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Filling the Regulatory Void in the FX Spot Market: How Traders Rigged the Biggest Market in the World

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FILLING THE REGULATORY VOID IN THE FX SPOT MARKET: HOW TRADERS RIGGED THE BIGGEST MARKET IN THE WORLD

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“What is the chief end of man? – to get rich. In what way? – dishonestly if we can, honestly if we must.”

—Mark Twain

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

—Justice Louis D. Brandeis

INTRODUCTION

On June 12, 2013, Bloomberg published an article exposing a practice by which traders for the world’s biggest international banks colluded to manipulate the benchmark for foreign currency exchange rates for their own profit.¹ The article explained, “[t]he behavior occurred daily in the spot foreign-exchange market and has been going on for at least a decade, affecting the value of funds and derivatives.”² The foreign currency exchange (forex or FX) market is the biggest market in the world, with a daily turnover rate of \$5.3 trillion as of April 2013.³ Yet, there is “no single global body to police

1. See Liam Vaughan, Gavin Finch & Ambereen Choudhury, *Traders Said to Rig Currency Rates to Profit Off Clients*, BLOOMBERG (June 11, 2013, 7:00 PM), <http://www.bloomberg.com/news/articles/2013-06-11/traders-said-to-rig-currency-rates-to-profit-off-clients> [<https://perma.cc/Q3AJ-R9GW>].

2. *Id.*

3. BANK OF INT’L SETTLEMENTS, 85TH ANNUAL REPORT: 1 APRIL 2014-31 MARCH 2015, at 85 (2015). The manipulated benchmark rates “are used as settlement values for currency derivatives . . . meaning that they largely determine the value of instruments worth some \$3.3 trillion in daily trading. About two trillion

the massive 24/7 forex market.”⁴ “The FX market is like the Wild West,” according to a trader who spent twelve-years working at banks.⁵

For two years investigations of this accusation went on, with the market unsure of how to proceed.⁶ Although the investigation is still continuing, it has so far resulted in over \$10 billion in fines for seven of the world’s largest financial institutions,⁷ four banks pleading guilty to violations of the Sherman Antitrust Act,⁸ and over thirty of the banks’ top traders being fired, suspended, or put on leave.⁹ The investigation has sparked unprecedented regulatory scrutiny on the foreign currency exchange market.¹⁰

The impact of foreign exchange benchmark rates on urban economies is profound. According to Joseph Gold, former General Counsel of the International Monetary Fund, “for most countries, there is no single price which has such an important influence on both

dollars more is traded in the ‘spot’ market.” Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215, 235-36 (2015).

4. Roger Aitken, *Forex Market Regulation: Who Can Really Police This Global Market?*, FORBES (Aug. 11, 2014, 10:25 AM), <http://www.forbes.com/sites/rogeraitken/2014/08/11/forex-market-regulation-who-can-really-police-this-global-market/>.

5. Vaughan, Finch & Choudhury, *supra* note 1.

6. See Richard Willsher, *Why FX Needs Better Policy Synchronization and Trading Transparency*, E-FOREX MAG. (April 2015), <http://www.fxspotstream.com/wp-content/uploads/2015/04/e-forex-April-2015.pdf> [<https://perma.cc/QEE2-3DX6>] (“Uncertainty over the future course of regulation and whether more trading malpractice may come to light are continuing to cloud the foreign exchange market.”).

7. Karen Freifeld, David Henry & Steve Slater, *Global Banks Admit Guilt in Forex Probe, Fined Nearly \$6 Billion*, REUTERS (May 20, 2015, 6:28 PM), <http://www.reuters.com/article/us-banks-forex-settlement-idUSKBN0O50CQ20150520> [<https://perma.cc/6PFQ-FUGE>].

8. Antoine Gara, *Four Banks Plead Guilty to Foreign Exchange Collusion, UBS Pleads Guilty to Wire Fraud*, FORBES (May 20, 2015, 11:12 AM), <http://www.forbes.com/sites/antoinegara/2015/05/20/four-banks-plead-guilty-to-foreign-exchange-collusion-ubs-pleads-guilty-to-wire-fraud/#1ece824c48cd> (explaining that a fifth bank, UBS, was granted immunity because of its cooperation in the FX investigation, but accepted a guilty plea to wire fraud for its violation of a non-prosecution agreement in connection with its involvement in manipulating LIBOR rates in 2012).

9. Suzi Ring & Hugo Miller, *UBS Traders May Be First to Face Sanctions in Forex Probes*, BLOOMBERG (Nov. 30, 2015, 11:00 PM), <http://www.bloomberg.com/news/articles/2015-12-01/seven-ubs-traders-may-be-first-to-face-sanctions-in-fx-probes> [<https://perma.cc/3A2N-6H9X>].

10. See Rick Baert, *Major Changes Are Coming Following FX Crackdown*, PENSIONS & INVEST. (Dec. 22, 2014), <http://www.pionline.com/article/20141222/PRINT/312229983/major-changes-are-coming-following-fx-crackdown> [<https://perma.cc/MK8L-N58G>].

the financial world—in terms of asset values and rates of return, and on the real world—in terms of production, trade and employment.”¹¹ The benchmark rates are not only pivotal in the FX market, but the “Dow Jones Industrial Average, S&P 500, FTSE 100, and others equity indices all use the WM/Reuters benchmarks to compute the value of stocks denominated in foreign currency.”¹² Seventy-five percent of all forex trading takes place in just five cities: London (41%); New York (19%); Singapore (5.7%); Tokyo (5.6%); and Hong Kong SAR (4.1%).¹³ Cities have long been centers for commerce, trade, and ideas, and the FX manipulation scheme poses a threat to the economies within these cities and the urban experiment generally.

This Note aims to provide an approachable explanation of the complex FX regulatory scheme and how the manipulation came about, along with an analysis of the future of the market. Part I of this Note outlines the history and structure of the FX market and explains the way the manipulation scheme worked. Part II provides a detailed look at the market’s regulatory scheme. Part III provides a discussion of the arguments for and against additional regulation and proposals that have been made. Lastly, Part IV proposes a solution to the regulatory void present in the foreign exchange spot market: to create a reporting requirement for the purpose of monitoring and transparency and to impose more severe criminal sanctions.

I. MECHANICS OF THE FOREIGN CURRENCY MARKET AND MANIPULATION SCHEME

Part I of this Note provides a brief history of the foreign currency exchange market, explains how the foreign exchange market functions, explains its impact on other global markets, and details the way the benchmark manipulation scheme worked.

11. Richard Myrus, *From Bretton Woods to Brussels: A Legal Analysis of the Exchange-Rate Arrangements of the International Monetary Fund and the European Community*, 62 FORDHAM L. REV. 2095, 2095 (1994) (“Orderly exchange-rate management is crucial for nations seeking to maintain stable price levels and sustained economic growth. Exchange rate volatility has a chilling effect on both free trade and international investment because when exchange rates fluctuate significantly, profits become uncertain and businesses must hedge exchange-rate risks. This uncertainty diminishes the willingness of enterprises to trade with their counterparts in other countries, ultimately resulting in reduced output and fewer jobs in affected industries.”).

12. Verstein, *supra* note 3, at 236.

13. BANK FOR INT’L SETTLEMENTS, TRIENNIAL CENTRAL BANK SURVEY: FOREIGN EXCHANGE TURNOVER IN APRIL 2013: PRELIMINARY GLOBAL RESULTS 8 (2013).

A. Brief History of Currency Market

The stability of exchange rates¹⁴ is necessary to maintain economic growth and financial prosperity, affecting nearly all areas in international markets, including free trade and international investment.¹⁵ To provide exchange-rate stability, major industrial nations have proposed and engaged in a number of monetary systems throughout the twentieth century.¹⁶ The most successful system¹⁷ emerged as a result of the Bretton Woods Accord in 1944.¹⁸ The conference¹⁹ resulted in the creation of the International Bank for Reconstruction and Development (the World Bank) and the formation of the International Monetary Fund (IMF).²⁰ The Bretton Woods Accord required the international community to scrutinize and control exchange-rate policies for the first time, rather than countries reserving oversight as a matter of national sovereignty.²¹ The Articles of Agreement of the International Monetary Fund required that each nation would establish a par-value for its currency, defined in terms of gold or United States currency, and that this rate could only be changed or adjusted with the Fund's authorization.²² Exchange rates were not to rise or fall more than one percent of the

14. An exchange rate is defined as: “[t]he price of one currency stated in terms of another currency.” *CFTC Glossary*, CFTC, <http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm#E> [https://perma.cc/3C72-VH3E] [hereinafter *CFTC Glossary*]. Exchange-rates generally refer to benchmark exchange rates.

15. See Myrus, *supra* note 11, at 2095.

16. *Id.*

17. The European Community Exchange Rate Mechanism (“ERM”) has also come close to maintaining exchange rate stability on a regional scale. *Id.*

18. *Id.*

19. Seven hundred representatives from forty-four nations convened at the United Nations Monetary and Financial Conference held in Bretton Woods, New Hampshire, in July of 1944. See GREGORY J. MILLMAN, *THE VANDALS’ CROWN: HOW REBEL CURRENCY TRADERS OVERTHREW THE WORLD’S CENTRAL BANKS* 55 (1995).

20. Myrus, *supra* note 11, at 2097. The agreement was a compromise between the participating members’ goals to stabilize exchange rates. *Id.* These goals included the expansion of world trade, international liquidity, and shielding domestic economies from foreign disturbances. *Id.*

21. Myrus, *supra* note 11, at 2098. In the past, the power to control and maintain monetary policy was controlled exclusively by the government. See Ashton S. Phillips, *Bank-Created Money, Monetary Sovereignty, and the Federal Deficit: Toward A New Paradigm in the Government-Spending Debate*, 36 W. NEW ENG. L. REV. 221, 231 (2014) (“Indeed, the connection between sovereignty and monetary power is so well established that the State’s sovereignty over its own currency is traditionally recognized by public international law.” (internal quotation marks omitted)).

22. Myrus, *supra* note 11, at 2099.

established par-value, necessarily prohibiting the exchange rates from floating against one another freely.²³

The system was essentially a gold standard, and the U.S. dollar had assumed the role of the key reserve currency by providing necessary liquidity.²⁴ Eventually, with inflationary pressures, the accounts held in dollars began to exceed the U.S. monetary gold reserves, lowering the value of the dollar and the fixed rate system became unsustainable.²⁵ The Bretton Woods Accord broke down by 1971 when the United States officially withdrew from the exchange rate system.²⁶ A Second Amendment to the Articles of the International Monetary Fund passed in 1978.²⁷ Still in place today, this Amendment created a floating rate system,²⁸ in which major currencies are allowed to float against one another.²⁹ According to the Fund, “for want of a better label, the present system might therefore be characterized as a discretionary and decentralized system,”³⁰ as opposed to the previous system directly controlled by the IMF.

During the period of the Bretton Woods Agreement, the stability of currency rates left little room for speculation.³¹ The currency market was essentially a cash market, with currency exchanged only for the commercial purpose of doing business internationally.³² A bank customer would purchase foreign currency because of the actual

23. *Id.*

24. *Id.* at 2100.

25. *Id.* at 2101.

26. *Id.* at 2102. A second, short-lived fixed-exchange rate system, the Smithsonian Agreement was established by President Nixon in December of 1971. *Id.* This system also broke down by March of 1973. *Id.* at 2103.

27. *Id.* at 2103.

28. A floating exchange rate is “[a] country’s exchange rate regime where its currency is set by the foreign-exchange market through supply and demand for that particular currency relative to other currencies. Thus, floating exchange rates change freely and are determined by trading in the forex market. This is in contrast to a ‘fixed exchange rate’ regime.” *Floating Exchange Rate*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/floatingexchangerate.asp> [<https://perma.cc/7Y6R-8YY5>].

29. MILLMAN, *supra* note 19, at 74; Armando T. Belly, *The Derivative Market in Foreign Currencies and the Commodity Exchange Act—The Status of Over-the-Counter Futures Contracts*, 71 TUL. L. REV. 1455, 1463-64 (1997); *see also* Myrus, *supra* note 11, at 2103.

30. Myrus, *supra* note 11, at 2103 (citing Int’l Monetary Fund, *The Exchange Rate System: Lessons of the Past and Options for the Future*, Occasional Paper No. 30, at 40 (1984)).

31. Belly, *supra* note 29, at 1464.

32. *See id.*

need to use it in a transaction.³³ The FX market has since evolved with the adoption of a floating rate system, with speculative instruments now playing a substantial role.³⁴

B. Financial Instruments in Foreign Exchange Markets

Currency transactions take place in a number of different forms. The distinction between the spot market and these financial instruments is necessary to a complete understanding of the regulatory scheme of this market. As discussed in Part II, financial legislation and regulation identify and govern each instrument individually. This Part defines spot transactions, forwards, futures, swaps, and options.

1. Spots

A spot trade is the most basic currency transaction, upon which all financial instruments are built.³⁵ A spot transaction is not a financial instrument at all, but is “simply the exchange of one currency for another currency, at the current or spot rate, or a ‘currency pair.’”³⁶ It is an agreement between two private parties, typically two banks, to exchange a specified quantity of one currency for another for immediate delivery, typically within two days.³⁷ For example, Bank X may contract to sell €100 million to Bank Y for U.S. dollars at an exchange rate³⁸ of 1.10 euro per dollar. Bank X would receive \$110 million in exchange for its €100 million.

2. Derivatives

Financial instruments derive their price from the exchange rate determined in the spot market. Derivative products are financial instruments whose value is determined by an underlying commodity or financial product such as a stock or a bond.³⁹ Those who buy and sell currency derivatives have two goals in mind: to hedge the risk of

33. See *infra* Part I.B.1 and accompanying text.

34. See *infra* Part I.B.2 and accompanying text.

35. RAJ BHALA, *THE LAW OF FOREIGN EXCHANGE* 9 (1997).

36. John W. Labuszewski, Sanda Rio & David Gibbs, *Currencies: Understanding FX Futures*, CME GROUP (Apr. 22, 2013), <https://www.cmegroup.com/education/files/understanding-fx-futures.pdf> [https://perma.cc/LV5E-YSMX].

37. BHALA, *supra* note 35, at 9.

38. An exchange rate is “[t]he price of one currency in terms of another currency.” *CFTC Glossary*, *supra* note 14.

39. BHALA, *supra* note 35, at 7.

currency rate fluctuations and to profit off of accurate prediction of future currency rates.⁴⁰ Forwards,⁴¹ futures,⁴² swaps,⁴³ and options⁴⁴ are derivative instruments.

Derivatives are instruments of speculation.⁴⁵ The parties are quite literally purchasing and taking bets that certain events in the market will or will not occur in the future.⁴⁶ These instruments were, and still are by some, considered to be a danger to the financial industry. Warren Buffet, for example, has called derivatives “financial weapons of mass destruction.”⁴⁷ The word “derivatives” has also been referred to as “the 11-letter, four letter word,” by Richard Syron, the

40. *Id.*

41. A forward contract is nearly identical to a spot transaction, but the parties agree to defer the date of exchange to a later time. Labuszweski, Rio & Gibbs, *supra* note 36, at 2-3. For example, a German company may know that it needs to buy an American product a month from the time at which it makes a contract. The German company may contract to buy the same \$110 million for euros at the same rate. The purpose behind forward contracts is to hedge—or mitigate—the risk of losing money due to currency rate fluctuations between the time the forward contract is made and the time the contract matures. *Id.* at 3-4.

42. Futures, like forwards, are contracts to buy or sell foreign currency at a fixed rate in the future. BHALA, *supra* note 35, at 19. The most important distinction between futures and forwards is that futures are standardized contracts lacking any customization for any particular party, whereas forwards are geared for a particular transaction. *Id.* at 20.

43. A swap is simultaneously a series of spot transactions *and* forward transactions. “An FX swap may be thought of as a combination of two offsetting currency transactions separated by time and constitute the largest segment of the FX marketplace in terms of daily turnover.” Labuszweski, Rio & Gibbs, *supra* note 36, at 4. An FX swap is to be distinguished from a “currency swap,” which “entails an element of an FX swap as well as an element of an interest rate swap.” *Id.*

44. Options are categorized as “call options,” or the right to buy currency at some point in the future for a specified price, and “put options,” which is the right to sell currency in the future. BHALA, *supra* note 35, at 29. These are generally referred to as calls and puts. *Id.* at 31-34. What one is essentially purchasing in buying options is simply the *right*, not the obligation, to sell or buy at a certain price. *Id.* at 29. The option buyer, in effect, pays the seller to assume all of the risk of market fluctuations, and in exchange the seller receives a premium for this service. MILLMAN, *supra* note 19, at 10. If the price of a currency increases, the right to buy it at a lower price (a call option) will be valuable to a purchaser, and if the price to a currency decreases, the right to sell it at a higher price (a put option) will be similarly valuable. *Id.*

45. See Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. REV. 1, 6 (2011) (“Derivatives are *literally* bets—agreements between parties that one will pay the other a sum of money that is determined by whether or not a particular event occurs in the future.” (emphasis added)).

