LIBOR, Public Inquiries & FSA Disciplinary Powers

Standard Note: SN/BT/6376

Last updated: 3 July 2012

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Section Business & Transport Section

This note summarises some of the key points relating to the LIBOR scandal. It looks at issues surrounding public enquiries and at the role and limitations of the FSA's disciplinary powers.

Contents

1 LIBOR

LIBOR is short for the London Interbank Offered Rate. It is the benchmark (guide) interest rate at which banks will theoretically lend to each other on the overnight market.

Banks are huge, complex organisations which have literally millions of debits and credits appearing on their accounts daily, as well as their own ongoing financing needs that change daily as borrowings require repayment or loans are repaid. At the end of each day, these debits and credits are netted off leaving a net financing position which can be either a surplus or a deficit. The interbank market is where they can either deposit excess funds or borrow to cover shortfalls. Depending on a range of factors such as how much they borrow or the perceived credit standing of the bank, the cost of borrowing, the interest rate, for one bank will not necessarily be the same as the cost for another. It is this range of rates which ultimately contributes to the average LIBOR benchmark rate. A British Bankers Association (BBA) briefing explains the mechanics of the rate setting process:

> Thomson Reuters is the designated calculation agent for LIBOR. Data submitted by panel banks into the libor process is received and processed by Thomson Reuters and the data is calculated using guidelines provided by the FX&MM Committee.
>
> Each cash desk in a LIBOR contributor bank has a Thomson Reuters application installed allowing that institution to confidentially submit rates. Each morning between 1100 and 1110 a named individual responsible for cash management at each panel bank formulates their own rates for the day and inputs them into this application, which links directly to a rate setting team at Thomson Reuters. A bank cannot see other contributor rates during the submission window - this is only possible after final publication of the LIBOR data. Thomson Reuters run a collection of automated and manual tests on the submitted rates before they are sent to the calculation engine, and after calculation, the data is released to the market via Thomson Reuters and other licensed data vendors.[1]

It continues:

> Every contributor bank is asked to base their libor submissions on the following question:
>
> ***"At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?"***
>
> Therefore, submissions are based upon the lowest perceived rate at which a bank could go into the London interbank money market and obtain funding in reasonable market size, for a given maturity and currency.
>
> Libor is not necessarily based on actual transactions, as not all banks will require funds in marketable size each day in each of the currencies/ maturities they quote and so it would not be feasible to create a suite of LIBOR rates if this was a requirement. However, a bank will know what its credit and liquidity risk profile is from rates at which it has dealt and can construct a curve to predict accurately the correct rate for currencies or maturities in which it has not been active.
>
> "*Reasonable market size*" is intentionally left broadly defined: it would have to be constantly monitored and in the current conditions would have to be changed very frequently. It would also vary between currencies and maturities, leading to a considerable amount of confusion.

> The current definition was adopted as the standard after a review in 1998. Up until this point, submissions from panel members were based upon the following: *"At what rate do you think interbank term deposits will be offered by one prime bank to another prime bank for a reasonable market size today at 11am?"* The new definition enables accountability for the rates.
>
> All libor rates are quoted as an annualised interest rate. This is a market convention. For example, if an overnight Sterling rate from a contributor bank is given as 2.00000%, this does not indicate that a contributing bank would expect to pay 2% interest on the value of an overnight loan. Instead, it means that it would expect to pay 2% divided by 365.

In the light of the findings regarding LIBOR by a Barclays, it is important to note that there are many contributors to the process. According to the BBA, "the euro panel has 15 banks; the sterling panel has 16; the US dollar panel has 18".[2] This large number of contributors limits the ability of one bank to actually affect the stated rate. A single bank's influence is further diluted by the mathematical conversion of the individual bids to a 'trimmed average'. This is explained below:

> Every libor rate produced by Thomson Reuters is calculated using a trimmed arithmetic mean. Once Thomson Reuters receive each contribution submission they rank them in descending order and then exclude the highest and lowest 25% of submissions - this is the trimming process. The remaining contributions are then arithmetically averaged to create a libor quote. This is repeated for every currency and maturity, producing 150 rates every business day.[3]

Obviously, if a bank artificially raised or lowered its submission by a significant amount in order to influence the final rate, this submission would have a greater chance of being excluded anyway (it would either be in the highest or lowest 25% of submissions). Hence, purely from the point of view of tactics, a bank has a greater chance of influencing the rate if it made a smaller misrepresentation than if it made a large one, but the impact of a small representation would be correspondingly smaller too.

