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White-Collar Crime

Expert Analysis

Deferred Prosecution Agreements In Decline? Enforcement Implications

By Elkan Abramowitz And Jonathan Sack

The Department of Justice has come under sharp criticism—from Congress, the courts and commentators—for failing to prosecute high-level individuals for serious financial crimes. Hillary Clinton recently joined the fray, arguing in an op-ed that "executives need to be held more accountable" and "[n]o one should be too big to jail."[1]

The controversy over prosecuting individuals is linked to a broader controversy over the resolution of high-profile corporate investigations since the financial crisis—specifically, the government's reliance on corporate deferred prosecution agreements (DPAs), often without charges being brought against any individuals.[2] In a DPA, the government files criminal charges against the company in court but then defers and ultimately seeks dismissal of the case when the company takes agreed-upon remedial measures, such as the payment of fines and the adoption of compliance programs.[3]

In this article, we address two recent developments that reflect a significant shift in attitude toward the role of DPAs in recent white-collar criminal enforcement. First, courts have subjected DPAs to increased scrutiny, in some cases casting doubt on the prosecutorial judgment that led the government to enter into the DPA. Second, in a September 2015 memorandum issued by Deputy Attorney General Sally Quillian Yates (the Yates Memorandum), the Justice Department adopted new measures "to strengthen [its] pursuit of individual corporate wrongdoing."[4] We suggest that these developments raise some new, and some old but persistent, issues for counsel representing both individuals and companies in white-collar criminal investigations.

> The Department of Justice has recently suggested that deferred prosecution agreements have been used too extensively in the context of corporate wrongdoing.

Judicial Scrutiny of DPAs

Since at least the prosecution of accounting firm Arthur Anderson more than 10 years ago, DPAs have been used extensively to resolve significant corporate investigations.[5] For the most part, federal courts rubber-stamped their approval of DPAs—until 2013. That changed in *United States v. HSBC Bank USA*,[6] in which Judge John Gleeson in the Eastern District of New York held that courts have the authority to review DPAs to ensure they do not "lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."[7]

Two recent decisions follow Judge Gleeson's lead. In *United States*

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v. Fokker Servs.,[8] Judge Richard Leon in the District of Columbia rejected a proposed DPA. The company, Fokker Services, admitted to a five-year conspiracy, extending to the highest levels of the company, to violate federal export laws by shipping aircraft systems to Iran. Judge Leon took issue with the low amount of the fine and the absence of a mechanism to verify the company's compliance with the law going forward. Additionally, employees involved in the conspiracy were not prosecuted, and some kept their jobs. Judge Leon ruled that he could not approve the DPA because it was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world"[9]—a ruling that is now on appeal in the U.S. Court of Appeals for the D.C. Circuit.

In *United States v. Saena Tech Corporation*,[10] Judge Emmet Sullivan, also in the District of Columbia, followed *HSBC* and *Fokker* in asserting the district court's authority to conduct a substantive, if circumscribed, review of the terms of a DPA. After approving the DPAs at issue, Judge Sullivan took the unusual step of taking issue in dicta with the government's use of DPAs generally. Judge Sullivan maintained that Congress intended DPAs to facilitate community rehabilitation programs, dating to the 1960s. Under these programs, prosecutors deferred charges of non-violent crimes against individuals if they successfully completed employment placement and counseling programs, while also avoiding re-arrest and drug use.[11] Judge Sullivan wrote that he was "disappointed" that, notwithstanding Congress's "clear intent," DPAs are being used to afford corporations, but not individuals, a chance for rehabilitation without the devastating consequences of a criminal conviction.[12]

The Department of Justice has recently adopted a very different perspective from the one urged by Judge Sullivan. While Sullivan critiqued federal criminal enforcement for using DPAs too sparingly in the context of non-violent street crime, the Department of Justice has recently suggested that DPAs have been used too extensively in the context of corporate wrongdoing.

> The Yates Memorandum requires a corporation to disclose "all relevant facts about individual misconduct" in order to receive "any consideration for cooperation"; a company "cannot pick and choose what facts to disclose."

The Yates Memorandum

Against the backdrop of criticism of the Department of Justice's handling of high-profile corporate investigations, the Yates Memorandum sets forth a number of changes to internal Department of Justice practice in such investigations, including requiring civil division attorneys to share information with criminal division attorneys, and requiring the latter to explain to supervisory attorneys why charges have not been sought against individuals in cases of corporate misconduct.