46. *Id.*

47. Brian M. McCall, *Gambling on Our Financial Future: How the Federal Government Fiddles While State Common Law Is a Safer Bet to Prevent Another Financial Collapse*, 46 ARIZ. ST. L.J. 1347, 1347 (2014).

Chairman of the American Stock Exchange.⁴⁸ The speculative nature of derivatives, as opposed to the practical and commercial nature of spot transactions, has led to a distinction in the way these two types of transactions are regulated.⁴⁹

C. How the Forex Market Works

With the exception of futures and options, the FX market is geographically dispersed, decentralized, and takes place between private parties, rather than through a central exchange.⁵⁰ This over the counter (OTC) system is divided into two tiers: the retail tier and the wholesale tier.⁵¹ In the retail tier, most parties transact with banks to exchange currencies.⁵² The banks are typically able to match these retail deals on their own books. Any remaining balances are offset in the wholesale market, where banks exchange currency in the traditional interbank, or inter-dealer market.⁵³ The central banks are known as “market makers,”⁵⁴ and “therefore play a critical role in

48. Lydie Nadia Cabrera Pierre-Louis, *Controlling A Financial Jurassic Park Obtaining Jurisdiction over Derivatives by Regulating Illegal Foreign Currency Boiler Rooms*, 8 U.C. DAVIS BUS. L.J. 35, 35 (2007).

49. See *infra* Part II.

50. FIN. STABILITY BD., FOREIGN EXCHANGE BENCHMARKS FINAL REPORT 5 (2014), http://www.fsb.org/wp-content/uploads/r_140930.pdf [<https://perma.cc/CX93-HY8C>] [hereinafter FOREIGN EXCHANGE BENCHMARKS].

51. Michael R. King, Carol Osler & Dagfinn Rime, *Foreign Exchange Market Structure, Players and Evolution* 24 (Norges Bank, Working Paper, 2011), <http://www.unich.it/~vitale/Rime-2.pdf> [<https://perma.cc/9PRL-H6NY>]. This clear distinction has broken down with the creation of new trading platforms such as multibank trading systems (“MBT”) and FX prime brokerage (“PB”), which allow for customers to trade directly with FX dealers. *Id.* Banks have also created single-bank trading systems (SBT), which allow customers to enter orders to be fulfilled within the bank itself. *Id.* at 25.

52. These parties include governments, hedge funds, corporations, institutional investors and high net-worth individuals. Dagfinn Rime & Andreas Schrimpf, *The Anatomy of the Global FX Market Through the Lens of the 2013 Triennial Survey*, BIS Q. REV. 29 (2013), http://www.bis.org/publ/qtrpdf/r_qt1312e.pdf [<https://perma.cc/8E2P-EX2X>].

53. *Id.* A dealer is “[a] financial institution that is entering into transactions on both sides of the markets, seeking profits by taking risks in those markets and by earning a spread; sometimes also referred to as a ‘sell-side.’” *Id.* at 43.

54. “Market makers ‘make’ or set both the bid and the ask prices on their systems and display them publicly on their quote screens. Grace Cheng, *Market Makers vs. Electronic Communications Networks*, INVESTOPEDIA, <http://www.investopedia.com/articles/forex/06/ecnmarketmaker.asp#ixzz3vBMpyVPP> [<https://perma.cc/4LJV-7XZC>]. They stand prepared to make transactions at these prices with their customers, who range from banks to retail forex traders. *Id.* In doing this, market makers provide some liquidity to the market.” *Id.*

ensuring the continued functioning of the market,”⁵⁵ by virtue of both buying and selling currencies.⁵⁶

Electronic platforms facilitate both the interbank and retail markets. The two most used platforms are the Thomas Reuters Dealing (Reuters) and the Electronic Broking Service (EBS).⁵⁷ The lower transaction costs of electronic trading have greatly reduced the bid-ask spread⁵⁸ between the retail market and the interbank market, reducing the profit to banks at the retail level.⁵⁹ This decrease in profit and the need to invest in technology to access electronic platforms have reduced the number of banks at the highest level of the FX market.⁶⁰

Further, although these electronic platforms facilitate anonymous trading, banks must identify and give prior authorization to deal with each other bank, essentially creating “an invitation only market.”⁶¹ The minimum trade amount for the interbank market is typically \$5 million and is too large an amount for smaller banks to be able to participate.⁶² As a result, four banks make up 50% of the market.⁶³

55. Plea Agreement at 4, *United States v. JPMorgan Chase & Co.*, No. 3:15-cr-79(SRU) (D. Conn. May 20, 2015). This decentralized market is open for trading twenty-four hours a day. *See* FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 5. The market opens at 5:00 a.m. in Sydney every Monday morning and closes at 5:00 p.m. in New York every Friday. *Id.*

56. Around the year 2000, retail-oriented platforms began to bundle many small trades together and then sell them to the interbank market. Rime & Schrimpf, *supra* note 52, at 39. These “retail aggregators” have received better prices than they would have selling individually. *Id.*

57. King, Osler & Rime, *supra* note 51, at 22.

58. The bid-ask spread is the difference between the price a bank is willing to pay (the bid price) and the price a bank is willing to sell (the ask or offer price) foreign currency. *CFTC Glossary*, *supra* note 14. The profit banks earn is the difference between the bid-ask spread, which compensates them for the risk they take that the exchange rate will drop before they find another buyer.

59. King, Osler & Rime *supra* note 51, at 29.

60. *Id.*

61. Verstein, *supra* note 3, at 238.

62. *See id.* €1 million is the minimum trade size on the interdealer market; €5 million is the upper range for most interdealer trades; and €25 million is the level at which customer trades are typically handled with human intervention. Geir Høidal Bjønnes, Neophytos Kathitziotis & Carol Osler, *The Cost of FX Liquidity: Empirical Tests of Competing Theories* 8 (Sept. 16, 2014), <https://www.ifw-kiel.de/konfer/staff-seminar/paper/2014/Bjonnes.pdf> [<https://perma.cc/VY44-QX8R>] (unpublished manuscript) (on file with Brandeis Univ.).

63. Vaughan, Finch & Choudhury, *supra* note 1. These four banks are: Deutsche Bank AG; Citigroup Inc.; Barclays Plc.; and UBS AG. *Id.*

In 2013, 98% of the U.S. spot market consisted of trades by ten firms.⁶⁴ The largest five firms accounted for 80% of the spot market.⁶⁵

D. Benchmarks

A benchmark is “a standard against which foreign exchange rates may be measured.”⁶⁶ Essentially, a benchmark is a standardized spot exchange rate of two currencies.⁶⁷ Thousands of transactions occur in the FX market every day with parties exchanging currencies at different rates. A benchmark gives buyers an idea of what the exchange rate between two currencies might be for any given day by providing a standard rate. There are two important benchmark rates for the FX market: the World Markets/Reuters fix (WM/Reuters) and the European Central Bank fix (ECB).

The WM/Reuters fix was created in 1994⁶⁸ for the purpose of providing “a clear single independent reference rate for the foreign exchange market.”⁶⁹ The WM/Reuters is, by and large, the prominent FX benchmark.⁷⁰ In addition to the FX market, WM/Reuters is also used as a key input in multi-currency equity, bond, and credit indices.⁷¹ It is hardwired directly into other benchmarks such as the DOW Jones and S&P 500.⁷² The Commodities Futures Trading Commission (CFTC) notes that the “WM/R[eu]ters] Rates are the most widely referenced FX benchmark rates in the United States and globally.”⁷³ As a result, the WM/Reuters fix has a direct and consequential effect on financial markets, beyond currency exchanges, around the world.

64. FED. RESERVE BANK OF N.Y., *THE FOREIGN EXCHANGE AND INTEREST RATE DERIVATIVES MARKETS: TURNOVER IN THE UNITED STATES, APRIL 2013*, at 6 (2013), <https://www.newyorkfed.org/medialibrary/media/markets/pdf/2013triennialreport.pdf> [<https://perma.cc/8JW8-QEZF>].

65. *Id.*

66. THE WM COMPANY, *WM/REUTERS SPOT & FORWARD RATES METHODOLOGY GUIDE 17* (2012), <http://www.wmcompany.com/pdfs/WMReutersMethodology.pdf> [<https://perma.cc/9FRP-EBYH>].

67. BHALA, *supra* note 35, at 9.

68. “The WM/Reuters service is a joint venture between The WM Company and Thomson Reuters.” *History*, WM COMPANY, <http://www.wmcompany.com/wmr/AboutUs/History/> [<https://perma.cc/C6JU-8CSX>].

69. FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 7.

70. *Id.*

71. *Id.* at 1.

72. Verstein, *supra* note 3, at 236.

73. *In re JPMorgan Chase Bank, N.A.*, CFTC No. 15-04, 2014 WL 6068387, at *2 (Nov. 11, 2014).

WM/Reuters calculates spot fix rates, forward rates, and non-deliverable forward rates, providing spot fix rates for 160 currencies.⁷⁴ WM/Reuters calculates these rates with two different methods, 21 trade currencies and 139 non-trade currencies.⁷⁵ Also known as the 4pm London Fix, WM/Reuters records the exchanges of single trades during the thirty seconds before and the thirty seconds after 4:00pm London time using transactional and quote data from the Thomson Reuters Matching and EBS trading platforms.⁷⁶ The WM/Reuters benchmark is the average rate of exchange during this one-minute period.⁷⁷

The ECB provides foreign exchange rates for the euro against thirty-two different currencies on a daily basis.⁷⁸ The ECB rates are based upon trade information within and outside the European System of Central Banks at 2:15pm Central European Time.⁷⁹ A number of institutions, particularly non-financial corporations, use this benchmark. The ECB rates use has increased as a result of the FX benchmark investigations.⁸⁰

Traders are well aware of the calculation of these benchmarks and structure their trading around them. To prevent affecting the benchmark, they may trade on electronic platforms other than the Reuters or ESB or they may buy and sell over the telephone.⁸¹ A trader can push the benchmark higher or lower by timing transactions around the 4 PM and 2:15 PM periods used for the benchmarks. For

74. FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 8.

75. *Id.* This note will discuss the calculation method for trade currencies; for an explanation of the calculation for non-trade currencies, see *id.* at 10.

76. *Id.* at 8. The FX market continues to trade through and after the main 4:00 p.m. London fixing window, even though the 4:00 p.m. rate is often referred to as a 'closing' rate. *Id.* at 5, 15.

77. This rate has been extended to five minutes. See *infra* note 298 and accompanying text.

78. FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 11.

79. *Id.*

80. *Id.*

81. See *In re Citibank, N.A.*, CFTC No. 15-03, 2014 WL 6068386, at *4 (Nov. 11, 2014) (explaining banks strategically offset some position outside of the polled window and venue); BANK FOR INT'L SETTLEMENTS, HIGH-FREQUENCY TRADING IN THE FOREIGN EXCHANGE MARKET 9 (2011), <http://www.bis.org/publ/mkfc05.pdf> [<https://perma.cc/FK2Q-4R2H?type=pdf>] ("They can evade detection . . . by executing large flows in less transparent venues, including reverting to transacting bilaterally over the telephone."). This is evidenced by the decrease in concentration of interdealer transactions conducted on Reuters and ESB (those platforms that determine the exchange rate benchmark) from 22% in 2010 to 16% in 2013 and the noticeable increase in turnover rates during the time before and after the WMR London 4pm fix. FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 1.

example, if a trader wanted the Euro/Dollar exchange rate to go from 1.0770 to 1.0785, he would make sure to be trading at or above a rate of 1.0785 in significant quantities during the one minute fix period.

E. Incentive Structure

A bank typically acts as a dealer, buying and selling currency to its customers throughout the day. In these transactions, banks guarantee their customers the benchmark rate that day before the fix and thus agree to contract with customers at an unknown price to be determined during the fix calculation window.⁸² This “trading ahead” means that the banks take on the risk that the benchmark rate will move against them and creates an incentive to move the rates in their favor.⁸³ It was this structure that incentivized FX dealers to try to manipulate the benchmark rate and to make a profit by collusion and sharing confidential client information.⁸⁴ The goal was to push the benchmark rate up or down, depending on the customer orders they had as a collective group, in order to create the maximum profit for the traders.⁸⁵

F. How the Manipulation Scheme Worked

As early as 2006, regulators were alerted to trouble with the London fix when bankers hinted that “players that had no particular interest in that fix” were moving prices.⁸⁶ Seven years later, in June 2013, Bloomberg published an article suggesting that the foreign currency rates were rigged.⁸⁷ Over two years of investigation by

82. FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 2.

83. See Claer Barrett & John Aglionby, *Traders' Forex Chatroom Banter Exposed*, FIN. TIMES (Nov. 12, 2014, 2:09 PM), <http://www.ft.com/intl/cms/s/2/47c32ec4-6a34-11e4-8fca-00144feabdc0.html#slide0> [<https://perma.cc/4BY4-F5WD>].

84. See Chiara Albanese, *Forex Scandal Drives Shift to Algo Trading*, WALL ST. J. (Sept. 28, 2015, 8:51 AM), <http://www.wsj.com/articles/forex-scandal-drives-shift-to-algo-trading-1443444666?alg=y> [<https://perma.cc/U92G-2285>] [hereinafter Albanese, *Forex Scandal Drives Shift to Algo Trading*].

85. See FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 2.

86. Marion Dakers, *How the Forex Trading Scandal Came to Light*, TELEGRAPH (Nov. 13, 2014, 6:47 AM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11227006/How-the-forex-trading-scandal-came-to-light.html> [<https://perma.cc/53M6-U63L>]; James Quinn & John Ficenec, *The Lunch Meetings at the Heart of the Bank of England Forex Inquiry*, TELEGRAPH (Nov. 12, 2014, 11:30 AM), <http://www.telegraph.co.uk/finance/bank-of-england/10685543/The-lunch-meetings-at-the-heart-of-the-Bank-of-England-forex-inquiry.html> [<https://perma.cc/X2YW-2T3K>].

87. See Vaughan, Finch & Choudhury, *supra* note 1.

dozens of regulatory and government agencies around the world revealed a long and intricate scheme in which traders for the world's biggest international banks manipulated the foreign currency exchange benchmark for their own profit.⁸⁸ Traders used private electronic chat rooms with names such as “the players,” “the three musketeers,”⁸⁹ “The Cartel,” “The Mafia,” and “The Bandits’ Club”⁹⁰ to communicate and attempt to manipulate the benchmark by trading disproportionately during the fix period to profit from their clients’ positions.⁹¹ Traders would have multiple chat rooms open at once, each one focusing on a particular currency pair.⁹² The conversations were often in slang, used code words, and intentionally used poor grammar and spelling to evade systematic checks.⁹³

Membership in the chat rooms was exclusive and by invitation only.⁹⁴ For example, consider the following conversation between bankers considering allowing a new member into the chat room:

UBS Trader: 7:49:55 are we ok with keeping this as is .. ie the info
lvls & risk sharing?

Citibank Trader: 7:50:27 well...

UBS Trader: 7:50:30 that is the qu[estion]

Citibank Trader: 7:50:32 you know him best obv...

7:50:39 if you think we need to adjust it

7:50:43 then he shouldn't be[] in chat

JPMC Trader: 7:50:54 yeah that is key

7:51:00 simple question [UBS trader]

7:51:08 I trust you implicitly [UBS trader]

7:51:13 and your judgement

7:51:16 you know him

88. Dakers, *supra* note 86.

89. Chad Bray, Jenny Anderson & Ben Protess, *Big Banks Are Fined \$4.25 Billion in Inquiry Into Currency-Rigging*, N.Y. TIMES: DEALBOOK (Nov. 12, 2014, 2:24 AM), http://dealbook.nytimes.com/2014/11/12/british-and-u-s-regulators-fine-big-banks-3-16-billion-in-foreign-exchange-scandal/?_r=0 [<https://perma.cc/CA2L-XQSZ>].

90. Elvis Picardo, *How the Forex “Fix” May Be Rigged*, INVESTOPEdia (Sept. 2, 2014), <http://www.investopedia.com/articles/forex/031714/how-forex-fix-may-be-rigged.asp> [<https://perma.cc/JN2T-D55R>].

91. *Five Major Banks Agree to Parent-Level Guilty Pleas*, DEP’T JUSTICE (May 20, 2015), <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas> [<https://perma.cc/W4XX-V35R>] [hereinafter *Five Major Banks Agree to Parent-Level Guilty Pleas*].

92. *In re JPMorgan Chase Bank, N.A.*, 2014 WL 6068387, at *4 (Nov. 11, 2014).

