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The Financial Institutions Reform, Recovery, and Enforcement Act of 1989: The Effect of the “Self-Affecting” Theory on Financial Institutions

I. INTRODUCTION

Imagine the government prosecuting someone for attempted murder after that person failed to commit suicide. The defendant might say that the government is converting a statute designed to shield individuals from other’s criminal behavior into one that penalizes him for conduct “affecting” himself.1 In response, the government, using the attempted murder statute, argues that “affect” has long been considered a reflexive verb that includes effects an individual may produce on himself.2 Therefore, the government asserts that attempted murder statute should extend to prosecuting failed suicides.

The illustration above may seem like an absurd hypothetical, but the concept of the hypothetical has become a reality for JPMorgan,3 Citigroup,4 Bank of New York Mellon (“BNYM”),5 and Bank of

1. See Bank of New York Mellon’s Memorandum of Law in Support of Its Motion to Dismiss the Second Amended Complaint at 10, United States v. Bank of New York Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. Aug. 6, 2012) (No. 11 Civ. 6969 (LAK)) [hereinafter BNYM’s Mem.] (claiming that the DOJ’s reading of FIRREA is contrary to its intended purpose, which is to protect federally insured financial institutions from fraud by others).

2. See Memorandum of Law of the United States in Opposition to Defendants’ Motions to Dismiss at 17, United States v. Bank of New York Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. Oct. 12, 2012) (No. 11 Civ. 6969 (LAK)) (stating the word “affect” has long been used to describe conduct that one may have upon oneself).


4. See Victoria Finkle & Joe Adler, Three Takeaways from Citi’s $7B Mortgage Settlement, AM. BANKER (July 14, 2014), http://www.americanbanker.com/issues/179_134/three-takeaways-from-citis-7b-mortgage-settlement-1068646-1.html (reporting that this settlement will allow the DOJ to set its sight solely on Bank of America, the prominence of FIRREA, and the DOJ can still pursue criminal charges against U.S. banks if FIRREA fails).

5. See Brent Ylvisaker, FIRREA Civil Money Penalties, DORSEY & WHITNEY LLP (May 16, 2013), http://www.dorsey.com/ea_firrea_civil_money_penalties/ (describing how the Self-Affecting Theory has allowed the DOJ to overcome Bank of New York Mellon’s motion to dismiss).
The Department of Justice (“DOJ”) has strong-armed these financial institutions into massive settlements for engaging in fraudulent conduct that has “affected” the institution itself. The “Self-Affecting Theory,” proffered by the DOJ, allows a self-inflicted wound to trigger civil penalties. The DOJ anchors the legality of the Self-Affecting Theory to section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), which is codified as amended in 12 U.S.C. § 1833a. Section 1833a affords the DOJ a ten-year statute of limitations to bring fourteen broad criminal offenses, including mail and wire fraud, under a preponderance of the evidence standard. When facing FIRREA penalties, financial institutions have yet to succeed in getting cases dismissed.

This Note addresses why the Self-Affecting Theory misinterprets § 1833a. This Note argues that in cases where the DOJ could bring, but is unwilling or unable to bring, criminal actions, a federally insured financial institution should not be held civilly liable under § 1833a for engaging in fraudulent conduct “affecting” that same


7. For simplicity, in this Note a “financial institution” refers to all federally insured depository institutions unless otherwise specified. A “financial institution” is defined in 18 U.S.C. § 20 (2012).


12. 18 U.S.C. § 1833a(c).

13. Campbell et al., supra note 8.
FIRREA does not define what it means to “affect[] a federally insured financial institution.” Congressional intent demonstrates that Congress enacted § 1833a in response to the pervasive insider abuse and fraud of the savings and loan crisis (“S&L Crisis”) and was not intended to punish financial institutions for losses incurred from their own conduct. Under this perspective, the Self-Affecting Theory presents an impermissible reading of § 1833a.

The analysis proceeds in five parts. Part II examines the historical circumstances leading to the passage of FIRREA. Part III explains FIRREA’s usefulness as a tool for the U.S. government. Part IV describes the Self-Affecting Theory and how the courts and government have addressed it. Part V addresses why the Self-Affecting Theory is inconsistent with the meaning of FIRREA. Part VI concludes by proposing recommendations for financial institutions to assess their exposure to potential FIRREA claims.

II. INSIDER ABUSE AND FRAUD PLAYED A SIGNIFICANT ROLE IN CAUSING THE S&L CRISIS

Congress enacted FIRREA in response to the S&L Crisis.

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15. See 12 U.S.C. § 1833a; see also Memorandum of Law of the United States in Opposition to Defendants’ Motion to Dismiss at 30, United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (Apr. 1, 2013) (No. 12 Civ. 1422 (JSR)) (Countrywide I) (arguing that since FIRREA does not define what “affects” a financial institution, the court should look to similar language in other provisions of § 1833a).


17. See BNYM’s Mem., supra note 1.

18. See infra Part II.

19. See infra Part III.

20. See infra Part IV.

21. See infra Part V.

22. See infra Part VI.

23. See GENERAL ACCOUNTING OFFICE, THRIFT FAILURES—COSTLY FAILURES RESULTED FROM REGULATORY VIOLATIONS AND UNSAFE PRACTICES 10 (1989) [hereinafter 1989 GAO REPORT] (reporting that serious misconduct by senior insiders or outsiders has contributed to insolvencies of most banks, savings and loan, and credit unions).
Although the S&L Crisis can be causally linked to a variety of factors, insider abuse and fraud served as a major catalyst. Individuals like Erwin Hansen, Don Dixon, and Charles Keating defrauded their financial institutions in order to achieve both institutional and personal gain. Upon specific examination of twenty-six failed thrifts between 1985 and 1987, the Government Accounting Office ("GAO") noted that each of the failed thrifts involved individuals that engaged in conduct constituting fraud and insider abuse. On an aggregate level, serious insider misconduct contributed to the insolvencies of at least 75% of all failed institutions in the S&L Crisis. These failed institutions often skirted regulatory supervision by engaging in "land flips," which involve two or more groups selling properties back and forth in order to artificially inflate the face value of the real property.

24. Insider abuse and fraud refers to a wide range of conduct by high-ranking employees and directors of financial institutions, who committed unlawful acts with the intent of personal gain without regard for the safety and soundness of the institution they control. H.R. REP. NO. 98-1137, at 2 n.5 (1984) (defining fraud and insider abuse). For example, insider abuse may include conduct such as high-risk and speculative ventures; payment of dividends or bonuses at a time when the entity is close to or is insolvent; or when the insider has breached fiduciary duties to customers. 1989 GAO REPORT, supra note 23, at 7–9. Additionally, insider has been defined as a person who by virtue of their position is able to influence the operations or decisions within a bank. OFFICE OF THE COMPTROLLER OF THE CURRENCY, BANK FAILURE: AN EVALUATION OF THE FACTORS CONTRIBUTING TO THE FAILURE OF NATIONAL BANKS 33 (1988). Insider abuse includes legal violations, but they are not a necessary element. Id. Furthermore, insider abuse may include actions or failure to take action where the bank is harmed, takes on additional risk, or loses an opportunity. Id.

25. See H.R. REP. NO. 101-54(I), supra note 16.


27. Don Dixon operated Vernon Savings and Loan in Texas. When Vernon was taken over in 1987, 96% of its loans were in default. The resolution of Vernon cost taxpayers $1.3 billion. See id. at 25.

28. Charles Keating purchased Lincoln Savings and Loan in 1984. After being shutdown in 1989, it cost more than $3 billion to resolve. See id. at 26–27.

29. See id. at 23 (describing the most notorious insiders from the S&L Crisis).


The end result of the practice typically benefitted insiders, senior management, or other outside affiliates.34

Even though a lone fraudster may have significantly damaged his respective financial institution through an isolated event, the fraudulent conduct of failed institutions typically extended to senior management.35 Inert boards of directors,36 usually dominated by one or two individuals, bypassed internal controls and allowed their financial institutions to pursue risky investments.37 Some financial institutions pursued excessive loan growth with the view that the Federal Savings and Loan Insurance Corporation (“FSLIC”) would insure their deposits in the event borrowers could not repay the loans and the institutions failed.38 The FSLIC had statutory authority to liquidate failed thrift

1993 GAO REPORT] (explaining that “land flips” were used in order to inflate the value of real estate prices).

34. See 1989 GAO REPORT, supra note 23, at 45–46 (detailing the Federal Housing Loan Bank Board’s description of a typical conduct constituting insider abuse and fraud).

