

The Recent Scrutiny of Financial Services Firms Under the Foreign Corrupt Practices Act

Jon Jordan*

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I. INTRODUCTION

Financial services firms and the financial industry have traditionally avoided scrutiny for violations under the Foreign Corrupt Practices Act (FCPA).¹ However, this changed in 2015 when financial services firms

* © 2022 Jon Jordan. Mr. Jordan is a Senior Investigations Counsel with the Foreign Corrupt Practices Act Unit of the United States Securities and Exchange Commission (SEC). Mr. Jordan has held various positions in both the SEC's Miami and Washington D.C. offices. The SEC disclaims responsibility for any private publication or statement by any SEC employee or Commissioner. This Article expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners, or other members of the staff.

1. Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78(a) (dd), (ff), (m) (2006 & Supp. 2010)).

started facing actions by the United States Department of Justice (DOJ) and the United States Securities and Exchange Commission (SEC) for improper hiring practices in violation of the FCPA.² Soon thereafter, financial services firms also faced FCPA actions for bribery related to Libya.³ This started a trend of FCPA actions against financial services firms, a trend which ultimately evolved into two major cases being brought in 2020 and 2021. In October 2020, the DOJ and SEC brought a record-setting \$2.9 billion dollar parallel FCPA action against The Goldman Sachs Group, Inc. (Goldman Sachs), in connection with a scheme to pay over \$1 billion in bribes to government officials in order to obtain or retain business.⁴ The *Goldman Sachs* action was remarkable in that it was the largest FCPA action brought against a financial services firm, and the largest FCPA action ever.⁵ Then in January 2021, the SEC

2. See The Bank of New York Mellon Corp., Administrative Proceeding File No. 3-16762 (Aug. 18, 2015) [hereinafter “BNY Mellon SEC Order”]; Press Release, SEC, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015) [hereinafter “BNY Mellon SEC Press Release”]; see discussion *infra* notes 20-24.

3. Press Release, U.S. Dep’t of Justice, Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating Libor Rate (June 4, 2018) [hereinafter “Société Générale DOJ Press Release”]; Press Release, U.S. Dep’t of Justice, Legg Mason Inc. Agrees to Pay \$64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials (June 4, 2018) [hereinafter “Legg Mason DOJ Press Release”]; see discussion *infra* notes 43-45.

4. The Goldman Sachs Group, Inc. Administrative Proceeding File No. 3-20132 (Oct. 22, 2020) [hereinafter “Goldman Sachs SEC Order”]; Press Release, SEC, SEC Charges Goldman Sachs with FCPA Violations (Oct. 22, 2020) [hereinafter “Goldman Sachs SEC Press Release”]; The Goldman Sachs Group, Inc. Information, CR. No. 20-437 (Oct. 22, 2020) (E.D.N.Y.) [hereinafter “Goldman Sachs DOJ Information”], <https://www.justice.gov/criminal-fraud/file/1329911/download>; The Goldman Sachs Group, Inc. Deferred Prosecution Agreement (Oct. 22, 2020) [hereinafter “Goldman Sachs DOJ DPA”], <https://www.justice.gov/criminal-fraud/file/1329926/download>; U.S. v. Goldman Sachs (Malaysia) SDN. BHD., Information, CR. No. 20-438 (Oct. 22, 2020) (E.D.N.Y.), <https://www.justice.gov/usao-edny/press-release/file/1329951/download>; U.S. v. Goldman Sachs (Malaysia) SDN. BHD., Plea Agreement, CR. No. 18 CR 20-438, Oct. 22, 2020 (E.D.N.Y.), <https://www.justice.gov/usao-edny/press-release/file/1329956/download>; Press Release, U.S. Dep’t of Justice, Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion (Oct. 22, 2020) [hereinafter “Goldman Sachs DOJ Press Release”]. The DOJ brought an action against The Goldman Sachs Group, Inc. and its Malaysian subsidiary, Goldman Sachs (Malaysia) Sdn. Bhd., while the SEC brought an action exclusively against The Goldman Sachs Group, Inc. See Liz Hoffman, *Goldman Sachs Malaysia Subsidiary Pleads Guilty in IMDB Case*, WALL ST. J. (Oct. 22, 2020), <https://www.wsj.com/articles/goldman-fined-350-million-by-hong-kong-regulator-over-lmdb-scandal-11603363392>; see Jacob Bogage, *Goldman Sachs Fined Record \$2.9 Billion to Resolve IMDB Bribery Scheme*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/business/2020/10/22/goldman-sachs-lmdb-record-fine/>.

5. Harry Cassin, *What’s New on the FCPA Top Ten List?*, FCPA BLOG (May 26, 2021), <https://fcpublog.com/2021/05/26/whats-new-on-the-fcpa-top-ten-list/>; Mike Koehler, *The Top Ten*

and DOJ brought a \$123 million dollar parallel action against Deutsche Bank AG (Deutsche Bank) for FCPA violations in connection with the wrongful use of third-party intermediaries.⁶ Taken together, the *Goldman Sachs* and *Deutsche Bank* cases demonstrated how financial services firms can be severely punished for running afoul of the FCPA, and signified continued scrutiny of financial services firms for violations of the FCPA.⁷

Several takeaways can be gathered from the recent trend of FCPA cases against financial services firms and, in particular, the *Goldman Sachs* and *Deutsche Bank* cases. One takeaway is that these cases illustrate how financial services firms are not immune from the FCPA. Indeed, these cases have proven that the financial sector can be a hot spot for FCPA enforcement activity. Another takeaway is that the global nature of the financial industry can make financial services firms vulnerable to potential FCPA actions in the future. And because financial services firms often deal in large financial transactions and international projects, it is conceivable that future FCPA actions against financial services firms may involve record-setting penalties similar to that which was seen in *Goldman Sachs*. As such, financial services firms need to be more diligent than ever in their compliance with the FCPA in a heightened anti-bribery regulatory environment.

This Article will provide an outline of the FCPA. Improper hiring practice cases involving financial services firms in violation of the FCPA will then be explored. The Article will next discuss recent financial services firm cases involving bribery in Libya. There will then be a

List of Corporate FCPA Settlements, FCPA PROFESSOR (Oct. 23, 2020), <https://fcpaprofessor.com/top-ten-list-corporate-fcpa-settlements-5/>.

6. Deutsche Bank AG, Administrative Proceeding File No. 3-20200 (Jan. 8, 2021) [hereinafter “Deutsche Bank SEC Order”]; Press Release, SEC, SEC Charges Deutsche Bank with FCPA Violations Related to Third Party Intermediaries (Jan. 8, 2021) [hereinafter “Deutsche Bank SEC Press Release”]; U.S. v. Deutsche Bank Aktiengesellschaft, Information, CR. No. 20-584 (Jan. 8, 2021) (E.D.N.Y.) [hereinafter “Deutsche Bank DOJ Information”]; U.S. v. Deutsche Bank Aktiengesellschaft, Deferred Prosecution Agreement, CR. No. 20-584 (Jan. 7, 2021) (E.D.N.Y.) [hereinafter “Deutsche Bank DOJ DPA”]; Press Release, U.S. Dep’t of Justice, Deutsche Bank Agrees to Pay over \$130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021) [hereinafter “Deutsche Bank DOJ Press Release”]; Matthew Goldstein and David Enrich, *Deutsche Bank will Pay \$125 Million Over Bribery Allegations*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/business/deutsche-bank-bribery-charges.html>; Corinne Ramey & Margot Patrick, *Deutsche Bank to Pay \$130 Million to Settle Federal Criminal and Civil Investigations*, WALL ST. J. (Jan. 8, 2021), <https://www.wsj.com/articles/deutsche-bank-to-pay-130-million-to-settle-federal-criminal-and-civil-investigations-11610144318>.

7. See Goldman Sachs SEC Order, *supra* note 4; Goldman Sachs DOJ Information, *supra* note 4; Deutsche Bank SEC Order, *supra* note 6; Deutsche Bank DOJ Information, *supra* note 6.

detailed discussion of the record-setting *Goldman Sachs* and *Deutsche Bank* cases. Finally, this author will provide what he believes to be takeaways that can be learned from recent FCPA cases against financial services firms.

II. THE FCPA

The FCPA establishes civil and criminal liability for the bribery of foreign government officials in order to obtain or retain business.⁸ The anti-bribery law can be divided into accounting and anti-bribery prohibitions.⁹

The accounting provisions require that issuers, companies that have a class of securities registered with the SEC or that are required to file reports with the SEC, maintain certain recordkeeping standards and internal accounting controls.¹⁰ The recordkeeping standard requires that

8. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a). The FCPA became law in 1977 and was created in response to a report issued by the SEC in 1976 that found that many public companies had engaged in questionable payments overseas and falsified their accounting with respect to such payments in their books and records. *See* S. REP. NO. 95-114, at 1-2 (1977); H.R. REP. NO. 95-640, at 1-3 (1977); SENATE COMM. ON BANKING HOUS. & URBAN AFFAIRS, 94TH CONG., 2D SESS., REP. OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976). The FCPA is both a civil and criminal statute, and the DOJ is responsible for criminal enforcement of the FCPA and civil enforcement of the anti-bribery provisions against non-issuers, and the SEC is responsible for civil enforcement of the accounting provisions and for civil enforcement of the anti-bribery provisions with respect to issuers. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 395-396 (2010).

