**‘“Greed, for lack of a better word, is good. Greed is right. Greed works": A contemporary and comparative review of the relationship between the global financial crisis, financial crime and white collar criminals in the U.S. and the U.K.'.**

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**Abstract**

Since the start of the 2008 financial crisis, a multitude of scholarly work has been written on identifying the factors that contributed towards it. Many excellent texts and articles have identified such factors, including weak banking regulation, the deregulation of consumer credit laws, high risk banking, the greed of profit driven traders, the sub-prime mortgage crisis, securitisation, deregulation of banking laws, access to convenient credit, irresponsible lending, predatory lending and weak macroeconomic policies. This article seeks to offer a refreshing and alternative interpretation and identifies a new factor that not only contributed towards the 2008 financial crisis, but continued to thrive in the perfect economic storm: white collar crime. The hypothesis of this article is that white collar crime is an important factor that contributed towards the 2008 financial crisis. To demonstrate this point, the article concentrates on the impact of the financial crisis and its relationship white collar crime in the United States of America [[1]](#footnote-1) and the United Kingdom.[[2]](#footnote-2) This comparison presents a unique opportunity to compare and contrast the different approaches towards combating the association between the 2008 financial crisis and white collar crime. The article will initially demonstrate that the US and the UK have adopted similar legislative and policy reforms towards improving the regulation of their heavily criticised financial services sectors. The similarities are illustrated by the embarrassment of legislative reforms enacted in both countries. For example, in the US this includes the Emergency Economic Stabilization Act 2008, the Housing and Economic Recovery Act 2008, the American Recovery and Reinvestment Act 2009 and the Dodd–Frank Wall Street Reform Act 2012. While legislators in the UK introduced the Banking (Special Provisions) Act 2009, the Financial Services Act 2010, the Financial Services Act 2012 and the Banking Reform (Financial Services) Act 2013. Conversely, the search for the ‘culprits’ or ‘villains’ who caused and contributed the 2008 financial crisis has demonstrated a number of striking differences in both countries. For instance, one of the first legislative measures introduced in the US was the Fraud Enforcement and Recovery Act 2009,[[3]](#footnote-3) which is of great significance in this article for two reasons. Firstly, the legislation was a direct response to white collar crime that contributed towards the 2008 financial crisis. Secondly, this legislation redressed the imbalance created by President George Bush, who tasked the Federal Bureau of Investigation [[4]](#footnote-4) with tackling the ‘War on Terror’ and maintaining ‘Homeland Security’ at the expense of white collar crime, by providing the Department of Justice with additional funding.[[5]](#footnote-5) This measure can be contrasted with that adopted in the UK, where there has been *no* direct legislative response to the white collar crime that is associated with the financial crisis. The Coalition government has only created a small number of reactive criminal offences under the Financial Services Act 2012 and the Banking Reform (Financial Services) Act 2013 following several instances of market manipulation that will be addressed towards the end of this article. Another important contrast between the US and UK relates to the enforcement strategies adopted by law enforcement agencies and regulatory bodies. For example, the FBI has handled over 1,000 criminal prosecutions while the Securities and Exchange Commission has vigorously used its civil enforcement powers against the perpetrators of the financial crisis.[[6]](#footnote-6) Furthermore, the SEC has also imposed record amounts of financial penalties and banned people from working in the financial sector since the start of the financial crisis.[[7]](#footnote-7) Importantly, there is a clear division between the roles of the FBI and SEC, a situation that doesn’t exist in the UK. In the UK, the pursuit of white collar criminals has been lethargically led by the Financial Services Authority,[[8]](#footnote-8) the Financial Conduct Authority [[9]](#footnote-9) and the Serious Fraud Office.[[10]](#footnote-10) There has been some *reluctance* from these agencies to actively pursue the alleged wrongdoers. For example, both the FSA and SFO were rather averse to investigate the alleged manipulation of the London Interbank Offered Rate in 2010.[[11]](#footnote-11) At the time of writing this article, the SFO has only secured one criminal conviction in relation to the manipulation of LIBOR, yet it has charged thirteen other individuals.[[12]](#footnote-12) Furthermore, not one director of a bank has been disqualified under the Company Directors Disqualification Act 1986 for their conduct during the 2008 financial crisis, despite a strong amount of political rhetoric from Vince Cable MP.[[13]](#footnote-13) However, it is important to note that the FCA and its predecessor the FSA, has increased the number of prohibition orders,[[14]](#footnote-14) which permit the regulator to ban individuals from working in the financial services sector and imposed record financial penalties on both firms and individuals who have breached its rules and regulations since 2008.[[15]](#footnote-15) A key part of the discussion of the response in the UK will emanate from the sparse resources provided for the SFO by the Coalition government since 2010. Once again, this is an important contrast between the US and the UK. There is no individual or ‘super villain’ that has become the face of white collar crime during the financial crisis despite the illegal activities of notorious white collar criminals including Bernard Madoff and Alan Stanford. The article concludes that the response by the US and UK governments and its law enforcement and regulatory agencies towards white collar crime during the financial crisis has been lacklustre and they have wrongly prioritised imposing financial penalties at the expense of pursuing criminal prosecutions.[[16]](#footnote-16)

**The Financial Crisis and the Usual Suspects**

A previously unattributed factor that contributed to the 2008 financial crisis is white collar crime.[[17]](#footnote-17) However, it is important to note and accept that white collar crime was *not* the sole and *only* cause of the financial crisis. For example, it has been asserted by many leading economists,[[18]](#footnote-18) the International Monetary Fund,[[19]](#footnote-19) the Department of Treasury,[[20]](#footnote-20) HM Treasury,[[21]](#footnote-21) official enquiries [[22]](#footnote-22) and academic commentators [[23]](#footnote-23) that the foundations of the financial crisis were laid as a result of the spectacular collapse of the US subprime mortgage market. Others have argued that the foundation of the financial crisis was placed by the continued imposition of low interest rates by the Federal Reserve,[[24]](#footnote-24) which was used by successive US governments as a preventative measure to avoid economic turmoil.[[25]](#footnote-25) Furthermore, it is also interesting to note that the adoption of low interest rates continued following the terrorist attacks in September 2001.[[26]](#footnote-26) Other well documented factors that contributed towards the 2008 financial crisis, which are beyond the scope of the article, include the deregulation of banking laws,[[27]](#footnote-27) the development and promotion by lenders of access to convenient credit.[[28]](#footnote-28) This, when combined with the irresponsible lending practices or predatory lending,[[29]](#footnote-29) by financial institutions contributed towards record levels of personal debt and extreme levels over indebtedness.[[30]](#footnote-30) Another well documented factor that contributed towards the financial crisis was ineffective banking regulation. This is clear illustrated in the UK following the publication of several damning reports [[31]](#footnote-31) into the regulatory performance of the FSA.[[32]](#footnote-32) Likewise, the SEC has attracted a fair share of criticism due to its sluggish response to the Ponzi fraud scheme of Bernard Madoff.[[33]](#footnote-33) There are many other factors that contributed towards the 2008 crisis including subprime mortgage crisis,[[34]](#footnote-34) weak banking regulation,[[35]](#footnote-35) high levels of consumer debt,[[36]](#footnote-36) toxic debts,[[37]](#footnote-37) securitisation,[[38]](#footnote-38) deregulation of banking legislation,[[39]](#footnote-39) ineffective macroeconomic policies,[[40]](#footnote-40) weak credit regulation,[[41]](#footnote-41) deregulation of consumer credit legislation,[[42]](#footnote-42) self-regulation credit rating agencies [[43]](#footnote-43) and the culture of some banking practices.[[44]](#footnote-44) However, it is the author’s contention that white collar crime is an equally important factor and this is considered in the next section of the article.

