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The FIRREA Revival

Dredging Up Solutions to the Financial Crisis

OCTOBER 2014

U.S. CHAMBER
Institute for Legal Reform

An Affiliate of the U.S. Chamber of Commerce

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Introduction

Like a well-stocked medicine cabinet, the United States Code contains statutes Congress originally prescribed to address yesterday's issues. As new challenges arise, it can be tempting to search the cabinet for older remedies. But care must be taken to ensure that they are not used to address ailments too different from Congress' original purpose.

Perhaps no better recent example exists than the civil penalties provision of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).[2] Enacted in 1989 in response to the savings and loan crisis—but hardly used in the two decades that followed—FIRREA today serves as the Department of Justice's (DOJ) remedy of choice to investigate and prosecute cases arising out of the recent financial crisis. The statute's main ingredients reveal why: a broad scope without the limitations of other statutory schemes (most especially, the federal securities laws), a reduced burden of proof, tough civil penalty provisions, broad investigative authority, incentivizing whistleblower provisions, and a generous 10-year statute of limitations.

A close look at FIRREA and the sparse, though significant, case law interpreting it reveals a statutory scheme that DOJ is sure to continue to rely upon as part of any final push to bring headline-grabbing cases arising out of yesterday's financial crisis. Having glimpsed the unexpected power of this old weapon, DOJ can also be expected to employ FIRREA in other settings. Defining sensible outer limits on FIRREA's reach is today's challenge.

This paper describes the parameters of FIRREA's civil penalties provision. It then reviews some of the recent enforcement actions that have been filed using FIRREA and highlights the key holdings that have come out of those cases. The paper then identifies trends to watch for as DOJ expands its use of FIRREA.

FIRREA as an Enforcement Tool

Congress passed FIRREA in the wake of the savings and loan crisis of the 1980s "[t]o reform, recapitalize, and consolidate the Federal deposit insurance system, [and] to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies."[3]

Congress intended to combat, among other things, the "outright fraud and insider abuse" that had been present in the savings and loan industry.[4] That fraud and abuse contributed to the failure of hundreds of savings and loan institutions in the 1980s—190 failures in 1988 alone—which resulted in estimated losses of $160 billion.[5] FIRREA contains a range of measures designed to protect the integrity of financial institutions. One of those measures is the powerful enforcement tool found at 12 U.S.C. Section 1833a.

FIRREA's enforcement mechanism is a hybrid: it is a penal statute that vests DOJ with the authority to seek civil financial penalties for violations of certain enumerated criminal statutes. This scheme allows DOJ to seek civil penalties from a defendant upon proof by a preponderance of the evidence—and thus not by the criminal standard of beyond a reasonable doubt—that the defendant violated one or more of fourteen federal criminal predicate statutes.[6] Nine of these predicates by their explicit terms address conduct that harms financial institutions.[7] On their face, FIRREA's five remaining predicates require no nexus to financial institutions.[8] To create such a nexus, Congress required that a FIRREA action predicated on any of these five predicates address conduct that "affect[s] a federally insured financial institution."

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The appeal of FIRREA to DOJ in cases against corporate defendants is easy to understand. In a criminal case, the government must prove guilt beyond a reasonable doubt before a court can impose a financial penalty. By using FIRREA, however, DOJ need only meet a preponderance burden to subject a corporate defendant to financial penalties. The ceiling for penalties, below which judges have discretion, is $1,100,000, unless there is a continuing violation, in which case the penalty can reach the lesser of $1,100,000 per day or $5,500,000.[9] An alternative provision provides that "[i]f any person derives any pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator, the amount of the civil penalty may exceed the amounts described in paragraphs (1) and (2) but may not exceed the amount of such gain or loss."[10] How these penalty computations work in practice is a key area to watch moving forward.

FIRREA provides the government with other flexibility as well. Its 10-year statute of limitations is five years longer than the general limitations period applicable to most federal criminal statutes.[11] In deciding whether to bring a case under FIRREA, DOJ does not need to present evidence to a grand jury. Congress also equipped the government with the ability to issue administrative subpoenas to compel document productions and testimony.[12]

The Attorney General's enforcement authority is exclusive under FIRREA; the statute provides no private right of action, and courts have refused to imply one.[13] As a way of encouraging robust enforcement, however, Congress authorized awards to whistleblowers whose information leads to successful FIRREA actions.[14]

The Use of FIRREA in Response to the Financial Crisis of 2008

FIRREA's civil penalty provision sat relatively unused for decades following the savings and loan crisis.[15] In the wake of the recent financial crisis, however, DOJ dusted off the statute and began using it with noteworthy frequency.

