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corpcounsel.com | October 20, 2016

Will the DOJ Find Deutsche Bank 'Too Big to Jail'?

From the Experts

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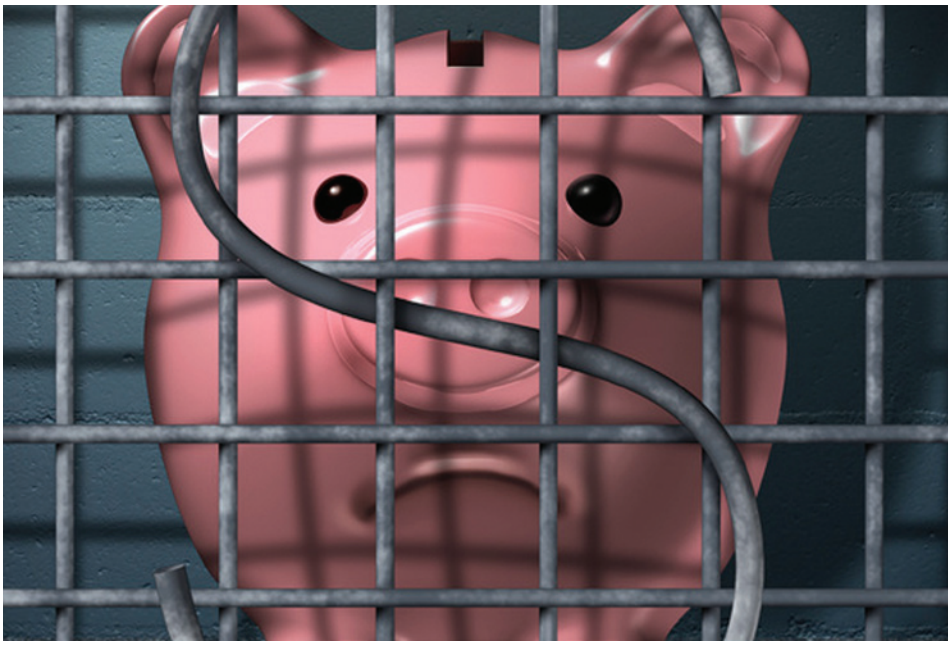

Recent media reports regarding a potential multibillion-dollar settlement between the U.S. Department of Justice and Deutsche Bank have breathed new life into the debate regarding whether major financial institutions can be "too big to jail."

While news of the potential settlement has leaked to the media, it is very rare for the public to gain insight into Justice's deliberations regarding the appropriateness of indicting a major financial institution. But a July 11 House Committee on Financial Services report provided exactly that. The committee report criticized former Attorney General Eric Holder and the Justice Department for refusing to indict HSBC in 2012 for money laundering and sanctions violations. The committee concluded that Justice entered into an out-of-court settlement with HSBC, rather than indict the bank, because of the bank's "systemic importance." According to the committee, this kind of deal creates "a two-tiered system of justice—one for the largest banks, and another for everyone else." In other words, to use the committee's terminology, HSBC was "too big to jail."

The committee report provides a revealing—and rare—insight into a disagreement between the career prosecutors and higher-level Justice officials regarding the extent to which collateral consequences, such as the impact on innocent employees and the world economy, should be considered when deciding whether to indict a corporation. The career prosecutors' recommendation to indict HSBC, combined with the widespread criticism of then-Attorney General Eric Holder's decision to instead resolve the case through a deferred prosecution agreement, raises new uncertainty regarding the extent to which Justice will consider collateral consequences in future

corporate charging decisions. As explained below, a possible shift toward giving less weight (or potentially no weight at all) to collateral consequences could lead to more corporate indictments in the future, thereby raising the risks for corporations and increasing the importance of companies taking full advantage of other potentially mitigating factors, such as having an effective compliance program, responding promptly and thoroughly to evidence or allegations of misconduct and taking appropriate remedial actions.

The House committee report focused largely on evidence that the career prosecutors in Justice's Asset Forfeiture and Money Laundering Section (AFMLS) recommended indictment of HSBC, but were apparently overruled by more senior Justice officials, resulting in the bank's $1.92 billion out-of-court settlement. The report finds that "senior DOJ leadership, including Attorney General Holder, overruled an internal recommendation … to prosecute HSBC because of DOJ leadership's concern that prosecuting the bank would have serious adverse consequences on the financial system." According to the report, financial regulators in both the U.S. and the United Kingdom expressed concern that indicting HSBC could threaten the bank's authorization to clear U.S. dollar transactions and thereby destabilize the world economy. The committee report criticized Holder's decision to forgo an indictment in favor of a deferred prosecution agreement as based on concern about the economic impact of an indictment rather than the strength of the evidence.