35. See H.R. REP. NO. 98-1137, at 102 (1984) (stating that individual insider abuse and fraud is typically representative of a larger scheme of insider abuse, self-dealing, and gross mismanagement); Renae V. Stevens, Insider Abuse and Criminal Misconduct in Financial Institutions: A Crisis, 64 NOTRE DAME L. REV. 222, 227 (1999) (explaining that well-managed institutions that have strong internal controls usually continue successful operation when facing economic downturn).

36. For simplicity, in this Note “directors” refers to an “institution-affiliated party” within the meaning of 12 U.S.C. § 1813(u)(1) (2012), which is “any director, officer, employee, or controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an insured depository institution.”


38. See 1989 GAO REPORT, supra note 31, at 17–18. The report offered the following example of one S&L institutions’ excessive loan growth:

At one failed thrift, the president of the thrift initiated a construction lending program in 1980 whereby the thrift provided 100 percent of the financing in return for interest and a profit participation. The board of directors did not give serious review or consideration to the amount of capital involved or to the necessary staffing, record keeping, and monitoring requirements prior to adopting the new lending program. Moreover, without board oversight and control, the president and other senior management simply operated the program as they wished. Despite the fact that since 1982, examination reports pointed out problems with the new lending program, the problems were not
institutions and pay off insured accounts up to $100,000. By 1987, however, the FSLIC had become insolvent and required a $10.825 billion recapitalization plan under the Competitive Equality Banking Act of 1987 (“CEBA”). Unfortunately, CEBA insufficiently covered the FSLIC losses when 535 banks and savings institutions failed in 1989, which prompted the enactment of FIRREA.

In response to the fraud and abuse that contributed to the S&L Crisis, Congress enacted FIRREA to strengthen criminal and civil penalties for “defrauding or otherwise damaging financial institutions and depositors.” FIRREA also sought to help depositors regain confidence in the financial system by deterring fraudulent behavior by corrected. In 1983, over $500 million (approximately 16% of the thrift’s assets) had been committed to the program. The thrift’s board of directors dismissed the president in 1984 but still made little progress in correct the previously cited deficiencies. Bank Board documents noted that, in the aggregate, ‘substantial losses’ were incurred as a result of the lending program and additional losses were expected.

Id.
42. Associated Press, Bank Failures Dip, For Now, N.Y. TIMES, Jan. 1, 1991, at 42 (describing the total number of failed institutions in 1989 and comparing it to the number of failed institutions in 1990).
43. See Remarks on Signing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1226 (Aug. 9, 1989) (“This legislation [will] . . . safeguard and stabilize America’s financial system . . . . And moreover, it says to tens of millions of S&L depositors: You will not be the victim of others’ mistakes.”).
44. H.R. REP. NO. 101-54(I), at 305 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 101; see also Mark David Wallace, Life in the Boardroom After FIRREA: A Revisionist Approach to Corporate Governance in Insured Depository Institutions, 46 U. MIAMI L. REV. 1187, 1189 (1992) (stating that after FIRREA was enacted, William Seidman, former Chairman of the FDIC predicted there would be over 100,000 lawsuits attempting to place liability on corporate officers and directors for the failure of individual thrift institutions).
individuals and managers. Specifically, Congress viewed Title IX, which includes § 1833a, as a necessary response to prevent insider abuse and fraud from occurring in the future. After signing FIRREA into law, President H. W. Bush stated “[b]eginning today, penalties for wrongdoing by officers and directors of insured institutions will be increased up to $1 million per day.”

The prosecutions stemming from the S&L Crisis bolster the view that FIRREA was enacted to deter individuals from damaging financial institutions and their depositors. Between 1988 and 1992, the DOJ charged and convicted over 2,500 financial institution fraud offenders. A majority of the convictions rested on the individual violating, or conspiring to violate, the predicate offenses listed under § 1833a(c). While the prosecution statistics fail to show any cases involving a financial institution affecting itself, the statistics readily demonstrate DOJ actions against individuals. For example, special government task forces sentenced nearly 1,700 bank officials to prison terms with a conviction rate of nearly 96%.

45. See Current Conditions, supra note 40, at 24 (statement of M. Danny Wall, Chairman, Federal Home Loan Bank Board, accompanied by Larry White and Roger Martin) (“A fact of critical importance, sometimes overlooked in the kind of historical review I have just outlined, is that it is the function of a system of deposit insurance to protect depositors, not the management of thrift institutions and not the stockholders of thrifts that are structured as stock associations.”).
46. See 1993 GAO REPORT, supra note 33, at 23 n.17 (1993) (stating that the House of Representatives report accompanying FIRREA demonstrates the belief that Title IX of FIRREA was “absolutely essential to respond to serious epidemic of financial insider abuse and criminal misconduct and to prevent its recurrence in the future”).
48. See 1993 GAO REPORT, supra note 33, at 104–05 (stating that the Special Counsel appointed by President George H. W. Bush sought to “emphasize the need to proceed with the coordinated two-pronged effort to put the crooks in jail and take their money back for the public.”).
49. See id. at 76 (reporting that between October 1, 1988, and June 30, 1992, the DOJ charged 3,270 defendants and convicted 2,603 defendants with a conviction rate close to 96 percent).
50. Compare id. at 14 (noting the commonly applied banking statutes in FIRREA prosecutions) with 12 U.S.C. § 1833a(c) (2012) (listing the predicate offenses for civil liability).
51. See 1993 GAO REPORT, supra note 33, at 69–84 (discussing the prosecution statistics for financial institution fraud offenders).
52. See id. at 77–80 (listing examples of successful prosecutions against individuals and their accompanying criminal and civil penalties); see also Gretchen Morgenson & Louise Story, In Financial Crisis, No Prosecutions of Top Figures, N.Y. TIMES (Apr. 14, 2011), http://www.nytimes.com/2011/04/14/business/14prosecute.html?pagewanted=all&_r=1&.
prosecute, the DOJ considered numerous factors, such as “whether the offense is part of a systemic problem; whether an insider (i.e., an officer, director, or senior employee) committed the offense; whether the applicable statute of limitations is about to expire; [and] whether there is a reasonable, available alternative to criminal prosecution.”53 In light of such considerations, the DOJ elected to prosecute individuals and not financial institutions under § 1833a.54

III. THE BENEFITS OF FIRREA AS AN ENFORCEMENT TOOL

The DOJ has been aggressively using § 1833a in pursuing civil liability against financial institutions in the wake of the 2008 financial crisis.55 Section 1833a permits the Attorney General, acting through the DOJ, to initiate actions to recover monetary penalties against persons or entities that have allegedly committed, or that have allegedly conspired to commit, certain predicate criminal offenses.56 As of February 2015, the financial institutions being prosecuted under § 1833a have failed in their efforts to dismiss cases based on the argument that the Self-Affecting Theory is contrary to the literal reading of § 1833a.57 The DOJ has proffered the Self-Affecting Theory under § 1833a because the statute offers the following five advantages: (1) a preponderance of the evidence standard; (2) fourteen predicate criminal offenses; (3) a ten-year statute of limitations; (4) the use of administrative subpoenas; and (5) stiff penalties that apply to each violation.58

[Notes]
53. 1993 GAO REPORT, supra note 33, at 20 n.15.
54.  See id. at 77 (listing some of the major fraud cases that the DOJ has successfully prosecuted, which only include individuals being prosecuted).
55.  See Thomas P. Vartanian et al., Enforcement Actions Continue Three-Year Decline; DOJ Emerges as Major Player, 102 Banking Rep. (BNA) No. 20, at 947, 948 (May 20, 2014) (arguing that the DOJ has become a “de facto banking regulator” by using § 1833a).
A. Preponderance of the Evidence Standard

Section 1833a is a hybrid statute that bases civil liability on the DOJ’s ability to prove criminal violations under a preponderance of the evidence standard. Since FIRREA actions are brought as civil proceedings, § 1833a applies a preponderance of the evidence standard to the enumerated fourteen predicate criminal offenses rather than the beyond a reasonable doubt standard. The lower burden of proof in civil actions allows the DOJ to pursue enforcement for fraud that would not ordinarily rise to the criminal standard. Thus, the DOJ will likely choose to bring civil action when it does not have enough compelling evidence to meet the criminal burden of proof.

