

# Justice Deferred

The Use of Deferred and Non-Prosecution Agreements in the Age of “Too Big To Jail”

## **Acknowledgments**

This report was written by Public Citizen's Congress Watch division.

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Public Citizen's Congress Watch

215 Pennsylvania Ave. S.E

Washington, D.C. 20003

P: 202-546-4996

F: 202-547-7392

<http://www.citizen.org>

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## Introduction

Over the last decade, the Department of Justice (DOJ) has increased its use of deferred and non-prosecution agreements (NPAs) to resolve a wide range of criminal cases with corporate bad actors from fraud and money laundering to adulterated food and workplace safety violations. Among these are agreements the DOJ has reached with large, complex financial institutions to resolve cases involving criminal activity. Although most of these agreements have remained obscure, one case in particular caught the attention of the public and has ignited a debate over both the DOJ's escalating reliance on these agreements and the lack of transparency regarding their use.

In December 2012, HSBC, one of the world's largest financial institutions, which operates in 81 countries and has roughly \$2.7 trillion in assets according to international accounting standards,<sup>1</sup> admitted to criminal activity by violating the Bank Secrecy Act (BSA), the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA).<sup>2</sup> The bank's criminal violations permitted drug cartels to launder hundreds of millions of dollars of narcotics proceeds through HSBC subsidiaries and to facilitate hundreds of millions of dollars in transactions on behalf of customers in countries that are sanctioned by the United States, including Cuba, Iran, Libya, Sudan and Burma. Despite these violations, rather than indicting HSBC, the DOJ chose not to move forward with an indictment, and instead elected to enter into a deferred prosecution agreement (DPA) with the bank.<sup>3</sup>

Under the terms of the DPA, the government agreed not to prosecute the company for its actions in exchange for HSBC acknowledging wrongdoing, paying a \$1.9 billion fine, and agreeing to cooperate with the government and remedy its compliance programs. While a \$1.9 billion fine may appear punitive on its face, it only amounts to roughly 9 percent of HSBC's reported \$20.6 billion in pre-tax profit in 2012.<sup>4</sup>

At the press conference announcing the settlement, then-Assistant Attorney General Lanny Breuer explained his reasoning for entering the DPA instead of indicting the company,

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<sup>1</sup> HSBC Holdings PLC; HSBC Bank USA, National Association, US Resolution Plan pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Section, (July 2013)

<http://1.usa.gov/1a4Ricm>

<sup>2</sup> Press Release, The United States Department of Justice, "HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement," (Dec. 11, 2012) <http://1.usa.gov/19sGlk2>

<sup>3</sup> *Id.*

<sup>4</sup> Press Release, HSBC Holdings PLC, "HSBC Holdings PLC Annual Results, 2012," (March 4, 2013)

<http://bit.ly/1doH3hI>

saying, “Our goal here is not to bring HSBC down, it’s not to cause a systemic effect on the economy, it’s not for people to lose thousands of jobs.”<sup>5</sup>

Subsequently, when asked at a Senate Judiciary Committee hearing about why the government chose not to indict HSBC, Attorney General Eric Holder responded: “I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy.”<sup>6</sup>

Breuer’s and Holder’s statements indicate that the bank was treated gently for its misdeeds out of fear that prosecuting such a large bank could have disastrous repercussions on our economy. Unfortunately, this surprising bit of transparency soon became another source of confusion when Holder was asked whether some banks were “too big to jail” at a subsequent Capitol Hill Hearing. “Let me be very, very, very clear,” Holder said. “Banks are not too big to jail. If we find a bank or a financial institution that has done something wrong...those cases will be brought.”<sup>7</sup> Despite the unequivocal nature of Holder’s latter statement, the two claims are difficult to reconcile and only make the lack of clarity in this area more pronounced.

The DOJ’s decision to enter into a DPA with HSBC garnered immediate and significant media attention. Members of both parties in Congress expressed serious concerns about whether the DOJ maintains a “too big to jail”<sup>8</sup> policy, and if so, how it decides which financial institutions are “too big to jail,” and what information it relies upon to make those decisions.<sup>9</sup> However, as evidenced by the Holder comments above, the DOJ thus far has not provided any information about its policy or practice with regard to large, complex financial institutions.

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<sup>5</sup> James O’Toole, *HSBC: Too Big to Jail?*, CNNMONEY, (December 12, 2012) <http://cnnmon.ie/1eCeOdB>

<sup>6</sup> Transcript, American Banker, “Attorney General Eric Holder on ‘Too Big to Jail,’” (March 6, 2013), <http://bit.ly/1eCeNGC>

<sup>7</sup> Mark Gongloff, *Eric Holder: Actually, I Meant to Say No Banks Are Too Big To Jail*, HUFFINGTON POST (May 15, 2013) <http://huff.to/1cZZNzT>

<sup>8</sup> We use “too big to jail” in the colloquial sense, acknowledging that companies cannot be jailed; a more accurate term would be “too big to prosecute” or “too big to indict.”

<sup>9</sup> See, e.g. Press release, Senators Sherrod Brown (D-OH), Charles Grassley (R-IA), “Sens. Brown, Grassley Press Justice Department On ‘Too Big To Jail,’” (January 29, 2013), <http://1.usa.gov/1Zv1Oa>; Press release, Senator Jeff Merkley (D-OR.) “Merkley Blasts ‘Too Big to Jail’ Policy for Lawbreaking Banks,” (December 13, 2012), <http://1.usa.gov/1d4adhy>; Hearing on “Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?” House Financial Services Subcommittee on Oversight and Investigations, (May 22, 2013) <http://1.usa.gov/1eCeUlz>

While the considerable attention on this case might give the impression that the apparent special treatment afforded to HSBC was a unique and anomalous occurrence, the reality is that the HSBC agreement was more indicative of the norm rather than the exception. Accordingly, this report first documents the sharp increase in the overall usage of DPAs and NPAs by the DOJ over the last decade. The report then focuses on numerous recent instances in which the DOJ has resolved criminal cases involving large, complex financial institutions through the use of DPAs and NPAs.

The examples below of DPAs and NPAs with large, complex financial institutions that in most realms are considered “too big to fail” cause us concern. Because there is an increased likelihood that the government would not allow these institutions to fail in the event of financial instability, there may also be the possibility that the government has not commenced criminal proceedings against them for fear that doing so would lead to their failure. As such, the instances categorized in this report may be indicative of a de-facto policy in which the DOJ is refusing to indict certain institutions because of their relative size and systemic importance. Further confusing the issue, of late there have been two high profile criminal indictments in cases similar to earlier big bank non-prosecution or deferred prosecutions, Credit Suisse and BNP Paribas. Seeing these cases begs the question as to why similar crimes deserved such different reactions, and makes the case for further transparency around larger financial institution crime.

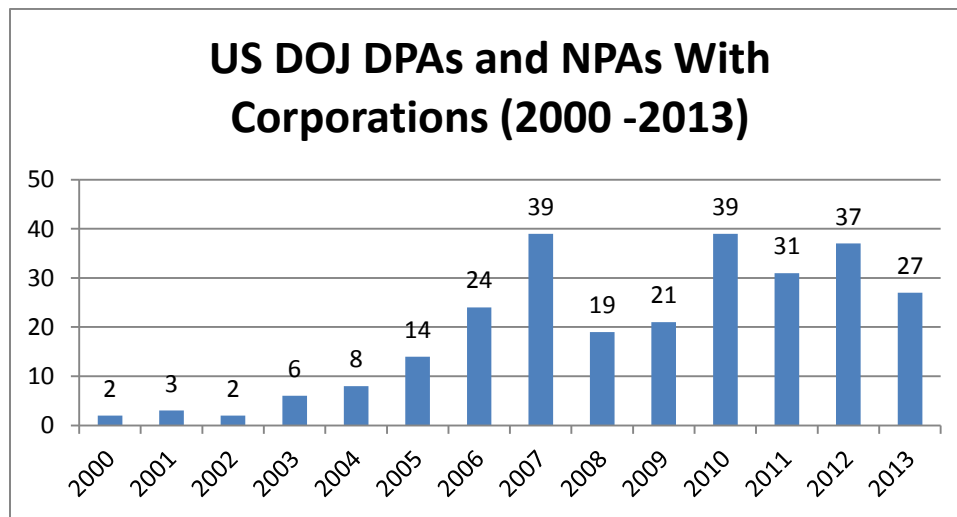
If such a policy exists, Congress should take steps to require the DOJ to publicly disclose if and when it is providing favorable treatment under the law to financial institutions. That way, the DOJ’s charging decisions will be transparent to the public, and Congress will be able to appropriately exercise its oversight authority over the DOJ.

