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David Flower
Grant Thornton LLP

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# The LIBOR Scandal and Lessons for Antitrust Compliance Programs

David Flower[1]

## I. INTRODUCTION

In June of 2012, when regulators in the United States and United Kingdom announced settlements totaling USD $451,000,000 with Barclays Bank, news that a large bank apparently falsified its submissions used to set the LIBOR index outraged lawmakers and the public in both countries. The revelations, for those just hearing them, seemed particularly shocking—one of the world's largest banks deliberately misstated information used to set the interest rate index relied upon by hundreds of trillions of dollars' worth of financial instruments, consumer and residential loans, and public financing arrangements. That some bank personnel were so cavalier in doing this, reflected in the now all too familiar e-mails ("Always happy to help, leave it with me, sir" and "Done . . . for you big boy" being but two examples of statements from helpful LIBOR submitters) only inflamed a public perception that at least some people at a powerful financial institution had seemingly gone off the ethical rails.

As eye-opening as the LIBOR scandal was for the general public, it was old news for the banking industry, which had been expecting the hammer to eventually drop ever since the Commodity Futures Trading Commission in the United States and the Financial Services Authority in the United Kingdom began large scale LIBOR investigations of a number of large banks in late 2008 and early 2009. That Barclays had long been viewed as possibly one of the *least* egregious LIBOR manipulators no doubt made the public relations disaster that befell it, as the bank that settled first, all the more painful for that organization.

What is also old news is the apparent compliance and ethical gaps that damaged Barclays—and the broader incentives in the industry that apparently created the environment for such problems at many of the LIBOR panel banks. Although the LIBOR scandal on the surface might strike many outside the industry as a complicated issue involving obscure interest rates, trading and banking issues, and financial products, the story is actually fairly simple: it appears that certain professionals in positions of opportunity, unchecked by adequate internal controls or oversight, falsified information in order to self-deal on behalf of their institutions, and placed information in the public that presented their institutions in a better light.

What can advisors and attorneys counseling companies on antitrust compliance, or the compliance professionals within such companies, take away from this story? The lessons of LIBOR for compliance and ethical professionals are particularly sharp and disappointingly familiar.

[1] David Flower practices with Grant Thornton's Forensic, Investigative and Dispute Services group in Minneapolis, Minnesota. Mr. Flower focuses on internal corporate investigations and compliance, fraud, and anti-corruption matters, with a focus on the financial services and securities industries. All views in this article are personal to the author, and do not necessarily represent the positions or opinions of Grant Thornton LLP.

## II. WHY ANTITRUST?

The United States Department of Justice has long advised companies on the necessity of strong antitrust compliance programs, even as many commentators have noted that the DOJ has seldom given explicit credit to companies involved in antitrust violations for establishing such programs. It should come as no surprise that the DOJ's investigation of the LIBOR issues involved the heavy participation of the Antitrust Division. And, indeed, some of the conduct described by the CFTC in its settlement with Barclays is enough to give shudders to anyone with antitrust compliance responsibilities:

> [C]ertain Barclays swaps traders received external requests to alter Barclays' U.S. Dollar LIBOR submissions from former Barclays swaps traders who had left Barclays and now were employed by other financial institutions. These former Barclays employees made the requests to benefit their derivatives trading positions, and expected that not only would these requests be forwarded to the LIBOR submitters, but that Barclays' LIBOR submitters would take their requests into account when making their LIBOR submissions.[2]
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> Barclays, through its swaps traders and submitters, also attempted to manipulate Euribor through internal requests by traders, which were accommodated by Barclays' submitters. The Euro swaps traders at times coordinated their requests with swaps traders at certain other banks. The requests were made in order to benefit Barclays' derivatives trading positions and the derivatives trading positions of the other individual institutions involved.[3]
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> [O]ne former Barclays' senior Euro swaps trader on occasion sent requests to alter Barclays' Euribor submissions to his former fellow traders after he had left Barclays and was employed by other financial institutions. He made the requests to benefit his derivatives trading positions.[4]

