November 16, 2011 – Too Big To Be Sued

Too Big To Be Sued

Much has been written about those large financial firms and banks that have become either too big or too interconnected to be allowed to fail. Should such a large financial entity go under, it is thought the failure would drag down the entire financial system, pushing the world into an economic depression. Therefore, those firms thought to be too big to fail must be considered with diligence and foresight in regulatory terms. This is no easy task, because by the time an entity has become too big to fail it has reached a scale so large as to fend off attempts to control its scope and size. This is a genuine and dangerous dilemma.

However, there is another aspect to the too big to fail syndrome that is just as dangerous but that is widely underappreciated. Invariably, any entity that is too big to fail is also too big to be sued. By the time a bank or other financial institution has become too big to fail, it has also attained a legal status that few can challenge. Simply put, any entity considered too big to fail or anywhere near that level has at its disposal an army of lawyers defending it at every turn. This legal prowess and firepower renders large entities as almost immune to outside legal attack except by the most formidable of adversaries. In a very real sense, such entities have effectively morphed into being above the law.

Everyday examples abound of this too big to be sued syndrome. It largely explains why no one really important went to jail as a result of the financial crisis, even though there was much blame visible. Even when large entities are taken to legal task by government prosecutors; it usually results in a long drawn-out settlement process where guilt is never admitted. The government is more intent on securing certain victory, as in insider trading cases, rather than go head to head with a too big to be sued entity. Since a failed government prosecution against a too big to be sued entity is the worst possible outcome for the government, such suits are avoided at all costs. If such a case is brought, the too big to be sued entity must fight it with all the resources it can muster, as its very existence may be at stake.

Given the financial and legal power of the largest banks, that translates into a legal stand-off of sorts between the banks and the only entities in a position to challenge them when wrongdoing occurs; government agencies. In the case of the very largest financial entities, like JPMorgan, the CME Group and BlackRock, for example, the government agencies that regulate them, like the SEC and CFTC, may not be big enough to mount any true legal challenge. And I'm not so sure if an agency as powerful as the Justice Department could ever really challenge the likes of a JPMorgan. Certainly, any government agency would think long and hard about confronting JPMorgan head-on, considering the resource commitment required and the fight it would face.

Not a week goes by when someone hasn't written to me asking why instead of writing about the silver manipulation crime in progress, that I just don't sue them directly? I always explain that even if I had the financial ability to mount such a legal attack (I don't), I still wouldn't do so. That's because I would rather use the money to buy all the silver in the world instead of funding the legal effort to fight the army of lawyers that would await such a suit. The simple fact is that no one outside the US government may be big enough to stand up to the too big to be sued manipulators of silver. Additionally, a private suit faces a higher burden. Since the CFTC is the prime regulator of the silver market, unless it (or the DOJ) moves against the CME Group and JPMorgan, the manipulators have the perfect-sounding defense against private suits, namely, Â?if we were doing anything wrong, why haven't our regulators moved against us?Â?

Instead of implying innocence, however, the answer may have more to do with the actual resource matchup between the government and any too big to be sued entity. For instance, the CFTC has an annual budget of $200 million versus annual revenues of $120 billion and an annual profit of near $15 billion for JPMorgan. Total employees of the Commission number in the hundreds, while total employees at JPMorgan run to the hundreds of thousands. Does that sound like a fair match-up to you? Even if the CFTC were to devote its entire budget to fighting JPMorgan's role in the silver manipulation (something it can't do), it would still be no match. And please remember that JPMorgan is just one of the many thousands of entities and traders that the CFTC must monitor.

I know that many believe that the government is crooked and involved in the silver manipulation; just as many believe that CFTC chairman, Gary Gensler, is a tool of the devil himself, having worked at the reviled Goldman Sachs. Those beliefs aside, what I am suggesting is something else. The Commission's failure to address and terminate the silver manipulation may be more related to the resource mismatch it faces in confronting JPMorgan and the CME Group. I understand that there hasn't been support from a majority of Commissioners to go after the silver crooks at JPMorgan and the CME; I am postulating that even if there was majority support for such action, the resources would still not be available. The law is not always about what's fair and just; more often it revolves around resources and legal strategy.

I am not suggesting unlimited resources and more power be transferred to the government. No amount would ever be sufficient to match the resources of the too big to be sued entities. But neither am I suggesting that we succumb to the yoke of manipulation at the hands of corrupt, but resource-rich entities like JPMorgan and the CME. We do live in a society intended to be governed by the rule of law and JPMorgan and the CME Group are not above the law. So what can we do about it? The answer is what we have been doing about it all along, namely, take advantage of artificially depressed silver prices and agitate for the termination of the silver manipulation.

One of the best stories in the bible is that of David and Goliath. David slew the more powerful Goliath by virtue of his sling and a stone. Without the sling, there would have been no outcome of David defeating Goliath. I consider silver investors and market participants to be David and JPMorgan and the CME to be Goliaths (only much more evil). There is no way that JPMorgan or the CME can be defeated without a device like a sling, as they tower over everyone, the government included. (This is apart from a physical shortage ending the silver manipulation). Whereas David had a sling, silver investors have the Internet, which allows the spread of uncensored information. If JPMorgan and the CME are the silver criminals that I allege, then it is the dissemination of that information that will likely lead to their undoing. The evidence to date seems to suggest that process is well under way.