9. *See* 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a), 78m(b)(2). The FCPA was amended in 1988 to revise and clarify several of its provisions in response to criticisms of the original statute. *See* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff). The statute was amended again in 1998 to conform its provisions to the OECD Anti-Bribery Convention. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd(1)-(3), 78ff).

10. 15 U.S.C. § 78m(b)(2). The FCPA applies to any issuer which has a class of securities registered under Section 12(g) of the Securities Exchange Act of 1934 (hereinafter "Exchange Act") or which is required to file reports under Section 15(d) of the Exchange Act as well as to any officer, director, employee, or agent of such an issuer or any stockholder acting on behalf of such issuer. 15 U.S.C. § 78dd-1(a). This would include certain foreign companies that list stock on a U.S. securities exchange and their relevant personnel. 15 U.S.C. § 78dd-1(a). The relevant accounting provisions can be found in Section 13(b)(2) of the Exchange Act which specifically require issuers to keep accurate books and records and establish and maintain a system of internal accounting controls. 15 U.S.C. § 78m(b)(2). In addition, the SEC has adopted two rules related to the accounting provisions. Rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)" of the Exchange Act. 17 C.F.R. § 240.13b2-1. Rule 13b2-2 prohibits a director or officer of an issuer

issuers “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”¹¹ The internal controls provision requires that issuers create a system of internal accounting controls that provide “reasonable assurances” that transactions are executed in “accordance with management’s general or specific authorization.”¹²

The FCPA anti-bribery provisions prohibit the bribing of foreign government officials for the purpose of obtaining or retaining business, directing business to other persons, or securing any improper advantage.¹³ More specifically, the FCPA anti-bribery provisions prohibit: (1) any issuer, domestic concern, or any person acting within U.S. territory, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing; (2) from using any means or instrumentality of U.S. commerce “corruptly” in furtherance of; (3) an offer, payment, or promise to pay, or authorization of the payment of anything of value; (4) to (a) any “foreign official,” (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any public international organization official, or (e) any other person while “knowing” that the payment or promise to pay will be given to any of the foregoing; (5) for the purpose of (a) influencing any act or decision of that person in his or her official capacity, (b) inducing that person to do or omit to do any act in violation of his lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; (6) in order to assist such issuer, domestic concern, or person acting within U.S. territory, in

from making or causing to be made any materially false or misleading statement or omission in connection with any audit. 17 C.F.R. § 240.13b2-2.

11. 15 U.S.C. § 78m(b)(2)(A). The term “reasonable detail” is defined to mean “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” 15 U.S.C. § 78(m)(b)(7).

12. 15 U.S.C. § 78m(b)(2)(B). The provision specifically requires that issuers “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.” *See id.*

13. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

obtaining or retaining business, or directing business to any person.¹⁴ The anti-bribery provisions apply to any issuer and “domestic concern” which is defined as any United States citizen, national or resident, and any corporation, partnership or association that has its principal place of business in the United States or that is incorporated in the United States.¹⁵

There are two affirmative defenses to the FCPA anti-bribery provisions.¹⁶ The first affirmative defense applies when the payment at issue is lawful under the written laws of a relevant foreign official’s country.¹⁷ The second affirmative defense allows for payments that are considered “reasonable and bona fide” expenditures “such as travel and lodging expenses” incurred by foreign officials directly related to “the promotion, demonstration, or explanation of products or services,” or “the execution or performance of a contract with a foreign government or agency.”¹⁸ There is also a facilitation payments exception to the anti-bribery provisions that allows for so-called “facilitation” or “grease payments” to foreign officials for the purposes of expediting or securing

14. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a). There is both criminal and civil liability for violations of the anti-bribery provisions and the anti-bribery provision has been incorporated into the federal securities laws as Section 30A of the Exchange Act. *See* 15 U.S.C. §§ 78dd-1(a). Issuers subject to the anti-bribery provision are the same as the relevant issuers subject to the accounting provisions. 15 U.S.C. § 78dd-1(a); *see* discussion *supra* note 9. The term “foreign official” means “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.” 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A). It is worth noting that on May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Esquenazi* issued a decision in which an appellate court defined the term “instrumentality” of a foreign government for the first time as the term is used in the definition of a “foreign official” under the FCPA. *See* *United States v. Esquenazi*, Case No. 11-15331 (11th Cir. May 16, 2014). The decision set out a two-part test and list of factors for determining what constitutes an “instrumentality” of a foreign government under the FCPA and provided clarity as to the meaning of a “foreign official” under the FCPA. *Id.* at 20-24. The decision also affirmed an interpretation by the DOJ and SEC that state-owned and state-controlled entities could be considered “instrumentalities” of a foreign government subject to the FCPA. *Id.* *See* U.S. DEP’T OF JUSTICE AND SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 19-21 (2012), [<http://perma.cc/F42U-K4RZ>] [hereinafter FCPA RESOURCE GUIDE]. For further analysis of the *Esquenazi* decision, *see* Jon Jordan, *U.S. v. Esquenazi: U.S. Appellate Court Defines “Instrumentality” under the Foreign Corrupt Practices Act for the First Time*, 6 WM. & MARY BUS. L. REV. 663 (2015), <http://scholarship.law.wm.edu/wmblr/vol6/iss2/7/>.

15. 15 U.S.C. §§ 78dd-1(a), -2(a), -2(h)(1), -3(a).

16. *See* 15 U.S.C. §§ 78dd-1(c)(1)(2), -2(c)(1)(2), -3(c)(1)(2).

17. *See* 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).

18. 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).

the performance of “routine governmental action[s]” such as the processing of immigration visas.¹⁹

III. IMPROPER HIRING PRACTICE CASES INVOLVING FINANCIAL SERVICES FIRMS

Prior to the recent Goldman Sachs and Deutsche Bank matters, there were various subject matter areas involving the FCPA and financial services firms. One of these areas involved improper hiring practice or “relationship hire” cases that concerned financial services firms hiring and promoting individuals connected to foreign government officials in order to obtain or retain business.²⁰ Another subject matter area related to potential bribery in Libya.²¹ These cases involved major firms in the financial sector and served as a wake-up call to financial services firms that they were not immune from liability under the FCPA.

A. *BNY Mellon*

In 2015, the SEC brought a case against The Bank of New York Mellon Corporation (BNY Mellon), which involved the financial services firm providing improper internships to family members of foreign government officials in the Middle East.²² The *BNY Mellon* case was the

19. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b). The term “routine governmental action” means any action which is ordinarily and commonly performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services. 15 U.S.C. §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A). Specifically, the FCPA defines “routine governmental action” as “an action which is ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing government papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.” *Id.* Payments made to expedite any of the basic services listed above or “of a similar nature,” are not considered payments prohibited by the FCPA. *Id.* The facilitation payments exception is an exception only to the FCPA’s anti-bribery provisions and is not an exception to the accounting provisions. See Lucinda A. Low, Owen Bonheimer, and Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 *PLI/CORP* 711, 725 (2008). Issuers that make facilitation payments, and do not properly record such payments in their books and records, may be liable under the accounting provisions. *Id.*; 15 U.S.C. § 78m(b)(2).

20. See *infra*, notes 22-44, and accompanying discussion.

21. See *infra*, notes 45-57, and accompanying discussion.

22. See BNY Mellon SEC Order, *supra* note 2; see BNY Mellon SEC Press Release, *supra* note 2; Michael J. de la Merced, *Bank of New York Mellon Settles Bribery Case over Interns*, N.Y.

first FCPA action against a financial services firm and the first FCPA action based entirely on improper hiring and internship practices.²³ In the case, the SEC charged the firm with violating the FCPA by providing “valuable student internships” to certain family members of foreign government officials “affiliated” with a Middle East sovereign wealth fund.²⁴ According to the SEC Order, the violations occurred in 2010 and 2011 when BNY Mellon employees “sought to corruptly influence foreign officials in order to retain and win business” relating to managing the assets of the relevant sovereign wealth fund.²⁵ As part of settling the case the firm agreed, among other things, to pay a total of \$14.8 million to settle the charges, comprising of \$8.3 million in disgorgement, \$1.5 million in prejudgment interest, and a \$5 million civil money penalty.²⁶

B. *JPMorgan Chase*

A little over a year later, the SEC and the DOJ brought a parallel action against JPMorgan Chase & Co. (JPMorgan Chase) for improper hiring practices in violation of the FCPA.²⁷ In *JPMorgan Chase*, it was

TIMES (Aug. 18, 2015), <https://www.nytimes.com/2015/08/19/business/dealbook/bank-of-new-york-mellon-settles-bribery-case-over-interns.html>.

