

BIG BANKS: END OF THE NON-PROSECUTION DEAL?

Since 2009, the U.S. DOJ has settled close to two dozen investigations into banking violations via huge fines — coupled with “non-prosecution” agreements or “deferred prosecution” agreements. Under either scenario, actual criminal prosecution has been avoided. Many of the settlements were related to charges arising out of the financial crisis of 2008.

“That View Is Mistaken” –Holder

In March 2013, U.S. Attorney General Eric Holder, addressing the Senate Judiciary Committee said: “I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them 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.”

Nevertheless, in an about-face in a U.S. DOJ video briefing on May 5, 2014, Holder emphasized: “There is no such thing as too big to jail. Some have used that phrase to describe the theory that certain financial institutions, even if they engage in criminal misconduct, should be considered immune from prosecution because of their sheer size and their influence on the economy. That view is mistaken, and it is a view that has been rejected by the Department of Justice.”

Echoing the Words of U.S. Prosecutor

Holder’s briefing echoed the cautionary note uttered last month by the U.S. Attorney for Manhattan: “And you can expect that before too long a significant financial institution will be charged with a felony or be made to plead guilty to a felony, where the conduct warrants it.” Clearly, the heat is on for big banks that were heretofore deemed “too big to prosecute” due to fears of adverse effects on the domestic and global economies.

Swiss and French Banks Facing Prosecution

Last week it was reported that the DOJ is in the process of trying to wrest criminal guilty pleas from two European banks. The charges stem not from financial-crisis conduct but rather from charges of assisting U.S. taxpayers to evade taxes in the case of the Swiss bank and charges related to violations of U.S. sanctions laws (i.e., Iran in particular) in the case of the French bank. The billion-dollar fines appear to still be on the table — but the non-prosecution agreements are not.

What Changed in the Last Year?

“Increased cooperation” between banking regulators and the DOJ was cited as the difference between the DOJ’s former position and the one posited now. Regardless of what prompted the change in prosecutorial position, it is clear that in the financial sector, there has never been a better time to consider the meaning of “Risk” in Enterprise Risk Management.

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