The DOJ had in 2013 closed its probe (opened in 2009) without any charges. The European Commission (EC) ended its investigation into the banks in December 2015, but it continues to investigate potential misconduct by nondealers Markit and ISDA.

Two groups of IRS antitrust complaints had been filed: one class action on behalf of interest rate swap customers and a related one brought by a SEF that was allegedly boycotted. In June 2016, all related cases were consolidated as *In re: Interest Rate Swap Antitrust Litigation*.

According to the IRS plaintiffs' complaints, the defendants would allegedly only be amenable to participating on 1) SEFs that the dealers owned (or in which they held sizable investments or controlling interests) or 2) SEFs that were most similar to the OTC environment itself, and therefore an inconsequential threat to the profitable status quo.

Two constraints that the dealer-preferred SEFs allegedly impose on their users are "name give-up" and "request for quote" (RFQ). Name give-up requires a firm to identify itself to its trade counterparty.[11] RFQ requires potential customers to communicate with dealers individually to obtain executable quotes. The demands of name give-up and RFQ are typically unappealing to swap market participants, who generally prefer anonymity and executable quotes. They would also ideally seek to trade among themselves, on a so-called "all-to-all" platform featuring a central limit order book (CLOB).

The plaintiffs allege that the dealer defendants boycotted SEFs that permitted anonymous or "all-to-all" trading, thereby starving those platforms of the necessary liquidity and traction to achieve any critical mass. Furthermore, dealers allegedly increased clearing fees or threatened or refused to clear trades conducted on certain SEFs, rendering those buy-side friendly SEFs less desirable alternatives.

Regulators are also investigating interest rate swap trading practices. In November 2016, Citigroup disclosed in its third quarter 10-Q that the CFTC is "conducting an investigation into the trading and clearing of interest rate swaps by investment banks," and Goldman Sachs added "trading and clearance of … interest rate swaps" to its list of regulatory investigations disclosed in its 10-Q.

Supranational, Subsovereign, and Agency Bonds (SSA Bonds)

In December 2015, the DOJ reportedly launched an investigation into supranational, subsovereign, and agency (SSA) bond trading, and three months later it was reported that the European Union had opened its own investigation into the matter. SSA bonds are issued by such entities as the World Bank and Germany's Kreditanstalt für Wiederaufbau (KfW) and constitute a $9 trillion market (by total issuance outstanding). In May 2016, investors filed complaints alleging "collusive activities to fix the prices of SSA bonds sold to and purchased from investors in the secondary market." Plaintiffs claim that SSA bond dealers colluded to widen bid–ask spreads. The cases have been consolidated with the caption *In re: SSA Bonds Antitrust Litigation*.

TRADING PRACTICES

Beyond alleged antitrust allegations, there has been a significant regulatory concentration on whether the modern trading market structure creates unfair advantages for certain market participants. Regulators are also investigating the way brokers and trading desks interact with their customers and their flow, among other trading concerns.

Issues of Market Micro-Structure (and High-Frequency Trading)

SENATOR LEVIN: So, again, *your subjective judgment* as to which market provided best execution for tens of millions of customer orders *virtually always led you to route orders to the markets that paid* ***you*** *the most?*
MR. QUIRK: No, not always led us...

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SENATOR LEVIN: I said "virtually always."
MR. QUIRK: Virtually, yeah.
(Quirk [2014], emphasis added.)

The March 2014 release of Michael Lewis' best seller *Flash Boys: A Wall Street Revolt* brought attention to the internal workings (or "microstructure") of the trading markets: the ins and outs of how both institutional and retail clients' orders are handled and executed. Lewis highlighted what he deemed a "rigged" marketplace in which high-frequency traders, with the help of exchanges like the New York Stock Exchange (NYSE), are able to trade on order and pricing information made available to them ahead of other market participants.

Modern equity markets are fragmented. Years ago, there was essentially one stock-trading venue in the United States: NYSE. Today, there are 21 national securities exchanges on which orders are placed and trades are executed, not to mention dozens of off-exchange trading venues, such as alternative trading systems (ATS).

Given the tremendous disconnectedness resulting from the proliferation of exchanges, investors need to easily ascertain the best trading levels available, rather than having to sift through quotes from 21 different exchanges. The National Best Bid and Offer (NBBO) represents this level: the highest bid and lowest offer available throughout the market. The Securities Information Processor (SIP) consolidates quote and trade information from across all venues and disseminates the NBBO.[12] The SIP was created to centralize information across the fragmented equity markets but had been rendered obsolete, according to some concerned investors.

