New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
JULY 8, 2021

Congress Requires DOJ To Report on Deferred Prosecution Agreements

By Elkan Abramowitz and Jonathan S. Sack

In the wake of the financial crisis of 2008, federal white-collar criminal enforcement came under fire. Much of the criticism was directed at prosecutors who were seen as going too easy on large financial institutions, and a principal target of critics was the corporate Deferred Prosecution Agreement (DPA). Under a DPA, the government files criminal charges, the company agrees to remediate wrongdoing (through financial payments and internal reforms), and the charges are ultimately dismissed.

In a little noticed provision of the National Defense Authorization Act (NDAA), Congress recently signaled heightened interest in the use of DPAs (and non-prosecution agreements, or NPAs) as an enforcement tool. The NDAA, a January 2021 law that appropriated funds for the armed forces, included separate pieces of legislation aimed at enhancing anti-money laundering enforcement. Included in this mix was a little-noted provision that requires the Department of Justice (DOJ) to report to Congress on the use of DPAs and NPAs in Bank Secrecy Act (BSA) prosecutions every year for the next five years, with the first report due Jan. 1, 2022. The provision indicates a clear recognition of the importance of DPAs and NPAs in BSA and other white-collar enforcement—and a clear interest in being able to review DOJ decision-making.

In this article, we first discuss the practical and policy reasons for the use of DPAs and NPAs in white-collar criminal investigations. Next, we consider the NDAA's new reporting provision and its relationship with other efforts to enhance transparency in DOJ decision-making. Lastly, we contrast the present reporting requirement with prior, judicial efforts to review the terms of DPAs.

DPAs and NPAs in Context

Since the 1990s, the DOJ has maintained written internal guidelines that address the circumstances under which federal prosecutors should, and should not, pursue criminal charges against a company. See generally Justice Manual, *Principles of Federal Prosecution of Business Organizations* §§9-28.210, 9-28.300, 9-28.700. The point of departure for these policies is a recognition of both the

Elkan Abramowitz and Jonathan Sack

relative ease of establishing corporate criminal liability (under the doctrine of respondeat superior) and the potentially harsh consequences to innocent third parties (e.g., employees and creditors) from prosecuting a company. Consequently, each iteration of these DOJ guidelines has contemplated a range of outcomes depending on the circumstances, including felony prosecution (e.g., if the illegal conduct was widespread and supported by senior management) and declining to prosecute a company (e.g., if the illegal conduct was isolated and limited in scope). See generally Sack and Abramowtiz, *Deferred Prosecution Agreements in Decline? Enforcement Implications*, N.Y.L.J. (Jan. 5, 2016).

For the DOJ, the potential for leniency promotes important law enforcement goals. So, for example, the DOJ Criminal Division has adopted policies that establish a presumption of leniency, including possible non-prosecution—but

ELKAN ABRAMOWITZ *and* JONATHAN S. SACK *are members of Morvillo Abramowitz Grand Iason & Anello. Mr. Abramowitz is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. Mr. Sack is a former chief of the criminal division in the U.S. Attorney's Office for the Eastern District of New York.* ADAM BRADLOW, *an associate at the firm, assisted in the preparation of this column.*

only for companies that self-report misconduct, remediate the underlying issues and fully cooperate with the DOJ's investigation, including against individual wrongdoers. See, e.g., Rod Rosenstein, *Remarks at the American Conference Institute* (Nov. 29, 2018). This was the basis of the innovative and successful FCPA Pilot Program in 2016, which has been expanded over time to become a standard policy in FCPA and other white-collar prosecutions. See Jonathan Sack, *DOJ Announces it Will Extend FCPA "Pilot Program"*, Forbes (March 13, 2017).

DPAs (and NPAs) have been a fairly common means of resolving BSA investigations, which relate to the adequacy of a financial institution's anti-money laundering controls. The use of DPAs in this context is not surprising given the importance of financial institutions to the economy and the potential impact on innocent third parties of a prosecution and guilty plea by a bank. Yet leniency of this kind, in BSA and other white-collar cases, has faced sometimes intense criticism. See generally Sack and Abramowtiz, *White-Collar Enforcement Under Attorney General Eric Holder,* N.Y.L.J. (March 3, 2015). One of the charges against such deals is that they shift financial costs onto current shareholders while the individuals responsible for the corporate wrongdoing are not held accountable.

Interestingly, this criticism is arguably more about failing to hold individuals to account for serious misconduct than it is about not requiring a company to enter a guilty plea. This concern with a supposed inadequacy of individual prosecutions has manifested itself in various ways, perhaps most significantly in 2015 in the Yates Memorandum, which urged federal prosecutors to pursue charges against *individuals before closing cases involving corporate wrongdoing*, Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015). This policy itself has been accused of going too far in the other direction, pushing companies to help prosecutors bring unwarranted charges against individuals. See Aruna Viswanatha and Dave Michaels, *Flaws Emerge in Justice Department Strategy for Prosecuting Wall Street*, Wall St. J. (July 5, 2021).

In the years since the financial crisis, the debate over corporate leniency programs has receded somewhat. But the proper approach to prosecuting misconduct in companies remains a hot-button issue.

Congressional Oversight of DPAs

The NDAA, which authorizes military spending, is commonly used as a vehicle for enacting other legislation. This year, the NDAA included a number of bipartisan provisions, including the Corporate Transparency Act (CTA) and the Anti-Money Laundering Act (AMLA), which are aimed at increasing the ability to detect and prosecute money laundering, BSA violations and related offenses. The CTA requires new and existing U.S. businesses to disclose their beneficial owners to the Treasury Department. The AMLA increases penalties for repeat BSA offenders as well as increase inter-agency coordination in BSA investigations.

