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Introduction

The pandemic crisis has accelerated the entry of financial technology ("fintech") firms into the banking industry. Some of the new fintech banks are owned or controlled by commercial enterprises. Affiliations between commercial firms and fintech banks raise fresh concerns about the dangers of mixing banking and commerce. Recent scandals surrounding the failures of Wirecard and Greensill Capital (Greensill) reveal the potential magnitude of those perils.

In the U.S., the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) have encouraged commercial enterprises to acquire fintech banks. The FDIC has authorized commercial firms to acquire FDIC-insured industrial banks in reliance on a controversial loophole in the Bank Holding Company Act (BHC Act). The OCC is seeking to charter nondepository fintech national banks, which commercial firms could own under a separate exemption in the BHC Act. The FDIC's and OCC's initiatives undermine – and could potentially destroy – the BHC Act's longstanding policy of separating banking and commerce.[1]

[1] Arthur E. Wilmarth, Jr., "The OCC's and FDIC's Attempts to Confer Banking Privileges on Nonbanks and Commercial Firms Violate Federal Laws and Are Contrary to Public Policy," 39 *Banking & Financial Services Policy Report* No. 10 (Oct. 2020), at 1 [hereinafter Wilmarth, "Banking Privileges"], available at http://ssrn.com/abstract=3750964; Arthur E. Wilmarth, Jr., "The FDIC Should Not Permit Commercial Firms to Acquire Industrial Banks," 39 *Banking & Financial Services Policy Report* No. 5 (May 2020), at 1 [hereinafter Wilmarth, "Industrial Banks"], available at http://ssrn.com/abstract=3613022.

The debacles at Wirecard and Greensill demonstrate the importance of maintaining a strict separation between banking and commerce. Regulators in Germany and other countries allowed banks controlled by Wirecard and Greensill to engage in risky and abusive transactions that benefited their parent companies and other related parties, including commercial firms connected to their major investors. Wirecard Bank provided financial support to its parent company and CEO, and it also made fraudulent transfers of funds to insiders and their controlled entities. Greensill Bank made preferential and unsound loans that benefited its parent company and leading investors. Greensill Bank securitized many of its reckless loans, and Greensill Capital sold the resulting asset-backed securities as "safe" and "liquid" investments to misinformed investors.

Regulators failed to take timely enforcement actions against Wirecard and Greensill because they did not exercise consolidated supervisory authority over the complex international structures created by both firms. In addition, Wirecard and Greensill built extensive networks of influence that produced significant political favors and regulatory forbearance in Germany and the U.K. The collapse of Wirecard and Greensill embarrassed government agencies and inflicted massive losses on investors, creditors, and other stakeholders.

The failures of Wirecard and Greensill provide clear warnings about the dangers of allowing fintechs to offer banking services while evading prudential regulatory requirements and supervisory standards that apply to traditional banks and their corporate owners. Regulators and policymakers should not allow fintechs' claims of "innovation" to serve as a rationale for regulatory arbitrage and as camouflage for fraud. Both disasters show that high-tech firms engaged in banking and commercial activities are likely to create the same unacceptable hazards as previous banking-and-commercial conglomerates, including toxic conflicts of interest, reckless lending, dangerous concentrations of economic power and political influence, supervisory blind spots, and systemic threats to economic and financial stability.

Analysis

1. The Rise and Fall of Wirecard

In its 2017 annual report to shareholders – entitled "Digitise Now" – Wirecard stated that it was "a global technology group" offering "one of the world's fastest growing digital platforms in the area of financial commerce." Wirecard processed "electronic payments from all sales channels" and combined "innovative digital payment solutions" with "data analytics" to create a "comprehensive ecosystem" for its customers.[2] Wirecard provided a wide range of services in addition to processing payments, such as risk management, fraud prevention, call centers, and customer loyalty programs. Wirecard also furnished the technology needed to support those services, including "self-learning algorithms" and other forms of "machine learning" and "artificial intelligence."[3]

Wirecard was founded in Germany in 1999. A few years later, Wirecard purchased a failed call center company and took over that firm's listing on the Frankfurt stock exchange. Wirecard acquired a German bank in 2006 and renamed it Wirecard Bank. The acquisition of Wirecard Bank enabled Wirecard to gain access to Visa's and Mastercard's payment networks and to become an issuer of credit cards as well as an acquirer of payments from other issuers of

[2] Wirecard 2017 Annual Report, at front cover, 7-8, 40-46, 59, 71-72 (April 2018), available at https://www.wirecard.com/wp-content/uploads/2020/12/Annual-Report-2017.pdf. *See also* Consolidated Class Action Complaint for Violations of the Federal Securities Laws, *In re Wirecard AG Securities Litigation*, Civ. Action No. 2:20-cv-03326-AB (E.D. Pa., filed Dec. 22, 2020), ¶¶ 34-36, 84-90 [hereinafter Wirecard Securities Litigation Complaint], available at https://www.hbsslaw.com/sites/default/files/case-downloads/securities/2020-12-22-Wirecard-Consol-Compl.pdf.

[3] Wirecard 2017 Annual Report, *supra* note 2, at 7-8, 40-46, 51-72, 88-93, 128-34

credit cards.[4] Wirecard's "unusual hybrid of banking and non-banking operations [made] its accounts harder to compare with peers, and [helped] persuade investors to rely on the company's adjusted versions of financial statements."[5]

Wirecard furnished payment processing and other services to a wide variety of online merchants, including retailers, travel companies, and providers of digital music, as well as firms operating in "legal grey areas," such as gaming, sports betting, and pornography. Wirecard allegedly set up shell companies and established fake accounts that helped a California company to conceal its sales of marijuana products so that it could receive credit card payments from customers of U.S. banks.[6]

Wirecard Bank offered "multi-channel" payment services that covered "more than 40 alternative payment methods" and "[o]ver 100 transaction currencies." Wirecard Bank processed payments for merchants around the globe on credit and debit cards issued by Visa, Mastercard, American Express, Diners Club, Discover, JCB, and UnionPay. Wirecard Bank also offered "innovative solutions" to meet the "e-Commerce business" needs of its customers,

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[4] Paul J. Davies, "Tech Star Wirecard Fell Apart in Days," *Wall Street Journal* (July 3, 2020), A1; Dan McCrum, "Wirecard: the timeline," *Financial Times* (June 25, 2020), available at https://www.ft.com/content/284fb1ad-ddc0-45df-a075-0709b36868db; Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 83-89.

[5] McCrum, *supra* note 4.

[6] Liz Alderman & Christopher F. Schuetze, "Many Analysts Not Surprised by Downfall of Wirecard," *New York Times* (June 27, 2020), A1; Davies, *supra* note 4; McCrum, *supra* note 4; Dan McCrum & Olaf Storbeck, "Wirecard's future in doubt after missing cash sparks investor flight," *Financial Times* (June 19, 2020), available at https://www.ft.com/content/149cd24c-7a0d-4ef0-a46c-fece79124322; Rebecca Davis O'Brien, "Trial Alleges Wirecard Aided Marijuana Scam," *Wall Street Journal* (Mar. 24, 2021), B5; *see also* Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 34-36. 84-86.

including mobile payments, money transfers, online banking, and digital wallets.[7] A separate Wirecard subsidiary furnished information technology services and management consulting.[8]

Wirecard acquired payment firms in several Asian countries and purchased Citigroup's payment processing businesses in North America and Asia. Wirecard became known as "Germany's PayPal," and it claimed to handle over $140 billion of payments annually for 250,000 global corporate customers. Wirecard's market valuation peaked at €24 billion in August 2018. One month later, Wirecard was added to Germany's Dax 30 index, replacing Commerzbank (Germany's second largest bank). In 2019, Wirecard launched "Project Panther," a bold plan to acquire Deutsche Bank (Germany's largest bank). Under that plan, prepared by McKinsey & Company, Wirecard would have become "Wirebank" and would have achieved its ambition of "thinking and acting like a fintech, at the scale of a global bank."[9]

Wirecard was "Europe's largest fintech" and "one of Germany's most feted companies" in 2018. It was widely viewed as a "European tech champion" as well as a "homegrown success story." Wirecard's CEO, Markus Braun, became a "rock star" and a "legend" in "the elite corridors of corporate Germany." Braun "promoted the concept of a fully cashless society from which players like Wirecard would benefit," and he "predicted that all retail payments would be

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[7] Wirecard Bank, "Acquirer Profile: Wirecard Bank AG, Your Multi-Channel Acquirer" (December 1, 2017), available at https://www.wirecard.com/fileadmin/user_upload/wirecard/downloads/en/documents/Acquirer_Profile_Factsheet-ENG_Web.pdf.

[8] Offering Memorandum dated 9 September 2019 for €500 million 0.50% Notes due 2024 [hereinafter Wirecard 2019 Offering Memorandum], at 47, available at https://www.wirecard.com/wp-content/uploads/2020/12/02_20190912_Wirecard_Offering_EN.pdf.

[9] Davies, *supra* note 4; McCrum, *supra* note 4; Olaf Storbeck, "Wirecard: the frantic final months of a fraudulent operation," *Financial Times* (Aug. 25, 2020) (quoting plan prepared by McKinsey & Co.), available at https://www.ft.com/content/6a660a5f-4e8c-41d5-b129-ad5bf9782256; Wirecard 2019 Offering Memorandum, *supra* note 8, at 2, 62; Wirecard 2017 Annual Report, *supra* note 2, at 45-46, 94-95, 138-40; Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 87-90.

digital within a decade."[10] In 2019, he "pledged that [Wirecard's] revenue and operating profit by 2025 would be more than six times higher than they were in 2018, as consumers around the world abandoned cash."[11]

In April 2019, Wirecard entered into a "strategic partnership" with Japan's SoftBank. SoftBank acquired €900 million of Wirecard's convertible bonds, thereby giving SoftBank a potential equity stake of more than 5% in Wirecard. (In September 2019, SoftBank sold those bonds to institutional investors in a deal arranged by Credit Suisse.) SoftBank agreed to help Wirecard expand its activities in Asia, especially in Japan and South Korea. SoftBank also encouraged its "sprawling portfolio of tech firms" to buy payment services from Wirecard.[12]

Wirecard entered into payment services agreements with several firms controlled by SoftBank. SoftBank's "strategic partnership" with Wirecard triggered a significant rise in Wirecard's stock price. In August 2019, Moody's gave Wirecard an investment-grade rating of "Baa3." Moody's favorable credit rating helped Wirecard to sell €500 million of five-year notes (also rated "Baa3" by Moody's) to institutional investors in September 2019.[13]

The offering memorandum for Wirecard's five-year notes stated that SoftBank was a "strategic partner and new strategic shareholder" for Wirecard. According to the memorandum,

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[10] Alderman & Schuetze, *supra* note 6; Davies, *supra* note 4; McCrum, *supra* note 4; Dan McCrum et al., "Wirecard collapses into insolvency," *Financial Times* (June 25, 2020), available at https://www.ft.com/content/650d7108-dca8-4299-95ad-e68476bc3020.

[11] McCrum & Storbeck, *supra* note 6.

[12] Myriam Balezou, Pavel Alpeyev & Kat Van Hoof, "Wirecard's Complex Tie-Up with Softbank Unravels After Insolvency, *Bloomberg Law* (July 2, 2020); Ryan Browne, "Softbank's troubled $1 billion Wirecard bet under scrutiny as troubled payments processor fights for survival," *CNBC* (June 26, 2020), available at https://www.cnbc.com/2020/06/24/softbanks-1-billion-wirecard-investment-under-scrutiny.html; McCrum et al., *supra* note 10; Caitlin Ostroff & Margot Patrick, "SoftBank Seeks to End Its Wirecard Partnership," *Wall Street Journal* (July 2, 2020), B1; Margot Patrick, "Lenders Magnify Wirecard Shock," *Wall Street Journal* (June 24, 2020), B12; Margot Patrick, Bradley Hope & Liz Hoffman, "SoftBank's Stamp Elevated Wirecard," *Wall Street Journal* (July 30, 2020), B1; Robert Smith & Arash Massoudi, "Softbank executive set to lose profits from Wirecard trade," *Financial Times* (June 22, 2020), available at https://www.ft.com/content/b8eec9d0-0c85-467d-8cb1-467ad87adced; Wirecard 2019 Offering Memorandum, *supra* note 8, at 3-4, 33-34, 62.

[13] Balezou, Alpeyev & Van Hoof, *supra* note 12; Browne, *supra* note 12; Ostroff & Patrick, *supra* note 12; Patrick, Hope & Hoffman, *supra* note 12; Wirecard 2019 Offering Memorandum, *supra* note 8, at 35, 116.