93. *Id.* at *5.

94. *Id.* at *4.

7:51:21 will he tell rest of desk stuff

7:51:26 or god forbin his nyk...

Citibank Trader: 7:51:46 yes

7:51:51 that's really imp[ortant] q[uestion]

7:52:01 dont want other numpty's in mkt to know

7:52:17 but not only that

7:52:21 is he gonna protect us

7:52:33 like we protect each other against our own branches

7:52:46 ie if you guys are rhs⁹⁵.. and my nyk is lhs..ill say my nyk lhs in few

UBS Trader: 7:53:52 what concerns me is that i know he'll never tell us when at risk...⁹⁶

The traders decided to let the fourth trader from Barclays into the chat room on a "1 month trial" basis, before which he was told "mess this up and sleep with one eye open."⁹⁷

The traders used a number of strategies. According to the CFTC Order filing and settling charges against JPMorgan Chase Bank, N.A. (JPMC) filed on November 11, 2014:

At times, in certain chat rooms, FX traders at JPMC and other banks disclosed confidential customer order information and trading positions, altered trading positions to accommodate the interests of the collective group, and agreed on trading strategies as part of an effort by the group to attempt to manipulate certain FX benchmark rates, in some cases downward and in some cases upward.⁹⁸

Traders would exchange information about their respective banks' net position and attempt to coordinate their trades. One method the traders used was a practice known as "netting off."⁹⁹ If one trader had a net position in the opposite direction as the other traders in the

95. Traders used "right-hand side" (rhs) and "left-hand side" (lhs) to refer to the currency that they were selling. For example, a trader's position looking to sell EUR/USD would be "lhs." *Id.*

96. *Id.*; see also *In re Citibank, N.A.*, 2014 WL 6068386, at *5 (Nov. 11, 2014); *In re UBS AG*, CFTC No. 15-06, 2014 WL 6068389, at *5 (Nov. 11, 2014).

97. Kevin McCoy & Kevin Johnson, *5 Banks Guilty of Rate-rigging, Pay More than \$5B, USA TODAY* (May 20, 2015), <http://www.usatoday.com/story/money/2015/05/20/billions-in-bank-fx-settlements/27638443/> [<https://perma.cc/93HC-RSJW>].

98. *In re JPMorgan Chase Bank, N.A.*, 2014 WL 6068387, at *2.

99. *Id.* at *5.

group before the fix period, he would try to sell those positions with traders outside of the chat room in order to maintain the groups' overall position in the same direction.¹⁰⁰

The Southern District of New York (SDNY) explains other specific strategies traders allegedly used in more detail in an order denying in part and granting in part a motion to dismiss a private action against the banks:

[1] “Front running” or “trading ahead”—Defendants traded their own proprietary positions before executing their customers' large market-moving trades so that Defendants could take positions to their benefit and “to the detriment of the customer;”¹⁰¹ [2] “Banging the close”—Because the calculation of the Fix does not weight the trades by amount traded and takes into account only the number of trades in any currency pair, traders conspired to impact the Fix by engaging in more trades. To this end, traders broke up larger orders into smaller amounts and concentrated the trades in the minutes before and after the Fixing Window to affect the Fix; [and 3] “Painting the screen”—Defendants' traders placed fake orders with other Defendants to create the illusion of trading activity in a given direction to move rates prior to the Fixing Window. These trades were not actually executed.¹⁰²

In contrast to “banging the close,” another widely reported strategy to manipulate the benchmark was “building ammo” where one trader would accumulate a large quantity in a currency and then sell the “ammo” right before or during the fix period in an effort to move the benchmark.¹⁰³ For example:

On January 6, 2012, one Barclays trader, who was also a Head of the FX Spot desk in London, attempted to manipulate the ECB fix by unloading EUR 500

100. *Id.*

101. Front-running is technically legal in the FX market. *See infra* Part III.B.

102. *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581, 587-88 (S.D.N.Y. 2015).

103. Lianna Brinded, *Barclays FX Fixing Traders Colluded in Chatrooms and Said ‘We All Die Together’*, BUS. INSIDER UK (May 20, 2015, 3:53 PM), <http://uk.businessinsider.com/barclays-fx-traders-chatroom-transcripts-of-currency-market-collusion-2015-5?IR=T> [<https://perma.cc/V2V7-UU9H>]; Press Release, N.Y. Dep't of Fin. Servs., NYDFS Announces Barclays to Pay \$2.4 Billion, Terminate Employees for Conspiring to Manipulate Spot FX Trading Market (May 20, 2015), <http://www.dfs.ny.gov/about/press/pr1505201.htm> [<https://perma.cc/NV5E-FZBP>].

million right at the fix time, stating in the Cartel chat room “i saved 500 for last second” and in another chat room “i had 500 to jam it.”¹⁰⁴

In another example the traders had the following exchange:

Bank W Trader: 3:46:53 i’d prefer we join forces

Bank Y Trader: 3:46:56 perfick

3:46:59 lets do this...

3:47:11 lets double team them

Bank W Trader: 3:47:12 YESssssssssss¹⁰⁵

Immediately after the fixing window, the traders congratulated themselves:

Bank W Trader: 4:03:25 sml rumour we haven’t lost it

Bank Y Trader: 4:03:45 we

4:03:46 do

4:03:48 dollarr¹⁰⁶

The conversations make clear that the traders knew what they were doing was illegal. When one HSBC trader was left out of a collusion he scolded another trader, “[you] are uselees[sic] . . . how can I make free money with no ****ing heads up.”¹⁰⁷ In 2010, a Barclays employee was quoted as saying in one chat: “markup is making sure you make the right decision on price . . . which is [what’s] the worst price [I] can put on this where the customers decision to trade with me or give me future business doesn’t change . . . if you aint cheating, you aint trying.”¹⁰⁸

This statement reveals the state of trading in forex during the years of collusion. The traders *decided* on what the forex benchmarks would be based upon their profit margin rather than the actual demands of the market. For years, traders at the largest firms in the world engaged in these conversations every day with the purpose of manipulating the market to make as much money off of their customer’s orders as they could.

104. Press Release, N.Y. Dep’t of Fin. Servs., *supra* note 103.

105. *In re JPMorgan Chase Bank, N.A.*, 2014 WL 6068387, at *6 (Nov. 11, 2014).

106. U.S. COMMODITY FUTURES TRADING COMM’N, EXAMPLES OF MISCONDUCT IN PRIVATE CHATROOMS (2014), <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/hsbcmisconduct111114.pdf> [<https://perma.cc/5F79-PCCU>].

107. Dakers, *supra* note 86.

108. Kirstin Ridley, *In FX Rigging: “If You Ain’t Cheating, You Ain’t Trying”*, REUTERS (May 20, 2015, 1:07 PM), <http://www.reuters.com/article/banks-forex-settlement-traders-idUSL5N0YB3Q820150520> [<https://perma.cc/S6LB-ESX9>].

II. CURRENT REGULATORY SCHEME OF THE FX MARKET

The foreign currency markets have been the subject of numerous crimes, resulting in a loss of \$460 million to nearly 26,000 people in the United States between 2001 and 2007.¹⁰⁹ Further, as a result of their actions before and after the financial crisis, banks have been subject to \$100 billion in United States legal fines alone since the crisis hit.¹¹⁰ Despite this, the spot market is still largely unregulated.¹¹¹ For the vast majority of its history the foreign currency market has not come under the authority of any legislative act. In recent years, other financial instruments such as swaps, options, futures, and derivatives have all come under legislation.¹¹² The spot market, however, has been explicitly exempted from each act and remains unregulated in the United States,¹¹³ the UK,¹¹⁴ and Europe,¹¹⁵ leaving a regulatory void in this market.

This lack of regulation has led to a scarcity in market data, as there is no single reporting agency or corporation for the market as a whole. Unlike stocks and commodities, which have highly regulated and carefully watched markets, “on any given day no one knows how

109. Aitken, *supra* note 4.

110. Michael Flaherty, *Banks Should Defer Bonuses 10 Years, Tap Them for Fines: Fed Official*, REUTERS (Oct. 20, 2014, 6:07 PM), <http://www.reuters.com/article/us-usa-fed-dudley-idUSKCN0192C520141020> [<https://perma.cc/83D9-GSDE>].

111. *See* FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 5 (“There is not a single market place, and much of the market is not subject to formal regulation . . .”); King, Osler & Rime, *supra* note 51, at 8 (“The vast majority of FX trading is essentially unregulated, in striking contrast to the extensive regulations in most equity and bond markets.”).

112. *See generally* NAT’L FUTURES ASSOC., FOREX TRANSACTIONS: A REGULATORY GUIDE (2016) <http://www.nfa.futures.org/nfa-compliance/publication-library/forex-regulatory-guide.pdf> [<https://perma.cc/E2RR-9ARA>] (explaining that the CFTC has regulatory jurisdiction over currency futures and options); *Fact Sheet: Final Determination on Foreign Exchange Swaps and Forwards*, U.S. DEP’T TREASURY, (Nov. 16, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1773.aspx> [<https://perma.cc/AC3Z-T4MC>] [hereinafter *Fact Sheet: Final Determination*] (explaining that “FX swaps and forwards [are] subject to the Dodd-Frank Act’s new requirement to report trades to repositories and rigorous business conduct standards”).

113. *See* Aitken, *supra* note 4.

114. *See id.* (“One difficulty for the UK financial regulator is that spot forex contracts are not in themselves qualifying investments under The Financial Services and Markets Act and therefore the market abuse regime under that Act and the FCA’s Code of Market Conduct does not apply.”).

115. *See 10 Things You Should Know – Regulation in the FX Markets*, NORTON ROSE FULBRIGHT (June 2014), <http://www.nortonrosefulbright.com/knowledge/publications/117779/10-things-you-should-know-regulation-in-the-fx-markets> [<https://perma.cc/WNX4-PUME>].

much was traded in FX markets – not the regulators, not the monetary authorities, not even the major FX dealers.”¹¹⁶ When asked why it took regulators so long to find out about the manipulation, the CEO of the Financial Conduct Authority, a financial regulatory body in the UK answered, “[these] are not regulated markets. So, the spot FX market is not a regulated market. Where it’s not a regulated market, we don’t get regular reports. . . . We don’t have things we can monitor. . . .”¹¹⁷ The Bank for International Settlements (BIS) compiles the only source of aggregate data for the FX market every three years in the Triennial Central Bank Survey of Foreign Exchange Market Activity in an effort by central banks around the world every third April.¹¹⁸

Despite this void, it was previously thought that the immense size of the market and its liquidity¹¹⁹ served to prevent market manipulation from occurring. As stated in 2012: “Fortunately, the FX market is sufficiently liquid that significant manipulation by any single actor is all but impossible during active trading hours for the major currencies.”¹²⁰ The regulatory void, evidently, was not thought to have been problematic whatsoever but that it was merely a by-product of the immense size of the FX market.

This Part provides a discussion of the history of foreign exchange regulation and outlines the numerous laws Congress passed and regulations agencies promulgated, ultimately showing that while all foreign exchange instruments have come under the jurisdiction of some regulation, spot transactions are still largely unregulated. Each subpart discusses the specific sanctions brought in relation to this scheme by each regulatory body. Part II.D provides an overview of international foreign exchange regulation, concluding the same. Part II.F then discusses the remaining repercussions of the manipulation scheme.

116. King, Osler & Rime, *supra* note 51, at 8.

117. Press Conference, *in* Press Release, Fin. Conduct Authority, FCA Fines Five Banks £1.1 Billion for FX Failings and Announces Industry-wide Remediation Programme, (Nov. 13, 2014), <http://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings> [<https://perma.cc/SK3G-N9W2>] [hereinafter FCA Press Conference].

118. *See* King, Osler & Rime, *supra* note 51, at 8.

119. A liquid market is one “in which selling and buying can be accomplished with minimal effect on price.” *CFTC Glossary*, *supra* note 14.

120. King, Osler & Rime, *supra* note 51, at 8.

A. Commodities Futures Trading Commission

1. *Commodities Exchange Act*

The first piece of legislation to purport to regulate the foreign currency market was the Commodities Exchange Act.¹²¹ The Commodities Exchange Act was rooted in concerns over speculation in wheat prices.¹²² The volatility of grain prices caused the forward grain market to develop into one of speculation, in which investors would trade futures and derivative contracts, the profits and losses of which depended upon the rise and fall of grain prices.¹²³ Congress enacted the Futures Trading Act in 1921 to regulate excessive speculation.¹²⁴ This Act has developed into the modern Commodities Exchange Act (“CEA”).¹²⁵ Congress established the Commodities Futures Trading Commission as an independent federal regulatory agency by an amendment to the Act in 1974.¹²⁶ The CEA is the principal means by which all commodity future transactions in the United States are regulated.¹²⁷

Spots and forward transactions are exempted from regulation under the CEA. The Act gives the CFTC the authority to regulate “contracts for sale of a commodity for future delivery,” typically called “commodity futures contracts.”¹²⁸ While the CEA does not provide a precise definition for a sale “for future delivery” the Act does explicitly state that “[t]he term “future delivery” does not include any sale of any cash commodity for deferred shipment or

121. See Thomas A. Tormey, *A Derivatives Dilemma: The Treasury Amendment Controversy and the Regulatory Status of Foreign Currency Options*, 65 FORDHAM L. REV. 2313, 2327-28 (1997).

122. William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 VAND. L. REV. 473, 477 & n.23 (1988).

123. Belly, *supra* note 29, at 1465.

124. *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970 (4th Cir. 1993) (citing Pub. L. No. 67-66, 42 Stat. 187); Stein, *supra* note 122, at 473, 477 & n.23 (collecting relevant legislative history).

125. See 7 U.S.C. §§ 1-25 (2014). One year after its enactment, the Supreme Court declared the Act unconstitutional as an improper exercise of Congress’s taxing power. Belly, *supra* note 29, at 1474. In response, Congress passed the Grain Futures Act of 1922, which was essentially identical to the Futures Trading Act, with the important exception that it was passed under the powers of the Commerce Clause. *Id.* The Grain Futures Act made it a misdemeanor to enter into a grain futures contract in any way except on a designated market. *Id.* The Supreme Court upheld the constitutionality of the Act 1923. *Id.*

126. See Pub. L. No. 93-463, 88 Stat. 1389 (1974). Congress renamed the Act in 1936. See Pub. L. No. 74-675, 49 Stat. 1491 (1936).

127. Stein, *supra* note 122, at 478.

128. 7 U.S.C. § 2(a)(1)(A) (2014).

delivery.”¹²⁹ Spot transactions were excluded as sales for a cash commodity, not for future delivery, and forwards were excluded as a sale “for deferred shipment or delivery.”¹³⁰ This regulatory distinction was made because it was thought that spot transactions, which deal with the actual commodity (currency), do not present the same incentive for manipulation as speculative instruments do.¹³¹ This subtle but immensely consequential distinction has brought about much litigation regarding what transactions are defined as futures, and therefore fall within the Act, and which transactions are defined as spots¹³² and forwards and are exempt from regulation.¹³³

2. *Treasury Amendment*

While the definition of “future delivery” exempted spot and forward foreign currency transactions, the remaining foreign currency instruments were exempted through the Treasury Amendment.¹³⁴ The Amendment states: “Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency [or a variety of financial instruments] unless such transactions involve the sale thereof for future delivery conducted on a board of trade.”¹³⁵ The legislative history cites concerns that transactions in foreign currency, “carried out through an informal network of banks and tellers” are “more properly supervised by the bank regulatory agencies.”¹³⁶ The legislative history states that because of this alternative way to regulate banking activity, regulation of the FX market under the CEA was unnecessary.

129. *Id.* § 1a(27).

130. *See* Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 970-71 (4th Cir. 1993) (citing Pub. L. No. 67-66, 42 Stat. 187); CFTC v. Am. Bd. of Trade, 473 F. Supp. 1177 (S.D.N.Y. 1979), *aff’d*, 803 F.2d 1242 (2d Cir. 1986).

131. *See Tauber*, 8 F.3d at 970-71.

132. CFTC v. Calvary Currencies LLC, 437 F. Supp. 2d 453, 460 (D. Md. 2006).

133. *See* Elizabeth D. Lauzon, *What Are “Contracts of Sale of a Commodity for Future Delivery” Within Meaning of Commodity Exchange Act (7 U.S.C.A. §§ 1 et seq.)*, 182 A.L.R. Fed. 559 (2002).

134. 7 U.S.C. § 2(c) (2014). As Congress considered the passage of the CEA, Department of the Treasury sent a letter expressing concern about the impositions the new act would have on interbank currency market, proposed that Congress create an exemption for transactions and leave banking regulation to the Comptroller of Currency and Federal Reserve. Belly, *supra* note 29, at 1482. The Act incorporated language nearly identical to that proposed by the Department of Treasury in what is known as the Treasury Amendment. *Id.*

135. 7 U.S.C. § 2 (2014).

