

[Banking and Finance Law Daily Wrap Up, TOP STORY—E.D.N.Y.: HSBC compliance report cannot be kept secret, federal judge says, \(Feb. 1, 2016\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

A monitor's report on HSBC Bank's compliance with a deferred prosecution agreement is a judicial record that must be available to the public, according to a federal district court judge. A request by the bank and the federal government that the report remain secret has been rejected, although they have an opportunity to designate parts of the report that should remain confidential ([U.S. v. HSBC Bank USA, N.A.](#), Jan. 28, 2016, Gleeson, J.).

The corporate compliance monitor was required under a 2012 settlement of Justice Department charges that HSBC violated Bank Secrecy Act regulation anti-money laundering program requirements and other federal laws. According to the charges, HSBC Bank USA failed to monitor more than \$10 billion in transactions with HSBC Mexico between 2006 and 2009. The company also allowed the movement of hundreds of millions of dollars by nations that were subject to U.S. sanctions over a 10-year period. Unusually, HSBC admitted the violations as part of the settlement, and the company also agreed to pay more than \$1.9 billion.

Confidential filing. The first annual report by the compliance monitor was issued in January 2015, but it was not filed with the court. Instead, the government filed a six-page document that it said summarized the more than 250-page report. The summary noted that HSBC has made significant progress but still needs to improve its compliance technology and corporate culture (see [Banking and Finance Law Daily, April 2, 2015](#)).

The judge, unsatisfied with the summary, ordered that the full report be filed. The report was filed under seal, and both HSBC and the government subsequently objected when a private individual asked that it be made public.

Judicial document. Both the common law and the First Amendment give the public a right of access to judicial documents, the judge noted, and that right applies even if the document does not contain any information that would be useful to the person seeking access. The first question to be answered was whether the monitor's report is a judicial document.

A judicial document is one that is "relevant to the performance of the judicial function and useful in the judicial process," the judge said. The compliance report meets that standard.

The report was needed to ensure that HSBC is in compliance with a DPA in an open criminal prosecution. The judge said he has an obligation to oversee the bank's compliance, and he could not do so without some reports from both the bank and the government. In fact, the order that approved the settlement explicitly provided that the judge was to be kept informed of any significant developments.

The judge rejected the government's assertion that he had no part in overseeing the monitor's work, replying that his job was to oversee the entire criminal prosecution. "[I]t would demean this institution" for him to take no action if the monitor reported that HSBC continued to launder money for drug traffickers, the judge said.

The DPA provided that the charges against HSBC could be dismissed if the banks complied with the agreement's terms. However, the prosecution could be dismissed only by a court order, and that order could not be entered unless the judge reviewed the monitor's reports to ensure that the DPA had been fulfilled.

Right of access. On the other hand, the First Amendment right of access to judicial documents is not unlimited. It applies only if both experience and logic support access, the judge said. Both criteria support public access to the monitor's report.

Deciding whether HSBC is complying with the DPA is not comparable to deciding whether to file a case, the judge said in rejecting the government's contrary argument. The DPA relates to "undoing" a case that already

has been filed. A DPA is more akin to a plea agreement or a pretrial hearing, both of which commonly are subject to public access.

Logic also supports public access, the judge continued. The HSBC settlement was a matter of “great public interest,” he observed. The Justice Department and the court are public institutions, and HSBC is a vast international financial services institution. It is “appropriate and desirable” to allow the public to know what is going on.

Redaction. The judge did, however, concede that it is appropriate to protect some aspects of the report. Information that could identify HSBC employees can be redacted, as can information that could expose weaknesses in HSBC’s anti-money laundering and Bank Secrecy Act compliance programs. Also, appendices to the report that could cause conflicts with foreign regulatory agencies will remain sealed, and related information in the report will be redacted.

The judge rejected the government’s request to keep confidential information it said could harm future law enforcement efforts. The government’s interest in preventing access on that basis was “minimal,” he said.

The case is [No. 12-CR-763 \(JG\)](#).

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Companies: HSBC Bank USA, N.A.; HSBC Mexico; HSBC Holdings PLC

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