The DOJ initially brought, however, criminal fraud charges against two senior managers at Bear Stearns in 2008. The DOJ alleged that by 2007 the two managers were aware of investments on the verge of collapse, and instead of warning investors about their deteriorating condition, the managers misrepresented the funds in order to limit investor withdrawals. Nevertheless, the fund collapsed in June 2007 and its investors lost $1.6 billion. The jury found reasonable doubt on every charge and found the two managers not guilty of the

60. See 12 U.S.C. § 1833a(f) (“In a civil action to recover civil penalties under this section, the Attorney General must establish the right to recovery by a preponderance of the evidence.”); see also John R. Rowlett, The Chilling Effect of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the Bank Fraud Prosecution Act of 1990: Has Congress Gone Too Far?, 20 AM. J. CRIM. L. 239, 246 (1992) (predicting that the DOJ will bring more claims under FIRREA because of the lower burden of proof).
62. See Bruce A. Green, After the Fall: The Criminal Law Enforcement Response to the S&L Crisis, 59 FORDHAM L. REV. S155, S179 (1991) (stating that the civil proceeding in such a case is basically a criminal proceeding without certain protections, such as the presumption of innocence).
64. See William D. Cohan, How the Scapegoats Escaped, N.Y. TIMES, Nov. 12, 2009, at A35 (describing how the Bear Stearns case was tried).
alleged crime. The DOJ committed two errors in its prosecution. First, the prosecution used emails from the two managers’ accounts that, when viewed holistically, were highly ambiguous as to proving fraudulent intent. Second, the assistant U.S. attorney tried to preemptively classify the defendants’ as deceitful Wall Street financiers, and he openly accused them of lying in his opening statement. The DOJ experienced that the criminal burden of proving fraudulent intent would present a difficult task and that it might have to build a new litigation strategy.

Satisfying the burden of proof for criminal fraud charges proves difficult partly because of the complicated nature of the transactions underlying the 2008 financial crisis. To succeed in a criminal action, the DOJ must usually prove specific intent as a necessary element and have substantial evidence to reach the beyond a reasonable doubt burden of proof. In United States v. Countrywide Financial Corp., the DOJ alleged that Countrywide Financial Corporation had perpetrated a scheme to defraud the Federal National Mortgage Association (“Fannie Mae”) and Federal Home Loan Mortgage Group

66. Cohan, supra note 64 (quoting a juror who said, “We just didn’t feel that the case had been proven”).
67. Id.
68. Id.
69. Id.
70. See Amir Efrati & Peter Lattman, U.S. Loses Bear Fraud Case, WALL ST. J., Nov. 11, 2009, at A1 (explaining how the DOJ lost the Bear Stearns case and implications that it might have in the future).
71. See Elkan Abramowitz & Jonathan Sack, The ‘Civil-izing’ of White Collar Criminal Enforcement, 249 N.Y. L.J. 1, 2–3 (May 7, 2013) (suggesting reasons why the DOJ has not brought more criminal actions for conduct attributable to the 2008 financial crisis).
75. Fannie Mae is “the leading source of residential mortgage credit in the U.S. secondary market,” and is tasked with establishing industry standards, such as “manag[ing] credit risk, build[ing] new infrastructure to ensure a liquid and efficient market, and facilitate[ing] the collection and reporting of data for accurate financial reporting and improved risk management.” Who Is Fannie Mae Today?, FANNIE MAE, http://www.fanniemae.com/portal/about-us/company-overview/about-fm.html (last updated Nov. 6, 2014).
2015] FIRREA & THE SELF-AFFECTING THEORY 273

(“ Freddie Mac” 76 in connection with Countrywide’s residential mortgage lending business. 77 Under the criminal burden of proof, the DOJ would need to sufficiently allege factual circumstances that specific individuals had knowingly intended to violate the criminal offenses. 78 Whereas the civil burden of proof allowed the DOJ to simply prove that the existence of the fraudulent scheme was more probable than its nonexistence. 79 The DOJ prevailed on its civil claim. Countrywide was found guilty after a jury trial, and Judge Jed S. Rakoff ordered Countrywide to pay $1.2 billion in FIRREA penalties. 80

B. Fourteen Predicate Criminal Actions

In addition to the favorable burden of proof, FIRREA allows the DOJ to prosecute an alleged violator under fourteen predicate criminal actions. 81 Section 1833a separates the fourteen criminal offenses into two separate categories. 82 The first category comprises nine of the predicate offenses and deals specifically with banks and other financial

78. See In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1069, 1072 (1970) (affirming the New York Court of Appeals’ observation that “‘a person accused of a crime . . . would be at a severe disadvantage . . . if he could be adjudged guilty . . . on the strength of the same evidence as would suffice in a criminal case’”); see also CHARLES DOYLE, MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW 5 (2011) (stating for both mail fraud and wire, “intent to defraud requires a willful act by the defendant with the intent to deceive or cheat, usually for the purpose of getting financial gain for one’s self or causing financial loss to another”) (citing United States v. Howard, 619 F.3d 723, 727 (7th Cir. 2010); United States v. Phipps, 595 F.3d 243, 245–46 (2010) (“Mail and wire fraud are both specific intent crimes that require the Government to prove that a defendant knew the scheme involved false representations.”); United States v. Stalnaker, 571 F.3d 428, 436 (5th Cir. 2009)).
80. See Opinion and Order at 19, United States v. Countrywide Fin. Corp., No. 12-CV-1422 (JSR), 2014 WL 3734122 (S.D.N.Y. July 30, 2014) (Countrywide III) (directing Bank of America, which is Countrywide’s successor, to pay the nearly $1.3 billion FIRREA penalty).
institutions. Under these offenses, the DOJ does not have to prove anything beyond the offense itself. The second category, however, contains the remaining five offenses, is broader in scope than the first category, and the DOJ is required to prove that the offense “affect[ed] a federally insured depository institution.” The mail fraud and wire fraud statutes, which belong to the second category containing the “affecting” language, are the most utilized by the DOJ due in large part to their broad construction and interpretations.

The DOJ has largely utilized the mail fraud and wire fraud offenses under § 1833a(c)(2) to trigger the Self-Affecting Theory. In making out a prima facie case for mail or wire fraud, the prosecution must show that the defendant (1) created a scheme to defraud, (2) for purposes of obtaining money or property, and (3) used the mail or wires in furtherance of that scheme. Additionally, the DOJ must present proof that the defendant acted knowingly with “specific intent to deceive or cheat, usually for the purpose of getting financial gain for one’s self or causing financial loss to another.”

The DOJ has struggled with proving the requisite intent of the high-ranking officers.

83. § 1833a(c)(1), (3).
84. See Edwin L. Fountain et al., FIRREA Civil Money Penalties: The Government’s Rediscovered Weapon Against Financial Fraud, 36 SEC. REFORM ACT LITIG. REP. 9, 9 (2013) (discussing the predicate offenses under FIRREA and what are the proper pleading requirements).
85. Id. (emphasis added).
87. § 1343.
89. 18 U.S.C. § 1341.
90. § 1343.
91. See documents cited supra note 88.
93. United States v. Moede, 48 F.3d 238, 241 (7th Cir. 1995) (citing United States v. Sims, 895 F.2d 326, 329 (7th Cir. 1990)).
for financial institutions because of the organizational culture and the complexity of the transactions underlying the 2008 financial crisis.  

Under § 1833a, the DOJ has had considerable success charging financial institutions under the mail fraud and wire fraud statutes. Mail fraud involves using the U.S. Postal Service or any private service, such as FedEx or UPS, in an effort to obtain money or property in furtherance of a fraudulent scheme. Likewise, wire fraud involves using telecommunication systems, including the Internet and email, to obtain money or property in furtherance of a fraudulent scheme. The DOJ has relied principally on these two statutes because they are interpreted “to criminalize a wide range of conduct involving conflicts of interests, alleged misrepresentations, [and] the failure of agents to inform alleged principals of certain facts.” Moreover, the DOJ can amass thousands of mail and wire fraud violations because each separate use of the mail or wire connected to the fraudulent scheme constitutes a separate offense. For instance, Countrywide was ordered to pay nearly $1.3 billion for selling upwards of 7,600 defective loans—each loan constituting a separate offense—transmitted via interstate mail and wire carriers.