HFTs utilize direct data feeds, connected to co-located servers, to bypass the SIP and execute against quotes before that information reaches the SIP, based on lightning-fast algorithms that execute commands in micro-seconds. Certainly, traditional investors cannot move as fast, and importantly, the pricing information they rely on is often already stale by the time they see it, or even by the time it reaches the SIP.

Exchanges also specifically cater to HFTs by creating special order types that enable players to move to the top of the order queue (provided that they have the know-how and sufficient computing power), in order to increase their chances of getting their bids hit (or offers taken).

Some market participants are frustrated that HFTs are extracting profits to the detriment of investors and that markets are increasingly being dominated by entities that have no interest in investing, but only in executing trades over minutely small intervals of time. HFTs often begin and end their trading days with blank slates, having no investments at risk on their balance sheets. For example, upon going public in April 2015, HFT and market-making firm Virtu Financial revealed in its IPO registration statement that it had suffered only *one day of trading losses from 2009 through 2013*.

Although HFTs might argue that their trading success is the result of superior risk management, others feel strongly that it is owed to the *guaranteed economics* provided to HFT firms by the exchanges. Arguments made in private litigation against equity and futures exchanges, however, have not convinced the courts. The exchanges were defending claims similar to that of aiding and abetting: that they had allegedly helped create avenues, like special order types, that could render "unfair" advantages to high-speed robots over their human counterparts. The exchanges successfully asserted that they are self-regulatory organizations and, as such, have absolute immunity from plaintiffs' claims with respect to the creation of HFT-friendly order types and proprietary data feeds. The cases were consolidated as *In Re: Barclays Liquidity Cross and High Frequency Trading Litigation*, which was dismissed in August 2015 and is under appeal in the 2nd Circuit Court of Appeals. In October 2016, the SEC filed an amicus brief in support of the plaintiffs.

With the obfuscation caused by spoofing (see more on this the next subsection) and with HFT algorithms and robots arguably front-running orders on exchanges (particularly large orders), institutional investors seek out alternative venues where they can hide their trading intentions until after they have executed their larger orders.

Dark pools—private, off-exchange trading venues—were often the natural choice and were regularly marketed as such. In a dark pool, order flow and customer identity could ostensibly go undetected, except by the pool's operator. For any dark pool to be effective, however, its operator needed to ensure that a significant amount of order flow passed through it.

Allegations were made that, contrary to their marketing of their dark pools as havens from predatory HFT trading, Barclays and Credit Suisse had failed to protect

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customers from predatory trading within their dark pools. The banks settled these and other related electronic trading issues with the SEC and New York State in January 2016 for a combined total of $154 million. Separately, in December 2016, Deutsche Bank settled allegations with New York State and FINRA for a total of $40 million over its electronic order-routing practices, as they related to the bank's dark pool.

Another quirk of modern market structure is the practice of *payment for order flow.* Akin to referral fees, brokerages are compensated for routing customer orders to third-party market-making firms (termed "wholesalers" or "internalizers"), in exchange for small payments, perhaps $0.003 per share.

Payment for order flow can constitute a significant portion of brokerage revenue and thus a principal–agent problem could arise when the brokerages' duties of best execution conflict with their desire to generate revenue from customer order flow.

Brokerages might route the marginal order to the party (or venue) that pays *them* the highest referral fee (adjusted for probability of execution), rather than the party that results in optimal execution *for their client*. It is this undisclosed arrangement that is central to *Klein v. TD Ameritrade* and *Lim v. Charles Schwab*. *Klein* is still ongoing; *Lim* has been dismissed and is under appeal in the 9th Circuit Court of Appeals.

In the same vein, according to recent reports, the DOJ is investigating whether two of the largest wholesalers—Citadel and KCG—are executing retail customer orders at inferior prices by using different data feeds.

The concern is that a wholesaler might be tempted to engage in latency arbitrage between the SIP and the faster, direct data feeds it receives from the exchanges. If the wholesaler filled a customer sell order at the SIP's high bid of, say, $11.82, when it knew the best bid was really $11.83, then it would arguably be in violation of its "best execution" duty. In November 2015, FINRA released Regulatory Notice 15-46 to clarify its guidance regarding best execution. In January 2017, the SEC fined Citadel $23 million for making misleading statements in this context.