## **Background**

Under a DPA, the company waives indictment, and the government files with the court an *information*, a term for a document that formally accuses the company of criminal wrongdoing. The government agrees not to prosecute the company for its criminal acts, pending compliance with specified conditions that are set out in a contractual agreement between the government and the company. Usually, the company pays a fine, admits wrongdoing and agrees to cooperate and remedy its activities. Additionally, a compliance monitor is often installed to make sure that the company remediates its activities during a probationary period, usually between one and two years. If the government determines that the company has breached the agreement during the probationary period, it reserves

the right to commence formal criminal court proceedings and proceed to trial.<sup>10</sup> Under an NPA, the government does not file an information and thus does not formally accuse the company of criminal wrongdoing.<sup>11</sup>

The use of NPAs and DPAs has become “a mainstay of white collar criminal law enforcement,” according to Lanny Breuer.<sup>12</sup> Prior to 2000, the DOJ very rarely entered into DPAs and NPAs with corporations in lieu of criminal prosecution. From 2000 through 2004, the agency entered into an average of about four agreements each year, with eight agreements in 2004 according to figures compiled by the law firm Gibson, Dunn, and Crutcher.<sup>13</sup> Each subsequent year, however, the DOJ averaged 28 agreements per year, with only two years that saw fewer than 20 agreements.<sup>14</sup> The graph below [Chart 1] depicts the surge in DOJ’s reliance on DPAs and NPAs over the last decade:



Source: GIBSON, DUNN AND CRUTCHER, *2013 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)* 1 (January 2014), <http://bit.ly/1qz6F3m>.

<sup>10</sup> J. Brady Dugan and Diana L. Gillis, Antitrust Alert: Another Antitrust Division Non-Prosecution Agreement—Anomaly or New Trend? Akin Gump Strauss Hauer & Feld LLP, (December 20, 2011) <http://bit.ly/1kAxfXr>

<sup>11</sup> *Id.*

<sup>12</sup> Patrick Doris, et al., *2012 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, (Jan. 3, 2013) <http://bit.ly/1iPZehB>

<sup>13</sup> GIBSON, DUNN AND CRUTCHER, *2013 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, (January 2014) <http://bit.ly/1qz6F3m>.

<sup>14</sup> *Id.*

## Case Studies

### 1. Barclays

Barclays Bank PLC is headquartered in London and operates in more than 50 countries, including the United States.<sup>15</sup> It currently has approximately 1,500 legal entities across the globe.<sup>16</sup> According to court documents, the bank had roughly \$1.97 trillion in assets according to United States accounting standards at the end of 2009, prior to the filing of a DPA with the bank in 2010.<sup>17</sup> Tom Hoenig, Vice Chair of the Federal Deposit Insurance Corporation (FDIC) recently estimated that the bank had \$2.354 trillion of assets according to international accounting standards.<sup>18</sup>

During the recent global financial crisis, Barclays benefited from massive U.S. government assistance. According to Bloomberg, Barclays borrowed an average of \$19.1 billion per day from the Federal Reserve (Fed) from Aug. 1, 2007, until April 30, 2010.<sup>19</sup> These loans were at below-market rates. The company was indebted to the Fed for 724 days, and at its peak, the Fed was liable for \$64.9 billion of debt incurred by Barclays.<sup>20</sup> The unprecedented nature and extent of Fed assistance suggests that the bank was considered “too big to fail” by U.S. regulators.

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<sup>15</sup> Barclays Bank PLC, US Resolution Plan pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Section, (October 2013) <http://1.usa.gov/1b0BOjZ>

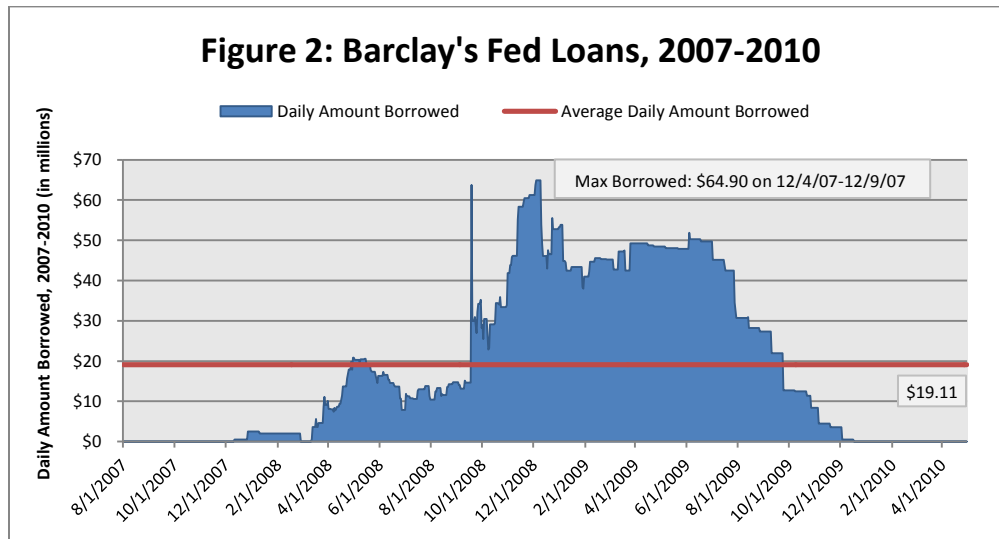
<sup>16</sup> *Id.*

<sup>17</sup> *United States v. Barclays Bank PLC*, Exh. 1 – Factual Statement at 3, (August 16, 2010) <http://bit.ly/1eCf24s>

<sup>18</sup> Thomas M. Hoenig, Capitalization Ratios for Global Systemically Important Banks (G-SIBs), Data as of second quarter of 2013, <http://1.usa.gov/KhufhD>; Banks usually have smaller balance sheets under U.S. Generally Accepted Accounting Principles (GAAP) rules than under International Financial Reporting Standards (IFRS) because U.S. rules allow for more favorable netting of derivatives, which enables banks to offset different exposures to their counterparties. IFRS allow for less netting, following the principle that derivatives contracts often don't offset each other precisely. Where possible, we've tried to provide an apples-to-apples comparison between banks. Simon Johnson, *U.S. Banks Aren't Nearly Ready for Coming European Crisis*, BLOOMBERG, (June 24, 2012) <http://bloom.bg/1d1vgF2>

<sup>19</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, Barclays Plc Details*, BLOOMBERG, (Dec 23, 2011) <http://bloom.bg/L1cluZ>

<sup>20</sup> *Id.*



Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1i7X7bt>.