136. S. Rep. No. 93-1131, at 23 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5843, 5863, 5887.

The scope of the CFTC was changed in the Commodities Futures Modernization Act of 2000.¹³⁷ The CFMA explicitly removed the CFTC's power to regulate OTC derivatives trade among "sophisticated parties," in addition to extending the CFTC's power to regulating OTC futures transactions with a retail customer on one side.¹³⁸ The CFMA's deregulation has had such profound effects that it has been credited with being the "most direct and significant cause" of the financial crisis of 2008.¹³⁹

3. *Dodd-Frank Act*

The Dodd-Frank Act,¹⁴⁰ passed in light of the 2008 financial crisis "put in place a comprehensive set of reforms to help build stronger, safer, and more efficient financial markets."¹⁴¹ The Act brought nearly all foreign exchange instruments under the jurisdiction of the CFTC or the SEC. The Act requires all swaps to be traded on a central exchange and secured by a clearinghouse and regulated by the CFTC or the SEC. The Act provided the U.S. Department of Treasury (Treasury Department) with authority to determine if foreign exchange transactions may be exempt from these requirements.¹⁴² On November 16, 2012, the Treasury Department issued a final ruling providing that foreign exchange transactions are exempt from the definition of a "swap" under the CEA,¹⁴³ and thus are excluded from some regulations under the Dodd-Frank Act.

137. See Commodities Future Modernization Act of 2000, H.R. 4541, 106th Cong. (2000).

138. *Regulation of Forex in the Wake of Dodd-Frank*. FOLEY & LARDNER LLP (Oct. 14, 2011), <https://www.foley.com/regulation-of-forex-in-the-wake-of-dodd-frank-10-14-2011/> [<https://perma.cc/8NZ4-VQLE>].

139. Stout, *supra* note 45 ("The crisis was caused, first and foremost, by *changes in the law*. In particular, the crisis was the direct, foreseeable, and in fact foreseen . . . consequence of the CFMA's sudden and wholesale removal of centuries-old legal constraints on speculative trading in over-the-counter (OTC) derivatives." (emphasis added)).

140. See Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, Tit.VII, 124 Stat 1376 (2010).

141. *Fact Sheet: Final Determination*, *supra* note 112.

142. *Id.*

143. See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards under the Commodity Exchange Act, 77 Fed. Reg. 69694, 69694 (Nov. 16, 2012); Silla Brush, *U.S. Treasury Exempts Foreign Exchange Swaps from Dodd-Frank*, BLOOMBERG BUS. (Nov. 16, 2012, 9:26 PM) <http://www.bloomberg.com/news/articles/2012-11-16/u-s-treasury-exempts-foreign-exchange-swaps-from-dodd-frank> [<https://perma.cc/5YRN-ZCS8>].

Deutsche Bank AG, Bank of New York Mellon Corp., UBS AG, and other banks supported the determination, while the Treasury Department met resistance by regulators and Democratic lawmakers.¹⁴⁴ The Treasury Department stated: “Unlike other derivatives, FX swaps and forwards already trade in a highly-transparent, liquid and efficient market.”¹⁴⁵ Even with this determination, FX swaps and forwards “remain subject to the Dodd-Frank Act’s new requirement to report trades to repositories and rigorous business conduct standards.”¹⁴⁶ Thus, FX instruments are now subject to limited regulations under the Dodd-Frank Act.

The CFTC and SEC issued a final joint rule interpreting the Dodd-Frank Act on August 12, 2013 to address concerns that spot transactions may be considered an exchange “on a specific date in the future” and would thus qualify as a foreign exchange forward under the Act.¹⁴⁷ The rule states: “The CEA generally does not confer regulatory jurisdiction on the CFTC with respect to spot transactions.”¹⁴⁸ The Commissions then provide clarification that “a bona fide foreign exchange spot transaction, *i.e.*, a foreign exchange transaction that is settled on the customary timeline of the relevant spot market, is not within the definition of the term “swap,” and thus not subject to regulation.¹⁴⁹ The customary timeline “of a two-day settlement for spot foreign currency transactions has been recognized by the CFTC and the courts.”¹⁵⁰ However, depending on “relevant facts and circumstances” that may affect that timeline, “the Commissions will consider a foreign exchange transaction that is entered into solely to effect the purchase or sale of a foreign security to be a bona fide spot transaction where certain conditions are met.”¹⁵¹ The rule thus clarified that the CFTC and the SEC do not intend to impose any regulatory power upon traditional spot transactions.

144. Brush, *supra* note 143.

145. *Fact Sheet: Final Determination*, *supra* note 112.

146. *Id.*

147. *See* Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48207, 48257 (Aug. 13, 2012).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

4. Manipulation Laws

Despite legislative failure to grant jurisdictional authority over spot transactions to the CFTC, the Commission maintains some authority over these transactions through anti-manipulation provisions of the Act, § 9(a)(2), 7 U.S.C. § 13(a)(2). The CEA provides that it shall be a felony for “[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.”¹⁵² The CEA also provides that notwithstanding its explicit exclusion of foreign currency, such transactions are subject to the anti-manipulation provisions.¹⁵³

Historically, the CFTC has been largely unsuccessful in prosecuting manipulation claims. “[T]he CFTC has only won one case in thirty-seven years.”¹⁵⁴ The CFTC has, however settled a number of claims and has successfully maintained actions by demonstrating such authority.¹⁵⁵ The Dodd-Frank Act provides the CFTC with significantly expanded authority over manipulative conduct,¹⁵⁶ and by such authority, the CFTC has promulgated new regulations.¹⁵⁷ The Dodd-Frank Act added anti-manipulation language mirroring that of

152. 7 U.S.C. § 13 (2014).

153. See 7 U.S.C. § 2(c)(2)(C) (2006) (“Notwithstanding subclauses (II) and (III) of subparagraph (B)(ii), agreements, contracts, or transactions described in subparagraph (B) shall be subject to sections 4b, 4c(b), 6(c) and 6(d) (to the extent that sections 6(c) and 6(d) prohibit manipulation of the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any market), 6c, 6d, and 8(a) if they are entered into by a futures commission merchant or an affiliate of a futures commission merchant that is not also an entity described in subparagraph (B)(ii) of this paragraph.”).

154. Rosa M. Abrantes-Metz, Gabriel Rauterberg & Andrew Verstein, *Revolution in Manipulation Law: The New CFTC Rules and the Urgent Need for Economic and Empirical Analyses*, 15 U. PA. J. BUS. L. 357, 359 (2013).

155. See, e.g., CFTC v. Atha, 420 F. Supp. 2d 1373 (N.D. Ga. 2006) (finding “the manipulation of the price of any commodity is prohibited”); CFTC v. Johnson, 408 F. Supp. 2d 259 (S.D. Tex. 2005) (finding manipulation under a fraud-based theory within the jurisdiction of the CFTC); CFTC v. Enron Corp., 2004 U.S. Dist. LEXIS 28794 (D. Tex. 2004) (CFTC alleged violation of Section 9(a)(2) for manipulation of Henry Hub natural gas next-day spot market).

156. See 7 U.S.C. §§ 9, 15 (2014). The authority for the CFTC’s new anti-manipulation regulations is section 753 of Dodd-Frank, which amends section 6(c) of the Commodity Exchange Act. See *id.*

157. Abrantes-Metz, Rauterberg & Verstein, *supra* note 154, at 360 (citing Prohibition on the Employment, or Attempted Employment, of Manipulation and Deceptive Devices, Prohibition on Price Manipulation, 76 Fed. Reg. 41398 (July 14, 2011)).

the well-known securities fraud SEC Rule 10b-5¹⁵⁸ and thus adopted the expansive case law interpreting the statute, although the CFTC does not intend to be bound by those precedents.¹⁵⁹ The Act also extended CFTC authority to reckless manipulative conduct.¹⁶⁰

The CEA has long prohibited manipulation, proven by four elements: (1) a manipulative act or omission; (2) intent; (3) causation; and (4) artificial price.¹⁶¹ Of these, the element of price artificiality has been called the *sine qua non* of manipulation.¹⁶² An artificial price is one that does not “reflect basic forces of supply and demand,” and creates “conditions which prevent the futures market from performing its basic economic function and hence [diminishes] its utility to those members of the trade and general public who rely on its basic purposes.”¹⁶³ Meanwhile, attempted manipulation requires the showing of only two elements: intent and an overt act in furtherance of that intent, providing a lower bar for prosecution of such conduct. Therefore, in the FX manipulation scheme, as in any scheme, the burden to prove attempted manipulation is lower than the burden to prove the four elements of manipulation itself.

5. *Charges Brought by CFTC in FX Manipulation*

On November 11, 2014, the CFTC issued Orders against five banks: Citibank, HSBC, JPMorgan Chase, The Royal Bank of Scotland (RBS), and UBS AG, filing and settling charges of attempted manipulation and aiding and abetting attempts to manipulate the FX benchmark, collectively resulting in \$1.4 billion in

158. Rule 10b-5 provides that it shall be unlawful “for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5 (2015).

159. Mark D. Young, “*Summary of New CFTC Market Manipulation Rules*”, SKADDEN (Nov. 30, 2010), <https://www.skadden.com/insights/summary-new-cftc-market-manipulation-rules> [<https://perma.cc/XS42-4WK2>].

160. Abrantes-Metz, Rauterberg & Verstein, *supra* note 154, at 359.

161. *Id.* at 369-70.

162. *Id.* at 370.

163. *Id.* at 370 (quoting *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1158 (8th Cir. 1971)).

fines.¹⁶⁴ On May 20, 2015, the CFTC filed a separate Order filing and settling the same charges against Barclays.¹⁶⁵

Although the CEA gives the CFTC authority over spot transactions in Section 2(c)(2)(C), the Order clearly incorporates a nexus to the derivatives market in stating:

FX benchmark rates, including the WM/R Rates, are used to price a variety of transactions including foreign exchange swaps, cross-currency swaps, spot transactions, forwards, options, futures and other financial derivative instruments Accordingly, the integrity of the WM/R Rates and other FX benchmark rates is critical to the integrity of the markets in the United States and around the world.¹⁶⁶

The Orders charge that the banks lacked internal controls, failed to perceive the risks associated with participation in the FX benchmark rates, failed to adequately supervise their traders, and failed to monitor electronic chat rooms.¹⁶⁷ The Orders also find the banks engaged in attempted manipulation, finding the two necessary elements of intent to affect the market price and an overt act.¹⁶⁸ With the transcripts of the chat room discussions, the CFTC found that the traders “acted . . . with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect legitimate forces of supply and demand.”¹⁶⁹ The settlement of attempted manipulation did not require the CFTC to show that there would actually be an effect on the FX benchmark or the price of the transactions, as would have been necessary for a showing of market manipulation.¹⁷⁰ The banks were also found liable for the acts of its traders through agency liability, and for aiding and abetting the attempted manipulation of other banks.¹⁷¹

164. *CFTC Orders Five Banks to Pay over \$1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates*, CFTC (Nov. 12, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr7056-14> [<https://perma.cc/ZF55-PPNH>] [hereinafter *CFTC Orders Five Banks to Pay over \$1.4 Billion*].

165. *Barclays to Pay \$400 Million Penalty to Settle CFTC Charges of Attempted Manipulation and False Reporting of Foreign Exchange Benchmark Rates*, CFTC (May 20, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7181-15> [<https://perma.cc/SAJ5-44WN>].

166. *In re JPMorgan Chase Bank, N.A.*, 2014 WL 6068387, at *1 (Nov. 11, 2014).

167. *Id.* at *2.

168. *Id.* at *7.

169. *Id.* (citing *In re Indiana Farm Bureau Coop. Ass'n*, CFTC No. 75-14, 1982 WL 30249, at *7 (Dec. 17, 1982)).

170. *See supra* Part II.A.4.

171. *In re JPMorgan Chase Bank, N.A.*, 2014 WL 6068387, at *8.

B. Department of Justice

1. *Sherman Antitrust Act*

Congress first enacted the Sherman Antitrust Act in 1890 out of concern regarding growing corporate organization and accompanying wealth accumulation in the late 1800s.¹⁷²

The Act consists of two short provisions, providing in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.¹⁷³

The Clayton Act, passed in 1914, provides the right for private parties to sue in federal district court for violations of the Sherman Act where they may receive treble damages and the cost of suit, including reasonable attorney's fees.¹⁷⁴

2. *Charges Brought by DOJ in FX Manipulation*

On May 20, 2015, the Department of Justice Criminal Division and Antitrust Division released agreements with Citicorp, JPMorgan Chase, Barclays, RBS, and UBS.¹⁷⁵ Citicorp, JPMorgan Chase, Barclays, and RBS agreed to plead guilty to violations of the Sherman Anti-Trust Act and agreed to pay fines totaling \$2.5 billion.¹⁷⁶ UBS pleaded guilty to manipulating the London Interbank Offered Rate (LIBOR) after breaching its non-prosecution agreement in the resolution in that case, and agreed to pay a criminal penalty of \$203 million.¹⁷⁷

The Plea Agreements provide that Citicorp, JPMorgan Chase, Barclays, and RBS conspired to:

172. Jason A. Casey, *The Rule of Reason After Leegin: Reconsidering the Use of Economic Analysis in the Antitrust Arena*, 42 SUFFOLK U. L. REV. 919, 922-23 (2009).

173. 15 U.S.C. § 1 (2014).

174. *See id.* § 15.

175. These are the same banks the CFTC settle with in November 2014, with the exception of HSBC. *Five Major Banks Agree to Parent-Level Guilty Pleas*, *supra* note 91.

176. *Id.*

177. *Id.*

fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the euro/U.S. dollar (“EUR/USD”) currency pair¹⁷⁸ exchanged in the foreign currency exchange spot market (“FX Spot Market”), which began at least as early as December 2007 and continued until at least January 2013, by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.¹⁷⁹

All five banks were able to secure waivers from the Securities and Exchange Commission, allowing the companies to continue operating business unimpeded by their guilty pleas, including running mutual funds and issuing stocks, without deep regulatory review.¹⁸⁰ At least one member of the SEC dissented to this decision, citing the “recidivism of these institutions” and stating that for the SEC to continually grant these waivers “has effectively rendered criminal convictions of financial institutions largely symbolic.”¹⁸¹ With these waivers, the banks proudly boast that these guilty pleas will have no practical effect on their corporations.¹⁸²

178. Interestingly, Plea Agreements only charge the banks with fixing the EUR/USD currency pair. Plea Agreement at 3, *United States v. JPMorgan Chase & Co.*, No. 3:15-cr-79(SRU) (D. Conn. May 20, 2015); Plea Agreement at 3, *United States v. Citicorp*, No. 3:15-cv-78 (SRU) (D. Conn. May 20, 2015); Plea Agreement at 3, *United States v. Barclays PLC*, No. 3:15-cv-77 (SRU) (D. Conn. May 20, 2015); Plea Agreement at 3, *United States v. Royal Bank of Scotland PLC*, No. 3:15-cv-80 (SRU) (D. Conn. May 20, 2015).

179. *Id.*

180. Aruna Viswanatha, *Banks to Pay \$5.6 Billion in Probes*, WALL STREET J. (May 20, 2015, 12:49 PM), <http://www.wsj.com/articles/global-banks-to-pay-5-6-billion-in-penalties-in-fx-libor-probe-1432130400> [<https://perma.cc/NNC4-W9ET>].

181. Kara M. Stein, *Public Statement: Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates*, SEC (May 21, 2015), <http://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement.html> [<https://perma.cc/AYP3-D9UH>] (explaining this was Citigroup’s fifth waiver since 2006, Barclay’s third waiver since 2007, UBS’s seventh waiver since 2008, JPMorgan’s sixth waiver since 2008 and RBSG’s third waiver since 2013).

182. *See Gara, supra* note 8 (“Citigroup and JPMorgan said . . . that criminal guilty pleas to collusion are not expected to have a material impact on their operations.”).