Spoofing

Spoofing is another trading phenomenon that has piqued the interest of regulators and private litigants. The advent of HFT resulted in the creation of far more order quotes than actual trades. Spoofing, meanwhile, can be thought of as a problematic subset of HFT, in which orders are created *en masse*, but no actual trades occur. Rather, the objective of a spoofing order is actually not to trade, but only to move the market by creating the appearance of tremendous supply or demand.

Dodd–Frank codified the illegality of spoofing by amending the Commodities Exchange Act (CEA): "A section 4c(a)(5)(C) violation occurs when the trader bids or offers with the intent to cancel a bid or offer before execution." For example, a trader could accumulate a long position in XYZ and then send multiple large buy orders just slightly below the prevailing market price, thereby creating the appearance of strong demand and causing other participants to raise their quotes. The trader would then sell his long position at the higher prices and quickly cancel his bids.

The CFTC, SEC, and DOJ have been particularly active in pursuing spoofing cases. In 2013, Michael Coscia, the owner of Panther Energy Trading, faced administrative actions from the CFTC and the FCA, as well as from the CME, paying $3.7 million in fines. Coscia would ultimately be convicted in late 2015, in the first-ever criminal case linked to spoofing.

The CFTC and DOJ both pursued actions against Navinder Singh Sarao for using spoofing tactics they claimed contributed significantly to the notorious May 6, 2010, "Flash Crash," when the Dow Jones Industrial Average index dropped nearly 600 points (~5%) in a matter of a few minutes (only to recover most of those losses by the close of the market that day). In November 2016, Sarao pleaded guilty to manipulating the CME's E-Mini S&P 500 futures contract, which plunged and in turn created a domino effect of cascading equity prices.

Another high-profile spoofing case involved Igor Oystacher of 3 Red Trading, whom the CFTC alleged used spoofing tactics in trading various products such as copper, crude oil, natural gas, VIX, and E-Mini S&P 500 futures. In December 2016, Oystacher settled with the CFTC for $2.5 million. Other recent cases include *CFTC v. Khara and Salim*, *CFTC v. Moncada, CFTC v. Wilson, SEC v. Milrud*, and *SEC v. Taub*, as well as such private litigation as *HTG Capital Partners v. John Doe(s)*.

The largest entity to be accused of spoofing is Citigroup: In January 2017, the CFTC fined the fourth-largest U.S. bank (by assets) $25 million, alleging that

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five Citi traders engaged in spoofing the Treasury futures markets 2,500 times in 2011 and 2012.

Bond Traders' Representations to Customers

Two crisis-era cases received their fair share of public attention. The criminal and civil cases filed against former Bear Stearns managers Ralph Cioffi and Matthew Tannin, following the 2007 implosion of two Bear Stearns funds, focused on representations made by the fund managers about the funds and investors' prospects.[13] The second case was a civil fraud case, successfully pursued by the SEC against Goldman Sachs employee Fabrice Tourre. At the core of the issue was what Goldman or Tourre knew, but failed to properly disclose to prospective stakeholders, about the true motivations of other Goldman client-participants to the deal and the conflicts involved.

There has also been a separate focus on dealer representations in OTC markets. Several cases have been brought, post crisis, accusing bond traders or their firms of fraudulent dealing in the provision of misleading information as part of a trade or sale.

The first concerns Jesse Litvak, a former Jefferies & Co. RMBS trader who admitted to misleading customers about how much he had paid for bonds that he was selling to customers. After being convicted and later having that conviction reversed, upon retrial, the jury found Litvak guilty in January 2017 on just 1 of 10 counts. The specific charge on which he was found guilty was the altering of an electronic chat to show how much he claimed to have paid for a bond, before forwarding the chat to his customer. He was not found guilty on the counts that were based on verbal or written misrepresentations he agreed he had made but had argued were fair in the context of a salesperson trying to sell his product.

The SEC has reportedly built over a dozen cases of this ilk. One such case involves three former Nomura RMBS traders who are accused by the SEC and DOJ of lying about prices paid, and bid and offer levels available, in the marketplace at that time. Unlike in the world of exchange-listed stocks, customers in over-the-counter markets (like RMBS) often rely on dealers for market color and transparency regarding trading levels and available liquidity. In December 2015, Adam Siegel pleaded guilty to securities fraud, having "made misrepresentations to induce buying customers to pay inflated prices and selling customers to accept deflated prices for bonds" when he was the co-head of ABS, MBS, and CMBS trading at RBS (DOJ [2015]). In December 2016, the DOJ charged former Cantor Fitzgerald trader David Demos with securities fraud for similar misconduct.