23. Daniel Huang, et al., *Are Wall Street Interns the Latest Regulatory Target?* WALL ST. J. (Aug. 18, 2015), <https://www.wsj.com/articles/bank-of-ny-mellon-to-pay-14-8-million-to-settle-fcpa-probe-1439915579>; Kevin McCoy, *Bank of New York Mellon Pays \$14.8M to Settle Internship Probe*, USA TODAY (Aug. 18, 2015), <https://www.usatoday.com/story/money/2015/08/18/bank-new-york-mellon-pay-14m-settlement/31912815/>; Nate Raymond et al., *BNY Mellon to Pay \$14.8 Million to Settle Intern Bribery Probe*, REUTERS (Aug. 18, 2015), <https://www.reuters.com/article/us-bny-mellon-sec-corruption/bny-mellon-to-pay-14-8-million-to-settle-intern-bribery-probe-idUSKCN0QN1PJ20150818>.

24. See BNY Mellon SEC Order, *supra* note 2, at 4-7; see BNY Mellon SEC Press Release, *supra* note 2.

25. See BNY Mellon SEC Order, *supra* note 2, at 2.

26. See *id.* at 9-10; see BNY Mellon SEC Press Release, *supra* note 2. For a more in-depth analysis of the BNY Mellon case, see Jon Jordan, *BNY Mellon and Qualcomm: A Recent Focus on Improper Hiring Practices in Violation of the Foreign Corrupt Practices Act*, 63 LOY. L. REV. 1 (2017).

27. JPMorgan Chase & Co., Administrative Proceeding File No. 3-17684 (Nov. 17, 2016) [hereinafter “JPMorgan Chase SEC Order”]; Press Release, SEC, JPMorgan Chase Paying \$264 Million to Settle FCPA Charges (Nov. 17, 2016); JPMorgan Securities (Asia Pacific) Limited and JPMorgan Chase & Co. Non-Prosecution Agreement (Nov. 17, 2016) [hereinafter “JPMorgan Chase DOJ NPA”]; Press Release, U.S. Dep’t of Justice, JPMorgan’s Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China (Nov. 17, 2016); Aruna Viswanatha, *J.P. Morgan Settlement Lays Bare the Practice of Hiring ‘Princelings’*, WALL ST. J. (Nov. 17, 2016), <https://www.wsj.com/articles/j-p-morgan-to-pay-264-million-to-end-criminal-civil-foreign-corruption-cases-1479398628>; Ben Protess & Alexandra Stevenson, *JPMorgan Chase to Pay \$264 Million to Settle Foreign Bribery Case*, N.Y. TIMES (Nov. 17, 2016),

alleged that between 2006 and 2013 the firm gave jobs and internships to relatives and friends of current and prospective clients and foreign government officials in the Asia-Pacific region “as a personal benefit to the requesting officials” in order to obtain or retain business for the firm.²⁸ It was alleged that during the relevant seven-year period, the firm hired approximately 100 interns and employees at the request of foreign government officials, which enabled the firm to win or retain business worth more than \$100 million to the firm.²⁹ JPMorgan Chase paid over \$200 million to settle the parallel action, which included a little over \$130 million in disgorgement and prejudgment interest to the SEC, and a \$72 million criminal penalty to the DOJ.³⁰

C. *Credit Suisse*

In 2018, the SEC and DOJ brought a parallel action against Credit Suisse Group AG (Credit Suisse) related to charges that the firm hired relatives of Chinese and Asian government officials in order to win investment banking business.³¹ It was alleged that senior firm managers

<https://www.nytimes.com/2016/11/18/business/dealbook/jpmorgan-chase-to-pay-264-million-to-settle-foreign-bribery-charges.html>; Antonio Gara, *JPMorgan Agrees to Pay \$264 Million Fine for ‘Sons and Daughters’ Hiring Program in China*, FORBES (Nov. 17, 2016), <https://www.forbes.com/sites/antoinegara/2016/11/17/jpmorgan-agrees-to-pay-264-million-fine-for-sons-and-daughters-hiring-program-in-china/?sh=402d43e25688>.

28. See JPMorgan Chase SEC Order, *supra* note 27, at 2, 4-20. According to the allegations many of the firm’s clients were state-owned entities, and therefore client executives requesting employment for relatives and friends were considered foreign government officials under the FCPA. *Id.* at 2, 7-20.

29. *Id.* at 2.

30. JPMorgan Chase SEC Order, *supra* note 27, at 25; see JPMorgan Chase DOJ NPA, *supra* note 27, at 4. The firm also paid a \$61.9 million fine to the Federal Reserve. J.P. Morgan Chase & Co., Board of Governors of the Federal Reserve System, Docket No. 16-22-B-HC, 16-22-CMP-HC (Nov. 17, 2016), <https://www.federalreserve.gov/newsevents/pressreleases/files/enf2016117a1.pdf>; Press Release, Board of the Governors of the Federal Reserve System, Federal Reserve Board Orders JPMorgan Chase & Co. to Pay \$61.9 Million Civil Money Penalty (Nov. 17, 2016).

31. Credit Suisse Group AG, Administrative Proceeding File No. 3-18571 (July 5, 2018) [hereinafter “Credit Suisse SEC Order”]; Press Release, SEC, SEC Charges Credit Suisse with FCPA Violations (July 5, 2018); Credit Suisse (Hong Kong) Limited Non-Prosecution Agreement (May 24, 2018), <https://www.justice.gov/opa/press-release/file/1077881/download> [hereinafter “Credit Suisse DOJ NPA”]; Press Release, U.S. Dep’t of Justice, Credit Suisse’s Investment Bank in Hong Kong Agrees to Pay \$47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA (July 5, 2016); Emily Flitter, *Credit Suisse Fined \$77 Million in Corruption Inquiry*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/business/credit-suisse-china-bribery.html>; Joe Mont, *Credit Suisse Subsidiary Settles FCPA Violations*, COMPLIANCE

sought to win business by hiring and promoting individuals connected to state-owned government officials that were in a position to award Credit Suisse business from their respective state-owned entities.³² It was alleged that over a six-year period, the firm offered to hire more than 100 individuals that were referred by, or had connections to, foreign government officials in positions to award business.³³ As a result, the firm obtained business worth tens of millions of dollars in revenue.³⁴ Credit Suisse paid \$77 million to settle the actions, which comprised of approximately \$30 million in disgorgement to the SEC and a \$47 million criminal penalty to the DOJ.³⁵

D. Deutsche Bank

The next improper hiring practice action against a financial services firm was brought by the SEC against Deutsche Bank AG (Deutsche Bank) in 2019.³⁶ In that action the SEC alleged that from at least 2006 through 2014, the firm hired relatives of foreign officials in Asia and Russia in order to improperly influence them in connection with obtaining or retaining investment banking business and other benefits.³⁷ The SEC alleged that these relationship-hires bypassed the firm's competitive and

WEEK (July 10, 2018), <https://www.complianceweek.com/credit-suisse-subsiary-settles-fcpa-violations/8282.article>.

32. Credit Suisse SEC Order, *supra* note 31, at 2, and 6-14. It was alleged that Credit Suisse had written policies that prohibited the hiring of candidates referred or related to state-owned entity officials, however those policies were not enforced and, in some instances, prohibited hires were approved. *Id.* at 2, 3-14.

33. *Id.* at 2-3, 14.

34. *See id.*

35. *See id.* at 15; *see* Credit Suisse DOJ NPA, *supra* note 31, at 5. Credit Suisse's settlement with the DOJ involved it entering into a non-prosecution agreement with the DOJ wherein it agreed to pay an approximate \$47 million criminal penalty in order to resolve the matter. *See* Jonathan Stempel, *Credit Suisse Pays U.S. \$77 Million to Settle Asia Hiring Corruption Probes*, REUTERS (July 5, 2018), <https://www.reuters.com/article/us-credit-suisse-settlements/credit-suisse-pays-u-s-77-million-to-settle-asia-hiring-corruption-probes-idUSKBN1JV1XS>.