In August 2010, Barclays entered into a DPA with the DOJ relating to its violations of the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA).<sup>21</sup> Barclays knowingly and willfully engaged in illegal transactions, by moving or permitting to move hundreds of millions of dollars through the U.S. financial system on behalf of customers from Cuba, Iran, Sudan, Libya, and Burma, and other parties or jurisdictions subject to U.S. sanctions.<sup>22</sup>

According to court documents, Barclays engaged in a pattern between the mid-1990s and 2006 of violating U.S. banking laws by stripping vital information from payment messages, concealing information that would have alerted U.S. financial institutions about the origins of the funds.<sup>23</sup> Barclays' activities included routing U.S. dollar payments through an internal Barclays account to hide the payments' connection to the sanctioned entities, and removing payment information that would identify the sanctioned entities.<sup>24</sup> The New York County District Attorney, who was also a party to the agreement, said that the type of activity that Barclays engaged in not only deceived financial institutions but also threatened our national security.<sup>25</sup>

<sup>21</sup> Press release, The United States Department of Justice, "Barclays Bank PLC Agrees to Forfeit \$298 Million in Connection with Violations of the International Emergency Economic Powers Act and the Trading with the Enemy Act," (August 18, 2010), <http://1.usa.gov/1eH5tn3>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



As part of the DPA, Barclays accepted responsibility for its criminal conduct and forfeited \$298 million to the U.S. government and the New York County District Attorney's Office.<sup>26</sup> That fine amounted to roughly 3 percent of Barclay's reported pre-tax profits of \$9.7 billion for 2010.<sup>27</sup>

Neither the agreement nor the DOJ's press materials make clear why the Department chose to enter into the agreement with Barclays instead of seeking to indict the institution, and then proceed to trial.

In June 2012, Barclays entered into an NPA with the DOJ for violations relating to fraudulent submissions for London InterBank Offered Rate (LIBOR) and Euro InterBank Offered Rate (EURIBOR).<sup>28</sup> LIBOR and EURIBOR are benchmark interest rates that are used in financial markets around the world.<sup>29</sup>

Futures, options, swaps, and other derivatives contracts that are traded in the over-the-counter market and on exchanges worldwide are settled based on LIBOR.<sup>30</sup> In addition, mortgages, credit cards, private student loans, and other consumer lending products often use LIBOR as a reference rate.<sup>31</sup> Because so many financial contracts are tied to LIBOR and EURIBOR, the manipulation of these rates can have significant negative effects on consumers and financial markets worldwide.<sup>32</sup>

LIBOR represents a rough estimate of the rate at which banks are able to borrow or willing to lend on a short-term basis. A select group of large banks submit their respective rates to Thomson Reuters, which then calculates and publishes the average rate.<sup>33</sup>

According to the Department of Justice, between 2005 and 2007, and occasionally thereafter through 2009, Barclays traders encouraged the manipulation of LIBOR and

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<sup>26</sup> *Id.*

<sup>27</sup> *Barclays reports annual profits of £6.07bn*, BBC, (February 15, 2011) <http://bbc.in/1eR39YE>; Based on an exchange rate of 1.6 British pounds to U.S. dollars, that is roughly \$9.7 billion U.S. dollars. <http://bit.ly/1eH5GGI>

<sup>28</sup> Press release, The United States Department of Justice, "Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty," (June 27, 2012), <http://1.usa.gov/1iVopUn>

<sup>29</sup> *Id.*

<sup>30</sup> Non-Prosecution Agreement between the United States Department of Justice, Criminal Division, Fraud Section and Barclays Bank PLC, Appendix A, Statement of Facts, at 1, (June 26, 2012) <http://1.usa.gov/1kdSol2>

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 13-14.

<sup>33</sup> *Id.* at 1-3.

EURIBOR submissions to benefit their trading positions.<sup>34</sup> They did so by requesting that the company's LIBOR and EURIBOR submitters contribute inaccurate LIBOR and EURIBOR rates, and the submitters accommodated the traders' requests on numerous occasions.<sup>35</sup>

Additionally, Barclays' management directed submitters to artificially lower their LIBOR submissions to give a better impression of the bank's borrowing ability.<sup>36</sup> Because a bank's LIBOR contributions can be viewed as an indicator of a bank's creditworthiness, Barclays was concerned that if it submitted higher rates relative to other banks, it would indicate that it was having difficulty borrowing funds at market rates. Decreasing the submission rates would avoid exposing the bank's borrowing difficulties and overall financial health.

As part of the NPA, Barclays admitted and accepted responsibility for its fraudulent rate submissions, and agreed to pay a \$160 million penalty.<sup>37</sup> That fine amounted to less than 2 percent of Barclay's reported \$11.2 billion in profits in 2012.<sup>38</sup>

Just as the DOJ has not made public the reasons for entering into a DPA with Barclays in 2010, the Department has not provided an explanation for its decision to enter into an NPA with Barclays in 2012, instead of seeking to indict the institution, and then proceeding to trial.

## 2. UBS

UBS AG is headquartered in Zurich, Switzerland, and is Switzerland's largest bank, as measured by assets.<sup>39</sup> UBS owns and operates banks, investment banks, and stock brokerage businesses in more than 50 countries, including the United States.<sup>40</sup> Between 2009 and 2012, UBS had between \$1.3 trillion and \$1.9 trillion of assets, according to U.S. accounting standards.<sup>41</sup> According to estimates put forth by FDIC Vice Chair Tom Hoenig,

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<sup>34</sup> Press release, The United States Department of Justice, "Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty," (June 27, 2012) <http://1.usa.gov/1iVopUn>

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Barclays reported adjusted pre-tax profits of £7.048 billion in 2012. Barclays PLC Results Announcement, (December 31, 2012) <http://bit.ly/1gGxj8K>; Based on an exchange rate of 1.6 British pounds to U.S. dollars, that is roughly \$11.2 billion U.S. dollars. <http://bit.ly/1eH5GGI>

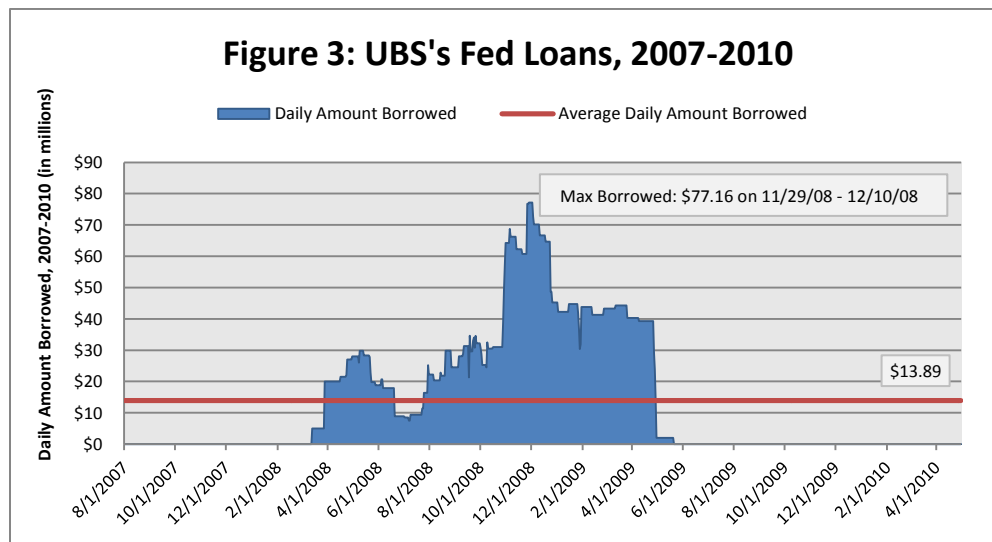
<sup>39</sup> KellyPhillips Erb, *The Biggest Story in Banking, Thanks to IRS*, FORBES, (March 21, 2012) <http://onforb.es/1ckpUBa>

<sup>40</sup> UBS AG, US Resolution Plan pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Section, (October 2013) <http://1.usa.gov/1eCforV>

<sup>41</sup> See UBS Historical Total Assets (Quarterly) Data, <http://bit.ly/1fvt8jY>

UBS had roughly \$1.34 trillion of assets according to international accounting standards at the end of 2012.<sup>42</sup>

During the recent global financial crisis, UBS benefited from U.S. government assistance in several ways. According to Bloomberg, UBS borrowed an average of \$13.9 billion per day from the Fed from Aug. 1, 2007, until April 30, 2010.<sup>43</sup> These loans were at below-market rates. Specifically, the company benefited from the use of the Commercial Paper Funding Facility (\$37.2 billion peak amount borrowed), the Single-Tranche Open Market Operations (\$20.5 billion peak amount borrowed), the Term Auction Facility (\$12.5 billion peak amount borrowed), and Term Securities Lending Facility (\$6.9 billion peak amount borrowed).<sup>44</sup> At its peak, UBS borrowed a cumulative daily amount of \$77.2 billion on Nov.28, 2008, and the company was indebted to the Fed for 435 days.<sup>45</sup>



Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1j7X7bt>.