**The Financial Crisis and White Collar Crime**

Initially, the link between the financial crisis and white collar crime was at times difficult to quantify and establish. There is no ‘super villain’ that has become the face of white collar crime during the financial crisis. However, research has concluded that several different types of white collar crime have interacted with the traditional variables, as outlined above, that contributed towards the financial crisis. It is my contention that this includes the relationship between subprime mortgages and mortgage fraud, the activities of some Credit Rating Agencies in the lead up to the financial crisis,[[45]](#footnote-45) predatory lending, Ponzi fraud schemes, market misconduct and market manipulation.[[46]](#footnote-46) Some of these examples are now considered in more detail. For example, mortgage fraud was identified as one of the most widespread and uncontrolled white collar crimes associated with the financial crisis.[[47]](#footnote-47) This is clearly illustrated by the fact that the FBI has moved mortgage fraud towards the top of its white collar crime agenda.[[48]](#footnote-48) Since the start of the 2008 financial crisis, the FBI has secured over 1,200 mortgage fraud related convictions, launched hundreds of mortgage fraud related investigations, created a plethora of mortgage fraud task forces and attempted to recompense lenders and borrowers who have been victims of this type of white collar crime.[[49]](#footnote-49) The explosion of instances of mortgage fraud associated with the financial crisis was clearly illustrated by the dramatic increase in the number of alleged instances of mortgage fraud reported to the Department of Treasury’s Financial Crimes Enforcement Network.[[50]](#footnote-50) For example, between 1996 and 2006 FinCEN received 82,851 mortgage fraud related suspicious activity reports.[[51]](#footnote-51) During this period the number of suspected instances of mortgage fraud reported to FinCEN increased by 1,400 per cent.[[52]](#footnote-52) Furthermore, FinCEN stated that between 2006 and 2007 it received 37,313 mortgage fraud SARs.[[53]](#footnote-53) This figure represented a 45 per cent of the total mortgage fraud related reports it received between 1996 and 2006. In 2010 the number of mortgage fraud related SARs received by FinCEN numbered 70,472,[[54]](#footnote-54) while in 2011, the number increased to 92,028,[[55]](#footnote-55) an increase of 33 per cent.[[56]](#footnote-56) This position was succinctly summarised by Smith who concluded that “the past decade has witnessed an explosion of mortgage fraud, with reports to the federal government of suspected criminal behaviour rising by a magnitude of over eighteen times from 2000 to 2008”.[[57]](#footnote-57) Furthermore, it has been argued that the figures from FinCEN only represent a small percentage of the true extent of mortgage fraud.[[58]](#footnote-58) It is also interesting to note that “mortgage fraud, far from abating, has only expanded since the foreclosure crisis began”.[[59]](#footnote-59)

Another example of white collar crime that contributed toward the financial crisis was predatory lending.[[60]](#footnote-60) The most comprehensive definition of predatory lending was afforded by the Department of Treasury’s Task Force on Predatory Lending which provides that it “involves engaging in *deception* or *fraud*, *manipulating* the borrower through aggressive sales tactics, or taking *unfair* advantage of a borrower’s lack of understanding about loan terms”.[[61]](#footnote-61) It has been argued that *any* loan could be categorised as predatory lending where the debtor does not have adequate funds to meet the monthly repayments.[[62]](#footnote-62) Predatory lending can be divided into two categories. Firstly, the lending activity includes *illegal* lending practices such as *fraud*.[[63]](#footnote-63) Secondly, predatory lending behaviour that is not necessarily illegal but actions that are “misused by unprincipled lenders”.[[64]](#footnote-64) The foundations of predatory lending were put in place by legislation that was originally designed to prevent such practices, to end to concept of redlining and to increase consumer’s access to credit.[[65]](#footnote-65) For example, the Fair Housing Act 1968, the Community Reinvestment Act 1977 and the Financial Services Modernization Act 1999 contributed to “the seeds of predatory lending and pursuit of unacceptable risk to blossom into the carnivorous plants of financial meltdown”.[[66]](#footnote-66) Legislation that has attempted to limit the impact of predatory lending included the Federal Trade Commission Act 1914, the Truth in Lending Act 1968, the Home Ownership Equity Protection Act 1994, the Real Estate Settlement Procedures Act 1974, the Equal Credit Opportunity Act 1974, the Fair Debt Collection Practices Act 1977, the Home Ownership and Equity Protection Act 1994, the Mortgage Reform and Anti-Predatory Lending Act 2007 and the Credit Card Accountability, Responsibility, and Disclosure Act 2009. The predatory lending laws are enforced by the Federal Trade Commission,[[67]](#footnote-67) by virtue of the Federal Trade Commission Act 1914. This Act prohibits unjust and misleading practices,[[68]](#footnote-68) and provides the FTC with the ability and flexibility to determine what amounts to unjust, misleading and predatory practices. Therefore, the FTC who is charged with enforcing the Federal Trade Commission Act has been provided with an extensive array of enforcement powers.[[69]](#footnote-69) Since the start of the financial crisis the FTC has imposed large financial penalties on firms who have participated in predatory lending practices. This includes for example Household International who agreed to pay a $484m fine to the FTC [[70]](#footnote-70) and Ameriquest paying $325m for conducting predatory lending practices.[[71]](#footnote-71) Additionally, in September 2008 the FTC reached an agreement with Bear Stearns and EMC Mortgage for $28m after they admitted engaging in “unlawful practices in servicing consumers’ home mortgage loans”.[[72]](#footnote-72) Additionally, the DoJ reached a financial settlement with Bank of America for $335m over discriminatory lending practices [[73]](#footnote-73) and $175m with Wells Fargo.[[74]](#footnote-74)

Furthermore, there is also evidence to suggest that the 2008 financial crisis resulted in a significant increase in the exposure and instances of Ponzi related frauds. The SEC defined a Ponzi fraud as “an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors”.[[75]](#footnote-75) It has been suggested that between 2007 and 2009 over 150 Ponzi fraud schemes were identified with losses exceeding $16.5bn.[[76]](#footnote-76) Furthermore, the relationship between the financial crisis and Ponzi related fraud schemes is clearly illustrated by referring to the number of enforcement actions pursued by the SEC against the perpetrators of this white collar crime. For example, according to Johnston *et al* there has been a 21 per cent increase in the number of Ponzi fraud related enforcement actions conducted by the SEC.[[77]](#footnote-77) The FBI added “the recent financial crisis led to the identification of numerous investment fraud schemes, many of which were Ponzi schemes and have increased the number of agents investigating such schemes by 61 per cent”.[[78]](#footnote-78) However, it is very important to note that “the recession serves as the impetus to provide a transparency that brings to light Ponzi schemes and existing frauds”.[[79]](#footnote-79) The next section of the article appraises the responses of authorities in the US and UK towards white collar crime emanating from the financial crisis.

**Responses in the United States of America**

The first legislative measure that was introduced to counter the threat and problems caused by the financial crisis was the Emergency Economic Stabilisation Act in 2008.[[80]](#footnote-80) This legislation was designed to permit the US government to pursue bad or troubled assets and to protect the financial system, tax payers and prevent further economic disturbances. The most important part of this Act was the creation of the Troubled Asset Relief Programme,[[81]](#footnote-81) which resulsted in the US government providing $700bn of financial support. The Housing and Economic Recovery Act 2008 aimed to improve the regulation of Fannie Mae and Freddie Mac, after they were heavily exposed to record financial losses in the subprime mortgage sector.[[82]](#footnote-82) This was followed by the American Recovery and Reinvestment Act 2009, which aimed to reduce the financial benefits of those firms who had utilised and received TARP funding. The final piece of legislation introduced in the US was the Dodd-Frank Wall Street Reform Act 2010, the aim of which was to promote and manintain financial stability and improve the US system of banking regulation.[[83]](#footnote-83) However, for the purpose of this article the most important legislation was the Fraud Enforcement and Recovery Act 2009.[[84]](#footnote-84) Importatntly, the enactment of this legislation was a direct response to “chronic misconduct which may have helped foster economic instability”.[[85]](#footnote-85) Specifically, the Act provided additional funding for the FBI and DoJ, it increased the custodial sentences for those convicted of mortgae fraud, it amended fraud and money laundering legislation and it increased the regulation of TARP.

The US has presented an aggressive legislative, policy and enforcement stance towards white collar crime emanating from the financial crisis. President Barak Obama boldly declared on several occasions that his administration would take an aggressive stance against the perpetrators of the financial crisis. For example, the Fraud Enforcement and Recovery Act 2009, provided essential funding for law enforcement agencies and regulatory bodies. These measures provided a welcome addition to the already extensive legislative armoury of the DoJ, SEC and the FBI. These measures are a stark contrast to the *ill-advised* white collar crime policies adopted by President George Bush following the terrorist attacks in September 2001.[[86]](#footnote-86) As a result of Fraud Enforcement and Recovery Act 2009, President Barak Obama created the Financial Fraud Enforcement Task Force via a Presidential Executive Order 13,519.[[87]](#footnote-87) The aim of the Task Force was to tackle white collar crime that originated during the financial crisis.[[88]](#footnote-88) However, the performance of this Task Force is unfavourably compared to the performance of its predecessor, the Corporate Fraud Task Force.[[89]](#footnote-89) The aim of the Corporate Fraud Task Force was to “provide direction for the investigation and prosecution of cases of securities fraud, accounting fraud, mail and wire fraud, money laundering … and other related financial crimes committed by commercial entities”.[[90]](#footnote-90) Arogeti argued that the Corporate Fraud Task Force was created to ‘restore market confidence and cut down on corporate fraud’.[[91]](#footnote-91) The Corporate Fraud Task Force secured over 1,200 prosecutions which included numerous company chief executive officers, chief executives and chief financial officers.[[92]](#footnote-92) Therefore, the merits of creating *another* task force and replacing an already existing and successful one must also be questioned. A very important question that must be considered is why haven’t any high profile contributors to a financial crisis been successfully prosecuted in the US? The ability of federal prosecutorial agencies to prosecute chief executives officers or chief financial officers of those corporations who were involved in risky, unethical, immoral or illegal business practices that contributed to the financial crisis has been limited by several factors. This includes for instance the myriad and complex nature of the financial markets and thousands of transactions that such firms are involved in. Thus, the collection of evidence is problematic and extremely difficult. Nonetheless, there is evidence to suggest that a concerted and aggressive effort to those involved in the financial crisis could have resulted in prosecutions and convictions. For example, as a result of the 1980s Savings and Loans Crisis federal prosecutors successfully instigated criminal proceedings against approximately 800 senior banking officials.[[93]](#footnote-93) It is also interesting to compare the contrasting policies of the DoJ after the Savings and Loans Crisis and the 2008 financial crisis. In relation to the Savings and Loans Crisis it was claimed that the “the DoJ is now giving special attention to the investigation and prosecution of banking crimes, particularly crimes connected with failed savings and loans institutions”.[[94]](#footnote-94) Therefore, it can be argued that the performance of the DoJ towards white collar crime emanating from the 2008 financial crisis can be contrasted with its approach in the Savings and Loans Crisis. Nonetheless, there is evidence that suggests the SEC has outperformed its DoJ counterparts and has prioritised the use of financial penalties. For example, since the start of the 2008 financial crisis, the SEC has charged 161 companies and individuals, including 66 senior corporate officials with related offences, 37 individuals have either been barred from acting as company directors or suspended from doing so, the SEC has imposed penalty orders of $1.53bn, enforced disgorgement orders totalling $800m, obtained $400m compensation for affected investors and the total amount of penalties amounts to $2.73bn.[[95]](#footnote-95) Abramowitz and Sack took the view that:

“Enforcement statis­tics from the SEC reveal a constant steady uptick in enforcement actions. Fiscal years 2011 and 2012 brought the highest num­bers ever for the agency, with 735 and 734 total actions in those respective years. In the SEC’s 2012 annual report, Chairwoman Mary Schapiro noted that in connection with the financial crisis, the SEC has filed actions against 117 entities and individu­als (in 80 actions) including more than 50 CEOs, CFOs and other senior corporate officers, and obtained over $2.2 billion in monetary relief”.[[96]](#footnote-96)

Specific instances of enforcement action pursued by the SEC include Goldman Sachs agreeing to pay $550m to reconcile SEC charges related to subprime mortgage collateralised debt obligation [[97]](#footnote-97) and CR Intrinsic agreeing to pay $600m to settle insider trading charges.[[98]](#footnote-98) In addition to the record fines imposed by the SEC, the Commodities Futures Trading Commission [[99]](#footnote-99) has been heavily involved in the manipulation of LIBOR and and has fined Barclays $200m,[[100]](#footnote-100) UBS $700m,[[101]](#footnote-101) RBS $325m,[[102]](#footnote-102) ICAP $65m [[103]](#footnote-103) and Lloyds Banking Group $105m.[[104]](#footnote-104) Abramowitz and Sack took the view that:

“A similar upward trend has been doc­umented at the CFTC. Fiscal year 2011 brought record highs with 99 enforcement actions, the highest tally in the agency’s his­tory and a 74 percent increase over the prior year, and more than 450 new investigations opened. In fiscal year 2012, the agency filed 102 enforcement actions and opened 350 new investigations”.[[105]](#footnote-105)

Additionally, the DoJ announced that RBS Securities Japan Limited, a wholly owned subsidiary of RBS, pleaded guilty to wire fraud and its role in influencing the Japanese Yen London Interbank Offered Rate.[[106]](#footnote-106) As part of a deferred prosecution agreement they have agreed to pay a $50m fine. Additionally, RBS Securities Japan Limited agreed to pay a $100m penalty [[107]](#footnote-107) and Rabobank paid a $325m criminal penalty.[[108]](#footnote-108) The Bank of America’s Countrywide Financial unit was found answerable for defrauding Fannie Mae and Freddie Mac.[[109]](#footnote-109) Furthermore, JP Morgan reached an agreement with the DoJ relation to the mortgage-backed securities and agreed a settlement worth $13bn.[[110]](#footnote-110) Finally, the DoJ fined Bank of America $16.65bn for fraud before and during the financial crisis in 2014 [[111]](#footnote-111) and in February 2015 it fined S&P $1.375bn for defrauding investors in the lead up to the financial crisis.[[112]](#footnote-112)

The US approach towards white collar crime that contributed towards and emanated from the 2008 financial crisis has failed to successfully prosecute any senior figures in Wall Street. The DoJ appeared to act swiftly after the collapse of the US subprime mortgage market and instigated numerous investigations into a number of failing institutions. The DoJ asserted that it has played an important role in tackling white collar crime associated with the financial crisis. The Attorney General Eric Holder Jr. testified before the Financial Crisis Inquiry Commission stated:

“The Department has a long history of prosecuting financial fraud – and we will continue to do so. Working in concert with our Federal, state, local, tribal and territorial partners, the Justice Department is using every tool at our disposal – including new resources, advanced technologies and communications capabilities, and the very best talent we have – to prevent, prosecute and punish these crimes. And by taking dramatic action, our goal is not just to hold accountable those whose conduct may have contributed to the last meltdown, but to deter such future conduct as well”.[[113]](#footnote-113)

The DoJ claims to have ‘investigated and held accountable those responsible for financial fraud’ during the financial crisis.[[114]](#footnote-114) For example, it has ‘prosecuted some of the most significant financial crimes bringing to justice involving numerous individuals across the country who perpetrated investment, securities and other fraud schemes’.[[115]](#footnote-115) It has been claimed that the creation of the Task Force clearly illustrates that the “investigation and prosecution of financial and investment fraud is a primary concern [for the Obama administration]”.[[116]](#footnote-116) However, the creation of *another* fraud related task force has been questioned. For example, Ramirez suggested that:

“Rather than combating the relentless waves of corporate criminality with a collection of ad hoc task forces that seek to coordinate policy among a vast array of offices and agencies, the DOJ should create a Corporate Crimes Division as a permanent base in the department from which to pursue national policy and to more efficiently investigate and prosecute such crime”.[[117]](#footnote-117)

However, it is important to note that the DoJ has failed to obtain any high profile convictions and in response to these criticisms President Barak Obama announced that he would create a new Financial Crimes Unit “to crack down on large-scale fraud and protect people’s  
investments”.[[118]](#footnote-118) The Attorney General Eric Holder launched the new working group in January 2012 and stated that it would closely work with the Financial Fraud Enforcement Task Force.[[119]](#footnote-119)

**United Kingdom**

The Coalition government has adopted a very similar policy to its US counterparts and introduced legislation aimed at improving its level of banking regulation following the 2008 financial crisis. In its Coalition Agreement the new government stated that it would “reform the regulatory system to avoid a repeat of the financial crisis”.[[120]](#footnote-120) In June 2010, HM Treasury announced that he intended to abolish the FSA and transfer its powers back to the Bank of England,[[121]](#footnote-121) create a Financial Policy Committee,[[122]](#footnote-122) establish the Prudential Regulation Authority,[[123]](#footnote-123) establish the Consumer Protection Markets Authority,[[124]](#footnote-124) establish the single Economic Crime Agency,[[125]](#footnote-125) create the Independent Commission on Banking and introduce a specific bank levy.[[126]](#footnote-126) These measures were partly implemented via the Financial Services Act 2012 which brought a fresh approach towards banking regulation [[127]](#footnote-127) that moved away from the tri-partite system that was introduced by the then Labour government to a ‘twin peaks’ system of regulation.[[128]](#footnote-128) However, despite the similarities in the approaches towards reforming the regulation of banks in the US and UK, there is one fundamental distinction between both countries: their legislative approach towards white collar crime and the financial crisis. For example, as outlined above, one of the first legislative measures introduced by President Bark Obama was the Fraud Enforcement and Recovery Act 2009. This legislation increased the allocation of funding for the DoJ and the FBI, which has previously been diverted by President George Bush toward the War on Terror following the terrorist attacks in September 2001. It is interesting to note that President George Bush refused to redirect any funding during his two terms of office toward the FBI, who had correctly predicted the threat posed by mortgage fraud in 2004. Indeed, the inability of the FBI to tackle mortgage fraud during this period was even recognised by the Financial Crisis Enquiry Commission in its 2011 report.[[129]](#footnote-129) This decision must be questioned and its adverse effects are lavishly clear as the true extent of the involvement between mortgage fraud and financial crisis becomes clearer. Furthermore, the results achieved by the ‘War on Terror’ and the ‘Financial War on Terror’ are derisory at best.[[130]](#footnote-130)

