

February 24, 2014

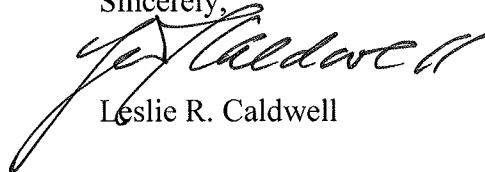
The Honorable Patrick Leahy  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Charles Grassley  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you again for giving me the opportunity to appear before the Committee on February 11, 2014. I enclose my responses to the Questions for the Record that I received from Senator Feinstein and Ranking Member Grassley.

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie R. Caldwell". The signature is written in a cursive style with a large, sweeping initial "L".

Leslie R. Caldwell

Enclosure

**Questions for the Record from Senator Charles Grassley**

**Leslie R. Caldwell**

**Nominee for Assistant Attorney General of the Criminal Division, Department of Justice**

**February 24, 2014**

I am concerned that the Department is avoiding prosecuting institutions or executives at financial institutions for fear that the company is “too big to jail.” I certainly recognize that settlements and non-prosecution agreements have a place in the prosecutor’s playbook. But I find it disturbing how often they are relied on. In my view, this rewards and perpetuates criminal misconduct, and increases the risk that future criminal behavior will adversely affect financial markets and our fragile economy.

1. Do you believe that there is any corporation or any corporate executive that is “too big to jail?”

**ANSWER: No individual or corporation is above the law. As I said in my statement to the Committee, if confirmed, I will vigorously prosecute criminal wrongdoing whether it occurs in a boardroom, across a computer network, or on a street corner. Indeed, as a prosecutor I brought criminal charges against numerous senior executives and institutions and would draw on those experiences if confirmed as the Assistant Attorney General of the Criminal Division.**

2. How much deference should the Department give a regulator’s advice concerning the collateral effects of a criminal prosecution or conviction on an institution’s viability or the broader economy in weighing criminal charges against that institution?

**ANSWER: The Department has long-established guidelines that must be considered when weighing whether to bring criminal charges against an institution. One of several factors to be considered is what, if any, collateral consequences a criminal charge might have on innocent third parties. In considering claims by a prospective defendant institution that a criminal charge could have negative effects on the company or beyond, it would be prudent for the Department to consult with appropriate regulators to obtain their advice on the likelihood that the claimed consequences actually would come to pass. However, the Department alone would make the ultimate decision whether to bring a criminal charge in a particular case.**

3. You certainly have extensive experience in prosecuting these types of cases. As a federal prosecutor, did you ever consult with an outside expert or with a regulator on the effects a criminal charge against a company or an individual could have on the economy or

financial markets? If so, what factors did you and the Department consider before making a charging decision?

**ANSWER: In my experience as a federal prosecutor, I never consulted with an outside expert on the effects that a criminal charge against a company or individual could have on the economy or financial markets. Nor did I ever consult with a regulator regarding the possible financial or economic effects of a charge against an individual. I can recall two occasions when I consulted with regulators regarding the possible collateral financial impacts of a potential corporate criminal prosecution. In one case, involving the prosecution of a national nursing home chain for Medicare fraud, I consulted and worked with the Department of Health and Human Services to ensure that residents of the homes would not be displaced or their care disrupted as a result of the prosecution. In the other case, I and others in the Department consulted with the Securities and Exchange Commission to determine whether a criminal charge against an accounting firm could be disruptive to the markets they regulate. In both cases, after weighing all the factors listed in the Department's guidelines for federal prosecution of business organizations, criminal charges were filed.**

4. What factors should the Department consider relevant when a regulator expresses concerns over a potential criminal prosecution?