SoftBank's support would enable Wirecard to "further expand and consolidate its own market position" in Japan, South Korea, and other Asian countries. Wirecard's "strategic partnership" with SoftBank would also promote Wirecard's sales of payment and technology services to SoftBank's portfolio of companies in the fields of telecommunications, transportation, "e-commerce platforms," and "FinTech."[14]

Wirecard received additional support from large global banks. ABN Amro, Citigroup, Crédit Agricole, Credit Suisse, Deutsche Bank, ING, and Lloyds Bank acted as lead underwriters for Wirecard's successful offering of five-year notes in September 2019. Wirecard obtained a five-year, €1.75 billion line of credit from ABN Amro, Commerzbank, ING, and other banks in June 2018. Wirecard drew down most of that line of credit before the company collapsed two years later.[15]

Wirecard's stock received strong backing from European asset managers. Investment analysts at major European banks and leading European investment firms posted favorable investment ratings on Wirecard's stock until shortly before Wirecard collapsed.[16] The head of Deutsche Bank's Asian business encouraged Asian clients to do business with Wirecard until a few months before Wirecard failed.[17]

Wirecard's meteoric rise did not go unchallenged. Beginning in 2008, and with increasing intensity after 2014, a growing number of shareholder activists, journalists, securities analysts, and hedge fund managers expressed serious doubts about the accuracy of Wirecard's

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[14] Wirecard 2019 Offering Memorandum, *supra* note 8, at 3-4.
[15] *Id.* at cover page, 7-8, 62, 118; McCrum et al., *supra* note 10.
[16] McCrum & Storbeck, *supra* note 6; Paul Murphy, "The fund managers who kept faith with Wirecard," *Financial Times* (June 19, 2020), available at https://www.ft.com/content/b3d664db-17c3-4648-8c10-b8bd667e290e; Berndt Ziesemer, "Why was Frankfurt so blind for so long about Wirecard?", *Financial Times* (June 19, 2020), available at https://www.ft.com/content/f04793df-43a2-4d69-a39f-e04dac36ce8e; Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 96, 102-03, 106, 109, 111-12, 142, 155, 186, 221-23.
[17] Olaf Storbeck, "Top Deutsche Banker wooed clients for Wirecard months before collapse," *Financial Times* (Feb. 17, 2021), available at https://www.ft.com/content/c34b1e3d-c758-4203-b98b-360fe319770f.

financial statements. In fact, Wirecard's activities in Europe and North America were unprofitable for several years before the company failed, and much of its reported business in Asia was a sham. For at least a decade, Wirecard issued fraudulent financial statements that inflated its assets, revenues, and profits. Senior Wirecard officials also arranged fraudulent transactions involving large transfers of Wirecard's funds to companies they controlled.[18] Wirecard Bank extended a €35 million loan to Markus Braun in January 2020, at a time when Braun faced significant personal financial problems. Wirecard Bank also made suspicious transfers of large amounts of cash to Wirecard's insiders and foreign affiliates.[19]

Wirecard collapsed into insolvency in June 2020, after its external auditors discovered that Wirecard's reported deposits of €1.9 billion in an overseas bank did not exist. Those fictitious deposits were equal to all of the net profits Wirecard reported after 2012. Wirecard's failure wiped out its equity investors and triggered €12.4 billion of creditor claims. The company's remaining assets were expected to cover only a small fraction of those claims.[20]

As Wirecard experienced mounting financial problems, Wirecard Bank obtained additional funding for its parent company by soliciting more deposits. Wirecard Bank attracted

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[18] Ruth Bender & Paul J. Davies, "Wirecard Fraud Is Traced to 2015," *Wall Street Journal* (July 23, 2020), B1; Paul J. Davies, "Adviser Linked to Wirecard's Deals," *Wall Street Journal* (Nov. 19, 2020), B1; Jack Ewing, "Former Wirecard C.E.O. Arrested on New Charges." *New York Times* (July 23, 2020), B4; Bradley Hope, Paul J. Davies & Patricia Kowsmann, "Wirecard's No. 2 Was Key to the Firm's Rapid Rise," *Wall Street Journal* (July 6, 2020), B1; Olaf Storbeck, "Wirecard fraud 'started more than a decade ago'," *Financial Times* (Mar. 23, 2021), available at https://www.ft.com/content/650d7108-dca8-4299-95ad-e68476bc3020; Olaf Storbeck, Stefania Palma & Dan McCrum, "Prosecutors suspect Wirecard was looted before collapse," *Financial Times* (Aug. 7, 2020), available at https://www.ft.com/content/c8acf321-7bc7-4348-99f6-b17e01085238; Dylan Tokar & Paul J. Davies, "Wirecard Executive Says Warning Signs Were Clear," *Wall Street Journal* (Feb. 9, 2021), B11; Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 92-245, 263-302, 325-62.

[19] Olaf Storbeck, "Wirecard's Markus Braun took €35m loan from group's banking arm," *Financial Times* (July 16, 2020) (reporting that Braun repaid the loan in March 2020, after Wirecard's supervisory board urged him to do so), available at https://www.ft.com/content/2650cf4a-4ca5-4f99-9916-cb5cae4bde73; Olaf Storbeck, "Wirecard employees removed millions in cash using shopping bags," *Financial Times* (April 22, 2021), available at https://www.ft.com/content/31a8ed93-f602-47f0-9120-4b4f152ec7bc.; Olaf Storbeck, "Marsalek's assistant handled six-digit amounts of cash in plastic bags," *Financial Times* (May 7, 2021), available at https://www.ft.com/content/eef0e06f-a206-4b6e-8c7f-4350f767978b.

[20] Alderman & Schuetze, *supra* note 6; Eyk Henning et al., "Wirecard Bank Has $237 Million, Administrator Says (Correct)," *Bloomberg Law* (Nov. 18, 2020); McCrum et al., *supra* note 10; McCrum & Storbeck, *supra* note 6; Storbeck, *supra* note 9.

new deposits by paying interest rates that were significantly higher than the deposit rates offered by most other German banks. Wirecard Bank's deposits rose to $2 billion in 2019, an increase of more than 25% from the previous year. After Wirecard collapsed in June 2020, Germany's banking regulator, BaFin, "ringfenced" Wirecard Bank to prevent the bank from making any additional loans or other transfers of funds to its parent company, affiliates, or insiders. German authorities subsequently obtained court approval to liquidate Wirecard Bank under the supervision of Wirecard's insolvency administrator.[21]

2. Failures by Wirecard's Regulators and Auditors

Wirecard developed strong relationships with "a vast network of businessmen, politicians, and lobbyists" in Germany. Wirecard hired several prominent former German officials as advisers and lobbyists, including a former minister of defense and Bavaria's former chief of police. German officials viewed Wirecard as "a rare German tech success story" and a "national tech champion," and they eagerly promoted Wirecard's ventures at home and abroad. In 2019, the former defense minister persuaded Chancellor Angela Merkel to encourage Chinese officials to approve Wirecard's acquisition of a Chinese payments company.[22]

Wirecard also built "close ties" to German intelligence and law enforcement agencies. For example, Wirecard provided fee-free credit cards to the staff of Germany's criminal police agency (BKA). In 2014, Wirecard's chief financial officer told his colleagues, "We will become the BKA's house bank at some point." A special investigator stated that BKA "put the fox in

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[21] Nicholas Comfort & Steven Arons, "Wirecard Bank Ringfenced by Germany's BaFin After Insolvency (1)," *Bloomberg Law* (June 25, 2020); Henning et al., *supra* note 20.

[22] Guy Chazan, "Wirecard enjoyed 'no special treatment,' Merkel says," *Financial Times* (April 23, 2021), available at https://www.ft.com/content/b37bde10-53c9-4592-ad01-9a44f83b9c77; Guy Chazan & Olaf Storbeck, "Wirecard inquiry: Germany's financial and political elite exposed," *Financial Times* (April 19, 2021) [hereinafter "Wirecard inquiry"], available at https://www.ft.com/content/6e0c6b5f-3461-463d-b49b-f572dbc39c26; Guy Chazan & Olaf Storbeck, "Wirecard: the scandal spreads to German politics," *Financial Times* (Sept. 29, 2020) [hereinafter "Wirecard scandal"], available at https://www.ft.com/content/81779b15-7b1d-404f-b523-d61510397dd4;.

charge of the henhouse" and failed to uncover evidence of widespread money laundering by Wirecard.[23]

In 2020, Germany's Bundestag established a special committee to investigate why the German government did not discover Wirecard's massive fraud for more than a decade. Members of the special committee strongly criticized Germany's ministry of finance, BaFin, and German prosecutors for ignoring "compelling, substantiated indications of criminal activity at Wirecard." One of the committee members, Lisa Paus, concluded that "[a]t all the critical junctures, [German officials] decided in favour of Wirecard." Journalists reported that "none of Germany's regulatory authorities have emerged from the Wirecard proceedings with their reputation unscathed."[24]

BaFin did not launch a serious investigation of Wirecard until shortly before it failed, despite numerous allegations of misconduct by shareholder activists and financial journalists since 2008. Instead of investigating Wirecard, BaFin launched criminal inquiries alleging market manipulation by shareholders and journalists who published negative stories about Wirecard. In addition, BaFin imposed a two-month ban on short-selling of Wirecard's stock in February 2019. BaFin stated that its short-selling ban was justified by "a serious threat to market confidence" as well as Wirecard's "importance for the economy." When BaFin ordered the ban, it asked Germany's accounting oversight board to review Wirecard's financial statements. The

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[23] "Wirecard inquiry," *supra* note 22; Olaf Storbeck, "German police had close ties with Wirecard, report shows," *Financial Times* (April 14, 2021) (quoting a 2014 email message from Wirecard's chief financial officer, Alexander von Knoop, and also quoting the special investigator's report), available at https://www.ft.com/content/ba9a578b-d03f-4d77-91f0-b7ae7606a115.

[24] "Wirecard inquiry," *supra* note 22 (quoting statements by Free Democrat MP Florian Toncar and Green Party MP Lisa Paus); *see also* "Wirecard scandal," *supra* note 22.

weak and thinly-resourced oversight board did not issue any report before Wirecard collapsed more than a year later.[25]

BaFin defended its failure to uncover Wirecard's fraud by claiming that it did not have authority to examine the affairs of Wirecard and its nonbank subsidiaries. BaFin classified Wirecard as a technology company rather than a "financial holding company." As a result of that classification, BaFin supervised only Wirecard Bank and did not scrutinize the bank's parent company and other affiliates.[26] In November 2020, the European Securities and Markets Authority (ESMA) issued a report that found serious "deficiencies in [BaFin's] supervision and enforcement of Wirecard's financial reporting." ESMA's report questioned whether BaFin possessed adequate authority and political independence to prevent financial fraud by influential companies like Wirecard.[27]

Ernst & Young audited Wirecard's financial statement for a decade but similarly failed to detect Wirecard's massive fraud until a few weeks before it collapsed. Among other lapses, Ernst & Young allowed Wirecard's senior management to terminate prematurely the auditor's inquiry into a whistleblower's claims of fraud and bribery in Wirecard's operations in India. In addition, for more than three years, Ernst & Young failed to discover the nonexistence of Wirecard's foreign deposits because its auditors relied on assurances from Wirecard's executives

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[25] Tom Fairless, Patricia Kowsmann & Paul Davies, "Wirecard Warnings Were Ignored," *Wall Street Journal* (July 17, 2020), A1; "Wirecard inquiry," *supra* note 22; "Wirecard scandal," *supra* note 22; *see also* Katja Langenbucher et al., *What are the wider supervisory implications of the Wirecard case?* 7-8, 12-13, 19-21, 30-33 (PE 651.385, Nov. 2020) (study commissioned by the European Parliament's Economic and Monetary Affairs Committee), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651385/IPOL_STU(2020)651385_EN.pdf; Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 100-04, 123, 140-43.

[26] Guy Chazan & Olaf Storbeck, "Head of German financial watchdog defends agency's Wirecard role," *Financial Times* (July 1, 2020), available at https://www.ft.com/content/fd2e1442-d35c-412e-a7a5-aa4d5b52e629; Fairless, Kowsmann & Davies, *supra* note 25; Langenbucher et al., *supra* note 25, at 19; "Wirecard inquiry," *supra* note 22; "Wirecard scandal," *supra* note 22.

