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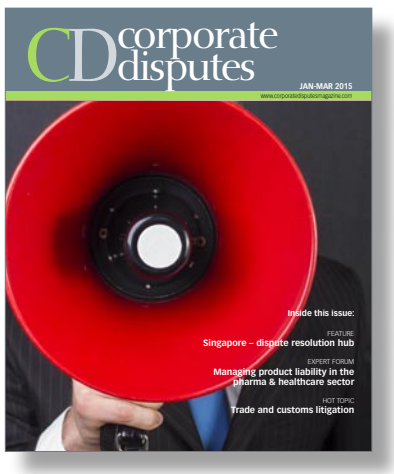


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PERSPECTIVES

# 2014 CORPORATE RESOLUTION ROUNDUP

BY **JUSTIN WEDDLE, STEPHEN BEST AND ELNAZ ZARRINI**
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White-collar and regulatory enforcement experts diverge on whether recent aggressive corporate enforcement actions, coupled with high monetary penalties, reflect either heightened adverse consequences for the entities prosecuted or a continuation of the deferred prosecution era, where banks are still 'too big to jail'. At first glance, the May 2014 Credit Suisse settlement with the US Department of Justice (DOJ) offers proof for either point. Credit Suisse pled guilty to conspiracy to aid US taxpayers in filing false documents with the IRS, and agreed to pay $2.6bn, arguably signifying a shift toward tougher outcomes. However, the closure of the government's investigation with no further consequences – or, as Credit Suisse's chief executive (CEO) Brady Dougan put it, the penalties had no "material impact on its operational or business capabilities" – supports a view that the more things change, the more they stay the same.

The name attached to the entity-level resolution of a criminal investigation is often less important than the certainty provided by a resolution of the collateral consequences – including the monetary

settlements – banks pay to settle governmental investigations. Prosecutors' appreciation of their leverage over corporate entities, paired with a company's realisation that even an admission of criminal conduct may be preferable to a reputation-clearing legal victory that requires years of uncertainty, have combined to result in more corporate settlements.

The past year has seen no major contested fraud-based liability litigation between an enforcement body and an entity-defendant – Bank of America's trial loss on liability occurred in October 2013, while the damages phase continued into 2014. However, 2014 saw many negotiated resolutions, of varying names, with varying enforcement bodies, and involving sometimes eye-popping monetary penalties. In each we can infer negotiated trade-offs in the various common elements of a negotiated resolution.

**"Both regulators and corporate entities under investigation have realised that negotiated resolutions offer some certainty about collateral consequences and monetary penalties."**

### Elements of a negotiated resolution

In an effort to avoid the type of market uncertainty that helped destroy Arthur Andersen more than a decade ago, both regulators and corporate entities under investigation have realised that negotiated resolutions offer some certainty about collateral consequences and monetary penalties. There are a number of elements that normally make up a negotiated resolution, no matter the type of agreement, be it a guilty plea, deferred prosecution agreement (DPA), a nonprosecution agreement (NPA) or even civil settlement: What is the entity going to pay? What is the entity going to do? What is the entity going to say? What will we call it? What are the collateral consequences?

If an observer compares negotiated resolutions based on only one of these elements, the trade-offs embedded in the deal may be missed. For example, a simple comparison of monetary penalties might tell you that the $9bn BNP Paribas agreed to pay as part of its plea agreement with the DOJ for illegally processing financial transactions for countries subject to US economic sanctions, reflects less culpable conduct than the $13bn in penalties levied against JP Morgan Chase in relation to the sale of risky mortgage-based securities. However, BNP Paribas pled guilty to a felony charge, while

JPMorgan Chase entered into a civil settlement, avoiding an admission of culpable conduct.

Furthermore, as part of the DOJ's plea agreements, BNP Paribas and Credit Suisse were assured they would not lose their licences to do business – Benjamin Lawsky, superintendent of the Department of Financial Services (DFS) in New York, agreed not to revoke the banks' charters. According to Lynnley Browning, despite its guilty plea, Credit Suisse was even able to withhold the names of at least 22,000 of its "tax-dodging Americans hiding up to $12bn offshore through the bank". In return, both entities paid billions of dollars.

A DPA or NPA can have similar results. In July, Lloyd's Bank of London entered into a DPA with the DOJ and agreed to pay more than $380m to British and US authorities to resolve investigations regarding LIBOR manipulations. And Liechtensteinische Landesbank AG which late last year entered into an NPA for assisting US taxpayers in evading their tax obligations, agreed to pay $23.8m and cooperate with US authorities by giving them the names and account information of their US clients.