Amid the crisis in February 2009, UBS entered into a DPA with the DOJ relating to its participation in a conspiracy to defraud the Internal Revenue Service (IRS).<sup>46</sup> According to court documents, from 2000 until 2007, UBS participated in a scheme to provide unlicensed and unregistered banking services and investment advice to U.S. clients to help

<sup>42</sup> Thomas M. Hoenig, Capitalization Ratios for Global Systemically Important Banks (G-SIBs), Data as of fourth quarter of 2012, <http://1.usa.gov/1am89Fc>;

<sup>43</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, UBS AG Details*, BLOOMBERG, (Dec 23, 2011) <http://bloom.bg/1kAxPnY>

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Press release, The United States Department of Justice, "UBS Enters into Deferred Prosecution Agreement," (February 18, 2009) <http://1.usa.gov/1ho1BYk>

them conceal their identities and evade their income tax obligations by setting up accounts that hid U.S. taxpayers' ownership or beneficial interest.<sup>47</sup> UBS' clients also filed false and misleading income tax returns, under penalty of perjury.<sup>48</sup>

With UBS's assistance, approximately 17,000 of UBS's 20,000 UBS cross-border clients concealed their identities and the existence of their accounts from the IRS.<sup>49</sup> From 2002 through 2007, UBS's cross-border business generated approximately \$200 million per year in revenue for the company.<sup>50</sup> Even though certain UBS executives and managers knew of the unlawful conduct, the bank continued to operate and expand its cross-border business during those years because the conduct was so profitable for the bank.<sup>51</sup>

Pursuant to the DPA, UBS agreed to pay \$780 million in fines, penalties, interest and restitution.<sup>52</sup> The DPA acknowledged the risk of extracting further penalties in the midst of the financial crisis, an implicit recognition that the institution could pose a risk to the financial system if it were to fail: "In recognition of the current international financial crisis and after consultation with the Federal Reserve Bank of New York, the Government will forgo additional penalties."<sup>53</sup>

In May 2011, UBS entered into an NPA with the DOJ relating to antitrust violations in the municipal bond market.<sup>54</sup> According to the non-prosecution agreement, from 2001 to 2006, certain UBS employees who worked for the company's municipal reinvestment and derivatives desks entered into unlawful agreements to manipulate the bidding process and rig bids on municipal investment contracts.<sup>55</sup> These contracts were used to invest the proceeds of, or manage the risks associated with, bond issuances by municipalities.<sup>56</sup> As a result of UBS's anticompetitive conduct, municipalities and taxpayers were harmed.<sup>57</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *United States v. UBS AG*, Information at 2, (February 18, 2009) <http://1.usa.gov/1ho1D2q>

<sup>50</sup> *Id.*

<sup>51</sup> *United States v. UBS AG*, Exh C, Statement of Facts at 2, (February 18, 2009) <http://1.usa.gov/1ho1D2q>

<sup>52</sup> Press release, The United States Department of Justice, "UBS Enters into Deferred Prosecution Agreement," (February 18, 2009) <http://1.usa.gov/1ho1BYk>

<sup>53</sup> *United States v. UBS AG*, Deferred Prosecution Agreement at 3, (February 18, 2009) <http://1.usa.gov/1ho1D2q>

<sup>54</sup> Non-prosecution Agreement between the United States Department of Justice, Antitrust Division and UBS AG, (May 4, 2011) <http://1.usa.gov/1ZxkmY>

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.* at 1.

<sup>57</sup> Press release, The United States Department of Justice, "UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$160 Million to Federal and State Agencies," (May 4, 2011) <http://1.usa.gov/1kAy1DQ>

As part of the NPA, UBS agreed to pay a total of \$160 million in restitution, penalties and disgorgement to federal and state agencies.<sup>58</sup> That amounted to roughly 3 percent of UBS's reported \$5.3 billion in pre-tax profits in 2011.<sup>59</sup>

Neither the agreement nor the DOJ's press materials make clear why the DOJ chose to enter into this NPA with UBS instead of seeking to indict the institution, and then proceeding to trial.

In December 2012, UBS entered into an NPA with the DOJ related to its involvement in the LIBOR rate-rigging scandal.<sup>60</sup> Between 2001 and 2010, certain UBS affiliates exercised improper influence over UBS's LIBOR, EURIBOR, and TIBOR (Tokyo Interbank Offered Rate) submissions to benefit traders' positions.<sup>61</sup> As a result of the manipulation, traders—whose compensation from UBS was tied to the financial products they traded, which were in turn tied to the benchmark interest rates—benefited.<sup>62</sup> According to court documents, traders engaged in “sustained, wide-ranging, and systematic efforts” to manipulate interest rates to their advantage, and during some periods UBS employees engaged in interest rate manipulation “on nearly a daily basis.”<sup>63</sup> Many of UBS's counterparties and countless consumers' whose borrowing contracts were tied to these benchmark rates were likely harmed.

In addition to UBS's manipulation of interest rates to benefit traders' positions, during the financial crisis certain UBS manager and senior managers directed UBS LIBOR submitters to either “err on the low side” or submit rates in “the middle of the pack” of the other contributor panel banks to create the perception that the bank was able to borrow at or below market rates and therefore its borrowing ability and overall financial health were not in trouble.<sup>64</sup>

As part of the NPA, UBS paid a \$400 million penalty; additionally, one of the firm's Japanese subsidiaries pled guilty to one count of wire fraud.<sup>65</sup> In perspective, the penalty that UBS

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<sup>58</sup> *Id.*

<sup>59</sup> UBS Annual Report to Shareholders, “Our Performance in 2012,” at 6, (March 14, 2013)

<http://bit.ly/1ho1QTq>

<sup>60</sup> Press release, The United States Department of Justice, “UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates,” (December 19, 2012)

<http://1.usa.gov/1m1uvk7>

<sup>61</sup> Non-Prosecution Agreement between the United States Department of Justice, Criminal Division, Fraud Section and UBS AG, Appendix A, Statement of Facts, at 7, (December 18, 2012) <http://1.usa.gov/1eCfCPL>

<sup>62</sup> *Id.* at 35-37.

<sup>63</sup> *Id.* at 9.

<sup>64</sup> *Id.* at 38-39.

<sup>65</sup> Press release, The United States Department of Justice, “UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates,” (December 19, 2012)

<http://1.usa.gov/1m1uvk7>

paid pursuant to the NPA amounted to approximately 12 percent of UBS's reported \$3.3 billion in pre-tax profits for 2012.<sup>66</sup>

Just as the 2011 NPA did not provide justification for entering into an agreement with the DOJ, neither the 2012 NPA with UBS nor the DOJ's press materials relating to it made clear why the department chose to enter into an agreement with UBS instead of seeking to indict the institution, and then proceeding to trial.