[27] European Securities and Markets Authority, "ESMA identifies deficiencies in German supervision of Wirecard's financial reporting," (Nov. 3, 2020) (press release), available at https://www.esma.europa.eu/press-news/esma-news/esma-identifies-deficiencies-in-german-supervision-wirecard%E2%80%99s-financial; Patricia Kowsmann, "Wirecard Probe Faults Regulators," *Wall Street Journal* (Nov. 4, 2020), B12.

and did not directly contact the bank that supposedly held the deposits.[28] An investigation commissioned by the Bundestag's special committee concluded that Ernst & Young ignored "numerous fraud risk indicators," which should have caused Ernst & Young to intensify its audits of Wirecard's financial statements.[29]

3. The Rise and Fall of Greensill

Lex Greensill grew up on his family's farm in Australia. He moved to the U.K. in 2001, earned an M.B.A. degree, and worked as an investment banker for Morgan Stanley and Citigroup. In 2011, Greensill launched his own finance company, Greensill Capital. Greensill Capital acquired a German bank in 2014 and renamed it Greensill Bank.[30]

Greensill specialized in supply-chain finance, "a fancy name for the age-old practice of factoring." Greensill extended credit to its corporate customers by purchasing, at a discount, invoices that its customers owed to suppliers of goods and services. Greensill later collected the full amounts due from its customers on the invoices and earned profits equal to the discounts provided by the suppliers. Supply-chain lenders generally provide financing to large, well-established companies for periods of 30 to 120 days, with the possibility of renewal. Greensill,

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[28] Langenbucher, *supra* note 25, at 13-16, 30-33; Olaf Storbeck, "EY fraud expert: 'incomprehensible' that Wirecard 'red flags' were ignored," *Financial Times* (May 7, 2021), available at https://www.ft.com/content/0288d7b1-1e52-4a3d-a9e1-6850afae0d26; Olaf Storbeck, "Whistleblower warned EY of Wirecard fraud four years before collapse," *Financial Times* (Sept. 30, 2020), available at https://www.ft.com/content/3b9afceb-eaeb-4dc6-8a5e-b9bc0b16959d; Olaf Storbeck, Tabby Kinder & Stefania Palmer, "EY failed to check Wirecard bank statements for 3 years," *Financial Times* (June 26, 2020), available at https://www.ft.com/content/a9deb987-df70-4a72-bd41-47ed8942e83b; Wirecard Securities Litigation Complaint, *supra* note 2, ¶¶ 10-16, 103-04, 108, 172-74, 183-84, 218-19, 227-30, 246-76, 314-23.

[29] Olaf Storbeck, "EY's Wirecard audits suffered serious shortcomings, German probe finds," *Financial Times* (April 17, 2021), available at https://www.ft.com/content/abd89375-3fa1-4457-abd6-b3e3231ba339.

[30] Eshe Nelson, Jack Ewing & Liz Alderman, "Debt Drove a Firm's Rise and Its Ruin," *New York Times* (Mar. 31, 2021), B1; Robert Smith, Michael Pooler & Olaf Storbeck, "The unraveling of Lex Greensill: a mixture of bravado and financial alchemy," *Financial Times* (Mar. 5, 2021), available at https://www.ft.com/content/7e79117f-cbf5-4765-82ca-7e8f1fb5915b.

however, "supercharge[d]" this "dull banking business" with "aggressive innovation" and "revolutionary thinking."[31]

Greensill said that it was using technology to "digitize" supply-chain finance while also "expand[ing] the client base" to serve smaller and newer firms. Greensill provided most of its supply-chain financing to higher-risk companies that could not obtain such credit from traditional banks. About 90% of Greensill's revenues came from corporate borrowers that did not qualify for investment-grade credit ratings.[32]

Lex Greensill "portrayed himself as a savior for small business." He declared that Greensill's high-tech business model was "making finance fairer" and "democratising capital," thereby "changing finance to change the world." One of Greensill's early investors commented, "Lex is a great salesman . . . . He's got this 'good old boy farmer made good' story. But I think his ambition is reckless."[33]

Former U.K. Prime Minister David Cameron praised Greensill Capital as "one of Britain's many fintech success stories." Greensill claimed to be "disrupting big banks" with

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[31] Patrick Jenkins, "The echoes of Enron in Greensill saga," *Financial Times* (Mar. 29, 2021), available at https://www.ft.com/content/70ba9c03-e207-4187-b62f-4b73c8fcac19; Duncan Mavin, Julie Steinberg & Margot Patrick, "Before Greensill Imploded, Credit Suisse Saw Danger," *Wall Street Journal* (Mar. 4, 2021), B1; John Plender, "Greensill implosion exposes risks of shadow banking," *Financial Times* (Mar. 7, 2021), available at https://www.ft.com/content/ebeec5fc-4e52-4dd7-9aa1-092df6f0d97b; Robert Smith, "Greensill and supply-chain financing: how a contentious funding tool works," *Financial Times* (Mar. 2, 2021), available at https://www.ft.com/content/1bbbe94c-9c3d-43d1-bcdd-8add6557c5a7.

[32] Lucca De Paoli et al., "In Stunning Collapse, SoftBank-backed lender Greensill files for U.K. insolvency," *Fortune* (Mar. 9, 2021), available at https://fortune.com/2021/03/09/collapse-softbank-backed-lender-greensill-u-k-insolvency/; Duncan Mavin & Julie Steinberg, "Behind Greensill's Collapse: Detour Into Risky Loans," *Wall Street Journal* (Mar. 13, 2021), A1 [hereinafter "Behind Greensill's Collapse"];

[33] Duncan Mavin & Julie Steinberg, "Before Greensill Failed, It Relied on Wall Street," *Wall Street Journal* (Mar. 24, 2021), A1 [hereinafter "Greensill Relied on Wall Street"]; "'System-generated truncations': Greensill, Gupta, and the hunt for the mystery holding company," *Financial Times* (Aug. 20, 2020), available at https://www.ft.com/content/dcc1807a-fb14-47db-b1b0-3337d905b298; Smith, Pooler & Storbeck, *supra* note 30 (quoting "one of [Greensill's] early backers").

superior technology. However, Greensill's "revolutionary innovation" mainly consisted of "complex financial engineering," which greatly increased the risks of Greensill's operations.[34]

Instead of keeping risky supply-chain invoices on its balance sheet, Greensill used securitization and credit insurance to convert those invoices into "low risk" asset-backed securities. Greensill Bank purchased customer invoices and held them in its "warehouse" until they could be securitized into bonds that were sold to investment funds managed by GAM Holding (GAM) and Credit Suisse. Greensill, GAM, and Credit Suisse told investors that Greensill's invoice-backed bonds were "safe, highly rated, fully-insured investments" that could be redeemed by investors on short notice (usually five or 10 days).[35]

Greensill obtained credit insurance for its bonds from several Australian insurance companies. Credit Suisse assured investors that Greensill's bonds were "low risk" because "[t]he underlying credit risk of the [Greensill] notes is fully insured by highly rated insurance companies."[36]

Greensill's invoice-backed bonds bore a disturbing resemblance to the subprime mortgage-related securities that global banks marketed as "safe" investments during the 2000s in reliance on credit insurance provided by AIG and monoline bond insurers. In both cases, banks performed the "alchemy" of packaging risky debts into supposedly "low risk" securities with

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[34] "Greensill Relied on Wall Street," *supra* note 33; Plender, *supra* note 31; Andrew Woodman, "Weekend Pitch: In Greensill's fintech debacle, where does the buck stop?", *Pitchbook* (Mar. 28, 2021) (quoting Mr. Cameron), available at https://pitchbook.com/news/articles/greensill-debacle-fintech-regulation-softbank.

[35] "Behind Greensill's Collapse," *supra* note 32; Jenkins, *supra* note 31; Duncan Mavin & Julie Steinberg, "Problems Intensify for Greensill," *Wall Street Journal* (Mar. 3, 2021), B1; Mavin, Steinberg & Patrick, *supra* note 31; Nelson, Ewing & Alderman, *supra* note 30; Plender, *supra* note 31; Smith, Pooler & Storbeck, *supra* note 30.

[36] Tom Bergin, "Greensill insurance mystery turns up the heat on Credit Suisse," *Reuters* (April 1, 2021), available at https://www.reuters.com/article/us-britain-greensill-credit-suisse-insig/greensill-insurance-mystery-turns-up-the-heat-on-credit-suisse-idUSKBN2BO4VP; Tom Braithwaite, "The insurance call that toppled Greensill," *Financial Times* (Mar. 4, 2021), available at https://www.ft.com/content/ebeec5fc-4e52-4dd7-9aa1-092df6f0d97b; Mavin, Steinberg & Patrick, *supra* note 31; Ian Smith et al., "The Australian underwriter who provided Greensill Capital's lifeline," *Financial Times* (Mar. 16, 2021), available at https://www.ft.com/content/9722efce-7d32-4abd-99b8-46f6b47de6dc; Smith, Pooler & Storbeck, *supra* note 30.

support from credit insurers. Thus, Greensill's "innovation" created ominous "echoes of the asset-backed securitization that was at the heart of the 2008 financial crisis."[37]

Greensill magnified the risks of its invoice-backed bonds in three ways. First, Greensill securitized "projected receivables" from anticipated future sales as well as invoices from actual past sales. For example, Greensill provided $850 million of supply-chain credit to Bluestone Resources, a West Virginia coal mining company. Most of that financing was based on "projected receivables" from future sales of Bluestone's coal to "prospective buyers." Similarly, Greensill extended large amounts of credit to Sanjeev Gupta's firms based on "future receivables." Greensill's financing of "hypothetical invoices" from "anticipated [future] business . . . went well beyond industry norms" and was far riskier than traditional supply-chain financing. Moreover, Greensill's primary credit insurer, Tokio Marine, warned Greensill that its credit insurance would guarantee payment of invoices only if they documented actual sales of goods or services.[38]

Second, Greensill offered long-term financing commitments to its most important customers. Greensill reportedly agreed to provide financing to Sanjeev Gupta's companies for at least three years, General Atlantic for at least three years, Bluestone for at least six years, and Tradeshift Network (a company controlled by SoftBank) for five years. Greensill fulfilled those

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[37] Braithwaite, *supra* note 36; Jenkins, *supra* note 31; Nelson, Ewing & Alderman, *supra* note 30; Plender, *supra* note 31; *see also* Arthur E. Wilmarth, Jr., *Taming the Megabanks: Why We Need a New Glass-Steagall Act* 208-11, 218-21, 230-42 (Oxford Univ. Press, 2020) (describing the subprime mortgage-related securities that global banks sold to investors during the 2000s) [hereinafter Wilmarth, *Taming the Megabanks*].

[38] John Basquill, "Banks steer clear of GFG after Greensill collapse leaves funding gap," *Global Trade Review* (April 21, 2021), available at https://www.gtreview.com/news/global/banks-steer-clear-of-gfg-after-greensill-collapse-leaves-funding-gap/; Bergin, *supra* note 36; Duncan Mavin & Julie Steinberg, "Greensill Accused of Fraud by Coal Miner," *Wall Street Journal* (Mar. 17, 2021), B12 [hereinafter "Greensill Accused of Fraud"]; Jenkins, *supra* note 31; Robert Smith, Cynthia O'Murchu & Owen Walker, "Suspect Sanjeev Gupta invoices used in Greensill raise fraud concerns," *Financial Times* (April 9, 2021), available at https://www.ft.com/content/e450c8f9-29fa-432b-98fd-5885edb4680f; *see also* Tom Braithwaite, "The finance inventor whose vision blurred at Greensill Capital," *Financial Times* (Mar. 19, 2021) (stating that Bluestone "borrowed $780m [from Greensill] against 'receivables that have not yet been generated by Bluestone' from 'prospective buyers' which included 'entities that were not and might not ever become customers of Bluestone'"), available at https://www.ft.com/content/c02ba2e1-71d2-4fb1-8166-4ad712b4ace2.

longer-term commitments by repeatedly renewing (rolling over) its customers' short-term invoices. However, as noted above, Greensill's bonds were sold to investors as "short-term liquidity vehicles similar to money market funds," and the terms of those bonds promised payment on short notice.