C. Other U.S. Regulators

1. Monetary Authorities

The monetary authorities for the United States are the Department of the Treasury and the Federal Reserve. The Department of the Treasury is mandated with setting U.S. exchange rate policy since the breakdown of the Bretton Woods system in 1971 and with setting international financial policy. Practically, it is the Federal Reserve Bank of New York that implements the Department of Treasury's exchange rate policies, and thus these decisions are often made in consultation with the Federal Reserve.¹⁸³ The U.S. Federal Reserve and the U.S. Treasury Department also pay close attention to FX markets and look for evidence of manipulation.¹⁸⁴

In connection to their roles in manipulating the foreign exchange rates, on May 20, 2015, the Federal Reserve imposed \$1.8 billion in fines collectively against six banks¹⁸⁵ in conjunction with the Department of Justice for "unsafe and unsound practices in the foreign exchange markets."¹⁸⁶ Along with the fines, the Federal Reserve issued cease and desist orders requiring each bank to improve their policies and oversight in the wholesale FX market.¹⁸⁷ The Federal Reserve required the banks "to improve senior management oversight, internal controls, risk management, internal audit policies, trading activities and procedures," and prohibits the re-employment of individuals involved in the manipulation scheme.¹⁸⁸

2. U.S. Office of the Comptroller of the Currency

On November 12, 2014, the U.S. Office of the Comptroller of the Currency (OCC) announced it would impose a total \$950 million fine

183. To execute a decision to support or reduce the value of the dollar, the New York Federal Reserve deals directly with large interbank dealers in the spot market. To support the value of the dollar, the Federal Reserve will buy dollars and sell foreign currency. On the other hand, to reduce the price of the dollar, the Federal Reserve will sell dollars in exchange for foreign currency.

184. Aitken, *supra* note 4.

185. The fines respectively were: \$342 million each for UBS AG, Barclays Bank PLC, Citigroup Inc., and JPMorgan Chase & Co.; \$274 million for Royal Bank of Scotland PLC (RBS); and \$205 million for Bank of America Corporation. *Press Release*, BOARD GOVERNORS FED. RES. SYS. (May 20, 2015, 10:00 AM) <http://www.federalreserve.gov/newsevents/press/enforcement/20150520a.htm> [<https://perma.cc/2MPH-44JH>].

186. *Id.*

187. *Id.*

188. *Id.*

on three banks: Citibank, JPMorgan Chase, and Bank of America¹⁸⁹ for their role in unsound practices in the FX market.¹⁹⁰ The OCC found the banks lacked sufficient internal controls and failed to detect traders' improper business. After their investigation, the OCC determined:

[T]he traders disclosed confidential bank information, including customer orders and rate spreads. The OCC's examinations also found that traders discussed activity to trigger trading actions potentially detrimental to customers and beneficial to the trader or bank, and discussed pending orders and agreed not to trade in particular currencies.¹⁹¹

3. *New York Department of Financial Services*

On the same day the Department of Justice and Federal Reserve announced fines and criminal penalties in connection to FX market manipulation, the New York Department of Financial Services announced a fine against Barclays in connection with this same scheme for violations of New York Banking Law.¹⁹² In its press release, the NYDFS added that it would continue to investigate Barclays' use of electronic FX trading.¹⁹³ On November 18, 2015, the NYDFS announced an additional \$150 million fine for Barclays' use of its "Last Look" system¹⁹⁴ in FX trading.¹⁹⁵ The use of this electronic trading system would automatically reject any orders from the bank's customers that would not ultimately be profitable.¹⁹⁶

189. The OCC was the only agency to fine Bank of America.

190. *OCC Fines Three Banks \$950 Million for FX Trading Improprieties*, OFF. COMPTROLLER CURRENCY (Nov. 12, 2014), <http://www.occ.treas.gov/news-issuances/news-releases/2014/nr-occ-2014-157.html> [<https://perma.cc/43SJ-WGUG>].

191. *Id.*

192. See Press Release, N.Y. Dep't of Fin. Servs., *supra* note 103.

193. *Id.*

194. "The system . . . operated by introducing a hold period between a customer order being received and it being executed by Barclays. It allowed the bank to root out trades where the price had moved against them, often in just milliseconds. Customers . . . would receive messages saying 'NACK' (not acknowledged)." Jill Treanor, *Barclays Fined \$150m over Forex Trading by New York Regulator*, GUARDIAN (Nov. 18, 2015, 1:03 PM), <http://www.theguardian.com/business/2015/nov/18/barclays-fined-150m-over-forex-trading-by-new-york-regulator> [<https://perma.cc/6N72-S4Z4>].

195. *Id.*

196. *Id.* Anthony Albanese, New York's top financial regulator stated: "This case highlights the need for greater oversight and action to help prevent the misuse of automated, electronic trading platforms on Wall Street, which is a wider industry issue that requires serious additional scrutiny." *Id.*

D. International Authorities

The Heads of State and the Government of the Group of Twenty (G20) established the Financial Stability Board in 2009.¹⁹⁷ The international body of twenty countries seeks to review and promote international financial stability.¹⁹⁸ In response to concerns regarding the integrity of the FX markets, the Board has issued a report and set out a number of recommendations to reform the FX market and benchmark rates.¹⁹⁹

The Financial Conduct Authority (FCA) is a financial regulatory body in the United Kingdom, operating under the regulatory jurisdiction of the Financial Services Act of 2012.²⁰⁰ Spot transactions are not deemed to fall under this Act as a qualifying investment, and therefore, FX spot transactions cannot apply to the market abuse regime under the FCA's Code of Market Conduct guidelines.²⁰¹

On November 12, 2014, the FCA announced they would impose a \$1.7 billion fine on five banks, Citibank, HSBC, JPMorgan Chase, RBS, and UBS, for "failing to control business practices" related to the FX operations.²⁰² On May 20, 2015, the FCA announced an additional 284 million GBP (approximately \$441 million) fine on Barclays for the same.²⁰³ Noticeably, the fines were imposed because of the banks' unsound internal practices, rather than for manipulating the FX markets.²⁰⁴ The FCA, in connection with the Bank of England and the HM Treasury,²⁰⁵ also established a review by the three U.K.

197. *Our History*, FIN. STABILITY BOARD, <http://www.fsb.org/about/history/> [<https://perma.cc/W7K5-HCXG>].

198. *About the FSB*, FINANCIAL STABILITY BOARD, <http://www.fsb.org/about/> [<https://perma.cc/F3HU-6QMT>].

199. *See generally* FOREIGN EXCHANGE BENCHMARKS, *supra* note 50.

200. *History of the FCA*, FIN. CONDUCT AUTHORITY, <https://www.fca.org.uk/about/history> [<https://perma.cc/K2AX-UK2H>].

201. George Tchertakov, *Global FX Market Regulation Part 1 – A Big Dream That Requires Even Bigger Ambition*, FIN. MAGNATES (Sept. 12, 2014), <http://www.financemagnates.com/forex/analysis/global-fx-market-regulation-part-1-big-dream-requires-even-bigger-ambition/> [<https://perma.cc/P64M-KPRL>].

202. Press Release, Financial Conduct Authority, FCA Fines Five Banks £1.1 Billion for FX Failings and Announces Industry-wide Remediation Programme, (Nov. 13, 2014), <http://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings> [<https://perma.cc/SK3G-N9W2>] [hereinafter FCA Fines Five Banks £1.1 Billion].

203. Press Release, Fin. Conduct Authority, FCA Fines Barclays £284,432,000 for Forex Failings (May 20, 2015), <https://www.fca.org.uk/news/fca-fines-barclays-for-forex-failings> [<https://perma.cc/JZ65-B84U>].

204. *See id.*; FCA Fines Five Banks £1.1 Billion, *supra* note 202.

205. Her Majesty's Treasury is the UK's "economic and financial ministry, maintaining control over public spending, setting direction of the UK's economic policy and working to achieve strong and sustainable economic growth." *HM*

authorities to research and make recommendations regarding the foreign exchange market, along with others.²⁰⁶ This review, called the Fair and Effective Markets Review, has included recommendations and is widely cited in considerations of policy and regulatory change in this market.²⁰⁷

The Swiss Financial Market Supervisory Authority (FINMA) is “Switzerland’s independent financial-markets regulator.”²⁰⁸ FINMA issued an order against UBS on November 12, 2014 charging the bank with attempting to manipulate foreign benchmarks and fining the bank \$139 million.²⁰⁹ FINMA also levied bans from the FX market against six traders at UBS in December 2015.²¹⁰ In July, the Brazilian antitrust agency also began looking into FX manipulation affecting their currency, the real.²¹¹

E. Internal Banking Regulations

One of the most prominent reasons cited for the regulatory exemption of the FX markets for decades has been that the market is regulated by the banks’ internal regulations, and additional regulatory jurisdiction would be duplicitous.²¹² Additionally, as explained by the

Treasury, GOV.UK, <https://www.gov.uk/government/organisations/hm-treasury> [<https://perma.cc/39YC-QWMV>].

206. *Fair and Effective Markets Review*, BANK ENG., <http://www.bankofengland.co.uk/markets/Pages/fmreview.aspx> [<https://perma.cc/2M7H-SYER>].

207. *See generally* HM TREASURY, BANK OF ENG. & FIN. CONDUCT AUTH., *FAIR AND EFFECTIVE MARKETS REVIEW: FINAL REPORT 16* (2015), <http://www.bankofengland.co.uk/markets/Documents/femrjun15.pdf> [<https://perma.cc/5NE9-RPYB>] [hereinafter *FAIR AND EFFECTIVE MARKETS REVIEW*].

208. *FINMA - An Independent Supervisory Authority*, FINMA, <https://www.finma.ch/en/finma/finma-an-overview/> [<https://perma.cc/SR4K-S9T3>].

209. Kirstin Ridley, Joshua Franklin & Aruna Viswanatha, *Regulators Fine Global Banks \$4.3 Billion in Currency Investigation*, REUTERS (Nov. 12, 2014, 5:10 PM), <http://www.reuters.com/article/2014/11/12/us-banks-forex-settlement-cftc-idUSKCN0IW0E520141112#dekZUmd69obx9eGt.97> [<https://perma.cc/2J4J-DCV2>].

210. Jeff Patterson, *FINMA Cracks Down on Former UBS FX Employees, Lobbying Industry Bans*, FIN. MAGNATES (Dec. 17, 2015), <http://www.financemagnates.com/institutional-forex/regulation/finma-cracks-down-on-former-ubs-fx-employees-lobbying-industry-bans/> [<https://perma.cc/6A2J-Q8HS>].

211. Jeffrey T. Lewis & Rogerio Jelmayer, *Brazil Antitrust Agency Investigating Banks for Suspected Rate Manipulation*, WALL STREET J. (July 2, 2015, 4:17 PM), <http://www.wsj.com/articles/brazil-antitrust-agency-investigating-banks-for-suspected-rate-manipulation-1435850570?alg=y> [<https://perma.cc/EN94-SHAX>].

212. *See* S. Rep. No. 93-1131, at 23 (1974), as reprinted in 1974 U.S.C.C.A.N. 5843, 5863; Tormey, *supra* note 121, at 2370-71 (“CFTC regulation would be superfluous and unnecessary encumbrance of the industry’s efficiency.”).

Final Report of the Fair and Effective Markets Review, published in June 2015: “[r]eflecting the challenge of devising a single global regulatory framework for a market that trades around the clock across multiple jurisdictions, standards in spot FX have historically been guided by voluntary sets of principles drawn up on a national basis.”²¹³ Yet, the report goes on to state: “[i]t became clear through recent enforcement cases that few firms had integrated the provisions of these codes into their internal control systems.”²¹⁴ In fact, each regulatory body to bring charges or fines against the banks in connection with the FX manipulation, cited to the lack of internal controls and adequate oversight policies in addition to manipulation charges, if not exclusively.²¹⁵ As a result, the banks have agreed to revamp their internal control structure and policies and procedures in order to address the issues exposed in light of these investigations.²¹⁶

F. Repercussions of the Manipulation Scheme

The effects of the FX manipulation scheme are far from over. As of yet, more than thirty traders have been fired,²¹⁷ while one RBS trader was arrested in December 2014 although he was not charged

213. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 14.

214. *Id.*

215. See *CFTC Orders Five Banks to Pay over \$1.4 Billion*, *supra* note 164 (In addition to finding collusion, “[t]he Orders [from the CFTC] also find that the Banks failed to adequately assess the risks associated with their FX traders participating in the fixing of certain FX benchmark rates and lacked adequate internal controls in order to prevent improper communications by traders. In addition, the Banks lacked sufficient policies, procedures and training specifically governing participation in trading around the FX benchmarks rates; and had inadequate policies pertaining to, or sufficient oversight of, their FX traders’ use of chat rooms or other electronic messaging”); see also Plea Agreement at 10-11, *United States v. Citicorp*, No. 3:15-cv-78 (SRU) (D. Conn. May 20, 2015); *Press Release*, *supra* note 187 (“The Federal Reserve on Wednesday announced it will impose fines totaling more than \$1.8 billion against six major banking organizations for their unsafe and unsound practices in the foreign exchange (FX) markets The Federal Reserve also issued cease and desist orders requiring the firms to improve their policies and procedures for oversight and controls over activities in the wholesale FX and similar types of markets.”).

216. See *supra* note 206 and accompanying text.

217. Suzi Ring & Kit Chelle, *Fired Currency Traders Won’t Leave Quietly*, BLOOMBERG (Sept. 14, 2015, 7:00 PM), <http://www.bloomberg.com/news/articles/2015-09-14/fired-currency-traders-won-t-leave-quietly-as-lawsuits-mount> [<https://perma.cc/GYQ2-KSDC>] (last updated Sept. 15, 2015, 6:32 AM) (explaining that fired employees are now suing the banks, claiming to have been a scapegoat for failing to stop the manipulation of currency benchmarks.); see also Steve Slater, *Former RBS FX Trader Joins List of Ex-bankers Suing over Dismissals*, REUTERS (Sept. 16, 2015, 10:23 AM), http://mobile.reuters.com/article/internal_ReutersNewsRoom_ExclusivesAndWins_MOLT/idUSKCN0RG1YF20150916 [<https://perma.cc/8E83-LP39>].

with an offense.²¹⁸ Private lawsuits²¹⁹ have been filed in the U.K. and the United States even before the investigation results were released and the banks pleaded guilty; some have been consolidated, some have settled, and some are outstanding.²²⁰ A further seven banks continue to face litigation in the United States from investors over forex rigging, including Deutsche Bank, Morgan Stanley, and Standard Chartered.²²¹ Bank of America settled a private lawsuit for its conduct in the FX scheme on April 29, 2015 for \$180 million.²²²

The economic impact of the scheme is difficult to define precisely. The manipulation “inflated the banks’ profits while harming countless consumers, investors and institutions around the globe — from pension funds to major corporations, and including the banks’ own customers,” according to U.S. Attorney General Loretta Lynch.²²³ Britain’s chief market regulator recently called the exchange rate manipulation scheme the “biggest series of quantifiable wrongdoing in the history of our financial services industry.”²²⁴ As a result, the market expected a significant increase in regulation, although that has not happened quite yet.²²⁵

218. Jaimie McGeever & Kirstin Ridley, *Arrested RBS Forex Trader Named as Paul Nash: Sources*, REUTERS (Jan. 8, 2015, 10:23 AM), <http://www.reuters.com/article/us-forex-rbs-court-idUSKBN0KH1IZ20150108> [<https://perma.cc/A9YW-5YRJ>].

219. In addition to a private right of action stemming from violations of the Sherman Antitrust Act, Section 22 of the CEA provides for a private right of action for violations of the Act, for several categories of conduct, available to “any person who sustains loss as a result of any alleged violation of the chapter.” 7 U.S.C. § 25(a)(2) (2014).

220. See Maya Rajamani, *Futures Traders Folded Into Forex OTC Litigation*, LAW360 (Aug. 17, 2015, 7:32 PM), <http://www.law360.com/articles/691809/futures-traders-folded-into-forex-otc-litigation> [<https://perma.cc/K8CV-U5MG>].

221. Elizabeth Fry, *Global Banks Face More Litigation from Angry Investors*, AUSTRAL. BANKING & FIN. (Dec. 24, 2015), <https://www.australianbankingfinance.com/banking/global-banks-face-more-litigation-from-angry-investors/> [<https://perma.cc/2H2E-XBV9>].

222. Christina Rexrode, *Bank of America to Pay \$180 Million to Settle Investors’ Forex Lawsuit*, WALL STREET J. (April 29, 2015, 6:06 PM), <http://www.wsj.com/articles/bank-of-america-to-pay-180-million-to-settle-private-forex-lawsuit-1430340190> [<https://perma.cc/X6KR-AZ64>].

223. McCoy & Johnson, *supra* note 97.

224. Pam Martens, *Top UK Regulator: People Have Good Reason Not to Trust Currency Rates Set By Big Banks*, WALL STREET ON PARADE (Feb. 5, 2014), <http://wallstreetonparade.com/2014/02/top-uk-regulator-people-have-good-reason-not-to-trust-currency-rates-set-by-big-banks/> [<https://perma.cc/G3RH-784B>].

225. See Baert, *supra* note 10; Jeff Patterson, *Regulatory Changes Coming Amid Vulnerabilities in FX, Swaps Compliance*, FIN. MAGNATES (Mar. 24, 2014), <http://www.financemagnates.com/forex/regulation/regulatory-changes-coming-amid-vulnerabilities-in-fx-swaps-compliance/> [<https://perma.cc/75UU-TA9K>].