36. Deutsche Bank AG, Administrative Proceeding File No. 3-19373 (Aug. 22, 2019) [hereinafter "Deutsche Bank 2019 SEC Order"]; *see* Press Release, SEC, SEC Charges Deutsche Bank with FCPA Violations Related to its Hiring Practices (Aug. 22, 2019); Dylan Tokar, *Deutsche Bank to Pay \$16 Million for Improper Hiring Practices*, WALL ST. J. (Aug. 23, 2019), <https://www.wsj.com/articles/deutsche-bank-to-pay-16-million-for-improper-hiring-practices-11566586251>; Michelle Price, *U.S. Fines Deutsche Bank \$16 Million to Settle China, Russia Corruption Charges*, REUTERS (Aug. 22, 2019), <https://www.reuters.com/article/us-deutsche-bank-sec/u-s-fines-deutsche-bank-16-million-to-settle-china-russia-corruption-charges-idUSKCN1VC2O3>.

37. Deutsche Bank 2019 SEC Order, *supra* note 36, at 2-11.

merit-based hiring policies, and that such hires were often less qualified than other applicants that were hired through the firm's formal hiring process.³⁸ Deutsche Bank paid approximately \$16 million to settle the action, which comprised of roughly \$13 million in disgorgement and prejudgment interest, and a \$3 million civil money penalty.³⁹

E. Barclays

In 2019, the SEC brought another relationship-hire case, this time against the financial services firm of Barclays PLC (Barclays).⁴⁰ The SEC alleged that Barclay's Asia-Pacific region provided employment to relatives, friends, and associates of government officials in order to improperly influence them in connection with obtaining or retaining investment banking business.⁴¹ It was alleged that many of the relevant hires were made through an unofficial internship program within the firm.⁴² In the action, the SEC alleged that Barclays failed to ensure proper internal accounting controls around its hiring practices, and that firm employees falsified records in order to conceal the identity of requesting individuals and the reasons for requesting the relevant hires.⁴³ Barclays paid approximately \$6.3 million to settle the action, which comprised of

38. *See id.*

39. *Id.* at 12; see Michael Volkov, *Deutsche Bank Settles FCPA Case with SEC for \$16 Million for Hiring Relatives of Public Officials*, CORP. COMPLIANCE INSIGHTS (Sept. 9, 2019), <https://www.corporatecomplianceinsights.com/deutsche-bank-fcpa-sec/>. Unlike the previous two improper hiring practice actions in JPMorgan Chase and Credit Suisse, the Deutsche Bank improper hiring practice action did not involve a parallel action by the DOJ. Deutsche Bank 2019 SEC Order, *supra* note 36; see Kara Brockmeyer et al., *Recent FCPA Enforcement Activity: Hiring Practices, Technology Sales Channels, Travel & Entertainment, and Individual Accountability*, DEBEVOISE & PLIMPTON, at 3 (Sept. 2019), <https://www.debevoise.com/insights/publications/2019/09/fcpa-update-september-2019>.

40. Barclays PLC, Administrative Proceeding File No. 3-19537 (Sept. 27, 2019) [hereinafter "Barclays SEC Order"]; Press Release, SEC, SEC Charges Barclays with FCPA Violations Related to its Hiring Practices (Sept. 27, 2019) [hereinafter "Barclays SEC Press Release"]; Kristin Broughton, *Barclays Agrees to Pay \$6.3 Million in Asian Hiring Case*, WALL ST. J. (Sept. 27, 2019), <https://www.wsj.com/articles/barclays-agrees-to-pay-6-3-million-in-asian-hiring-case-11569619016>; Jonathan Stempel, *Barclays Pays \$6.3 Million to Settle SEC's Asia-Pacific Hiring Probe*, REUTERS (Sept. 27, 2019), <https://www.reuters.com/article/us-sec-barclays/Barclays-pays-6-3-million-to-settle-u-s-secs-asia-pacific-hiring-probe-idUSKBN1WC21F>.

41. Barclays SEC Order, *supra* note 40, at 3-8; Barclays SEC Press Release, *supra* note 40.

42. Barclays SEC Order, *supra* note 40, at 2-5. This unofficial internship program was called the "work experience program" within the firm.

43. *Id.* at 2-8.

approximately \$4.8 million in disgorgement and prejudgment interest, and a \$1.5 million civil money penalty.⁴⁴

IV. THE SOCIÉTÉ GÉNÉRALE AND LEGG MASON LIBYA BRIBERY CASES

Another subject matter area involving financial services firms and violations of the FCPA concerned bribery in Libya. As early as 2014, it was reported that the DOJ and SEC were looking into whether banks, private-equity firms, and hedge funds may have violated the FCPA in their dealings with Libya's government-run investment fund.⁴⁵ Then in June 2016, the DOJ announced FCPA actions against Société Générale S.A., and its wholly owned subsidiary, SGA Société Générale Acceptance, N.V. (altogether Société Générale), concerning the bribery of foreign officials in Libya during the Gaddafi era.⁴⁶ On the same day the DOJ also announced a related action against Legg Mason Inc. (Legg Mason).⁴⁷

44. Barclays SEC Order, *supra* note 40, at 9; Harry Cassin, *Barclays Pays SEC \$6.3 Million to Settle 'Referral Hiring' FCPA Violations*, FCPA BLOG (Sept. 27, 2019), <https://fcpublog.com/2019/09/27/barclays-pays-sec-63-million-to-settle-referral-hiring-fcpa/>. Like the Deutsche Bank improper hiring practice action, the Barclays action was a stand-alone SEC case with no parallel action by the DOJ. Barclays SEC Order, *supra* note 40; Deutsche Bank 2019 SEC Order, *supra* note 36.

45. Joe Palazzolo, Michael Rothfield, & Justin Bauer, *Probe Widens into Dealing Between Finance Firms, Libya*, WALL ST. J. (Feb. 3, 2014), <https://www.wsj.com/articles/SB10001424052702303743604579355162160100456>. It was reported that several firms were under investigation related to investment deals made in the years leading up to Libya's revolution in 2011.

46. U.S. v. Société Générale S.A., Information, CR. No. 18 CR 253 (E.D.N.Y.), <https://www.justice.gov/opa/press-release/file/1068596/download>; U.S. v. Société Générale S.A., Deferred Prosecution Agreement, No. 18-CR-253 (June 5, 2018), <https://www.justice.gov/opa/press-release/file/1068521/download> [hereinafter "Société Générale DOJ DPA"]; U.S. v. SGA Société Générale Acceptance, N.V., Information, CR. No. 18 CR 274 (June 5, 2018) (E.D.N.Y.), <https://www.justice.gov/opa/press-release/file/1068621/download>; U.S. v. SGA Société Générale Acceptance, N.V., Plea Agreement, CR. No. 18 CR 274 (June 5, 2018) (E.D.N.Y.), <https://www.justice.gov/opa/press-release/file/1068526/download>; Société Générale DOJ Press Release, *supra* note 3; Karen Freifeld, *SocGen to Pay \$1.3 Billion to Settle Libya, Libor Probes*, REUTERS (June 4, 2018), <https://www.reuters.com/article/us-socgen-lawsuit/socgen-to-pay-1-3-billion-to-settle-libya-libor-probes-idUSKCN1J00KU>; Erika Kelton, *Société Générale's Settlement Signals Continued Strong Enforcement of U.S. Anti-Bribery Law*, FORBES (June 20, 2018), <https://www.forbes.com/sites/erikakelton/2018/06/20/societe-generales-settlement-signals-continued-strong-enforcement-of-us-anti-bribery-law/?sh=387e015e359a>. It should be noted that the Société Générale action had both an FCPA and LIBOR component to it, however this Article will only focus on the FCPA component.

47. See Legg Mason Inc. Non-Prosecution Agreement (June 4, 2018), <https://www.justice.gov/opa/press-release/file/1068036/download>, [hereinafter "Legg Mason DOJ NPA"]; see Legg Mason DOJ Press Release, *supra* note 3; Robin Wigglesworth, *Legg Mason to Pay \$64m to Settle US Libya Corruption Probe*, FIN. TIMES (June 4, 2018), <https://www.ft.com/content/>

In the intertwined *Société Générale* and *Legg Mason* actions, it was alleged that between 2004 and 2010, Société Générale partnered with a Legg Mason subsidiary to solicit business from state-owned financial institutions in Libya.⁴⁸ It was alleged that during the relevant time period Société Générale paid bribes through a Libyan “broker” in connection with investments made by the institutions.⁴⁹ In the transactions, the firm paid the broker a commission of between one and a half and three percent of the amount of investments made by the institutions.⁵⁰ It was alleged that the commissions paid to the broker benefitted Société Générale and the relevant Legg Mason subsidiary, which managed the investments held by the institutions.⁵¹ Overall, Société Générale paid the broker over \$90 million, some of which the broker used to pay high-level Libyan officials in order to secure business and investments from the institutions.⁵² As a result of the bribery scheme, Société Générale obtained business worth approximately \$523 million and the Legg Mason subsidiary obtained business worth approximately \$31.6 million.⁵³ In settling the actions, Société Générale and Legg Mason agreed to pay \$649 million related to the FCPA scheme.⁵⁴

1204b9f2-683b-11e8-b6eb-4acfcfb08c11; Jaclyn Jaeger, *Legg Mason to Pay \$64.2M in FCPA Case*, COMPLIANCE WEEK (June 7, 2018), <https://www.complianceweek.com/legg-mason-to-pay-642m-in-fcpa-case/8365.article>.