Greensill's longer-term financing commitments created a severe liquidity mismatch with its bonds' promise of short-term repayment.[39] Greensill's invoice-backed bonds created the same illusion of immediate liquidity as the asset-backed commercial paper – backed by illiquid, subprime mortgage-related securities – that global banks sold to investors prior to the financial crisis of 2007-09.[40]

Third, Greensill provided much of its financing to firms that exercised significant influence over Greensill because they were major investors in Greensill or closely connected to those investors. General Atlantic, a large private equity firm, invested $250 million in Greensill in 2018. Greensill responded by providing a $350 million loan to General Atlantic to "strengthen its relationship with a significant sponsor." General Atlantic used that loan to finance a joint venture with Deutsche Börse, a German stock exchange operator. Greensill provided additional support for that joint venture by extending $95 million of supply-chain finance to Deutsche Börse.[41]

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[39] "Behind Greensill's Collapse," *supra* note 32; "Greensill Accused of Fraud," *supra* note 38; Lawrence Fletcher & Robert Smith, "Investors pull money from GAM and Greensill supply chain fund," *Financial Times* (June 2, 2019), available at https://www.ft.com/content/f6d210e6-8394-11e9-b592-5fe435b57a3b; Robert Smith et al., "Sanjeev Gupta denies debts are due ahead of crunch meeting," *Financial Times* (April 1, 2021), available at https://www.ft.com/content/d7fd7673-e4de-402d-acec-5aea358ee461.

[40] Plender, *supra* note 31; Robert Smith, Kaye Wiggins & Cynthia O'Murchu, "General Atlantic: the revered tech investor that backed Greensill," *Financial Times* (Mar. 25, 2021), available at https://www.ft.com/content/cdb7f2fe-7589-457e-8c5d-e5f515c557da; *see also* Wilmarth, *Taming the Megabanks*, *supra* note 37, at 218-20, 244-45, 250-51, 254-59 (discussing the asset-backed commercial paper that global banks sold to investors prior to the global financial crisis of 2007-09).

[41] "Behind Greensill's Collapse," *supra* note 32; Miriam Gottfried, "Disrupter Startup Gets Injection," *Wall Street Journal* (July 16, 2018), B2; Smith, Wiggins & O'Murchu, *supra* note 40; Julie Steinberg & Duncan Mavin, "Greensill Made Loans to Its Top Backers," *Wall Street Journal* (Mar. 6, 2021), B1.

Greensill provided extensive credit to firms controlled by SoftBank, which was "Greensill's largest outside backer." Greensill was a "key part" of Softbank's strategy of acquiring ownership stakes in "the world's leading tech companies and encouraging them to cooperate." SoftBank wanted Greensill "to offer struggling SoftBank startups easy access to credit without having to pledge onerous collateral."[42]

SoftBank invested $1.9 billion in Greensill during 2019 and 2020 and acquired 25% of Greensill's stock. In March 2020, SoftBank invested an additional $1.5 billion in Credit Suisse's funds that bought Greensill's invoice-backed bonds. SoftBank's additional investment stabilized Credit Suisse's funds at a time when many investors were making withdrawals in response to the Covid pandemic. In return, Greensill provided more than $1 billion of credit to companies controlled by SoftBank's Vision Fund.[43]

Greensill provided an even larger share of its credit to companies controlled by Sanjeev Gupta. Gupta was Greensill's biggest customer and a significant early investor. Between 2013 and 2020, Gupta and his corporate group, GFG Alliance, spent over $6 billion building a global industrial empire that included metals, mining, and power generating facilities in a dozen countries on four continents. Gupta's empire employed 35,000 people and produced $20 billion of revenues in 2020.[44]

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[42] Julie Steinberg et al., "SoftBank Confronts Deeper Losses on Greensill," *Wall Street Journal* (Mar. 10, 2021), A1; Giles Turner, Lucca De Paoli & Pavel Alpeyev, "How Masayoshi's Son's 'money guy' Lex Greensill went from hero to zero," *Bloomberg* (April 2, 2021), available at https://www.business-standard.com/article/international/how-masayoshi-son-s-money-guy-lex-greensill-went-from-hero-to-zero-121040100134_1.html.

[43] Steinberg et al., *supra* note 42; Turner, De Paoli & Alpeyev, *supra* note 42; Margot Patrick et al., "Credit Suisse Failed to Heed Alerts on Archegos, Greensill," *Wall Street Journal* (April 9, 2021), B1; Julie Steinberg & Duncan Mavin, "Deal Making Caught Up with Lex Greensill," *Wall Street Journal* (Mar. 19, 2021), B1.

[44] Alistair MacDonald, "Greensill Problems Put Spotlight on an Anglo-Indian Steel Tycoon," *Wall Street Journal* (Mar. 4, 2021), B2; Alistair MacDonald & Duncan Mavin, "Greensill-Gupta Tie Had Raised Concerns," *Wall Street Journal* (April 5, 2021), B6; Sylvia Pfeifer, Oliver Barnes & Jamie Smyth, "Sanjeev Gupta's empire faces test of its steel," *Financial Times* (Mar. 10, 2021), available at https://www.ft.com/content/fedcf26c-4313-4649-b628-9a2884b3e43e; Michael Pooler & Robert Smith, "The workings of Sanjeev Gupta's empire," *Financial Times* (Feb. 26, 2020), available at https://www.ft.com/content/5f279604-5719-11ea-a528-dd0f971febbc; Eddie Spence, "Greensill Crisis Pressures Ambitious 'Savior of Steel' Gupta," *Bloomberg* (Mar. 3, 2021), available at

Greensill became Gupta's primary source of credit in 2017, after several large banks stopped providing loans to Gupta. Greensill extended more than $7 billion of credit to Gupta's firms by 2019. Greensill tried to reduce its credit exposures to Gupta's companies in 2019 and 2020, in response to pressure from BaFin, GAM, and Credit Suisse. However, Gupta's companies still owed $5 billion to Greensill in March 2021.[45]

During the last three years of its operations, Greensill found it increasingly difficult to sell all of its invoice-backed bonds to GAM and Credit Suisse. Consequently, Greensill Bank kept a larger share of Greensill's loans on the bank's books. At the end of 2020, Greensill Bank had a loan portfolio of €3.5 billion, including more than €2 billion of credit extended to Gupta's companies. Greensill Bank's credit exposures to Gupta's companies doubled between 2018 and 2020, and the bank's total assets grew from €3.8 billion to €4.5 billion between 2019 and 2020. Greensill Capital borrowed almost £100 million from Greensill Bank during the last few months before Greensill Capital collapsed in March 2020.[46]

In March 2021, Greensill Bank held total deposits of €3.6 billion, including €700 million of uninsured deposits from German municipalities and other institutional investors. German municipalities held large deposits in Greensill Bank because the bank paid interest rates on

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https://www.bloomberg.com/news/articles/2021-03-03/greensill-woes-put-pressure-on-ambitious-savior-of-steel-gupta.

[45] Basquill, *supra* note 38; "Behind Greensill's Collapse," *supra* note 32; MacDonald & Mavin, *supra* note 44; Alistair MacDonald & Rhiannon Hoyle, "Tycoon Seeks to Delay Payments of Billions in Debt to Greensill," *Wall Street Journal* (Mar. 10, 2021), B2; Robert Smith et al., "How Sanjeev Gupta lived large on the back of rickety financing," *Financial Times* (Mar. 19, 2021), available at https://www.ft.com/content/8d5956d2-33e0-4ab0-a6d9-76cf63929bd9; Robert Smith, Arash Massoudi & Olaf Storbeck, "BaFin pushes Greensill Bank to reduce its exposure to Sanjeev Gupta," *Financial Times* (Feb. 18, 2021), available at https://www.ft.com/content/44c47737-5d8b-4aca-8ff3-dbcc8349bc04.

[46] Mavin & Steinberg, *supra* note 35; Smith, Pooler & Storbeck, *supra* note 30; Robert Smith & Olaf Storbeck, "German regulator files criminal complaint against Greensill Bank," *Financial Times* (Mar. 3, 2021), available at https://www.ft.com/content/dd0735f9-3587-4d1c-977b-6554dfc4c019; Smith, Massoudi & Storbeck, *supra* note 45; Julie Steinberg, Ben Dummett & Patricia Kowsmann, "Greensill to File for Insolvency," *Wall Street Journal* (Mar. 4, 2021), B1; Kaye Wiggins, Olaf Storbeck & Robert Smith, "Greensill Capital borrowed almost €100m from its own bank before collapse," *Financial Times* (Mar. 12, 2021), available at https://www.ft.com/content/6612daba-d846-4a84-aa4f-23f8c202f283.

deposits that were significantly higher than the rates paid by other German banks, with the prominent – and equally troubling – exception of Wirecard Bank. During the same period, many German banks either charged fees or paid negative interest rates on institutional deposits.[47]

German municipalities held about €500 million of uninsured deposits in Greensill Bank when BaFin seized control of the bank in March 2021 and subsequently placed it in liquidation. BaFin's actions stunned municipal officials and other uninsured depositors, and they strongly criticized BaFin for not issuing timely public warnings about Greensill Bank's risks. In April 2021, the administrators of Germany's deposit insurance programs paid €2.7 billion to over 20,000 individual depositors in Greensill Bank. Municipalities and other institutional depositors were not protected by deposit insurance and did not receive payments.[48]

Greensill Bank did not produce substantial profits after Greensill acquired it in 2014. BaFin received warnings about Greensill Bank's very large exposures to Gupta's companies in 2019 (from a report issued by a German credit rating agency) and again in 2020 (from a report issued by the Association of German Banks). BaFin told senior executives of Greensill Capital

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[47] Steven Arons, Nicholas Comfort & Lucca De Paoli, "Billionaire Greensill's Bank Attracts Regulatory Scrutiny," *Bloomberg* (Aug. 29, 2020), available at https://www.bloomberg.com/news/articles/2020-08-19/billionaire-greensill-s-german-bank-draws-regulatory-scrutiny; Patricia Kowsmann, "German Bank Declared Insolvent," *Wall Street Journal* (Mar. 17, 2021), B12; Smith & Storbeck, *supra* note 46; Olaf Storbeck, "German towns braced for €500m in losses from Greensill Bank collapse," *Financial Times* (Mar. 12, 2021), available at https://www.ft.com/content/015fd183-42d5-4fdb-8f8e-d63187a3f67b; *see also supra* note 21 and accompanying text (discussing the similarly high deposit interest rates paid by Wirecard Bank).

[48] "German capital markets: A new master for the watchdog," *Economist* (Mar. 27, 2021) [hereinafter "German watchdog"], available on Westlaw at 2021WLNR 9845402; Jean-Philippe Lacour, "German municipalities left reeling by Greensill scandal," *Agence Frence-Presse English Wire* (Mar. 17, 2021), available on Westlaw; Duncan Mavin & Julie Steinberg, "German Regulator Tipped on Greensill: Authorities were scrutinizing the bank for over a year before it failed," *Wall Street Journal* (April 1, 2021), B12 [hereinafter "German Regulator Tipped"]; John O'Donnell & Tom Sims, "Analysis: Shaken by Greensill, German towns pull millions from banks," *Reuters* (Mar. 31, 2021), available at https://www.reuters.com/article/us-britain-greensill-germany-savings-ana/analysis-shaken-by-greensill-german-towns-pull-millions-from-banks-idUSKBN2BN0R6; Tom Sims, "Greensill Bank customers get $3 bln in deposit protection scheme," *Reuters* (April 5, 2021), available at https://www.nasdaq.com/articles/greensill-bank-customers-get-%243-bln-in-deposit-protection-scheme-2021-04-05; Storbeck, *supra* note 47.

and Greensill Bank to reduce the bank's exposures to Gupta's firms and increase the bank's capital.[49]

In May 2019 and November 2020, Greensill used more than $1 billion of funding from SoftBank to strengthen Greensill Bank's capital. BaFin allowed Greensill Bank to remain in operation and to expand its deposits and loans, including loans to Gupta's firms. BaFin received "whistleblower tips" in 2020 about Greensill Bank's financial weakness as well as alleged fraudulent reports to regulators. In September 2020, BaFin commissioned a special audit of the bank by KPMG. However, BaFin did not take any public action against the bank until March 3, 2021. On that date, BaFin filed a criminal complaint against the bank for suspected accounting fraud and seized control of the bank.[50]

Greensill's empire quickly collapsed after Tokio Marine, its largest credit insurer, refused to renew €4.6 billion of credit insurance that expired on March 1, 2021. Greensill sued to compel Tokio Marine to renew those policies, but an Australian court rejected Greensill's claims. Greensill could not find replacement credit insurance, and Credit Suisse and GAM froze their investment funds holding Greensill's invoice-backed bonds. In addition, Gupta's companies stopped paying invoices they owed to Greensill. With its major sources of funding cut off, Greensill was doomed. Greensill's holding companies in Australia and the U.K. filed for insolvency administration, and BaFin received court approval to liquidate Greensill Bank on

[49] Arons, Comfort & De Paoli, *supra* note 47; "German Regulator Tipped," *supra* note 48; "German watchdog," *supra* note 48; Smith, Massoudi & Storbeck, *supra* note 45; Patricia Uhlig, "German bank auditors say lodged Greensill Bank complaints in 2020," *Reuters* (Mar. 4, 2021), available at https://www.reuters.com/business/finance/german-bank-auditors-say-lodged-greensill-bank-complaints-2020-2021-03-04/.