As it stands, there is no agency with regulatory jurisdiction over the spot market. While the CFTC and DOJ prohibit and have enforcement authority over manipulation and collusion, respectively, there has yet to be any practical consequence of this manipulation scheme.

III. IMPLICATIONS OF REGULATORY PROPOSALS

In light of the manipulation scandal, one contention that is largely understood is that change is inevitable in the FX market. The prospect of new regulations or internal controls are expected to soon change the landscape of the market, “and plenty of potential solutions have been supplied, including creating a banking union, introducing a single-reserve currency, creating one global regulator, or putting FX trading on exchange, giving as a few examples.”²²⁶ However, it is far from agreed upon what these new regulations will look like and if they should come at all. This Part discusses positions against and for additional regulations and various proposals for the FX market. Part A details a number of arguments against additional regulations in the market. Part B provides an explanation of those arguments for new regulations and oversight. Part C provides an explanation of the criminal jurisdiction over the foreign currency market and the criminal consequences of the scheme.

A. The Market Should Remain Unregulated

The FX market, and the spot market in particular, is one of self-regulation. No agency monitors or has authority over it.²²⁷ The few regulations that exist stem from firms’ obligations as financial institutions and are governed by banking regulators.²²⁸ The banks themselves, who have adamantly argued for the preservation of this model,²²⁹ enforce these regulations and guidelines internally.²³⁰ One

226. Tchertvertakov, *supra* note 203.

227. Aitken, *supra* note 4.

228. *See supra* note 134-36 and accompanying text.

229. Patrick Graham, *Troubled FX Industry Set to Defend ‘Self-regulation’*, REUTERS (Mar. 26, 2014, 10:38 AM), <http://www.reuters.com/article/us-banks-forex-congress-idUSBREA2P15020140326> [<https://perma.cc/EFX6-2L6G>].

230. LMAX EXCH., *RESTORING TRUST IN GLOBAL FX MARKETS: STRIKING A BALANCE BETWEEN TRANSPARENCY AND EFFICIENCY* 25 (2015), <https://www.lmax.com/restoring-trust-report> [<https://perma.cc/28J8-SQW6>] [hereinafter *RESTORING TRUST*] (“To date, the FX market has always relied on self-regulation. There is unease, therefore, at the idea that too much regulatory power will be ceded to external parties. Accordingly, some within the industry prefer to

important reason for this regulatory model is that market participants, major international banks, are all financially sophisticated and do not require the protection of regulations like those in the securities or derivatives market.²³¹ The market's international nature made comprehensive regulation impracticable and due to its massive size, the market was thought to be highly unlikely to be susceptible to manipulation. As stated in 2012: "Fortunately, the FX market is sufficiently liquid that significant manipulation by any single actor is all but impossible during active trading hours for the major currencies."²³² Thus, the spot market has historically been free from intrusive regulations.

Derivatives have all come under some form of regulation because of their speculative nature and inherent risk. Spots have escaped such regulation because it is simply a sale of one currency for another – an even exchange at a negotiated price by two parties. The Fourth Circuit explained, "[t]ransactions in the commodity itself which anticipate actual delivery did not present the same opportunities for speculation, manipulation, and outright wagering that trading in futures and options presented."²³³ It is for this reason that the CEA has long excluded spot transactions explicitly from its regulations.

Another reason cited for the lack of regulation in the spot FX market is that the market is self-regulating, in that the participants ensure the best prices and best practices even absent regulation. They are said to value their autonomy and try to ensure the integrity of the market. A central banker once said, "[i]t's an entirely professional market and there's honour among thieves. The participants are keen on a clean market, not least because of the risk to reputation."²³⁴ Similarly, the FX market was subject to market discipline.²³⁵ Purchasing firms and retail customers could withdraw

stress the importance of restoring codes of conduct, rather than imposing new rules.").

231. See S. Rep. No. 93-1131, at 49-50 (1974), as reprinted in 1974 U.S.C.C.A.N. 5843, 5887-88 (emphasis in original) ("The participants in this market are sophisticated and informed institutions, unlike the participants on *organized* exchanges, which, in some cases, include individuals and small traders who may need to be protected by some form of governmental regulation.").

232. King, Osler & Rime, *supra* note 51, at 8.

233. *Tauber*, 8 F.3d at 970-71.

234. Lee Oliver, *From the Archive: Does FX Need Best-execution Regulations?*, EUROMONEY (May 2006), <http://www.euromoney.com/Article/1039431/From-the-archive-Does-FX-need-best-execution-regulations.html> [<https://perma.cc/Y2A3-D5W8>].

235. See Andrew Hauser, Director of Markets Strategy, Bank of Eng., and Head of the Fair and Effective Markets Review Secretariat, *Realigning Private and Public*

their business if they suspected misconduct among any of the other participants.²³⁶ The prospect of losing this business was said to have been a sufficient deterrent in itself to prevent misconduct.²³⁷

Regulations on the FX market would also impede efficiency and liquidity.²³⁸ The market participants are already a part of a highly regulated industry, and would be “more properly supervised by the bank regulatory agencies.”²³⁹ It is generally understood that any increase in transparency will come at a price, negatively affecting liquidity, which is said to be the beating heart of the global FX market.²⁴⁰ Regulation, which tends to lock in prices and obstruct necessary flexibility that has thus far been a touchstone of the FX market, would also impede further evolution of the market through the use of technology.²⁴¹

In addition to their impediment on market efficiency, many argue that regulations are simply not necessary and would not actually solve the issues facing the FX market today. To think even a global regulatory scheme will prevent collusion among top-tiered banks is probably a naïve assumption.²⁴² These market makers will “always have an opportunity to ‘fix’ benchmark prices.”²⁴³ No amount of regulations can universally solve the issue of market manipulation, but will only serve to shift the details of its origin and structure.²⁴⁴

Interests in Wholesale Financial Markets: The Fair and Effective Markets Review (Jan. 29, 2015), *in* <http://www.bankofengland.co.uk/publications/Documents/speeches/2015/speech795.pdf> [<https://perma.cc/5NV9-RQ39>] (“To put it bluntly, firms knew that an attempt by them to abuse the interests of others in the market today could be punished by the removal of large quantities of lucrative business tomorrow. And that knowledge was thought to be the most powerful way of sustaining broadly well-functioning and sound markets.”).

236. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 25.

237. *Id.*

238. See Tormey, *supra* note 121, at 2357 (“CFTC regulation would be superfluous and unnecessary encumbrance of the industry’s efficiency.”).

239. S. Rep. No. 93-1131, at 22 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5843, 5863.

240. Elliot Holley, *FX Industry Must Act Now or Face Regulation Warns LMAX*, BANKING TECH. (Oct. 19, 2015), <http://www.bankingtech.com/388002/fx-industry-must-act-now-or-face-regulation-warns-lmax/> [<https://perma.cc/LUC3-DMCX>].

241. Oliver, *supra* note 236.

242. See George Tchetvertakov, *Global FX Market Regulation – A Big Dream That Requires Even Bigger Ambition, Part 2*, FIN. MAGNATES (Sept. 18, 2014), <http://www.financemagnates.com/forex/analysis/global-fx-market-regulation-big-dream-requires-even-bigger-ambition-part-2/> [<https://perma.cc/X9JL-QTAK>].

243. *Id.*

244. *See id.*

Increased regulations in the United States may incentivize big banks to take their business to other nations without such intrusive laws. Banks may change the focus of their business to other countries or move their entire business offshore,²⁴⁵ posing a detriment to the U.S. markets.²⁴⁶ New regulations in the United States in a global market could also cause “fragmentation . . . regulatory arbitrage,²⁴⁷ and in the worst case . . . a race to the bottom.”²⁴⁸ One fear is that new regulations would either cause market prices to vary, not because of the supply or demand of the market but exclusively because of the effect of the regulations themselves, creating a disparity of prices. An additional concern is that countries would compete with each other to create the most appealing regulatory scheme to financial institutions in order to attract their business, and ultimately harm the market itself because of ineffective regulations.

Finally, many argue that the FX market should not come under the view of a strict regulatory scheme because of the “unintended consequences” that could result. This same concern was raised by both the U.S. Treasury Department regarding the regulation of FX instruments²⁴⁹ and the Association for Financial Markets in Europe regarding the possible results of regulating the FX market in Markets in Financial Instruments Directive II (MiFID II), a new piece of legislation for financial reform in Europe.²⁵⁰ Likewise, others have implored that regulators do not enact a legal regime out of “hysteria and ignorance,”²⁵¹ regulating for the sake of regulating instead of carefully identifying what exactly would solve the issues faced by the FX market today.

245. Tormey, *supra* note 121, at 2359-60.

246. *Id.*; see also King, Osler & Rime, *supra* note 51, at 8 (“Governments have learned through experience that dealers will simply move elsewhere if they are regulated. In the 1960s, for example, bond dealers simply moved offshore when the U.S. government attempted to regulate the foreign issuance of US dollar denominated bonds in the domestic market.”).

247. Arbitrage “is a trade that profits by exploiting price differences of identical or similar financial instruments, on different markets or in different forms.” *Arbitrage*, INVESTOPEDIA, <http://www.investopedia.com/terms/a/arbitrage.asp#ixzz3vD6D6OpO> [<https://perma.cc/EH8U-GJTH>].

248. GEORGE UGEUX, INTERNATIONAL FINANCE REGULATION: THE QUEST FOR FINANCIAL STABILITY 1 (2014) (quoting IOSCO Director General David Wright).

249. Brush, *supra* note 143.

250. Aitken, *supra* note 4.

251. BHALA, *supra* note 35, at 38.

1. *Proposals to Maintain Self-Regulation*

Many international regulatory bodies seem to support the self-regulatory model in citing the banks' internal failures as the purpose for the manipulation. On March 30, 2015, eight foreign exchange committees from different nations came together and published a "Global Preamble: Codes of Best Market Practice and Shared Global Principles."²⁵² The Global Preamble serves as guidance of ethical standards and behavior for the industry regarding a number of practices, including client confidentiality and market conduct, personal conduct, and policies for best execution practices.²⁵³ In its Fair and Effective Markets Review, the Financial Conduct Authority and the Bank of England recommend the adoption of a single code of conduct for the industry.²⁵⁴ In addition, the Bank of International Settlement set up a working group to develop behavior standards for FX traders, building off of the established framework of the Global Preamble.²⁵⁵ This code will go into effect in May 2017.²⁵⁶ It will be up to the banks and each government to enforce the rules and it is unclear what, if any, consequences there will be to violations.²⁵⁷

Other changes have been aimed at reducing the possibility of trader manipulation in the way trades are actually carried out. For example, since the manipulation scheme has come to light there has been an increased use of algorithmic trading.²⁵⁸ One estimate suggests that 90% of orders are placed using algorithms, compared with about

252. See GLOBAL PREAMBLE: CODES OF BEST MARKET PRACTICE AND SHARED GLOBAL PRINCIPLES (2015), https://www.ecb.europa.eu/paym/groups/pdf/fxcg/global_preamble.pdf?6ba97a4cd5ce1e57c965e7461443cc0c [<https://perma.cc/37XV-7Z29>].

253. See *id.*

254. See FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 7.

255. Chiara Albanese, *BIS Calls For Single FX Code of Conduct*, WALL STREET JOURNAL: MONEYBEAT (May 11, 2015, 11:45 AM), <http://blogs.wsj.com/moneybeat/2015/05/11/bis-calls-for-single-fx-code-of-conduct/> [<https://perma.cc/K75D-8EPV>] [hereinafter Albanese, *BIS Calls For Single FX Code of Conduct*].

256. Patrick Graham & Huw Jones, *New Global Forex Code to Take Effect in May 2017*, REUTERS (Sept. 9, 2015, 12:01 PM), <http://uk.reuters.com/article/markets-forex-regulations-idUKL5N11F1XK20150909> [<https://perma.cc/MKB3-4X7V>].

257. *Id.* ("[T]he biggest challenge [is] to devise ways of making banks and other participants stick to the new code The code won't have the status of formal, binding regulation and it will be up to governments how it could be enforced.").

258. Albanese, *Forex Scandal Drives Shift to Algo Trading*, *supra* note 84. Algorithmic trading "utilizes very advanced mathematical models for making transaction decisions in the financial markets." *Algorithmic Trading*, INVESTOPEDIA, <http://www.investopedia.com/terms/a/algorithmictrading.asp> [<https://perma.cc/X5QN-Y8VZ>].

5% before the manipulation investigation.²⁵⁹ With the use of these algorithms, banks can simply act as an intermediary when taking client orders in providing the service of connecting the orders to trading platforms rather than taking on the order, and the risk, themselves.²⁶⁰ In exchange, instead of making a profit off of the clients' positions, banks charge a fee for this service.²⁶¹

B. Regulations are Necessary

Since the FX market manipulation scheme has become public, there are also advocates in favor of creating a regulatory regime for the still unregulated spot FX market. One thing these advocates agree on is the ineffectiveness of internal banking controls. In 2001, sixteen of the top banks signed a voluntary code of conduct for their practices in the FX market.²⁶² A standard code of conduct presents a fundamental issue: that it remains up to the banks to implement them on their own.²⁶³ The Financial Conduct Authority stated, “[t]he banks’ failures to establish adequate systems and controls are what allowed the traders to manipulate the fixed rate across the world’s largest currencies.”²⁶⁴ Simon Potter, head of markets at the Federal Reserve Bank of New York said that, previously, banks may have intentionally disregarded the industry’s best practices, identifying an important issue in the self-regulatory model.²⁶⁵

Even with new internal controls, regulators are still advocating for more to be done.²⁶⁶ Officials from central banks across the world have warned banks that “more restrictive regulation is inevitable” if they did not act on new standards and recommendations.²⁶⁷ Others suggest that even if banks successfully implement codes of conduct,

259. Albanese, *Forex Scandal Drives Shift to Algo Trading*, *supra* note 84.

260. *Id.*

261. *Id.*

262. Vaughan, Finch & Choudhury, *supra* note 1. This code was later included in a set of guidelines issued by the Bank of England in 2011. *Id.*

263. *See id.* (“The thing about the code is it is a voluntary code. It may be that compliance with that has almost been seen as optional.”).

264. Bray, Anderson & Protess, *supra* note 89.

265. Katy Burne, *NY Fed Official to Currency Traders: Adhere to Industry Best Practices*, WALL STREET J. (July 14, 2015), <http://www.wsj.com/articles/ny-fed-official-to-currency-traders-adhere-to-industry-best-practices-1436879710> [<https://perma.cc/T8CW-QGLB>].

266. *See* Chiara Albanese, *Currencies Trading Needs Further Cleanup, Regulators Say*, WALL STREET J. (Oct. 1, 2015), <http://www.wsj.com/articles/currencies-trading-needs-further-cleanup-regulators-say-1443699941?alg=y> [<https://perma.cc/5VA9-6E9C>]; Albanese, *BIS Calls For Single FX Code of Conduct*, *supra* note 257.

267. Burne, *supra* note 267.

that will not be enough. Codes of conduct will be a “complement to regulation,” but regulation will still be necessary.²⁶⁸

An independent review by the Bank of England explained that the structure of the FX market lends itself to “conflicts of interests; limited transparency; poor benchmark design; market concentration; and a reduction in the effectiveness of market discipline.”²⁶⁹ Specifically, some financial actors thought transparency was enhanced by the increased use of electronic systems.²⁷⁰ Yet, a recent study discovered that 80% of market participants think the FX market needs more transparency.²⁷¹ Another article explains, “there is an almost complete lack of transparency in forex.”²⁷² Thus, it is clear that the transparency gained by the use of electronic systems is not nearly enough for investors to be made aware of the specific data necessary to provide clarity to the now opaque market. It is commonly accepted that transparency should be the common goal of the market despite whatever costs may come with it.²⁷³

Similarly, the FX market was thought to have been governed by the discipline of the market. Banks understood they would lose business if it was discovered that they attempted to abuse the market, “[a]nd that knowledge was thought to be the most powerful way of sustaining broadly well-functioning and sound markets.”²⁷⁴ The understanding that this is not actually how the market works has left a leader in the industry to even question the value of a debate of whether there ever “was a historic ‘golden age’ when the real world actually worked like this.”²⁷⁵ The Fair and Effective Markets Review

268. Simon M. Potter, Executive Vice President of the Markets Group, Fed. Res. Bank of N.Y., Trends in Foreign Exchange Markets and the Challenges Ahead 8 (July 15, 2015), *in* <http://www.bis.org/review/r150721f.pdf> [<https://perma.cc/TET6-XQNW>].

269. HM TREASURY, BANK OF ENG. & FIN. CONDUCT AUTH., HOW FAIR AND EFFECTIVE ARE THE FIXED INCOME, FOREIGN EXCHANGE AND COMMODITIES MARKETS? 3 (2014), <http://www.bankofengland.co.uk/markets/Documents/femr/consultation271014.pdf> [<https://perma.cc/6L75-VYVK>].