### 3. Credit Suisse

Credit Suisse AG, also headquartered in Zurich, Switzerland, is the country's second largest bank by assets.<sup>67</sup> The global bank spans 30 countries in Europe, the Middle East and Africa, 14 countries in the U.S., Canada, the Caribbean, and Latin America, and 12 countries in Asia.<sup>68</sup> Credit Suisse has over \$900 billion in assets, according to U.S. accounting standards. At the time of entering into its DPA with the DOJ in 2009, it had just short of \$1 trillion in assets.<sup>69</sup>

Credit Suisse also took advantage of the U.S. government's unprecedented assistance during the recent financial crisis. According to Bloomberg, Credit Suisse borrowed an average of \$13.3 billion per day from the Fed from Aug. 1, 2007 until April 30, 2010.<sup>70</sup> These loans were at below market rates. The company was the biggest user of the Fed's Single-Tranche Open Market Operations, borrowing a peak amount of \$45 billion in August 2008.<sup>71</sup> At its peak, Credit Suisse borrowed a cumulative daily amount of \$60.8 billion on Aug. 27, 2008, and the company was indebted to the Fed for 386 days.<sup>72</sup>

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<sup>66</sup> Press release, UBS, "UBS's fourth-quarter 2012 results: UBS continues with successful execution of accelerated strategy" (Feb 5, 2013) <http://bit.ly/1d4bmWC>; UBS reported pre-tax profits of CHF 3.0 billion (Swiss Franks); Based on an exchange rate of 1.1 CHF to U.S. dollars; that is roughly \$3.3 billion U.S. dollars. <http://bit.ly/1eH5GGI>

<sup>67</sup> Elena Logutenkova, *Credit Suisse to Fence Off Swiss Operations in Extra Unit*, BLOOMBERG, (Nov 21, 2013) <http://bloom.bg/1d1wv7d>

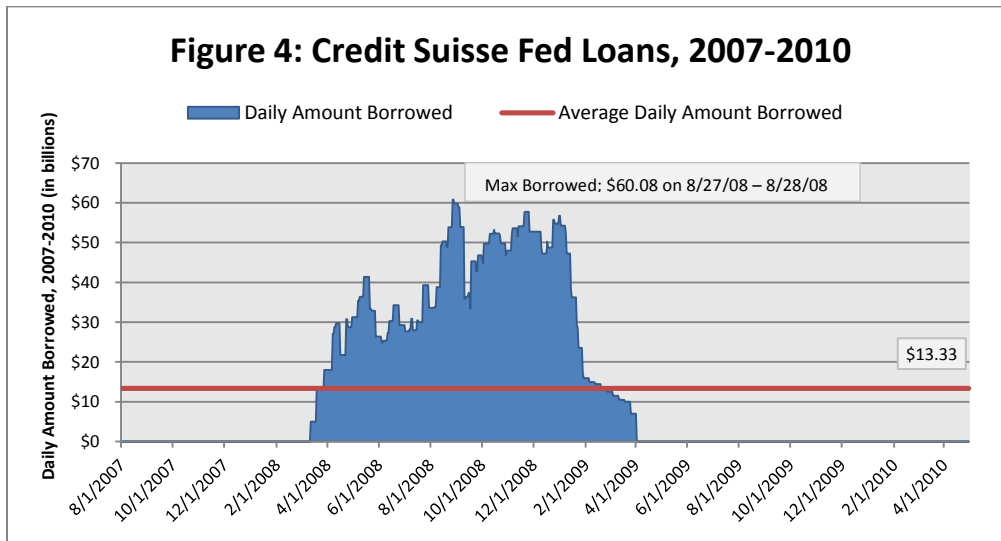
<sup>68</sup> Credit Suisse AG, US Resolution Plan pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Section, (September 2013) <http://1.usa.gov/1a4T90P>

<sup>69</sup> See Credit Suisse Group Historical Total Assets (Quarterly) Data, <http://bit.ly/KhvbCM>

<sup>70</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, Credit Suisse Group AG Details*, BLOOMBERG, (Dec 23, 2011) <http://bloom.bg/1d1wD6y>

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1j7X7bt>.

In December 2009, Credit Suisse entered into a DPA with the DOJ for violations of the International Emergency Economic Powers Act (IEEPA) and regulations issued under the Act.<sup>73</sup> According to court documents, the company illegally conducted transactions on behalf of customers from Iran, Sudan and other countries sanctioned in programs administered by the Department of the Treasury's Office of Foreign Assets Control (OFAC).<sup>74</sup> From 1995 through 2006, Credit Suisse altered wire transfers involving U.S. sanctioned countries or persons, deliberately removing material information, including customers' names, bank names and address so that the wire transfers would pass undetected through U.S. financial institutions' filters.<sup>75</sup>

In addition to altering payment information, Credit Suisse actively assisted sanctioned countries by advising, instructing, and training clients to falsify wire transfers so that their messages would pass undetected through the U.S. financial system.<sup>76</sup> Credit Suisse promised its clients that no message would leave the bank without being hand-checked by a Credit Suisse employee to ensure that the message had been formatted to avoid U.S. filters.<sup>77</sup>

<sup>73</sup> Press release, The United States Department of Justice, "Credit Suisse Agrees to Forfeit \$536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law," (December 16, 2009) <http://1.usa.gov/L8RKLc>

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*



The bank's scheme allowed U.S. sanctioned countries and entities to move hundreds of millions of dollars through the U.S. financial system.<sup>78</sup> U.S. Attorney General Eric Holder said, "Credit Suisse's decades-long scheme to flout the rules that govern our financial institutions robbed our system of the legitimacy that is fundamental to its success."<sup>79</sup>

As part of the DPA, Credit Suisse acknowledged that at least \$536 million was involved in transactions related to the violation of IIEEPA and agreed to pay \$536 million for its wrongdoing.<sup>80</sup> That amounted to roughly 5.7 percent of the bank's roughly \$9.46 billion in profits that year.<sup>81</sup>

Neither the agreement nor the DOJ's press materials relating to the agreement made clear why the department chose to enter into a DPA with Credit Suisse instead of seeking to indict the institution, and then proceeding to trial.

#### 4. Deutsche Bank

Deutsche Bank AG is based in Frankfurt, Germany, and operates in 72 countries, including the United States.<sup>82</sup> Deutsche Bank is Germany's largest bank, as well as one of the largest financial institutions in the world by assets, with approximately \$2.5 trillion by international accounting standards, according to FDIC Vice Chair Tom Hoenig's estimates.<sup>83</sup> The firm currently has approximately 2,900 active legal entities.<sup>84</sup>

Like other large, complex financial institutions across the globe, Deutsche Bank took advantage of below-market rate loans from the Federal Reserve. According to Bloomberg, the bank borrowed an average of \$12.5 billion per day from the Fed from Aug.1, 2007, until April 30, 2010.<sup>85</sup> Deutsche Bank was indebted to the Fed for 439 days, and at its peak, the Deutsche Bank owed \$66 billion of debt to the Fed.<sup>86</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *United States v. Credit Suisse AG*, Deferred Prosecution Agreement at 3, <http://1.usa.gov/1m5Deik>

<sup>81</sup> Credit Suisse reported pre-tax profits of CHF 8.6 billion (Swiss Franks) in 2009. Credit Suisse Annual Report to Shareholders, "Annual Report 2009," (March 2010) <http://bit.ly/1am92NQ>; Based on an exchange rate of 1.1 CHF to U.S. dollars; that is roughly \$9.46 billion U.S. dollars. <http://bit.ly/1eH5GGI>

<sup>82</sup> Deutsche Bank AG, US Resolution Plan pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Section, (October 2013) <http://1.usa.gov/L1erjO>