In March 2010, United States Attorney for the Southern District of New York, Preet Bharara, announced the creation of a new civil fraud unit.[16] Two months later, Leon Weidman, Chief of the Civil Division of the United States Attorney's Office for the Central District of California, published an article that highlighted FIRREA as an "extremely powerful civil remed[y] … available to supplement criminal prosecutions" in connection with the housing crisis.[17]

Mr. Bharara's office has brought several notable FIRREA actions in the past three years. In *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*,[18] for example, the government obtained a jury verdict on liability, and the court imposed a $1.267 billion penalty against Bank of America, Countrywide Financial Corporation, and several of its subsidiaries. The complaint alleged that Countrywide had misrepresented its mortgage origination processes in order to sell Fannie Mae and Freddie Mac poor quality mortgages, and thus committed mail and wire fraud so as to warrant a civil penalty under FIRREA.[19]

In *United States v. Wells Fargo Bank, N.A.*,[20] Mr. Bharara's office alleged that Wells Fargo's origination and underwriting of government-insured home mortgage loans violated the FIRREA predicates barring false statements to government authorities (18 U.S.C. § 1001), false banking entries (18 U.S.C. § 1006), false statements in loan and insurance applications (18 U.S.C. § 1014), and mail and wire fraud (18 U.S.C. §§ 1341, 1343).[21]

New York prosecutors are not alone in recognizing FIRREA's enforcement possibilities. For example, the United States Attorney's Office for the Central District of California sued McGraw Hill,

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the parent to Standard and Poor's.[22] The government accused the rating agency of manipulating its ratings and obscuring the true credit risks of financial products, in violation of the bank fraud predicate statute (18 U.S.C. § 1344(2)) and sought the maximum civil penalty available under FIRREA.[23]

The United States Attorney's Office for the Southern District of Texas is pursuing a FIRREA and False Claims Act complaint against Americus Mortgage Corporation. The complaint alleges that the defendants violated the FIRREA predicates barring false banking entries (18 U.S.C. § 1006) and false statements in loan applications (18 U.S.C. § 1014) by making numerous false statements to procure mortgage insurance.[24]

For its part, DOJ has used FIRREA in several headline grabbing actions. In 2013 and 2014, Attorney General Holder announced massive FIRREA settlements, including a $13 billion settlement with JPMorgan Chase, a $7 billion settlement with Citibank, and a $16.65 billion dollar settlement with Bank of America.[25]

The government has not limited its use of FIRREA to cases related to the sale of mortgages or even to the financial crisis. In *United States v. Bank of New York Mellon*,[26] for example, the government alleged Bank of New York Mellon misrepresented that it provided "best execution" when pricing foreign exchange trades under its "standing instructions" program, warranting FIRREA penalties based on violations of the mail and wire fraud statutes.[27]

Recent Decisions Clarify FIRREA's Scope

The recent spate of cases has provided some clarification as to FIRREA's meaning and application. District courts have now had the opportunity to address, among other things, what it means to "affect a federally insured financial institution" and how to calculate a FIRREA penalty. These issues remain far from settled, though, and we expect the law to develop as DOJ continues to employ FIRREA in future cases.

The Requirement That Certain FIRREA Predicates Affect a Financial Institution

To seek civil penalties under five of the FIRREA predicates, the relevant violations must "affect[] a federally insured financial institution."[28] Until late 2011, no court had interpreted what it meant to "affect" a financial institution. In three recent high profile FIRREA cases, defendants argued that the victims of their alleged wrongdoing were not financial institutions and therefore the conduct did not "affect" a federally insured financial institution.[29] But the courts found that the term "affect" did not limit the scope of FIRREA to cases where a financial institution was the direct and intended victim of fraud.[30] In all three cases, the district courts endorsed the so-called "self-affecting" theory—that an institution can be affected for purposes of FIRREA by its own acts.[31]

This broad interpretation of Congress' intention when it used the word "affect" affords the government significant flexibility in determining what types of conduct to target with FIRREA penalties. Taken to its boundary, this broad self-affecting construction allows any violation of 18 U.S.C. Sections 287, 1001, 1032, 1341, or 1343 by a financial institution

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to serve as the basis of a FIRREA action. It makes FIRREA civil penalties applicable to conduct far afield from conduct that threatens the financial integrity of the financial institution. It may surprise the drafters of FIRREA to learn that it could be used to penalize a financial institution for fraud against a non-financial institution counter-party.