[50] "Behind Greensill's Collapse," *supra* note 32; "German Regulator Tipped," *supra* note 48; "German watchdog," *supra* note 48; Smith & Storbeck, *supra* note 46.

March 16, 2021. In April, creditors voted to liquidate Greensill's top-tier Australian holding company.[51]

As Greensill unraveled, substantial evidence of fraud emerged. Greensill Capital's administrator, Grant Thornton, determined that many invoices underlying Greensill's loans to Gupta's firms were based on "prospective" sales involving companies that had never done business with Gupta's companies and had no plans to do so.[52] Similarly, KPMG's special audit of Greensill Bank failed to confirm the validity of many invoices underlying the bank's loans to Gupta's companies. Some invoices reflected dubious "sales" purportedly made by Gupta's companies to related firms that were owned by "friends of Sanjeev." Others documented completed sales but were actually based on "hypothetical" future sales. BaFin closed Greensill Bank after determining that the bank "was unable to provide evidence of the existence" of many receivables backing the bank's loans to Gupta's firms.[53]

4. Failures by Greensill's Regulators

[51] Behind Greensill's Collapse, *supra* note 32; "German court orders Greensill Bank windup, after British parent's insolvency filing," *DW* (Mar. 16, 2021), available at https://www.dw.com/en/german-court-orders-greensill-bank-windup-after-british-parents-insolvency-filing/a-56892342?maca=en-EMail-sharing; Lucca De Paoli, "Greensill, Gupta, and the Fragile Tower of Money and Metal (1)," *Bloomberg Law* (Mar. 10, 2021); Kowsmann, *supra* note 47; Mavin & Steinberg, *supra* note 35; Nelson, Ewing & Alderman, *supra* note 30; Ian Smith, "Greensill's demise turns spotlight on Marsh," *Financial Times* (April 8, 2021), available at https://www.ft.com/content/4e8e5730-6225-41be-b934-10fe7c2d4062; Smith, Pooler & Storbeck, *supra* note 30; Jamie Smyth, "Greensill parent enters liquidation," *Financial Times* (April 22, 2021), available at https://www.ft.com/content/0a256a37-d8e4-4655-91cc-678e38685628; Jenny Wiggins, Simon Evans & Hans van Leeuwen, "Claims war to heat up after Greensill Bank assets frozen," *Australian Financial Review* (April 8, 2021), available at https://www.afr.com/companies/financial-services/claims-war-to-heat-up-after-greensill-bank-assets-frozen-20210408-p57hfp; Kaye Wiggins, Robert Smith & Sylvia Pfeifer, "Greensill files for administration and warns of GFG 'defaults'," *Financial Times* (Mar. 8, 2021), available at https://www.ft.com/content/db5bc46a-57cc-4c7d-a6fe-47f5a59412d4.

[52] Basquill, *supra* note 38; Cynthia O'Murchu & Robert Smith, "Greensill Capital's administrator unable to verify Gupta invoices," *Financial Times* (April 1, 2021); available at https://www.ft.com/content/fe234f59-75b9-44f7-af8a-f05e588957b7; Smith, O'Murchu & Walker, *supra* note 38.

[53] Smith & Storbeck, *supra* note 46; Robert Smith, Cynthia O'Murchu & Michael Pooler, "Invoices to 'Friends of Sanjeev' underpinned Greensill loans," *Financial Times* (April 23, 2021), available at https://www.ft.com/content/aca5f4d3-6ae1-46ce-8729-ce2f2d4ab9f7?emailId=6087427aab426c0004d7cbc9; Robert Smith, Cynthia O'Murchu & Michael Pooler, "Greensill financed Gupta based on invoices from 'friends of Sanjeev'," *Financial Times* (Mar. 16, 2021), available at https://www.ft.com/content/b1ce1ab2-46d0-4005-a633-b38a4ee16aac; Spence, *supra* note 44; Wiggins, Storbeck & Smith, *supra* note 46.

Like Wirecard, Greensill developed influential relationships with government agencies and hired former officials to strengthen those connections. Lex Greensill was a close friend of Jeremy Heywood after working with Heywood at Morgan Stanley. Heywood became head of the U.K.'s civil service and served as cabinet secretary during David Cameron's tenure as Prime Minister (2010-15). Heywood gave Greensill a desk in the Cabinet Office, and the Cameron government appointed Greensill as a "crown representative" to advise on procurement issues. Greensill strongly encouraged the U.K. government to increase its use of supply-chain financing. In 2017, Greensill received a Commander of the British Empire award "for services to the economy."[54]

In 2015, Greensill hired Bill Crothers, the U.K.'s head of government procurement, first as a part-time adviser (shortly before Crothers retired) and then as a director. Greensill also hired David Cameron as an adviser in 2018. In the same year, the U.K. government awarded Greensill and Taulia, a fintech firm, a joint government contract to provide supply-chain financing for invoices owed by the U.K.'s National Health Service (NHS) to pharmacies. After the Covid pandemic broke out in 2020, Greensill offered to give NHS employees early access to their paychecks (without charge) through advance payments made by Greensill. Greensill described its "early payments" plan as a "piece of altruism." Greensill used that "altruism" to promote its lobbying campaign to qualify as a participant in the U.K. government's guarantee programs for pandemic business loans.[55]

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[54] Cynthia O'Murchu et al., "Greensill's demise shines spotlight on government ties," *Financial Times* (Mar. 4, 2021), available at https://www.ft.com/content/41a1cf9e-c610-4263-88a9-39a8c2944dbc; Sebastian Payne & George Parker, "Greensill worked within government without contract," *Financial Times* (April 26, 2021), available at https://www.ft.com/content/cca3ab83-22d6-4bc3-8c24-1208e1c0f981; Jim Pickard, "Greensill scandal puts Heywood's business dealings under spotlight," *Financial Times* (April 23, 2021), available at https://www.ft.com/content/78a63195-87c9-484c-8419-f9e9551e3498.

[55] Cynthia O'Murchu, "Senior civil servant held Greensill role while still in government," *Financial Times* (April 14, 2021), available at https://www.ft.com/content/e383bc59-b447-4f19-950d-baf66c51ceb3; O'Murchu et al., *supra* note 54; Cynthia O'Murchu, Jim Pickard & Robert Smith, "Ex-senior civil servant took Greensill job without

In June 2020, the British Business Bank approved Greensill as a provider of government-guaranteed loans to U.K. businesses in amounts up to £50 million per qualified borrower. Greensill extended "hundreds of millions of pounds" of government-guaranteed loans to Gupta's firms, including new shell companies that Gupta set up for "the sole purpose of securing more taxpayer-backed loans through Greensill." David Cameron and John Healey, the Labor Party's shadow defense minister, made repeated – but unsuccessful – efforts to persuade top-level officials to approve Greensill for even larger pandemic loan guarantee programs established by the U.K. Treasury and the Bank of England.[56]

Lex Greensill made similar efforts to exploit his government connections in Australia and Germany. He hired Julie Bishop, Australia's former foreign minister, as an adviser. With Bishop's help, Greensill tried (but failed) to persuade Australian officials to retain Greensill for an early payments program for Australian government employees. David Cameron unsuccessfully urged Germany to hire Greensill for a similar early payments scheme for German government workers.[57]

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telling watchdog," *Financial Times* (Mar. 30, 2021), available at https://www.ft.com/content/93561de9-6d74-4267-bcff-9759b4b1e01c; Robert Smith, "Greensill tried to use NHS pay 'gift' as a lever to sell supply chain finance," *Financial Times* (April 23, 2021), available at https://www.ft.com/content/b76df097-8f3c-4310-92ac-b0aaa2fa5646.

[56] George Parker, "Sunak 'pushed' Treasury to help Greensill after Cameron's lobbying," *Financial Times* (April 8, 2021), available at https://www.ft.com/content/01086016-2fc1-4462-a709-e2a13ee32392; George Parker, Daniel Thomas & Robert Smith, "Labour faces Greensill pressure over shadow minister's lobbying," *Financial Times* (April 7, 2021), available at https://www.ft.com/content/f75c027c-69bf-4173-8415-33d643cf6440; Jim Pickard et al., "Cameron lobbied BoE and top Treasury official over Greensill," *Financial Times* (April 22, 2021), available at https://www.ft.com/content/7363a40c-f250-4e1a-bdff-002f065151f8; Robert Smith et al., "UK taxpayer exposed to Gupta and Greensill via £1bn debt guarantees," *Financial Times* (Mar. 12, 2021), available at https://www.ft.com/content/8baceeda-957a-409d-8061-17b70f298fe1; Robert Smith & Cynthia O'Murchu, "Gupta carved up business empire in attempt to secure UK Covid loans," *Financial Times* (April 15, 2021), available at https://www.ft.com/content/b2c846db-2537-47e3-a75d-5118c69ba54a; Robert Smith & Michael Pooler, "Sanjeev Gupta-linked firms with just 11 staff took millions in UK loans" *Financial Times* (Oct. 7, 2020), available at https://www.ft.com/content/9c12a439-4bfd-4cce-bf74-4bd7d7ffe238.

[57] Ian Smith et al., "Lex Greensill cited David Cameron in bungled Australian lobbying," *Financial Times* (April 9, 2021), available at https://www.ft.com/content/0cffbfed-d7c3-44d0-bf1b-183673a68be4; Olaf Storbeck, Robert Smith & Sebastian Payne, "Cameron pitched Greensill's services to German official," *Financial Times* (April 16, 2021), available at https://www.ft.com/content/7bed418b-d4c3-4ad4-b07e-10c7fd83dac4.

Lex Greensill obtained better results when he dispatched Cameron to Australia in 2018 to strengthen Greensill's relationship with Greg Brereton. Brereton was the lead underwriter for Bond & Credit Co. (BCC), Greensill's primary provider of credit insurance. Greensill's relationship with Brereton flourished until Tokio Marine acquired BCC in 2019 and fired Brereton in 2020. Tokio Marine alleged that Brereton breached his risk limit by approving almost $8 billion of credit insurance for Greensill's invoice-backed bonds.[58]

Greensill increased its political clout through its status as the principal funding source for Sanjeev Gupta's industrial empire. Gupta was acclaimed as "the savior of steel" as he acquired troubled steel mills and other struggling industrial facilities in Australia, France, the U.K., and several other countries. The U.K. provided £1 billion of loan guarantees to support Gupta's British operations. Greensill's role as the leading financier for Sanjeev Gupta created a symbiotic relationship between Greensill and Gupta.[59] Government agencies were likely reluctant to crack down on Greensill in light of Gupta's heavy dependence on Greensill's funding.

Financial regulators in Germany, the U.K., and Australia failed to respond in a timely or effective manner to Greensill's growing risks. As described above, BaFin monitored Greensill Bank's financial condition between January 2019 and March 2021, and it also received reports and whistleblower tips about the bank's financial dangers and suspected fraud. BaFin persuaded Greensill's management to inject about €1 billion of new capital into Greensill Bank during 2019 and 2020. BaFin allowed Greensill Bank to continue growing and to double the size of its

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[58] Bergin, *supra* note 36; Ian Smith, *supra* note 51; Ian Smith et al., *supra* note 36.

[59] De Paoli, *supra* note 51; MacDonald & Mavin, *supra* note 44; Pfeifer, Barnes & Smyth, *supra* note 44; Pooler & Smith, *supra* note 44; Smith et al., *supra* note 45; Spence, *supra* note 44; *see also* David Ricketts, "Myners: FCA 'culpable' for ignoring warning signs on Greensill," *editorpen* (Mar. 16, 2021) (quoting Paul Myners' observation that "[t]here was a symbiosis between Gupta and Greensill . . . . There was too much dependency between the two."), available at https://editorpen.com/finance/myners-fca-culpable-for-ignoring-warning-signs-on-greensill/.

