

Recent Developments In the Prosecution of Corporations

In recent years, prosecutors, defense counsel and courts have wrestled with how to enforce white-collar criminal law appropriately against corporations. On the federal level, we have settled on a process in which prosecutors consider, before charges are brought, multiple factors embodied in written “Principles of Federal Prosecution of Business Organizations.” These Principles, beginning with the Holder Memorandum in 1999 and continuing through the Filip Factors in 2008 (as modified by the Yates Memorandum in 2015), are intended to guide prosecutors’ discretion and help them make charging decisions that punish and deter wrongdoing by companies without causing undue harm to innocent employees, shareholders and other third parties.

The logic of this arrangement rests on several facts of corporate life: Corporate criminal liability is relatively easy to establish, a corporation faces severe risks if it goes to trial against the government in a criminal case, and so prosecutorial discretion, rather than the adversary process, is the only practical

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means of seeking a just outcome. To illustrate the prohibitive costs of litigating a criminal case, observers typically point to the Arthur Andersen case, in which the Supreme Court reversed the company’s conviction, albeit two years after the company collapsed following the jury verdict. What follows from this practical reality is that a company must make its argument to prosecutors, not a judge or jury, as to why the facts, law and equities call for no or very limited charges and punishment.

Two recent developments underscore the central role of prosecutorial discretion in white-collar corporate prosecutions. First, on Nov. 29, 2017, the Justice Department released a new FCPA Corporate Enforcement Policy (the Policy) which defines specific conditions under which the government will presumptively not charge a company with FCPA violations. See Rod J. Rosenstein, *Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017); U.S. Attorneys’ Manual (USAM) 9-47.120. Second, about one week earlier,

on Nov. 20, 2017, Judge William Young in the District of Massachusetts rejected a proposed corporate plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). See *United States v. Aegerion Pharmaceuticals*, No. 17-10288-WGY, 2017 WL 5586728, at *2 (D. Mass. Nov. 20, 2017). In a sharply worded opinion, the court took the government to task for, among other things, seeking to dictate the appropriate sentence, thereby denying the court its authority to exercise discretion at sentencing, a core judicial function.

We discuss these two developments below and consider some of the practical consequences of the substantial power prosecutors wield in the prosecution of corporations.

FCPA Corporate Enforcement Policy

The FCPA Corporate Enforcement Policy builds on the Justice Department’s earlier FCPA Pilot Program, which began in 2016. See generally Elkan Abramowitz and Jonathan Sack, “FCPA Enforcement Trends: Will They Continue?,” NYLJ (March 7, 2017). The new Policy modifies a number of features of the Pilot Program, most importantly by creating a presumption that prosecution will be declined if all of the Policy’s requirements are met. Under the Pilot Program, declination of prosecution would be “consider[ed]” by prosecutors, but was not presumptive.

The new Policy provides that, “absent aggravating circumstances,” the Justice Department will presumptively decline to prosecute a company if the company (1) voluntarily discloses FCPA misconduct, (2) fully cooperates with the Justice Department’s investigation, and (3) remediates the violation in a timely and appropriate manner. In addition, a corporate monitor will not be required if a company has implemented an effective compliance program at the time of the resolution. The Policy includes guidance to companies about what is required to satisfy the self-disclosure, cooperation and remediation criteria—all important issues in their own right but beyond the scope of the present article.

Notably, the presumption of non-prosecution does not apply if there are aggravating circumstances “involving the seriousness of the offense or the nature of the offender.” In addition to these two broad categories of aggravators, the Policy provides a non-exhaustive list of other possible aggravating facts: involvement by executive management in the misconduct, a significant profit to the company from the misconduct, pervasiveness of the misconduct and criminal recidivism. If a company complies with the Policy’s requirements but aggravating factors are present, charges will be filed, but at sentencing the Justice Department will recommend a 50 percent reduction off the low end of the U.S. Sentencing Guidelines fine range. Similarly, if a company meets the Policy’s cooperation and remediation requirements but chooses not to make a voluntary disclosure, the government will recommend a 25 percent reduction off the Sentencing Guidelines.

This sort of concrete, well-articulated policy has very positive features for companies: In addition to providing the substantial benefit of leniency, the program’s increased clarity and transparency should help corporate leaders make better and less speculative decisions as to how they

conduct their businesses and what path to take when violations of law come to their attention. To promote consistency in handling FCPA charging decisions, including application of the new declination policy, the U.S. Attorney’s Manual provides that all FCPA criminal investigations and prosecutions will be handled by one unit of the Justice Department, the Fraud Section of the Criminal Division, unless otherwise determined by the Assistant Attorney General of the Criminal Division. USAM 9-47.110.

But alongside these considerable benefits, the new Policy raises at least three issues that grow out of the central role played by federal prosecutors. First, the power of one small group of federal prosecutors is enhanced by the extraordinary

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benefit (declining prosecution) they have to confer on a corporation. The conferral of that benefit will often turn on determinations of complex facts and judgments about such issues as whether the misconduct was “pervasive” or the company received a “significant” profit, and whether a company has fully cooperated with the government and remediated its issues in a timely and appropriate fashion. Thus, many millions of dollars and the fate of entire companies may depend not on a neutral fact finder’s decision on close issues but rather on the fairness and thoroughness of a small number of government lawyers. This concentration of power is not new, but its implications for an individual company and for the many companies facing FCPA investigations are magnified.