Bankers have been scrutinized elsewhere for taking advantage of the opacity of securities markups and trading fees, such as in the area of *transition management*, a service provided to institutional investors to help them move assets between asset managers or liquidate portfolios. In January 2017, State Street paid $64 million as part of a deferred prosecution agreement with DOJ over allegations that two former employees at the bank charged customers undisclosed commissions on top of the customers' negotiated fees. The individuals currently face criminal charges. In another transition management case, in 2013 Convergex paid $150 million combined to the DOJ and SEC for allegedly adding hidden markups, via an affiliate, to customer orders for which the customers were already paying commissions. The SEC has an ongoing case against Convergex's former head of transition management (*SEC v. Bassily*).

Another interesting case of questionable selling tactics concerns AnchorBank, a Wisconsin bank that struggled to survive the aftermath of the financial crisis. While trying to unload some of its commercial real estate assets, former vice president David Weimert allegedly maintained for himself a piece of the deal by misleading both the buyer and his former employer about each party's desire for him to obtain a portion of the deal. He was later convicted of wire fraud, but the U.S. Court of Appeals for the Seventh Circuit overturned the conviction, explaining that, "… as best we can tell, no previous case at the appellate level has treated as criminal a person's lack of candor about the negotiating positions of parties to a business deal. In commercial negotiations, it is not unusual for parties to conceal from others their true goals, values, priorities, or reserve prices in a proposed transaction."

BUY-SIDE ISSUES

In addition to the numerous sell-side probes discussed previously, several investigations have begun into decisions made by asset managers—the buy-side. In what is becoming a perennial focus for the SEC, the

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agency purports to be homing in on asset managers' valuation practices. The SEC has regularly highlighted valuation practices among its priorities since at least 2012. In December 2012, the SEC [2012a] stated that one of its priorities was "detecting fraudulent or weak valuation practices… and the failure to follow a fund's stated valuation procedures." Another theme has been the concern over fund fees and the appropriateness of disclosures accompanying them. A third theme, garnering attention of late, is that of representations made about liquidity.

Pricing and Valuation

The SEC has been examining buy-side valuation processes for several years, but the scrutiny has been growing over the last four years. In October 2012, the SEC's Office of Compliance Inspections and Examinations [2012c] sent a letter to hedge fund managers regarding "presence examinations" that noted, "[National Exam Program] staff will review advisers' valuation policies and procedures, including their methodology for fair valuing illiquid or difficult to value instruments." Its focus remains acute. In July 2013 the SEC announced three initiatives: 1) the Financial Reporting and Audit Task Force, 2) the Microcap Fraud Task Force, 3) and the Center for Risk and Quantitative Analytics.

Asset managers typically charge fees based on assets under management (AUM) and performance—the financial incentives therefore lie in increasing one's asset base and improving performance. Strong performance can also help a manager market her fund and raise her asset base.

Performance is measured by changes in the net asset value (NAV) of the manager's positions, which directly reflects the valuations used on each investment. At worst, the performance incentive can tempt the manager to use more aggressive marks and assumptions than would otherwise be appropriate, compromising the integrity of the valuation process. Certain asset classes are more susceptible to being artfully massaged. While valuations of public equities are relatively straightforward due to transparent closing prices on exchanges, fixed-income assets are trickier, typically trading OTC.

One temptation may be for a bond fund manager to buy "odd lots" of bonds. Odd lots are small or uneven amounts of an issue, say, less than $1 million, although there is no set threshold and it would vary by bond type. Because bond trading is dominated by dealers and institutional customers trading in large blocks, odd lots typically trade at a discount to round lots.

The SEC fined PIMCO $20 million in December 2016 for what the SEC claimed was the habitual marking up of odd lots, in its BOND fund, to its third-party-vendor's round-lot price. BOND is an ETF form ($2.2 billion AUM) of its well-known Total Return Fund ($74.6 billion AUM, down from a peak of $293 billion in 2013), formerly managed by Bill Gross. After one year, following BOND's February 29, 2012, inception, it had outperformed PIMCO's own Total Return Fund by more than 2%, despite being run by the same manager and adopting similar investment objectives and sector allocations.

The SEC is reportedly probing valuation methods in general and has found deficiencies, ranging from asset price inflation to the switching of valuation methods several times a year to maximize asset values.

In October 2012, the SEC charged Yorkville Advisors (approximately $1 billion AUM at peak) with fraud concerning the firm's valuations. The SEC [2012b] said it found "a scheme to inflate fees by grossly overvaluing fund assets."