Gupta-related exposures between 2018 and 2020, while paying above-average interest rates that attracted large amounts of deposits (including uninsured deposits from German municipalities).[60]

BaFin did not detect evidence of fraud or other criminal activities when it reviewed Greensill Bank during the first half of 2020. In September 2020, BaFin commissioned KPMG to perform a special audit of the bank. By January 25, 2021, KPMG "uncovered evidence that called into question the future of the bank and revealed 'serious violations by the management'." Despite KPMG's findings, BaFin did not issue public warnings or institute public enforcement measures against Greensill Bank until it seized control of the bank on March 3, 2021.[61]

BaFin may have delayed taking action against Greensill Bank because of Sanjeev Gupta's attempt to buy a large German steel operation in the fall of 2020. In October 2020, Gupta made an unsolicited offer to purchase the troubled steel division of Thyssenkrupp AG, a large German industrial conglomerate. In mid-February 2021, Thyssenkrupp terminated its negotiations with Gupta due to concerns about several issues, including Gupta's heavy reliance on Greensill's supply-chain financing. In view of the importance of Thyssenkrupp's steel division to the German state of North Rhine-Westphalia, it is possible that BaFin refrained from taking public action against Greensill Bank until Thyssenkrupp rejected Gupta's bid.[62]

In sum, BaFin's supervisory record at Greensill Bank was only marginally better than its woeful performance at Wirecard Bank. BaFin adopted the same "blinkered" supervisory

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[60] *See supra* notes 48-50 and accompanying text.

[61] Arons, Comfort & De Paoli, *supra* note 47; Maria Fritzsche, "First Wirecard, now Greensill Bank lead to questions for BaFin," *Thomson Reuters Regulatory Intelligence* (Mar. 12, 2021), available on Westlaw; "German Regulator Tipped," *supra* note 48; Smith & Storbeck, *supra* note 46; Spence, *supra* note 44; Storbeck, *supra* note 47.

[62] Joe Miller & Robert Smith, "Thyssenkrupp ends talks with Gupta's Liberty over steel unit," *Financial Times* (Feb. 17, 2021), available at https://www.ft.com/content/cd80a3e0-02d9-4ed3-a44a-fdbd68196e20; Michael Pooler, Joe Miller & Robert Smith, "Sanjeev Gupta in spotlight after swoop on Thyssenkrupp steel unit," *Financial Times* (Oct. 25, 2020), available at https://www.ft.com/content/1679627e-c294-426e-ace4-9d75d83c8661; Smith, Massoudi & Storbeck, *supra* note 45; Julie Steinberg et al., "SoftBank-Backed Lender Faces Insolvency with Funds Blocked," *Wall Street Journal* (Mar. 2, 2021), A1.

approach toward Greensill Bank as it did toward Wirecard Bank. In each case, BaFin focused its attention on the bank and did not attempt to ascertain the full range of financial risks posed by the bank's parent company, affiliates, insiders, influential investors, and customers. According to German MP Lisa Paus, "The Greensill Bank case fits seamlessly into a long list of oversight failures in recent years."[63]

U.K. regulators did intervene to prevent the failure of Wyelands Bank, a U.K. bank that Sanjeev Gupta owned. In 2020, the U.K. Prudential Regulatory Authority (PRA) ordered Wyelands Bank to conduct "an independent review of its lending practices and financial controls." The PRA determined that Wyelands Bank had extended credit to Gupta's companies, as well as firms owned by "friends of Sanjeev," in amounts that exceeded legal limits on bank lending to "connected entities." The PRA also found that Wyelands Bank – like Wirecard Bank and Greensill Bank – offered "highly attractive deposit rates" to obtain funding for its loans to related parties.[64] In March 2021, the Bank of England ordered Wyelands Bank to return all deposits held by its retail customers. The Bank of England also directed Gupta to inject £75 million of new capital into Wyelands Bank.[65]

However, U.K. authorities did not take timely or effective measures to prevent the collapse of Greensill Capital, despite numerous warning signs. Serious problems with Greensill's supply-chain financing became a matter of public knowledge in 2018. GAM fired Tim Haywood, a senior fund manager, after determining that he violated GAM's risk

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[63] Fritzsche, *supra* note 61 (quoting Ms. Paus); "German watchdog," *supra* note 48; "German Regulator Tipped," *supra* note 48; Woodman, *supra* note 34; *see also* "Beefing up BaFin," *Financial Times* (Mar. 30, 2021) (editorial) (describing BaFin as "a toothless lapdog whose incompetence resonates beyond its borders," as shown by its very poor record of supervising Wirecard and Greensill).

[64] Tabby Kinder, Robert Smith & Michael Pooler, ""Wyelands Bank launches review after regulatory probe, *Financial Times* (Feb. 28, 2020), available at https://www.ft.com/content/a591c986-5983-11ea-abe5-8e03987b7b20; Robert Smith et al., "Sanjeev Gupta draws scrutiny over Wyelands Bank loans," *Financial Times* (Feb. 23, 2020), available at https://www.ft.com/content/2f3bde1e-4e4f-11ea-95a0-43d18ec715f5; Smith, Pooler & Storbeck, *supra* note 30.

[65] Smith et al., *supra* note 45; Smith, Massoudi & Storbeck, *supra* note 45.

management policies by purchasing huge amounts of Greensill's bonds, including many bonds backed by invoices owed by Gupta's firms. GAM demanded a reduction in the exposure of its fund to Gupta's companies. Gupta paid off more than more than $700 million of Greensill bonds held by GAM, using funds provided by Greensill and Greensill Bank. In addition, Morgan Stanley purchased $300 million of Greensill bonds held by GAM and repackaged those bonds into new securities that Morgan Stanley sold to its own clients. In June 2019, House of Lords member (and former U.K. financial services minister) Paul Myners urged the Conservative government to investigate the Greensill-GAM scandal, but no public inquiry occurred.[66]

In early 2020, NMC, which operated a chain of hospitals, failed after receiving large amounts of supply-chain financing from Greensill. NMC's collapse was considered "one of the worst corporate governance scandals to hit the London stock exchange." Several other large recipients of Greensill loans failed during the pandemic crisis. Even so, "as red flags cropped up, Greensill remained in high esteem among British officials," and Greensill was allowed to participate in one of the U.K.'s pandemic loan guarantee programs.[67]

Greensill Capital's ability to remain in business until March 2021 owed much to Lex Greensill's relationships with David Cameron and other former and present U.K. government leaders. As Lord Myners observed after Greensill collapsed, British ministers and civil servants

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[66] Tom Bergin & John Miller, "Britain's Lord Myners urges U.K. to investigate GAM-Greensill fund," *Reuters* (June 19, 2019), available at https://www.reuters.com/article/uk-gam-holdg-investigation-idUKKCN1TK1H0; "Greensill Relied on Wall Street," *supra* note 33; Lawrence Fletcher et al., "Asset management: Inside the scandal that rocked GAM," *Financial Times* (Mar. 18, 2019), available at https://www.ft.com/content/56e5b0ba-39ed-11e9-b856-5404d3811663; O'Murchu et al., *supra* note 54; Michael Pooler & Robert Smith, "How Sanjeev Gupta's empire is fuelled by opaque financing," *Financial Times* (Sept. 17, 2019), available at https://www.ft.com/content/e8e2d33c-dfb3-11e9-b112-9624ec9edc59; Smith, Pooler & Storbeck, *supra* note 30.

[67] Mavin & Steinberg, *supra* note 35; Robert Smith, "Softback-backed Greensill suffers raft of client defaults," *Financial Times* (May 3, 2020), available at https://www.ft.com/content/d5a5951f-bab8-4ea8-b0d7-2b70455c9ed5; Nelson, Ewing & Alderman, *supra* note 30; Smith, Pooler & Storbeck, *supra* note 30.

"seemed at times bewitched" by Lex Greensill. "There was a failure to ask basic questions about him and how his business had so quickly become a big player in such a significant market."[68]

Lord Myners repeatedly warned government officials about Greensill's "potential systemic risk and fraud." However, his warnings elicited "nothing but bland responses from government and financial regulators who appeared to have no appetite to ask some pretty obvious questions." Myners concluded that the U.K. Financial Conduct Authority (FCA) was "culpable" for failing to respond to "the warning signs around Greensill." Kevin Hollinrake, a Conservative MP and chair of a Parliamentary group on fair business banking, agreed that the FCA "fail[ed] to fulfill" its mandate when it allowed Greensill Capital "to operate in the UK in the shadows" for so long.[69]

The FCA delegated oversight of Greensill Capital to ACA Mirabella, a private company that served as Greensill's "appointed representative" and was responsible for ensuring Greensill's compliance with the FCA's investment disclosure requirements. ACA Mirabella cancelled its representation a few days before Greensill Capital failed, but it did not issue any public warnings. As one journalist commented, the FCA's delegation of supervisory responsibility for Greensill Capital to a private entity was "a dubious set-up for keeping watch on a company of Greensill's size – it arranged about $50 billion of financing last year alone."[70]

Australian regulators also failed to take meaningful steps prior to the collapse of Greensill's top-tier holding company, which was incorporated and headquartered in Australia.

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[68] O'Murchu et al., *supra* note 54 (quoting Lord Myners).
[69] Kayleena Makortoff & Phillip Inman, "Greensill Capital collapse shows City watchdog needs shake-up, say MPs," *Guardian* (Mar. 9, 2021) (quoting Mr. Hollinrake and Lord Myners), available at https://www.theguardian.com/business/2021/mar/09/greensill-capital-collapse-shows-city-watchdog-needs-shake-up-say-mps; Ricketts, *supra* note 59 (quoting Lord Myners); *see also* Tom Braithwaite, "Billions at stake and no one knows who takes the hit," *Financial Times* (Mar. 12, 2021) ("Citing the need for confidentiality, the government has refused for almost two years to answer questions about Greensill posed by former City minister Lord Myners."), available at https://www.ft.com/content/811b1211-3135-4622-a81f-4bcbda568823.
[70] Braithwaite, *supra* note 69; *see also* Makortoff & Inman, *supra* note 69; Ricketts, *supra* note 59.

The Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) paid little attention to Greensill before it failed. The passivity of Australian agencies is difficult to explain, in light of Greensill's headquarters in Australia and its heavy reliance on credit insurance provided by Australian insurance companies. In addition, Greensill provided essential financing for Sanjeev Gupta's Australian steel mills and other production facilities, which employed 7,000 people.[71]

In late November 2020, John Hempton, an Australian hedge fund manager, warned APRA and ASIC about the financial risks posed by Greensill's operations as well as the very large potential claims faced by Tokio Marine and Insurance Australia Group (IAG) as credit insurers for Greensill's bonds.[72] Despite Kempton's warning, APRA and ASIC did not take any enforcement actions against Greensill before it collapsed into insolvency in March 2021. ASIC was "largely unconcerned about the operations of Greensill," and ASIC did not begin to investigate Greensill's operations until after it failed. Like their German and British counterparts, APRA and ASIC did not recognize or respond in a timely way to Greensill's growing dangers, particularly in view of Greensill's role as primary financier for Gupta's empire.[73]

5. Failures by Wirecard's and Greensill's Private-Sector Gatekeepers

[71] David Ross, "ASIC probes Greensill collapse," *Australian* (April 13, 2021), available on Westlaw at 2021 WLNR 11776285; Jenny Wiggins, Simon Evans & Hans van Leeuwen, "Long and winding road to oblivion for Greensill," *Australian Financial Review* (Mar. 27, 2021), available on Westlaw at 2021 WLNR 10250672; Perry Williams & Nick Evans, "Greensill Capital's unravelling entangles Sanjeev Gupta," *Australian* (Mar. 3, 2021); Woodman, *supra* note 34.

[72] Sarah Duckert, "APRA aware of IAG's potential Greensill risk since November," *Sydney Morning Herald* (Mar. 4, 2021), available at https://www.smh.com.au/business/banking-and-finance/apra-aware-of-iag-s-potential-greensill-risk-since-november-20210304-p577ov.html; Robert Gottliebsen, "IAG Counts Greensill Costs," *Australian* (Mar. 16, 2021), available on Westlaw at 2021 WLNR 8510262; John Hempton, "Greensill: Who is holding the bag?", *Bronte Capital* (Mar. 8, 2021), available at http://brontecapital.blogspot.com/2021/03/greensill-who-is-holding-bag.html; Robert Smith, Ian Smith & Jamie Smyth, "Hedge fund 'warned Australian regulator' about Greensill," *Financial Times* (Mar. 8, 2021), available at https://www.ft.com/content/5d725ad3-af81-4295-953a-714f2bf60862.

[73] Greensill failure highlights shadow banking risks," *The Banker* (April 1, 2021) [hereinafter "Greensill shadow banking risks"], available on Westlaw at 2021 WLNR 12266618; Woodman, *supra* note 34.