**ANSWER: The Department has a long history of working collaboratively with a broad array of regulators who serve as valuable partners in the Department's law enforcement mission. Given that these regulators often have significant subject matter expertise, the Department may seek their input when appropriate in weighing whether to bring a criminal prosecution. As noted above in response to Question 2, however, a regulator's view as to the potential collateral consequences of a possible prosecution is just one factor the Department considers in deciding whether to file a criminal charge. The decision whether to bring a criminal charge in any given case rests solely with the Department, and if confirmed, I would make such decisions after consulting the factors enumerated in the United States Attorney's Manual.**

A few days after your hearing before the Committee on the Judiciary, the Department of Justice and the Department of the Treasury jointly released two memos providing further guidance on one of the issues we discussed: money laundering and marijuana business proceeds.

The February 14, 2014 memo issued by Deputy Attorney General James M. Cole, states the following:

“This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence.... This memorandum is not intended, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It... does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

5. In light of the above paragraph in the Department’s February 14, 2014 memo, do you agree that:
  - a. The possession, cultivation, and distribution of marijuana remains illegal in all states under the Controlled Substances Act;

**ANSWER: Yes. If I am confirmed as the Assistant Attorney General of the Criminal Division, I will carefully review the memorandum issued to all United States Attorneys on February 14, 2014. I certainly support the Department’s continuing and vigorous enforcement of the Controlled Substances Act in a manner consistent with appropriate policies and priorities. As a federal prosecutor for 17 years, I prosecuted numerous drug crimes and drug trafficking organizations and know too well the devastating effect that gang and drug violence bring to our communities. I would draw on those experiences in confronting these issues at the Department.**

- b. The laundering of the proceeds of the possession, cultivation, and distribution of marijuana remains illegal in all states under federal money laundering statutes;

**ANSWER: Yes. As described above, if I am confirmed as the Assistant Attorney General of the Criminal Division, I will carefully review the memorandum issued to all United States Attorneys on February 14, 2014. I**

**certainly support the Department’s continuing and vigorous enforcement of federal money laundering statutes in a manner consistent with appropriate policies and priorities.**

- c. The Department’s ability to enforce federal law in these areas remains unchanged; and

**ANSWER: Because I am not currently at the Department, I have not studied the memorandum issued to all United States Attorneys on February 14, 2014. If confirmed, I will review it carefully. In response to this question, I do note that the portion of the memorandum quoted above states in part, “This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law.”**

- d. The memo does not create a “safe harbor” that an institution can rely upon as a defense to a prosecution under either of these types of laws.

**ANSWER: Because I am not currently at the Department, I have not studied the memorandum issued to all United States Attorneys on February 14, 2014. If confirmed, I will review it carefully. In response to this question, I do note that the portion of the memorandum quoted above states in part, “Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence....”**

The Treasury Memo attempts to offer guidance to financial institutions on how they may offer various financial services to business engaged in marijuana production or distribution despite federal criminal law clearly prohibiting the same.

- 6. Please confirm that the activities described in or that would require a bank to file a “Marijuana Limited” Suspicious Activity Report are, despite the Cole Memos, a direct violation of current federal anti-money laundering statutes.

**ANSWER: I am not currently at the Department; therefore I am not in a position to respond to this question. If I am confirmed as the Assistant Attorney General of the Criminal Division, I will carefully review the memorandum issued by the United States Department of Treasury on February 14, 2014, as well as the memoranda**

**issued by Deputy Attorney General James Cole on August 29, 2013, and February 14, 2014. I certainly support the Department of Justice's continuing and vigorous enforcement of the Controlled Substances Act and federal money laundering statutes in a manner consistent with appropriate policies and priorities.**

7. If, within the statute of limitations of the federal money-laundering statute, the Department of Justice reverses course and fully enforces the Controlled Substances Act and federal anti-money laundering statutes, could the Department of Justice use these "Marijuana Limited SARs" in the criminal prosecution against financial institutions that file them?
  - a. If no, please describe what would limit a federal prosecutor from using these SARs in a criminal prosecution, other than prosecutorial discretion.

