

United States Senate

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BUDGET

December 13, 2012

Hon. Eric Holder
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

On Tuesday, the Justice Department entered into a deferred prosecution agreement with HSBC related to more than \$800 million in illicit narcotics proceeds that drug traffickers laundered through the bank's Mexican and American affiliates, as well as over \$600 million in transactions that violated U.S. sanctions against Cuba, Iran, Libya, Sudan, and Burma.¹ Assistant Attorney General Lanny Breuer highlighted just how brazen the violations were, with traffickers depositing "hundreds of thousands of dollars in cash, in a single day, into a single account, using boxes designed to fit the precise dimensions of the teller window."² Sanctions violations were equally deliberate, with the bank intentionally stripping information from transactions to avoid detection. Yet despite these clear and blatant violations, the Department of Justice refused to bring criminal charges against the bank, relevant employees, or senior management.

Indeed, Mr. Breuer stated yesterday that in deciding not to prosecute, the Department considered the "collateral consequences" of its decision on the financial system. Mr. Breuer stated "If you prosecute one of the largest banks in the world, do you risk that people will lose jobs, other financial institutions and other parties will leave the bank, and there will be some kind of event in the world economy?"³ The HSBC decision comes on the back of deferred prosecution agreements with Standard Charter Bank and ING Group related to similar charges.

¹ Department of Justice, Office of Public Affairs, *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement*, Dec. 11, 2012, <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>.

² Peter Finn, Sari Horwitz, *Justice Department outlines HSBC transactions with drug traffickers*, THE WASHINGTON POST, Dec. 11, 2012, http://www.washingtonpost.com/world/national-security/justice-department-outlines-hsbc-transactions-with-drug-traffickers/2012/12/11/1b8130c4-43bf-11e2-8061-253bccfc7532_story.html (quoting Mr. Breuer).

³ *Id.*

I do not take a position on the merits of this or any other individual case, but I am deeply concerned that four years after the financial crisis, the Department appears to have firmly set the precedent that no bank, bank employee, or bank executive can be prosecuted even for serious criminal actions if that bank is a large, systemically important financial institution. This “too big to jail” approach to law enforcement, which deeply offends the public’s sense of justice, effectively vitiates the law as written by Congress. Had Congress wished to declare that violations of money laundering, terrorist financing, fraud, and a number of other illicit financial actions would *only* constitute civil violations, it could have done so. It did not.

Instead, Congress placed these financial crimes squarely in the federal criminal code precisely because the consequences are so severe. Drug trafficking between the U.S. and Mexico continues to wreak extraordinary violence across North America, leading to 15,000 deaths in Mexico in 2010 alone and continued gang violence and deaths in the U.S.⁴ Drug cartels are also increasingly connected to terrorism. According to the Drug Enforcement Administration, 39 percent of State Department-designated foreign terrorist organizations (FTOs) have “confirmed links” to the drug trade, as of November 2011.⁵ The consequences to U.S. national security for violations involving terrorism financing and Iran sanctions violations are obvious and severe. Congress deemed criminal law the appropriate tool for punishing and deterring actions that have such serious and damaging public consequences.

Refusing to prosecute on the grounds of financial stability is also troubling from the perspective of ending “too big to fail.” The Dodd-Frank Wall Street Reform and Consumer Protection Act, which declared some institutions to be systemically important financial institutions subject to tougher regulation, did *not* declare that those institutions would be exempt from criminal prosecution. Indeed, the Dodd-Frank Act explicitly created new authority to permit a failed institution to be wound down safely, without impacting financial stability. If a financial institution, because of its criminal actions, ultimately fails, that may indeed be precisely the consequence that justice and accountability demand, and which is so necessary to deterring future illegal behavior. I am deeply concerned that the Department’s continuing application of deferred prosecution agreements on the grounds of financial stability runs contrary to the intent of Congress and undermines the accountability to the rule of law that is so fundamental to a healthy, functioning free market economy.

⁴ Sara Miller Llana, *Mexico drug war death toll up 60 percent in 2010. Why?*, CHRISTIAN SCIENCE MONITOR, Jan. 13, 2011, <http://www.csmonitor.com/World/Americas/2011/0113/Mexico-drug-war-death-toll-up-60-percent-in-2010.-Why>.

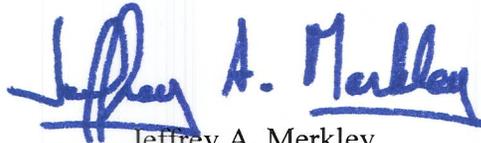
⁵ Prepared testimony of U.S. Drug Enforcement Administration Special Operations Division Special Agent in Charge Derek S. Maltz, in U.S. Congress, House Comm. on Foreign Affairs, Subc. on Terrorism, Nonproliferation, and Trade, *Narcoterrorism and the Long Reach of U.S. Law Enforcement, Part II*, 112th Cong., Nov. 17, 2011.

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According to the U.S. Sentencing Commission, jail time is served by over 96 percent of persons that plead or are found guilty of drug trafficking, 80 percent of those that plead or are found guilty of money laundering, and 63 percent of those caught in possession of drugs.⁶ As the deferred prosecution agreement appears now to be the corporate equivalent of acknowledging guilt, the best way for a guilty party to avoid jail time may be to ensure that the party is or is employed by a globally significant bank. The Department's deferred prosecution agreements may offer something in the way of promises of future compliance, but they look sorely lacking in justice and accountability.

I ask for your immediate response and explanation.

Sincerely,



Jeffrey A. Merkley
United States Senator

cc: Hon. Timothy Geithner, Secretary of the Treasury
Hon. Ben Bernanke, Chairman, Federal Reserve Board
Hon. Tom Curry, Comptroller of the Currency
Hon. Martin Gruenberg, Chairman, Federal Deposit Insurance Commission

⁶ U.S. Sentencing Commission, *2011 Sourcebook of Federal Sentencing Statistics*, Table 12, (2011)
http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table12.pdf.