The next few years may see DOJ test the outer bounds of the "affecting" requirement, bringing FIRREA cases where the relevant financial institution has only a tangential relationship to the underlying predicate offense. A corporate accounting scandal that leads to a substantial drop in the stock price of the corporation might well "affect" the financial institution where the corporation holds accounts, but is it the kind of threat to the integrity of the financial institution that FIRREA was designed to combat? Pinpointing the outer boundary is a question sure to present itself to appellate courts in the coming years.

Calculation of Penalties

Though FIRREA provides for substantial civil penalties, until recently, there were no reported cases discussing how to calculate them. In the last year and a half, however, two decisions have considered how to calculate FIRREA penalties. The first case, *United States v. Menendez,* dealt with the proper test to use in deciding what penalty should be assessed.[32] The second, *U.S. ex rel. O'Donnell v. Bank of America Corp., et al.,* addressed how to calculate the "pecuniary gain" or "loss" for purposes of determining the maximum available penalty.[33] Rather than settling this issue, the decisions in these cases appear to be the beginning of courts marking different approaches and offering different perspectives on the severity of FIRREA penalties.

In March 2013, the U.S. District Court for the Central District of California issued a decision that identified the specific factors that a court should consider when calculating FIRREA civil penalties.[34] The *Menendez* case concerned a real estate broker who committed bank fraud.[35] The government sought a penalty of $1.1 million, which it claimed was the amount of the losses suffered by HUD. The court considered eight factors culled from penalty considerations in other contexts. The factors included: (1) the good or bad faith of the defendant and the degree of scienter; (2) the injury to the public and loss to other persons; (3) the egregiousness of the violation; (4) the isolated or repeated nature of the violation; (5) the defendant's financial condition and ability to pay; (6) the criminal fine that could be levied for the conduct; (7) the amount of the defendant's profit from the fraud; and (8) the penalty range available under FIRREA.[36] In considering these factors, the court found that the government had not presented sufficient evidence of the alleged loss and instead imposed a penalty for the full amount of Menendez's profit from the fraud.[37]

While *Menendez* does signal that evidence of losses should be presented, the case otherwise provides little guidance regarding how such losses should be calculated. Moreover, the eight factor test is not particularly helpful in providing tailored guidance to clients in need of reliable assessments of FIRREA penalty exposure.

In contrast, Judge Rakoff's decision in *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.,*[38] provides a clear framework, but little comfort, to prospective defendants. In calculating the pecuniary "gain" or "loss" from a fraud that misrepresented the underwriting process associated with mortgages that Fannie Mae and Freddie

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Mac purchased, Judge Rakoff determined that the maximum penalty that could be imposed was the full sales price of the mortgages because none of the mortgages would have been sold absent the fraudulent misrepresentations.[39] This interpretation caps FIRREA penalties at the total amount of funds generated through the allegedly fraudulent transaction.

In short, the gain and loss definition that Judge Rakoff endorsed in *O'Donnell* was revenue rather than profit. He declined to take into consideration the fact that for each mortgage that the defendant originated, the defendant made an upfront payment in the amount of the mortgage. So, too, did Judge Rakoff decline to analyze whether "loss" was the result of misrepresentation or of extraneous factors, such as declines in the values of homes. To be fair, it is worth noting that, after calculating the ceiling, Judge Rakoff did not apply the maximum penalty available.[40] Instead he backed out of "gain" the money that the defendant received from selling mortgages having characteristics that matched those that Fannie Mae and Freddie Mac understood themselves to be purchasing.[41]

The important takeaway from these decisions is that in FIRREA cases brought to address transactions where misrepresentations or omissions were used, damages are capped at the revenues from the offense rather than the profits, and loss causation appears to be analyzed on a but-for basis by asking whether, without the fraud, the loss would have occurred. Within that framework, a judge has discretion to set a penalty accounting for the *Menendez* factors. This high penalty ceiling will continue to make FIRREA an attractive tool for DOJ enforcement going forward, and it may result in the government using FIRREA to venture into enforcement areas that have traditionally fallen under the supervision of other agencies and statutory schemes—perhaps foremost the SEC. In time, we also expect courts of appeals to weigh in on the proper measures of FIRREA penalties.