95. See Stipulation and Order of Settlement and Dismissal ¶ 10, United States v. Citigroup, Inc., No. 11 Civ. 5473 (VM) (Feb. 13, 2012); Settlement Agreement ¶ 11, United States v. JPMorgan.
96. See United States v. Fox, 69 F.3d 15, 18–19 (5th Cir. 1995) (holding that evidence demonstrating that an item had been mailed is sufficient to support the conviction for mail fraud).
97. See United States v. Stalnaker, 571 F.3d 428, 437 (5th Cir. 2009) (finding that defendant’s use of an internet connected program to process mortgage loan transactions constituted wire fraud).
99. See C.J. Williams, What is the Gist of the Mail Fraud Statute?, 66 OKLA. L. REV. 287, 287–88 (2014) (explaining how broadly the mail and wire fraud statutes may be construed).
C. Statute of Limitations

Not only are the underlying criminal offenses broad, § 1833a also extends the statute of limitations. The civil actions cannot commence more than ten years after the cause of action accrues, which is substantially longer than the typical three to five-year period for civil fraud suits. For both mail and wire fraud, the criminal statute of limitations is five years. Under the criminal statute of limitations for mail and wire fraud, most of the actions contributing to the 2008 financial crisis would have been precluded. However, under § 1833a, the extended period allows the DOJ to take its time and amass as much evidence as possible before deciding whether to bring charges against an individual or an institution.

In October 2012, the DOJ alleged that Wells Fargo submitted thousands of false loans to the Federal Housing Administration ("FHA") from 2001 through 2005 in violation of both mail and wire fraud statutes. Typically, the seven-year lapse would bar the DOJ’s

103. See 18 U.S.C. § 3282(a) (2012) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."); § 3293(2) ("No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate . . . section 1341 or 1343, if the offense affects a financial institution . . . unless the indictment is returned or the information is filed within 10 years after the commission of the offense."); see also JENNIFER R. ECKLUND, THE EVOLVING DEFINITION OF MORTGAGE FRAUD: ANALYZING THE CHANGES IN INTERPRETATION THROUGH COURT DECISIONS AND LEGISLATION SINCE THE SUBPRIME MORTGAGE CRISIS 2 (2014).
106. See Jay Williams et al., FIRREA: An Old Acronym is Turning into the Government’s New Hammer on Banks and Other Financial Institutions, 129 BANKING L.J. 579, 581–82 (2012) (discussing the benefits the Government has in pursuing civil claims under FIRREA).
107. Wells Fargo Compl., supra note 86, ¶ 47.
action under similar mail and wire fraud statutes.¹⁰⁸ Under FIRREA, however, the statute of limitations is extended an additional five years (totaling ten years), which permits the DOJ to collect all available information to support the action before filing the FIRREA claim.¹⁰⁹

D. Administrative Subpoenas

The extended statute of limitations, coupled with the Attorney General’s subpoena power, allows the DOJ to conduct extensive discovery without ever filing suit.¹¹⁰ The Attorney General holds broad power to issue administrative subpoenas “to summon witnesses and require production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry.”¹¹¹ While administrative subpoenas are not traditionally used in criminal investigations, they allow the prosecutor to compel testimony and production of documents in aid of the DOJ’s performance of its duties.¹¹² With this authority, the DOJ may issue an administrative subpoena to any person believed to be in possession of evidence.¹¹³ In contrast, judicial subpoenas require court approval before records must be produced.¹¹⁴ Moreover, judicial subpoenas also require a reason to believe that the evidence relates to a legitimate law enforcement investigation.¹¹⁵ Thus, the use of administrative subpoenas under FIRREA permits the DOJ to access vast amounts of information in pretrial discovery without having to acquire court approval.¹¹⁶

¹⁰⁸. See 18 U.S.C. § 3282 (2012). But see § 3293 (extending statute of limitations except for mail and wire fraud schemes that affect a financial institution).
¹¹⁰. Lurie, supra note 101.
¹¹¹. § 1833a(g)(1)(C) (emphasis added).
Additionally, administrative subpoenas are rarely overturned. For example, the DOJ issued an administrative subpoena to Clayton Holdings, LLC, for information relating to the “2008 collapse of the housing market and economy in the United States.” Clayton Holdings provided major due diligence information to Wall Street firms that pooled mortgages into bonds, which were sold to investors. When Clayton Holdings challenged the relevancy of the administrative subpoena, the U.S. District Court of Connecticut required that Clayton Holdings turn over its emails, databases, and due diligence reports concerning mortgage loans and mortgage pools from 2005 to 2007. The court noted that FIRREA’s administrative subpoenas aid in determining whether any evidence exists. Therefore, the DOJ may utilize administrative subpoenas to investigate with mere suspicion.

E. Large Monetary Penalties

Finally, the statute permits large monetary penalties against violators. Although the civil penalties may generally not exceed $1 million, § 1833a has two exceptions that may increase the penalties. First, in the case of a continuing violation, the civil penalty

117. See Andrew W. Schilling et al., Challenging FIRREA Subpoenas: The RMBS Working Group Faces Subpoena Fight, 101 Banking Rep. (BNA) No. 21, at 905, 906 (Dec. 3, 2013) (stating that challenging a government subpoena does not justify the risk with the reward, because the challenges are rarely successful and only anger the prosecutor).
121. See id. at 5–6.
122. See United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (describing the function of the administrative subpoena as “analogous to [that of] the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not”).
124. § 1833a(b)(1).
125. DOUGLAS W. BARUCH, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, FRAUD MAIL ALERT: JUSTICE DEPARTMENT BRANDISHES RARELY USED WEAPON—FIRREA—IN FULL-SCALE ASSAULT ON S&P, AND CALIFORNIA JOINS THE BATTLE WITH SEPARATE STATE FALSE
may be increased to $5 million.126 Second, “if any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator,” the civil penalty can be increased to the amount of such gain or loss.127

Under both of these exceptions, the DOJ has sought increased penalties in bank prosecutions for alleged mortgage fraud.128 In settlement agreements resulting from § 1833a actions, defendants made substantial payments.129 As of February 2015, Bank of America has received the highest FIRREA civil penalty of $5 billion.130 Furthermore, since most of the DOJ’s FIRREA cases have ended in settlements, it is hard to determine if the penalties were based on detailed calculations or a negotiated settlement.131 Nonetheless, the DOJ reached these record-setting penalties because of the amount of available information in pretrial discovery that may be applied to broad criminal offenses under a lower burden of proof.132

In Countrywide,133 the United States District Court for the Southern District of New York gave a detailed calculation as to how it reached the $1.2 billion FIRREA penalty.134 The court based the penalty on Countrywide’s fraudulent scheme that induced Fannie Mae

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126. See 12 U.S.C. § 1833a(b)(2) (“In the case of a continuing violation, the amount of the civil penalty may exceed the amount described in paragraph (1) but may not exceed the lesser of $1,000,000 per day or $5,000,000.”).
127. § 1833a(b)(3).
129. See, e.g., Settlement Agreement at 2, United States v. Citigroup, Inc., No. 11 Civ. 5473 (VM) (July 15, 2014) (applying a $4 billion FIRREA penalty); Settlement Agreement at 3, United States v. JPMorgan, No. 13 Civ. 0220 (JPO) (Nov. 19, 2013) (applying a $2 billion FIRREA penalty).
132. Villalpando, supra note 58.
and Freddie Mac to purchase risky mortgages originating from the “High Speed Swim Lane” (“HSSL”) program.\textsuperscript{135} In calculating the damages, the court determined that the HSSL program started on August 13, 2007, and ended on May 22, 2008.\textsuperscript{136} During that roughly nine-month period, a total of 28,882 loans, valued at $4.8 billion, were sold to Fannie Mae and Freddie Mac.\textsuperscript{137} Of the 28,882 loans, the HSSL program initiated 17,611 defective loans, comprising 61% of the total loans sold.\textsuperscript{138} The court valued each loan at the price Fannie Mae and Freddie Mac paid to Countrywide for the defective loan and determined that the upper-limit of the penalty equaled 61% of the total amount paid, which equaled $2.9 billion.\textsuperscript{139} Of the 17,611 defective HSSL loans, 57% percent proved not to be materially defective, and the total damages were reduced by 43% to $1.2 billion.\textsuperscript{140}

IV. THE DOJ AND THE CASE LAW BOLSTERING THE SELF-AFFECTING THEORY

In the wake of the 2008 financial crisis, the DOJ has actively pursued charges against financial institutions for the pervasive mortgage and financial fraud that occurred prior to the crisis.\textsuperscript{141} In response, President Barack Obama created the Financial Fraud Enforcement Task Force (“Fraud Task Force”) with the primary purpose to hold accountable and assign liability to those responsible for the 2008 financial crisis.\textsuperscript{142} After failed criminal prosecutions, the U.S.

