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TD money-laundering scandal revives allegations of Too Big To Jail

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*U.S. Attorney General Merrick Garland
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One thing notably absent from Attorney General Merrick Garland's historic settlement announcement with TD Bank was any mention of criminal charges against executives who oversaw the bank during its involvement in a yearslong money-laundering conspiracy.

TD Bank, the ninth largest in the U.S. and second largest in Canada, became the first bank to plead guilty to [money-laundering conspiracy](#), settling for \$3.09 billion with U.S. authorities last week. The DOJ said the bank enabled hundreds of millions of illicit dollars tied to drug and human trafficking to pass through its system, leaving about \$18 trillion in customer funds effectively unmonitored for more than six years.

"The fact that the bank was not only guilty of violating the BSAs — call them, preventative and reporting controls — but went a step further in violating the foundational, oldest money-laundering law on the books in the United States in actually conspiring, agreeing to launder money is really remarkable," said Scott Greytak, director of advocacy at Transparency International. "It's got to be one of the top three dirty money stories I've seen in the last five years or so ... right up there with the Pandora papers and stories of Russian oligarchs being able to use gaps in our AML framework to move dirty money into the U.S."

Yet the absence of any criminal charges against individual executives at the bank suggest to some consumer advocates that [regulators and law enforcement](#) remain focused on monetary penalties and prosecuting low-level employees rather than forcing accountability from those at the top. Dennis Kelleher, president and CEO of consumer advocacy group Better Markets, said the lack of accountability for executives continues a trend whereby banks are uniquely able to essentially pay to bypass criminal charges. While prosecutors said they charged more than two dozen individuals, including two bank insiders who accepted bribes, Kelleher said the fact that none of the bank's supervisors or executives were named [in the recent actions](#) is a big failure.

"The illegal conduct at TD Bank happened because bank executives and supervisors failed repeatedly and year after year for more than ten years," he said. "Handcuffing minnows while letting the whales go free is not justice and will not deter those who have the power at banks to ensure that they are following the law."

Experts say the reluctance to charge TD Bank executives individually stems from the complexity of proving personal intent in a diffuse decision-making

environment, the legal strategy of focusing on corporate fines and the institutional size that provides a shield of protection.

While Garland indicated "criminal investigations into individual employees at every level of TD Bank are active and ongoing," experts say the challenges of holding top executives accountable in corporate crime cases, especially at institutions as large as TD Bank, remain a significant barrier and bank executives continue to enjoy unique cover from criminal liability — a notable contrast with other sectors.

In the guilty plea, prosecutors attributed TD Bank's failures partially to its leadership prioritizing growth over compliance, the bank's neglecting due diligence and deliberately ignoring glaring red flags. While the settlement caps TD's U.S. assets, it allows the firm to keep its U.S. banking charter and has not outlined any charges against senior executives in connection to the conspiracy.

The lack of individual charges against TD Bank executives can be attributed to multiple factors that highlight the complexities of prosecuting individuals in large organizations.

Brandon L. Garrett, a law professor at Duke University and author of the book *Too Big to Jail: How Prosecutors Compromise with Corporations*, largely attributes this to challenges involved in assigning personal liability within corporate crime cases. While TD Bank pleaded guilty to money laundering, assigning individual blame becomes challenging because the decision-making process is often decentralized, and proving intent is a major obstacle.

"Companies can't go to jail, so their sentences usually involve fines, restitution, compliance reforms, and cooperation with investigations ... but pinpointing individual responsibility is difficult, even when a company cooperates. In large organizations, roles are divided, and it's easy for people to point fingers," he said. "The DOJ aims to hold individuals accountable in corporate crimes, but the complexity of these cases makes that difficult."

This fragmentation of responsibility makes it harder for prosecutors to prove that a specific executive had direct intent to commit a crime.

Size influences prosecution

However, the contrast between TD Bank's case and similar offenses by financial firms is stark. While TD Bank avoided individual charges, executives of other companies accused of abetting money laundering — such as with cryptocurrency exchange Binance — faced much harsher consequences.

Trial attorney Brian Klein of Waymaker LLP said that in smaller businesses, identifying the decision-makers is more straightforward, whereas in large institutions like TD, it's much more difficult to trace accountability to a single person. This diffusion — as well as big companies' greater legal and financial resources — often protects individuals within the organization, even when the company faces penalties.

"Large institutions, like big banks, can often absorb fines without major impact, whereas smaller businesses typically can't," Klein said. "A small business engaging in similar misconduct like TD Bank would likely see its key individuals prosecuted, but the sheer scale of a large institution often shields the individuals within it."

Klein said size plays a major role in the DOJ's decision to target individuals, indicating that smaller businesses face much harsher penalties for similar misconduct.

"When smaller businesses are involved in financial misconduct, the outcomes are very different [and you] see examples in DOJ press releases of small business owners being prosecuted for financial-related crimes for relatively small sums," he said. "These cases and the recent TD Bank plea agreement highlight the disparity in how justice is applied between large institutions and small businesses."

In a 2022 speech, Deputy Attorney General Lisa O. Monaco emphasized the importance of holding individuals accountable for corporate crimes, noting that the DOJ will prioritize prosecuting individuals who violate laws, regardless of their positions within a company. The Treasury Department is also

undertaking a rulemaking process to revise the specific requirements that banks must fulfill to establish an effective, risk-based, and reasonable anti-money-laundering program.

Kelleher said while Monaco's comments are encouraging, he is not optimistic that this case will be markedly different from previous instances.

"We are encouraged by the Department of Justice's assurance that the investigations are ongoing, and that no individual involved in TD Bank's illegal conduct is off limits ... [however], we have heard this often before from the DOJ and nothing has ever come of it," he wrote in a release following the settlement. "It is past time that the DOJ gets serious about deterring crime before it happens and that will require prosecuting, convicting, and sending individual bank supervisors and executives to jail."

Garrett believes prosecutors want to take action against individuals, but that the sheer size and complexity of such organizations remains the major hurdle to prosecuting individuals.

"There's no real evidence to support that [prosecutors are sheepish]," he said. "Prosecutors find it rewarding to take tough cases to trial; it's valuable experience, and it's department policy to hold individuals accountable where possible...[but] the complexity of the transactions and attributing intent in these white-collar cases pose significant challenges."

Klein said that while the DOJ has internal guidance on going after individuals, he says it's hard to see those guidelines having much impact in practice. "In the case of TD Bank, the penalties it is paying are large — \$3 billion is a lot of money, obviously — but for a bank of that size, that should be very manageable," he said. "Prosecutors push for big penalties to show they're serious, but for a number of these massive institutions paying them is just part of doing business."

Greytak said more charges — including those against individual actors — could be coming, and that the settlement should represent a moment of reckoning for the whole industry.

"I would certainly hope that the investigators here went up the corporate food chain, so to speak, and were able to find out who knew what, and to see whether this was localized, and yeah, what level of liability you can trace back to leadership," he said. "They set the culture here and are the ones who are ultimately responsible for ensuring adequate compliance and a culture of compliance and having the internal checks and oversight."

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