While much of the Yates Memorandum implies that the seemingly small number of individual prosecutions has been driven by insufficient zeal and sharing of information within the Department of Justice, another section of the Memorandum tends to place responsibility on companies and their counsel. The Memorandum suggests that companies have been able to obtain meaningful cooperation credit, and thereby avoid criminal charges, without being sufficiently probing and aggressive in internal investigations, and without being required to identify evidence of misconduct by individual employees. On that basis, the Memorandum requires a corporation to disclose "all relevant facts about individual misconduct" in order to receive "*any* consideration for cooperation"; a company "cannot pick and choose what facts to disclose."[13]

Internal Investigations

The Yates Memorandum may have significant implications for how internal investigations are conducted. Deputy Yates made clear in a speech on Sept. 10, 2015, that department attorneys will be scrutinizing internal investigations closely for adequacy and completeness:

> [W]e're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want cooperation credit, they

need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.[14]

In another speech on Nov. 16, 2015, Yates indicated that prosecutors will "expect cooperating companies to make their best effort to determine the facts with the goal of identifying the individuals involved."[15] Importantly, prosecutors will proceed on "the presumption" that corporate entities "have access to the evidence" concerning individual misconduct. If a company cannot obtain, or is legally prohibited from disclosing, complete information concerning the individuals, the company "need[s] to raise these issues with the prosecutor."[16]

Reviving Previous Concerns

Commentators have objected that the Yates Memorandum seeks to enlist corporate counsel as "a member of the government team."[17] The Yates Memorandum places enormous pressure on companies and their counsel to obtain information about individuals, and then to treat that information as inculpatory, in order to convince the government that the company is being fully cooperative. As a result, the Memorandum could generate the very dangers of government coercion that arose so prominently nearly 10 years ago in connection with the investigation of KPMG and the ensuing criminal prosecutions.

In 2005, the U.S. Attorney's Office for the Southern District of New York (USAO) was investigating KPMG and certain employees in connection with an alleged tax shelter scheme.[18] At the time, prosecutors were required to assess KPMG's cooperation under a 2003 memorandum issued by Deputy Attorney General Larry Thompson (the Thompson Memorandum). The Thompson Memorandum directed prosecutors to consider the company's "willingness to cooperate in the investigation of its agents," including "mak[ing] witnesses available" to the government, and "a corporation's promise of support to culpable employees and agents" by "the advancing of attorneys fees."[19]

In a series of meetings and communications, the USAO informed KPMG's counsel that, unless KPMG was legally obligated to advance attorney fees to employees, the advancement of fees "could be held against the firm."[20] As part of its effort to cooperate with the USAO, KPMG departed from its longstanding practice of advancing its employees' reasonable attorney fees. Instead, KPMG capped the attorney fees it would provide for each employee and told employees it would stop paying their fees if they failed to provide "prompt, complete, and truthful" information to prosecutors.[21]

In *United States v. Stein*, Judge Lewis Kaplan found that KPMG's decision "was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO,"[22] and that the government's conduct violated the constitutional rights of KPMG employees by interfering with their access to counsel. As a result, Judge Kaplan dismissed the indictments against certain KPMG employees who were "forced to limit their defenses" because the USAO interfered with the advancement of their attorney fees,[23] and the dismissal was affirmed by the U.S. Court of Appeals for the Second Circuit.[24]

Judge Kaplan also found that the USAO had coerced KPMG employees into participating in proffer meetings—that is, to submit to informal questioning by prosecutors—in violation of their right against self-incrimination. After KPMG learned that certain employees refused to participate in proffer meetings with the USAO, KPMG threatened to fire them and cease paying their attorney fees.[25] Certain KPMG employees then reversed course and participated in proffer meetings. Judge Kaplan found that, through the Thompson Memorandum and the conduct of prosecutors, the USAO "deliberately precipitated KPMG's use of economic threats to coerce the proffer statements."[26]

KPMG Redux?