The Coalition government and law enforcement agencies have heavily relied on the common law offence of ‘conspiracy to defraud’ [[131]](#footnote-131) and created new criminal offences to tackle misconduct in the financial sector under the parameters of the Financial Services Act 2012 and Financial Services (Banking Reform) Act 2013. For example, Financial Services Act 2012 abolished the ‘misleading statement and practices’ offence created by the Financial Services and Markets Act 2000.[[132]](#footnote-132) The misleading statement and practices offence was enforced by the FSA, who only secured one successful prosecution,[[133]](#footnote-133) that of Carl and Gareth Bailey in 2005, who were convicted of “recklessly making a statement to the market which was misleading, false or deceptive in a material particular”.[[134]](#footnote-134) The FSA only secured one criminal conviction under this provision of FSMA because they were “not keen” to initiate criminal proceedings.[[135]](#footnote-135) There has been some confusion over the ability of the FSA to commence criminal proceedings for certain types of white collar crime. For example, it wasn’t until to decision of the Supreme Court in *R v Rollins* that the ability of the FSA to prosecute money laundering offences under Part 7 of the Proceeds of Crime was clarified.[[136]](#footnote-136) Furthermore, there is evidence to suggest that the FSA is ‘unsure’ of its ability to prosecute instances of fraud. For instance, the FSA stated that “we cannot prosecute most types of fraud and dishonesty in contrast with money laundering; we have no direct powers to prosecute fraud or dishonesty offences. Prosecution is the responsibility of other law enforcement agencies”.[[137]](#footnote-137) However, the FSA *does* have the regulatory remit to prosecute certain fraudulent activity based on the following cases. For example, in March 2000 the FSA successfullyprosecuted Paul Haslam for breaches of the Banking Act 1987.[[138]](#footnote-138) Furthermore, in February 2008 the FSA successfully prosecuted William Anthony ‘Robin’ Radclyffe, who was convicted after pleading guilty to a series of offences under the Theft Acts, the Financial Services Act 1986 and FSMA 2000.[[139]](#footnote-139) The ‘misleading statement and practices’ offence has been replaced by the Financial Services Act 2012 (Misleading Statements and Impressions) Order,[[140]](#footnote-140) which stipulates relevant activities, investments and benchmarks for the purposes of Part 7 of the Financial Services Act 2012.[[141]](#footnote-141) Additionally, the 2012 Act creates the new offence of creating misleading impressions, where a person will be guilty if they “does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments commits an offence if they intends to create the impression, and (b) the case falls within subsection (2) or (3) (or both)”.[[142]](#footnote-142) More recently, the Financial Services (Banking Reform) Act 2013 resulted in the introduction of criminal sanctions for reckless misconduct by senior managers in the management of a bank.[[143]](#footnote-143) However, the new criminal offence only applies to people covered by the Senior Managers Regime.[[144]](#footnote-144) HM Treasury took the view that Act “introduce[s] a new criminal offence for reckless misconduct in the management of a bank. The new offence will strengthen individual accountability for senior bankers, and act as a deterrent against misconduct”.[[145]](#footnote-145) The foundations of the reckless misconduct offence were located in a consultation document ‘Sanctions for the directors of failed banks’ that was published by HM Treasury in July 2012.[[146]](#footnote-146) The introduction of a new criminal offence of reckless misconduct makes a welcome addition to the armoury of those agencies that have been given the unenviable task of prosecuting white collar criminals. The reckless misconduct offence carries a maximum custodial sentence of seven years.[[147]](#footnote-147) However, its general effectiveness must be questioned because the new criminal offence can only be used for reckless misconduct that leads to a bank failure.[[148]](#footnote-148) This poses a significant question, what is the likelihood of a UK bank failing due to the misconduct of one of its senior officers, when several banks are still partly owned by the tax payer?

However, it is important to note that there has been an increase enforcement activity of regulatory agencies in the UK since the start of the financial crisis. For example, the FSA, as subsequently followed by the FCA, have adopted what it refers to as a ‘credible deterrence’ approach towards its then financial crime statutory objective.[[149]](#footnote-149) In 2007, the FSA imposed a total of £5.3m financial penalties on firms and individuals.[[150]](#footnote-150) A year later, the FSA reported that the figure had increased to £22.7m.[[151]](#footnote-151) In 2009 the total amount of financial penalties imposed by the FSA had risen to £35m.[[152]](#footnote-152) The figures for 2010 and 2011 illustrated an increase to £89.1m [[153]](#footnote-153) and £66.1m.[[154]](#footnote-154) By 2012, the total amount of financial penalties imposed by the FSA, totalled £311.5m.[[155]](#footnote-155) This amount of fines paid in 2013 increased to £474.2m.[[156]](#footnote-156) However, these figures were dwarfed in 2014, when the FCA announced it had collected fines totaling £1.47bn.[[157]](#footnote-157) This amount of fines imposed in the UK by the FSA and FCA since 2011 have been heavily influenced by the imposition of a series of record fines due to the LIBOR, FOREX and gold rigging scandals. For example, a £59.5m fine on Barclays,[[158]](#footnote-158) £160m fine on UBS,[[159]](#footnote-159) £87.5m fine on RBS,[[160]](#footnote-160) ICAP £14m,[[161]](#footnote-161) Rabobank £105m,[[162]](#footnote-162) Barclays £26m,[[163]](#footnote-163) Lloyds Banking Group £105m,[[164]](#footnote-164) UBS £223.8m,[[165]](#footnote-165) RBS £217m,[[166]](#footnote-166) JP Morgan £222m,[[167]](#footnote-167) HSBC £216m [[168]](#footnote-168) and Citibank £225m.[[169]](#footnote-169) It is important to note that the FCA has continued to use the ‘credible deterrence’ strategy by virtue of the Financial Services Act 2012. It has been suggested by one commentator that the:

“FCA intends to pursue the policy of credible deterrence as vigorously as (if not more so than) the FSA has done. This will mean even higher penalties against high-profile targets, both firms and individuals. There has been a continuing trend of imposing significant, exemplary sanctions against senior individuals in the market, particularly in the context of market conduct cases”.[[170]](#footnote-170)

Additionally, there has been an increase in the enforcement activities of the SFO, which was created as a result of the influential recommendations of the Roskill Report and the implementation of the Criminal Justice Act 1987.[[171]](#footnote-171) The SFO is an independent government department that investigates and prosecutes serious, complex fraud and corruption.[[172]](#footnote-172) The SFO was heralded at the UK’s answer to the FBI, due to its combined investigative and prosecutorial powers. However, the SFO has led a troubled life and is perceived by many commentators as a failing organisation. Its reputation has been tarnished by a several high-profile failures including for example Guinness,[[173]](#footnote-173) Blue Arrow,[[174]](#footnote-174) Maxwell,[[175]](#footnote-175) Levitt [[176]](#footnote-176) and Azil Nadir.[[177]](#footnote-177) More recently, the SFO has been in the headlines for its handling of the bribery allegations against BAE Systems and its abandonment of the investigation into arms sales in Saudi Arabia.[[178]](#footnote-178) The weaknesses of the SFO have been highlighted by several reports including the de Grazia Review,[[179]](#footnote-179) HM Crown Prosecution Service Inspectorate in 2008 [[180]](#footnote-180) and 2012.[[181]](#footnote-181) More recently, the SFO has been severely criticized over its poor handling of the Tchenguiz brother’s investigation.[[182]](#footnote-182) However, it is important to note that the SFO has increased the frequency of its investigations and prosecutions against its tainted track record. For example, in 2007 the SFO reported that since 2001 it achieved a conviction rate of 61%.[[183]](#footnote-183) However, this figure increased to 71% in 2006/2007.[[184]](#footnote-184) In its next Annual Report, the conviction rate had increased to 68%.[[185]](#footnote-185) In 2009, the SFO achieved an impressive conviction rate of 91%;[[186]](#footnote-186) however, the figure fell to 84% in 2010, 73% in 2011 [[187]](#footnote-187) and 70% in 2012.[[188]](#footnote-188) The SFO responded to the drop in conviction rate and achieved an 85% conviction success rate in 2013.[[189]](#footnote-189) It is essential to point out that the enforcement performance of the SFO has also been hindered by decision to extend their remit to include the Bribery Act 2010.[[190]](#footnote-190) Under the Act the SFO or “chief prosecutors of offences under the Bribery Act”,[[191]](#footnote-191) have been provided with additional prosecutorial powers by creating several new offences.[[192]](#footnote-192) This includes for example offering, promising or providing a bribe,[[193]](#footnote-193) requesting, agreeing to receive, or accepting a bribe,[[194]](#footnote-194) bribery of foreign public officials [[195]](#footnote-195) and failure of commercial organisations to prevent bribery.[[196]](#footnote-196) As will be argued in the next section of this paper, the ability of the SFO to effectively enforce the Bribery Act 2010 must be questioned due to the extensive reduction in its operating budget since the 2010 General Election.