Settlements and Admissions of Wrongdoing

Against the backdrop of the three major FIRREA settlements coming out of the financial crisis, certain observations are in order. Aside from their sheer size—totaling more than $36 billion—one of the most interesting aspects has been how DOJ has handled acknowledgements of wrongdoing. The government has not demanded that settling parties explicitly admit to violating the relevant criminal predicates. Rather, it has required that the settling party "acknowledge facts set forth in the Statement of Facts" that accompany the settlements.[42] While varying in their levels of detail, the statements of facts accompanying the settlement agreements have been long on the contents of documents and internal processes at the three banks but short on legal conclusions and direct admissions of wrongdoing.[43]

As additional FIRREA settlements are reached, many eyes will be watching for whether DOJ seeks more damaging admissions from settling parties. Certainly defendants will attempt to hold the line, mindful of the prospect of civil litigation stemming from the underlying conduct at issue in the FIRREA action. Moreover, an admission to a violation of a FIRREA predicate would essentially constitute an admission of criminal conduct. A hard line stance from DOJ on admissions in settlements may cause defendants to consider litigating cases rather than settling.

Trends to Watch

FIRREA is an attractive enforcement tool that gives the government great flexibility. Its resurrection, however, may bring unintended consequences for government enforcement as a whole.

FIRST

Several of the FIRREA criminal predicates are broad in that they can be read to cover a great deal of conduct. When combined with FIRREA' s extended statute of limitations and lower burden of proof, this breadth of coverage may incentivize DOJ to pursue claims under FIRREA that relate to conduct that has traditionally been policed under other statutes.

The observation is not hypothetical. In *United States v. Bank of America, et al.*, for example, the government filed a FIRREA action alleging that the defendant had violated Sections 1001 and 1014 by filing a prospectus supplement for a securities offering that contained material misstatements.[44] That very same day the SEC brought its own action challenging the exact same conduct under the federal securities laws, in particular Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933.[45]

Parallel FIRREA and federal securities enforcement actions raise many unanswered questions, including whether Congress intended FIRREA and its highly generalized predicate offenses, such as mail and wire fraud, to regulate conduct otherwise governed by the more particularized requirements of the federal securities laws. Congress made specific policy choices when it enacted the

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statutory framework that governs the issuance and sale of securities, including, for example, safe harbors and due-diligence defenses for various parties to a securities offering.[46] Similarly, the SEC focused on transactions in securities as it exercised rule-making power pursuant to the Securities and Exchange Acts. These policy decisions are embedded in the specialized statutory and regulatory provisions that courts, too, have had the opportunity to interpret for many years—yielding a body of case law that allows defendants to assess risk and exposure with an important degree of reliability. Those same courts also have set out specific methods for calculating loss and damages under the securities laws—methods that may conflict with FIRREA penalty calculations.

It is fair to ask whether the government's newfound use of FIRREA to police transactions in securities (and related disclosures to investors) is consistent with Congress's intent. At the very least, there is meaningful risk of the more generalized FIRREA predicates imposing obligations that differ from those otherwise imposed by the federal securities laws. Time will tell whether 80 years of federal securities jurisprudence will be displaced (or supplemented) in large or small ways by FIRREA's highly generalized, catch-all predicates.

SECOND

The next few years will likely see continued use of FIRREA in connection with investigations into the extension of credit and securitization of loans. For example, on August 4, 2014, General Motors Financial Company Inc. disclosed in an 8-K that it had received a subpoena from DOJ seeking records related to possible violations of FIRREA in its underwriting and securitizations of automobile loans.[47] Santander Holdings USA Inc. announced in its August 13, 2014, 10-Q that it had received a similar subpoena.[48] It seems likely that entities involved in securitizing student loans and credit card debt may also face scrutiny under FIRREA.

Practitioners should also watch for efforts to bolster FIRREA's rewards to whistleblowers. In remarks given on September 17, 2014, Attorney General Eric Holder called the current maximum whistleblower reward under FIRREA, $1.6 million, "a paltry sum in an industry in which, last year, the collective bonus pool rose above $26 billion, and median executive pay was $15 million and rising."[49] He added that "we should think about modifying the FIRREA whistleblower provision—perhaps to the False Claims Act levels—to increase its incentives for cooperation," which "could significantly improve the Justice Department's ability to gather evidence of wrongdoing when complex financial crimes are still in progress."[50]

THIRD

Finally, if it is not clear from Attorney General Holder's remarks, *United States v. Bank of New York Mellon* shows that regulators are willing to turn to FIRREA to address conduct separate from the lending and securitization activity that has marked the heartland of FIRREA actions since the financial crisis.[51] In *Bank of New York Mellon,* DOJ is using FIRREA to seek penalties for basic alleged fraud against the defendant's foreign exchange customers. DOJ has clearly moved FIRREA to the front of the medicine cabinet and shows no signs of returning it to the back.