270. King, Osler & Rime, *supra* note 51, at 24.

271. Elliot Holley, *supra* note 242.

272. Gregg Fields, *A Fixed Game? Institutional Corruption Charges Taint Global Markets – Again.*, HARV. U.: EDMOND J. SAFRA CTR. FOR ETHICS (Feb. 13, 2014), <http://ethics.harvard.edu/blog/fix-ed-game> [<https://perma.cc/SZ8G-M5JN>] (“When it comes to how exchange rates are set . . . [a] client doesn’t have any independent way of knowing, for instance, if the price is good or bad relative to what others are paying.”).

273. RESTORING TRUST, *supra* note 230, at 5.

274. Hauser, *supra* note 235.

275. *Id.*

found that market discipline was either lacking or non-existent in FX. 276 This is because of three reasons: there are few alternative firms to buy from if misconduct is discovered; the need to maintain relationships with other firms; and the difficulty of detecting market abuse.²⁷⁷ This mismatch between the financial interests of the banks and their shareholders and those of society is now widely understood.²⁷⁸

In response to concerns about efficiency, advocates for regulation note that much of what makes the FX market efficient would be deemed illegal in other markets.²⁷⁹ A notable example is the practice of front-running, which is legal in the FX market.²⁸⁰ Front-running is defined as “the practice whereby an individual is trading in possession of private information about an order designed to take advantage of the anticipated price effect of a future order.”²⁸¹ In FX front-running, once a bank receives an order to be placed at the fix rate, banks trade in the opposite direction as their customers in order to hedge against market shifts. For example, if a client placed an order to buy 500 million euros to be executed at the fix price, which at that time was \$1.1200, a trader would begin to buy euros in the market.²⁸² This activity would begin to push the price up so that the trader would sell the euros for \$1.1250 to the customer when he purchased them at an

276. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 25.

277. *Id.*

278. Justin Fox, *How Shareholders Are Ruining American Business*, ATLANTIC (July 2013), <http://www.theatlantic.com/magazine/archive/2013/07/stop-spoiling-the-shareholders/309381/> [<https://perma.cc/B9G9-UX8W>].

279. See Sid Verma, *FX Fixing Controversy Is So 2006: What They Said Back Then*, EUROMONEY (Mar. 20, 2014), <http://www.euromoney.com/Article/3321671/FX-fixing-controversy-is-so-2006-what-they-said-back-then.html> [<https://perma.cc/BB6K-RU7F>] (“Another issue hardly anybody is prepared to speak about on the record but which has been referred to, is that many of the very practices that help make FX so efficient would most definitely be frowned on or even deemed illegal in other markets and will almost certainly not pass muster in a market that falls under Mifid’s scope. Pre-empting orders, if not even actually front-running them – and there is a subtle but important difference – is almost the norm in FX. However, very few banks are prepared to admit it.”).

280. King, Osler & Rime, *supra* note 51, at 8. Despite the fact that front-running is technically legal in the FX market, the SDNY denied a motion to dismiss in a civil case against twelve defendant banks in connection to the FX manipulation, citing front-running as an example of the misconduct. See *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 587-88, 594-95 (S.D.N.Y. 2015).

281. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 104.

282. See Matt Levine, *RBS Promises Not to Trade Against Clients Too Much*, BLOOMBERG VIEW (Oct. 30, 2013, 2:14 PM), <http://www.bloombergview.com/articles/2013-10-30/rbs-promises-not-to-trade-against-clients-too-much> [<https://perma.cc/KK74-4KFM>].

average rate of \$1.1225. The bank's profit would be \$.0025. Banks argue this is a necessary practice in risk management, to protect against market volatility and the chance that the price would drop when they promise to trade at the fix price.²⁸³ On the other hand, the customer ends up paying a higher price than he would have without this practice.²⁸⁴

Although front-running is illegal in other markets, in the FX market, reports have characterized this practice in a number of ways such as "part of the game" in FX trading with "absolutely no legal repercussions"²⁸⁵ to "bad practice"²⁸⁶ to "unacceptable."²⁸⁷ Market participants indicated a need for clarification of the fine line between acceptable hedging and unacceptable front-running of client orders.²⁸⁸ In any event, collusive front-running has never been acceptable in any market, including FX.

Along with the need to provide clarity is the need to protect market integrity and to recreate public trust where it has been lost.²⁸⁹ The loss of public trust in the FX market has been a detriment to its efficiency, created uncertainty among investors, and increased the cost of management, resources, and compensation necessary to risk taking.²⁹⁰ To rebuild the public trust in the market, the Fair and Efficient Market Review recommends both domestic regulatory reform, and international cooperation among regulators.²⁹¹

1. *Proposals/Solutions*

The industry has widely come to terms with the inevitability of change to the market, and the call for a global reform is nearly universal in proposals to response to the FX market manipulation.²⁹² The globalization of the financial markets demands consistency and

283. *See id.*

284. *See id.* RBS has tried to negate the deceptive nature of such practices by informing its clients of its front running practices. *See id.*

285. AGUSTIN SILVANI, *BEAT THE FOREX DEALER: AN INSIDER'S LOOK INTO TRADING TODAY'S FOREIGN EXCHANGE MARKET* 11 (2006).

286. King, Osler & Rime, *supra* note 51, at 8.

287. Tom Young, *FCA's Wheatly: Lawyers Must Engage in Forex Principles*, INT'L FIN. L. REV. (Feb. 25, 2015), <http://www.iflr.com/Article/3430823/FCAs-Wheatley-lawyers-must-engage-in-forex-principles.html> [<https://perma.cc/X3NP-EBPW>].

288. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 52.

289. Hauser, *supra* note 235.

290. *Id.*

291. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 5-6.

292. *See* RESTORING TRUST, *supra* note 230, at 27 ("While the industry accepts that change is inevitable, ultimately that change must be developed and agreed upon within the market, on a global basis.").

cooperation in both regulatory development and implementation.²⁹³ Any new regulatory regime, without global coordination risks “fragmentation . . . regulatory arbitrage, and in the worst case . . . a race to the bottom.”²⁹⁴ In providing its recommendations, the Bank of England agreed that, provided the international scope of the FX markets, it is vital that the governing principles should be agreed to internationally.²⁹⁵

There has been a move to change the structure of market operations, with the goal of preventing opportunities for market abuse. The WM/Reuters benchmark timeframe has been increased to five minutes from the previous one-minute window and now obtains data from a wider range of sources in the calculation.²⁹⁶ While this has reduced the scope of manipulation, it has also reportedly decreased market liquidity, as banks respond to “greater uncertainty over the fix level,” by increasing bid-offer spreads.²⁹⁷ This is reported to have increased trading costs by about 37%.²⁹⁸ The FX benchmark, along with six other financial benchmarks, has also been brought under the U.K. regulatory regime as of April 2015.²⁹⁹

There are also proposals of imposing regulations on the market. Some suggest putting the FX market on central trading exchanges.³⁰⁰ Advocates argue this would increase transparency, and limit the

293. *Id.* at 25.

294. UGEUX, *supra* note 248, at 1.

295. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 13. The need for global coordination is seen in other industries, such as the securities market as well. See Nathan Lynch, *Pushing Toward Convergence Amid Warnings of Fragmentation*, UNSW AUSTL.: CTR. FOR L. MKTS. & REG., <http://www.cmr.unsw.edu.au/article//pushing-towards-convergence-amid-warnings-of-fragmentation> [<https://perma.cc/LU8H-VT8L>].

296. See FOREIGN EXCHANGE BENCHMARKS, *supra* note 50, at 3.

297. *Lawsuits Bring Renewed Attention to FX Transaction Costs*, COOCONNECT (June 16, 2015), <http://cooconnect.com/feature/lawsuits-bring-renewed-attention-to-fx-transaction-costs> [<https://perma.cc/N45T-DYJW>].

298. *Id.*

299. THE FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES) (AMENDMENT) ORDER 2015, at 1 (2015), http://www.legislation.gov.uk/ukxi/2015/369/pdfs/ukxi_20150369_en.pdf [<https://perma.cc/G8DX-X35K>]. The other benchmarks are: The ISDA Fix; Sterling Overnight Index Average (SONIA); Repurchase Overnight Index Average (RONIA); LBMA Silver Price; London Gold Fix; and ICE Brent Index. *Id.* at 2.

300. See Patrick Graham & Jamie McGeever, *Pressure Builds to Move More FX Trading onto Exchanges*, REUTERS (Feb. 16, 2015, 7:44 AM), <http://www.reuters.com/article/markets-forex-regulation-idUSL5N0VJ1VU20150216> [<https://perma.cc/A9HP-G84D>].

possibility of manipulation.³⁰¹ On the other hand, critics argue this would hamper competition and innovation, create risks and push up prices.³⁰² The Financial Conduct Authority and the Bank of England have also identified the lack of regulatory jurisdiction over the spot FX market as an issue in their Fair and Efficient Markets Review.³⁰³ They have proposed a new civil and criminal market abuse regime to be created for the spot market specifically.³⁰⁴

C. Criminal Sanctions

As a result of the manipulation scheme, four banks pled guilty to the Department of Justice to violations of the Sherman Anti-Trust Act, punishable by a prison term of up to ten years for an individual. Six banks settled charges of attempted manipulation with the CFTC, a crime also punishable by a prison term of up to ten years for an individual found guilty. Yet, no individual traders have been prosecuted for this egregious misconduct.

This is not due to a general policy decision by the Department of Justice not to prosecute antitrust or market manipulation crimes. The Antitrust Department charged sixty-three individuals with criminal offenses in 2012, thirty-four in 2013, and forty-four in 2014.³⁰⁵ Nineteen executives were charged and four executives were sent to prison for price fixing in the airline industry in 2011.³⁰⁶ In the year leading up to its Spring 2015 report, the Antitrust Department charged thirty individuals in connection with real estate foreclosure auctions.³⁰⁷

301. *See id.*

302. Phillip Stafford, *Banks Face Erosion of Business Around Currency Fix*, FIN. TIMES: FT TRADING ROOM (Oct. 5, 2015), <http://www.ft.com/intl/cms/s/0/8458f4d6-6862-11e5-97d0-1456a776a4f5.html#axzz40BqdrzKm> [<https://perma.cc/PAF5-RK2H>].

303. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 13.

304. *See id.* at 57 (“So, although some of the behaviours witnessed in the recent FX cases might be caught where behaviour in the spot FX market affects a financial instrument (such as an FX derivative) or a benchmark, others which relate exclusively to the spot FX market – including front running client orders and other forms of market manipulation – will not.”).

305. DEP’T OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS FY 2005-2014, at 4, <http://www.justice.gov/atr/file/788426/download> [<https://perma.cc/AXA7-HH3L>].

306. Alicia A. Caldwell, *21 Airlines Fines for Fixing Passenger, Cargo Fees*, USA TODAY (Mar. 6, 2011, 3:16 AM), http://usatoday30.usatoday.com/news/topstories/2011-03-05-1759203546_x.htm [<https://perma.cc/8NUZ-KHTM>].

307. *Criminal Program Update 2015*, DEP’T JUSTICE, <http://www.justice.gov/atr/division-update/2015/criminal-program-update> [<https://perma.cc/TT67-Y8YY>].

In addition to antitrust charges, the U.S. Department of Justice and authorities around the world have taken criminal action against traders who manipulate the markets.³⁰⁸ In November 2015, a jury in the Southern District of New York found two traders guilty of conspiracy and wire fraud in connection with the manipulation of LIBOR.³⁰⁹ A LIBOR trader in London was found guilty in August 2015 and sentenced to eleven years in prison upon appeal in December of that same year for manipulating the benchmark.³¹⁰ Similarly, commodities trader Michael Coscia was the first person to have been charged with the CFTC's new anti-spoofing³¹¹ authority under the Dodd-Frank Act and was found guilty by a jury in November 2015.³¹²

The CFTC also likely has authority to bring criminal charges in connection with the FX manipulation. As it stands, the Commodities Exchange Act makes it a felony to manipulate commodities. The requirements for attempted manipulation are: (1) an intent and (2) an overt act in furtherance of that intent. Regarding the intent element, the circuits are split regarding whether fraud is necessary to charge this offense.³¹³ As explained below, the Fifth Circuit requires a showing of fraud or manipulation, whereas the Second Circuit does not.

In *United States v. Radley*, the Fifth Circuit affirmed a decision to grant a motion to dismiss a criminal indictment for manipulation under the CEA because the conduct charged involved only legitimate

308. Nate Raymond & Brendan Pierson, *Former Rabobank Traders Convicted in U.S. over Libor Rigging*, REUTERS (Nov. 5, 2015, 5:06 PM), <http://www.reuters.com/article/us-rabobank-libor-trial-idUSKCN0SU2HX20151105> [<https://perma.cc/KD3H-SDGD>].

309. *Id.*

310. Margot Patrick, *Former Libor Trader Tom Hayes Gets Prison Sentence Cut to 11 Years*, WALL STREET J. (Dec. 21, 2015, 11:56 AM), <http://www.wsj.com/articles/former-trader-tom-hayes-gets-prison-sentence-cut-to-11-years-1450708815> [<https://perma.cc/GSG4-APA3>].

311. "Spoofing, criminalized as part of the 2010 Dodd-Frank Act, occurs when traders trick other investors' algorithms by entering their own buy or sell orders with no intention of filling them." Brian Louis, Annie Massa & Janan Hanna, *From Pits to Algos, an Old-School Trader Makes Leap to Spoofing*, BLOOMBERG (Nov. 12, 2015, 5:00 AM), <http://www.bloomberg.com/news/articles/2015-11-12/from-pits-to-algos-an-old-school-trader-makes-leap-to-spoofing> [<https://perma.cc/XQX6-KMDF>].

312. *Id.*

313. One scholar has referred to this as the open-market, closed-market debate. See JERRY W. MARKHAM, LAW ENFORCEMENT AND THE HISTORY OF FINANCIAL MANIPULATION 385 (2014).

trades in the market place and created legally enforceable contracts.³¹⁴ The Court explained: “[a]cting in a manner that shifts the price of a commodity in a favorable direction is the business of profit-making enterprises, and if it is done without fraud or misrepresentation, it does not clearly violate the CEA.”³¹⁵ The Court specified that it supported its conclusion with an analysis of the 1934 Securities Exchange Act Section 10(b) in securities manipulation cases.³¹⁶

In *CFTC v. Amaranth Advisors, LLC*, the Southern District of New York distinguished manipulation under the CEA and the Securities Exchange Act. The Court noted that Section 10(b) of the Securities Exchange Act prohibited both fraud and manipulation, whereas the CEA has two separate sections for anti-fraud and anti-manipulation provisions, finding “[w]hen the statute distinguishes fraud and manipulation by addressing them in different provisions, it would be redundant to construe manipulation to require a fraud element.”³¹⁷ The Court ultimately concluded that the only requisite intent necessary to pursue a manipulation charge under the CEA was “that the accused acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand.”³¹⁸ This was the definition the CFTC cited in their settlement agreements with the banks for attempted manipulation.³¹⁹

The CFTC has taken the position of the Second Circuit in promulgating its anti-manipulation authority under the Dodd-Frank Act in its adoption of Rule 180.2.³²⁰ The Commission “emphasizes, consistent with the weight of existing precedent, that the conduct giving rise to a manipulation charge need not itself be fraudulent or otherwise illegal.”³²¹ Yet, despite this explanation of the CFTC’s

314. *United States v. Radley*, 659 F. Supp. 2d 803, 820-21 (S.D. Tex. 2009), *aff’d*, 632 F.3d 177 (5th Cir. 2011).

315. *Id.* at 816.

316. *Id.* at 816 n.5.

317. *CFTC v. Amaranth Advisors, L.L.C.*, 554 F. Supp. 2d 523, 534 (S.D.N.Y. 2008).

318. *Id.* at 532.

319. *See, e.g., In re JPMorgan Chase Bank, N.A.*, 2014 WL 6068387, at *7 (Nov. 11, 2014).

320. 17 C.F.R. § 180.2 (2015).