\textsuperscript{135} Id.
\textsuperscript{136} Id. at 7–8.
\textsuperscript{137} Id. at 14 n.10.
\textsuperscript{138} Id. at 9.
\textsuperscript{139} Id. at 14 n.10.
\textsuperscript{140} Id. at 15.
\textsuperscript{141} ECKLUND, supra note 103, at 9.
Attorneys Office rediscovered FIRREA and began to use § 1833a.\textsuperscript{143} Section 1833a is a “hybrid statute predicking civil liability on the [DOJ] proving criminal violations . . . by a preponderance of the evidence standard.”\textsuperscript{144} Under § 1833a, the DOJ has advanced the Self-Affecting Theory in a wide array of contexts, such as FHA loan origination and servicing,\textsuperscript{145} loan sales to Fannie Mae and Freddie Mac,\textsuperscript{146} and foreign exchange practices.\textsuperscript{147}

The Self-Affecting Theory allows the DOJ to sue a financial institution when it has committed one or more of the five enumerated offenses that “affect[] a federally insured financial institution.”\textsuperscript{148} The five predicate offenses are: (1) false claims made to the officers or agencies of the United States;\textsuperscript{149} (2) false statements or entries made to the U.S. government;\textsuperscript{150} (3) attempts to conceal assets or property from the Federal Deposit Insurance Corporation;\textsuperscript{151} (4) use of interstate mail carriers in a scheme to defraud;\textsuperscript{152} and (5) use of electronic, radio, or television communications in a scheme to defraud.\textsuperscript{153} The DOJ has largely utilized the mail fraud and wire fraud offenses to trigger the Self-Affecting Theory.\textsuperscript{154}

Section 1883a, however, does not define what constitutes

\textsuperscript{143} Schilling, supra note 61, at 186.
\textsuperscript{147} United States v. Bank of New York Mellon, 941 F. Supp. 2d 438, 444, 463 (S.D.N.Y. 2013) (holding that “BNYM has been charged with participating in a fraudulent scheme and harming itself in the process. . . . [BNYM’s] motion to dismiss on this ground is denied in full.”).
\textsuperscript{150} § 1001(a)(1)–(3).
\textsuperscript{151} § 1032(1).
\textsuperscript{152} § 1341.
\textsuperscript{153} § 1343.
\textsuperscript{154} See Wells Fargo Compl., supra note 88, ¶¶ 167–73; Countrywide Compl., supra note 74, ¶¶ 182–86; BNYM Compl., supra note 88, ¶¶ 182–185.
“affecting a federally insured financial institution.” Yet courts have interpreted this language in § 1833a by applying the dictionary definition of “affect,” meaning “to act upon” as in “to produce an effect . . . upon,” “to produce a material influence upon or alteration in,” or possible “to have a detrimental influence on.” Some courts assert that a financial institution is “affected” by its own conduct whenever its participation harms itself irrespective of whether it participated in its own fraudulent scheme. Accordingly, in holding that the Self-Affecting Theory allows the financial institution to be both the victim and perpetrator, courts have relied on the canons of statutory interpretation and case law interpreting a similar provision, 18 U.S.C. § 3293(2), under FIRREA.

A. Courts and DOJ Constructions of § 1833a

In United States v. Bank of New York Mellon, the DOJ brought a FIRREA civil fraud action alleging that from 2000 to 2011 BNYM defrauded its custodial clients who used BNYM’s standing instruction foreign exchange service. Under the standing instruction service, BNYM would complete foreign exchange transactions on an as needed basis, and BNYM would determine the price of the currency the custodial client received. The DOJ alleged that BNYM, using interstate mail and wire carriers, selected the worst possible exchange rates for its clients and that BNYM profited from these trades because it

158. See id. at 451 (holding that defendants’ argument that affecting is synonymous with victimizing and that the harm needs to come from a third person is not persuasive).
160. See United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 630 (S.D.N.Y. 2013) (rejecting Wells Fargo’s defense to the Self-Affecting Theory on the grounds that the text support a reading of the Self-Affecting Theory and that § 3293(2) contains nearly the same language).
162. BNYM Compl., supra note 88, ¶ 1.
163. Id. ¶¶ 26–38.
received the difference between the actual rate and the rate it charged its clients. The DOJ proffered the Self-Affecting Theory by arguing that BNYM, as a federally insured financial institution, had affected itself because the fraudulent scheme had exposed it to significant risk of legal exposure. In response, BNYM argued that § 1833a imposes penalties “if any person derives pecuniary gain from the violation,” which, under a natural reading, would distinguish the person potentially subject to the penalties from the federally insured financial institution that was the target of the violation.

BNYM’s argument against the Self-Affecting Theory was not persuasive to Judge Lewis A. Kaplan. The initial provision of § 1833a provides that “[w]henever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section.” The term “whoever” applies to “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Courts have further determined that “whoever” should be “ ‘construed liberally.’ ” When read in conjunction with “affecting a federally insured financial institution,” the term “whoever” would permit any federally insured financial institution that has committed one of the five predicate offenses to be liable for harming itself.

Judge Kaplan also found the Self-Affecting Theory to constitute a valid reading within the statutory structure of § 1833a(c)(2).

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164. Id. ¶¶ 175–77.
165. Id.
167. § 1833a(c)(2); BNYM Mem., supra note 1, at 11.
169. 12 U.S.C. § 1833a(a); see also Memorandum of Law of the United States in Opposition to Defendants’ Motions to Dismiss at 14, supra note 2 (“If Congress had intended to exempt federally insured financial institutions from civil penalties under FIRREA when they engage in fraudulent conduct ‘affecting’ themselves, it could have easily done so. Instead, it used the broad language ‘[w]hoever.’ ”).
174. Id. at 463.
Neither § 1833a(c)(1) nor § 1833a(c)(3) contains the “affecting a federally insured financial institution” language found in § 1833a(c)(2), which necessitates that the violation or conspiracy violate a predicate offense “affecting a federally insured financial institution.” In resolving the discrepancy, the U.S. District Court for the Southern District of New York concluded that the limiting language was not added to require the offense be directed at the financial institution; rather, “affecting” is synonymous with “involving” and, therefore, “being in the financial industry.” Thus, according to the court, § 1833a(c)(2) should be read to encompass all conduct involving the entire financial industry, including how a financial institution’s conduct may affect itself.

B. Courts and DOJ Interpretation of § 3293(2)

In United States v. Wells Fargo Bank, N.A., the DOJ brought a FIRREA civil fraud action alleging that Wells Fargo’s residential mortgage lending business defrauded the Department of Housing and Urban Development (“HUD”) from May 2001 through October 2005, which resulted in the FHA paying $190 million on defaulted mortgages. When a borrower defaults on a residential mortgage

175. See 12 U.S.C. § 1833a(c)(1) (listing the following predicate offenses under Title 18 of the United States Code: 215, 656, 657, 1005, 1006, 1007, 1014 or 1344).
176. § 1833a(c)(3) (listing a violation of conspiracy to violate 15 U.S.C. § 645(a) as a predicate offense).
177. § 1833a(c) (“This section applies to a violation of, or a conspiracy to violate section 287, 1001, 1032, 1341 or 1343 of Title 18 affecting a federally insured financial institution . . . .” (emphasis added); see also 18 U.S.C. § 1341 (2012) (describing the use of “the Postal Service, or . . . private or commercial interstate carrier” for the purpose of executing, or attempting to execute, “[a] scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . .”); 18 U.S.C. § 1343 (describing the use of “wire . . . in interstate or foreign commerce” for the purpose of executing, or attempting to execute, “[a] scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . .”).
179. The Southern District of New York found this comparison between affecting and involving relevant because of the heading for Subtitle E of Title IX of FIRREA, which is the section containing § 1833a. Subtitle E was entitled, “Civil Penalties for Violations Involving Financial Institutions.” United States v. Bank of New York Mellon, 941 F. Supp. 2d 438, 454 (S.D.N.Y. 2013).
180. Id. at 454.
181. Id. at 453.
183. See Wells Fargo Compl., supra note 88, ¶ 136.
insured by the FHA, HUD pays the lender the balance of the loan and
HUD assumes ownership of the foreclosed property. Since the FHA
and HUD are federal agencies and not federally insured financial
institutions, the DOJ alleged that Wells Fargo’s fraudulent conduct, as a
federally insured financial institution, “has affected the bank by
exposing it to actual losses and increased risk of loss[,] which
included exposure to civil liabilities under the False Claims Act alleged
in the same complaint.