Another technical feature of the rate setting process which contributed to the manipulation of rates is the fact that after the rate is set, individual submissions to the panel are published in full. This means that other participants can see what the other banks posted. Part of the finding of the American Commodity Futures Trading Commission (CFTC) regulator was that:

> The CFTC Order also finds that Barclays, acting at the direction of senior management, engaged in other serious unlawful conduct concerning LIBOR. In late 2007, Barclays was the subject of negative press reports raising questions such as, "So what the hell is happening at Barclays and its Barclays Capital securities unit that is prompting its peers to charge it premium interest in the money market?" Such negative media speculation caused significant concern within Barclays and was discussed among high levels of management within Barclays Bank. As a result, certain senior managers within Barclays instructed the U.S. Dollar LIBOR submitters and their supervisor to lower Barclays' LIBOR submissions to be closer to the rates submitted by other banks and not so high as to attract media attention.
>
> According to the Order, senior managers even coined the phrase "head above the parapet" to describe high LIBOR submissions relative to other banks. Barclays' LIBOR

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1 BBA website
2 BBA briefing
3 BBA website

> submitters were told not to submit at levels where Barclays was "sticking its head above the parapet." The directive was intended to fend off negative public perceptions about Barclays' financial condition arising from its high LIBOR submissions relative to the submissions of other panel banks, which Barclays believed were too low given the market conditions.[4]

Normally, greater transparency in activities is associated with less secret manipulation. In this case, it appears as though it was a prime motive.

LIBOR matters. Interest rates on a number of financial products from complex derivatives to mortgage rates and credit card rates are one way or another, linked to LIBOR. The BBA notes that:

> Libor is the primary benchmark for short term interest rates globally. It is used as the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges (including CME Group and NYSE Euronext LIFFE) as well as most Over the Counter (OTC) and lending transactions such as mortgages.[5]

LIBOR is big. One academic wrote that "$350 - $400 trillion dollars of contracts, instruments and transactions are referenced to it".[6] In its *Order* against Barclays, the CFTC say "interest rate derivatives, such as swaps and Forward Rate Agreements, comprised over $449 trillion in notional value at the end of 2009, and over $500 trillion in notional value at the end of2011."[7]

It should be noted that with many banks contributing to the LIBOR process, several others are also being investigated for potential misconduct.

2 The Regulators' findings

The investigation has been carried out jointly by the Financial Services Authority (FSA) in the UK and the American Commodity Futures Trading Commission (CFTC). The following section provides a detailed guide to their findings, section 2.2 provides a far shorter summary.

2.1 Formal findings

On 27th June 2012, both regulators published the findings of a long joint investigation into LIBOR rate setting. The FSA *Final Notice* to Barclays of its findings is the most detailed UK 'charge sheet' publicly available. Key extracts are shown below:

> **Inappropriate submissions following requests by derivatives traders**
>
> 8. Barclays acted inappropriately and breached Principle 5 on numerous occasions between January 2005 and July 2008 by making US dollar LIBOR and EURIBOR submissions which took into account requests made by its interest rate derivatives traders ("Derivatives Traders"). At times these included requests made on behalf of derivatives traders at other banks. The Derivatives Traders were motivated by profit and sought to benefit Barclays' trading positions.
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> 9. The definitions of LIBOR and EURIBOR require submissions from contributing banks based on borrowing or lending in the interbank market. The definitions do not

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4 CFTC press release 27 June 2012
5 BBA website: LIBOR FAQs
6 *Why & How Should the Libor be Reformed?*, Rosa M Abrantes Metz, June 26, 2012, p1
7 CTFC, Order instituting proceedings, June 27 2012, p1

allow for consideration of derivatives traders' positions. It was inappropriate for Barclays to make US dollar LIBOR and EURIBOR submissions which took its Derivatives Traders' positions (or the positions of traders at other banks) into account. Barclays did not therefore observe proper standards of market conduct when making US dollar LIBOR and EURIBOR submissions.

