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WHITE-COLLAR CRIME

Expert Analysis

The Debate About Deferred And Non-Prosecution Agreements

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The most evident problem for law enforcement in investigating and prosecuting corporate crime is that, unlike an individual, a corporate entity has "no soul to be damned, and no body to kick."[1] As a result, prosecutors have to find alternatives short of imprisonment to deter corporate crime. For years, the only alternative was a criminal indictment, which carried significant collateral consequences including monetary penalties and reputational damage. In recent years, the Justice Department frequently has turned instead to another tool in its arsenal against corporate crime—deferred prosecution and non-prosecution agreements, familiarly known as DPAs and NPAs. The efficacy of these agreements and the government's increased reliance on them has been the subject of ongoing and recent debate.

Increasing Reliance

In the past decade, the total number of corporate DPAs and NPAs entered into by the Justice Department has risen sharply, totaling more than 150 since 2007. In the first part of this year alone, the Justice Department has entered into more than 20 such agreements.[2] In late 2010 and 2011, the Securities and Exchange Commission adopted the policy, entering into its first DPA and NPA, indicating its intention "to encourage individuals and companies to provide information about misconduct and assist with an SEC investigation."[3] And last month the United Kingdom announced government plans to promulgate adoption of DPAs for corporate crime based upon the United States model.

In a typical agreement, the government agrees to forgo prosecution if a company admits to wrongdoing; cooperates with any ongoing investigations, including those against individual employees; pays monetary penalties and fines; and improves its compliance programs to better insure against future wrongdoing. If a corporate defendant fails to keep up its end of the deal, the government can prosecute the case fully. Typically, in the case of DPAs, the government files a criminal information, while no accusatory instrument is filed in the case of an NPA.

The United States Attorney's Manual, which guides federal prosecutors in deciding whether to indict a corporation, states that prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases. These collateral consequences include not only harm to innocent third-party employees and shareholders, but also the significant non-penal sanctions that may be imposed on a corporation as a result of a criminal conviction, such as debarment from government contracts or other federal programs.

When the collateral consequences are too significant, "a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement."[4]

On Sept. 13, 2012, Assistant Attorney General Lanny Breuer spoke at an event at the New York City Bar Association about the Justice Department's white-collar criminal enforcement efforts, focusing specifically on the fact that deferred prosecution and non-prosecution agreements have become a mainstay of the government's enforcement efforts with regard to corporate wrongdoing. According to Breuer, DPAs and NPAs "have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe."[5] Breuer observed that before the existence of tools such as deferred prosecution agreements, federal prosecutors were forced either to criminally indict a corporation or decline prosecution if they believed the collateral consequences too severe. Breuer opined that deferred prosecution agreements offer government lawyers an alternative to the "blunt instrument of criminal indictment" and result in "far greater accountability for corporate wrongdoing."

Criticism of DPAs and NPAs

As recognized by Breuer in his remarks, a primary justification for use of DPAs and NPAs is that the agreements keep corpora-

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tions accountable while allowing them to avoid the so-called Arthur Andersen effect, named after the now-defunct accounting firm that was forced to close shop after being convicted of obstruction of justice in connection with the Enron scandal. Critics argue that the Andersen effect is illusory, however. This argument is supported by a study conducted by Gabriel Markoff, a recent graduate of the University of Texas Law School and current law clerk in the U.S. District Court for the Southern District of Texas. The study found that not one public company convicted between 2001 and 2010 failed under circumstances that could reasonably be linked to their convictions.[6]

Markoff's study found 51 convictions of public companies between 2001 and 2010, all of which were obtained by plea agreement. In 36 instances, the companies are still functioning and active on their respective stock exchanges. Eleven of the defendant companies merged with other businesses under favorable conditions. Finally, only four companies suffered business failures following their convictions, but not, according to Markoff, because of their convictions, a notion purportedly supported by the fact that three of the companies failed more than three years after the date of conviction.[7]

Markoff's study further notes that the plea agreements used in many of the cases required the convicted corporations to put compliance programs in place, engage corporate monitors, and cooperate with the government in its investigation. Markoff's findings are supported by data from the U.S. Sentencing Commission reporting that organizational defendants frequently are required to make improvements in compliance or ethics procedures as part of a plea agreement.[8] Advocates of the use of DPAs and NPAs frequently tout the government's ability to require these types of institutional reforms, which are outside the realm of traditional criminal penalties, as a justification for their use. Given that the vast majority of cases brought against corporations end in a plea agreement,[9] systematic reforms touted as a benefit to DPAs and NPAs are no longer unique to those agreements.

