VI. Aftermath of the LIBOR Scandal

A. Introduction

LIBOR, the London Inter-bank Offered Rate, is a key benchmark interest rate that supports an estimated $450 trillion of financial deals.[1] In order to set LIBOR's daily rate, selected banks are supposed to submit the actual interest rates they are paying, or an estimate of rates they would expect to pay, to borrow from other banks.[2] Based on an average of these submissions, LIBOR is then "[c]alculated for five different currencies . . . at seven different maturity lengths" for up to one year.[3] Allegedly, traders of various banks worked together "to influence the final average rate . . . by agreeing amongst themselves to submit rates that were either higher or lower than their actual estimates," referred to as the LIBOR Scandal.[4] These traders submitted false estimates to increase trade profits or portray the institutions as more stable than they were.[5] Although former traders claim rate manipulation has occurred over the past few decades, it was not until Barclays Bank's criminal settlements in June 2012 that the public received notice of the fraudulent and collusive acts related to rate submissions.[6]

Martin Wheatley, former CEO of the Financial Conduct Authority (FCA), conducted an independent review and proposed

---

[1] *See Libor: What Is It and Why Does It Matter?*, BBC NEWS (Aug. 3, 2015), http://www.bbc.com/news/business-19199683 [http://perma.cc/N8GD-RUE2] [hereinafter *Libor*].
[2] *See id.*
[3] *See* James McBride et al., *Understanding the Libor Scandal*, COUNCIL ON FOREIGN REL. (Aug. 3, 2015), http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729 [http://perma.cc/FL74-DYJ4].
[4] *See Libor*, *supra* note 1; McBride et al. *supra* note 3.
[5] *The LIBOR Scandal: The Rotten Heart of Finance*, ECONOMIST, (July 7, 2012), http://www.economist.com/node/21558281 [http://perma.cc/ZZ5X-NK4F] [hereinafter *The LIBOR Scandal*].
[6] *Id.* ("[D]amning evidence has emerged, in documents detailing a settlement between Barclays and regulators . . . ."); CNN Wire Staff, *Barclays Makes Public Apology After Rate-Rigging Scandal*, CNN, (July 14, 2012), http://www.cnn.com/2012/07/14/business/barclays-scandal-apology/index.html [http://perma.cc/7PZA-SU7Z].

several recommendations in efforts to reform LIBOR.[7] Upon Wheatley's recommendation, Intercontinental Exchange Group (ICE) became the new, independent administrator for LIBOR in 2014.[8] According to most critics, however, the reforms have not gone far enough to restore confidence in our financial system.[9] Many have also critiqued the United Kingdom's relaxed approach to white-collar crime.[10] Although global banks have incurred over $9 billion in fines related to LIBOR manipulation as of May 2015, former UBS trader Thomas Hayes was the first individual to stand trial.[11] In August 2015, a U.K. court convicted Hayes for his role in the LIBOR scandal—a big win for the U.K.'s Serious Fraud Office (SFO).[12] United States' Deputy Attorney General Sally Yates recently announced new policies for prosecutors and investigators to implement in the coming months.[13] These policies emphasize the importance of individuals being held accountable as an effective deterrent for future corporate fraud.[14] Specifically, in October 2015, the Department of Justice (DOJ) brought its first case against corporate individuals, two former Rabobank traders.[15] Both men

---

[7] Max Colchester, *FSA Sets Out Rules to Prevent Rate-Rigging*, WALL ST. J., (Mar. 25, 2013, 10:26 AM), http://www.wsj.com/articles/SB10001424127887324789504578382233768389610 [http://perma.cc/BG5S-ERQV].

[8] *See ICE Benchmark Administration Limited – Overview,* ICE LIBOR (2014) https://www.theice.com/publicdocs/IBA_ICE_LIBOR_Overview.pdf [https://perma.cc/7SCB-E5YW].

[9] *See* Juliet Samuel & Chiara Albanese, *No Fix for Libor: Benchmark Still Broken, Regulators Say*, WALL ST. J. (July 7, 2015, 6:30 AM), http://www.wsj.com/articles/libor-reform-has-not-gone-far-enough-says-regulator-1436195584 [http://perma.cc/679Q-R7KU].