The ongoing investigations, expected settlements, and possible criminal charges involving personnel from a number of other LIBOR panel banks are evidence enough that Barclays may not have been alone in such conduct. Information recently released from a lawsuit brought by a former Singapore-based trader with the Royal Bank of Scotland against RBS includes an instant message stating, "It's just amazing how Libor fixing can make you that much money or lose if opposite. It's a cartel now in London."[5]

Indeed, it would appear the very nature of how LIBOR rates have been set—in which outlying submissions are omitted from the rate calculation—virtually requires explicit or implicit cooperation among rate submitters in order for effective manipulation of the published rates. So it is no surprise that the Department of Justice—and now numerous plaintiffs in LIBOR-related litigation—have suspected coordination among panel banks to manipulate the published LIBOR rates.

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[2] *In the Matter of Barclays Bank, et al.*, CFTC Docket No. 12-25, Order Instituting Proceedings, at 9 (June 27, 2012) ("CFTC Order").

[3] *Id.*, at 11.

[4] *Id.*, at 14.)

[5] *RBS Instant Messages Show Libor Rates Skewed for Traders*, BLOOMBERG (September 26, 2012).

## III. THE LESSONS OF LIBOR

So how did the panel banks come to this pass? What lessons could or should they have learned since 1986, when LIBOR was first regularly published? There are any number of lessons to be learned from Barclays' experience,[6] but three are crucial:

***Controls and compliance must keep up with changing conditions.*** The LIBOR index was launched by the British Bankers' Association ("BBA") in 1986 partly because of the rapid growth of derivative financial instruments that required a reliable, universally accepted index of short-term interest rates. Since 1986, however, the notional value of outstanding derivatives, as well as the number, variety, and complexity of such products, have exploded. In addition, LIBOR increasingly became the index of choice tied to interest rate swaps used by municipal and state governments in the United States in connection with public financing. Despite these trends, and the staggering amount of money that changes hands with even small fluctuations in LIBOR, neither the methods of calculating the benchmark interest rate nor the degree or type of internal and external oversight of the rate submission process appears to have materially changed—until the scandal blew up.

***High market reliance on activity that is voluntary or lightly regulated demands high internal policing.*** LIBOR was essentially a proprietary, branded product devised and controlled by a private trade organization, the BBA, and calculated based on self-reported numbers from panel banks. The contributed rates were not bound by specific legal requirements and were subjected only to light regulatory oversight by the BBA, which relied on loosely worded submission instructions that allowed for a high level of interpretation on behalf of the panel bank. As pointed out by the CFTC, though, LIBOR was "relied upon by countless large and small businesses and individuals who trust that the rates are derived from candid and reliable submissions made by each of the banks on the panels."[7] The lack of a regulatory structure did not, obviously, insulate Barclays and probably other panel banks from paying the price of compliance gaps. For such a high stakes process, in which personnel are exercising discretion on a regular basis, an organization *must* ensure that it develops appropriate controls, even in the absence of specific regulatory guidance.

***Organizations need rigorous risk assessments to create adequate compliance programs.*** In a rather remarkable written response to the announcement of its LIBOR settlements, Barclays explained that it "along with many other market participants, viewed LIBOR as low risk, and the controls which were in place were therefore inadequate."[8] In retrospect, could or should Barclays have more quickly identified the real risk associated with its LIBOR submissions? If true risks are never explicitly identified, then those risks will likely not be adequately addressed—until it is too

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[6] Other lessons that could be expanded at length include: people in a position to know about a problem usually do; odd or changed economic or financial information about a process can indicate a problem; investigation and settlement cost much more than risk assessment and compliance; reputational and operational costs of compliance problems can be more devastating than the financial costs; obvious conflicts of interest require high degrees of scrutiny and oversight; and leadership must set the tone for ethics and compliance.

