July 8, 2013

U.S. District Court Applies Supervisory Authority Over Criminal Proceedings to Review of Deferred Prosecution Agreement

Over the last several years, deferred prosecution agreements ("DPAs"), in which the government and a corporate defendant agree to defer prosecution on criminal charges for an agreed upon period of time in exchange for some combination of a monetary penalty, an admission of wrongdoing, and remedial measures have become an important – and often controversial – law enforcement tool. If the defendant satisfies its obligations under the DPA, the charges are dismissed by the government at the end of the agreement's term. Although there were only two such agreements in 2000, there have been 63 since 2010 alone.[1] For the most part, DPAs and the rules governing their use have developed without scrutiny by the courts. A recent decision by United States District Judge John Gleeson, of the Eastern District of New York, however, may signal an end to this state of affairs.

On July 1, 2013, Judge Gleeson issued an opinion approving a deferred prosecution agreement between the United States Department of Justice ("DOJ") and HSBC Bank USA, N.A. and HSBC Holdings Plc ("HSBC"). The approval came over six months after the government had filed a criminal information against the defendants and requested approval of the DPA. The court's decision includes what the court characterized as a "novel" exercise of its supervisory power over criminal proceedings to conduct a substantive review of the terms of the DPA.[2] It is difficult to predict whether other courts will follow this approach and conduct similar reviews of DPAs. As the first analysis of its sort, however, the court's decision merits attention from any company operating in a regulated industry or that may one day enter into a DPA to resolve a criminal investigation by the DOJ.

The court's decision is also significant because it, along with several recent decisions reviewing settlements with the Securities and Exchange Commission ("SEC") and other regulatory agencies, is consistent with a trend toward increasing judicial scrutiny of settlements between the government and corporations. The underlying challenge for the courts in both the criminal and regulatory contexts is to strike the right balance between deference to agency discretion and judicial oversight. It may be some time before the law in this area becomes settled and that balance is struck.

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1 *See* Brandon L. Garrett and Jon Ashley, *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, at http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

2 *U.S.* v. *HSBC Bank USA N.A., et al.*, No. 12 CR 763 (JG) ("*HSBC*"), slip op. at 10 (E.D.N.Y. July 1, 2013).

A Brief Overview of DPAs and NPAs

As explained recently by Lanny A. Breuer, former chief of the DOJ's Criminal Division, "DPAs have become a mainstay of white collar criminal law enforcement" over the course of the last decade.[3] A related tool that is sometimes used by the DOJ is a non-prosecution agreement (or "NPA"), which can entail similar obligations on the part of a defendant but under which the DOJ agrees that it will not actually file criminal charges regarding the misconduct at issue.

The use of DPAs and NPAs by the DOJ since the 1990s has, as Breuer observed, allowed the DOJ to avoid what would otherwise be a "stark choice" in cases of corporate misconduct – between using the "blunt instrument of criminal indictment" (in the process imposing potentially devastating consequences on the company) or simply "walk[ing] away." Denis J. McInerney, a Deputy Assistant Attorney General for the Criminal Division, has suggested that prior to the advent of DPAs and NPAs, "most of the time no thought was really given to pursuing the company at all."[4]

The HSBC DPA

The DOJ entered into a DPA with HSBC last December to resolve a four-year investigation into the bank's responsibility for alleged money-laundering that had been conducted through various HSBC entities across the globe. As part of that agreement and on the same day, the DOJ filed a criminal information in the United States District Court for the Eastern District of New York charging HSBC with violations of the Bank Secrecy Act (for, among other things, willfully failing to maintain an effective anti-money laundering program),[5] as well as the International Emergency Economic Powers Act and the Trading with the Enemy Act (for willfully facilitating financial transactions on behalf of entities in Iran, Libya, Sudan, Burma, and Cuba).[6]

Under the DPA, HSBC admitted the accuracy of and accepted responsibility for the conduct of its officers, directors, employees and agents, as described in the criminal information and a 30-page statement of facts that accompanied the DPA. The DPA included a term of five years – after which the charges would be dismissed by the DOJ – and required HSBC to accept a corporate compliance monitor to supervise the

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3 *Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association*, Sept. 13, 2012, *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

4 Douglas Gillison, *Criminal Division's McInerney Defends Deferred Prosecution Agreements*, Main Justice (May 3, 2013), http://www.mainjustice.com/justanticorruption/2013/05/03/criminal-divisions-mcinerney-defends-deferred-prosecution-agreements.