[10] *See* Giles Turner & David Enrich, *U.K. Serious Fraud Office Plans More Libor Charges in the Fall*, WALL ST. J. (Aug. 4, 2015, 12:18 PM), http://www.wsj.com/articles/u-k-fraud-office-plans-more-libor-charges-in-the-fall-1438695884 [http://perma.cc/3V4U-YWQH].

[11] McBride et al., *supra* note 3.

[12] Turner & Enrich, *supra* note 10.

[13] William D. Cohan, *Justice Dept. Shift on White-Collar Crime is Long Overdue*, N.Y. TIMES DEALBOOK (Sept. 11, 2015), http://www.nytimes.com/2015/09/12/business/dealbook/justice-dept-shift-on-white-collar-crime-is-long-overdue.html [http://perma.cc/EB3R-QNGS].

[14] *Id.*

[15] Nate Raymond & Brendan Pierson, *Former Rabobank Traders Convicted in U.S. Over Libor Rigging,* REUTERS (Nov. 5, 2015, 5:06 PM),

were found guilty of fraud for their role in rigging LIBOR.[16] Although such cases have unique challenges, the DOJ will likely continue prosecuting specific corporate executives.[17]

This article discusses the history of LIBOR, illuminates ways in which the rate can be manipulated, reports the penalties, convictions, and pending trials as a result of the LIBOR Scandal, and analyzes various solutions to repair this heavily relied upon rate. First, Part B discusses LIBOR's importance to financial markets, the potential for its manipulation, and the rise of the LIBOR Scandal. Part C analyzes the various sanctions regulators imposed on banks involved in rate-rigging as well as several reforms slowly implemented since 2012. Next, Part D discusses the pending lawsuits facing numerous banks and Thomas Hayes's trial. Part E examines the new Deputy Attorney General's new policies seeking to prosecute Wall Street executives. Finally, Part F explores a variety of suggestions to reform LIBOR or replace it altogether in efforts to instill confidence back in the public and in financial institutions.

B. Brief History of LIBOR and the Rise of the Scandal

LIBOR was created in the 1980s—a time when banks regularly made loans to one another.[18] This rate became "the most relied upon global benchmark for short-term interest rates."[19] Mortgages, auto loans, student loans, and other financial products typically depend on LIBOR as an important reference rate.[20] LIBOR is intended to depict the health and overall confidence of the financial system.[21] The rate is set daily by using between eleven and eighteen international banks' estimated interest rate submissions,

---

http://www.reuters.com/article/2015/11/05/us-rabobank-libor-trial-idUSKCN0SU2HX20151105#YXkhuBzxx3hbvaqE.97 [http://perma.cc/ZY8X-GHLH].

[16] *Id.*

[17] *See* Matt Apuzzo & Ben Protess, *Justice Dept. Sets Sights on Executives*, N.Y. TIMES, Sept. 10, 2015, at A1.

[18] Gary Gensler, Opinion, *Libor, Naked and Exposed*, N.Y. TIMES, Aug. 7, 2012, at A23.

[19] McBride et al., *supra* note 3.

[20] *See id.*

[21] *See Libor*, *supra* note 1.

supposedly based on their honest beliefs regarding borrowing costs.[22] The top and bottom four submissions are discarded, and the remaining rates are averaged.[23] Currently, the rate is calculated for five different currencies at seven different maturities.[24] The most important borrowing rate is the three-month dollar LIBOR, indicating "what a bank would pay to borrow dollars for three months from other banks."[25]

Since the submissions are based on estimates rather than actual prices, LIBOR is highly susceptible to manipulation.[26] Rate setting had "one flaw": dependence on bankers who have a financial interest in the published LIBOR rate.[27] Investigations revealed that the majority of the banks setting LIBOR may have submitted rates that were "30-40 basis points too low on average."[28] Very little lending between banks occurred beginning in 2007, minimizing the amount of real market transactions to use as support for rate submissions.[29] Further, traders had an incentive to manipulate their rate submissions in order to increase their profits on derivatives.[30] Additionally, the banks' submissions reflected their solvency, and thus, there was a desire to be aligned with other bank submissions to appear less risky and more stable.[31] An estimated twenty big banks were allegedly involved in rigging LIBOR by submitting false estimates of their borrowing costs.[32]