In a more recent development, the DOJ and SEC charged Visium Asset Management (approximately $8 billion AUM at its peak) for valuation issues (as well as insider trading). In June 2016, a Visium portfolio manager pleaded guilty to mismarking securities at month-end and year-end on hundreds of occasions by obtaining sham "u-turn" quotes from friendly dealers and using those quotes to override independent third-party valuations, in order to increase the positions' marks. According to the SEC, the mismarking yielded $6 million in extra fees to Visium. The firm is now winding down or selling its funds and assets.

The DOJ and SEC have also brought cases against Platinum Partners (approximately $1.7 billion AUM at its peak) for fraudulent valuations of the fund's illiquid assets, in particular, certain oil assets. According to the SEC [2016], Platinum terminated its 2014 auditor that had identified "material weakness" in Platinum's valuation process and "a 'very material' misstatement that required a large markdown…." The fund is in liquidation, has filed for bankruptcy protection, and estimates that it will be able to return only approximately 10% of what is owed to its investors.

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Outside of the fixed-income world, the SEC has reportedly contacted large mutual funds, requesting information about how they are marking their investments in startups and other private companies. According to one *Wall Street Journal* article, "BlackRock said data-mining software firm Palantir Technologies Inc. was worth $10.70 a share as of September 30. That was 61% more than venture-capital firm Founders Fund's valuation of Palantir on the same day, according to fund documents reviewed by the Journal" (Winkler and Austin [2016]).[14]

Investment and Fund Fees

Private equity fees. Since 2014, the SEC has paid considerable attention to deficiencies in disclosures surrounding fees collected by private equity (PE) general partners (GPs). This focus was first highlighted in a May 6, 2014, speech by Andrew J. Bowden, then director of the SEC's Office of Compliance Inspections and Examinations, titled "Spreading Sunshine in Private Equity."[15]

In addition to explicit management and performance fees, there are various other means for GPs to earn fees from limited partners (i.e., their investors), some of which are being probed as potentially improper, including:

- Having portfolio companies pay for monitoring services performed by the PE firm, and accelerating future payments for surveillance that would otherwise have been performed had a portfolio company not been sold
- Collecting broken deal or diligence expenses
- Transaction fees
- Sharing expenses across portfolio companies to benefit one group of investors over another.

Since Bowden's speech in 2014, several noteworthy PE firms have moved toward disclosing more of their fees to their investors, and some have settled with the SEC over improper fee disclosures. KKR, Blackstone, and Apollo reached settlements with the SEC for $30 million, $39 million, and $53 million, respectively. Those three firms, along with TPG, have updated their disclosures regarding fees.

Mutual fund advisory fees. In recent years, investors have become more cognizant of the material impact that fees can have on their investment returns.

Investors in the BlackRock Global Allocation Fund and the BlackRock Equity Dividend Fund are suing BlackRock for allegedly charging excessive investment advisory fees. According to a 2010 Supreme Court decision, an excessive investment advisory fee is "a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining" (Gibson Dunn [2010]).

The complaint (*In re: BlackRock Mutual Funds Advisory Fee Litigation*) alleges that BlackRock charged investors in these funds up to $280 million more per year in advisory fees for the underlying funds than it charged for similar sub-advised funds that are sponsored by institutions independent of BlackRock. The complaint also alleges that fee percentages were not decreased as AUM increased, per the fee schedule.

Redemptions and illiquidity. In December 2015, mutual fund Third Avenue Focused Credit Fund (peak AUM approximately $3 billion) halted investor redemptions, purportedly due to its inability to liquidate assets in an orderly manner. The mutual fund was invested in distressed and high-yield debt, and Third Avenue decided that there was not enough liquidity available in the market for the fund to liquidate in an orderly fashion, that the sale of the assets *en masse* would trigger a plunge in the assets' prices during the sale to the investors' detriment. One key advantage of mutual funds is the supposition that investors have access to daily liquidity—they can redeem their investment at the fund's NAV on a daily basis—which makes Third Avenue's redemption freeze an uncommon, peculiar event. The fund is slowly unwinding its holdings and represents that it will return the proceeds to its investors over the next year. Since the redemption halt, investors have filed shareholder derivative actions.[16] The cases have not been consolidated and are in the early stages, awaiting rulings on motions to dismiss.