Following the government's setback in the KPMG prosecution, as well as widespread criticism from the legal profession and the prospect of corrective legislation in Congress, the Justice Department revised its standards for evaluating corporate cooperation. The revised standards, currently memorialized in a 2008 memorandum by Deputy Attorney General Mark Filip (the Filip Memorandum"), prohibit prosecutors from considering whether a company advances fees to employees, and removes the Thompson Memorandum's statement that

prosecutors should consider a company's willingness to "make witnesses available" to the government.[27]

The Yates Memorandum may result in pressures akin to those that led to the Stein decisions and the subsequent changes to department policy and practice. Under the Yates Memorandum, the government "expect[s] cooperating companies to make their best effort to determine the facts with the goal of identifying the individuals involved."[28] Under that standard, the steps a company takes—or fails to take—to induce employees to cooperate with an internal investigation, including threats of discipline or termination, appear to be relevant to judging the adequacy of its cooperation. On the margin, it may encourage some companies to apply greater pressure on individual employees to admit misconduct or characterize the conduct of others as improper. As a result, the Yates Memorandum could, in Judge Kaplan's words, precipitate a company's "use of economic threats to coerce"[29] employees to make statements to company counsel, who have little choice but to turn the information over to prosecutors.

Moreover, the Yates Memorandum, by focusing so heavily on whether an investigation turns up incriminating information about individual employees, will affect the incentives of company counsel when conducting investigations. By directing prosecutors to judge corporate cooperation according to the nature and extent of incriminating information disclosed to the government, the Yates Memorandum may, in close cases, lead company counsel to overinterpret the facts, or find wrongdoing where the record is more consistent with innocent mistake or uncertainty. The effects of the Yates Memorandum in this respect could be harmful to both companies and employees alike.

Conclusion

In response to criticism over the reliance on DPAs to resolve high-profile investigations, the Department of Justice is sharpening its focus on wrongdoing by individuals. The Yates Memorandum understandably addresses the attitudes and practices of Department of Justice attorneys. But the Yates Memorandum also suggests that insufficiently probing and rigorous internal investigations bear some responsibility for the department's failure to prosecute more individuals, and it calls on prosecutors to demand more from companies in the future. It is too early to say whether practices found to be problematic under the Thompson Memorandum will return, but counsel for companies and their employees cannot afford to ignore the risk.

1. Hillary Clinton, "How I'd Rein in Wall Street," The New York Times (Dec. 7, 2015).

2. See e.g., Elkan Abramowitz and Jonathan Sack, "Why So Few Prosecutions Connected to the Financial Crisis," NYLJ (March 4, 2013); Brandon L. Garrett, "Too Big to Jail," 95-100 (Harvard University Press 2014).

3. See Jonathan Sack, "Meet the Fokker: Continued Judicial Skepticism Toward Deferred Prosecution Agreements," The Insider Blog, Forbes.com (March 12, 2015).

4. Memorandum from Sally Quillian Yates to Assistant Attorneys General (Sept. 9, 2015) (available at: http://www.justice.gov/dag/file/769036/download).

5. See Garrett, supra n. 1, at 45-80.

6. *United States v. HSBC Bank USA*, No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

7. Id. at *6.

8. *United States v. Fokker Servs.*, 79 F.Supp.3d 160 (D.D.C. 2015).

9. Id. at *167.

10. *United States v. Saena Tech Corp.*, No. CR 14-211, 2015 WL 6406266 (D.D.C. Oct. 21, 2015).

11. Id. at *24-29.

12. Id. at *25.

13. Id. at 3. (emphasis in original).

14. Prepared Remarks by Deputy Yates, Program on Corporate Compliance and Enforcement (Sept. 10, 2015) (available at: http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school).

15. Prepared Remarks by Deputy Yates, American Banking and Bar Associations Money Laundering Enforcement Conference (November 16, 2015) (available at: http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0).

16. Id.

17. Ellen Podgor, "It's Official—Throw the Employees Under the Bus," White Collar Crime Prof Blog, lawprofessors.typepad.com/whitecollarcrime_blog (Sept. 9, 2015).

18. See generally *United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y. 2006).

19. Memorandum from Larry D. Thompson to United States Attorneys (Jan. 20, 2003) (available at: http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf).

20. See *Stein*, 435 F.Supp.2d at 353.

21. Id. at 345-46.

22. Id. at 353.

23. *United States v. Stein*, 495 F.Supp.2d 390, 419 (S.D.N.Y. 2007).

24. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

25. *United States v. Stein*, 440 F.Supp.2d 315, 321-23 (S.D.N.Y. 2006).

26. Id. at 334.

27. Memorandum from Mark Filip to United States Attorneys (Aug. 28, 2008) (available at: http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf).

28. Supra n. 16.

29. *Stein*, supra n. 26, at 334.

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