Conclusion

FIRREA spent two decades at the back of the medicine cabinet. It is now on the countertop with its lid off, and it is being used regularly and aggressively by DOJ to challenge conduct arising from the recent financial crisis. Important questions, however, remain about the statute's scope and meaning.

Many eyes are waiting to see whether other courts follow Judge Rakoff's decision in *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*,[52] with respect to penalty calculations. Additionally, from a policy perspective, there remains questions as to how frequently DOJ should be relying on FIRREA, particularly when it seeks to address conduct that has traditionally fallen within the purview of other regulators and that has a separate enforcement jurisprudence designed specifically to cover it.

Endnotes

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2 18 U.S.C. § 1833a.

3 Pub. L. 101-73, 103 Stat. 183 (1989).

4 H.R. Rep. No. 101–54(I) at 294.

5 FDIC, History of the Eighties–Lessons for the Future at 169 *available at* https://www.fdic.gov/bank/historical/history/167_188.pdf (citing U.S. General Accounting Office, *Financial Audit: Resolution Trust Corporation's 1995 and 1994 Financial Statements* (1996), 13).

6 FIRREA covers conspiracy to violate the predicate statutes in addition to actual violations of the predicates. 12 U.S.C. § 1833a(c).

7 *See* 18 U.S.C. §§ 215 (receipt of commissions or gifts for procuring loans), 656 (theft, embezzlement, or misapplication by bank officer or employee), 657 (criminalizing embezzling, abstracting, purloining, or willfully misapplying property of lending, credit and insurance institutions), 1005 (false bank entries, reports, and transactions), 1006 (federal credit institution entries, reports and transactions), 1007 (Federal Deposit Insurance Corporation transactions), 1014 (loan and credit applications generally; renewals and discounts; crop insurance), 1344 (bank fraud); 15 U.S.C. § 645(a) (fraud in connection with Small Business Administration transactions).

8 *See* 18 U.S.C. §§ 287 (false, fictitious or fraudulent claims), 1001 (general prohibition on false statements in matters within the jurisdiction of the Government), 1032 (concealment of assets from conservator, receiver, or liquidating agent), 1341 (mail fraud), 1343 (wire fraud).

9 12 U.S.C. § 1833a(b)(1), (2); 28 CFR 85.3(a)(6), (7).

10 12 U.S.C. § 1833a(b)(3).

11 12 U.S.C. § 1833a(h).

12 *See* 12 U.S.C. § 1833a(g)(1)(A)-(C).

13 *See, e.g., United States v. Meisinger,* No. EDCV 11-00896 VAP (OPx), 2011 WL 4526082, at *7 (C.D. Cal. Aug. 26, 2011) ("FIRREA does not create a private right of action for persons who have suffered harm."); *Strecker v. LaSalle Bank, N.A.*, 04cv440, 2004 WL 2491596 at *2 (W.D. Wisc. Nov. 3, 2004).

14 *See* 12 U.S.C. § 4205(d) (allowing for awards based on a percentage of the penalties awarded up to $1.6 million).

15 A search for decisions under 12 U.S.C. §1833a returned six FIRREA actions from 1989 to 2010 and ten FIRREA actions after 2010.

16 *See* Press Release, U.S. Department of Justice (SDNY), United States Attorney Preet Bharara Announces Formation of Civil Frauds Unit (March 31, 2010).

17 Leon Weidman, *Civil Remedies for Mortgage Fraud*, United States Attorney's Bulletin, 22 (May 2010).

18 *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*, 12-cv-1422, slip op. at 19 (S.D.N.Y. Jul. 30, 2014).

19 *See* Second Amended Complaint, *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*, 12-cv-1422 (S.D.N.Y. Sept. 6, 2013).

20 *United States v. Wells Fargo Bank, N.A.*, 12-cv-7527 (S.D.N.Y.).