Asset managers supported the rapid growth of both Wirecard and Greensill. As discussed above, European asset managers were major backers of Wirecard's stock. SoftBank's Vision Fund served as a strategic investor and key funding source for both Wirecard and Greensill. Investment funds managed by General Atlantic, GAM, and Credit Suisse provided much of the funding that fueled Greensill's expansion.[74]

Global banks and a credit rating agency also played key roles in promoting both firms. Credit Suisse, Citigroup, Deutsche Bank, and several large European banks underwrote Wirecard's offering of £500 million of five-year notes in 2019. The disclosure memorandum for that offering included general references to allegations of accounting fraud and other misconduct involving Wirecard. However, the disclosure memorandum minimized the significance of those allegations, and it did not reveal the magnitude of Wirecard's fraud (including its fictitious foreign deposits).[75]

In October 2020, Credit Suisse and Citigroup tried to raise $1 billion of new funding for Greensill Capital through a private offering of equity and debt securities to institutional investors. The "initial pitch documents" for the offering touted Greensill's "underwriting excellence" and its "proven high quality management team." However, the pitch documents did not discuss Greensill's growing credit losses or BaFin's demands for additional capital infusions into Greensill Bank. Credit Suisse's and Citigroup's "fundraising drive" for Greensill was not successful, due in large part to contemporary news stories that described Greensill's mounting problems during 2020.[76]

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[74] *See supra* notes 12-16, 35-36, 41-43, and accompanying text.

[75] *See* Wirecard 2019 Offering Memorandum, *supra* note 8, at 1, 10-11, 34-35, 49-51, 64-65; *see also supra* notes 13-15 and accompanying text (discussing the 2019 offering of Wirecard's five-year notes).

[76] "Greensill Relied on Wall Street," *supra* note 33; Jared Lynch & Perry Williams, "Greensill raising in ASIC's sights," *Australian* (Mar. 12, 2021); Kaye Wiggins & Robert Smith, "Greensill painted a rosy picture as it sought $1bn before collapse," *Financial Times* (Mar. 11, 2021), available at https://www.ft.com/content/03f6649d-fdb6-4bfc-9ade-f970dfa1d7a0.

Morgan Stanley repackaged and sold about $300 million of Greensill's bonds held by GAM and backed by invoices from Sanjeev Gupta's companies, after GAM insisted on reducing its exposure to those bonds in 2018. Moody's provided investment-grade credit ratings for Wirecard's five-year notes and Greensill's invoice-backed bonds. Moody's did not downgrade its credit ratings for either Wirecard or Greensill until each firm faced imminent failure.[77]

Credit Suisse made the biggest and most costly mistakes about Greensill. In 2020, Credit Suisse's top executives still viewed Lex Greensill as a highly desirable client, despite Greensill's well-publicized difficulties and numerous warnings from Credit Suisse's risk managers. Credit Suisse's chief risk and compliance officer, Lara Warner, told her subordinates to leave the "academic ivory tower" and become "more commercial" and "aligned" with the bank's dealmakers. Warner and other senior executives approved a $160 million bridge loan to Greensill Capital in the fall of 2020 – while Credit Suisse and Citigroup were trying to sell Greensill's securities to institutional investors – over the objections of Credit Suisse's risk managers. Greensill Capital defaulted on that loan in March 2021.[78]

Credit Suisse allowed its investment funds to buy $10 billion of Greensill bonds, many of which were backed by obligations of high-risk companies. In addition, Credit Suisse did not confirm that Greensill maintained valid credit insurance coverage on its bonds. Credit Suisse evidently did not know that many of Greensill's bonds were backed by invoices for "prospective" rather than actual sales, even though Tokio Marine's credit insurance denied

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[77] *See supra* note 13 and accompanying text (discussing Moody's ratings for Wirecard and its five-year notes); "Greensill Relied on Wall Street," *supra* note 66 (discussing Morgan Stanley's sale of Greensill bonds held by GAM, and reporting that Moody's assigned its third-highest investment rating to Greensill's bonds, indicating "upper medium credit quality," and did not downgrade Greensill's bonds until March 2021).

[78] Mavin, Steinberg & Patrick, *supra* note 31; Stephen Morris et al., "How Credit Suisse rolled the dice on risk management – and lost," *Financial Times* (April 20, 2021) [hereinafter "Credit Suisse rolled the dice"], available at https://www.ft.com/content/cb708ba2-ea8c-4c66-9190-0255fa5112e3; Stephen Morris et al., "Credit Suisse executives 'overrule' risk managers on $160m loan to Greensill," *Financial Times* (Mar. 11, 2021), available at https://www.ft.com/content/ad2b8900-d9a4-4e45-bc74-0fc8dbc88b82.

coverage for "prospective" invoices. Credit Suisse also did not know, until March 1, 2021, that Tokio Marine had refused to renew $4.6 billion of its credit insurance, even though Tokio Marine gave six months' notice of that refusal to Greensill.[79]

In mid-April 2021, Credit Suisse announced that its investment funds held $2.3 billion of bonds backed by "problematic loans" from Greensill to Gupta's firms, Bluestone Resources, and Katerra (a failing construction company owned by SoftBank's Vision Group). Credit Suisse estimated that investors in its funds could potentially lose up to $3 billion. An investors' class action suit was filed against Credit Suisse in April 2020, alleging that the bank's risk management failures inflicted massive losses on the plaintiffs.[80]

As shown above, most private-sector gatekeepers proved to be no better than government regulators in identifying or restraining the growth of speculative risks at Wirecard and Greensill. The one major exception was Tokio Marine, whose refusal to renew $4.6 billion of credit insurance triggered Greensill's collapse.[81]

Three factors contributed to the failures of private-sector gatekeepers. First, and most importantly, they considered Wirecard and Greensill to be valuable clients because they paid lucrative fees. The same desire to generate fees compromised the integrity and destroyed the effectiveness of many private-sector gatekeepers during the 1990s and 2000s.[82] Second, it was difficult for gatekeepers to evaluate the risks posed by Wirecard and Greensill because they were

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[79] "Behind Greensill's Collapse," *supra* note 32; Bergin, *supra* note 36; Mavin, Steinberg & Patrick, *supra* note 31; Steinberg, Dummett & Kowsmann, *supra* note 46.

[80] "Credit Suisse rolled the dice," *supra* note 78; Peter Jeffrey & Katherine Burton, " Credit Suisse Is Sued over Greensill Capital and Archegos (2)," *Bloomberg Law* (April 16, 2021); Margot Patrick & Julie Steinberg, "Bank Lays Out Greensill Hazards," *Wall Street Journal* (April 14, 2021), B1; Owen Walker, "Credit Suisse counts $1.2bn exposure to Sanjeev Gupta's steel empire," *Financial Times* (April 13, 2021), available at https://www.ft.com/content/5b75290b-fcec-4eb0-8b41-f5e42cce05a5.; Owen Walker & Stephen Morris, "Credit Suisse pegs potential Greensill fund losses at $3bn," *Financial Times* (Mar. 25, 2021), available at https://www.ft.com/content/bb4f4311-e8b6-46a5-885d-4ed9b9febd22; Jenny Wiggins & Simon Evans, "Credit Suisse ignored 'red flags': lawsuit," *Australian Financial Review* (April 19, 2021), available on Westlaw at 2021 WLNR 12938735.

[81] Nelson, Ewing & Alderton, *supra* note 30.

[82] Wilmarth, *Taming the Megabanks*, *supra* note 37, at 3-4, 197-203, 212, 230-42.

large international enterprises with complex corporate structures and far-flung business operations. Third, Greensill was a privately-held company and therefore was not subject to the disclosure requirements for publicly-traded companies. Despite those challenges, widespread publicity about Wirecard's and Greensill's problems and suspected fraud should have caused private-sector gatekeepers to exercise a much higher level of scrutiny in dealing with both companies.[83]

6. Lessons from the Failures of Wirecard and Greensill

a. Companies that combine banking and commercial activities create toxic conflicts of interest.

When Congress passed the BHC Act in 1956, one of its principal purposes was to separate banking and commerce by prohibiting affiliations between banks and commercial firms. In 1970, 1987, and 1999, Congress amended the BHC Act to close loopholes that allowed combinations between commercial enterprises and federally-insured depository institutions. On all four occasions, Congress determined that banking-and-commercial conglomerates seriously undermined the objectivity of bank lending and encouraged preferential and reckless credit practices. Congress recognized that commercially-owned banks had powerful incentives to use their government-subsidized deposits – the cheapest source of funding in the private sector – to provide unsound loans to help their commercial affiliates and customers of those affiliates.[84]

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[83] "Greensill shadow banking risks," *supra* note 73; McCrum, *supra* note 4; Langenbucher et al., *supra* note 25, at 7-8, 13-19, 30-33: Nelson, Ewing & Alderton, *supra* note 30; Owen Sanderson, "Greensill's private status sheltered it from short-seller scrutiny," *GlobalCapital* (Mar. 9, 2021), available on Westlaw at 2021 WLNR 10189787; "Wirecard inquiry," *supra* note 22.

[84] Roy Schotland, "Bank Holding Companies and Public Policy Today," at 233, 233-39, 263-83, in *FINE: Financial Institutions and the Nation's Economy: Compendium of Papers Prepared for the FINE Study*, House Comm. on Banking, Currency & Housing, 94th Cong., 2d Sess. (Comm. Print, June 1976), Book I; Bernard Shull, "The Separation of Banking and Commerce in the United States: Principal Issues" (OCC Economics Working Paper 1999-1), at 19-22, 40-42, 57-58, available at https://www.occ.gov/publications-and-resources/publications/economics-working-papers/pub-econ-working-paper-1999-1.pdf; Wilmarth, "Industrial Banks," *supra* note 1, at 8-9; Wilmarth, *Taming the Megabanks*, *supra* note 37, at 148-49, 166, 302, 308, 340;

The disasters at Wirecard and Greensill provide additional evidence that toxic conflicts of interest are very likely to occur when banks affiliate with commercial firms. Wirecard Bank made large transfers of funds to prop up its parent company and to benefit its insiders and companies they controlled. Greensill Bank provided excessive and unsound credit to its leading investors – General Atlantic, SoftBank, and Sanjeev Gupta – as well as affiliates and customers of those investors. Preferential and reckless loans contributed to Wirecard Bank's failure and were the primary cause of Greensill Bank's collapse.

b. Combinations between banks and commercial firms create dangerous concentrations of economic power and political influence as well as systemic threats to economic and financial stability.

Congress had additional goals in adopting the BHC Act, including the prevention of hazardous concentrations of economic power and political influence and the avoidance of systemic threats to economic and financial stability. Congress understood that banking-and-commercial conglomerates were likely to wield excessive economic power and political influence and to enjoy unfair competitive advantages over commercial firms that did not control banks. Members of Congress expressed great concerns about the economic power and political influence that giant banking-and-commercial cartels exercised in Germany and Japan before and during World War II, as well as their active support for Fascist dictatorships in both countries.[85]

Congress also recognized that problems arising in banking-and-commercial conglomerates were very likely to spread across the entire span of those enterprises, creating systemic threats to economic and financial stability. Historical experience provides abundant

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Arthur E. Wilmarth, Jr., "Wal-Mart and the Separation of Banking and Commerce," 39 *Connecticut Law Review* 1539, 1566-71, 1584-98 (2007) [hereinafter Wilmarth, "Wal-Mart"], available at http://ssrn.com/abstract=984103.

[85] Schotland, *supra* note 84, at 233-39; Shull, *supra* note 84, at 27-32, 55-58, 67-71; Wilmarth, "Wal-Mart," *supra* note 84, at 1566-71; "Note: Regulating the One-Bank Holding Companies: Precluding *Zaibatsu*?", 46 *St. John's Law Review* 320, 322-43 (1971).

evidence that validates Congress's concerns. During the early 1930s, (i) several large U.S. banks with industrial or commercial real estate affiliates failed, and (ii) numerous universal banks with close connections to industrial enterprises collapsed in Germany, Austria, Belgium, Italy, and other European countries. During the 1990s, Japan, South Korea, and Mexico experienced systemic economic and financial crises as serious disruptions spread across their banking-and-commercial conglomerates. During the financial crisis of 2007-09, the federal government bailed out three banking-and-commercial conglomerates (GM-GMAC, GE-GE Capital, and CIT).[86]

Like other banking-and-commercial conglomerates, Wirecard and Greensill became powerful sources of political influence for their insiders. Both organizations built extensive networks with former and current government officials to obtain government subsidies, political favors, and regulatory forbearance. The histories of both companies reinforce longstanding concerns that enterprises combining banking and commercial activities are likely to amass unacceptable levels of political influence.