48. Société Générale DOJ Press Release, *supra* note 3; Société Générale DOJ DPA, *supra* note 46, at A6-9; Legg Mason DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at A9-10.

49. Société Générale DOJ DPA, *supra* note 46, at A10-34; Société Générale DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at A10-20; Legg Mason DOJ Press Release, *supra* note 3.

50. Société Générale DOJ DPA, *supra* note 46, at A10-34; Société Générale DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at A10-20; Legg Mason DOJ Press Release, *supra* note 3.

51. Société Générale DOJ DPA, *supra* note 46, at A10-34; Société Générale DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at A10-20; Legg Mason DOJ Press Release, *supra* note 3.

52. Société Générale DOJ DPA, *supra* note 46, at A10-34; Société Générale DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at A10-20; Legg Mason DOJ Press Release, *supra* note 3.

53. Société Générale DOJ DPA, *supra* note 46, at A10-34; Société Générale DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at A10-20; Legg Mason DOJ Press Release, *supra* note 3.

54. Société Générale DOJ DPA, *supra* note 46, at 13; Société Générale DOJ Press Release, *supra* note 3; Legg Mason DOJ NPA, *supra* note 47, at 5; Legg Mason DOJ Press Release, *supra* note 3. Société Générale agreed to pay \$585 million related to the FCPA scheme, while Legg Mason agreed to pay \$64 million related to the scheme. See Client Memorandum, *Société Générale and Legg Mason to Pay Nearly \$650 Million to Resolve DOJ Investigation of Libyan Bribery*

A couple of months after the DOJ action, the SEC brought a follow-up action against Legg Mason related to the conduct alleged in the DOJ action.⁵⁵ In the SEC action, the SEC alleged that Legg Mason violated the FCPA's internal controls provisions because it lacked proper internal accounting controls with respect to the use of intermediaries.⁵⁶ Legg Mason agreed to pay a little over \$34 million in disgorgement and prejudgment interest to resolve the SEC action.⁵⁷

V. GOLDMAN SACHS AND THE RECORD-SETTING \$2.9 BILLION FCPA ACTION

In October 2020, the SEC and DOJ brought a parallel action against Goldman Sachs, which was settled by the firm in a coordinated resolution for the record-setting amount of \$2.9 billion.⁵⁸ The *Goldman Sachs* matter involved a Malaysian state-owned and controlled investment fund called 1Malaysia Development Berhad (1MDB), which had been created to pursue projects for the economic benefit of Malaysia.⁵⁹ It was alleged that billions of dollars were diverted from 1MDB between 2009 and 2014, and that among the diverted funds was a portion of approximately \$6.5 billion that 1MDB had raised through three bond offerings it had executed with

Scheme, PAUL WEISS (June 7, 2018), <https://www.paulweiss.com/media/3977841/7jun18-socgen.pdf>. Société Générale also settled with the Parquet National Financier (PNF) in Paris in related proceedings concerning the Libyan bribery scheme. See Press Release, Société Générale, Société Générale Reaches Agreements with the DOJ, the CFTC and the PNF to Resolve their Pending Libor and Libya-Related Investigations (June 4, 2018), available at <https://www.societegenerale.com/en/news/newsroom/societe-generale-reaches-agreements-doj-cftc-and-pnf-resolve-their-pending-ibor-and>.

55. Legg Mason, Inc., Administrative Proceeding File No. 3-18684 (Aug. 27, 2018) [hereinafter "Legg Mason SEC Order"]; Press Release, SEC, Legg Mason Charged with Violating the FCPA (Aug. 27, 2018); Micah Maidenber, *Legg Mason to Pay SEC more than \$34 Million to Settle Libya Bribery Case*, WALL ST. J. (Aug. 27, 2018), <https://www.wsj.com/articles/legg-mason-to-pay-sec-more-than-34-million-to-settle-libya-bribery-case-1535393458>; *Legg Mason to Pay \$34 Million to Resolve Charges Related to Bribery Scheme: SEC*, REUTERS (Aug. 27, 2018), <https://www.reuters.com/article/us-legg-mason-sec/legg-mason-to-pay-34-million-to-resolve-charges-related-to-bribery-scheme-sec-idUSKCN1LC1PU>.

56. Legg Mason SEC Order, *supra* note 55, at 2, 6-7.

57. Legg Mason SEC Order, *supra* note 55, at 8; see Richard Cassin, *SEC Completes Legg Mason FCPA Enforcement Action*, FCPA BLOG (Aug. 27, 2018), <https://fcpublog.com/2018/08/27/sec-completes-legg-mason-fcpa-enforcement-action/>.

58. Goldman Sachs SEC Order, *supra* note 4; Goldman Sachs SEC Press Release, *supra* note 4; Goldman Sachs DOJ Information, *supra* note 4; Goldman Sachs DOJ DPA, *supra* note 4; Goldman Sachs DOJ Press Release, *supra* note 4.

59. Goldman Sachs SEC Order, *supra* note 4, at 2-4; see Goldman Sachs DOJ Information, *supra* note 4, at 4.

Goldman Sachs in 2012 and 2013 (the “bond deals”).⁶⁰ In this regard, it was alleged that former Goldman Sachs senior employees authorized and paid bribes to government officials in Malaysia and Abu Dhabi in order to obtain and retain business for Goldman Sachs, including the bond deals, from which the firm earned approximately \$600 million.⁶¹

A. The Bribery Scheme

More specifically, it was alleged that Tim Leissner (“Leissner”), a former Goldman Sachs managing director at the firm’s Asian region, knew that a questionable Malaysian third party going by the name of Jho Low (“Low”) would be playing a central role in the bond deals, and would be acting as an intermediary between Goldman Sachs, IMDB, and Malaysian and Abu Dhabi government officials.⁶² It was alleged that Leissner, and another former firm managing director, Roger Ng (“Ng”), also knew that Low promised to pay bribes to government officials in order to secure the IMDB business for Goldman Sachs.⁶³ In 2012 and 2013, the Goldman Sachs managing directors then “actively worked to obtain and retain business from IMDB for the benefit of Goldman Sachs through the promise and payment of bribes” to government officials using proceeds from the bond deals.⁶⁴ It was alleged that during the course of the scheme, Leissner, Low, and others then paid millions of dollars in bribes to government officials to secure lucrative business for Goldman Sachs, including the bond deals.⁶⁵

One of the relevant bond deals obtained by Goldman Sachs through bribery was known as “Project Magnolia.”⁶⁶ In early 2012, Goldman Sachs employees met with Low and IMDB officials to discuss IMDB’s purchase of a Malaysian energy company and Goldman Sachs’s ability to

60. Goldman Sachs SEC Order, *supra* note 4, at 2, 5-9; *see* Goldman Sachs DOJ Information, *supra* note 4, at 11-25.

61. Goldman Sachs SEC Order, *supra* note 4, at 2, 5-9; *see* Goldman Sachs DOJ Information, *supra* note 4, at 11-25.

62. Goldman Sachs SEC Order, *supra* note 4, at 5; Goldman Sachs DOJ Information, *supra* note 4, at 10-12.

63. Goldman Sachs SEC Order, *supra* note 4, at 5; Goldman Sachs DOJ Information, *supra* note 4, at 10-12.

64. Goldman Sachs SEC Order, *supra* note 4, at 5; Goldman Sachs DOJ Information, *supra* note 4, at 11-12.

65. Goldman Sachs SEC Order, *supra* note 4, at 5-6; Goldman Sachs DOJ Information, *supra* note 4, at 10-11.

66. Goldman Sachs SEC Order, *supra* note 4, at 6-7; Goldman Sachs DOJ Information, *supra* note 4, at 12-18.

obtain financing for the purchase.⁶⁷ During the meetings, attendees discussed with Low the type of financial guarantee that 1MDB needed to obtain for the bond deal and it was agreed that the guarantee would come from Abu Dhabi's Middle Eastern Sovereign Wealth Fund ("Sovereign Wealth Fund").⁶⁸ During one of the meetings, Low then explained "that in order to secure the guarantee" from the Sovereign Wealth Fund that they would have to pay bribes and kickbacks to government officials in Malaysia and Abu Dhabi.⁶⁹ Soon thereafter, in March 2012, 1MDB formally engaged Goldman Sachs to be the underwriter for the bond deal.⁷⁰ Then in late May 2012, near the closing of Project Magnolia, Leissner worked with Ng and Low to divert some of the proceeds raised from Project Magnolia into the bank accounts of shell companies that they controlled with the understanding that these funds would be used to pay bribes to government officials.⁷¹ Project Magnolia closed in May 2012 and earned \$193 million for Goldman Sachs.⁷² After the closing, millions of dollars in bond proceeds were then transferred through the relevant shell companies to shell companies owned and controlled by the relevant government officials with influence over the transaction.⁷³

