



Are some banks still too-big-to-jail?

The Justice Department needs greater transparency when prosecuting or not prosecuting banks.

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Ever since Attorney General Eric Holder [confided](#) that some banks had become "so large" that a prosecution "will have a negative impact on the national economy," he's been denying the inference that this means there are institutions that are "too big to jail."

"Let me be very, very, very clear," Holder said in a subsequent [congressional hearing](#). "Banks are not too big to jail. If we find a bank or a financial institution that has done something wrong, if we can prove it beyond a reasonable doubt, those cases will be brought."

On May 5, Holder [released a video](#) in which he declared that the view that some banks are "too big to jail" is "mistaken." The caption below the Department of Justice (DOJ) video [reads](#): "He intends to reaffirm that principle in the weeks ahead."

Now we have an important new criminal guilty [plea](#) from Credit Suisse for aiding tax evasion. Credit Suisse is one of the largest investment firms in the [world](#). Does this action prove that too big to jail is mistaken, or at least has ended?

Hardly.

Though we certainly applaud the DOJ's action, a criminal guilty plea from a foreign bank doesn't erase the many non-prosecutions and deferred prosecutions of the too-big-to-fail banks at the heart of the financial crisis. The Justice Department [wrung](#) \$20 billion in fines from JPMorgan Chase in 2013 — a [record](#) surpassing any other corporation — but stopped well short of obtaining an admission of criminal guilt from the world's largest bank or any of its officers. It reached settlements with [Bank of America](#) and [Wells Fargo](#), but again, did not secure an admission of criminal guilt.

And similarly, many [were stunned](#) when the DOJ decided [not to indict](#) London-based HSBC, one of the world's largest banks, despite the fact that the bank willfully [failed](#) to comply with anti-money laundering laws. Instead of charging HSBC, the government [agreed](#) not to prosecute the company in exchange for HSBC acknowledging wrongdoing, paying a fine and agreeing to cooperate with the government and remedy its compliance programs.

More recently, DOJ again [declined](#) to indict JP Morgan Chase over its involvement and knowledge of the Bernie Madoff Ponzi scheme that defrauded investors, allowing JP Morgan Chase to instead enter into a deferred prosecution agreement and pay roughly 2 billion to settle the charges.

We respect the DOJ's actions with Credit Suisse. But we wonder what sets this institution apart from others that committed similar crimes.

With the Credit Suisse case, the DOJ [consulted](#) with relevant regulators as it weighed its prosecutorial and judicial options. Regarding the involvement of JP Morgan Chase in the Madoff Ponzi scheme, recent reports indicated that DOJ prosecutors [met](#) with the Office of Comptroller Currency (OCC). The DOJ has remained silent on what it learned from the OCC, but it appears the OCC believed it would have to consider revoking JP Morgan Chase's charter in the event of a guilty plea. Such [coordination](#) is responsible and prudent of the DOJ, but also raises the question as to how the consultations steer the DOJ's decision-making.

The public and the Congress deserve to know whether and why justice may be calibrated based on the size of an institution. If a smaller bank facilitated tax evasion or laundered money, would regulators revoke its license and effectively put it out of business? If systemic repercussions would follow license revocation, does this justify a meeker penalty? And who makes this decision?

Crimes require the action of individuals. The DOJ has yet to articulate why proceeding with criminal prosecution against individuals would undermine the safety of the institutions at which they work or the broader economy.

We are not advocating criminalizing irresponsible behavior after the fact or abandoning due process protections. We are advocating a justice system that treats all equally, regardless of size or importance to the broader economy.

With the Credit Suisse episode, the DOJ has begun to walk down the path of explaining how it applies justice with large financial institutions. The public deserves more transparency and on a regular basis. Congress should legislate such disclosures.

Holder wants to be "very, very, very, very clear," that no bank that commits crimes is too big to jail. To ensure that clarity, we should enhance transparency on the process.

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