10. Barclays also breached Principle 5 on numerous occasions between February 2006 and October 2007 by seeking to influence the EURIBOR (and to a much lesser extent the US dollar LIBOR) submissions of other banks contributing to the rate setting process.

11. Where Barclays made submissions which took into account the requests of its own Derivatives Traders, or sought to influence the submissions of other banks, there was a risk that the published LIBOR and EURIBOR rates would be manipulated. Barclays could have benefitted from this misconduct to the detriment of other market participants. Where Barclays acted in concert with other banks, the risk of manipulation increased materially.

Inappropriate submissions to avoid negative media comment

12. Barclays acted inappropriately and breached Principle 5 on numerous occasions between September 2007 and May 2009 by making LIBOR submissions which took into account concerns over the negative media perception of Barclays' LIBOR submissions.

13. Liquidity issues were a particular focus for Barclays and other banks during the financial crisis and banks' LIBOR submissions were seen by some commentators as a measure of their ability to raise funds. Barclays was identified in the media as having higher LIBOR submissions than other contributing banks at the outset of the financial crisis. Barclays believed that other banks were making LIBOR submissions that were too low and did not reflect market conditions. The media questioned whether Barclays' submissions indicated that it had a liquidity problem. Senior management at high levels within Barclays expressed concerns over this negative publicity.

14. Senior management's concerns in turn resulted in instructions being given by less senior managers at Barclays to reduce LIBOR submissions in order to avoid negative media comment. The origin of these instructions is unclear. Barclays' LIBOR submissions continued to be high relative to other contributing banks' submissions during the financial crisis.[8]

Detailed descriptions of the activities of the Barclay's traders can be found later in the Note:

54. The misconduct involving internal requests to the Submitters at Barclays was widespread, cutting across several currencies and occurring over a number of years. The Derivatives Traders discussed the requests openly at their desks. At least one Derivatives Trader at Barclays would shout across the euro Swaps Desk to confirm that other traders had no conflicting preference prior to making a request to the Submitters.

55. Requests to Barclays' Submitters were made verbally and a large amount of email and instant message evidence consisting of Derivatives Traders' requests also exists. At times, requests made by email alone were sent by the Derivatives Traders nearly every day. For example, requests were made by Barclays' US dollar Derivatives Traders on 16 out of the 20 days on which Barclays made US dollar LIBOR

[8] FSA Final Notice 27 June 2012

submissions in February 2006 and on 14 out of the 23 days on which it made US dollar LIBOR submissions in March 2006.

56. The FSA has identified that:

- between January 2005 and May 2009, at least 173 requests[15] for US dollar LIBOR submissions were made to Barclays' Submitters (including 11 requests based on communications from traders at other banks);

- between September 2005 and May 2009, at least 58 requests for EURIBOR submissions were made to Barclays' Submitters (including 20 requests based on communications from traders at other banks); and

- between August 2006 and June 2009, at least 26 requests for yen LIBOR submissions were made to Barclays' Submitters.

57. At least 14 Derivatives Traders at Barclays made these requests. This included senior Derivatives Traders. In addition, trading desk managers received or participated in inappropriate communications on, at least, the following occasions:

- on 22 March 2006, Trader A (a US dollar Derivatives Trader) stated in an email to Manager A that Barclays' Submitter "*submits our settings each day, we influence our settings based on the fixings we all have".* Manager A took no action as a result of this email;

- on 5 February 2008, Trader B (a US dollar Derivatives Trader) stated in a telephone conversation with Manager B that Barclays' Submitter was submitting "*the highest LIBOR of anybody […] He's like, I think this is where it should be. I'm like, dude, you're killing us*". Manager B instructed Trader B to: "*just tell him* to *keep it, to put it low*". Trader B said that he had "*begged*" the Submitter to put in a low LIBOR submission and the Submitter had said he would "*see what I can do*"; and

- in July 2008, euro Derivatives Traders sent emails to Manager C indicating that they had spoken to Barclays' Submitter about the desk's reset positions and he had agreed to assist them. This followed instructions from Manager C for the traders to speak to the Submitter.[9]

The FSA fined Barclays £59.5 million in accordance with section 206 of the *Financial Services and Markets Act 2000*. This is the largest fine ever imposed by the FSA.