---

[22] McBride et al., *supra* note 3 ("The rate for each currency is set by panels of between eleven and eighteen banks."); *The LIBOR Scandal*, *supra* note 5.
[23] *The LIBOR Scandal*, *supra* note 5.
[24] McBride et al., *supra* note 3.
[25] *The LIBOR Scandal*, *supra* note 5.
[26] *See* Benn Steil & Dinah Walker, Opinion, *Good Riddance to Libor, a Flawed Benchmark*, COUNCIL ON FOREIGN REL. (July 30, 2012), http://www.cfr.org/international-finance/good-riddance-libor-flawed-benchmark/p28763 [http://perma.cc/W3CY-JMCX].
[27] *This Is the First Person to Be Tried in the Libor-Rigging Case*, BLOOMBERG BUS. (May 6, 2015, 2:26 PM), http://www.bloomberg.com/news/articles/2015-05-06/after-seven-years-a-libor-rigging-case-heads-to-court-in-london [http://perma.cc/XEA8-ZTLK].
[28] *The LIBOR Scandal*, *supra* note 5.
[29] *Id.*
[30] *See* McBride et al., *supra* note 3 ("[T]raders could make profits on derivatives pegged to the base rate . . . .").
[31] Steil & Walker, *supra* note 26. *See The LIBOR Scandal*, *supra* note 5.
[32] *See The LIBOR Scandal*, *supra* note 5.

Since LIBOR serves as an important benchmark in setting interest rates for corporate loans, when LIBOR changes, the rates and payments on auto, student, and home loans also fluctuate.[33] The manipulation of LIBOR "eroded public trust in the marketplace" because "trillions of dollars of financial instruments were priced at the wrong rate."[34] Even the smallest of changes to LIBOR can result in millions of dollars of profits or losses.[35] As the larger, savvier institutions are increasing their own profits, the effects of rate manipulation have a global financial impact.[36] Aside from monetary losses, rate manipulation harms the integrity of our financial system.[37] Governor of the Federal Reserve, Jerome H. Powell, acknowledged that LIBOR's application extends "well beyond its intended uses" and that it is possibly playing "too important" a role in our financial system.[38]

Officials at both the New York Federal Reserve and the Bank of England were aware of the need for LIBOR reforms.[39] In 2008, the New York Federal Reserve, specifically, knew about Barclays's dishonest submissions and the likelihood that other banks were submitting similarly false rates.[40] The New York Federal Reserve did not conduct an investigation, but simply informed British Bankers' Association (BBA), LIBOR's administrator at the time, of their recommendation for reforms.[41] In contrast, the Commodities Futures Trading Commission (CFTC) led their own

---

33 *See* McBride et al., *supra* note 3.

34 *Id.* (quoting Francesco Guerrera, *What's Next to Watch in Libor Drama*, WALL ST. J. (July 9, 2012, 7:46 PM), http://www.wsj.com/news/articles/SB10001424052702303567704577516450784443534?cb=logged0.4418117869544181 [http://perma.cc/8TYP-YX87]).

35 *The LIBOR Scandal*, *supra* note 5.

36 *See id.*

37 *See* Jerome H. Powell, Governor, Fed. Reserve, Address at the Money Marketeers of NYU: Reforming U.S. Dollar LIBOR: The Path Forward (Sept. 4, 2014), *available at* http://www.federalreserve.gov/newsevents/speech/powell20140904a.htm [http://perma.cc/B6JJ-D446].

38 *Id.*

39 *Tracking the Libor Scandal*, N.Y. TIMES DEALBOOK (Aug. 3, 2015), http://www.nytimes.com/interactive/2015/04/23/business/dealbook/db-libor-timeline.html#/#time370_10903 [http://perma.cc/49VK-Z5RY].