In denying Wells Fargo’s motion to dismiss, Judge Jesse
Furman relied on other courts interpreting § 3293(2), which is a
similar provision in FIRREA that contains nearly identical language as
§ 1833a. Section 3293(2) extends the statute of limitations for mail
fraud and wire fraud from five years to ten years “if the offense
affects a financial institution.” Courts previously interpreting §
3293(2) held that to trigger the “affecting” language, the DOJ only
needs to allege facts that would demonstrate an institution’s exposure to
an increased risk of loss due to its conduct. Applying that same
reasoning, the U.S. District Court for Southern District of New York
found that the DOJ had sufficiently alleged two increased risks of loss
that had resulted because of Wells Fargo’s allegedly fraudulent
scheme. First, Wells Fargo’s fraudulent underwriting practices
resulted in FHA-insured loans that would likely default, and
consequently, the FHA had to indemnify HUD against those defaulted
loans. Second, Wells Fargo’s fraudulent practices have exposed it to
“significant legal expenditures.”

Similarly, in Countrywide, the DOJ initiated a FIRREA civil

185. See Wells Fargo Compl., supra note 88, ¶ 170.
186. Id. at 47.
188. Wells Fargo Bank, N.A., 972 F. Supp. 2d at 630.
190. § 3292(2).
191. § 1343.
192. United States v. Serpico, 320 F.3d 691, 694–95 (2d Cir. 2003); United States v.
Mullins, 613 F.3d 1273, 1278–79 (10th Cir. 2010); United States v. Bank of New York
194. Id. at 630–31.
195. Id. at 631.
(Countrywide I).
fraud suit arising from an alleged scheme to defraud Fannie Mae and Freddie Mac.197 Under § 1833a, the DOJ sought to recover civil penalties for violations of mail fraud198 and wire fraud199 that “affect[ed] federally insured financial institutions.”200 The DOJ alleged that in 2007, Countrywide’s residential mortgage lending business instituted a loan origination model, known as HSSL,201 which increased the rate at which it originated and sold loans to Fannie Mae and Freddie Mac while eliminating underwriting and compliance supervision.202 The DOJ, using the Self-Affecting Theory, alleged that the affected federally insured financial institutions were Countrywide and Bank of America, because both entities have “directly or indirectly paid billions to settle repurchase demands.”203 After trial, the jury returned a verdict in favor of the DOJ on October 23, 2013,204 and Judge Jed Rakoff ordered Countrywide to pay $1.2 billion in FIRREA penalties.205

Judge Rakoff upheld the Self-Affecting Theory based on Countrywide having to settle repurchase claims to Fannie Mae and Freddie Mac resulting from the fraudulent HSSL scheme.206 Moreover, Judge Rakoff stated that since Countrywide committed mail and wire fraud, the court was able to rule that “such ‘self-inflicting’ effects were not only sufficient to satisfy the statutory requirement that a federally insured entity be affected, but also were here sufficient to warrant being found by the [c]ourt as a matter of law.”207 Further, Judge Rakoff reasoned that the threat of criminal liability alone is enough to affect the federally insured financial institution, which is enough to satisfy FIRREA.208 Citing Judge Furman’s interpretation of § 3293(2) in Wells

197. Countrywide Compl., supra note 74, at 2.
199. § 1343.
200. Countrywide Compl., supra note 74, at 10.
201. Id. at 3.
202. Id. at 3–5.
203. Id. at 39–40.
204. See CAMPBELL ET AL., supra note 8 (discussing progression of the Self-Affecting Theory through case law).
208. Id. at 249–50.
Fargo Bank,

Judge Rakoff agreed that the DOJ “need not allege actual harm, but only facts that would demonstrate that the bank suffered an increase risk of loss due to its own conduct.”

V. THE SELF-AFFECTING THEORY IS NOT CONSISTENT WITH CONGRESSIONAL INTENT

The Self-Affecting Theory is inconsistent with FIRREA’s legislative purpose because Congress intended to give the DOJ a tool for protecting financial institutions from individuals seeking personal gain at their institution’s expense. Prosecutions arising out of the S&L Crisis were conducted with that purpose in mind. However, in the aftermath of the 2008 financial crisis the DOJ has used § 1833a to assign liability to an unintended class of perpetrators, going beyond the congressional intent. The DOJ has erroneously applied the Self-Affecting Theory to recover damages and force settlements from the nation’s largest financial institutions for two reasons.

A. The DOJ’s Application of § 3293(2) to Its Interpretation of § 1833a

The DOJ has utilized holdings from cases interpreting § 3293(2)

210. Countrywide Fin. Corp. 996 F. Supp. 2d at 250 (Countrywide II).
211. William F. Johnson, Mortgage Lending Enforcement Invokes Old Tool With New Theories, 249 N.Y.L.J., Jan. 3, 2013, at 1, 2 (discussing FIRREA’s intended purpose and how it has been used for something entirely different).
212. See 1993 GAO REPORT, supra note 33, at 76 (listing examples and statistics of prosecutions arising out of the S&L Crisis).
214. See Abramowitz & Sack, supra note 71, at 1–2.
216. See Abramowitz & Sack, supra note 71, at 2.
without addressing § 3293(2)’s intended purpose.\textsuperscript{217} That section and its limiting language were not meant to harm financial institutions.\textsuperscript{218} Rather, the purpose of § 3293(2) served “to protect financial institutions, a goal it tries to accomplish in large part by deterring would-be criminals from including financial institutions in their schemes.”\textsuperscript{219} FIRREA sought to protect the depositors and federal taxpayers from the fraudulent behavior that caused the S&L Crisis.\textsuperscript{220} Therefore, the DOJ has bolstered the Self-Affecting Theory by taking a seemingly analogous provision out of its contextual boundaries and applying it contrary to congressional intent.\textsuperscript{221}

In addition, the DOJ does not address other case law that developed limitations on when a financial institution has been affected within § 3293(2).\textsuperscript{222} The Fourth Circuit has held that “mere utilization” of a financial institution in a fraudulent scheme is not by itself sufficient to trigger the “affecting” language.\textsuperscript{223} There needs to be evidence of some impact on the financial institution.\textsuperscript{224} The alleged fraud needs to


\textsuperscript{219} United States v. Serpico, 320 F.3d 691, 694 (7th Cir. 2003).

\textsuperscript{220} See United States v. Bank of New York Mellon, 941 F. Supp. 2d 438, 455 (S.D.N.Y. 2013) (“In fact, the legislative history shows who Congress truly believe were the victims of the S&L Crisis and whom Congress sought to protect through FIRREA: S & L depositors and federal taxpayers put at risk by the thrifts’ fraudulent behavior.”); see also Memorandum in Support of Motion to Dismiss at 6, United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (S.D.N.Y. 2013).

\textsuperscript{221} See Defendant Wells Fargo Bank, N.A.’s Reply in Support of Its Motion to Dismiss the First Amended Complaint at 18, United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593 (S.D.N.Y. 2013).

\textsuperscript{222} Memorandum in Support of Motion to Dismiss at 9–11, United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (S.D.N.Y. 2013) (CountrywideI).