The CTFC Order instituting proceedings was published on the same day. Extracts are shown below:

Barclays' violative conduct involved multiple desks, traders, offices and currencies, including United States Dollar ("U.S. Dollar"), Sterling, Euro and Yen. The wrongful conduct spanned from at least 2005 through at least 2009, and at times occurred on an almost daily basis.

Barclays' conduct included the following:

(1) During the period from at least mid-2005 through the fall of2007, and sporadically thereafter into 2009, Barclays based its LIBOR submissions for U.S. Dollar (and at limited times other currencies) on the requests of Barclays' swaps traders, including

[9] Ibid

former Barclays swaps traders, who were attempting to affect the official published LIBOR, in order to benefit Barclays' derivatives trading positions; those positions included swaps and futures trading positions; this same conduct occurred with respect to Barclays' Euribor submissions for the period of at least mid-200S through mid-2009

(2) During the period from at least mid-2005 through at least mid-2008, certain Barclays Euro swaps traders, led by a former Barclays senior Euro swaps trader, coordinated with, and aided and abetted traders at certain other banks to influence the Euribor submissions of multiple banks, including Barclays, in order to affect the official published Euribor, and thereby benefit their respective derivatives trading positions; and

(3) During the volatile, global market conditions of the financial crisis of late August 2007 through early 2009 (the "financial crisis period"), Barclays lowered its LIBOR submissions in order to manage what it believed were inaccurate and negative public and media perceptions that Barclays had a liquidity problem based in part on its high LIBOR submissions relative to the low submissions of other panel banks that Barclays believed were too low given market conditions. Pursuant to a directive by certain members of Barclays' senior management, Barclays submitted lower rates for U.S. Dollar LIB OR, and at limited times Yen and Sterling LIB OR, than what it had determined to be the appropriate rates reflecting the costs of borrowing unsecured funds in the relevant markets.

Barclays' lack of specific internal controls and procedures concerning its submission processes for LIBOR and Euribor and overall inadequate supervision of trading desks allowed this conduct to occur.

Specifically, during the period from at least mid-2005 through the fall of2007, and sporadically thereafter into 2009, interest rate swaps traders, primarily located in Barclays' New York and London offices, regularly requested that the Barclays' employee(s) responsible for determining and submitting Barclays' daily LIBORs and Euribors ("submitters") submit a particular rate or adjust their submitted rates higher or lower in order to affect the daily, official published LIBOR and Euribor. Barclays' swaps traders were improperly attempting to benefit Barclays' derivatives trading positions and the profitability of their particular trading books and desks. Barclays' swaps traders also facilitated former Barclays swaps traders' requests to alter LIBOR or Euribor submissions by passing along the former traders' requests to the Barclays LIBOR or Euribor submitters as if they were their own. The Barclays submitters routinely based their LIBOR and Euribor submissions on the traders' requests in furtherance of the attempts to manipulate LIBOR and Euribor. The majority of Barclays' violative conduct involved U.S. Dollar LIBOR and Euribor, but also, at limited times, involved Yen and Sterling LIBOR submissions.

In addition, during the period from at least mid-2005 through mid-2008, certain Barclays Euro swaps traders, led by a former Barclays senior Euro swaps trader, coordinated with and aided and abetted traders at certain other banks in attempts to manipulate Euribor. The Barclays swaps traders coordinated with traders at other banks on the rates to be submitted by their respective Euribor submitters in order to benefit their bank's derivatives trading positions. These Barclays Euro swaps traders agreed to ask, and did ask, the Barclays submitters for rates that benefited the trading positions of the traders at the other banks. The Barclays swaps traders made these requests as if they were their own requests and were to benefit Barclays' trading positions. The submitters routinely accommodated those requests. The Barclays Euro swaps traders also made similar requests to the traders at the other banks in order to benefit Barclays' derivatives trading positions.