40 *See id.*

41 *See id.*

investigation once the allegations of rate manipulation surfaced.[42] Authorities found an immeasurable amount of "e-mails, chat-room conversations and phone records that . . . showed traders colluding to try to manipulate the rates."[43] These traders' "actions had worldwide repercussions."[44]

C. Regulators Impose Sanctions but Reforms are Slow to Occur

1. Sanctions

In 2012, Barclays paid $451 million in fines to U.S. and U.K. regulators for its involvement in the Scandal.[45] UBS settled for $1.5 billion over a complaint comprised of "over 2,000 instances of wrongdoing."[46] In December 2013, the European Union imposed the "largest combined penalty ever by the European competition authorities," requiring eight banks to pay $2.3 billion in fines.[47] Deutsche Bank AG's settlement with investigators was comprised of a $2.5 billion fine and an order to fire seven employees.[48] Lloyds Banking Group's involvement in rate manipulation resulted in an $86 million criminal penalty as part of a deferred prosecution agreement entered into with the DOJ.[49] The agreement also required Lloyds to

---

[42] Sheila Bair, *Libor and the Folly of Deregulation*, FORTUNE (Aug. 17, 2012, 9:00 AM), http://fortune.com/2012/08/17/libor-and-the-folly-of-deregulation/ [http://perma.cc/D3SK-GMS6].

[43] *See This Is the First Person to Be Tried in the Libor-Rigging Case*, *supra* note 27.

[44] *Id.*

[45] Trefis Team, *FDIC Sues 16 Global Banks For Roles In Manipulating LIBOR*, FORBES (Mar. 18, 2014, 1:50 PM), http://www.forbes.com/sites/greatspeculations/2014/03/18/fdic-sues-16-global-banks-for-roles-in-manipulating-libor/ [http://perma.cc/XB8J-Z9ZZ].

[46] McBride et al., *supra* note 3.

[47] *Tracking the Libor Scandal*, *supra* note 39.

[48] *Citigroup Says U.S. Declines to Prosecute on Libor Rigging*, BLOOMBERG BUS. (May 11, 2015, 1:57 PM), http://www.bloomberg.com/news/articles/2015-05-11/citigroup-says-doj-declined-to-prosecute-on-libor-rigging-i9jwkab5 [http://perma.cc/5PX5-TCBM].

[49] Press Release, Dep't of Justice, Office of Pub. Affairs, Lloyds Banking Group Admits Wrongdoing in Libor Investigation, Agrees to Pay $86 Million Criminal Penalty (July 28, 2014), *available at* http://www.justice.gov/opa/pr/lloyds-banking-group-admits-wrongdoing-

cooperate with further investigations into other institutions and to accept responsibility for its role in the scandal.[50]

2. Reforms

In July 2012, the U.K. government requested that Martin Wheatley propose ideas for more effective oversight of interest rate setting.[51] Wheatley recommended removing BBA as LIBOR's administrator, basing rate submissions on "transaction data," and imposing statutory regulations for administration and submission methods.[52] Until March 2013, LIBOR regulatory supervision was "largely left up to industry bodies."[53] Recognizing the potential for abuse when the industry is self-regulated, the Financial Services Authority (FSA) implemented a few new regulations for LIBOR, many of which came from Wheatley's recommendations.[54] On April 2, 2013, LIBOR became a regulated activity under the Financial Services and Markets Act 2000.[55] U.K.'s regulator must now approve individuals responsible for overseeing rate submissions, and banks are required to have rigid rules regarding conflicts of interest.[56] In February 2014, ICE became LIBOR's new administrator.[57] Other reforms included streamlining LIBOR currencies to five and maturities to seven, instead of ten and fifteen, respectively, and not publishing rate submissions immediately, effective July 2013.[58] Another significant change was the implementation of criminal sanctions for rate manipulation.[59]

---

libor-investigation-agrees-pay-86-million-criminal [http://perma.cc/RJP4-EZPA].

[50] *Id.*

[51] Colchester, *supra* note 7.

[52] *See ICE Benchmark Administration Limited – Overview*, *supra* note 8.

[53] Colchester, *supra* note 7.

[54] *See id.*

[55] *LIBOR Becomes a Regulated Activity*, BBA (Apr. 2, 2013), https://www.bba.org.uk/news/press-releases/libor-becomes-a-regulated-activity [http://perma.cc/6QJE-N5CU].