Another bond deal obtained by Goldman Sachs through bribery was known as "Project Maximus."⁷⁴ This transaction was designed, among other things, to help 1MDB raise capital needed to purchase a second Malaysian energy company.⁷⁵ Like the Project Magnolia transaction, the

67. Goldman Sachs SEC Order, *supra* note 4, at 6; Goldman Sachs DOJ Information, *supra* note 4, at 12.

68. Goldman Sachs SEC Order, *supra* note 4, at 6; Goldman Sachs DOJ Information, *supra* note 4, at 12.

69. Goldman Sachs SEC Order, *supra* note 4, at 6; Goldman Sachs DOJ Information, *supra* note 4, at 12.

70. Goldman Sachs SEC Order, *supra* note 4, at 6-7; Goldman Sachs DOJ Information, *supra* note 4, at 12-15. Around that time some of the Goldman Sachs employees also knew that "Low would pay bribes and kickbacks to influence Malaysian officials to obtain the necessary approvals to execute Project Magnolia for Goldman Sachs." Goldman Sachs SEC Order, *supra* note 4, at 7.

71. Goldman Sachs SEC Order, *supra* note 4, at 7; Goldman Sachs DOJ Information, *supra* note 4, at 15-18.

72. Goldman Sachs SEC Order, *supra* note 4, at 6; Goldman Sachs DOJ Information, *supra* note 4, at 16.

73. Goldman Sachs SEC Order, *supra* note 4, at 7; Goldman Sachs DOJ Information, *supra* note 4, at 16-18.

74. Goldman Sachs SEC Order, *supra* note 4, at 8; Goldman Sachs DOJ Information, *supra* note 4, at 18.

75. Goldman Sachs SEC Order, *supra* note 4, at 8; Goldman Sachs DOJ Information, *supra* note 4, at 18.

transaction involved Goldman Sachs underwriting the bond offering but with an indirect guarantee from the Sovereign Wealth Fund.⁷⁶ Project Maximus closed in October 2012, raising approximately \$1.75 billion for the relevant IMDB entity and resulting in approximately \$188 million for Goldman Sachs.⁷⁷ Some of the bond proceeds raised were then later transferred into the accounts of IMDB government officials in exchange for their assistance in obtaining or retaining business for Goldman Sachs.⁷⁸

B. Record-Setting Settlement

Goldman Sachs ended up settling the matter for more than \$2.9 billion in a coordinated resolution.⁷⁹ As part of the resolution, Goldman Sachs agreed to resolve related matters with foreign authorities in the United Kingdom, Singapore, Hong Kong, and elsewhere, as well as with other domestic authorities in the United States.⁸⁰

76. Goldman Sachs SEC Order, *supra* note 4, at 8; Goldman Sachs DOJ Information, *supra* note 4, at 18.

77. Goldman Sachs SEC Order, *supra* note 4, at 8; Goldman Sachs DOJ Information, *supra* note 4, at 18-19.

78. Goldman Sachs SEC Order, *supra* note 4, at 8-9; Goldman Sachs DOJ Information, *supra* note 4, at 19-28. There was a third bond offering relevant to the case known as “Project Catalyze.” Goldman Sachs SEC Order, *supra* note 4, at 8-9; Goldman Sachs DOJ Information, *supra* note 4, at 22-25. The bond offering involved IMDB seeking to raise \$3 billion in order to fund its portion of a joint venture with a middle eastern investment firm. Goldman Sachs SEC Order, *supra* note 4, at 8-9; Goldman Sachs DOJ Information, *supra* note 4, at 22. The bond offering occurred in March 2013 and resulted in approximately \$186 million for Goldman Sachs. Goldman Sachs SEC Order, *supra* note 4, at 9; Goldman Sachs DOJ Information, *supra* note 4, at 22. Leissner and other Goldman Sachs employees worked with Low as an intermediary between Goldman Sachs and government officials in the deal, and ultimately some of the \$3 billion raised by the bond offering was transferred to Leissner at the direction of Low. Goldman Sachs SEC Order, *supra* note 4, at 9; Goldman Sachs DOJ Information, *supra* note 4, at 22-25. It was also alleged in the action that Goldman Sachs would go on to pursue and obtain further business from Low during and after the relevant bond deals. Goldman Sachs SEC Order, *supra* note 4, at 9; Goldman Sachs DOJ Information, *supra* note 4, at 25-28.

79. Goldman Sachs SEC Order, *supra* note 4, at 11-12; Goldman Sachs SEC Press Release, *supra* note 4; Goldman Sachs DOJ DPA, *supra* note 4, at 10-12; Goldman Sachs DOJ Press Release, *supra* note 4.

80. Goldman Sachs DOJ DPA, *supra* note 4, at 6; Goldman Sachs DOJ Press Release, *supra* note 4; Goldman Sachs SEC Press Release, *supra* note 4. In their settlement resolutions, the DOJ and SEC credited some of the amount that Goldman paid in resolutions with other regulatory authorities. Goldman Sachs DOJ DPA, *supra* note 4, at 6-7; Goldman Sachs DOJ Press Release, *supra* note 4; Goldman Sachs SEC Order, *supra* note 4, at 11-12; Goldman Sachs SEC Press Release, *supra* note 4. The SEC and DOJ also brought individual FCPA actions against the two relevant former Goldman Sachs managing directors, and the relevant broker involved in the case. The SEC and DOJ brought FCPA actions against former Goldman Sachs managing director Tim Leissner. Tim Leissner, Administrative Proceeding File No. 3-19619 (Dec. 16, 2019); *see* Press

The DOJ and SEC press releases announcing the *Goldman Sachs* case acknowledged major international cooperation in the matter.⁸¹ Between the two agencies, they announced and acknowledged assistance from governmental regulatory authorities in France, Guernsey, Hong Kong, Luxembourg, Malaysia, Singapore, Switzerland, and the United Kingdom.⁸²

Commentary followed the *Goldman Sachs* case. Many of the commenters focused on the record-setting \$2.9 billion amount paid in the

Release, SEC, SEC Charges Former Goldman Sachs Executive with FCPA Violations (Dec. 16, 2019); U.S. v. Tim Leissner, Complaint, Case 1:18-cr-00439-MKB (E.D.N.Y.) (June 7, 2018), <https://www.justice.gov/criminal-fraud/file/1231341/download>; U.S. v. Tim Leissner, Information, 1:18-CR-00439-MKB (E.D.N.Y.) (Aug. 28, 2018), <https://www.justice.gov/criminal-fraud/file/1231346/download>; Matthew Goldstein, *Ex-Goldman Sachs Partner Barred by S.E.C. over IMDB Scandal*, N.Y. TIMES (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/business/goldman-sachs-1mdb-tim-leissner.html>. The DOJ also brought actions against former Goldman Sachs managing director Roger Ng and the relevant broker Jho Low. See U.S. v. Low Taek Jho and Ng Chong Hwa, Indictment, 1:18-cr-00358 (E.D.N.Y.) (Oct. 3, 2018), <https://www.justice.gov/criminal-fraud/file/1231331/download>; U.S. v. Low Taek Jho and NG Chong Hwa, Superseding Indictment, 1:18-cr-00358-MKB (E.D.N.Y.) (Dec. 9, 2020), <https://www.justice.gov/criminal-fraud/file/1346676/download>; Press Release, U.S. Dep't of Justice, Malaysian Financier Low Taek Jho, Also Known as "Jho Low," and Former Banker Ng Chong Hwa, also Known as "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).