5 31 U.S.C. § 5311 *et seq.*

6 50 U.S.C. §§ 1702 & 1705; 50 U.S.C. App. §§ 3, 5, & 16.

bank's remedial measures and to evaluate its ongoing compliance with the relevant laws during the pendency of the agreement. As part of the DPA, HSBC agreed to forfeit $1.256 billion – the largest ever forfeiture in a bank prosecution.[7]

The HSBC DPA was the subject of "heavy public criticism," as Judge Gleeson observed in his opinion.[8] An editorial in *The New York Times* claimed, for instance, that the agreement demonstrated that the government had "bought into the notion that too big to fail is too big to jail."[9] The top-ranking Republican on the Judiciary Committee of the United States Senate similarly claimed that the settlement amounted to "a slap on the wrist" for HSBC and criticized the DOJ for failing to prosecute the charges against the bank or otherwise prosecuting any individuals.[10]

The *HSBC* Decision

After asking the parties to brief the issue, Judge Gleeson issued an opinion that addressed the court's authority to approve – or presumably reject – a DPA. The court's opinion in *HSBC* premises the "authority to approve or reject the DPA" on the court's inherent "supervisory power," which "permits federal courts to supervise the administration of criminal justice among the parties before the bar."[11] The opinion observes that "[o]ne of the primary purposes of the supervisory power is to protect the integrity of judicial proceedings" and notes that the authority has been deployed "substantively" – in order to remedy violations of criminal defendants' rights – as well as to fashion standards of procedure and evidence applicable to federal criminal proceedings.[12]

The court rejected the view of the parties that the court's authority to approve the DPA was limited. In doing so, the court distinguished a DPA both from a decision by the government not to prosecute a defendant (which is at the absolute discretion of the government, even when embodied in an NPA) and

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7 HSBC separately agreed to pay $665 million in civil penalties to the Office of the Comptroller of the Currency and the Federal Reserve. *See* Department of Justice, *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement* (Dec. 11, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html.

8 *HSBC* slip op. at 13.

9 Editorial, *Too Big to Indict*, N.Y. Times, Dec. 12, 2012, *available at* http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html?_r=0.

10 *See* Letter from Sen. Charles E. Grassley to U.S. Attorney General Eric H. Holder, Jr. at 2 (Dec. 13, 2012), *available at* http://www.grassley.senate.gov/judiciary/upload/HSBC-12-13-12-letter-to-Holder-no-criminal-prosecutions.pdf.

11 *HSBC* slip op. at 6-7 (quoting *United States* v. *Payner*, 447 U.S. 727, 735 n.7 (1980)) (internal quotations omitted).

12 *Id.* at 7.

from the "near-absolute power" to dismiss a case that it has actually brought.[13] The court concluded that, by entering into a DPA, the parties had "chosen to implicate the Court in their resolution of [the] matter" and, while noting that there was "nothing wrong with that," reasoned that "[b]y placing a criminal matter on the docket of a federal court, the parties [had] subjected their DPA to the legitimate exercise of that court's authority."[14]

The court conceded that "the exercise of supervisory power in this context is novel," because cases implicating this power have typically arisen where a defendant "raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety" – for instance, where a defendant seeks to vacate a conviction or dismiss an indictment.[15]

The court began its review of the HSBC DPA by acknowledging that the executive branch was entitled to "[s]ignificant deference" regarding the exercise of its prosecutorial discretion – which, in the case of corporate misconduct, requires consideration of a variety of factors that include the gravity and scale of the conduct within the company as well as the impact of collateral consequences on innocent parties – and concluded that well-recognized concerns regarding the institutional limits of a court's ability to second-guess such decisions were "just as applicable to the decision to enter into a" DPA.[16]

Turning to the particulars of the HSBC DPA, the court briefly reviewed the conduct that formed the basis of the DPA and emphasized four broad aspects of the agreement: (1) the various remedial measures that had been put in place to address systemic failures at the bank (including, among other things, the installment of new senior executives; corporate restructuring that elevated the head of the bank's compliance function; and substantial investments in HSBC Bank USA's anti-money laundering program); (2) the imposition of a corporate compliance monitor; (3) the substantial forfeiture amount; and (4) the admission of criminal wrongdoing as set forth in the DPA's statement of facts.[17]

The court concluded that the DPA, taken as a whole, imposed "significant, and in some respect extraordinary, measures;" that "much of what might have been accomplished by a criminal conviction ha[d] been agreed to in the DPA;" and that, "in light of the broad deference" owed to the DOJ's decision,

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13 *Id.* at 9.

14 *Id.* at 10.

15 *Id.* (citing *United States* v. *Johnson*, 221 F.3d 83, 96 (2d Cir. 2000)).

16 *Id.* at 14-15.

17 *Id.* at 18-20.

the court would "approve without hesitation both the DPA and the manner in which it has been implemented thus far."[18]

Conclusion

It remains to be seen whether other courts will follow the lead of the *HSBC* court. Although Judge Gleeson's decision is significant for being among the first to wade into this controversial area, its conclusion that the decision to enter into a DPA fits squarely within the long tradition of judicial deference to prosecutorial charging decisions is quite conservative.

The decision refrains from developing any cognizable legal standards that might be deployed to review DPAs in future cases. It also suggests that courts should engage in some sort of examination of the circumstances surrounding DPAs for the appearance of any attendant legal impropriety, but it is hard to see how any such impropriety could be identified by a court at the inception of a negotiated agreement between the government and a well-advised corporate defendant.

Nevertheless, by developing a compelling rationale for judicial review of DPAs, Judge Gleeson may have undermined any notion that such agreements are beyond the purview of the courts. In doing so, he may also have given the DOJ a shield it can employ in future debates about the propriety of DPAs, and thus, paved the way for the continued use of this prosecutorial tool.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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[18] *Id.* at 20.