[56] Colchester, *supra* note 7.

[57] HM Treasury & The Rt Hon Sajid Javid MP, *First Day of Business for New LIBOR Administrator*, GOV.UK (Feb. 3, 2014), https://www.gov.uk/government/news/first-day-of-business-for-new-libor-administrator [https://perma.cc/5F9C-GHTD].

[58] *LIBOR Becomes a Regulated Activity*, *supra* note .

[59] *See Libor*, *supra* note 1.

Traders' daily activities at large banks are now "recorded and monitored more often than ever before."[60] Phones, which were somewhat of a "haven, a place to build rapport and negotiate details of trades," are now under surveillance.[61] Dodd-Frank, passed in 2010, is in part the reason for this added surveillance, which requires firms to use "text and audio recordings to reconstruct details about certain trades in the derivatives market."[62] Regulators are now forced to screen numerous recordings and even translate traders' unique terms to find out their potential importance amongst traders.[63] After a review of Deutsche Bank AG employees' conversations with clients, two traders were fired in June 2015.[64] Thomas Hayes's trial and subsequent conviction included recordings which helped prove his involvement in rate manipulation.[65] Now, most large firms have prohibited the use of online chat rooms as an additional preventive measure against collusive behavior.[66]

D. Lawsuits and Convictions

In 2013, Freddie Mac and Fannie Mae filed lawsuits against several banks for reportedly losing $3 billion due to LIBOR manipulation.[67] Larger banks exert greater influence over LIBOR rate setting than smaller banks, and thus can attempt to produce a more suitable outcome for themselves during difficult financial times, but to the detriment of other, smaller banks.[68] Last year, the Federal Deposit Insurance Corporation (FDIC) filed a "lawsuit on behalf of 38 banks which went bankrupt" during the 2008 financial

---

[60] Emily Glazer, *Traders' Phones Are Becoming a Surveillance Zone*, WALL ST. J. (Sept. 14, 2015, 7:02 AM), http://www.wsj.com/articles/for-traders-no-more-privacy-on-the-phone-1442168422 [http://perma.cc/35D2-VHWT].
[61] *Id.*
[62] *Id.*
[63] *Id.* ("[Regulators] also must learn to translate piles of head-scratching terms—from 'bip' to 'yard' to 'monkey'—that have specific meaning to traders.").
[64] *See id.*
[65] *See id.*
[66] *This Is the First Person to Be Tried in the Libor-Rigging Case*, *supra* note 27.
[67] *See* Trefis Team, *supra* note 45.
[68] *See id.*

crisis, blaming their losses on interest-rate derivative investments.[69] The FDIC is seeking compensation and punitive damages for larger banks' misconduct, which is estimated at about $1 billion in total damages sought.[70]

Although huge fines were imposed on numerous banks, Thomas Hayes was the first trader to actually face charges for manipulating LIBOR rates.[71] Hayes, referred to by his colleagues as "Rain Man" due to his mild autism and "quirky personality," is a former UBS and Citigroup trader.[72] He faced eight counts of fraud for his role in the LIBOR scandal.[73] Hayes denied any misconduct and claimed that his bosses were not only aware of his actions, but were also involved.[74] In 2013, Hayes agreed to cooperate with the SFO by pleading guilty and testifying against other individuals.[75] SFO investigators interviewed Hayes for a total of 82 hours, during which "he repeatedly admitted that he had acted dishonestly."[76] He later claimed that he never believed he was guilty but was only trying to evade extradition to the U.S. due to similar crimes charged in 2012.[77] Nevertheless, the court found Hayes guilty on all counts and sentenced him to prison for fourteen years.[78] The trial judge "separated Hayes' [sic] conduct at each of the banks where he worked, making the sentences in respect of each consecutive" and not allowing for any mitigation.[79]