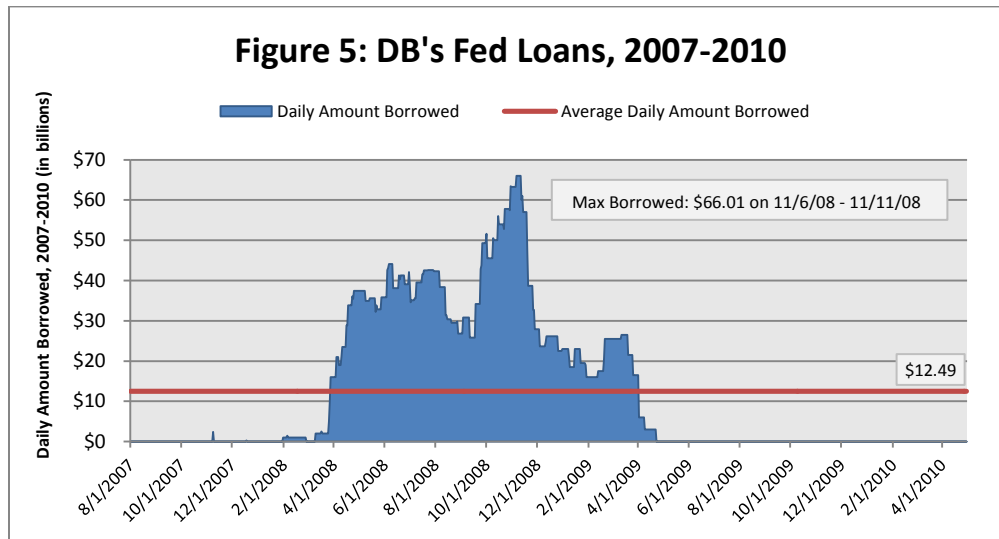
<sup>83</sup> *Id.*, Thomas M. Hoenig, Capitalization Ratios for Global Systemically Important Banks (G-SIBs), Data as of second quarter of 2013, <http://1.usa.gov/KhufhD>;

<sup>84</sup> *Id.*

<sup>85</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, Deutsche Bank AG Details*, BLOOMBERG, (Dec 23, 2011) <http://bloom.bg/1eCfSy4>

<sup>86</sup> *Id.*





Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1j7X7bt>.

In December 2010, Deutsche Bank entered into an NPA with the DOJ for participating in a conspiracy to defraud the United States government, commit tax evasion, falsify tax returns, and aid and assist in the preparation and filing of those tax returns.<sup>87</sup> According to the DOJ, between 1996 and 2002, Deutsche Bank participated in and implemented fraudulent tax shelters on behalf of high-net-worth U.S. citizens so they could evade taxes.<sup>88</sup> Specifically, Deutsche Bank assisted in the preparation of documents that misled the IRS about the true nature of the transactions, and executed the transactions on behalf of the taxpayers.<sup>89</sup>

Deutsche Bank participated in approximately 15 tax shelters, engaged in at least 1,300 deals involving over 2,100 customers, and implemented over 2,300 financial transactions related to these shelters.<sup>90</sup> Because of Deutsche Bank's actions, the firm's high net worth U.S. clients were able to report approximately \$29.3 billion in bogus transactions on their tax returns, which allowed them to evade approximately \$5.9 billion in individual income taxes on capital gains and ordinary income.<sup>91</sup>

Pursuant to the NPA, Deutsche Bank acknowledged that it was wrong and unlawful to engage in the sham transactions and expressed regrets for having done so.<sup>92</sup> The firm also

<sup>87</sup> Press release, The United States Department of Justice, "Deutsche Bank to Pay More than \$550 Million to Resolve Federal Tax Shelter Fraud," (December 21, 2010) <http://1.usa.gov/1am9fke>

<sup>88</sup> Deutsche Bank AG Non-Prosecution Agreement, at 1. (December 21, 2010) <http://bit.ly/1eR3UB6>

<sup>89</sup> Exh. A –Statement of Facts at 1, (December 21, 2010) <http://bit.ly/1eR3UB6>

<sup>90</sup> *Id.*

<sup>91</sup> Deutsche Bank AG Non-Prosecution Agreement, at 1. (December 21, 2010) <http://bit.ly/1eR3UB6>

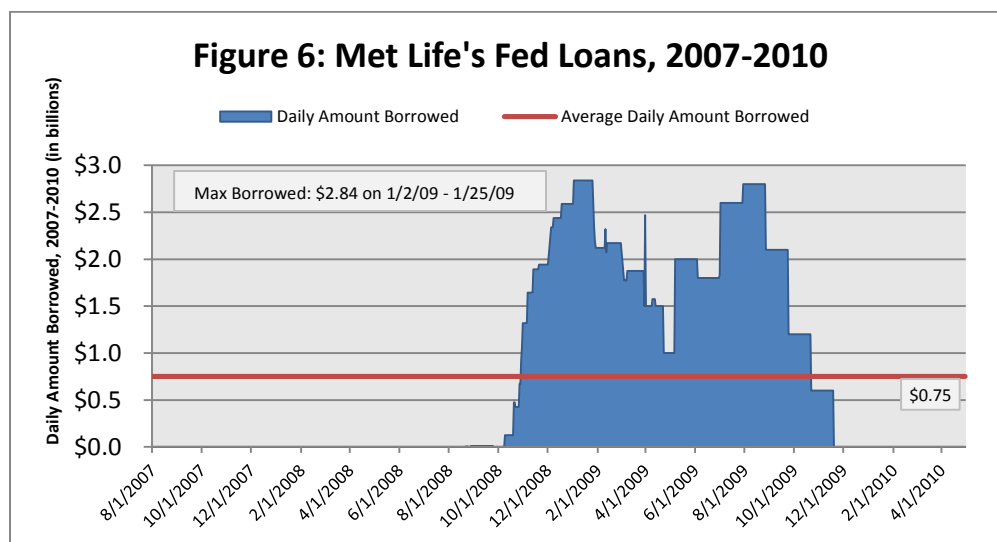
<sup>92</sup> Exh. A –Statement of Facts at 1, (December 21, 2010) <http://bit.ly/1eR3UB6>

agreed to pay more than \$550 million to the United States, equal to roughly 10.6 percent of its \$5.2 billion in pre-tax profits for 2010.<sup>93</sup>

Neither the agreement nor the DOJ's press materials relating to it made clear why the department chose to enter into an NPA with Deutsche Bank instead of seeking to indict the institution, and then proceeding to trial.

## 5. MetLife

MetLife is headquartered in New York City and operates in the United States, Japan, Latin America, Asia, Europe, and the Middle East.<sup>94</sup> It is a significant provider of insurance, annuities, and employee benefit programs.<sup>95</sup> The institution currently has more than \$800 billion in assets, according to a U.S. accounting standards.<sup>96</sup> In April 2010 at the time MetLife entered into a DPA with the DOJ, the firm had more than \$560 billion in assets.<sup>97</sup> During the recent financial crisis, MetLife benefited from discount loans from the Federal Reserve. According to Bloomberg, the firm borrowed for 437 consecutive days and owed an average daily balance of \$0.8 billion to the Fed from Aug. 1, 2007 to April 30, 2010.<sup>98</sup> At its peak, on Jan. 2, 2009, MetLife owed \$2.8 billion to the Fed.<sup>99</sup>



<sup>93</sup> Deutsche Bank reported a pre-tax profit of EUR 4.0 billion in 2010. Press Release, Deutsche Bank, "Deutsche Bank reported net income of EUR 605 million for the fourth quarter 2010 and EUR 2.3 billion for the full year," (February 3, 2011) <http://bit.ly/1am9lIE>; Based on an exchange rate of 1.3 Euros to U.S. dollars, that is roughly \$5.2 billion U.S. dollars. <http://bit.ly/1eH5GGI>

<sup>94</sup> MetLife, Investor Relations, Company Overview, <http://bit.ly/1m5Dv50>

<sup>95</sup> *Id.*

<sup>96</sup> See MetLife Historical Total Assets (Quarterly) Data, <http://bit.ly/1j6aKYE>

<sup>97</sup> *Id.*

<sup>98</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, MetLife Inc. Details*, BLOOMBERG, (Dec 23, 2011) <http://bloom.bg/1m5Dzl7>

<sup>99</sup> *Id.*

Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1j7X7bt>.