I have been alleging a manipulation in silver, due to uneconomic and excessive short selling on the COMEX for more than 25 years. But it is only in the past ten years or so that those allegations have been disseminated via the Internet. As a result of the allegations, the CFTC conducted two formal studies, in 2004 and 2008, in which they concluded that no silver manipulation was evident. Then, a few months after the last denial of manipulation in 2008, the agency initiated a new formal investigation which continues to this day and that was reaffirmed by the Commission only a week or so ago. This third and formal investigation resulted from my revelations that an unprecedented concentration existed on the short side that was held by JPMorgan. In turn, it is now common knowledge within the precious metals community that JPMorgan is the big COMEX silver short.

During these past three years, JPMorgan has remained silent on the allegations it has been manipulating the silver market by virtue of its concentrated short position. I think this is due to its status of being too big to be sued and knowing that even the government of the United States may be no match in a court of law. Likewise, the CME Group has avoided any comment on the silver manipulation and its role in allowing the two 30% silver smack downs this year, also due to its own status of being too big to be sued. But the silence of JPMorgan and the CME to the allegations has not stemmed the growing knowledge of their involvement in the silver manipulation.

I find it unfortunate that it has come to this, namely, repeated allegations of wrongdoing in the silver market by JPMorgan and the CME Group and the failure by the CFTC to address that wrongdoing. It was completely avoidable and not something I ever envisioned. The allegations have undermined confidence in our leading institutions and markets; something that must be labeled as undesirable. Even at this late date, it may be possible to avoid confrontation. All it would take is some open and honest debate. Open debate on the part of JPMorgan as to why it has been holding such a large concentrated COMEX silver short position over the years. Open debate on the part of the CME Group as to how a world commodity can fall (twice) 30% in a matter of days with no fundamental supply/demand change. Open debate by BlackRock on why it does nothing about a short position in its silver ETF, SLV, which is clearly fraudulent and manipulative.

Most important of all, we need open debate from the primary regulator, the CFTC, as to why it is powerless to terminate a manipulation that is clear to any objective observer. If it's because JPMorgan and the CME Group are just too big and mean, then ask for open assistance from the SEC and the Justice Department and the public. If it's because there are legitimate explanations for JPMorgan's, the CME's and BlackRock's behavior in the silver market, then provide those legitimate explanations. I think it's great that Commissioner Bart Chilton is out promoting the end to Ponzi schemes, but the fact is that by the time the CFTC gets involved in a Ponzi scheme, it is already too late and the money is long gone. How about interceding in the known crime in progress of the silver manipulation and prevent new damage?

What is not unfortunate is the continued opportunity presented to silver investors as a result of the continuing manipulation. It gets old, but the manipulation has created bargain entry points for investing in silver, both in the past and currently. It's hard to wear both hats simultaneously, but there are two aspects to the silver manipulation Â? outrage and opportunity. I'm human, so I'm sticking to outrage today. Yes, I'll be sending this to the CEO's of JPMorgan, CME and BlackRock.

Here's a quick market update. The most recent Commitment of Traders Report (COT) came in close to expectations. In silver, the total commercial net short position increased by just under2000 contracts, but not due to an increase in new commercial short selling. The raptors (the smaller commercials apart from the big 4 and big 5 thru 8) sold out more than 2000 of their long contracts, reducing their net long position to 15,000 contracts. The big 4 (read JPMorgan) and the big 5 thru 8 actually bought a few hundred contracts of their short position back. Although the total commercial net short position has increased by 6000 contracts from the extreme low point weeks ago, to 24,700 contracts, I would still classify it as spectacularly bullish in strict COT terms.

In gold, the total commercial net short position increased by a hefty 14,500 contracts, to almost 197,000 contracts, although less than the 20,000 to 30,000 contracts that I had estimated on Saturday. The increase was due to big 4 and raptor selling (the 5 thru 8 bought back a few thousand contracts). The gold COT is now neutral, with room to move in either price direction. We are almost 40,000 contracts away from the recent low commercial net short reading of under 160,000 contracts and more than double that number of contracts away from most recent bearish levels of the summer. Undoubtedly, changes in the composition of the gold COT will move future price, but you need a prophet to predict which way, not an analyst.

As can be seen in today's price action, where silver declined a full dollar from last night's close (for no legitimate reason), COT readings have little bearing on day to day price activity. I get the feeling more and more that silver is put down early in the COMEX trading day which forces it to struggle to recover the balance of the day. What controls daily pricing is the crooked trading activity on the CME, no doubt influenced by the presence of JPMorgan's crooked concentrated short position. I guess I'll get tired of calling the CME and JPMorgan crooks when they stop behaving as crooks. In the meantime, we must endure their illegal activities. While they control the next dollar or so in silver, they don't control the next ten to twenty dollars, which should be up.

Ted Butler

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Silver – $34

Gold – $1773

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