---

[69] *See id.*
[70] *See id.*
[71] *This Is the First Person to Be Tried in the Libor-Rigging Case*, *supra* note 27
[72] David Enrich, *Former Trader Tom Hayes Sentenced to 14 Years for Libor Rigging*, WALL ST. J. (Aug. 3, 2015, 7:22 PM), http://www.wsj.com/articles/tom-hayes-convicted-of-libor-rigging-1438610483?cb=logged0.5917282539246015 [http://perma.cc/YHT3-9E3E].
[73] *See id.*
[74] *See id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *See* Elly Proudlock & David Rundle, *The Political Implications Of UK's Tom Hayes Verdict*, LAW360 (Aug. 21, 2015, 3:29 PM), http://www.law360.com/articles/693346/the-political-implications-of-uk-s-tom-hayes-verdict [http://perma.cc/4NKM-64PJ].

Hayes's conviction is a huge victory for U.K. authorities who are often criticized for their leniency on white-collar crime.[80] Since Hayes's trial, a new trial has now commenced against six former brokers who were "willing and enthusiastic" to help Hayes in manipulating LIBOR and being "rewarded in various ways."[81] These men, also with "colorful nicknames, like Lord Libor and Big Nose," pleaded not guilty to the allegations regarding their roles in rate manipulation.[82] Their trial is expected to last longer than three months and contain records of instant messages, emails, and phone calls.[83] Eleven other men are currently anticipating their London trials for alleged rate-rigging.[84] SFO's director, David Green, claims he plans to prosecute "as high up the organization as [one] might choose."[85] Hayes's conviction will likely bolster SFO's additional efforts "to secure convictions in its ongoing investigations and prosecutions."[86] The conviction also increases the likelihood for the DOJ's success in future cases by giving it "greater leverage."[87] Currently, the DOJ is preparing to prosecute former Deutsche Bank employees allegedly involved in the scandal, and may file charges before year's end.[88] Although the laws vary by country, "the reactions jurors may have to the Libor allegations may be similar."[89]

Hayes's conviction also offers strong support for class action plaintiffs.[90] Although Hayes's conviction may be inadmissible in

---

[80] *See* Turner & Enrich, *supra* note 10.
[81] Chad Bray, *Trial Opens for 6 Brokers Accused of Rigging Libor*, N.Y. TIMES, Oct. 7, 2015, at B6.
[82] *Id.*
[83] *Id.*
[84] *See* Turner & Enrich, *supra* note 10.
[85] *Id.*
[86] Proudlock & Rundle, *supra* note 79.
[87] *See* Stephanie Russell-Kraft, *UK's Guilty Verdict in Libor Trial Bodes Well for DOJ*, LAW360 (Aug. 3, 2015, 7:22 PM), http://www.law360.com/articles/686816/uk-s-guilty-verdict-in-libor-trial-bodes-well-for-doj [http://perma.cc/TNG7-A5A5].
[88] Suzi Ring, *Deutsche Bank Libor Traders Said to Be Interviewed by SFO*, BLOOMBERG BUS. (Aug. 26, 2015, 11:03 AM), http://www.bloomberg.com/news/articles/2015-08-26/deutsche-bank-libor-traders-said-to-be-interviewed-by-u-k-sfo [http://perma.cc/B233-Y4Q4].
[89] Russell-Kraft, *supra* note 87.
[90] *See* Evan Weinberger, *1st UK Conviction Gives More Ammunition to Libor Plaintiffs*, LAW360 (Aug. 3, 2015, 6:35 PM), http://www.

these cases, testimony from both that case and "any further testimony from other defendants will be admissible."[91] "[A]s co-conspirators are convicted, plead guilty, or settle, particularly if they agree to cooperate against remaining defendants," pending cases become more practical.[92] Private lawsuits regarding banks' conduct have resulted in various outcomes.[93] For instance, a district judge in Manhattan dismissed a private lawsuit regarding the LIBOR Scandal due to her finding that rate manipulation was "not anticompetitive conduct."[94]