Holder initially defended his decision to consider the potential collateral consequences of indicting HSBC, telling a congressional committee shortly after the settlement that it can be difficult to indict certain financial institutions because of the "negative impact on the national economy, perhaps even the world economy." After facing bipartisan criticism for those comments, Holder appeared to walk them back two months later, stating, "Let me be very, very, very clear. Banks are not too big to jail."

This criticism of the Justice Department is the culmination of the too-big-to-jail concern—the federal government's purported reluctance to prosecute large corporations, and particularly financial institutions, because of the impact that such prosecutions could have on the economy and on innocent parties. Implicit, if not explicit, in the arguments of those who advocate indicting large financial institutions is that the potential external effects of an indictment—on innocent employees, shareholders, pensioners and the world economy—should not be taken into account.

This is where the House report is revealing. It highlights that prosecutors were overruled by higher-level Justice officials, including Holder. The exact rationale of the career prosecutors who recommended indictment cannot be gleaned from the report, as Justice refused to produce documents regarding its charging deliberations. But the committee report and accompanying documents from other agencies show that, at the very least, the career prosecutors who recommended indictment gave less weight to concerns about collateral consequences than did the higher-level Justice officials.

Thus the committee report raises uncertainty regarding the extent to which Justice will consider the collateral consequences of corporate indictments in the future. This is significant, as these collateral consequences have long been an established—though not always decisive—factor in corporate charging decisions. The Justice Department adopted its "Principles of Federal Prosecution of Business Organizations" in 1999 (the Principles). The purpose of the Principles was to provide guidance to Justice prosecutors in determining when to bring criminal charges against an artificial legal entity, such as a corporation. A common set of factors was essential because the doctrine of corporate criminal liability is extremely broad. Under U.S. law, dating back to the U.S. Supreme Court's 1909 decision in *New York Central & Hudson River Railroad v. United States*, an organization such as a corporation can be held criminally liable for the acts of its employees—no matter how low-level the employee may be—if the employee committed the crime within the scope of his employment and at least in part to benefit the corporation.

Since their original adoption in 1999 by then-*Deputy* Attorney General Eric Holder, Justice's Principles have provided that one of the factors that prosecutors should consider in a corporate charging decision is the "collateral consequences." The guidelines explain that "prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it or have been unable to prevent it." Additionally, prosecutors may account for a prosecution's impact on the public.

Other factors in the charging decision are hardly surprising; they include such obvious considerations as the nature and pervasiveness of the wrongdoing within the corporation, the corporation's past history, the steps the corporation took to try to prevent its employees from committing misconduct, the assistance the corporation provides in the government's investigation and the adequacy of other remedies available to the government, such as civil or regulatory penalties and the prosecution of individual corporate employees.

The Principles make clear that the mere existence of collateral consequences does not preclude prosecution, but is one of many factors for the prosecutors to consider. Indeed, the Principles explain that the collateral consequences will not always require declining a prosecution altogether, but instead may lead prosecutors to consider a third option between declination and indictment. This third option includes out-of-court resolutions such as the deferred prosecution agreement in the HSBC case, which allowed Justice to impose a massive penalty ($1.92 billion) and significant corporate governance reforms, including appointment of an external compliance monitor for five years.

The big question is: Where does this leave us?

The career prosecutors' recommendation to indict HSBC, the bipartisan criticism of Justice's decision not to indict, the likely criticism if Justice settles with Deutsche Bank as well, and the turnover among higher-level Justice officials (particularly with an upcoming change of administration) create doubt regarding the extent to which the already subjective corporate charging decisions will be influenced, if at all, by collateral consequences going forward. If Justice prosecutors begin to give less weight to the collateral consequences factor, that could mean more corporate indictments. This development—along with other recent pronouncements from Justice, such as the Yates Memo regarding prosecution of individual corporate executives—should be yet another wake-up call to C-suites regarding the risks of the current enforcement environment.

Any reduction in the weight given to collateral consequences would mean that it is all the more important that companies maximize the value that they can get out of other factors in Justice's Principles. These include mitigating factors such as a comprehensive and effective compliance program, quick response to allegations or evidence of wrongdoing and aggressive remedial measures when misconduct is discovered. While HSBC ultimately was not indicted, the House report's revelations regarding the career prosecutors' recommendation, combined with the political fallout from Holder's decision, suggest that even the largest and most systemically important corporations might not be too big to jail next time.

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