Wirecard and Greensill also illustrate the risks of contagion produced by combinations between banks and commercial firms. When Wirecard and Greensill encountered serious problems, their subsidiary banks tried to support their parent companies. Both banks failed soon after their parent companies filed for insolvency. The downfalls of Wirecard and Greensill have not triggered systemic crises. However, the potential collapse of Sanjeev Gupta's industrial empire – if it cannot replace Greensill's financing – could have serious and adverse economic impacts in several countries.[87]

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[86] Wilmarth, *Taming the Megabanks*, *supra* note 37, at 90-101, 117-24; Wilmarth, "Industrial Banks," *supra* note 1, at 4-8; Wilmarth, "Wal-Mart," *supra* note 84, at 1559-64, 1586-87, 1594, 1598-1613.

[87] Braithwaite, *supra* note 69; Alistair MacDonald, "Small Town's Hopes Ride on Fate of Metals Empire," *Wall Street Journal* (May 5, 2021), A3; Sylvia Pfeifer & Jim Pickard, "Sanjeev Gupta rushes to raise cash to save steel

In addition, Wirecard's failure would have posed a very severe systemic threat to Germany's economy and financial system if Wirecard had carried out its bold plan to acquire Deutsche Bank before Wirecard's massive fraud was revealed. In that case, Wirecard and Wirecard Bank would almost certainly have been bailed out by the German government, just as the U.S. government rescued GM, GMAC, and GE Capital during the financial crisis of 2007-09.[88]

c. Consolidated supervision of banks and their affiliates is crucial. However, consolidated supervision is not likely to be effective for banking-and-commercial conglomerates.

The Wirecard and Greensill disasters have once again demonstrated the inadequacy of bank-centric supervision. A banking regulator cannot determine the full range of risks posed by a bank's affiliates – including the risks of unsound loans and other preferential transactions involving those affiliates and their insiders and customers – unless the regulator exercises comprehensive and consolidated supervisory authority over the bank, its parent company, and its other affiliates. BaFin supervised only Wirecard Bank and Greensill Bank and did not attempt to supervise their parent companies and affiliates. BaFin's bank-centric supervision failed to uncover risky and abusive transactions involving affiliates of Wirecard Bank and Greensill Bank until both banks were on the brink of failure.[89]

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empire," *Financial Times* (Mar. 28, 2021), available at https://www.ft.com/content/d81769e0-a9c9-4384-9c33-32dd19d8a78b; Jamie Smyth, "Sanjeev Gupta's 'spiritual home' Whyalla left on edge by crisis," *Financial Times* (May 3, 2021), available at https://www.ft.com/content/1e904e24-ce30-4914-8440-618e7524e777; Wilmarth, "Banking Privileges," *supra* note 1, at 9.

[88] Storbeck, *supra* note 9; Wilmarth, "Industrial Banks," *supra* note 1, at 4-9; Wilmarth, *Taming the Megabanks*, *supra* note 37, at 184, 281, 285-86, 291, 309.

[89] *See supra* notes 21, 25-27, 48-50, 60-63 and accompanying text; Wilmarth, "Banking Privileges," *supra* note 1, at 10-11; Wilmarth, "Industrial Banks," *supra* note 1, at 10-11; Wilmarth, "Wal-Mart," *supra* note 84, at 1533, 1613-17.

Moreover, as I have previously argued, it would not be feasible to establish an effective system of consolidated supervision for banking-and-commercial conglomerates. A consolidated federal supervisor of such conglomerates would face at least four unsolvable problems. First, no federal banking agency possesses the expertise and resources needed to regulate large commercial firms. Second, appointing a consolidated federal supervisor for banking-and-commercial conglomerates would lead investors and creditors to expect that the federal government would support such conglomerates during future financial and economic crises. Third, consolidated supervision would greatly increase the scope and intensity of federal regulation over large commercial sectors of our economy, thereby undermining the effectiveness of market incentives and market discipline. Fourth, large banking-and-commercial conglomerates would almost certainly be deemed "too big to fail" – a status that greatly reduce the effectiveness of supervisory discipline over them.[90]

d. Claims of "financial innovation" often serve as a rationale for regulatory arbitrage and as camouflage for fraud.

Wirecard and Greensill are notable examples of "innovative" fintechs that successfully "arbitraged global regulatory architecture" and shielded most of their operations from meaningful regulatory oversight. Both companies acquired banks in Germany, where BaFin followed lenient policies and did not exercise consolidated supervision over technology firms that controlled small or midsized banks. Wirecard and Greensill "exploited the gaps" left by BaFin's weak regulation and by similarly lax oversight in other countries, including Australia and the U.K.[91]

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[90] Wilmarth, "Industrial Banks," *supra* note 1, at 11-12; Wilmarth, "Wal-Mart," *supra* note 84, at 1617-21.
[91] "Beefing up BaFin," *supra* note 63; Plender, *supra* note 31; *see also* Fritzsche, *supra* note 61; "German watchdog," *supra* note 48; Lacour, *supra* note 48; O'Donnell & Sims, *supra* note 48; "Wirecard inquiry," *supra* note 22; "Wirecard scandal," *supra* note 22.

The pursuit of regulatory arbitrage has been a persistent and defining strategy for fintechs. Fintechs constantly assert that they need "regulatory sandboxes" and other forms of light-touch regulation to capitalize on their "innovative" plans. A central goal of fintechs is to avoid many of the prudential regulatory requirements and supervisory standards that apply to traditional banks and their corporate owners. As indicated above, the FDIC and OCC are currently trying to shield commercial owners of fintech industrial banks and fintech national banks from regulation under the BHC Act. The OCC is also attempting to exempt fintech national banks from the Community Reinvestment Act and other important regulations that apply to FDIC-insured banks. The FDIC and OCC claim to be promoting "innovation," but their initiatives represent dangerous forms of regulatory arbitrage that undermine the prudential regulatory regime for banks, thereby threatening financial stability and consumer protection.[92]

To appreciate the potential hazards of regulatory arbitrage by fintechs, consider China's experience. "China stands out as the world's major jurisdiction in which large-scale entry of Big Tech firms into financial services has already happened."[93] During the past decade, Ant Group/MYBank and Tencent/WeBank have become leading suppliers of deposit, payment, lending, and asset management services in China by exploiting their dominant positions in ecommerce and hands-off government policies. The close links between their ecommerce activities and their financial services have given Ant Group and Tencent "a decisive advantage in terms of access to individual data," enabling them to compile extensive credit scoring profiles for their customers. Ant Group and Tencent have provided huge volumes of loans to consumers and

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[92] Hilary Allen, "Sandbox Boundaries," 22 *Vanderbilt Journal of Entertainment & Technology Law* 299, 302-13 (2020), available at http://ssrn.com/abstract=3409847; Plender, *supra* note 31; Wilmarth, "Banking Privileges," *supra* note 1, at 1, 6-11.

[93] Kathryn Petralia, Thomas Philippon, Tara Rice, & Nicolas Véron, *Banking Disrupted? Financial Intermediation in an Era of Transformational Technology* 26 (Geneva Reports on the World Economy 22, 2019), available at https://www.cimb.ch/uploads/1/1/5/4/115414161/banking_disrupted_geneva22-1.pdf.

small businesses through partnerships with regulated banks, while requiring their partner banks to assume most of the credit risk for those loans.[94]

In recent months, China has launched a regulatory crackdown against Ant Group, Tencent, and other Chinese technology firms. China has instructed those firms to organize separate holding companies for their financial activities and to bring those activities into compliance with banking regulations. Chinese authorities have charged Ant Group, Tencent, and other technology firms with anticompetitive practices (such as blocking their customers from dealing with competitors), misuse of customer data, reckless and unsound lending, and exerting improper influence over government officials. Those charges, if valid, indicate that Big Tech firms are likely to create similar threats to the public interest in the U.S. and other countries if they are allowed to offer banking services without complying with the prudential regulatory rules and supervisory standards that apply to traditional banks and their corporate owners.[95]

Companies that deliberately skirt regulatory boundaries frequently engage in fraud

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[94] *Id.* at 24-27 (quote at 26), 34, 54, 70-71, 85-87, 105, 108; Ryan McMorrow, Henny Sender & Mercedes Ruehl, "Ant Group poised for one of 2020's biggest IPOs," *Financial Times* (July 20, 2020), available at https://www.ft.com/content/0ede30bb-ef34-436e-89d5-f62a02b78aa0; Stella Yifan Yie, "Ant Grows from Outsider to China's Hope," *Wall Street Journal* (July 22, 2020), B8; Quentin Webb & Jin Yang, "Tencent Builds Investment Powerhouse," *Wall Street Journal* (Mar. 4, 2021), B1; Xie Yu, "China's Curbs to Pinch Online Lenders," *Wall Street Journal* (Feb. 23, 2021), B10 [hereinafter Yu, "Online Lenders"]; Xie Yu, "Regulators Eye Debt Held by China's Youth," *Wall Street Journal* (Mar. 15, 2021), B5; Xie Yu & Jin Yang, "Ant Group to End Some Practices that Fueled Its Growth," *Wall Street Journal* (April 14, 2021), B3.

[95] Ryan McMorrow & Primrose Riordan, "How China's big tech companies upset Beijing," *Financial Times* (Nov. 16, 2020), available at https://www.ft.com/content/72317ec5-5a5c-44ab-8b8b-a752f9792168; Lingling Wei, "Beijing Probes Ant's Speedy IPO Approval," *Wall Street Journal* (April 28, 2021), A1; Lingling Wei, "China Blocked Ant IPO After Uncovering Who Stood to Gain," *Wall Street Journal* (Feb, 17, 2021), A1; Lingling Wei & Stephanie Yang, "China Steps Up Oversight of Tech," *Wall Street Journal* (May 1, 2021), A1; Jing Yang, "Ant Falls in Line as China Tightens Oversight," *Wall Street Journal* (April 13, 2021), A1; Stephanie Yang, "China's Tech Firms Issue Vows to Abide by Regulator's Rules," *Wall Street Journal* (April 15, 2021), B1; Yuan Yang, "Chinese regulators tell fintech groups to fix 'problems'," *Financial Times* (April 30, 2021), available at https://www.ft.com/content/e69d7064-a126-47c4-a57c-58489ba59d0b; Yuan Yang & Sun Yu, "Ant ordered to restructure by Chinese regulators," *Financial Times* (April 12, 2021), available at https://www.ft.com/content/5c14c1d1-bd9e-4654-9a12-93c4ac46792d; Yu, "Online Lenders," *supra* note 94; Yu & Yang, *supra* note 94; Keith Zhai, "Chinese Tech Giants Told to Curb Financial Services," *Wall Street Journal* (May 1, 2021), A1

when their business strategies fail to achieve their profit targets. Commentators have pointed out the strong similarities between the infamous Enron scandal and the debacles at Wirecard and Greensill. Like Enron, Wirecard and Greensill each tried to transform itself into an "innovative tech-fuelled behemoth" by avoiding regulation and disrupting traditional competitors. When expected profits did not materialize, each company became a "vast fraud" and used "obfuscation" – including financial engineering, off-balance-sheet vehicles, and foreign entities – to conceal its fraud.[96] As John Plender has warned, "Revolutions in finance have a nasty way of ending badly, especially when they happen at breakneck speed."[97]

Conclusion

Wirecard and Greensill provide cautionary lessons about the perils of allowing technology companies to offer banking services without complying with the prudential regulatory requirements and supervisory standards governing traditional banks and their corporate owners. Wirecard and Greensill also provide clear warnings about the unacceptable risks of combining banking and commercial activities, including toxic conflicts of interest, harmful concentrations of economic power and political influence, threats to financial and economic stability, regulatory arbitrage, supervisory blind spots, and fraud. Congress should stop the FDIC and OCC from continuing to pursue their efforts to undermine the BHC Act's longstanding and eminently wise policy of separating banking and commerce.

[96] Martin Arnold, "Fintechs expect regulatory backlash after Wirecard scandal," *Financial Times* (July 6, 2020), available at https://www.ft.com/content/76f0856d-8b0f-404e-a94d-31584e50c431; Patrick Jenkins, *supra* note 31 (quotes); "Wirecard scandal," *supra* note 22. For discussions of Enron's fraud, see Wilmarth, *Taming the Megabanks*, *supra* note 37, at 198-203, 219, 385 (note 99), 434 (note 128), and sources cited therein.
[97] Plender, *supra* note 31.