When the fact that the Arthur Andersen effect is not as dire as believed is coupled with "the corresponding reality that plea agreements can be used to obtain the implementation of compliance programs and monitors just as DPAs can, the two main justifications usually cited for preferring DPAs over convictions appear groundless."[10] Nevertheless, critics believe that federal prosecutors use the specter of Arthur Andersen's demise to scare corporations into agreements requiring expensive compliance changes and, in some instances, forcing corporations to waive the attorney-client privilege to give the Justice Department a leg up in the prosecution of individual corporate officers.[11] Indeed, some opine that companies "agree to these vehicles for reasons of risk-aversion and efficiency and not necessarily because the conduct at issue actually violates the law."[12]

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At the same time, the government's use of DPAs and NPAs also is criticized as ineffectual in deterring criminal behavior, allowing corporate criminals to receive no more than a slap on the wrist and making the decision to police criminal activity within a corporation "just another dollars-and-cents decision." "With the threat of criminal liability effectively off the table, corporate executives may be more willing to skate aggressively close to the line—or to jump over it."[13]

Critics also complain that an enforcement climate that relies extensively on resolution through DPAs or NPAs "insulates DOJ's enforcement theories from judicial scrutiny." Specifically addressing the government's enforcement of the Foreign Corrupt Practices Act, former Attorney General Alberto Gonzales has observed, "In an ironic twist, the more that American companies elect to settle and not force the DOJ to defend its aggressive interpretation of the [FCPA], the more aggressive DOJ has become in its interpretation of the law and its prosecution decisions."[14]

Conclusion

While the reality is that corporations may not face the type of collateral consequences suffered by Arthur Andersen, there is no question that fighting criminal charges can have a tremendous impact on a corporation's reputation and pocketbook. Defending a criminal investigation by any means is expensive, and DPAs and NPAs frequently offer a faster and less expensive resolution. Even if settlement is the best course, however, corporations face additional risks.

As has been observed, "While these agreements provide corporations the ability to swiftly resolve investigations and reassure shareholders and employees of the company's continued viability, the agreements also create risks through increased exposure to civil liability and financial penalties and heightened tensions between the company and its employees resulting from the waiver of attorney-client and work-product privileges."[15] All these interests must be weighed by a corporation that is under investigation and viewed against the backdrop of history, experience, and an evolving landscape.

1. John C. Coffee, Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry Into the Problem of Corporate Punishment," 79 Mich. L. Rev. 386 (1980) (quoting Edward, First Baron Thurlow, Lord Chancellor of England).
2. Peter J. Henning, "Deferred Prosecution Agreements and Cookie-Cutter Justice," The New York Times (Sept. 17, 2012).
3. SEC Release 2011-112, "Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement" (May 17, 2011).
4. United States Attorney's Manual 9.28-1000.
5. Justice News, "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association" (Sept. 13, 2012).
6. Gabriel Markoff, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century" (Aug. 20, 2012) (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132242). This working paper has been accepted for publication in the April 2013 issue of the University of Pennsylvania Journal of Business Law.
7. Id.
8. U.S. Sentencing Commission, "Overview of Federal Criminal Cases Fiscal Year 2011" at p. 11.
9. Id. at p. 10.
10. Markoff, "Arthur Anderson [sic] and the Myth of the Corporate Death Penalty."
11. See Erik Paulsen, "Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements," 82 N.Y.U. L. Rev. 1434 (2008); Andrew Weissman and David Newman, "Rethinking Corporate Criminal Liability," 82 Ind. L.J. 411 (2007).
12, Mike Koehler, "Assistant Attorney General Breuer's Unconvincing Defense of DPAs/NPAs," FCPA Professor Blog (Sept. 17, 2012) (available at: http://www.fcpaprofessor.com/assistant-attorney-general-breuers-unconvincing-defense-of-dpas-npas).
13, Randall D. Eliason, "We Need to Indict Them," Legal Times (Sept. 22, 2008).
14. Koehler, "Assistant Attorney General Breuer's Unconvincing Defense of DPAs/NPAs."
15. Michael R. Sklaire and Joshua G. Berman, "Deferred Prosecution Agreements: What is the Cost of Staying in Business?" Washington Legal Foundation Legal Opinion Letter, Vol. 15 No. 11 (June 3, 2005).