> A bank's derivatives trading positions or profitability are not legitimate or permissible factors on which to base a bank's daily LIBOR and Euribor submissions. By basing its LIBOR and Euribor submissions on Barclays' derivatives traders' requests, and thereby on Barclays' derivatives trading positions, Barclays' LIBOR submissions were not consistent with the BBA's definitions and criteria for LIBOR submissions. Instead, Barclays conveyed false, misleading or knowingly inaccurate reports that its submitted rates for LIBOR and Euribor were based on and solely reflected the costs of bon-owing unsecured funds in the relevant interbank markets.
>
> Accordingly, Barclays regularly attempted to manipulate and knowingly delivered, or caused to be delivered, false, misleading or knowingly inaccurate reports concerning U.S. Dollar LIBOR and Euribor, and at times, Yen and Sterling LIBOR, which are all commodities in interstate commerce.
>
> During the financial crisis period, Barclays believed that the market and media inaccurately perceived Barclays as having liquidity problems in part because the rates submitted for LIBOR by Barclays were significantly higher at times than the rates submitted by other banks. Barclays contended the other banks' submissions were inappropriately low given the realities of the market conditions and lack of transactions occurring in the interbank markets. To manage public perceptions that its higher LIBOR submissions meant Barclays was a weaker institution, Barclays' senior management directed the Barclays submitters to lower Barclays' submissions in order to be closer to the rates submitted by the other banks, and thus, be a less noticeable outlier from the rest of the banks. The Barclays submitters complied with the management directive by submitting artificially lower rates than they would have otherwise submitted and that were inconsistent with the definition and criteria for submitting LIBOR. As a result, Barclays did not submit rates reflecting or relating to borrowing of unsecured funds in the relevant interbank markets.
>
> The management directive impacted at least Barclays' U.S. Dollar LIBOR submissions in multiple maturities ("tenors") on a regular basis throughout the financial crisis period. The directive, on occasion, also impacted Barclays' Sterling and Yen LIB OR submissions. Concerns for one's reputation or negative market or press reports are not legitimate or permissible factors upon which a bank may base its daily LIBOR submissions. Accordingly, during the financial crisis period, Barclays, through its submissions, knowingly delivered, or caused to be delivered, false, misleading or knowingly inaccurate reports that affected or tended to affect LIBOR, a commodity in interstate commerce.[10]

A footnote to the last paragraph above states:

> While Barclays typically was one of the highest submitters of the LIBOR panel banks during the financial crisis period, Barclays' submissions, at times, were part of the calculation of the official published LIBOR. However, the Commission has not found evidence that Barclays lowered its LIBOR submissions in response to the management directive during the financial crisis period with the intent to affect the official published LIBOR.[11]

The CFTC fined Barclays $200 million.

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[10] CFTC, Order instituting proceedings, June 27 2012, p 2-4

[11] Ibid

2.2 Summary

Both regulators concluded that Barclays had submitted false interest rates (contributor rates) over a period of time in a number of LIBOR related markets.

The first point to note is that the regulators did not find that the problems were due to the 'rogue trader'. These events happened over a long period of time, in various markets and involved multiple members of staff, in different parts of the organisation, some at management level.

The second point to note is that there are two distinct motives for the manipulation at different, but overlapping, periods of time:

- 2005 – 2007/8 manipulations were made largely for the financial benefit of Barclay's trading book.
- 2007 - early 2009 manipulations were made largely to manage Barclay's 'negative public and media perceptions'.