One of the major criticisms of the response to white collar crime emanating from the financial crisis has been the lack of criminal prosecutions. During the height of the financial crisis, David Cameron as leader of the opposition, boldly proclaimed that the City of London faced a ‘Day of Reckoning’ and that severe penalties would be imposed for those bankers whose reckless activities caused the financial crisis.[[197]](#footnote-197) During his ‘Day of Reckoning’ speech, David Cameron stated that the “important step we must take in enforcing responsibility in the City is to make sure that when rules are broken, and culprits are found, they are properly punished … the problem … is that there just doesn’t seem to be the will to see appropriate justice done at the highest level”.[[198]](#footnote-198) A number of interesting points can be raised from this section of the speech. For example, David Cameron stated that when “rules are broken, and culprits are found, they are properly punished”.[[199]](#footnote-199) This raises a very important question, how many of those who are responsible for the financial crisis or contributed to it have been held criminally liable since the Coalition government was formed in 2010? The answer at the time of writing is one, following the admission of conspiracy to defraud originating from the manipulation of LIBOR.[[200]](#footnote-200) Furthermore, not one director of a bank has been disqualified by the Department for Business Innovation and Skills [[201]](#footnote-201) under the Company Director Disqualification Act 1986.[[202]](#footnote-202) One of the most notorious failures by the FSA and DBIS relates to the actions of Fred Goodwin, who according to the DBIS have “prosecutable evidence” to pursue disqualification proceedings under the Company Directors Disqualification Act 1986.[[203]](#footnote-203) Despite the continued political rhetoric from politicians and the DBIS, the stark reality remains, that not one company director has been disqualified for conduct relating to the financial crisis. David Cameron also claimed that “corporate America really understood the consequences of dodgy accounting not just when Enron collapsed - but when Jeffrey Skilling was given a twenty-four year jail sentence”.[[204]](#footnote-204) This part of the speech must be questioned as there has been no high profile prosecutions let along convictions for those who contributed towards the financial crisis in the US. US law enforcement and regulatory agencies have concentrated on imposing what were initially perceived as impressive financial penalties on the culprits and also pursuing deferred or non-prosecution agreements. Sadly, authorities in the UK have adopted a similar, rather limp approach. David Cameron added that the “SFO should be following up every lead, investigating every suspect transaction … the government should be urging them on, because we need to make it one hundred percent clear: those who break the law should face prosecution”.[[205]](#footnote-205) In order for the SFO to ‘follow up’ every lead it is essential that it is granted the appropriate levels of funding. However, since the in 2010 General Election, the SFO, like many other government departments and agencies, has had its budget cut as part of a glut of extensive austerity measures. For example, the annual budget of the SFO in was £43.3m, in 2008/2009 it was £53.2m, in 2009/2010 the figure reduced to £40.1m, in 2010/2011 it was £35.5m, in 2011/2012 the annual budget of the SFO was £31.5m and this will reduce to £34,800 in 2012/2013, £32.1m in 2013/2014 and £30.8m in 2014/2015.[[206]](#footnote-206) The decision to reduce the budget of the SFO, at a time where white collar crime has increased and the duties of the SFO have been expanded to incorporate the enforcement of the Bribery Act 2010, has been questioned and criticised.[[207]](#footnote-207) The imposition of budgetary cuts on the SFO since 2010 initially adversely affected its investigation into the alleged manipulation of LIBOR.[[208]](#footnote-208) The Wall Street Journal reported that the SFO were unable to accept the offer to investigate LIBOR in 2011, due to significant budget cuts.[[209]](#footnote-209) However, it has also been argued that the former Director of the SFO, Richard Alderman, refused to investigate LIBOR and handed over to the FSA.[[210]](#footnote-210) It is important to note that the Coalition government responded by increasing the SFO budget into the investigation of LIBOR.[[211]](#footnote-211)

The UK stance towards white collar crime emanating from the financial crisis has been adversely affected because there has not been a coordinated policy from the Coalition government. What we have witnessed from the government amounts to nothing more than customary political rhetoric as illustrated by the Prime Minister’s ‘Day of Reckoning Speech’ and the ‘We take white collar crime seriously’ speech by George Osborne. In fact, it can be concluded that the Coalition government has not added to the foundations of a white collar crime strategy that were laid down by the Labour government following the publication of its money laundering strategy in 2004,[[212]](#footnote-212) the Fraud Review in 2006,[[213]](#footnote-213) its 2007 counter-terrorist financing strategy [[214]](#footnote-214) and bribery strategy.[[215]](#footnote-215) The Coalition government boldly asserted that it would tackle white collar crime and briefly considered the idea of creating a single Economic Crime Agency to tackle white collar crime.[[216]](#footnote-216) Sadly, the excellent vision of ECA was never achieved, largely due to continued political infighting and the desire of the government to reduce the budgetary deficit.[[217]](#footnote-217)

This clearly illustrates that the ‘day of reckoning’ speech amounts to another example of empty political promises. It is to the bemusement of the author that the Coalition government has steadfastly refused to provide any additional funding to such agencies as the SFO. In fact, the government has reduced the funding of the SFO by 25% since coming into office. This has resulted in the SFO going ‘cap in hand’ to HM Treasury to provide additional funding so that it could complete its investigation in to the manipulation of LIBOR. This is hardly the ideal picture that needs to be presented of the SFO. The Coalition government decided to create the National Crime Agency,[[218]](#footnote-218) a multifaceted organisation that would seek to tackle white collar crime as part of its wider agenda when compared to the previously narrow focused ECA.[[219]](#footnote-219) However, as opposed to merging the then existing white collar crime agencies into the NCA, we are left with an elaborate regulatory and law enforcement spiders web that has given different agencies overlapping roles leading to confusion and delay.

**Conclusion**

What become clear after reviewing the responses to white collar crime that is associated with the 2008 financial crisis is that both President Barak Obama and Prime Minster David Cameron have pledged to bring the perpetrators to justice. However, these bold statements have amounted to little more than sporadic attempts to prosecute those who allegedly contributed toward the financial crisis. For example, despite the advances made by the FBI towards tackling mortgage fraud, not one member of Wall Street has been convicted of a criminal offence in relation to the financial crisis. This can be contrasted with the tougher and more comprehensive response of law enforcement agencies after the Savings and Loans Crisis in the 1980s and the response to the collapse of Enron and WorldCom. It is the conclusion of this article that US law enforcement and regulatory agencies have deliberately steered away from pursuing criminal proceedings and have sought to impose inadequate media friendly financial penalties, which represent a very small percentage of a firm’s annual profits. The SEC and the DoJ are both culpable of adopting ill-considered approaches towards the enforcement of white collar crime legislation. For example, this was clearly illustrated by the meagre fines imposed by US authorities against several banks who manipulated LIBOR. None of the parties to the deferred prosecution agreements have been found criminally responsible for one of the largest frauds that have arisen during the financial crisis. This is also evident by the imposition of a several ‘record’ financial penalties imposed by the SEC. Sadly, the position is comparable with the enforcement activities in the UK by the FSA and FCA, who has also imposed a set of headline grabbing financial penalties on banks who manipulated LIBOR and FORX. The position has not been assisted by an inadequate legislative and regulatory framework that resulted in LIBOR not amounting to a regulated activity, thus exempting it from regulation. We were left in a very unsatisfactory position where LIBOR was managed and administered by British Bankers Association, thus representing the continuation of a ‘relic’ or the ‘dark side’ of banking regulation, namely self-regulation. The response of both governments in the US and UK was to initially introduce new legislative measures to improve their banking regulation and a series of economic stimulus measures aimed at maintaining the financial stability of both countries. However, there is one stark difference between the approaches in the US and UK, the Fraud Enforcement and Recovery Act 2009. This legislative measure was a direct response to white collar crime that is not only associated with the 2008 financial crisis, but also caused the financial crisis. This legislation redressed the imbalance caused by the policy and legislative directions pursued by President George Bush following the terrorist attacks in September 2001. The Coalition government has adopted a very different legislative approach by creating several reactionary criminal offences aimed at those involved in market manipulation. The enforcement response in both countries has been unsatisfactory, a point illustrated by the paucity of the financial penalties imposed by law enforcement and regulatory agencies. It is extremely likely that the future efforts of law enforcement agencies and regulators in the UK and US will continue to utilise financial penalties and there will be a small number of criminal prosecutions for low level traders.

1. Hereinafter ‘US’. [↑](#footnote-ref-1)
2. Hereinafter ‘UK’. [↑](#footnote-ref-2)
3. See Financial Fraud Enforcement Task Force ‘stopgraud.gov’, n/d, available from <http://www.stopfraud.gov/index.html>, accessed February 16 2015. [↑](#footnote-ref-3)
4. Hereinafter ‘FBI’. [↑](#footnote-ref-4)
5. Hereinafter ‘DoJ’. [↑](#footnote-ref-5)
6. Hereinafter ‘SEC’. [↑](#footnote-ref-6)
7. See Security and Exchange Commission ‘SEC Enforcement Actions – addressing the misconduct that led to or arose from the financial crisis’, September 14 2014, available from <http://www.sec.gov/spotlight/enf-actions-fc.shtml>, accessed January 14 2015 [↑](#footnote-ref-7)
8. Hereinafter ‘FSA’. [↑](#footnote-ref-8)
9. Hereinafter ‘FCA’. It is important to note that prior to the creation of the FCA, this role was performed by the Financial Services Authority under the Financial Services and Markets Act 2000 who pursued a policy of ‘credible deterrence’. For a more detailed discussion see Wilson, S. and Wilson. G. ‘The FSA, “credible deterrence”, and criminal enforcement - a “haphazard pursuit”?’ (2014) Journal of Financial Crime, 21(1). 4-28. [↑](#footnote-ref-9)
10. Hereinafter ‘SFO’. [↑](#footnote-ref-10)
11. Hereinafter ‘LIBOR’. [↑](#footnote-ref-11)
12. # Serious Fraud Office ‘LIBOR manipulation: banker pleads guilty to conspiracy to defraud’, October 7 2014, available from <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/libor-manipulation-banker-pleads-guilty-to-conspiracy-to-defraud.aspx>, accessed January 14 2015.