Whether Liechtensteinische Landesbank received a better deal than Credit Suisse, which was able to retain the privacy of its client accounts but faced higher financial penalties and the label of a criminal conviction, is not easily quantifiable. However, it does demonstrate that an entity may be willing to pay more in order to say less, or make other trade-offs at the negotiating table.

**Cooperation with investigators – what will the entity do?**

A major theme influencing settlement amounts in recent cases continues to be the extent to which banks cooperate with authorities in their investigation. Attorney General Eric Holder stated BNP Paribas "went to elaborate lengths to conceal prohibited transactions, cover its tracks, and deceive US authorities", and when "contacted by law enforcement it chose not to fully cooperate [which] significantly impacted the government's ability to bring charges". Mr Holder noted this failure to cooperate, "together with BNP's prolonged misconduct", mandated the criminal plea and the $9bn penalty.

Similarly, the Credit Suisse plea agreement reflected its "brazen conduct" in operating a decades-long illegal cross-border banking business. And just last month, DFS announced an enforcement action against Bank of Tokyo Mitsubishi UFJ, after a year-long investigation uncovered that the bank's employees pressured its consultant, PricewaterhouseCoopers, into removing key warnings to regulators in an "objective" report submitted to DFS regarding its transactions with Iran, Myanmar, Sudan, and other sanctioned countries. The enforcement action includes a $315m penalty, and disciplinary action for individual bank employees for misleading regulators. While punishments can be higher where a financial institution violated laws acting in its own self-interest rather than on behalf of

clients, a failure to cooperate with or an attempt to mislead investigators may trump the severity of the wrongdoing and drive up the settlement figure.

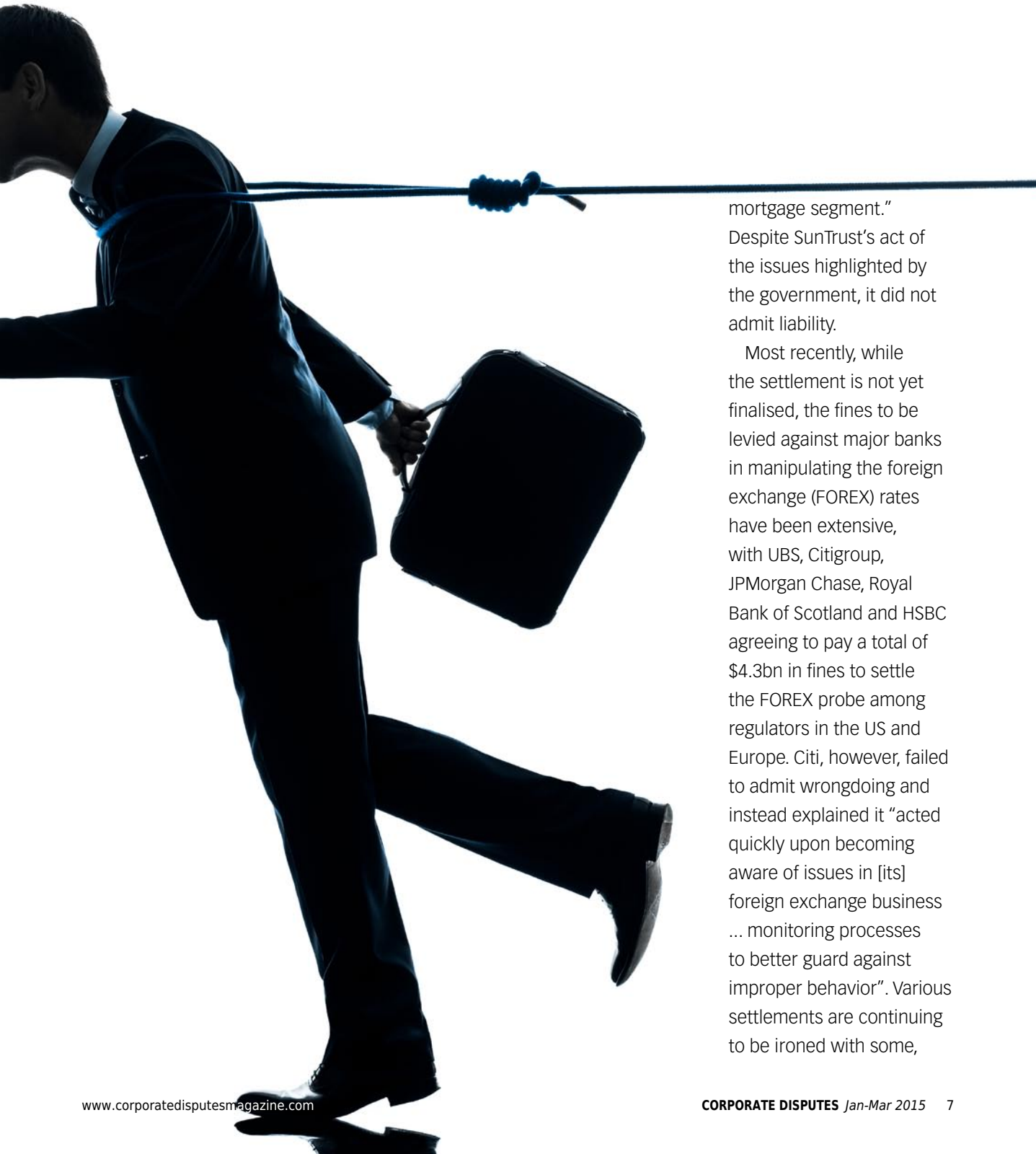
On the flipside is MetLife, which paid $60m to DFS and the Manhattan DA's office as part of a DPA for soliciting business in New York without a licence and misrepresenting those activities. The authorities recognised MetLife's cooperation when it provided all non-privileged information, and turned over certain client account files. Furthermore, the consent order Standard Chartered Bank reached with DFS in August also demonstrates that cooperating with authorities can lessen a monetary penalty. Standard Chartered Bank had already been subject to a $340m fine in 2012 when the bank landed in the government's crosshairs for not weeding out other risky transactions. Despite this repeat offence, DFS sought a figure smaller than the original fine because the bank cooperated with authorities by reporting failures in its monitoring system and providing a remediation plan. Accordingly, Standard Chartered was penalised just $300m – a better outcome given its situation.