In April 2010, MetLife entered into an NPA with the DOJ for violations of the Employee Retirement Income Security Act (ERISA) for failing to report all commissions and fees that MetLife paid to its insurance brokers.<sup>100</sup> According to the Department of Justice, from at least 1999 through 2005, MetLife engaged in secret side agreements with an insurance broker and the company's president and CEO whereby the broker would recommend MetLife's insurance products to the broker's clients in exchange for MetLife paying the broker supplemental compensation, raised through a variety of opaque "special fees," including "request for proposal fees," "communication fees," "brochure design and printing costs," and "enrollment fees."<sup>101</sup> MetLife also charged "override payments" based on the amount of business the broker placed with MetLife.<sup>102</sup> Neither the business agreements nor the payments were disclosed to the broker's clients.<sup>103</sup> In addition, MetLife made false and misleading statements to the broker's clients concerning the improper payments.<sup>104</sup>

As part of the DPA, MetLife agreed to pay \$13.5 million to the United States, roughly 0.3 percent of the \$3.96 billion in pre-tax profits in 2010.<sup>105</sup> Neither the agreement nor the DOJ's press materials relating to the agreement made clear why the Department chose to enter into an NPA with MetLife instead of seeking to indict the institution, and then proceeding to trial.

## 6. RBS

The Royal Bank of Scotland Group PLC (RBS) is a financial services corporation with headquarters located in Edinburgh, Scotland.<sup>106</sup> RBS has banking divisions and subsidiaries in over 45 countries, including the United States.<sup>107</sup> RBS currently has roughly \$1.9 trillion in assets, according to FDIC Vice Chair Tom Hoenig's estimates using international accounting standards.<sup>108</sup>

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<sup>100</sup> Non-Prosecution Agreement between the United States Department of Justice, Office of the United States Attorney for the Southern District of California, (April 15, 2010) <http://bit.ly/1eR42AL>

<sup>101</sup> Appendix A – Statement of Facts at 2-4, <http://bit.ly/1eR42AL>

<sup>102</sup> *Id.* at 2-3.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

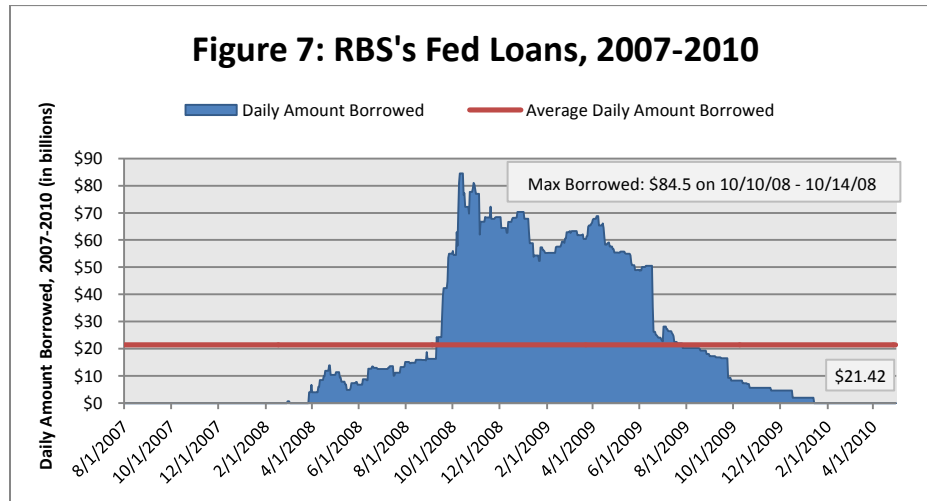
<sup>105</sup> MetLife, 2010 Annual Report, at 3, (March 1, 2011) <http://bit.ly/1a4TLDr>

<sup>106</sup> Royal Bank of Scotland Group PLC, US Resolution Plan pursuant to Section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Section, (July 2013) <http://1.usa.gov/1hUCrnb>

<sup>107</sup> *Id.*

<sup>108</sup> Thomas M. Hoenig, Capitalization Ratios for Global Systemically Important Banks (G-SIBs), Data as of second quarter of 2013, <http://1.usa.gov/KhufhD>;

According to Bloomberg, during the recent global financial crisis RBS received more secret loans from the U.S. Federal Reserve than any other foreign bank.<sup>109</sup> On Oct.10, 2008, as the bank's stock price plunged 21 percent, RBS borrowed \$84.5 billion from the Fed.<sup>110</sup> Between Aug. 1, 2007 and April 30, 2010, the company borrowed an average of \$21.4 billion, and was indebted to the Fed for 661 days.<sup>111</sup>



Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1j7X7bt>.

In February 2013, RBS PLC, a subsidiary of RBS Group PLC, entered into a DPA with the DOJ related to its involvement in the LIBOR rate-rigging scandal, in which it committed wire fraud and engaged in price fixing.<sup>112</sup> According to court documents, from at least 2006 through 2010, certain RBS traders engaged in hundreds of instances whereby they manipulated RBS's LIBOR submissions to benefit their positions instead of complying with proper rates.<sup>113</sup> At least two RBS managers were aware of significant conflicts of interest with derivatives traders acting as LIBOR submitters, and at times, one of these managers even participated in the manipulation of LIBOR submissions.<sup>114</sup>

<sup>109</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, Royal Bank of Scotland Group Plc Details*, (Dec 23, 2011) <http://bloom.bg/1ho37tx>

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Press Release, The United States Department of Justice, "RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates," (February 6, 2013) <http://1.usa.gov/KhvJZt>

<sup>113</sup> *Id.*

<sup>114</sup> *United States v. The Royal Bank of Scotland AG*, Deferred Prosecution Agreement, at 20, <http://1.usa.gov/1eH738i>

Pursuant to the DPA, RBS PLC admitted responsibility for its acts, agreeing that it would neither contest the admissibility of, nor contradict, the facts alleged in any proceeding.<sup>115</sup> It also admitted that if this matter were to proceed to trial, the DOJ would prove beyond a reasonable doubt, by admissible evidence, the facts alleged.<sup>116</sup> As part of the DPA, RBS paid a monetary penalty of \$150 million to the United States, and similar to the UBS settlement, one of the firm's Japanese subsidiaries pled guilty to one count of wire fraud.<sup>117</sup> In perspective, the fine that RBS paid amounted to roughly 8 percent of RBS PLC's reported \$1.8 billion in operating profits, prior to one-time impairment losses in 2012.<sup>118</sup>

While the DPA listed as one of the "Relevant Considerations" for entering into the DPA, "the potential collateral consequences of proceeding with a prosecution,"<sup>119</sup> the agreement did not expound on what those potential collateral consequences were.

## 7. JPMorgan Chase

JPMorgan Chase & Co. is the largest bank in the United States and the world, by assets. The firm has roughly \$2.4 trillion in assets according to U.S. accounting standards and \$3.7 trillion in assets according to international accounting standards, based on Tom Hoenig's estimates.<sup>120</sup> Based on the international estimate, JPMorgan holds assets equal to roughly one-quarter of gross domestic product. The firm was large and complex before the financial crisis, and became even larger with its acquisitions of Washington Mutual and Bear Stearns in 2008.

While JPMorgan has repeatedly insisted that the bank possesses a "fortress balance sheet," the bank still received \$25 billion from Troubled Asset Relief Program (TARP).<sup>121</sup> The bank also received substantial assistance from the Federal Reserve during the crisis. According to Bloomberg, JPMorgan owed to the Fed an average daily balance of \$12 billion from Aug. 1, 2007, until April 30, 2010.<sup>122</sup> These loans were at below market rates. The company was

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<sup>115</sup> *Id.* at 3.