81. See Goldman Sachs SEC Press Release, *supra* note 4; see Goldman Sachs DOJ Press Release, *supra* note 4.

82. Goldman Sachs SEC Press Release, *supra* note 4; Goldman Sachs DOJ Press Release, *supra* note 4. The relevant foreign authorities that were mentioned as providing assistance to the DOJ and/or the SEC were the Ministry of Justice of France (France); the Attorney General's Office of the Balliwick of Guernsey, and the Guernsey Economic Crime Division (Guernsey); the Securities and Futures Commission of Hong Kong (Hong Kong); the judicial investigating authority of the Grand Duchy of Luxembourg, and the Criminal Investigation Department of the Grand-Ducal Police of Luxembourg (Luxembourg); the Attorney General's Chambers of Malaysia, the Royal Malaysian Police, the Malaysian Anti-Corruption Commission, and the Securities Commission of Malaysia (Malaysia); the Attorney General's Chambers of Singapore, the Singapore Police Force—Commercial Affairs Division, and the Monetary Authority of Singapore (Singapore); the Office of the Attorney General and the Federal Office of Justice of Switzerland (Switzerland); and the United Kingdom Financial Conduct Authority, and the United Kingdom Prudential Regulation Authority (United Kingdom).

case.⁸³ There was also commentary on what many viewed as extraordinary international coordination and cooperation in the case.⁸⁴

VI. DEUTSCHE BANK AND THE IMPROPER USE OF THIRD-PARTY INTERMEDIARIES

On January 8, 2021, the SEC and DOJ announced a coordinated resolution against Deutsche Bank in which it agreed to pay approximately \$123 million to settle alleged FCPA violations.⁸⁵ This was the second

83. See Hugh Son, *Goldman Sachs Agrees to Pay More than \$2.9 Billion to Resolve Probes into its 1MDB Scandal*, CNBC (Oct. 22, 2020), <https://www.cnbc.com/2020/10/22/goldman-sachs-agrees-to-pay-more-than-2point9-billion-to-resolve-probes-into-its-1mdb-scandal.html>; see Jody Gody, *DOJ Anti-Bribery Settlements Hit New High in 2020*, REUTERS (Feb. 24, 2021), <https://www.reuters.com/article/securities-fcpa-doj/doj-anti-bribery-settlements-hit-new-high-in-2020-idUSL1N2KU2YF>; see Pam Davis and Mariana Pendas, *FCPA Enforcement in the Covid-19 Era: Trends and Compliance Takeaways*, WINSTON & STRAWN (Nov. 12, 2020), <https://www.winston.com/images/content/2/2/v2/223594/FCPA-Webinar-Trade-Series-2020-11-12-002.pdf>.

84. Daniel Bernstein & John Nassikas, *Record-Breaking FCPA Settlement in Record-Breaking Year Highlights International and Interagency Coordination in the Global Fight Against Corruption*, ARNOLD & PORTER (Oct. 23, 2020), <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2020/10/record-breaking-fcpa-settlement>; Nicola Bonucci, *Goldman Sachs: Beyond the Case, Five Takeaways*, INT'L BAR ASSOCIATION (Oct. 22, 2020), <https://www.ibanet.org/article/575a7701-fe88-4233-bb81-d8d2700a94d3>. It should be noted that Goldman Sachs has run into other issues concerning the FCPA beyond just the 1MDB action. In April 2020, the SEC charged a former Goldman Sachs executive for FCPA violations for engaging in a bribery scheme to help a client win a government contract to build and operate an electrical power plant in Ghana. *Securities and Exchange Commission v. Asante K Berko*, Complaint, No. 120-cv-01789-FB-MMH (E.D.N.Y.) (Apr. 13, 2020), <https://www.sec.gov/litigation/complaints/2021/comp25121.pdf>; Press Release, SEC, SEC Charges Former Financial Services Executive with FCPA Violations (Apr. 13, 2020). The former Goldman Sachs employee recently settled the action for approximately \$329,000. *Securities and Exchange Commission v. Asante K Berko*, Final Judgment, No. 120-cv-01789-FB-MMH (E.D.N.Y.) (June 23, 2021), <https://www.sec.gov/litigation/litreleases/2021/judgment25121.pdf>; SEC Obtains Final Judgment Against Former Executive of Financial Services Company, SEC Litigation Release No. 25121 (June 23, 2021); Dylan Tokar, *Ex-Goldman Banker Settles SEC Ghana Bribery Case*, WALL ST. J., (June 23, 2021), <https://www.wsj.com/articles/ex-goldman-banker-settles-sec-ghana-bribery-case-11624477612#:~:text=A%20former%20Goldman%20Sachs%20Group,win%20a%20power%2Dplant%20contract>; Jaclyn Jaeger, *Ex-Goldman Sachs Exec Asante Berko Settles FCPA Case*, COMPLIANCE WEEK (June 24, 2021), <https://www.complianceweek.com/regulatory-enforcement/ex-goldman-sachs-exec-asante-berko-settles-fcpa-case/30508.article>.

85. Deutsche Bank SEC Order, *supra* note 6; Deutsche Bank SEC Press Release, *supra* note 6; Deutsche Bank DOJ Information, *supra* note 6; Deutsche Bank DOJ DPA, *supra* note 6; Deutsche Bank DOJ Press Release, *supra* note 6; Laura Noonan & Olaf Storbeck, *Deutsche Bank Pays Nearly \$125m to Resolve US Bribery and Fraud Claims*, FIN. TIMES (Jan. 8, 2021), <https://www.ft.com/content/8bdf8fc9-0820-437c-b18c-fb6be6a517c0>; Jonathan Ponciano,

action against Deutsche Bank for FCPA violations within a one-and-a-half-year period.⁸⁶

The Deutsche Bank matter concerned the firm's use of third-party intermediaries, finders, and consultants from 2009 through 2016 to obtain and retain business.⁸⁷ During this time, hundreds of intermediaries were used "in circumstances where bribery risks were neither assessed nor sufficient steps taken to mitigate bribery risks posed by such engagements."⁸⁸ It was alleged that the firm lacked sufficient internal accounting controls related to the use and payment of intermediaries during the relevant time period, resulting in payments to intermediaries "that were actually bribe payments as well as payments made for unknown, undocumented or unauthorized services."⁸⁹ During the relevant period approximately \$7 million in payments to intermediaries were "improperly booked as legitimate expenses," and the firm was "unjustly enriched by approximately \$35 million."⁹⁰

The SEC Order and DOJ Information cited multiple circumstances where intermediaries were wrongfully used in violation of the FCPA.⁹¹ One of the circumstances involved a deal in Abu Dhabi in which it was alleged that between 2010 and 2011, Deutsche Bank retained and paid a consultant to obtain a deal with an Abu Dhabi wealth fund.⁹² It was alleged that Deutsche Bank knew that the consultant was a relative of a key decision-maker for the wealth fund and that paying fees to the consultant was a requirement in order for the firm to win the deal with the wealth

Deutsche Bank Fined \$120 Million Over Bribe Payments to Foreign Officials, FORBES (Jan. 8, 2021), <https://www.forbes.com/sites/jonathanponciano/2021/01/08/deutsche-bank-fined-120-million-over-bribe-payments-to-foreign-officials/?sh=2785acbc5ad8>. It should be noted that the DOJ settlement involved both an FCPA and a commodities fraud component to it. *See* Deutsche Bank DOJ Press Release, *supra* note 6. For purposes of this Article, focus will only be placed on the FCPA component.

86. *See* Deutsche Bank 2019 SEC Order, *supra* note 36; *see* discussion *supra* notes 36, 37;

87. Deutsche Bank SEC Order, *supra* note 6, at 2-8; Deutsche Bank DOJ Information, *supra* note 6, at 3-16.

88. Deutsche Bank SEC Order, *supra* note 6, at 2-8; Deutsche Bank DOJ Information, *supra* note 6, at 3-16.

89. Deutsche Bank SEC Order, *supra* note 6, at 2-8; Deutsche Bank DOJ Information, *supra* note 6, at 3-16.

90. Deutsche Bank SEC Order, *supra* note 6, at 2-8; Deutsche Bank DOJ Information, *supra* note 6, at 3-16.

91. *See* Deutsche Bank SEC Order, *supra* note 6, at 2-8; *see* Deutsche Bank DOJ Information, *supra* note 6, at 3-16.

92. Deutsche Bank SEC Order, *supra* note 6, at 6-7; Deutsche Bank DOJ Information, *supra* note 6, at 6-9.

fund.⁹³ Deutsche Bank won the deal with the wealth fund and paid the consultant more than \$3 million for his services.⁹⁴ As a result of the arrangement, Deutsche Bank ended up making approximately \$30 million.⁹⁵

Deutsche Bank settled the matter for more than \$120 million as part of a coordinated resolution with the DOJ and SEC.⁹⁶ The *Deutsche Bank* case received varying commentary by the legal regulatory community. Some commenters focused on Deutsche Bank's repeated violations of the FCPA, and other legal regulatory problems plaguing the firm, and questioned the firm's dedication to compliance.⁹⁷ Other commenters noted that 2020 turned out to be a record-breaking year for FCPA settlements, despite the Covid pandemic, and wondered whether *Deutsche Bank* might be a sign of further aggressive FCPA enforcement action to come in 2021.⁹⁸

93. See Deutsche Bank SEC Order, *supra* note 6, at 6; see Deutsche Bank DOJ Information, *supra* note 6, at 6.

94. See Deutsche Bank SEC Order, *supra* note 6, at 7-9; see Deutsche Bank DOJ Information, *supra* note 6, at 8-9.

95. See Deutsche Bank SEC Order, *supra* note 6, at 8; see Deutsche Bank DOJ Information, *supra* note 6, at 8-9.

96. See Deutsche Bank SEC Order, *supra* note 6, at 10; see Deutsche Bank SEC Press Release, *supra* note 6; Deutsche Bank DOJ Press Release, *supra* note 6; Deutsche Bank DOJ DPA, *supra* note 6, at 12. For purposes of the FCPA charges, Deutsche Bank agreed to pay the DOJ approximately \$80 million in a criminal penalty, and the SEC approximately \$43 million in disgorgement and prejudgment interest, for a total of approximately \$123 million paid in relation to the FCPA scheme. Deutsche Bank SEC Order, *supra* note 6, at 10; see Deutsche Bank DOJ DPA, *supra* note 6, at 12; Deutsche Bank DOJ Press Release, *supra* note 6; Michael MacPhail, Michael Sawers, & Emily Seymore, *\$125 Million Deutsche Bank Settlement with SEC/DOJ Newest in Line of Several Costly Resolutions*, NAT'L L. REV. (Jan. 19, 2021).

