

Forex Settlement Confirms DOJ's Recent Comments on Corporate Recidivism

The Department of Justice (DoJ) today announced fines totaling \$5.6 billion against five of the world's largest banks related to the banks' alleged manipulation of the foreign exchange markets ("forex"). The settlements are notable for a number of reasons; in particular, the settlements highlight the strong position the DoJ appears to be taking with respect to enforcement declinations and recidivism.

On March 16, 2015 Assistant Attorney General Leslie Caldwell, Criminal Division, spoke about Non-Prosecution Agreements ("NPAs") and Deferred Prosecution Agreements ("DPAs") at the ACAMS Anti-Money Laundering & Financial Crime Conference:

Just like an individual on probation faces a range of potential consequences for a violation, so too does a bank that is subject to a DPA or NPA. . . . Make no mistake: the Criminal Division will not hesitate to tear up a DPA or NPA and file criminal charges, where such action is appropriate and proportional to the breach.¹

The DoJ's actions in connection with today's forex settlements show why companies should take those remarks very seriously.

In the settlement announced today, the five banks agreed to resolve claims that the banks manipulated the global forex markets.² Four of the five banks also pleaded guilty to criminal charges of conspiracy to manipulate the forex markets. UBS, which alerted the DoJ to the alleged misconduct, is the only target-bank that was not required to plead guilty to criminal charges related to forex manipulation.³ However, the DoJ had a separate criminal hook for UBS (and Barclays) — 2012 NPAs covering the banks' roles in alleged LIBOR rigging.

As a result of the forex settlement, the DoJ "tore up" the 2012 LIBOR rigging NPAs, forcing both banks to pay criminal penalties and requiring UBS to plead guilty to wire fraud related to LIBOR rigging. The DoJ's destruction of the 2012 NPAs is even more significant when considered in conjunction with the banks' cooperation in the LIBOR rigging probe, which the

¹ <http://www.justice.gov/opa/speech/assistant-attorney-general-caldwell-delivers-remarks-acams-anti-money-laundering>.

² The five banks are JPMorgan, Citigroup, RBS, Barclays, and UBS.

³ While UBS avoided criminal charges, it was required to pay a \$342 million penalty in connection with the forex settlement.

DoJ has described as “extraordinary,” “commendable,” and “exceptional.”⁴ For example, UBS’s 2012 NPA states that the bank disclosed helpful information to the government before the DoJ had contacted the bank, expanded and advanced the DoJ’s investigation throughout the course of the probe, provided valuable information, and made significant changes in its compliance, training, and general approach to ensuring its adherence to the law. But those mitigating factors and UBS’s self-disclosure related to the forex markets were outweighed by UBS’s alleged forex misconduct, prior criminal, civil, and regulatory resolutions, and its alleged failures to detect the forex misconduct earlier.⁵

The DoJ’s strict enforcement of the 2012 NPAs should serve as an important reminder that the government has a low tolerance for corporate recidivism, even in the case of a cooperative target with a robust compliance system in place. While historically, the idea of criminal probation has been considered a punishment for individuals, companies should be mindful that the DoJ is extending that concept to corporations, and violations of probation may very well result in criminal charges against corporations.

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⁴ The Barclays NPA can be viewed here: <http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf>. The UBS NPA can be viewed here: <http://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf>.

⁵ See <http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.