[7] *CFTC Orders Barclays to Pay $200 Million Penalty for Attempted Manipulation of and False Reporting Concerning LIBOR and Euribor Benchmark Interest Rates*, CFTC Press Release (June 27, 2012).

[8] *Supplementary information regarding Barclays settlement with the Authorities in respect of their investigations into the submission of various interbank offered rates (AMENDED)*, at 6, *available* on the Barclays website.

late. Thorough design and testing of risk assessments, policies, and procedures are thus critical to developing any effective compliance program.

How do organizations adopt these lessons in developing effective antitrust compliance programs? Best practices with regard to antitrust compliance, like compliance and ethics programs more generally, have a number of common features:

***A responsible and empowered chief compliance officer and compliance organization.*** It is impossible to know from the published information the full extent to which Barclays' compliance organization was involved in attempting to identify or reduce risks related to LIBOR rate setting. It is clear, though, from the CFTC and FSA findings that those regulators did not see much evidence of effective oversight of the risks. An antitrust compliance program requires both an infrastructure of compliance professionals with the knowledge and skills to identify risks and implement best practices, and the authority and resources to adequately exercise oversight.

***A clear written policy regarding antitrust compliance.*** Any business or other organization involved in the market of any complexity should have a written antitrust compliance policy. Such a policy should be crafted to the particular antitrust risks identified through the organization's periodic risk assessment process. The antitrust policy must be in addition to and complement any other Code of Conduct or compliance policies in order to ensure that the particular risks attendant to antitrust compliance are known by the organization's personnel and are effectively controlled against.

***Training/awareness of antitrust compliance issues.*** The alleged willingness of some of the LIBOR panel banks' personnel to engage directly with their peers at other banks to manipulate rates suggests, at the least, an insufficient lack of awareness of antitrust issues. Training will seldom prevent a determined bad actor from engaging in inappropriate behavior. Training will, however, go a long way to prevent thoughtless or inadvertent behavior, as well as what might be truly innocuous behavior that nonetheless could be perceived as evidence of collusion or conspiracy. In addition, well-designed, focused, and regular training can also demonstrate that a company takes compliance seriously. As such, training is also part of an organization's potential defense to alleged violations by the *company*, or at least a possible mitigating factor in the event a regulator or law enforcement agency believes it has found violations.

***Employee certification and accountability.*** Antitrust training, even if well designed, is futile if employees are not held accountable to the appropriate standards of conduct. Any antitrust compliance program should require certification by all employees that they have received, understand, and will abide by the antitrust policy. Inadvertent violations must be promptly identified and corrected; willful violators must be swiftly and appropriately disciplined. Employees must also be provided an easy and safe channel (such as a hotline) for reporting suspected violations, and must be fully and explicitly protected against any retaliation for reporting potential violations.

***Ongoing risk assessment and program evaluation.*** As the changes in the LIBOR landscape since 1986 illustrate, times, businesses, and industries change. So do risks, both in severity (today's low risk could be tomorrow's high risk) and kind. Organizations must regularly and systematically identify, evaluate, and prioritize risks in each line of business. In addition,

organizations must regularly evaluate compliance program effectiveness by testing controls, with deeper and more frequent testing and evaluation focused on controls related to the greatest risks. Based on such ongoing risk assessment and program evaluation, organizations must be prepared to refresh their policies, controls, and training programs as conditions and risks change.

## IV. CONCLUSION

Like the LIBOR scandal itself, antitrust compliance is not as complicated as it might appear at first blush. An effective antitrust compliance program, like any compliance program, is fundamentally about ensuring a thorough, honest, and regular review of the particular organization's business environment, processes, policies, and incentives that can create conditions in which *people* make bad choices. Effective antitrust compliance is a practical process of understanding those risks and creating an environment that better enables people to know and to make the right choices. As the ongoing LIBOR story demonstrates, the financial and reputational costs of doing otherwise can be significant and long-lasting.