97. Ailia Slisco, *Deutsche Bank to Pay \$130 Million Over Foreign Corrupt Practices Act and Fraud Case*, NEWSWEEK (Jan. 18, 2021), <https://www.newsweek.com/deutsche-bank-pay-130-million-over-foreign-corrupt-practices-act-fraud-case-1560195>; Hugh Son, *Deutsche Bank to Pay \$125 Million to Settle U.S. Probes into Overseas Bribes, Trading Practices*, CNBC, (Jan. 8, 2021), <https://www.cnbc.com/2021/01/08/deutsche-bank-to-pay-125-million-to-settle-us-probes-into-overseas-bribes-trading-practices.html#:~:text=Deutsche%20Bank%20has%20agreed%20to,direct%20knowledge%20of%20the%20deal>; Thomas Fox, *Deutsche Bank—FCPA Recidivist*, JD SUPRA, (Jan. 11, 2021); see discussion *supra* notes 36-39.

98. Amanda Hoover & James Cooper, *Deutsche Bank to Pay More than \$130 Million to Settle FCPA and Spoofing Charges*, ARNOLD & PORTER (Jan. 14, 2021), <https://www.arnoldporter.com/en/%20perspectives/blogs/enforcement-edge/2021/01/deutsche-bank-to-pay-130-million-to-settle>. However, FCPA matters typically take several years to investigate, so the jury is still out over whether the pandemic has had any influence over future cases to be brought. See Adam Dobrik, *SEC Sees Fall in New FCPA Cases During Covid*, GLOB. INVESTIGATIONS REV. (July 6, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/sec-sees-fall-in-new-fcpa-cases-during-covid>.

VII. TAKEAWAYS FROM THE RECENT TREND OF FINANCIAL SERVICES FIRM CASES

There are several takeaways that can be gathered from the recent trend of FCPA cases against financial services firms. First, the recent trend has made it clear that financial services firms are not immune from the FCPA. Since the *BNY Mellon* FCPA action in 2015, there have been at least ten other FCPA actions involving financial services firms or their employees.⁹⁹ Therefore, the financial industry has increasingly become a hot spot for FCPA enforcement, and financial services firms need to be more diligent than ever about compliance with the FCPA.

Another takeaway concerns the growing international environment of the financial services industry. As the financial industry has become more global in nature, the recent trend in FCPA cases against major financial services firms will likely become the norm. Like other big companies that are vulnerable to potential FCPA violations because they operate in high-risk countries, such as companies in the defense, airline, and oil and gas industries, major firms in the financial industry that operate in similar countries will be just as vulnerable.¹⁰⁰ Therefore, the increasingly global nature of the financial industry will make major financial services firms more susceptible to potential FCPA actions in the future.

Another takeaway is that future financial services firm cases will likely involve large resolutions like that which was seen in the *Goldman Sachs* matter. Since major financial services firms are often involved in large transactions, such as raising large amounts of capital for investment, it is conceivable that future FCPA actions against major financial services firms will involve large disgorgement and penalty amounts and break new monetary resolution records in the future. Goldman Sach's whopping \$2.9

99. See JPMorgan Chase SEC Order, *supra* note 27; JPMorgan Chase DOJ NPA, *supra* note 27; Credit Suisse SEC Order, *supra* note 31; Credit Suisse DOJ NPA, *supra* note 31; Deutsche Bank 2019 SEC Order, *supra* note 36; Barclays SEC Order, *supra* note 40; Société Générale DOJ DPA, *supra* note 46; Legg Mason DOJ NPA, *supra* note 47; Legg Mason SEC Order, *supra* note 55; Goldman Sachs SEC Order, *supra* note 4; Goldman Sachs DOJ DPA, *supra* note 4; In the Matter of Tim Leissner, *supra* note 80; U.S. v. Tim Leissner, *supra* note 80; U.S. v. Low Taek Jho and Ng Chong Hwa, *supra* note 80; Securities and Exchange Commission v. Asante K Berko, *supra* note 84; Deutsche Bank SEC Order, *supra* note 6; and Deutsche Bank DOJ Information, *supra* note 6.

100. For a list of the most corrupt and high-risk countries in the world see TRANSPARENCY INTERNATIONAL, Corruption Perception Index, available at <https://www.transparency.org/en/cpi/2020/index/nzl>.

billion coordinated resolution is a testament to that.¹⁰¹ Not only is it the largest FCPA case brought against a financial services firm, but it is the largest FCPA case ever.¹⁰² Therefore, it is conceivable that future actions against major financial services firms engaged in large overseas transactions will yield similar large settlements as was seen in the *Goldman Sachs* matter. For now, however, the *Goldman Sachs* case remains firmly on top as the largest FCPA case of all time.¹⁰³

Finally, another takeaway that can be learned from the recent number of FCPA cases against financial services firms is that it is foreseeable that future actions against financial services firms will involve major international cooperation and coordination. This was seen in *Goldman Sachs* where at least seventeen governmental authorities from eight different countries assisted in the DOJ and SEC investigations and authorities from at least four of the countries had related investigations.¹⁰⁴ Thus it is foreseeable that future FCPA and anti-bribery actions will warrant similar international coordination and cooperation as was seen in *Goldman Sachs*. This is particularly true since financial services firms are part of the securities industry, and can be subject to investigations by both criminal and securities authorities in the countries where they are operating in.¹⁰⁵

VIII. CONCLUSION

The recent string of financial services firm cases demonstrates how financial services firms can get in trouble under the FCPA. In particular, the *Goldman Sachs* and *Deutsche Bank* cases illustrate how firms can be

101. See Goldman Sachs SEC Press Release, *supra* note 4; see Goldman Sachs DOJ Press Release, *supra* note 4.

102. Harry Cassin, *What's New on the FCPA Top Ten List?*, FCPA BLOG (May 26, 2021), *supra* note 5, <https://fcpablog.com/2021/05/26/whats-new-on-the-fcpa-top-ten-list/>; Mike Koehler, *The Top Ten List of Corporate FCPA Settlements*, FCPA PROFESSOR (Oct. 23, 2020), *supra* note 5, <https://fcpaprofessor.com/top-ten-list-corporate-fcpa-settlements-5/>.

103. Cassin, *supra* note 5; Koehler, *supra* note 5.

104. Goldman Sachs DOJ Press Release, *supra* note 4; Goldman Sachs DOJ DPA, *supra* note 4, at 6; Goldman Sachs SEC Order, *supra* note 4, at 11; Goldman Sachs SEC Press Release, *supra* note 4; Daniel Bernstein & John Nassikas, *Record-Breaking FCPA Settlement in Record-Breaking Year Highlights International and Interagency Coordination in the Global Fight Against Corruption*, ARNOLD & PORTER (Oct. 23, 2020), *supra* note 84, <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2020/10/record-breaking-fcpa-settlement>.

105. See Global Financial Services Regulatory Guide, BAKER MCKENZIE, available at https://www.bakermckenzie.com/-/media/files/insight/publications/2016/07/guide_global_fsr_guide_2017.pdf?la=en.

severely penalized for engaging in potential bribery.¹⁰⁶ These cases also show how financial services firms can face international cooperation and increased scrutiny for potential FCPA violations as a result of being involved in an increasingly global financial industry.¹⁰⁷

The recent trend in financial services firm cases suggests that financial services firms will likely face increased scrutiny for potential FCPA violations in the future. As such, financial services firms need to be more diligent than ever in their compliance with the FCPA. Staying diligent and compliant will help financial services firms avoid running afoul of the FCPA in a heightened anti-bribery regulatory environment.

106. See Goldman Sachs SEC Order, *supra* note 4; Goldman Sachs SEC Press Release, *supra* note 4; Goldman Sachs DOJ DPA, *supra* note 4; Goldman Sachs DOJ Press Release, *supra* note 4; Deutsche Bank SEC Order, *supra* note 6; and Deutsche Bank DOJ Information, *supra* note 6.

107. See *id.*