Second, if a tailored policy is justified for FCPA prosecutions, perhaps analogous policies are warranted for other areas of white-collar enforcement. Put differently,

why should FCPA offenses be subject to a declination policy (maintained by a single office in Washington), whereas other complex white-collar crimes, such as accounting fraud or other financial wrongdoing, are subject to general principles that may be applied differently by U.S. Attorney’s Offices around the country? The Policy alludes to “unique issues presented in FCPA matters, including their inherently international character,” which may refer to the difficulty of investigating and prosecuting many FCPA cases without companies sharing the findings of internal investigations and producing foreign witnesses, but the rationale for the Policy is not spelled out. Whatever the precise justifications, perhaps the same or similar reasoning would warrant declination policies for other large-scale, complex domestic or global financial offenses, but such policies do not exist—with the possible exception of antitrust. See Department of Justice, *Corporate Leniency Policy* (Aug. 10, 1993); Department of Justice, *Leniency Policy for Individuals* (Aug. 10, 1994).

Third, to receive any of the Policy’s benefits, a company must “pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.” In other words, even when prosecution is declined, a company must pay an amount of money, often substantial, that is computed by the government based on many, often highly subjective judgments. The rationale makes sense: Wrongdoers should not retain the fruits of their misconduct. But, once again, the power of prosecutors raises concerns. The costs of settlement borne by a company (in most cases, chiefly by its shareholders) are ultimately decided by the Justice Department without independent review, and against a corporate adversary with very limited bargaining power.

‘Aegerion Pharmaceuticals’ Plea Agreement

In *Aegerion Pharmaceuticals*, the company admitted that it had taken false and

deceptive acts in the development and marketing of Juxtapid, a drug used to treat high cholesterol in individuals with a rare genetic disease. Aegerion's misconduct was intended to "increase the use of Juxtapid in circumstances where such treatment was not medically indicated," and included knowingly inducing the prescription of Juxtapid in cases where it would provide no benefit. *Aegerion Pharmaceuticals*, 2017 WL 5586728, at *1.

Charged with two misdemeanor counts of introducing misbranded drugs into interstate commerce, Aegerion agreed to plead guilty under Federal Rule of Criminal Procedure 11(c)(1)(C), further agreeing to pay a fine of \$6.2 million and forfeit \$1 million. *Id.* at *2. Pleas under Rule 11(c)(1)(C), also known as "C Pleas," limit the judge's choice at sentencing to "[i]mposing the sentence agreed between the government and the offender or rejecting the plea together." *Id.* at *1. Given that limited choice, Judge Young rejected the guilty plea and ordered the case to stand for trial, in an opinion that can fairly be characterized as a blistering critique of the government's use of C Pleas in corporate prosecutions.

Judge Young's opinion began inauspiciously for both sides—the opinion's first words were "Let's see if I've got this straight"—and did not get better from there. *Id.* at *1 (footnote omitted). The court proceeded to take the parties to task in nine bullet points that "count[ed] the ways" he "dislike[d]" the Aegerion C plea, *id.* at *2-3, and then the court devoted more than half of the opinion to "The Larger Issue—A Two-Tier Criminal Justice System," *id.* at *4-9, a critique of what he saw as the disparate treatment of companies and individuals. As to the Aegerion plea specifically, Judge Young criticized the lack of a presentence report, restitution and fine enhancement for vulnerable victims; the plea's inconsistency with the Sentencing Guidelines; the Justice Department's agreement not to undertake further

prosecution of Aegerion; the insufficient evidence supporting Aegerion's cooperation credit; the decision not to require an independent monitor; the prohibition on any special conditions to be set by the court; and the fact that the plea might have been premature given ongoing investigations. *Id.* at *2-3.

Space does not permit a full description and consideration of Judge Young's thoughtful and provocative memorandum and order, but mention should be made briefly of his sharp criticism of C Pleas for "displac[ing] the common law adversarial proceeding" and reducing the authority of judges. *Id.* at *4. After rejecting Aegerion's arguments in support of the C Plea, the judge eventually directed his ire at the government: "What is far more difficult to

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fathom [than a company's acceptance of a C Plea] is why the government negotiates a 'C' plea with a corporation." *Id.* at *8. The court did not answer the question directly, but cited criticisms of the government's undue "risk aversion" offered by journalist Jesse Eisinger and Southern District of New York Senior Judge Jed Rakoff. *Id.*

Just as the FCPA Corporate Enforcement Policy underscores prosecutors' power over corporate charging decisions, Judge Young's opinion calls attention to the power of prosecutors to use corporate C Pleas to remove or at least sharply limit the power of independent judicial officers. Judge Young's concerns centered on a deal that appeared too lenient and did not allow a full and public vetting of relevant issues in

an adversarial process. In other cases, the concern may be with agreements and prosecutions that appear too harsh because they rest on what defendants regard as a one-sided and inaccurate understanding of the facts. But the basic issue is the same: the prosecutor's role as both advocate and ultimate arbiter of the facts, the law and the equities.

Conclusion

Judge Young has a relatively straightforward prescription for what ails our system of corporate white-collar prosecutions: more trials and more judicial oversight. A more adversarial process, in his view, would address concerns that prosecutors have too much power that goes largely unreviewed and unchecked in corporate prosecutions. But many barriers now stand in the way of such an outcome.

One of the most important is the standard of corporate criminal liability, which imposes a very low bar for liability, notwithstanding many suggestions to change the law. Thus the dangers of a company going to trial in a criminal case remain prohibitive, and the appeal of limiting risk and damage through a guilty plea or deferred prosecution, even on draconian terms, is usually compelling. A program like the FCPA Corporate Enforcement Policy or a deal like the *Aegerion Pharmaceuticals* C Plea, while in many ways of great benefit, only decrease incentives to challenge the government. For the foreseeable future, the present system, concentrating great power with prosecutors, is here to stay.