21 Complaint, *United States v. Wells Fargo Bank, N.A.*, 12-cv-7527 (S.D.N.Y. Oct. 9, 2012).

22 Complaint, *United States v. McGraw-Hill (S&P)*, 13-cv-779 (C.D. Cal. Feb. 4, 2013).

23 *Id.*

24 Intervenor Complaint, *United States v. Americus Mortgage Corp., et al.*, 12-cv-2676 (S.D. Tex. Nov. 4, 2011).

25 *See* DOJ Press Release, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for

Misleading Investors About Securities Containing Toxic Mortgages, Nov. 19, 2013; DOJ Press Release, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citibank for Misleading Investors About Securities Containing Toxic Mortgages, Jul. 14, 2014; DOJ Press Release, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During Financial Crisis, Aug 21, 2014.

26 *United States v. Bank of New York Mellon*, 1:11-cv-6969 (S.D.N.Y., Oct. 4, 2011).

27 Complaint, *United States v. Bank of New York Mellon*, 1:11-cv-06969 (S.D.N.Y. Oct. 4, 2011).

28 *See* 12 U.S.C. § 1833a(c)(2).

29 *See United States v. Bank of New York Mellon*, 941 F. Supp. 2d 438, 451 (S.D.N.Y. 2013); *United States v. Wells Fargo*, 972 F. Supp. 2d 593, 629-30 (S.D.N.Y. 2013); *United States v. Countrywide Fin. Corp. et al.*, 961 F. Supp. 2d 598, 604-05 (S.D.N.Y. 2013).

30 *Bank of New York Mellon*, 941 F. Supp. 2d at 456-57; *Wells Fargo*, 972 F. Supp. 2d at 630; *Countrywide Fin. Corp.*, 961 F. Supp. at 604-05.

31 *Bank of New York Mellon*, 941 F. Supp. 2d at 456-57, 459-60 ("It is difficult to fathom how [Bank of New York Mellon] could not have been affected when the scheme allegedly has led to the departure of a number of clients and significant reputational harm for the Bank."); *Wells Fargo*, 972 F. Supp. 2d at 630 (endorsing analogous reasoning); *Countrywide Fin. Corp.*, 961 F. Supp. at 604-05 (same).

32 *United States v. Menendez*, No. CV 11–06313, 2013 WL 828926, at *5 (C.D. Cal. Mar. 6, 2013).

33 *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*, 12-cv-1422 (S.D.N.Y. Jul. 30, 2014).

34 *Menendez*, 2013 WL 828926, at *5.

35 *Id.*

36 *Id.*

37 *Id.* at *8.

38 *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*, _F. Supp. 2d_, 2014 WL 3734122 (S.D.N.Y. 2014).

39 *Id.* at 13.

40 *Id.* at 15.

41 *Id.*

42 *See*, *e.g.*, Settlement Agreement with JPMorgan Chase at 3, *available at* http://www.justice.gov/iso/opa/resources/69520131119191246941958.pdf.

43 *See generally* JP Morgan Chase Statement of Facts, *available at* http://www.justice.gov/iso/opa/resources/94320131119151031990622.pdf; Citibank Statement of Facts, *available at* http://www.justice.gov/iso/opa/resources/558201471413645397758.pdf; Bank of America Statement of Facts, *available at* http://www.justice.gov/iso/opa/resources/4312014829141220799708.pdf.

44 Complaint, *United States v. Bank of America, et al.*, 13-cv-446 (W.D.N.C. Aug 6, 2013).

45 *See* Complaint, *SEC v. Bank of America, et al.*, 13-cv-447 (W.D.N.C. Aug. 6, 2013).

46 *See*, *e.g.*, 15 U.S.C. § 77z–2 (creating safe harbor for forward looking statements); 15 U.S.C. § 77k(b)(3) (providing due diligence defense).

47 General Motors Financial Co. Inc. 8-K (Aug. 4, 2014).

48 Santander Holdings USA Inc. 10-Q at 82 (Aug. 13, 2014).

49 Attorney General Holder Remarks on Financial Fraud Prosecutions, Sept.17, 2014 *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140917.html.

50 *Id.*

51 *United States v. Bank of New York Mellon,* 1:11-CV-6969 (S.D.N.Y. Oct. 4, 2011).

52 *U.S. ex rel. O'Donnell v. Bank of America Corp. et al.*, 12-cv-1422 (S.D.N.Y. Jul. 30, 2014).

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