

M E M O R A N D U M

To: Members of the Committee on Financial Services  
From: FSC Committee Majority Staff  
Date: May 17, 2013  
Subject: May 22, 2013 Subcommittee on Oversight and Investigations Hearing titled  
“Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal  
Prosecution?”

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The Oversight and Investigations Subcommittee will hold a hearing titled “Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?” at 2:00 p.m. on Wednesday, May 22, 2013, in Room 2128 of the Rayburn House Office Building. The Attorney General has said that the Justice Department relies on “outside experts” when assessing the economic harm that might result if it prosecutes large financial institutions, and that the Justice Department’s assessment of that harm has inhibited it from prosecuting such institutions. This hearing will examine the appropriateness and adequacy of the Justice Department’s opinions about the collateral consequences of prosecuting large financial institutions, the Justice Department’s ability to assess the economic consequences of such prosecutions, and whether an institution’s “Too Big to Fail” status has prevented the Justice Department from appropriately resolving criminal matters.

This will be a one-panel hearing with the following witness:

- Hon. James M. Cole, Deputy Attorney General, Justice Department

**Big Banks and Criminal Prosecutions: Do Big Banks Get a Pass?**

In deciding whether to prosecute large financial institutions, the Justice Department consults with domestic and foreign regulators to consider the effects of its prosecutions on third parties and the financial markets. These consultations are consistent with standards adopted by the Justice Department to guide prosecutorial decision-making, which instruct prosecutors to assess the “collateral consequences” of prosecuting a business organization, such as a financial institution, “including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution.”<sup>1</sup> In cases where convicting the business organization would have “significant” effects on innocent third parties, the Justice Department’s standards further permit prosecutors to resolve criminal matters through non-prosecution and deferred prosecution agreements, in which a company may be required to admit wrong-doing, undertake certain remedial actions, pay fines and

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<sup>1</sup> United States Attorneys’ Manual (“USAM”), 9.28-1000.

forfeitures, and submit to monitoring by an independent party—while stopping short of a prosecution unless a material breach of the agreement occurs.<sup>2</sup>

When determining whether to dispose of a case, the Justice Department's standards exhort prosecutors to "be mindful that confidence in the Department is affected both by the results we achieve *and by the real and perceived ways in which we achieve them.*"<sup>3</sup> Thus, the standards remind prosecutors that it may be appropriate to prosecute cases of widespread and sustained misconduct even where harm to third parties would result from a conviction.<sup>4</sup> However, in criminal matters involving large financial institutions—including unlawful manipulation of benchmark interest rates and violations of anti-money laundering and related laws—the Justice Department has forgone criminal prosecutions of these institutions, apparently out of concern that such prosecutions could disrupt the global economy or jeopardize the financial system. As a result, many believe that these institutions enjoy what is effectively a "Too Big to Fail" immunity from criminal prosecution.

For example, on December 19, 2012, in announcing that the Justice Department had settled charges against the large Swiss bank UBS for manipulating the London Inter-Bank Offered Rate, Attorney General Eric Holder stated that the Justice Department had consulted outside experts on the effects that prosecuting the institution would have had on financial markets:

The impact on the stability of the financial markets around the world is something we take into consideration. We reach out to experts outside of the Justice Department to talk about what are the consequences of actions that we might take, what would be the impact of those actions if we want to make particular prosecutive decisions or determinations with regard to a particular institution.

Similarly, in an interview broadcast on January 22, 2013, the former Assistant Attorney General for the Criminal Division of the Justice Department, Lanny Breuer, reiterated that federal prosecutors should speak with regulators and experts when deciding whether to charge a financial institution and how to proceed with a prosecution after having brought charges. Mr. Breuer stated that such analyses would allow the Justice Department to understand the extent to which a prosecution would harm the financial system of the United States or the world by injuring, among others, the innocent counterparties of the institution.<sup>5</sup>

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<sup>2</sup> USAM, 9-28-1000.

<sup>3</sup> USAM, 9-28.100 (emphasis added).

<sup>4</sup> USAM, 9-28.1000.

<sup>5</sup> See also Speech by Lanny Breuer, Assistant Attorney General, to the New York City Bar Association, Sept. 13, 2012, available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html> (last accessed May 7, 2013) ("We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client").

Following these public statements, the Attorney General confirmed that the collateral consequences of prosecuting some financial institutions, as understood by the Justice Department, hindered the Department's ability to prosecute large financial institutions. On March 6, 2013, the Attorney General testified before the Senate Judiciary Committee that:

I am concerned that . . . it does become difficult for us to prosecute [financial institutions] when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. And I think that is a function of the fact that some of these institutions have become too large. . . . I think it has an inhibiting influence – [an] impact on our ability to bring resolutions that I think would be more appropriate.<sup>6</sup>

### **The Committee's Investigation of the Justice Department's Reliance on Outside Experts in Cases Involving Financial Institutions**

To understand the Justice Department's decision not to seek convictions of large financial institutions, the Financial Services Committee has sought to identify the experts consulted by the Justice Department. Over the last two months, the Oversight and Investigations Subcommittee has requested information from the Justice and Treasury Departments, as well as from the Federal Reserve and the Office of the Comptroller of the Currency.<sup>7</sup>

The Subcommittee has so far been unable to find evidence that the Justice Department has received any material information from "outside experts" when making prosecutorial decisions in cases involving large financial institutions. In a Thursday, May 16<sup>th</sup> letter responding to a request that the Committee made over a month earlier, the Justice Department stated that "we are not currently aware . . . of any consultations with private, non-governmental third party entities on the potential collateral consequences of prosecutorial actions the Department might take with respect to any large, complex

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<sup>6</sup> In testimony before the House Judiciary Committee on May 15, 2013, the Attorney General attempted to "walk back" his prior testimony, stating that "there's no bank, there's no institution, there's no individual that cannot be prosecuted by the U.S. Department of Justice." The Attorney General did not explain (1) whether the Department's view of the collateral harm of convicting a financial institution has changed or (2) if the Department's view has not changed, the circumstances in which a party's criminal conduct is so egregious that prosecution is appropriate even in the face of significant harm to innocent parties.

