Banks Behaving Badly or Brother Can You Spare A Billion (or Two)?

Remember when a billion dollars was real money? Over the past couple of weeks there have been some mammoth fines paid by financial institutions for conduct, which would appear to fall under the category of "*Banks Behaving Badly*". Last week HSBC agreed to pay a fine of $1.92 *billion* for its transgressions involving money laundering. UBS is in the final stages of negotiations to pay $1.5 *billion* to resolve allegations that it tried to rig interest rate benchmark (i.e. 'Libor') to boost trading profits. Finally, on December 10, coming in at a paltry $327 million are our old friends Standard Chartered, which admitted processing thousands of transactions for Iranian and Sudanese clients through its American subsidiaries; subsequently to avoid having Iranian transactions detected by the US Treasury Department computer filters, Standard Chartered deliberately removed names and other identifying information, according to the authorities. All in all, it's not been a bad couple of weeks for the US Treasury, given the current stalemate over the 'fiscal cliff' and the need to reduce the US deficit.

For those of you keeping score at home, we present our updated *Banks Behaving Badly* Box Score of Settlements

Banks Behaving Badly - Box Score of AML Settlements

Bank	***Amount***	***Date of Settlement***
Lloyds TSB Bank	$567MM	December 2009
Credit Suisse	$536MM	December 2009
ING Bank	$619MM	June 2012
Royal Bank of Scotland	$500MM	May 2012
Barclays	$298MM	August 2012
Standard Chartered - NY state	$340MM	August 2012
Standard Chartered - Federal	$327MM	December 2012
HSBC	$1.92 BN	December 2012
Total	**$4.004BN**	

Banks Behaving Badly - Box Score of Libor Manipulation Settlements

Bank	***Amount***	***Date of Settlement***
Barclays	$450MM	June 2012
UBS	$1.5BN (proposed)	December 2012?
Total	**$1.95BN (proposed)**	

If you do not have a calculator handy, for the 2012 banking season alone, that is $4,004,000,000 all going to the US Treasury thanks to our friends at *Banks Behaving Badly*. If you want to sneak-a-peak at what it might look like if the UBS settlement comes through just add on an additional $1.5 bn so that is over ***$6 billion*** in fines, penalties and disgorged profits from one industry sector in one year. And people have the temerity to complain about the energy industry being corrupt.

So what is the cause of '*Banks Behaving Badly*'? Back in June, at the time of the Barclays Libor manipulation settlement, the Financial Times (FT) wrote on its Op-Ed page in the piece entitled "*Shaming banks into better ways*" that "few have shone such an unsparing light on the rotten heart of the financial system" and then went on to say "nothing less than a long-running confidence trick played on the public for personal and institutional advantage" and even pointed out the "rotten culture at Barclays". The FT editorial clearly focused on ethics when it said "But beyond the questions about legality there is a bigger worry about the wayward behavior of the financial sector." The FT editorial concluded by telling banks that if "banker-bashing is to stop, the banks themselves must change." Typical British understatement at its finest wouldn't you say?

The HSBC settlement was announced by Lanny A. Breuer, Assistant Attorney General of the Justice Department's Criminal Division. In the Department of Justice (DOJ) Press Release it was reported that HSBC received a Deferred Prosecution Agreement (DPA) which required, among other things, that it "committed to undertake enhanced AML and other compliance obligations and structural changes within its entire global operations to prevent a repeat of the conduct that led to this prosecution. HSBC has replaced almost all of its senior management, "clawed back" deferred compensation bonuses given to its most senior AML and compliance officers, and has agreed to partially defer bonus compensation for its most senior executives – its group general managers and group managing directors – during the period of the five-year DPA. In addition to these measures, HSBC has made significant changes in its management structure and AML compliance functions that increase the accountability of its most senior executives for AML compliance failures." There will also be an independent outside monitor appointed to oversee the bank's compliance efforts and report periodically to the DOJ.

Even with all the above and the fines, penalty and profit disgorgement, the DOJ has come under withering criticism for its failure to both let HSBC off so lightly, with a DPA, where "HSBC Bank USA failed to monitor over $670 billion in wire transfers and over $9.4 billion in purchases of physical U.S. dollars from HSBC Mexico" and no individuals were indicted. CNN reported that Sen. Charles Grassley, R-Iowa, sent a stinging letter to Attorney General Eric Holder, calling it "inexcusable" for the department [DOJ] not to prosecute criminal behavior by HSBC. Senator Grassley's letter was quoted as saying, "What I have seen from the department is an inexplicable unwillingness to prosecute and convict those responsible for aiding and abetting drug lords and terrorists." Further, "By allowing these individuals to walk away without any real punishment, the department is declaring that crime actually does pay," Grassley asserted.

Halah Touryalai, in an article entitled "*Final Thought On HSBC Settlement: How Much Bad Behavior Will We Tolerate*?" in forbes.com, put it another way. Touryalai asked "What's a bank got to do to get into some real trouble around here?" She went on to say, "So, let's get this straight. A major global bank failed to catch activity that put our country's security at risk and now it is sorry... The HSBC case brings to the forefront a big question for the U.S.: How much are we willing to tolerate from financial services companies? If we're looking at the HSBC case then a lot, apparently." Finally, Touryalai spoke for many when she said, "The scary part about the HSBC settlement is that U.S. authorities are essentially saying they couldn't act on criminal charges because it would harm the larger financial system. That's got many calling HSBC (and potentially others) too-big-to-jail."

However, the DOJ had many data points to factor into its calculus on settlement. First, and foremost, (apparently) remains Arthur Anderson. If the DOJ had pushed for a criminal settlement, would it have debarred HSBC from doing business with the US government or its monies going through the US banking system? What would be the effect of such a remedy? What if the DOJ had pushed too far and HSBC felt it had no choice but to go to trial, would they have been *Arthur Andersen'd* out of business? Perhaps this is a variant of the "too big to fail" argument, called the 'too-big-to-put-out of business' argument.

But there is another reason for the specific terms of the HBSC settlement, which was discussed by Lanny Breuer during the news conference. He stressed the extraordinary cooperation by HSBC during the investigation in addition to the structural changes the bank put in place as noted above. If the DOJ wants to obtain the highest level of cooperation from a defendant during an investigation, turning around after such cooperation and indicting either the entity or a bunch of its employees will most probably end such a level of cooperation. My guess is that the DOJ wants to encourage as much cooperation as it can from parties under investigation. That would include greater compliance after the resolution in addition to extraordinary cooperation during the investigation. However this may not be enough to quell the critics. So the DOJ may be stuck in the position of damned if they do (indict) and damned if they don't (indict).

But whatever your take on the DOJ's position as to HSBC, it certainly has been a year of reckoning for "*Banks Behaving Badly*".