**ANSWER: As stated above, I am not currently at the Department; therefore I am not in a position to respond to this question. If I am confirmed, I look forward to carefully reviewing these issues.**

The February 14, 2014 memos attempt to provide guidance to financial institutions on how they can simultaneously meet their reporting obligations under the Bank Secrecy Act ("BSA") while providing banking services to individuals or entities engaged in the cultivation or distribution of marijuana in certain states. At the same time, according to recent media reports, the Department's Civil Division has been aggressively pursuing certain legal practices by financial institutions in an operation named "Operation Choke Point."

As a result, on one hand, the Department of Justice's Criminal Division appears to be facilitating illegal behavior specifically prohibited by federal law by unilaterally limiting the scope of the BSA, while on the other hand, the Department's Civil Division is using the BSA in order to stop legal online lending practices, such as pay-day lending, by pressuring the banking industry to cease providing legal third-party payment services.

Given this inconsistent application of the BSA, it is understandable that the financial services industry should not trust the Department's assurances that those entities who engage in financial activities with marijuana cultivators, distributors, or retailers will not be prosecuted under existing federal law, including the BSA, the CSA, and federal money laundering statutes.

8. Will you commit that as Assistant Attorney General of the Criminal Division you will work to ensure that the various divisions within the department reach consensus on the Department's interpretation of the proper scope or use of a statute?

**ANSWER: I am not familiar with Operation Choke Point or the concerns presented in this question. However, I can assure you that if I am confirmed, I will**

**consult my colleagues in other components of the Department on areas of mutual interest.**

I recently asked Attorney General Holder these questions and have not yet received response. As the Foreign Corrupt Practices Act falls within Criminal Division jurisdiction, would you please respond to the following questions.

9. What are the Department's current enforcement priorities under the Foreign Corrupt Practices Act?

**ANSWER: I am not in the Department; therefore, I am not in a position to address this question. If I am confirmed as the Assistant Attorney General of the Criminal Division, I assure you that I will be vigilant in pursuing cases under the Foreign Corrupt Practices Act.**

10. What particular industries, markets or practices is the Department focusing on, and why?

**ANSWER: I am not in the Department; therefore, I am not in a position to address this question. As noted above, if I am confirmed as the Assistant Attorney General of the Criminal Division, I assure you that I will be vigilant in pursuing cases under the Foreign Corrupt Practices Act.**

11. What proportion of the Department's enforcement activity during 2013 involved non-U.S. companies?

**ANSWER: I am not in the Department; therefore, I am not in a position to address this question. If I am confirmed as the Assistant Attorney General of the Criminal Division, I assure you that I will be vigilant in pursuing cases against U.S. and non-U.S. companies that violate the Foreign Corrupt Practices Act.**

12. Has the Department seen a recent increase in whistleblower claims of FCPA violations?

- a. If so, to what would you attribute that?
- b. How has the Department responded?

**ANSWER: I am not in the Department; therefore, I am not in a position to address these questions.**

13. Although the Department does not publicize each particular instance in which it declines prosecution despite evidence of an FCPA violation, what characterized the Department's

declinations during 2013? Did the number increase from 2012? What factors were most important in leading the Department to decline prosecution?

**ANSWER: I am not in the Department; therefore, I am not in a position to address these questions. While I have not been privy to the internal deliberations surrounding the Department's declination decisions, if confirmed as the Assistant Attorney General of the Criminal Division, I assure you that declination decisions will be based on the law and the evidence presented.**

14. In November 2012, the Department and the SEC issued the FCPA "Resource Guide," which reflected guidance from your agencies regarding the interpretation and enforcement of the FCPA. Does the Department anticipate updating, supplementing or amending the "Resource Guide" in the foreseeable future?

**ANSWER: I am not in the Department; therefore, I am not in a position to address this question.**

15. In 2013, the Department issued only one Opinion Release concerning the FCPA. Does the Department consider the "Resource Guide" a substitute for its opinion release program?