    [↑](#footnote-ref-12)
13. For a general discussion of this point see Hillman, H. ‘Are the current laws and potential enforcement measures effective in achieving the accountability of bank directors for their actions, or the actions of the banks they manage? A comparison of UK and US approaches’, in Ryder, N, Turksen, U. and Hassler, S. (*eds*) *Fighting Financial Crime in the Global Economic Crisis* (Routledge: 2014) at 189-229. [↑](#footnote-ref-13)
14. Financial Services and Markets Act 2000, s. 56. [↑](#footnote-ref-14)
15. Financial Services and Markets Act 2000, s. 206. In 2014, the FCA reported that the amount of times imposed totalled £1,471,431,800. See Financial Conduct Authority ‘2014 Fines’, January 7 2015, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines/2014>, accessed February 4 2015. [↑](#footnote-ref-15)
16. For an interesting discussion of why there have been a low number of criminal prosecutions since the financial crisis see Pontell, H. Black, W. and Geis, G. ‘Too big to fail, too powerful to jail? On the absence of criminal prosecutions after the 2008 financial meltdown’ (2014) Crime, Law and Social Change, 61(1), 1-13. [↑](#footnote-ref-16)
17. For a more detailed explanation of this and other associated terms see Harrison, K. and Ryder, N. *The Law Relating to Financial Crime in the United Kingdom* (Ashgate: Farnham, 2013) at 1-3. [↑](#footnote-ref-17)
18. Reinhart, C. and Rogoff, K. *This time is different – eight centuries of financial folly* (Princeton University Press: New Jersey, 2009). [↑](#footnote-ref-18)
19. See International Monetary Fund *Global Financial Stability Report: Containing Systemic Risks and Restoring Financial Soundness* (International Monetary Fund, 2008). [↑](#footnote-ref-19)
20. Department of Treasury *Financial regulatory reform – A new foundation: Rebuilding financial supervision and regulation* (Department of Treasury: London, 2009). [↑](#footnote-ref-20)
21. For an interesting commentary on the UK response to the financial crisis see Arora, A. *Banking Law* (Pearson: Harlow: 2014) at 123-167 and HM Government Review of HM Treasury’s management response to the financial crisis (HM Government: London, 2012). [↑](#footnote-ref-21)
22. Financial Crisis Inquiry Commission *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (Financial Crisis Inquiry Commission: Washington DC, 2011). [↑](#footnote-ref-22)
23. For an interesting discussion of the subprime model see Seitz, N., Gilsinan, J., Fisher, J., Harshman, E., Islam, M., Yeager, F. and Millar, J. ‘The U.S. subprime mortgage crisis: what have we learned?’ (2010) Company Lawyer, 31(11), 355–361, McDonald, O. ‘The American mortgage market’ (2012) Company Lawyer, 33(6), 183–184 and Yeoh, P. ‘Hedge funds: from privileged child to locust and now bogeyman?’ (2012) Company Lawyer, 33(2), 42–49. [↑](#footnote-ref-23)
24. Financial Crisis Inquiry Commission above, n 22 at xvi. [↑](#footnote-ref-24)
25. See Taylor, J. *The financial crisis and the policy responses: an empirical analysis of what went wrong* National Bureau of Economic Research: Cambridge, 2009) [↑](#footnote-ref-25)
26. See Neely, C. ‘The Federal Reserve Responds to Crises: September 11th Was Not the First’ (2004) Federal Reserve Bank of St. Louis *Review*, March/April, 86(2), 27-42 [↑](#footnote-ref-26)
27. The arguments on the relationship between the financial crisis and banking deregulation relate to the impact of several pieces of legislation including the Graham-Leach-Bailey Act 1999, the Depository Institutions Deregulation and Monetary Control Act 1980 and the Garn St Germain Depository Institutions Act 1982. See Levitin, A. ‘The crisis without a face: emerging narratives of the financial crisis’ (2009) University of Miami Law Review, 63, 999-1010, at 1004. [↑](#footnote-ref-27)
28. See Ryder, N. and Thomas, R. ‘[Convenient credit and consumer protection - A critical review of the responses of Labour and coalition governments’ (2011)](http://eprints.uwe.ac.uk/20295/) Journal of Social Welfare and Family Law, 33(1), 85-95. [↑](#footnote-ref-28)
29. See Ryder, N. and Broomfield, K. ‘Predatory lending and white collar crime: A critical reflection’ (2014) *International Company and Commercial Law Review* (9), 287-293. [↑](#footnote-ref-29)
30. See Dickerson, M. ‘Over-indebtedness, the subprime mortgage crisis, and the effect on US cities’ (2009) Fordham Urban Law Journal, 36, 395-425. [↑](#footnote-ref-30)
31. See for example, Financial Services Authority *The Turner Review A regulatory response to the global banking crisis* (Financial Services Authority: London, 2009) andHM Treasury *Walker Review of Corporate Governance of UK Banking Industry* (HM Treasury: London, 2009). [↑](#footnote-ref-31)
32. See HM Treasury Select Committee *The Run of the Rock* (HM Treasury Select Committee: London, 2008). [↑](#footnote-ref-32)
33. See Ryder, N. *The financial crisis and white collar crime – the perfect storm* (Edward Elgar: Cheltenham, 2014) at 138-142. [↑](#footnote-ref-33)
34. See for example European Commission *Report of the High-Level Group on Financial Supervision in the EU* (European Commission: Brussels, 2009). [↑](#footnote-ref-34)
35. Hutchins, A. ‘Flip That Prosecution Strategy: An Argument for Using RICO to Prosecute Large-Scale Mortgage Fraud’ (2011) Buffalo Law Review 59(1), 293 at 306 [↑](#footnote-ref-35)
36. See generally Dickerson above, n 30. [↑](#footnote-ref-36)
37. Arsalidou, D. ‘The banking crisis: rethinking and refining the accountability of bank directors’ (2010) Journal of Business Law, 4, 284-310 at 292. [↑](#footnote-ref-37)
38. For a critical discussion of securitisation see Nwogugu, M. ‘Securitisation is illegal: racketeer influenced and corrupt organisations, usury, antitrust and tax issues’ (2008) Journal of International Banking Law and Regulation, 23(6), 316-332. [↑](#footnote-ref-38)
39. See Levitin above, n 27. [↑](#footnote-ref-39)
40. Gevurtz, G. ‘The role of corporate law in preventing a financial crisis: reflections on in re Citigroup Inc shareholder derivative litigation’ (2010) Pacific McGeorge Global Business & Development Law Journal, 23, 113, at 3. [↑](#footnote-ref-40)
41. Choi, J. and Papaioannou, M. ‘Financial crisis and risk management: reassessing the Asian financial crisis in light of the American financial crisis’ (2010) East Asia Law Review, Summer, 5, 442–466, at 443 [↑](#footnote-ref-41)
42. See for example the impact of the decision in *Marquette National Bank of Minneapolis v. First Omaha Service Corp* [439 U.S. at 299](http://international.westlaw.com.ezproxy.uwe.ac.uk/find/default.wl?mt=314&db=780&findtype=Y&tc=-1&rp=%2ffind%2fdefault.wl&spa=ukwengland-000&ordoc=0331422364&serialnum=1978139553&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=0914DDB4&referenceposition=299&rs=WLIN12.07). For a more detailed discussion of the impact of this case on the deregulation of the consumer credit market in the US see Schaefer, E. ‘The Credit Card Act of 2009 was not enough: a national usury rate would provide consumers with the protection they need’ (2012) University of Baltimore Law Review, Summer, 41, 741-767. [↑](#footnote-ref-42)
43. See European Commission above, n 34. [↑](#footnote-ref-43)
44. See generally Tomasic, R. ‘The financial crisis and the haphazard pursuit of financial crime’ (2011) Journal of Financial Crime, 18(1), 7–31. [↑](#footnote-ref-44)
45. Hereinafter ‘CRA’. [↑](#footnote-ref-45)
46. See Ryder above, n 33. [↑](#footnote-ref-46)
47. *Ibid*., at 47-58. [↑](#footnote-ref-47)
48. For an interesting discussion of this see Chambers, C. and Ryder, N. ‘[The credit crunch and mortgage fraud- too little too late? A comparative analysis of the policies adopted in the United States of America and the United Kingdom](http://eprints.uwe.ac.uk/14443/)’. In: Balogh, I. and Kis, S., eds. (2010) *Housing, housing costs and mortgages: Tends, impact and prediction*, Nova Science Publishers, 1-22. [↑](#footnote-ref-48)
49. See Federal Bureau of Investigation ‘Financial Crimes Report to the Public – Fiscal Years 2010-2011’, n/d, available from <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011/financial-crimes-report-2010-2011#Mortgage>, accessed January 9 2015. [↑](#footnote-ref-49)
50. Hereinafter ‘FinCEN’. [↑](#footnote-ref-50)
51. Hereinafter ‘SARs’. Financial Crimes Enforcement Network *Mortgage Loan Fraud an Industry Assessment based upon Suspicious Activity Report Analysis* (Financial Crimes Enforcement Network: Washington DC, 2006) at 4. [↑](#footnote-ref-51)
52. Mahallati, N. ‘Chapter 174: California’s dedicated mortgage fraud statute’ (2010) McGeorge Law Review, 41, 712-724, at 717. [↑](#footnote-ref-52)
53. Financial Crimes Enforcement Network *Mortgage Loan Fraud an update on trends based on analysis of suspicious activity reports April 2008* (Financial Crimes Enforcement Network: Washington DC, 2008) at 4. [↑](#footnote-ref-53)
54. Financial Crimes Enforcement Network *Mortgage Loan Fraud Update – suspicious activity report filings from January 1 – December 31 2010* (Financial Crime Enforcement Network: Washington DC, 2011) at 2. [↑](#footnote-ref-54)
55. Financial Crimes Enforcement Network *Mortgage Loan Fraud* (Financial Crime Enforcement Network: Washington DC, 2012) at 2. [↑](#footnote-ref-55)
56. Lexis Nexis *The LexisNexis 14th Annual Mortgage Fraud Report* (Lexis Nexis: 2012) at 3. [↑](#footnote-ref-56)
57. Smith, J. ‘The structural causes of mortgage fraud’ (2010) Syracuse Law Review, 60, 473-500, at 473. [↑](#footnote-ref-57)
58. For example, Black took the view that “the total SARs figure is only a faint indication of the true incidence of mortgage fraud”. See Black, K. ‘Neo-classical economic theories, methodology, and praxis optimize criminogenic environments and produce recurrent intensifying crisis’ (2011) Creighton Law Review, 44, 597–644, at 623. [↑](#footnote-ref-58)
59. Fisher, L. ‘Target marketing of subprime loans: racialised consumer fraud and reverse redlining’ (2009) Journal of Law & Policy, 18, 121-155, at 144. [↑](#footnote-ref-59)
60. Shelley, M. and Jackson, M. ‘Sub-prime Lending, its Deficiencies and the Government Responses’ (2008) Journal of International Banking Law and Regulation, 23(10), 523-537, at 527. [↑](#footnote-ref-60)
61. Department of Treasury Task Force on Predatory Lending *Curbing Predatory Home Mortgage Lending* 1 Treasury Task Force on Predatory Lending: Washington DC, 2000) at 1. [↑](#footnote-ref-61)
62. Nwogugu, M. ‘Corporate governance and high-risk finance: alternative methods for financing domestic/foreign emerging growth companies with inadequate collateral’ (2005) Journal of International Banking Law and Regulation, 20(10), 541-558, at 544. [↑](#footnote-ref-62)
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128. House of Commons Joint Committee on the draft Financial Services Bill *Draft Financial Services Bill Session 2010–12* (House of Commons Joint Committee on the draft Financial Services Bill: London, 2011) at 9. The ‘twin peaks’ regulatory model has been successfully used in Australia and Canada. Indeed, it has been argued that this model of financial regulation was extremely effective in countering the problems caused by the 2008 financial crisis. For example, the Assistant Governor of the Reserve Bank of Australia stated that “the regulatory culture in Australia may have been different from the one that prevailed in other countries … Some regulatory cultures are more comfortable than others with making use of softer powers. In Australia APRA would describe itself as being towards the end of the spectrum; that is, it would be more comfortable with using its persuasive powers and ability to put pressure on institutions to try to influence the way they behave”. As cited in House of Commons Joint Committee on the draft Financial Services Bill *Draft Financial Services Bill Session 2010–12* (House of Commons Joint Committee on the draft Financial Services Bill: London, 2011) at 10. [↑](#footnote-ref-128)
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131. For an interesting discussion of this common law offence see Jarvis, P. ‘Conspiracy to defraud: a siren to lure unwary prosecutors’ (2014) Criminal Law Review, 10, 738-743 and The Law Commission *Criminal Law: Conspiracy to Defraud* (The Law Commission: London, 1994). [↑](#footnote-ref-131)
132. This was originally a criminal offence under the Financial Services Act 1986, s. 47. See Swan, E. ‘Market abuse regulation and energy trading’ (2004) International Energy Law & Taxation Review, 4, 91-100, at 94. For a detailed commentary on the effectiveness of s. 47 of the Financial Services Act 1986 see Barnett, W. ‘Fraud enforcement in the Financial Services Act 1986: an analysis and discussion of s.47’ (1996) Company Lawyer, 17(7), 203-210. The misleading statement and practices offence provided that a person commits an offence if “(a)makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular; (b)dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or (c)recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular”. Financial Services and Markets Act 2000, s. 397(1). For a more detailed commentary see Hayes, A. ‘Market abuse’ (2010) Compliance Officer Bulletin, 75(Apr), 1-31 and Marsh, J. and McDonnell, B. ‘Handling price sensitive information: a guide to the legal and regulatory obligations’ (2005) Compliance Officer Bulleting, 23(Feb), 1-39. [↑](#footnote-ref-132)
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     [↑](#footnote-ref-139)
140. S.I 2013/637. [↑](#footnote-ref-140)
141. The order specifically refers to and identifies the London Interbank Offered Rate (LIBOR) as the only relevant benchmark. Additionally, the 2012 Act reproduces the ‘misleading statement and practices’ criminal offence. For example s. 89 applies to individuals who “(a) makes a statement which P knows to be false or misleading in a material respect, (b) makes a statement which is false or misleading in a material respect, being reckless as to whether it is, or (c) dishonestly conceals any material facts whether in connection with a statement made by P or otherwise”. See Financial Services Act 2012, s. 89(1). [↑](#footnote-ref-141)
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143. Financial Services (Banking Reform) Act 2013, s. 36. [↑](#footnote-ref-143)
144. HM Treasury ‘Financial Services (Banking Reform) Bill Government annotated amendments: Criminal Sanctions’, October 7 2013, available from <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245778/Annotated_Clause_-_Criminal_Sanctions.pdf>, accessed October 9 2013. The proposed offence provides that a person commits an offence if “(a) at a time when S is a senior manager in relation to a bank (B), S- (i) takes, or agrees to the taking of, a decision by or on behalf of B as to the way in which the business of a group bank is to be carried on, or (ii) fails to take steps that S could take to prevent such a decision being taken, (b) at the time of the decision, S is aware of a risk that the implementation of the decision may cause the failure of the group bank, (c) in all the circumstances, S‘s conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S‘s position, and (d) the implementation of the decision causes the failure of the group bank”. See HM Treasury *Financial Services (Banking Reform) Bill Government Amendments Criminal Sanctions* (HM Treasury: London, 2013) at 1. [↑](#footnote-ref-144)
145. HM Treasury added that “Senior managers could be liable if they take a decision which leads to the failure of the bank, or fail to take steps available to them to prevent such a decision being taken. The offence will only apply to behaviour which falls far below the standard that could reasonably be expected of a person in that position – this is similar to the test for corporate manslaughter. In addition, at the time the decision was taken, the senior manager must have been aware of a risk that its implementation may cause the failure of the bank”. See HM Treasury *Financial Services (Banking Reform) Bill Government Amendments Criminal Sanctions* (HM Treasury: London, 2013) at 1-2. [↑](#footnote-ref-145)
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155. Financial Services Authority ‘FSA Fines Table 2012’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2012>, accessed 8March 2013. [↑](#footnote-ref-155)
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160. Financial Services Authority ‘RBS fined £87.5m for significant failings in relation to LIBOR’ 6 February 2013, available from <http://www.fsa.gov.uk/library/communication/pr/2013/011.shtml>, accessed 8th February 2013. [↑](#footnote-ref-160)
161. # Financial Conduct Authority ‘ICAP Europe Limited fined £14 million for significant failings in relation to LIBOR’, September 25 2013, available from <http://www.fca.org.uk/news/icap-europe-limited-fined>, accessed February 5 2015.