As part of the AMLA, §6311 of the NDAA requires the DOJ annually to send the House and Senate Judiciary Committees, House Financial Services Committee, and Senate Banking Committee a report that contains the following information:

(1) a list of DPAs and NPAs that the Department of Justice "has entered into, amended, or terminated during the year covered by the report with any person with respect to a violation or suspected violation of the Bank Secrecy Act";

(2) "the justification for entering into, amending, or terminating" the DPA or NPA;

(3) "the list of factors that were taken into account in determining that the Attorney General should enter into, amend, or terminate" each agreement; and

(4) "the extent of coordination the Attorney General conducted with the Secretary of the Treasury, Federal functional regulators, or State regulators before entering into, amending, or terminating each" agreement.

Though the legislative history of §6311 is scant, §6311's reporting requirement did not emerge in a complete vacuum. Following the 2008 financial crisis, politicians on both the left and the right have questioned whether DPAs are being used to shield corporate wrongdoers from greater accountability and punishment. For example, the Republican Staff of the Committee on Financial Services issued a report in 2016, Too Big To Jail, criticizing the use of a DPA to resolve money laundering charges against HSBC Bank. In the same vein, in 2018, Democrat Senator Elizabeth Warren introduced the "Ending Too Big to Jail Act," which would have authorized to judiciary to exercise greater oversight over DPAs. The bill did not become law, but the issue did not go away.

Transparency of DOJ Decisions

The reporting requirement of NDAA §6311 raises several interesting issues for white-collar practitioners.

Notably, the DOJ already provides substantial transparency in connection with its reasons for entering into corporate DPAs. For many years, the DOJ has issued press releases together with DPAs and other corporate charging (and some non-charging) decisions which explain the factors that influenced the nature and extent of the leniency conferred by the government—for example, by indicating whether the company received credit for self-reporting or remediating misconduct or for providing cooperation with the government's investigation. This policy dates back to the Obama Administration, as reflected in statements by then Assistant Attorney General Leslie Caldwell, and continued in force in the Trump Administration. See Brian A. Benczkowski, *Remarks at the 33rd Annual ABA National Institute on White-Collar Crime Conference* (March 8, 2019).

Take, for example, the DPA last year between the DOJ and the Industrial Bank of Korea to resolve Bank Secrecy Act charges. In its press release, the U.S. Attorney's Office for the Southern District of New York (SDNY) explained that it had agreed to enter into a DPA because the Bank had conducted a "thorough internal investigation and transactional analysis," provided "frequent and regular updates to the U.S. Attorney's Office," and made employees located in other countries available for interviews in the United States. *Manhattan U.S. Attorney Announces Criminal Charges Against Industrial Bank of Korea for Violations of the Bank Secrecy Act* (April 20, 2020).

In light of this policy and practice, the law's requirement for reporting about the "justification" for a DPA or NPA and "the list of factors taken into account" is rather puzzling. To a large extent, the DOJ already provides this information publicly. This raises questions as to what more, exactly, Congress is looking for, whether the executive branch should be reporting its internal deliberations to Congress, and whether the reporting requirement might run afoul of Rule 6(e) of the Federal Rules of Criminal Procedure, which protects the secrecy of grand jury proceedings.

Oversight of the DOJ

Section 6311's reporting requirement represents a renewed effort by a separate branch of federal government to oversee and potentially limit the executive branch's use of DPAs. Following earlier criticism of agreements between the DOJ and certain companies, a number of district judges sought to exercise oversight over DPAs. In United States v. HSBC Bank, District Judge John Gleeson noted the "heavy public criticism of the DPA" and found authority to monitor the implementation of the DPA in that case in part to protect the "integrity" of the judicial process. No. 12-CR-763, 2013 WL 3306161, at *4, *7 (E.D.N.Y. July 1, 2013). This decision was followed by *United States v. Fokker Services*, in which District Judge Richard Leon similarly expressed concern over giving "the Court's stamp of approval to … overly-lenient prosecutorial action." 79 F.Supp.3d. 160, 166 (D.D.C. 2015). See Jonathan Sack, *Meet the Fokker*, Forbes (March 12, 2015).

These attempts to exercise oversight were rejected on appeal. In *HSBC*, the Second Circuit held that Judge Gleeson's decision "impermissibly encroached on the Executive's constitutional mandate to 'take Care that the Laws be faithfully executed.'" 863 F.3d 125, 129 (2d Cir. 2017) (citing U.S. Const. art. II, §3). Similarly, in *Fokker Services*, the D.C. Circuit vacated Judge Leon's rejection of a proposed DPA, emphasizing that "judicial authority is at its most limited when reviewing the Executive's exercise of discretion over charging determinations." 818 F.3d 733, 741 (D.C. Cir. 2016) (internal alternations and quotations omitted).

Conclusion

The President is charged under the Constitution with "tak[ing] Care that the Law be faithfully executed," U.S. Constitution Art. II, §3. The enforcement of federal criminal law, including the entry into DPAs, is a core executive authority. But the exercise of prosecutorial discretion in particular cases is not without controversy, especially cases against financial institutions. Judicial attempts to review DPAs were ultimately rejected by appellate courts. Section 6311 appears to be yet another effort to check, or at least, begin to check, executive authority. DPAs will almost certainly remain an important feature of white-collar criminal enforcement. What is uncertain is whether §6311 is a harbinger of renewed criticism of DOJ policies and decisions in white-collar enforcement.