**ANSWER: I am not in the Department; therefore, I am not in a position to address this question.**



## Questions for the Record from Senator Dianne Feinstein

For Leslie R. Caldwell

Senate Committee on the Judiciary

February 24, 2014

### **Prosecution of Drug, Gun, and Gang Crimes**

You have significant experience prosecuting drug, gang, and gun crimes, including as Chief of the Criminal Division in the U.S. Attorney's Office in my hometown of San Francisco. As you know, these often violent crimes continue to devastate many communities in California and across our country. According to the Centers for Disease Control and Prevention, 11,101 homicides were committed with firearms in the United States in 2011, the latest year that data is available. The 2011 National Gang Threat Assessment found that gang membership increased by 40 percent between 2009 and 2011 and that "[g]angs are responsible for an average of 48 percent of violent crime in most jurisdictions and up to 90 percent in several others . . . ."

- **If confirmed, will you vigorously enforce federal law against gang members and others who commit major drug or gun trafficking crimes, in coordination with the Offices of the U.S. Attorney?**

**Answer:** Yes. As a former federal prosecutor, I have prosecuted many violent gang cases and led the Violent Criminal Enterprises Section of the U.S. Attorney's Office in the Eastern District of New York, and oversaw the prosecution of violent drug traffickers, gangs and gun traffickers as Chief of the Criminal Division in the Northern District of California. I know too well the devastating effect that gang and drug violence bring to our communities. If confirmed, I certainly would vigorously enforce the law against this activity, in coordination with United States Attorneys' Offices.

**What will be your priorities in determining which drug, gun, and gang crimes will be prosecuted by attorneys in the Criminal Division and in formulating criminal enforcement policy for the broader Department of Justice?**

**Answer:** Since I am not now at the Department, I am not familiar with the current prosecution priorities for drug, gun and gang violence. If confirmed, I will familiarize myself with the Department's criminal enforcement policy and evaluate its current priorities. In any event, I would expect that prosecution of gangs and major drug and gun trafficking crime would be a significant Department priority. I also would expect to have a strong voice in formulating the Department's criminal enforcement policy.

### **Money Laundering – HSBC Case**

As you and I discussed when we met in my office in December, the failure of some U.S. banks to comply with anti-money laundering laws fuels drug-related violence in Mexico. As you know, HSBC allowed over \$670 billion in wire transfers and over \$9.4 billion in physical money to enter the U.S. from Mexico unmonitored. Of that money, we know that at least \$881 million in Mexican drug proceeds entered the U.S. illegally. On December 11, 2012, HSBC entered into a Deferred Prosecution Agreement with the Department of Justice and paid \$1.92 billion in fines.

An April 2013 report by the Senate Caucus on International Narcotics Control, which I chair along with Senator Grassley, stated that it is unacceptable for monetary penalties to remain the cost of doing business for financial institutions that do not comply with U.S. anti-money laundering laws. I believe the individuals responsible need to be criminally prosecuted and barred from the financial sector.

- **Do you agree with this assessment?**

**Answer:** I believe no person or institution is above the law, and when the evidence warrants, individuals responsible for corporate wrongdoing should be held accountable. As I said in my statement to the Committee, if confirmed, I would enforce the law vigorously whether the wrongdoing occurred in a boardroom or on a street corner.

- **If confirmed, what will you do to ensure that monetary penalties are not simply the cost of doing business for financial institutions that violate U.S. anti-money laundering laws?**

**Answer:** While I have not studied the facts of the HSBC matter or the report that you reference, I agree that potential criminal cases against financial institutions or other business organizations must be evaluated by applying the many factors discussed in the Department's long-standing guidance relating to federal prosecution of business organizations. At times, application of those factors may result in a decision to file criminal charges against the business. At other times, a decision may be made to enter into a DPA, which involves filing criminal charges and imposing case-specific compliance or reporting requirements, in addition to monetary payments. I am aware from my time both as a federal prosecutor and in private practice that, from a company's perspective, the non-monetary reporting and compliance requirements imposed pursuant to DPAs can be quite onerous, and often include terms that could not be imposed by a court following a conviction of the company at trial. If confirmed, I would follow the evidence in each case and use the tools available to federal prosecutors to hold accountable institutions and individuals that violate U.S. money laundering laws.