**Public admissions – what will the entity say?**

In earlier eras, target companies were not often required to admit wrongdoing in connection with settling governmental investigations. Recent civil settlements, however, reflect a shift from that approach, as regulators have increasingly sought admissions of wrongdoing in addition to fines. Comparisons of liability have become more nuanced when considering the scope of the admission as well as the name attached to the resolution.

In November 2013, the DOJ announced a $13bn settlement with JPMorgan Chase in order to resolve claims arising out of the sale of residential mortgage-backed securities tied to faulty subprime loans. Marianne Lake, JPMorgan's chief financial officer, did not assign culpability to JPMorgan, explaining that "conduct at Bear Stearns and at WaMu prior to JPMorgan's 2008 acquisitions accounted for the lion's share of costs in [the] settlement". In August 2014, the DOJ announced a $16.65bn settlement with Bank of America – the largest in American history – arising out of similar claims. Bank of America also did not admit wrongdoing. The bank's chief executive Brian Moynihan said "We believe this settlement, which resolves significant remaining mortgage-related exposures, is in the best interests of our shareholders."

This year, SunTrust Mortgage Inc entered into an NPA with the DOJ, agreeing to a $320m settlement to resolve a criminal investigation of SunTrust's administration of the Home Affordable Modification Program, by misleading mortgage servicing customers who sought relief through that program. A SunTrust spokeswoman said the bank has made "significant improvements to [its] mortgage servicing unit's processes and internal controls ... and appointed new leadership for the



mortgage segment." Despite SunTrust's act of the issues highlighted by the government, it did not admit liability.

Most recently, while the settlement is not yet finalised, the fines to be levied against major banks in manipulating the foreign exchange (FOREX) rates have been extensive, with UBS, Citigroup, JPMorgan Chase, Royal Bank of Scotland and HSBC agreeing to pay a total of $4.3bn in fines to settle the FOREX probe among regulators in the US and Europe. Citi, however, failed to admit wrongdoing and instead explained it "acted quickly upon becoming aware of issues in [its] foreign exchange business ... monitoring processes to better guard against improper behavior". Various settlements are continuing to be ironed with some,

but not all parties. Notably, Barclays withdrew from the main settlement late in the talks to "seek a more general coordinated settlement".

Overall, the major corporate resolutions of 2014 show that despite many active enforcement bodies and record-breaking monetary penalties, there are still trade-offs to be made in a negotiated resolution, and even the collateral consequences of a criminal conviction can be managed. CD