U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

FEB 27 2013

The Honorable Sherrod Brown
Chairman
Subcommittee on Financial Institutions and Consumer Protection
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated January 29, 2013, regarding criminal prosecutions of large financial institutions. An identical response is being sent to Senator Grassley, who joined in your letter.

The Department of Justice is committed to aggressively investigating allegations of wrongdoing at financial institutions and, along with our law enforcement partners, holding individuals and corporations responsible for their conduct. We appreciate your interest in better understanding the Department's "prosecutorial philosophy" concerning wrongdoing by large financial institutions. Our decision-making in this regard is guided by long-standing policies set forth in the United States Attorneys' Manual ("USAM"), particularly USAM 9-27.000 *et seq.*, Principles of Federal Prosecution, and 9-28.000 *et seq.*, Principles of Federal Prosecution of Business Organizations. Federal prosecutors have relied on these Principles in making charging determinations against corporations since they were first articulated, in their initial form, over a decade ago.

As a general matter, the USAM instructs prosecutors to apply the same factors in determining whether to charge a corporation as they do with respect to an individual: that the defendant's conduct constituted a federal crime and that the admissible evidence is more likely than not sufficient to obtain and secure a conviction by a jury. *See* USAM 9-27.220, 9-28.300. The USAM Principles dictate that corporations should be treated neither more leniently nor more harshly due to their artificial nature. *See* USAM 9-28.200. No corporate entity, no matter how large, is immune from prosecution.

The USAM details the benefits of vigorous enforcement against corporate wrongdoing but also explicitly notes that in certain instances it may be appropriate, upon consideration of factors set forth in the Principles, to resolve corporate criminal matters by means other than indictment. *See* USAM 9-28.200. Non-prosecution and deferred prosecution agreements occupy

an important middle ground between declining criminal prosecution altogether and pursuing prosecution of an entity where harm to innocent parties is likely to result. It should be recognized that some of the terms typically agreed to by companies in negotiated corporate dispositions may not be available if a court were imposing a criminal sentence in a litigated case. For example, the requirement that a company cooperate with the Department's ongoing criminal investigation (which is a common term in most negotiated corporate dispositions) may not be an available sanction in a litigated sentencing.

The USAM instructs that, in determining whether to bring charges or negotiate a plea or other agreement with a corporate target, prosecutors should consider, among other factors, the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation's timely and voluntary disclosure of wrongdoing; the existence and effectiveness of the corporation's pre-existing compliance program; the adequacy of remedies such as civil or regulatory enforcement actions; and the collateral consequences of prosecution. *See* USAM 9-28.300, 9-28.900.

In considering collateral consequences, prosecutors must determine whether there would be disproportionate harm to investors, pension holders, customers, employees, and others who were not personally culpable, as well as impact on the public arising from the prosecution. *See* USAM 9-28.300, 9-28.1000. In analyzing the collateral consequences of any particular corporate prosecution, it is entirely appropriate for prosecutors to hear from subject matter experts at relevant regulatory authorities. When the Department consults with relevant regulatory authorities, or hears from the companies who are the targets of the Department's investigations and their counsel regarding potential collateral consequences for enforcement actions, neither those agencies nor the target companies receive any compensation from the Department. The USAM also clarifies that while neither a corporation nor an individual may avoid prosecution merely by paying a sum of money, a prosecutor may consider, again, among other factors, the corporation's willingness to make restitution, or take other remedial actions, such as improving existing compliance programs or disciplining employees. The USAM explicitly encourages prosecutors to consult with relevant federal or state agencies in evaluating the appropriateness or adequacy of remedial compliance programs. *See* USAM 9-28.800.

The Department shares your concern that there must be accountability for corporate wrongdoing. Whether it is securing felony manslaughter convictions for BP or fraud convictions for a board member of Goldman Sachs, the Department has not hesitated to criminally prosecute major corporations and top executives when we have the evidence, no matter what the crime. And, as our ongoing criminal investigation into the manipulation of the London Interbank Offered Rate (LIBOR) demonstrates, we will vigorously investigate financial institutions, regardless of size, for suspected misconduct, and make charging decisions in accordance with the USAM. In December 2012, Swiss-based UBS AG and its Japanese subsidiary agreed to pay $1.5 billion in criminal and regulatory penalties and disgorgement for their roles in manipulating LIBOR submissions, and UBS Securities Japan agreed to plead guilty to felony wire fraud. UBS Securities Japan's guilty plea was the first criminal conviction of a

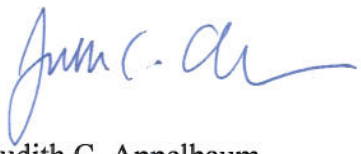
significant financial institution in several years. The Department also charged two former UBS traders with felony counts for allegedly manipulating the bank's LIBOR submissions. Following the announcement of the UBS agreement, another major financial institution – the Japanese subsidiary of the Royal Bank of Scotland – agreed to plead guilty to felony wire fraud for its role in manipulating LIBOR submissions, and together with its parent company, RBS plc, agreed to pay approximately $612 million in criminal and regulatory penalties and disgorgement.

In addition, over the past several years, the Department has secured significant financial fraud convictions of high-level executives. For example, we obtained convictions against Robert Allen Stanford, the former chairman of the board of directors of Stanford International Bank, and several of his executive-level co-conspirators for their roles in orchestrating a 20-year, multibillion dollar investment scheme. Stanford was sentenced to 110 years of imprisonment and required to forfeit $330 million to the United States. The Department also successfully prosecuted Raj Rajaratnam, General Partner of Galleon Management L.P., and Rajat Gupta, a former Goldman Sachs board member, for their involvement in the largest hedge fund insider trading scheme in history. Rajaratnam is serving 11 years and Gupta is serving two years in prison. These prosecutions, as well as others we have brought over the past four years, are the result of the Department's aggressive approach to financial fraud enforcement.

In combating financial fraud, the Department and its partners are committed to using all of the remedies available – criminal, civil, regulatory and administrative. The cases outlined above demonstrate the Department's commitment to using the full range of tools provided by Congress to seek justice for financial misconduct.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of assistance with this or any other matter.

Sincerely,



Judith C. Appelbaum
Principal Deputy Assistant Attorney General

cc: The Honorable Patrick J. Toomey
Ranking Minority Member