One interesting private lawsuit involves a hedge fund allegedly altering its valuation method in order to *lower* the fund's NAV, decreasing the fund's redemption value accruing to an investment firm that was redeeming its investment in the fund. The Canadian plaintiff is suing Saba Capital in New York State Court. The case (*Public Sector Pension Investment Board v. Saba Capital Management*) is still ongoing after the motion to dismiss was denied in part.

Retirement plans. The pace of new litigation in the retirement plan space has accelerated recently, with

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at least 25 new cases being filed in 2016. In most of these cases, employees are suing their employers in their capacity as sponsors of their companies' 401(k) plans. Defendants include corporations, such as Northrup Grumman and Oracle; financial institutions, such as American Century, MassMutual, Morgan Stanley, and New York Life Insurance Co.; and universities, such as New York University and Yale.

The plaintiffs' central grievance centers on the plans' allegedly excessive costs and poor performance. They argue that the plan sponsors have selected (and retained), suboptimal investment options for employees to choose from and have failed to adequately monitor the fees imposed on plan participants by third-party administrators and vendors, all in violation of sponsors' duties as defined by the Employee Retirement Income Security Act of 1974 (ERISA).

Complaints against financial services companies often have an additional claim that looks to conflicts of interest: the argument that companies have favored their own investment funds when deciding which investment choices to offer their employees. A recent paper explores potential conflicts of interest in 401(k) plans and concludes that: "We document significant favoritism in 401(k) menu decisions. We show that affiliated mutual funds are less likely to be removed from a 401(k) menu and that the sensitivity of fund deletions to prior performance is less pronounced for funds affiliated with the plan's service providers." (Pool, Sialm, and Stefanescu [2016]).

Settlements have reached into the tens of millions per case: for example, Boeing and Lockheed Martin have settled for $57 million and $62 million, respectively. Plaintiffs have generally been successful in extracting settlements, with one exception. In an August 2016 ruling, the presiding judge in *White v. Chevron* dismissed all claims, finding, "…facts as pled do not raise a plausible inference that defendants breached their fiduciary duties and/or duties of loyalty and prudence." Plaintiffs have since filed an amended complaint.

ENDNOTES

[1]The first key ruling was made by the Appellate Division, 1st Department; subsequent affirmation by the New York Court of Appeals settled the timeliness question, determining that the statute of limitations clock began as soon as the deal closed (rather than after the R&W cure period had lapsed, as argued by the plaintiffs). Case number 650980/2012.

[2]Plaintiffs include: BlackRock, PIMCO, NCUA, etc.; the trustees are: BNY Mellon, Citibank, Deutsche Bank, HSBC, U.S. Bank, and Wells Fargo.

[3]There are questions as to whether a senior official at the Bank of England implicitly encouraged this form of rate suppression in an effort to instill market confidence in the health of the banking system.

[4]The Hogg Committee chose NYSE Euronext Rate Administration Limited, but NYSE Euronext merged with ICE before the transfer of administrative duties was finalized.

[5]See IBA, "LIBOR: Frequently Asked Questions," www.theice.com/publicdocs/IBA_LIBOR_FAQ.pdf.

[6]The outstanding notional for swaptions is currently in the proximity of $31 trillion.

[7]ISDAFIX was administered by ICAP and Thomson Reuters during the relevant period.

[8]The processes for gold, silver, platinum, and palladium have since been changed.

[9]Other terms of the settlements were not disclosed. Remaining defendants: 1) Silver: HSBC Holdings Plc, Bank of Nova Scotia, and UBS; 2) Gold: HSBC Holdings Plc, Bank of Nova Scotia, UBS, Barclays, and SocGen.

[10]For example, the market for interest rate swaps currently surpasses $206 trillion in gross notional outstanding.

[11]In a bilateral OTC transaction, each party would understandably want to know the identity of its counterparty in order to manage counterparty risk and ensure proper margin maintenance. But for centrally cleared, exchange-traded products, the argument that name give-up is required is less compelling.

[12]There are technically two SIPs: one generally for NYSE-listed stocks (the CQS) and one for NASDAQ-listed stocks (the UTP).

[13]In 2009, Ralph Cioffi and Matthew Tannin were found not guilty of criminal charges brought against them by the U.S. Department of Justice. In 2012, the two managers settled the parallel civil litigation for $1.05 million.

[14]One can use the *Wall Street Journal's* "The Startup Stock Tracker" to monitor different firms' valuations: http://graphics.wsj.com/tech-startup-stocks-to-watch/.

[15]Available online at www.sec.gov/news/speech/2014—spch05062014ab.html.

[16]For example, *Engel v. Third Avenue Management LLC* (16-cv-01118).

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