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162. Financial Conduct Authority ‘The FCA fines Rabobank £105 million for serious LIBOR-related misconduct’, October 29 2013, available from <http://www.fca.org.uk/news/the-fca-fines-rabobank-105-million-for-serious-libor-related-misconduct>, accessed February 5 2015. [↑](#footnote-ref-162)
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168. *Ibid*. [↑](#footnote-ref-168)
169. Financial Conduct Authority above, n 165. [↑](#footnote-ref-169)
170. Travers Smith Regulatory Investigations Group ‘FSA enforcement action: themes and trends’ (2012) Compliance Officer Bulletin, [96(May), 1-30](https://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=6&crumb-action=replace&docguid=I6AC585A0BD1811E1A08EDA7C2C323C40), at 2. [↑](#footnote-ref-170)
171. Criminal Justice Act 1987, s. 1(1). [↑](#footnote-ref-171)
172. Serious Fraud Office ‘Who are we’, n/d, available from <http://www.sfo.gov.uk/about-us/who-we-are.aspx>, accessed 11 March 2013. [↑](#footnote-ref-172)
173. For a more detailed discussion see Sarker, R. ‘The trials and errors of the Guinness four’ (1995) Journal of Financial Crime, 3(1), 86-88 and Page, F. ‘Defining fraud: an argument in favour of a general offence of fraud’ (1997) Journal of Financial Crime, 4(4), 287-308. [↑](#footnote-ref-173)
174. For a more detailed discussion of this case see Cohen, H. ‘What place does the criminal law have in the regulation of securities markets after the Blue Arrow trials?’ (1992) Journal of International Banking Law, 7(10), 420-422 and Kirk, D. ‘Blue Arrow: the SFO on trial’ (1992) International Company and Commercial Law Review, 3(10), 331-333. [↑](#footnote-ref-174)
175. For a more detailed discussion see Sarker, R. ‘Maxwell: fraud trial of the century (Case Comment)’ (1996) Company Lawyer, 17(4), 116-117 and Honess, T. ‘Juror competence in processing complex information: implications from a simulation of the Maxwell trial’ (1998) Criminal Law Review, November 763-773. [↑](#footnote-ref-175)
176. For a more detailed discussion see Sarker, R. ‘The Serious Fraud Office - quo vadis?’ (1995) Company Lawyer, 16(2), 56-61. [↑](#footnote-ref-176)
177. For a more detailed discussion see Gallagher, J., Lauchlan,J. and Steven, M. ‘Polly PeckL the breaking of an entrepreneur?’ (1996) Journal of Small Business and Enterprise Development, 3(1), 3-12. [↑](#footnote-ref-177)
178. The decision by the SFO to terminate its investigation into sale of arms in Saudi Arabia was subject to a judicial review and the Queen’s Bench Divisional Court determined that the decision was unlawful. See The Queen on the application of (1) Corner House Research (2) Campaign Against Arms Trade v The Director of the Serious Fraud Office (Defendant) and BAE Systems Plc (Interested Party), Claim No CO/1567/2007, High Court of Justice, Queen's Bench Division, Administrative Court, 18 April 2007. However, this decision was overturned on appeal by House of Lords. See R (on the application of Corner House Research and others) v Director of the Serious Fraud Office [2008] UKHL 60, 30 July 2008, para 11. [↑](#footnote-ref-178)
179. de Grazia, J. *Review of the Serious Fraud Office – Final Report* (Serious Fraud Office: London, 2008). [↑](#footnote-ref-179)
180. HM Crown Prosecution Service Inspectorate *Review of the Fraud Prosecution Service* (HM Crown Prosecution Inspectorate: London, 2008). [↑](#footnote-ref-180)
181. HM Crown Prosecution Service Inspectorate *Report of the Attorney General on the inspection of the Serious Fraud Office* (HM Crown Prosecution Service Inspectorate: London, 2012). [↑](#footnote-ref-181)
182. # See for example Neate, R. ‘Tchenguiz brothers seek millions from Serious Fraud Office’, December 3 2012, available from <http://m.guardian.co.uk/business/2012/dec/03/tchenguiz-brothers-millions-damages-sfo>, accessed 18 March 2013, Russel, J. ‘Tchenguiz brothers launch damages case against SFO’, 2 December 2012, available from <http://www.telegraph.co.uk/finance/financial-crime/9717240/Tchenguiz-brothers-launch-damages-case-against-SFO.html>, accessed 18 March 2013.