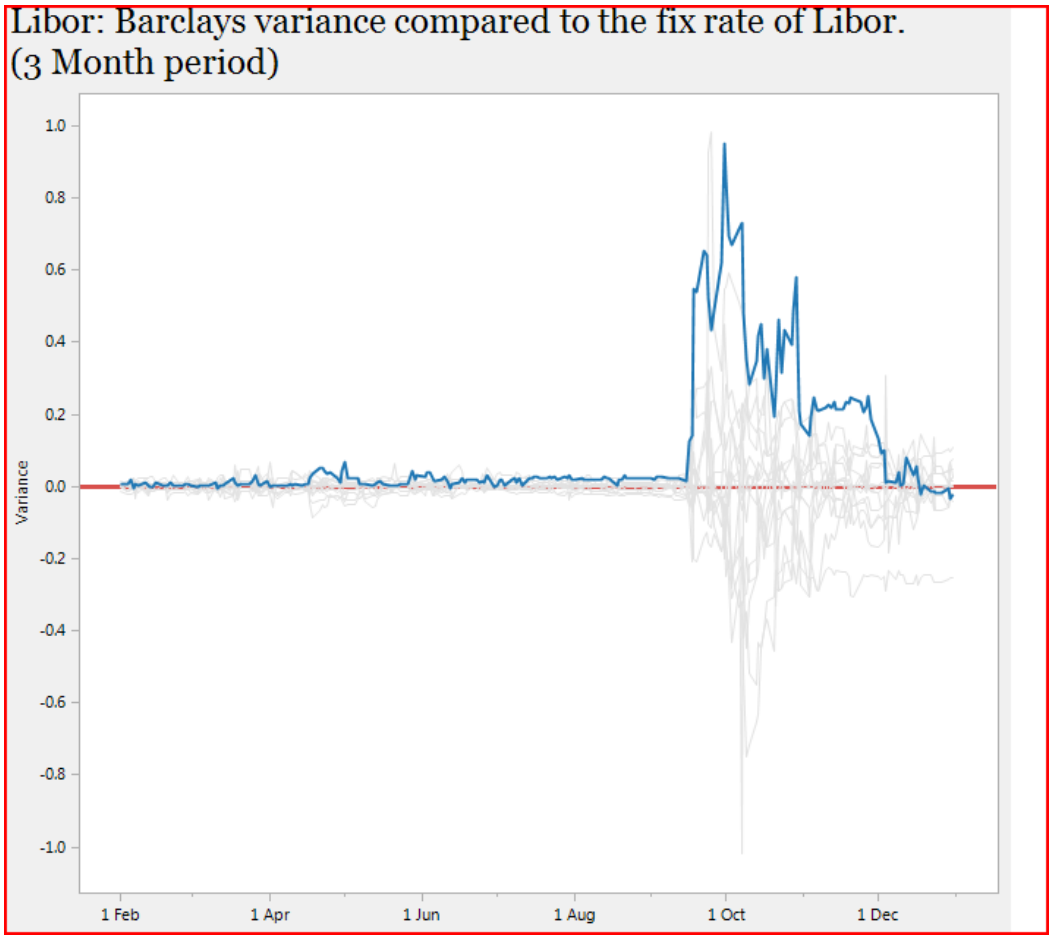
The third point is that in the first phase of manipulation, requests for financial assistance from traders were both high and low.[12] This makes it virtually impossible to calculate the 'cost' of such manipulation such as it affects mortgages, credit cards etc. At some point (assuming that the manipulation worked) rates would have been lower than they ought, to the benefit of borrowers. At other times, they would have been higher – to borrowers' detriment. In the second, 'reputational' phase of manipulation, the bias was downwards, so if the false submissions did have an effect it would have been to reduce interest rates.

[12] See para 58 Ibid

3 Barclay's record & response

An excellent visual guide to Barclay's rate submissions can be found on the Guardian website. The graphic is fairly self explanatory, allowing the user to compare Barclays with other rate setters or with the average LIBOR fix rate. The graphic below is taken from this site.

The graph compares Barclay's submitted rate with the average LIBOR fix rate over the calendar year 2008. In normal circumstances, one would expect a bank like Barclays to be both above and below the average at different times and not far from that average at all times. 2008, however, was not a normal time. Its submitted rate is nearly always above the average and during the peak of the crisis considerably so.



The inference of having a higher rate than other banks is that the bank is finding it difficult to borrow in the market. At the time of the crisis, this equated to doubts over a bank's viability. Whilst the UK Government had 'bailed out' both Lloyds and the Royal Bank of Scotland, Barclays was determined to maintain its independence and did not have direct government funding. Instead, it was seeking to raise funds from the Middle East. It was, in a sense therefore, more sensitive to market judgement than some other banks were.