<sup>7</sup> Letter from the Hon. Jeb Hensarling and Patrick McHenry to the Hon. Jacob Lew, Treasury Secretary, and Eric Holder, Attorney General, Mar. 8, 2013 (requesting the production of certain documents); Letter from the Hon. Patrick McHenry to the Hon. Jacob Lew, Mar. 20, 2013 (requesting a written response to a question); Letter from the Hon. Patrick McHenry to the Hon. Ben Bernanke, Federal Reserve Board of Governors Chairman, Mar. 20, 2013 (requesting written responses to questions and the production of certain documents); Letter from the Hon. Patrick McHenry to the Hon. Thomas Curry, Office of the Comptroller of the Currency, Mar. 20, 2013 (requesting written responses to questions and the production of certain documents); Letter from the Hon. Patrick McHenry to the Hon. Eric Holder, April 3, 2013 (requesting a written response to a question); *see also* Letter from the Hon. Maxine Waters to the Hon. Eric Holder, Feb. 6, 2013 (requesting a roundtable discussion with the Attorney General or members of the Financial Fraud Enforcement Task Force to discuss, among other things, the use by the Department of deferred prosecution agreements and the extent to which it takes the systemic risk of a financial institution into account when making prosecutorial decisions).

financial institutions” and that the Department has from time to time “contacted relevant government agencies to discuss such issues,” including domestic and foreign regulators.<sup>8</sup>

However, the Subcommittee has determined that the Treasury Department did not offer advice to the Justice Department in at least one prominent matter involving HSBC Holdings plc and HSBC Bank USA, N.A. (HSBC), because the Treasury Department “did not conduct any economic analysis” regarding the potential prosecution of those entities.<sup>9</sup> The Subcommittee has also determined that the Justice Department did not receive any analyses from the Financial Stability Oversight Council (FSOC) or the Office of Financial Research (OFR) about the HSBC matter, even though the Dodd-Frank Act charges these agencies with assessing risks to the financial system and coordinating among federal regulators.<sup>10</sup> The Subcommittee has also determined that the Justice Department did not receive analyses from the OCC or the Federal Reserve regarding the economic effect of prosecuting HSBC, although the Justice Department did consult them on other matters relating to HSBC.<sup>11</sup>

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<sup>8</sup> Letter from the Hon. Peter Kadzik, Principal Deputy Assistant Attorney General, to the Hon. Patrick McHenry, May 16, 2013. Senators Sherrod Brown and Charles Grassley have also sought to identify the experts relied upon by the Justice Department. *See* Letter from Senators Brown and Grassley to the Hon. Eric Holder, Attorney General, Jan. 29, 2013. However, in a response that the Senators characterized as “aggressively evasive,” the Justice Department merely acknowledged that it “consults with relevant regulatory authorities, or hears from the companies who are the targets of the Department’s investigations and their counsel regarding potential collateral consequences for enforcement actions[.]” Letter from Judith Appelbaum, Principal Deputy Assistant Attorney General, to Senator Brown, Feb. 27, 2013.

<sup>9</sup> Letter from the Hon. Alastair Fitzpayne, Assistant Secretary for Legislative Affairs, Treasury Department, to the Hon. Patrick McHenry, May 10, 2013.

<sup>10</sup> Testimony of Amias Gerety, Deputy Assistant Secretary, Financial Stability Oversight Council, Treasury Department, and Testimony of the Hon. Richard Berner, Director, Office of Financial Research, Hearing on “Who is Too Big to Fail? GAO’s Assessment of the Financial Stability Oversight Council and the Office of the Financial Research,” House Committee on Financial Services, Mar. 14, 2013.

<sup>11</sup> Letter from Hon. Ben Bernanke, Federal Reserve Board of Governors Chairman, to Hon. Patrick McHenry, April 22, 2013 (stating that “Justice Department personnel did not seek the views of the Federal Reserve on the collateral consequences of a decision to prosecute HSBC” but that Federal Reserve staff did attend a meeting with staff of the Justice Department’s Criminal Division to “discuss in general terms ways in which criminal prosecutors and banking regulators could better coordinate information sharing in order to assist the Justice Department in assessing the collateral consequences of the criminal conviction of banking organizations,” and that this meeting “did not include discussion of the views of the Federal Reserve on collateral consequences of prosecuting any institution”); Letter from the Hon. Thomas Curry, Comptroller of the Currency, to the Hon. Patrick McHenry, April 8, 2013 (stating that former Assistant Attorney General Lanny Breuer contacted Mr. Curry to discuss the OCC’s statutory authority concerning the prosecution of HSBC Holdings plc and HSBC Bank USA, N.A.).