<sup>116</sup> Attachment A – Statement of Facts at 1, <http://1.usa.gov/1eH738i>

<sup>117</sup> *United States v. The Royal Bank of Scotland AG*, Deferred Prosecution Agreement, at 8, <http://1.usa.gov/1eH738i>

<sup>118</sup> RBS PLC "Annual Report and Accounts 2012," (February 28, 2013) <http://bit.ly/1gGAFIT>; Elsewhere in this report, we calculate the payment pursuant to the DPA as a percentage of pre-tax profits. In this case, we calculate as a percentage of operating profits, excluding one-time charges. Counting one-time impairment losses for 2012, RBS PLC reported a loss of approximately \$3.4 billion.

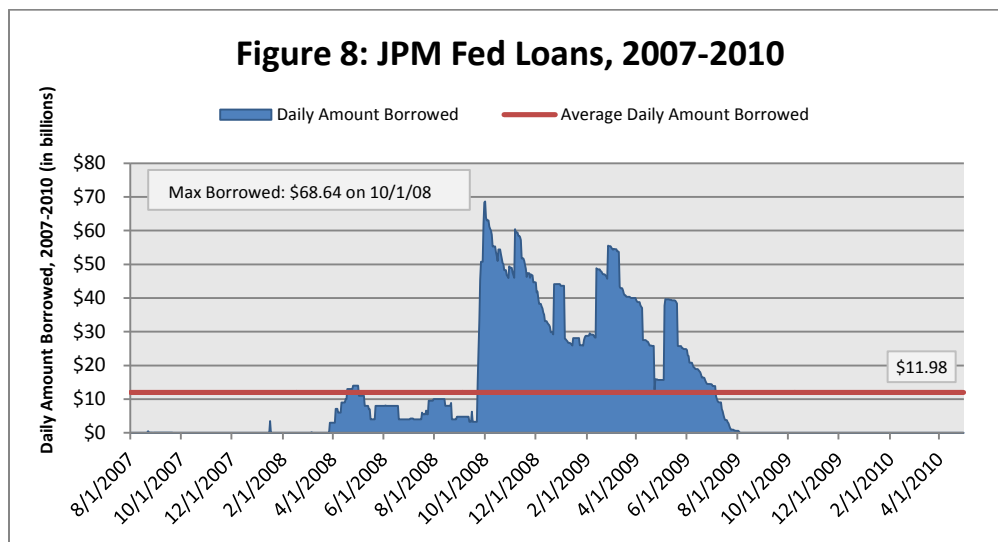
<sup>119</sup> *United States v. The Royal Bank of Scotland AG*, Deferred Prosecution Agreement, at 5, <http://1.usa.gov/1eH738i>

<sup>120</sup> Thomas M. Hoenig, Capitalization Ratios for Global Systemically Important Banks (G-SIBs), Data as of second quarter of 2013 <http://1.usa.gov/KhufhD>;

<sup>121</sup> ProPublica, Bailout Tracker, Bailout Recipients (Detailed View), <http://bit.ly/1iQ4odr>

<sup>122</sup> Bradley Keoun and Phil Kuntz, *The Fed's Secret Liquidity Lifelines, JPMorgan Chase & Co. Details*, (Dec. 23, 2011) <http://bloom.bg/1aIS1QI>

indebted to the Fed for 525 days, and at its peak, the Fed was liable for \$68.6 billion of debt incurred by JPMorgan.<sup>123</sup>



Source: Phil Kuntz and Bob Ivry, *Fed's Once-Secret Data Compiled by Bloomberg Released to Public*, BLOOMBERG NEWS (Dec. 23, 2011), <http://bloom.bg/1j7X7bt>.

In January 2014, JPMorgan Chase N.A., a subsidiary of JPMorgan Chase & Co. entered into a DPA with the DOJ to settle Bank Secrecy Act violations arising from the bank's involvement in the Bernie Madoff Ponzi scheme.<sup>124</sup> According to court documents, Madoff perpetrated the largest Ponzi scheme in history over the course of two decades, and did so almost exclusively through JPMorgan bank accounts.<sup>125</sup> Despite the bank's recognition that the returns that were probably "too good to be true," and the fact that the bank's chief risk officer at one point was told by a senior colleague that there was a "well-known cloud over the head of Madoff and that his returns [were] speculated to be part of a Ponzi scheme" the bank did not engage in appropriate due diligence, file suspicious activity reports with U.S. authorities, or direct Madoff to seize his operations.<sup>126</sup>

<sup>123</sup> *Id.*

<sup>124</sup> Press release, The United States Department of Justice, "Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Filing Of Criminal Charges Against And Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme," (January 7, 2014) <http://1.usa.gov/1m1xaKE>

<sup>125</sup> *United States v. JPMorgan Chase NA.*, Exh. B – Information at 3-4. <http://1.usa.gov/1aE4WNP>

<sup>126</sup> Press release, The United States Department of Justice, "Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Filing Of Criminal Charges Against And Deferred Prosecution Agreement With JPMorgan Chase Bank, N.A., In Connection With Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme," (January 7, 2014) <http://1.usa.gov/1m1xaKE>

Under the terms of the agreement, JPMorgan admitted to violating anti-money laundering and bank secrecy laws, agreed to pay \$1.7 billion to victims of the Madoff fraud, and promised to remedy its internal compliance regime.<sup>127</sup> To put this fine in perspective, it amounted to roughly 9 percent of JPMorgan's \$18 billion in profits in 2013.<sup>128</sup> Further, it is not clear why the department chose to enter into a DPA with JPMorgan instead of seeking to indict the institution, and then proceeding to trial.

In July 2011, JPMorgan entered into an NPA with the DOJ similar to the agreement that UBS entered into with DOJ two months prior, relating to antitrust violations in the municipal bond market.<sup>129</sup> According to the DOJ, from 2001 through 2006, certain JPMorgan employees who worked for the company's municipal derivatives desk entered into unlawful agreements to manipulate the bidding process and rig bids on municipal investment contracts.<sup>130</sup> The contracts were used to invest the proceeds of, or manage the risk associated with, bond issuance by municipalities and other public entities.<sup>131</sup> As a result of JPMorgan's illegal activity, municipalities were deprived of a competitive bidding process, to which they were entitled.<sup>132</sup>

As part of the NPA, JPMorgan agreed to pay \$228 million in restitution, penalties and disgorgement to federal and state agencies.<sup>133</sup> That amounted to just over 1 percent of JPMorgan's reported \$26.7 billion in pre-tax profits in 2011.<sup>134</sup>

Neither the agreement nor the DOJ's press materials relating to the agreement made clear why the Department chose to enter into an NPA with JPMorgan instead of seeking to indict the institution, and then proceeding to trial.

## Conclusion

The DOJ's increasing reliance on deferred prosecution agreements, as documented by this report, has occurred without complete transparency as to why DOJ keeps entering into these agreements with large financial firms instead of seeking criminal indictments for criminal violations. If DOJ believes that DPA's are the most effective way to hold large financial firms that commit crimes accountable and deter future criminal activity, it should

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<sup>127</sup> *Id.*

<sup>128</sup> Press Release, JPMorgan Chase Reports Fourth-Quarter 2013 Earnings, (January 14, 2014) <http://bit.ly/1qVKW3Z>.

<sup>129</sup> Press Release, The United States Department of Justice, "JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$228 Million to Federal and State Agencies," (July 7, 2011) <http://1.usa.gov/1eH7pvP>

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> JPMorgan Chase & Co., 2011 Annual Report, (March 30, 2012) <http://bit.ly/L8TyUL>

make that clear and explicit. If, on the other hand, DOJ believes that other circumstances exist that make a deferred or non-prosecution agreement preferable, they should make that clear and explain how those circumstances ultimately favored the DPA approach. Unfortunately, the lack of answers from DOJ has left both the lawmakers and the public in the dark.