The financial impact of the regulatory fines on Barclays is likely to be dwarfed by other developments. Both the Chairman, Marcus Agius, and the Chief Executive of the bank, Bob Diamond have resigned, together with a senior official, Jerry del Missier, implicated in giving instructions to lower submitted rates in the second phase. The bank has also announced its

own review into what happened with promises of improved performance and behaviour in the future. In a letter to all Barclay's staff written before his resignation, Mr Diamond wrote:

> The Board has agreed to launch an audit of our business practices.
>
> This audit will be led by an independent third party reporting to Sir Michael Rake and a panel of Non-Executive Directors.
>
> It will have three objectives:
>
> • To undertake a root and branch review of all of the past practices that have been revealed as flawed since the credit crisis started and identify implications for our business practices and culture going forward;
>
> • To publish a public report of its findings;
>
> • To produce a new, mandatory code of conduct that will be applied across Barclays.
>
> We will use the output of that review to adjust our HR processes so that the standards that emerge play a material role in hiring and induction; assessment and development; and reward. That will start with Executive Management.
>
> We will establish a zero tolerance policy for any actions that harm the reputation of the bank.
>
> We will also put in place an enforced governance process to ensure that we comply with these standards over time.
>
> I am committed to ensuring that the recommendations from this review are implemented in full.

4 Public inquiries

The House is also due to debate the precise format that its own enquiry into bank practices (which these LIBOR revelations have done much to inspire).

There are a number of different forms that public inquiries can take. Full details are set out in Standard Note 2599 *Investigatory Inquiries and the Inquiries Act 2005.* Inquiries can be statutory or non-statutory. Until 2005, the main statutory provision for setting up inquiries was the *Tribunals of Inquiry (Evidence) Act 1921*. This Act enabled independent tribunals to be established following parliamentary resolutions, although ministers had a major role in the decision to use the Act for a particular inquiry, such as the Saville (Bloody Sunday) inquiry. These tribunals were designed to replace an earlier system of investigation by parliamentary committees into matters of urgent public concern after that system was discredited by the unsatisfactory outcome of an inquiry by a Commons committee into the Marconi Affair in 1913.[13]

The 1921 legislation was replaced by the *Inquiries Act 2005.* The Act provides a statutory framework which may be used by ministers wishing to establish an inquiry with full powers to call for witnesses and evidence. Under the Act, an inquiry chairman has powers to determine the procedures to be adopted, and to require the production of evidence, the attendance of

[13] For background see Public Administration Select Committee HC 51 004-5 *Government by Inquiry*

witnesses and the taking of evidence on oath.[14] The Leveson inquiry into the culture, practice and ethics of the press is the most recent inquiry to be led under the *Inquiries Act*.

Select committees have power to hold inquiries on matters of public concern. The terms of reference are for the committee to determine. Their powers to summons persons, papers and records are set out in Chapter 7 of Erskine May. Standard Note *Select Committees: Evidence and witnesses* discusses current issues about these powers. Committees may take evidence on oath, but this power is rarely used. Mr Cameron said on 2 July that the Government would propose a motion to establish a joint committee of both Houses into professional standards in the banking industry. He said:

> On the second, I want us to establish a full parliamentary committee of inquiry involving both Houses, chaired by the Chairman of the House of Commons Treasury Select Committee. This committee will be able to take evidence under oath; it will have full access to papers, officials and Ministers, including Ministers and special advisers from the last Government; and it will be given by the Government all the resources it needs to do its job properly.[15]

In a statement on LIBOR immediately following, George Osborne proposed the same arrangement.[16]

5 FSA disciplinary powers & criminal sanctions

The FSA has very wide powers given to it by sections 205 – 2011 of the *Financial Services & Markets Act 2000* (FSMA) to impose disciplinary measures on regulated individuals and firms who break its rules. These include fines and withdrawal of authorisation from working within the regulated sector and in some cases criminal prosecutions. Within the last year a selection of the larger sanctions imposed include:

30 May 12 Alberto Micalizzi – Hedge Fund CEO fined £3M – for not being fit and proper and banned from performing any role in regulated FS

11 May 12 Martin Currie Investment and Marin Currie Inc (together, Martin Currie) - fined £3.5M for failing to manage a conflict of interest between two of its clients