E. DOJ Prosecuting Wall Street Executives

In September 2015, the DOJ "issued new policies . . . [to] prioritize the prosecution of individual employees . . . and put pressure on corporations to turn over evidence against their executives."[95] Although hefty fines have been imposed, these policies, by implication, recognize the lack of actual prosecutions by the DOJ during President Obama's term for executives' involvement in "the housing crisis, the financial meltdown and corporate scandals."[96] Deputy Attorney General Yates, who authored this memorandum, pointed out that, "Corporations can only commit crimes through flesh-and-blood . . . ."[97] She recognized the importance of accountability for wrongdoing and the public's need for confidence in a justice system applied equitably.[98] The memo, which was sent to federal prosecutors, instructs investigators to focus on individuals from the outset, requiring companies to specifically identify employees, "regardless of their position, status or seniority," in exchange for mitigated penalties for their cooperation."[99]

---

law360.com/articles/686505/1st-uk-conviction-gives-more-ammunition-to-libor-plaintiffs [http://perma.cc/9R86-HCGJ].

[91] *Id.*

[92] *See id.*

[93] *See* Nathaniel Popper, *Banks to Settle With Investors in Suit Over Crisis*, N.Y. TIMES, Sept. 12, 2015, at B5

[94] *See id.* ("One of the most prominent suits . . . was thrown out by another United States district judge in Manhattan, who said that rate rigging was not anticompetitive conduct . . . .").

[95] Apuzzo & Protess, *supra* note 17.

[96] *See id.*

[97] *Id.*

[98] *See id.*

[99] *Id.*

The policies are only non-binding guidelines, which means that the DOJ's interpretations may influence their impact.[100] Prior to Yates's memo, however, the DOJ, under Attorney General Eric Holder, was repeatedly criticized for its disparate and relaxed treatment of corporate executives.[101] In 1999, Holder's memorandum, now termed the "Holder Doctrine," argued that "big financial institutions are 'too big to jail'" due to the possible negative impact on our financial system.[102] Holder's focus was on "extracting huge fines" in exchange for the government's silence regarding any wrongdoing.[103] Further, the Holder Doctrine is cited as one of the primary reasons that Wall Street businesses and executives associated with the recent financial crisis escaped prosecution.[104]

As of October 2015, the first U.S. criminal trial concerning the LIBOR Scandal commenced in Manhattan federal court.[105] Two traders at Rabobank, Anthony Allen and Anthony Conti, faced charges for "exploit[ing] and abus[ing] their role" in setting Libor, but denied any involvement.[106] Both men, however, were found guilty and face up to ten years in prison.[107] Prosecutors for this case and for the current trial in the U.K. are spending significant time educating the jury on the intricacies of Libor.[108]

Now, companies are "expected to name names," a much stricter policy than simply submitting internal investigative findings to the DOJ.[109] Yates finds that holding parties personally accountable for their wrongdoing is important to "combat corporate

---

[100] *Id.*
[101] *See id.*
[102] Cohan, *supra* note 13.
[103] *Id.*
[104] *See id.*
[105] Kevin Dugan, *First US Trial Over Libor Scandal Kicks Off*, N.Y. POST (Oct. 14, 2015), http://nypost.com/2015/10/14/first-us-trial-over-libor-scandal-kicks-off [http://perma.cc/EPW7-HUBW].
[106] *Id.*
[107] Patricia Hurtado & Tom Schoenberg, *U.S. Wins First Libor-Rig Case as Ex-Rabobank Traders Convicted*, BLOOMBERG BUS. (Nov. 5, 2015, 11:28 AM), http://www.bloomberg.com/news/articles/2015-11-05/u-s-wins-its-first-libor-rigging-prosecution-in-n-y-jury-trial [http://perma.cc/3UCV-VHCR].
[108] *Id.* ("[T]he prosecutor tried to sketch out how the alleged scam, filled with financial jargon, worked."); Chad Bray, *supra* note 81.
[109] Apuzzo & Protess, *supra* note 17 at A19.

misconduct."[110] She claims this type of accountability is a deterrent for future misconduct, which encourages corporate behavior to change and restores faith in our justice system.[111]

