

WHITE-COLLAR CRIME

Up in the Air: Boeing's Deferred Prosecution Saga Continues

By Elkan Abramowitz and Jonathan Sack

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Corporate deferred prosecution agreements (DPAs) have become a key part of white-collar criminal enforcement. With a DPA, a company can resolve a criminal investigation without a guilty plea, while the government gets remediation of misconduct and a corporate admission of wrongdoing. These benefits have encouraged other countries to adopt, or consider adopting, similar arrangements, even where DPAs do not fit neatly in existing criminal procedures, such as France, England and Switzerland.

Corporate DPAs have also generated criticism. The critics say that (i) DPAs have been overly lenient to companies, and have contributed to prosecutors' willingness to settle with companies rather than aggressively pursue individual wrongdoers; (ii) DPAs have been negotiated in secrecy and have failed to protect the rights of victims of corporate misconduct; or (iii) DPAs have led not to promised



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corporate reform but, too often, to cosmetic changes and corporate recidivism due to inadequate sanctions and oversight. Companies still regularly enter into DPAs with the Department of Justice (DOJ), but their benefits may have become less clear and certain over time.

The January 2021 DPA between the Boeing Co. (Boeing) and DOJ illustrates the many complications that may flow from a corporate DPA. The Boeing DPA came after two plane crashes that were attributed to a software

design flaw and a resulting criminal investigation. Pursuant to the DPA, the company admitted to making false and misleading statements to the Federal Aviation Administration (FAA).

Beginning in December 2021, many months after the DPA had been signed and made public, victims of the crashes attempted to block court approval of the DPA. That effort was ultimately rejected by the district and appellate courts in 2023. In May 2024, after a mechanical failure on another Boeing plane, DOJ concluded that Boeing had violated the 2021 DPA by failing to meet its compliance obligations under that agreement. Boeing then agreed to plead guilty to the crime for which it had been given a DPA in 2021, but on Dec. 5, 2024, the district court rejected the plea agreement.

In this article, after discussing Boeing's DPA and challenges raised by representatives of crash victims, we turn to Boeing's compliance undertakings and DOJ's determination that Boeing violated the terms of the DPA, which in turn led to the plea agreement rejected by the district court. We conclude with observations about whether corporate DPAs, once seen as an efficient and definite way to resolve an investigation, have become less certain and beneficial over time.

Victim Claims

Under Boeing's January 2021 DPA, filed in the Northern District of Texas, Boeing agreed to pay a \$243.6 million criminal penalty, \$1.77 billion in compensation to airline customers, and \$500 million to crash victims' heirs, relatives and beneficiaries. The DPA followed a government investigation of statements

made to the FAA about flight software used to pilot Boeing-made commercial airplanes. The DPA resolved a charge that the company had defrauded the United States by interfering with the FAA's oversight of airplane safety.

In late 2021, family members and representatives of crash victims asked the district court to withhold approval of the DPA and impose new conditions and limitations on Boeing – notably, that additional funds (beyond the specified \$500 million) be set aside for crash victims. The victims argued that DOJ had violated their right under the Crime Victims' Rights Act (CVRA) to be consulted before the government reached a DPA with Boeing. See E. Abramowitz & J. Sack, *Not So Fast: The Rights of Victims in Corporate Deferred Prosecutions*, N.Y.L.J. (March 3, 2023).

U.S. District Judge Reed O'Connor granted the victims' request to arraign Boeing in open court and permitted them to be heard regarding the DPA. Ultimately, in February 2023, two years after the DPA was signed, Judge O'Connor denied the victims' request to impose conditions and limitations beyond those set forth in the DPA. The court held that it lacked the authority to supervise or substantially review and reject substantive terms of the DPA in the absence of a finding that the government had acted with bad faith or impropriety. See *United States v. The Boeing Co.*, No. 4:21-cr-05, 655 F. Supp. 3d 519 (N.D. Tex. 2023). Victims petitioned the Fifth Circuit for a writ of mandamus.

On December 15, 2023, the Fifth Circuit affirmed Judge O'Connor's decision and denied the petition without prejudice. The

Fifth Circuit emphasized district courts' "ongoing obligation" to uphold the public's rights under the CVRA at "every stage of the court's criminal proceedings," but found that the district court had "demonstrated careful competence" thus far. *In re Ryan*, 88 F.4th 614, 627 (5th Cir. 2023).

The Fifth Circuit explained that if the government concludes that Boeing has not complied with the DPA, the victims' CVRA rights would be protected by means of a trial or guilty plea proceedings. Alternatively, if the government concludes that Boeing has complied and moves to dismiss the criminal proceedings, "the court will expect to see the prosecutor recount that the victim has been consulted on the dismissal and what the victim's views were on the matter." *Id.* (quoting *United States v. Heaton*, 458 F. Supp. 2d 1271, 1273 (D. Utah 2006)).

DPA Compliance Requirements

The 2021 DPA imposed substantial compliance obligations on the company. Boeing agreed to implement and maintain a wide-ranging compliance and ethics program "to prevent and detect violations of the U.S. fraud laws throughout its operations," which includes not only Boeing's operations but also those of its subsidiaries, affiliates, agents, and joint ventures, and certain contractors and subcontractors. *Boeing*, No. 4:21-cr-05, Dkt. No. 4 at 14-15 (Jan. 7, 2021).

Boeing further agreed that it would continue to review and modify its existing internal controls, policies and procedures to ensure an effective program that detects and deters violation of U.S. fraud laws for

three years. Prosecutors "determined that an independent compliance monitor was unnecessary." *Id.* at 6.