     [↑](#footnote-ref-182)
183. Serious Fraud Office *Annual Report 2006/2007* (Serious Fraud Office: London, 2007) at 4. [↑](#footnote-ref-183)
184. *Ibid*. [↑](#footnote-ref-184)
185. Serious Fraud Office *Annual Report 2007/2008* (Serious Fraud Office: London, 2007) at 5. [↑](#footnote-ref-185)
186. Serious Fraud Office *Annual Report 2009/2010* (Serious Fraud Office: London, 2010) at 2. [↑](#footnote-ref-186)
187. Serious Fraud Office *Annual Report and Accounts 2011/2012* (Serious Fraud Office: London, 2012) at 6. [↑](#footnote-ref-187)
188. Serious Fraud Office *Annual Report and Accounts 2012/2013* (Serious Fraud Office: London, 2013) at 4. [↑](#footnote-ref-188)
189. Serious Fraud Office *Annual Report and Accounts 2013/2014* (Serious Fraud Office: London, 2014) at 1. [↑](#footnote-ref-189)
190. A full detailed commentary on the Bribery Act 2010 is beyond the scope of this article. For a more detailed analysis see Wells, C. ‘Who’s afraid of the Bribery Act 2010?’ (2012) Journal of Business Law, 5, 420-431; Yeoh, P. ‘The UK Bribery Act 2010: contents and implications’ (2012) Journal of Financial Crime, 19(1), 37-53 and Rose, C. ‘The UK Bribery Act 2010 and accompanying guidance: belated implementation of the OECD Anti-Bribery Convention’ (2012) International & Comparative Law Quarterly, 61(2), 484-499. [↑](#footnote-ref-190)
191. Breslin, B., Ezickson, D. and Kocoras, J. ‘The Bribery  Act 2010: raising the bar above the US Foreign Corrupt Practices Act’ (2010) Company Lawyer, 31(11), 362-369, at 362. [↑](#footnote-ref-191)
192. For an excellent discussion on the enforcement of the Bribery Act 2010 see Monteith, C. ‘The Bribery  Act 2010: Part 3: enforcement’ (2011) Criminal Law Review , 2, 111-121. [↑](#footnote-ref-192)
193. Bribery Act 2010, s. 1. [↑](#footnote-ref-193)
194. Bribery Act 2010, s. 2. [↑](#footnote-ref-194)
195. Bribery Act 2010, s. 6. [↑](#footnote-ref-195)
196. Bribery Act 2010, s. 7. [↑](#footnote-ref-196)
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198. # Conservatives ‘David Cameron: A day of reckoning’, December 15 2008, available from <http://www.conservatives.com/News/Speeches/2008/12/David_Cameron_A_day_of_reckoning.aspx>, accessed June 29 2013.

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199. *Ibid*. [↑](#footnote-ref-199)
200. Serious Fraud Office above, n 12. [↑](#footnote-ref-200)
201. Hereinafter ‘DBIS’. [↑](#footnote-ref-201)
202. Hereinafter ‘CDDA’. [↑](#footnote-ref-202)
203. Quinn, J. ‘Vince Cable: RBS report recommends prosecution’, 17 June 2012, available from <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9336327/Vince-Cable-RBS-report-recommends-prosecution.html>, accessed February 16 2015. [↑](#footnote-ref-203)
204. See Conservative above, n 198. [↑](#footnote-ref-204)
205. *Ibid*. [↑](#footnote-ref-205)
206. Serious Fraud Office above, n 187 at 7. Also see for example Purkiss, A. ‘U.K. Fraud Office Hit by Budget Cuts, Staff Losses’, March 28 2011, available from <http://www.bloomberg.com/news/2011-03-28/u-k-fraud-office-hit-by-budget-cuts-staff-losses-ft-reports.html>, accessed June 30 2013. [↑](#footnote-ref-206)
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214. HM Treasury *The financial challenge to crime and terrorism* (HM Treasury: London, 2007). [↑](#footnote-ref-214)
215. HM Government *UK anti-corruption plan* (HM Government: London, 2014). [↑](#footnote-ref-215)
216. Policy Exchange *Fighting Fraud and Financial Crime* (Policy Exchange: London, 2010). [↑](#footnote-ref-216)
217. However, it is still important to note that several media reports have suggested that the Home Secretary Teresa May intends to abolish the SFO following the 2015 General Election and house it within the NCA. See Binham, C. and Warrell, H. ‘Theresa May revives attempt to abolish SFO’, October 5 2014, available from <http://www.ft.com/cms/s/0/e15dc7c0-4ae9-11e4-b1be-00144feab7de.html#axzz3RuwtlSW7>, accessed January 16 2015. David Green, the Head of the SFO responded to these reports and defended the performance of the much maligned agency. See Binham, C. ‘SFO chief hits out at Theresa May’s plan to abolish agency’, October 9 2014, available from <http://www.ft.com/cms/s/0/eafa5c90-4fca-11e4-908e-00144feab7de.html#axzz3RuwtlSW7>, accessed February 16 2015. [↑](#footnote-ref-217)
218. Hereinafter ‘NCA’. [↑](#footnote-ref-218)
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