321. Prohibition of Market Manipulation, 75 Fed. Reg. 67657, 67661 (proposed Nov. 3, 2010). In adopting this position, the Commission cited the following cases: *In re Zenith-Godley Co., Inc. and John McClay, Jr.*, 6 Agric. Dec. 900 (1947) (extravagant purchases of butter for the purpose of supporting milk prices); *In re Henner*, 30 Agric. Dec. 1155 (1971); *In re DiPlacido*, CFTC No. 01-23, 2008 WL

interpretation, the law has not yet been settled.³²² The dispute remains open and a resolution may have to be decided ultimately by the Supreme Court.³²³

Aside from the issue of the requisite intent needed to charge a defendant, there is a dispute about whether or not, even with the statutory authority to do so, it would be an effective policy to charge individual traders at all. Those against charging individual traders contend that “[a]ggressive traders will become timid if they are punished” both when their trading strategies do not turn out favorably or if their strategies are too successful and they make large profits to the detriment of other market participants.³²⁴ This chilling effect would come from other participants accusing traders of market manipulation or unfair practices if they are too successful and the trader’s own firms or clients punishing them if their strategies are unsuccessful. Another argument is that traders should not be prosecuted for their activities when they were performed at the behest of senior management who either knew, or stayed willingly blind to their traders’ misconduct.³²⁵

On the other hand, not prosecuting the traders who actually committed these crimes, and allowing them to walk without consequence, is an ineffective criminal policy. A common strategy among defense attorneys representing corporations and their employees was to negotiate a deal where the corporation would plead guilty and pay a fee, in exchange for employees not being charged.³²⁶ Such a settlement policy has no deterrent effect whatsoever, either specifically against the individuals involved or generally against financial crime.

Although the Department of Justice obtained felony pleas from the corporations, the banks themselves acknowledge that their guilty pleas are not expected to have any practical impact on their

4831204 (Nov. 5, 2008), *aff'd in pertinent part*, DiPlacido v. CFTC, 364 Fed.Appx. 657, 2009 WL 3326624 (2d Cir. 2009).

322. *See, e.g.*, CFTC v. Hunter, No. 07 CIV. 6682(BSJ)(FM), 2012 WL 297838, at *2 (S.D.N.Y. Jan. 31, 2012).

323. MARKHAM, *supra* note 313, at 385.

324. *Id.*

325. *See* Yves Smith, *Libor Trader Sentenced to 14 Years for Market Manipulation. So What About His Bosses?*, NAKED CAPITALISM (Aug. 4, 2015), <http://www.nakedcapitalism.com/2015/08/libor-trader-sentenced-to-14-years-for-market-manipulation-so-what-about-his-bosses.html> [<https://perma.cc/J75M-X3W8>].

326. Steven John Fellman, *Department of Justice Targets Corporate Officers in Both Civil and Criminal Enforcement Actions*, GKG LAW (2015), http://www.gkglaw.com/site/files/doj_targets_corp_officers00340912.pdf [<https://perma.cc/2FAR-2C3L>].

operations.³²⁷ This is evidenced in that, despite hefty fines, most of the banks did not suffer any financial losses.³²⁸ An SDNY judge argues that not bringing charges against individuals “depicts weakness in the prosecutorial system.”³²⁹ Larry Breur, once head of the Criminal Division at the DOJ said “[t]he strongest deterrent against corporate crime is the prospect of prison time for individual employees.”³³⁰ The complete lack of punishment altogether may in fact reward this criminal behavior and incentivize such crimes, as evidenced by the repeated misconduct by the same institutions.³³¹

In reaction to these criticisms, the Department of Justice released a memo in September 2015 stating that it would begin to focus its resources on the prosecution of individual executives.³³² In releasing its new policy, the DOJ acknowledged that there had not been many individual convictions within the financial sector and emphasized that it will work to ensure an equal enforcement of the law for those “on a street corner or in a boardroom” alike.³³³ The practical effects of this position are yet to be seen.

IV. SHIFT TOWARD A REGULATED MARKET

When asked why it took regulators so long to discover that a market of this scale was being rigged in such an extraordinary way, a director of the Financial Conduct Authority, a financial regulatory body in the United Kingdom answered: “These are not regulated markets. We have taken swift action as soon as information [about the misbehavior] came to light I don’t accept that regulators have

327. Gara, *supra* note 8.

328. See *Financial Reform Newsletter - May 25, 2015*, BETTER MKTS. (May 25, 2015), <https://www.bettermarkets.com/newsroom/financial-reform-newsletter-may-25-2015> [<https://perma.cc/X79C-PNZF>].

329. Anna Stolley Persky, *Great Recession: Where’s the Punishment After the Crime?*, DC BAR (May 2014), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2014-recession.cfm> [<https://perma.cc/BN6C-M24K>].

330. Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big To Jail*, FORBES (Jul. 29, 2013, 9:30 AM), <http://www.forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/>.

331. Mark Melin, *Even Bove Wondering Why Individual Criminal Charges Not Filed in FX Manipulation*, VALUEWALK (May 20, 2015, 3:17 PM), <http://www.valuewalk.com/2015/05/fx-manipulation-libor/> [<https://perma.cc/N94Z-8KZP>].

332. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> [<https://perma.cc/QEA4-VSLY>].

333. *Id.*

taken too long.”³³⁴ Meanwhile, the FCA charged the banks for behavior beginning in 2008 and this press conference was held in 2014.³³⁵ The CEO of the FCA answered, “It’s a subtle point but it’s quite an important point The spot FX market is not a regulated market. Where it’s not a regulated market, we don’t get regular reports We don’t have things we can monitor.”³³⁶ The U.S. Department of Justice charged the banks with the same behavior dating back to 2007 until 2013.³³⁷ For six years, in the largest market in the world, FX traders at a handful of banks around the world rigged the price mechanism that is the “anchor to our entire economic system.”³³⁸ A director at the FCA does not even accept the premise that it took regulators too long to discover this misconduct because these markets are not regulated.³³⁹ The experiment of self-regulation may have been a valid economic theory at one point. However, the market has proven that with enough incentive and freedom, even the greatest of markets will be manipulated. To leave the FX market unregulated at this point should not be an option up for consideration.

Multiple goals of financial regulation are at odds here: protection of individual investors, the integrity of the market, and efficiency. Advocates against regulation in the spot FX market stress that the parties are sophisticated, do not need the protection of regulators, and that the efficiency of the market depends upon its self-regulatory model.³⁴⁰ While this is true, “no amount of counterparty sophistication” can protect the market from manipulation or collusion.³⁴¹ To cling to the solution of party sophistication is to simply distract from the real issue at stake. The integrity of the market and public trust must be protected independently of the market participants. The regulations imposed on the market will not be for the purpose of ensuring fairness to the banks’ counterparties in the spot FX market. It will be to prevent manipulation and to ensure market integrity. In regards to efficiency, “[e]fficient markets require certainty, risk, transparency, liquidity and innovation.”³⁴² Regulations

334. FCA Press Conference, *supra* note 117.

335. FCA Fines Five Banks £1.1 Billion, *supra* note 202.

336. FCA Press Conference, *supra* note 117.

337. *Five Major Banks Agree to Parent-Level Guilty Pleas*, *supra* note 91.

338. FCA Press Conference, *supra* note 117.

339. *See id.*

340. *See supra* Part II.B.

341. Hauser, *supra* note 235.

342. RESTORING TRUST, *supra* note 230, at 7.

will at the same time create transparency and public trust in the market, while not detracting from the risk taking possibilities or the market's innovation by simply requiring firms to report their transactions.

A code of conduct or best practices will not solve the issues facing the FX market because these solutions have the same inherent problems that allowed this manipulation scheme to occur. They rely on the banks to implement them. They, again, allow the banks to decide when and how to incorporate these principles. The issue was not with the substance of the code of conduct signed by sixteen banks in 2001; it was that they didn't implement it. They didn't implement it because it was not mandated, and competing interests fell in favor of not mandating a non-binding code. There has been important progress made in the development of a new code of conduct, signed in March 2015, "but there is a widely held view that little more can be done to enforce a set of principles upon the market and coerce participants to behave accordingly."³⁴³ The actors and firms within this industry will not adhere to any principles, at least for an extended period of time, unless they are mandated and are a prerequisite to their participation in the market at all.

This regulation scheme needs to be led by the United States and United Kingdom.³⁴⁴ The Fair and Effective Markets Review has already recommended a new civil and criminal market abuse scheme for regulating the spot FX market. The recommendation includes a requirement on firms, *inter alia*, "to keep records of orders and transactions, and report suspicious cases to the regulator."³⁴⁵ A similar regulatory regime is necessary in the United States. The adoption of a similar regime to the United Kingdom's will allay concerns about regulatory arbitrage and fragmentation.

Although it does not present identical concerns as the derivative instruments, such as betting on future prices, the risk of market manipulation of the spot markets is proven to be a legitimate and very real concern. Regulation here will be concerned with protecting the integrity of the market itself, rather than protecting any individual investors or market participants from transactions within it. This new regulatory approach will recognize that the spot market is not solely

343. *Trading Codes of Conduct: Going Global*, FUTURES & OPTIONS WORLD, (Aug. 11, 2015, 12:00 PM), <http://www.fow.com/3478865/Trading-codes-of-conduct-going-global.html> [<https://perma.cc/L2C5-6TYQ>].

344. Sixty percent of all forex trades take place in London and New York. BANK FOR INT'L SETTLEMENTS, *supra* note 13.

345. FAIR AND EFFECTIVE MARKETS REVIEW, *supra* note 207, at 14.

worthy of protection if it serves as a proxy for other derivative instruments but that it is independently worthy of its own legal protection.

This Part provides two solutions: (A) a new regulatory regime in the United States and (B) criminal penalties for manipulation of the spot FX market.

A. Regulate the Spot Market Explicitly

This new approach recognizes that the spot FX market needs to come under regulatory jurisdiction, and new regulations need to be adopted with the goal of effective monitoring and manipulation prevention. Despite the fact that the banks have paid billions of dollars in fines, some unquantifiable damage has undisputedly been done and it is false hope to expect these fines to deter future criminal behavior of these institutions. Monitoring is necessary to prevent prolonged manipulation in the first place. Of the U.S. financial agencies, the CFTC is the most viable candidate to take on this new role in the spot market. The CFTC already closely monitors FX futures and forwards and has an aggressive enforcement and market surveillance program in place.³⁴⁶

Pursuant to the Dodd-Frank Act, data on FX swaps must be reported to new CFTC regulated entities called “swap data repositories” (SDRs).³⁴⁷ This requirement is intended to “reduce systemic risk, increase transparency and promote market integrity within the financial system.”³⁴⁸ SDRs collect real time data of the creation and continuation of swaps in the FX market and their data is available to the CFTC at all times.

With the exception of the continuing data, a similar reporting system or a “spot data repository” would fit the needs of the spot market as well. This can be done by amending the Commodities Exchange Act §2(a)(13)(g). The subsection now reads: “Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.”³⁴⁹ Amending this section to state: “Each swap *and FX spot transaction . . .*” would include the spot market within the

346. See *Before the S. Comm. on Energy and Nat. Res.*, 109th Cong. (2005), <http://www.cftc.gov/files/opa/opaoverdahl0105.pdf> [https://perma.cc/ZF3L-RSHL] (testimony of James A. Overdahl, Chief Economist, U. S. Commodity Futures Trading Commission).

347. See 7 U.S.C. §§ 2(a)(13)(G), 24(a) (2014).

348. Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136, 2137 (Jan. 13, 2012).

349. 7 U.S.C. § 2(a)(13)(g).

reporting requirements that are intended to enhance transparency and integrity in the opaque OTC markets. This solution would require “spot data repositories” to collect transaction reports, to keep necessary records and to report suspicious cases to the CFTC. The CFTC and the public would have access to this information as well.

The adoption of this new regulatory system for the spot FX market would not only provide necessary transparency and prevention measures for market manipulation, but it will also enhance the public confidence and market integrity in the foreign currency market which is critical to its success.

B. Criminal Sanctions

Upon announcement of the bank’s guilty plea, Citigroup CEO stated that “the behavior . . . is an embarrassment to our firm and stands in stark contrast to Citi’s values.”³⁵⁰ The banks explained away their conduct by the bad behavior of a small number of employees. For example, JPMorgan Chairman and CEO Jamie Dimon stated: “The lesson here is that the conduct of a small group of employees, or of even a single employee, can reflect badly on all of us.”³⁵¹ UBS CEO Sergio Ermotti and Chairman Axel Weber said: “The conduct of a small number of employees was unacceptable and we have taken appropriate disciplinary actions.”³⁵² Barclays CEO Antony Jenkins stated: “I share the frustration of shareholders and colleagues that some individuals have once more brought our company and industry into disrepute.”³⁵³ JPMorgan CEO Jamie Dimon even went so far as to claim that the “banks are under assault.”³⁵⁴

Even with billions of dollars in fines, though, and criminal felony pleas, the banks have not experienced any *practical* repercussions. In fact, the shares of Barclays and UBS all went up when the DOJ fines

350. Gara, *supra* note 8.

351. Portia Crowe, *5 Global Banks Just Proved that No One Can Stop Wall Street from Breaking the Law*, BUS. INSIDER (May 23, 2015, 6:30 AM), <http://www.businessinsider.com/5-global-banks-just-proved-that-no-one-can-stop-wall-street-from-breaking-the-law-2015-5> [<https://perma.cc/2NBX-2MRH>].

352. Gara, *supra* note 8.

353. Erika Kelton, *Top 10 Not-To-Be-Missed Quotes from the Forex Manipulation Scandal*, FORBES (May 21, 2015, 6:30 PM), <http://www.forbes.com/sites/erikakelton/2015/05/21/top-10-not-to-be-missed-quotes-from-the-forex-manipulation-scandal/>.

354. *JPMorgan Bank Shows Unexpected Drop in Profit over Legal Costs*, RUSS. TODAY (Jan. 14, 2015, 7:01 PM), <https://www.rt.com/usa/222643-jpmorgan-profit-legal-costs/> [<https://perma.cc/Q3L2-G3UY>].

were announced because their penalties were lower than expected.³⁵⁵ The banks also announced that their guilty pleas are not expected to have any practical impact on their operations.³⁵⁶ What, then, *was* the consequence of rigging the biggest market in the world?

These inconsequential prosecutions are unlikely to create any illusion that the DOJ takes these offenses seriously enough to actually cause a deterrent effect. The purpose of such prosecutions is not just to punish those involved, but to deter the next potential financial manipulation around the corner.³⁵⁷ The incentive structure needs to be reversed so that banks will not ultimately profit from manipulating the market without consequence, and it is the government's proper role to step in to impose proper criminal sanctions. Only when proper criminal sanctions are imposed and prosecuted against the individuals responsible for this criminal behavior will this conduct be deterred.

Concerns about a potential chilling effect of legitimate trade practices can be addressed by requiring that the CFTC or the DOJ prove manipulative intent as an indispensable element of the offense. This has already been addressed by one court, which has held in one instance of securities manipulation that the "SEC must prove that *but for* the manipulative intent, the defendant would not have conducted the transaction."³⁵⁸ With this but-for requirement, concerns about legitimate trade activity are severely outweighed by the necessity of enforcing the anti-manipulation laws that exist.

The Commodities Exchange Act already makes manipulation in the foreign exchange spot market a felony. Section 2(c)(2)(C) provides that transactions in foreign exchange shall not be exempt from the anti-manipulation sections of the CEA, notwithstanding its exemption otherwise. The issue is that the DOJ has simply chosen not to enforce it in this particular case. An additional statute would be redundant, and would not make it more likely that it would be enforced. The DOJ may be concerned about the element of intent, and that courts may choose to require fraud in enforcing this statute. However, the CFTC has already taken the position that this is not necessary, and courts in the Second Circuit have agreed.

In September 2015, the DOJ issued a memorandum that it would take a harsher stance against individual executives in white-collar

355. Freifeld, Henry & Slater, *supra* note 7.

356. Gara, *supra* note 8.

357. Kaufman, *supra* note 330.

358. SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007).

crime, where they had not done so before. At this point it will be up to the DOJ to act on its assertion and to dedicate the resources necessary to take a critical stance against the individuals actually committing the crimes corporations have thus far pleaded guilty to.

CONCLUSION

This Note began by explaining how the foreign currency market began as a fixed market under the Bretton Woods Agreement. With the collapse of this system, currency rates were allowed to float against one another and speculation developed into a huge sector of the FX market. These derivative instruments and nearly all international financial markets depend upon spot benchmarks. It was these benchmarks that a handful of traders at the biggest financial institutions colluded to manipulate.

Advocates against regulation in the spot FX market stress that the parties are sophisticated, do not need the protection of regulators, and that the efficiency of the market depends upon its self-regulatory model. While this is true, no amount of counterparty sophistication can protect the market from manipulation or collusion. To cling to the solution of party sophistication is to simply distract from the real issue at stake. The integrity of the market and public trust must be protected independently of the market participants.

In order to achieve this goal, this Note advocates the daily monitoring of the spot FX market through a system similar, or identical, to the swap data repositories already in place under Dodd – Frank. This Note also advocates for the effective enforcement of the criminal laws already in place in order to create an effective deterrent to recidivist financial institutions. With these changes implemented, the forex market will be able to move beyond its current state of the unregulated “Wild West” into a market of laws and accountability.