Attachment C to the DPA set out the minimum requirements under the DPA. These compliance measures included a promise that Boeing's directors and senior management would support and adhere to a corporate policy against violations of U.S. fraud laws, and that Boeing would "create and foster a culture of ethics and compliance with the law in its day-to-day operations." *Id.* at 47. Further, Boeing agreed to promulgate compliance policies and procedures to "reduce the prospect of violations of U.S. fraud laws" on the basis of a periodic risk assessment and review these policies and procedures "no less than annually" to update them as appropriate. *Id.* at 48.

The compliance provisions of Boeing's DPA reflected DOJ's emphasis in recent years on the enhancement of corporate compliance programs. DOJ has published guidance on the essential elements of effective corporate compliance programs. They were updated recently to incorporate provisions relating to the use of Artificial Intelligence. See U.S. Dep't of Justice Criminal Division, Evaluation of Corporate Compliance Programs. <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl> (updated Sept. 23, 2024).

Post-DPA Events

On Jan. 5, 2024, a Boeing aircraft "door plug" blew out mid-flight, which opened a hole in the side of the plane. The plane was able to land safely, and no passengers were injured, but the incident renewed safety concerns about Boe-

ing planes. Multiple federal agencies, including the FAA, investigated the incident. The agencies said that Boeing's safety culture and quality standards contributed to the incident.

In May 2024, DOJ informed Judge O'Connor that it had concluded that Boeing had violated the terms of the January 2021 DPA by "failing to design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws throughout its operations." *Boeing*, No. 4:21-cr-05, Dkt. No. 199 (May 14, 2024).

If, as the government claims, Boeing violated the terms of the DPA, the company was subject to prosecution for any federal criminal violation of which the government has knowledge, including the offense of conspiring to defraud the United States charged in the Criminal Information that accompanied the 2021 DPA. Boeing ultimately agreed to plead guilty to that charge. Boeing's agreement to plead guilty is particularly noteworthy given that, in the only prosecution that grew out of the alleged misstatements to the FAA, an individual test pilot was found not guilty after a trial. See E. Abramowitz & J. Sack, *Jury Rejects Wire Fraud Charges in Boeing Crash Prosecution*, N.Y.L.J. (May 4, 2022).

In October 2024, the court heard argument on whether to accept or reject the proposed plea agreement, followed by supplemental briefing. DOJ said that the government had involved the victims in its decision, but victims nevertheless objected to the parties' proposed plea agreement on several grounds, including that the fine amount was based on an improper calculation of loss, and that the

proposed compliance monitorship provision was inadequate to address anti-fraud concerns. See *Boeing*, No. 4:21-cr-05, Dkt. Nos. 232 – 236 (July 31, 2024). Boeing intimated that it had sound arguments that it had not violated the terms of the original DPA, but it nonetheless agreed to enter a guilty plea.

Judge O'Connor rejected the proposed plea agreement in a December 5, 2024 order, based in part on victims' families' opposition. See *id.*, Dkt. No. 282 at 3-4 (Dec. 5, 2024). Judge O'Connor explained that "[i]t is not clear what all Boeing has done to breach the Deferred Prosecution Agreement," and noted that "[t]he victims assert the 'Government was forced to find that Boeing violated [the DPA] after the door fell off the Alaska airplane.'" *Id.* at 11. Judge O'Connor also noted Boeing's "hints" at legitimate arguments to oppose the government's determination of breach. See *id.*, Dkt. No. 246, Resp. Nos. 4, 9, 11.

Judge O'Connor also disagreed with the monitorship provision in the proposed plea agreement. Under the agreement, the government would choose the monitor, but in the court's view, the public interest required the court to select an independent monitor, and the proposed selection process "improperly marginalizes the Court." *Id.*, Dkt. No. 282 at 11. Judge O'Connor also expressed skepticism concerning the proposed plea agreement's diversity-and-inclusion provision that would guide the selection of a monitor. Judge O'Connor ordered the parties to meet and confer and provide the court with an update on how they intended to proceed in light of the court's rulings.

Notably, the district court refused to take at face value DOJ's assertion that Boeing had violated the compliance requirements of the DPA. That refusal is noteworthy. The court's hesitation may reflect an inherent uncertainty as to whether the subsequent event (the door plug incident) was attributable to inadequate compliance or whether, in fact, the incident took place in spite, rather than because, of company compliance programs. If judged under a standard of perfection, of course the compliance programs failed. But if judged under a standard of reasonableness, the incident might be an event that could happen notwithstanding real and substantial compliance efforts.

Conclusion

The compliance obligations in Boeing's DPA were worded very broadly. The court may ultimately find that virtually any post-DPA accident involving the company could reasonably constitute a "compliance failure," and thus a violation of the 2021 DPA. The practical effect of such language, and whether a company's compliance efforts will be examined in terms of reasonableness rather than held to a standard of perfection, may be addressed by the district court in further proceedings. The court's eventual ruling will inform how com-

panies view DPAs and the risk of subsequent incidents depriving them of the benefits of DPAs generally.

More broadly, DPAs have been a bedrock of corporate white-collar enforcement for many years. They have had great appeal to companies and the government alike. But the *Boeing* case may suggest that corporate DPAs have entered a different phase – one of complexity and perhaps even reconsideration. What was once relatively simple and efficient has now become burdened by concerns over treatment of victims, risks of subsequent violations and the burdens of monitorships. Corporate DPAs will most likely retain their appeal in the resolution of corporate investigations. But perhaps that appeal will be somewhat reduced and qualified going forward.

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