\textsuperscript{223} United States v. Ubakamma, 215 F.3d 421, 426 (4th Cir. 2000) (“The district court correctly concluded during Ubakamma’s sentencing hearing that a wire fraud offense under section 1343 ‘affected’ a financial institution only if the institution itself were victimized by the fraud, as opposed to the scheme’s mere utilization of the financial institution in the transfer of funds.”).

\textsuperscript{224} United States v. Agnes, 214 F.3d 47, 52 (1st Cir. 2000) (citing United States v. Pelullo, 964 F.2d 193, 216 (3rd Cir. 1992)) (“The court in Pelullo recognized that . . . the effect on the bank would be too attenuated to invoke the statute in certain circumstances, for example, ‘if the fraud was directed against a customer of the depository institution which was then prejudiced in its dealings with the institution.’ ”).
evidence a “sufficiently direct” result on the financial institution to trigger the extended statute of limitations.\textsuperscript{225} Moreover, the alleged fraud must proximately cause the harm or risk of harm, which necessarily includes reasonable foreseeability.\textsuperscript{226} A well-recognized canon of statutory construction provides that punitive statutes must be narrowly construed.\textsuperscript{227} Therefore, allowing settlements and related legal costs would be too attenuated to demonstrate an effect.\textsuperscript{228} Thus, it would be too remote to hold a financial institution liable for harm it might suffer by enacting the allegedly fraudulent schemes.\textsuperscript{229}

Similarly, allowing the DOJ to proceed after only demonstrating a new or increased risk of loss in pursuing FIRREA penalties is contradictory to the congressional intent of § 1833a.\textsuperscript{230} Congress passed § 1833a in direct response to the insider abuse and fraud that catalyzed the S&L Crisis.\textsuperscript{231} Congress did not contemplate that FIRREA would be used to prosecute a financial institution for conduct affecting itself.\textsuperscript{232}

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{225} See United States v. Rubin/Chambers, Dunhill Ins. Servs., 831 F. Supp. 2d 779, 783 (S.D.N.Y. 2011) (citing United States v. Bouyea, 152 F.3d 192, 195 (2nd Cir. 1998)); see also Bank of New York Mellon, 941 F. Supp. 2d at 459 ("[T]he Court is mindful that effects must be ‘sufficiently direct’ and that ‘there may be some point where the influence a defendant’s wire fraud has on a financial institution becomes so attenuated, so remote, so indirect . . . that it does not in any meaningful sense affect the institution.’ " (internal citations omitted)); Memorandum in Support of Motion to Dismiss at 9, United States v. Countrywide, 961 F. Supp. 2d 598 (S.D.N.Y. 2013).
  \item \textsuperscript{226} See Bank of New York Mellon, 941 F. Supp. 2d at 460.
  \item \textsuperscript{228} See King, supra note 218, at 786.
  \item \textsuperscript{229} See Memorandum in Support of Motion to Dismiss at 9, United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (S.D.N.Y. 2013) (describing the DOJ’s alternative theory of liability, the “derivative affects” theory, which would consider financial institutions to be affected under the mail and wire fraud statutes solely by their investment in another entity that was the direct object of the alleged fraud); Final Form Superseding Consolidated Brief for Defendant-Appellant Peter Ghavami at 29, United States v. Heinz, No. 13-3119, 2014 WL 7232371 (Dec. 17, 2014) (arguing that the plain language, legislative history, and purpose of § 3293(2) demonstrate that “settlement agreements reached by a culpable bank are not the type of harm contemplated by the statute”).
  \item \textsuperscript{231} See 1989 GAO REPORT, supra note 23, at 10 (“Serious misconduct by senior insiders or outsiders (i) has caused, has contributed to, or was present in the insolvencies of most banks, savings and loan (S&Ls), and credit unions, and (ii) also caused large losses in unhealthy and healthy institutions during the period 1984 through the first half of 1987.” (citations omitted)).
\end{enumerate}
\end{footnotesize}
Likewise, case law interpreting similar “affecting” language has not held that a financial institution “can be penalized on the basis that its fraud against a third party affected a financial institution by virtue of its own investment in that third party.” In effect, the DOJ has taken § 1833a beyond its intended boundaries of prosecuting individuals by applying it to prosecuting financial institutions.

B. The DOJ’s Prosecutions Under § 1833a

The prosecutions stemming from the S&L Crisis bolster the view that FIRREA was enacted to deter individuals from damaging financial institutions and their depositors. Between 1988 and 1992, the DOJ charged and convicted over 2,500 individual defendants. A majority of the convictions rested on the individual violating or conspiring to violate the predicate offenses listed under § 1833a(c). While the prosecution statistics fail to show any cases involving a financial institution affecting itself, the statistics readily demonstrate DOJ actions against individuals. For example, special government task forces sentenced nearly 800 bank officials to prison terms with a conviction rate of nearly 96%. Therefore, prosecuting a financial institution under § 1833a appears contradictory to how the DOJ

(quoting Steve Bartlett, a former Republican congressman from Texas, who co-sponsored FIRREA, as saying that the Justice Department’s new use of FIRREA strays from the law’s intent and that “he never recalled discussing the possibility that the law could be used this way as it was drafted and ultimately passed through Congress”).


234. See 1993 GAO REPORT, supra note 33, at 104–05 (stating that the Special Counsel appointed by President George H. W. Bush sought to “emphasize the need to proceed with the coordinated two-pronged effort to put the crooks in jail and take their money back for the public”).

235. Id.

236. Id. at 76 (“Between October 1, 1988, and June 30, 1992, Justice charged 3,270 defendants through indictments and information[,] and convicted 2,603 defendants (110 defendants were acquitted, establishing a conviction rate near 96 percent.”).


238. See 1993 GAO REPORT, supra note 33, at 69–84 (discussing the prosecution statistics for financial institution fraud offenders).

239. See id. at 77–80 (listing examples of successful prosecutions against individuals and their accompanying criminal and civil penalties); see also Morgenson & Story, supra note 52.
originally employed FIRREA regarding the S&L Crisis.\textsuperscript{240}

In response to the 2008 financial crisis, the Fraud Task Force has pursued primarily civil enforcement and regulatory action as opposed to criminal convictions.\textsuperscript{241} In its “First Year Report” published in 2011, the Fraud Task Force vaguely listed its prosecution statistics under \textit{Operation Stolen Dreams}, but it did not specifically state the violations leading to the prosecutions.\textsuperscript{242} Three years later, it has become apparent that the DOJ has increasingly resorted to pursuing civil actions under FIRREA to sanction alleged corporate misconduct resulting from the 2008 financial crisis.\textsuperscript{243} The likely reasons for the shift from criminal to civil liability are twofold: first, the DOJ has geared its prosecution policy towards charging organizations;\textsuperscript{244} and second, the complexity of the financial instruments and transactions underlying the financial crisis make proving criminal culpability difficult.\textsuperscript{245}

The 2008 DOJ revisions—also referred to as the Filip Memorandum, to the United States Attorneys’ Manual, which is binding on all federal prosecutors—altered how federal prosecutors investigate and prosecute corporate crimes.\textsuperscript{246} Specifically, the Filip Memorandum added a provision allowing federal prosecutors to determine whether or not to pursue non-criminal alternatives.\textsuperscript{247} In evaluating the adequacy of the non-criminal alternatives (civil or regulatory enforcement actions), the federal prosecutor has broad discretion and may even

\begin{footnotes}
\footnotetext{240}{See Matthews, supra note 232 (stating that when FIRREA was used previously, it was employed against individuals whose frauds harmed the financial institution).}
\footnotetext{241}{See Abramowitz & Sack, supra note 71, at 2.}
\footnotetext{242}{See FIN. FRAUD ENFORCEMENT TASK FORCE, FIRST YEAR REPORT, at 4.8–4.9 (2011) (separating and listing the number of criminal and civil enforcement actions under Operation Stolen Dreams while not detailing what offenses the violators committed).}
\footnotetext{243}{See Abramowitz & Sack, supra note 71.}
\footnotetext{245}{Abramowitz & Sack, supra note 71.}
\footnotetext{246}{ALAN I. RAYLESBER, CHADBOURNE & PARK LLP, CLIENT ALERT: DOJ REVISES GUIDELINES TO LIMIT DEMANDS THAT CORPORATIONS WAIVE ATTORNEY-CLIENT PRIVILEGE OR NOT ADVANCE EMPLOYEE’S LEGAL FEES AS A CONDITION OF “COOPERATING” WITH A GOVERNMENT INVESTIGATION (Sept. 8, 2008), http://www.chadbourne.com/clientalerts/2008/dojrevises/.}
\end{footnotes}
consider “the likelihood that an effective sanction will be imposed.”248 Considering this discretion in light of either the lack of enough evidence to surpass the criminal burden of proof249 or the belief that criminal prosecutions may have a negative effect on the economy,250 the DOJ has authority to pursue financial institutions in civil actions.