27 May 12 Coutts and Company - fined £8.75M for failing to take reasonable care to establish and maintain effective ant-money laundering systems and controls relating to high risk customers including Politically Exposed Persons

26 Jan 12 David Einhorn - fined £7.2M for engaging in market abuse in relation to an anticipated significant equity fundraising by Punch Taverns in June 2009

6 Dec 11 HSBC – fined £10.5M for Mis-selling products to elderly customers

9 Nov 11 Coutts & Company – fined £6.04M for failing in connection with the sale of the AIG Enhanced Variable Rate Fund

26 Oct 11 Credit Suisse (UK) – fined £5.95M Systems and controls failing in relation to sales by its private bank of structured capital at risk

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[14] Details are contained in the *Inquiries Rules 2006* SI 2006/1838
[15] HC Deb 2 July 2012 c587
[16] HC Deb 2 July 2012 c613

14 Jun 11 Mr David Roger Griffiths Mason, - fined £700,000 criminal conviction sentenced for 2 years (Boiler Room Fraud)

26 May 11 RBS – fined £3.5M for fined for complaint handling failures and secures £17M compensation for customers

Although LIBOR is not, in itself an authorised activity, the fact that its participants were, means that the FSA had a locus to act as it did. The specific ground for action in this case was that Barclays breached principle 5 of the FSA Handbook.[17] This states that "A firm must observe proper standards of market conduct." Generally speaking, the FSA does not have the power to impose criminal sanctions. The exception to this is with respect to market abuse cases (normally referred to as insider dealing). Section 129 of FSMA states:

> Power of court to impose penalty in cases of market abuse.
>
> (1)The Authority may on an application to the court under section 381 or 383 request the court to consider whether the circumstances are such that a penalty should be imposed on the person to whom the application relates.
>
> (2)The court may, if it considers it appropriate, make an order requiring the person concerned to pay to the Authority a penalty of such amount as it considers appropriate.

Market abuse relates to actions "in relation to qualifying investments traded on a market".[18] It is not clear whether the events relating to LIBOR could be construed within this definition. There have been calls for criminal sanctions to be applied; however, the legal position is currently extremely unclear as to what offence such action could be taken under.[19]

The most obvious offence that might be relevant is fraud contrary to section 1 of the *Fraud Act 2006*. George Osborne indicated in his statement that Serious Fraud Office is in discussion with the FSA and is looking at the evidence as it develops.[20]

Fraud can be committed in a number of ways, including by false representation and by abuse of position. Fraud by false representation is dealt with in section 2 of the Act, which provides that a person commits the offence of fraud if he:

- dishonestly makes a false representation; and
- Intends, by making the representation, to either make a gain for himself or another or to cause loss to another or expose another to a risk of loss.

False representations can be made directly to another person or, under section 2(5), by submitting the representation (or anything implying it) in any form to "any system or device designed to receive, convey or respond to communications (with or without human intervention)". This would capture representations made by inputting false information into a computer.

Although the person making the representation must have intended it to result in gain for himself or another or loss (or exposure to a risk of loss) by another, there is no requirement for any gain or loss to have actually occurred.

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[17] FSA Handbook Prin 2.1.1
[18] Section 118 FSMA
[19] The following section was written by Sally Lipscome (x4322)
[20] HC Deb 2 July 2012 c616

Fraud by abuse of position is dealt with in section 4 of the 2006 Act. A person commits this offence if he:

- occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person;
- dishonestly abuses that position; and
- intends, by means of the abuse of that position, to either make a gain for himself or another or to cause loss to another or expose another to a risk of loss.

Fraud carries a maximum penalty of six months' imprisonment and/or a fine (if tried in the magistrates' court) or ten years' imprisonment and/or a fine (if tried in the Crown court).

In the Barclays case, the substantive offence of fraud would appear to be most relevant to the LIBOR submitters, rather than to the traders who sought to influence the submitters. However, individuals other than the submitters could potentially be caught by the offences of conspiracy (contrary to section 1 of the *Criminal Law Act 1977*), or encouraging or assisting crime (contrary to section 44 of the *Serious Crime Act 2007*), or the common law offence of conspiracy to defraud.