F. Suggestions for and Hurdles to Reform

As of May 2015, total global fines for LIBOR manipulation have exceeded $9 billion and over "one hundred traders or brokers have been fired or suspended," twenty-one of whom are facing charges.[112] Many critics still find LIBOR "broken," and the "efforts to overhaul" the rate insufficient.[113] Powell points to two possible resolutions for the U.S. dollar LIBOR.[114] First, redefining LIBOR by including a larger variety of transaction types will enable the rate to "reflect actual bank funding costs," making it more precise.[115] A second solution is to "promote robust alternatives . . . that better reflect the secured nature of many of today's financial market transactions."[116] Other suggested reforms include making the government the rate's overseer, leaving the rate up to market forces, penalizing false submissions while increasing the number of banks submitting, and punishing specific traders.[117]

U.K. and U.S. regulators disagree about which methods to employ for reforming LIBOR.[118] The New York Federal Reserve claims that the only options are "repair and reform, or replace."[119] Many U.S. critics find LIBOR "totally discredited" and favor establishing a new transaction-based rate.[120] U.K. regulators argue for a "gradual shift" that allows for LIBOR to still apply to existing contracts, allowing future contracting parties to choose either LIBOR or a transaction-based rate.[121] Wheatley supports LIBOR being based

---

110 Cohan, *supra* note 13.
111 *Id.*
112 McBride et al., *supra* note 3.
113 Samuel & Albanese, *supra* note 9.
114 Powell, *supra* note 37.
115 *See id.*
116 *Id.*
117 Nin-Hai Tseng, *Four Fixes to the Libor Scandal*, FORTUNE (July 23, 2012, 3:36 PM), http://fortune.com/2012/07/23/four-fixes-to-the-libor-scandal/ [http://perma.cc/Q333-CCZK].
118 McBride et al., *supra* note 3.
119 *Id.*
120 *Id.*
121 *Id.*

on actual trades, completely removing the submitters' judgment.[122] Removing judgment, however, could present an issue on days when "there are not enough transactions to allow a rate to be calculated."[123] Regulators want to increase bank participation in setting LIBOR, but many banks are hesitant "to participate in the scandal-tainted process."[124] An additional "hurdle to [LIBOR] reform: red tape."[125] If and when LIBOR is changed, any contracts or other documents referencing LIBOR would also require revisions.[126]

G. Conclusion

Numerous civil actions have been filed against various banks, but determining "a figure for the potential liability facing banks" is difficult.[127] Further, these cases are expanding into uncharted legal territory.[128] Other difficulties include determining when a party was hurt due to a change in LIBOR, how long the harm persisted, and what particular investments were affected.[129] Another problematic task is "determining what [LIBOR] should have been without the rigging, a key element" in deciding how much parties were harmed.[130] Banks have an incentive to settle these civil claims, but quantifying the impact is tough.[131] The DOJ faces significant challenges in pursuing high-level officials due to their ability to "insulate themselves from direct involvement in wrongdoing."[132] Banks "face an asymmetric risk" due to their intermediary role in transactions.[133] Thus, if a bank manipulated LIBOR, one of the bank's clients likely suffered a loss while another likely enjoyed a financial gain.[134] Banks cannot recover their customers' unjust gains resulting from the manipulation, but may be sued for damages by

122 Samuel & Albanese, *supra* note 9.
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *The LIBOR Scandal*, *supra* note 5.
128 *Id.*
129 Weinberger, *supra* note 90.
130 *Id.*
131 *Id.*
132 Apuzzo & Protess, *supra* note 17.
133 *The LIBOR Scandal*, *supra* note 5.
134 *Id.*

those who were harmed.[135] "The Financial Stability Board, an umbrella of global regulators," is pushing to have a new transaction-based rate before the end of 2016.[136] "Reforming LIBOR and rebuilding the reputation of this crucial global benchmark" is essential for efforts to regain the public's trust and confidence in the financial system.[137]

Alexandra Youngblood[138]

---

[135] *Id.*

[136] Chiara Albanese, *Super Regulator On A Libor Reform Mission*, WALL ST. J. (July 23, 2014, 11:31 AM), http://blogs.wsj.com/moneybeat/2014/07/23/super-regulator-on-a-libor-reform-mission/ [http://perma.cc/Y6NJ-4QNW].

[137] HM Treasury & The Rt Hon Sajid Javid MP, *supra* note 57.

[138] Student, Boston University School of Law (J.D. 2017)