In addition to the DOJ policy favoring civil action, the complex circumstances giving rise to the 2008 financial crisis and the institutional structure of the financial institutions make criminal prosecutions unappealing.251 Although evidence of insider abuse and fraud exists, the pervasiveness of such conduct cannot be singled out with enough certainty to meet the criminal standard.252 The organizational culture allows for responsibility to be dispersed among high-ranking employees, which portrays any misconduct as symptomatic of the entire organization.253 Prior to the recent crisis, most institutions incentivized its participants in fraudulent schemes by offering larger salary bonuses for increased loan volume.254 This

248. Id. § 9-28.1100(A)(2).
249. See Frontline Interview with Lanny Breuer, Lanny Breuer: Financial Fraud Has Not Gone Unpunished, FRONTLINE (Jan. 22, 2013, 9:42 PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/lanny-breuer-financial-fraud-has-not-gone-unpunished/ (“With respect to Wall Street cases, we looked at those as hard as we looked at any others, and when a case could be brought, we did. But when we cannot prove beyond a reasonable doubt that there was criminal intent, then we have a constitutional duty not to bring those cases.”).
250. See Dunstan Prial, Why Us and Not Them?, FOX BUSINESS (May 27, 2014), http://www.foxbusiness.com/economy-policy/2014/05/23/why-us-and-not-them/ (quoting former U.S. Attorney General Eric Holder as saying that he was concerned with “the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that . . . if we do bring a criminal charge . . . it will have a negative impact on the national economy”).
251. See Abramowitz & Sack, supra note 71.
created an adversarial system within the organization that condoned misconduct and deterred reporting such conduct. 255 A study released in 2013 noted that 26% of the survey respondents with ten years or less experience in the financial industry believed that they have to engage in misconduct to get ahead. 256 Even though evidence of misconduct exists in these institutions, 257 the pervasiveness of such conduct cannot be singled out with enough certainty to reach the criminal level. 258

Moreover, when dealing with large financial institutions, especially in the subprime mortgage lending arena, the ability to pinpoint individual culpability becomes even more opaque. 259 In the subprime mortgage market, depository institutions would initially use a mortgage broker, who acted as a middleman between the lender and borrower, to issue newly formed mortgages. 260 The depository institution would then sell the mortgage to investment banks that pooled together various mortgages, estimated future cash flows, and then converted the cash flows into bonds secured by the compiled mortgages. 261 The investment bank would then sell the bonds to buyers, who purchased shares and became the owners of the mortgage-backed securities. 262 The subprime mortgage market invoked participation of countless individuals, which makes demonstrating the requisite fraudulent intent for criminal liability difficult. 263 Thus, the DOJ, in

256. Id. at 3.
257. Morgenson, supra note 252.
258. Breslow, supra note 252.
261. Id. at 1090–91.
262. Id.
seeking to assign liability from the 2008 financial crisis, has opted to look at criminal conduct as a general, civil matter within a financial institution.\(^{264}\)

Although the DOJ may have authority to pursue civil actions against financial institutions, it does not necessarily make it desirable.\(^{265}\) In determining the applicability of § 1833a, the statute’s “wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve” must be considered.\(^{266}\) In § 1833a, Congress illustrated a clear intent to deter fraudulent conduct by individuals.\(^{267}\) By applying the Self-Affecting Theory, however, the DOJ has disregarded the legislative intent and instead proffered a literal interpretation of § 1833a that is contrary to congressional intent.\(^{268}\)

\(^{264}\). Raman Hearing, supra note 259.

\(^{265}\). See GEORGE COSTELLO & YULE KIM, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2008) (stating that the statute may derive meaning from the “definition of terms, by the statute’s statement of findings and purposes, by the directive’s relationship to other specific directives . . . and by the statute’s overall structure. Courts also look to the broader context of the body of law into which the enactment fits”).


\(^{267}\). See H.R. REP. NO. 101-54(I), at 300 (1989). The report described the losses arising from the S&L Crisis had a general pattern:

> While the majority of thrifts are run by honest and dedicated management, it is clear that fraud and insider abuse has been a major factor in a significant portion of thrift failures in the 1980’s. Many fraud cases involving FSLIC’s largest losses have borne an uncanny resemblance. The general pattern has been a state chartered institution that underwent a change of control during the early 1980’s. These institutions participated in rapid growth schemes and adopted risky investment strategies. Poor management techniques and unresponsiveness to regulatory appeals for change are also a hallmark of these institutions; so are high levels of compensation and extravagant expenditures. Regulators estimate that as many as 40% of thrift failures are due to some form of fraud or insider abuse.

VI. CONCLUSION

FIRREA intended to assign liability to individuals who were responsible for causing the S&L Crisis. The 2008 financial crisis, however, presented a new set of circumstances that involved complex transactions within large financial institutions. When trying to assign individual criminal culpability, it is not surprising that the DOJ struggled with overcoming the criminal burden of proving “whether or not the entity or person acted willfully, that is, with an intent to violate the law.” The DOJ experienced this difficulty first hand when the jury returned the not guilty verdicts for the two Bear Stearns senior managers. In attempting to assign culpability, the DOJ has improvised new ways to assign liability. The DOJ has used the Self-Affecting Theory to hold three of the nation’s largest financial institutions civilly liable for criminal misconduct.

The Self-Affecting Theory, however, is not within the scope and legislative intent of Congress. Congress passed FIRREA with the intention that it would be used to help banks, not hurt them. Thus, the DOJ has used FIRREA for a contrary purpose as it continues to assign liability to the very financial institutions it was ordered to protect.

Since the Self-Affecting Theory has yet to be overturned, the DOJ will likely continue to pursue FIRREA claims against large

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271. Raman Hearing, supra note 259.
272. Cohan, supra note 64.
275. Villalpando, supra note 58.
276. See Matthews, supra note 232 (describing that one co-sponsor of the 1989 law said the Justice Department’s new use of FIRREA strays from the law’s intent).
national institutions and even smaller, more regional banks.\textsuperscript{278} Thus, FIRREA is at least relevant to all financial institutions.\textsuperscript{279} Financial institutions may evaluate their exposure to potential FIRREA claims in a number of ways.\textsuperscript{280} They may perform audits of Suspicious Activity Reports filed within the previous ten years to assess potential FIRREA claims and determine whether any self-reporting measures can be taken to limit exposure.\textsuperscript{281} Additionally, financial institutions should attempt to deal with whistleblower complaints internally, especially since most whistleblowers report their concerns internally before reporting to the government.\textsuperscript{282} Under FIRREA, a whistleblower is entitled to “20 percent to 30 percent of any recovery up to the first $1,000,000 recovered, 10 percent to 20 percent of the next $4,000,000 recovered, and 5 percent to 10 percent of the next $5,000,000 recovered,”\textsuperscript{283} for a maximum total reward of $1.6 million.\textsuperscript{284} Regardless of whether or not the $1.6 million is likely to incentivize a high-ranking employee to risk his or her lucrative career,\textsuperscript{285} whistleblowers play key roles in developing strong cases against financial institutions, such as the role Edward O’Donnell played in \textit{Countrywide}.\textsuperscript{286}

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\textsuperscript{278} Finkle & Adler, \textit{supra} note 4.
\textsuperscript{279} Holder, \textit{supra} note 249.
\textsuperscript{280} Williams, \textit{supra} note 99.
\textsuperscript{281} Id.
\textsuperscript{285} Holder, \textit{supra} note 249.
\textsuperscript{286} See \textsc{Nate Raymond, Bank of America Fraud Trial Spotlights Whistleblower Awards}, \textsc{Reuters} (Sept. 27, 2013), http://www.reuters.com/article/2013/09/27/us-bankofamerica-hustle-whistleblower-idUSBRE98Q18420130927 (describing how the Countrywide whistleblower may receive up to $1.6 million).