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U.S. District Court Orders Compliance Monitor's Report Unsealed Pursuant to First Amendment Right of Public Access to Judicial Documents

On January 28, 2016, United States District Judge John Gleeson of the Eastern District of New York found that a report by a corporate compliance monitor retained to supervise HSBC under a deferred prosecution agreement ("DPA") was "a judicial record, and that the public has a First Amendment right to see [it]."[1] The Department of Justice and HSBC had argued that unsealing the report could chill cooperation by bank employees with the monitor, give criminals a "road map" to exploit the bank's compliance programs, undermine the effectiveness of monitors in future cases and harm the monitor's relationships with foreign regulators. Largely rejecting these concerns, the court found that personal, sensitive and confidential information in the report could be protected through the use of redactions and by keeping certain appendices under seal.

The court's opinion marks another unprecedented development in a case that has already made headlines. Its reasoning, if adopted by other courts, could lead to the public disclosure of other reports prepared by corporate compliance monitors pursuant to DPAs – including reports concerning the remedial and compliance efforts of some of the world's largest financial institutions.

Background Regarding DPAs

Over the past few decades, the government has used DPAs to resolve investigations of alleged corporate criminal activity. Under such agreements, the government files charges and agrees with the corporate defendant to defer prosecution for a defined period of time in exchange for some combination of a monetary penalty, an admission of wrongdoing and remedial measures. The government promises to dismiss the charges at the end of the agreement's term if the company satisfies its obligations under the DPA.

The retention of a corporate compliance monitor is a common feature of a DPA.[2] Such monitors typically are given broad mandates to review company documents, interview employees and recommend corrective actions. In most cases, however, it seems fair to assume that neither the government nor the defendant

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[1] *U.S.* v. *HSBC Bank USA N.A., et al.*, No. 12 CR 763 (JG), slip op. at 1 (E.D.N.Y. Jan. 28, 2016) ("*HSBC II*").

[2] "Meet the Private Watchdogs Who Police Financial Institutions," *The Wall Street Journal*, August 30, 2015, *available at* http://www.wsj.com/articles/meet-the-private-watchdogs-who-police-financial-institutions-1440983917.

contemplated that the monitor's report, which is likely to contain commercially sensitive, proprietary or otherwise confidential information, would ever be disclosed to the public.

The HSBC DPA

In December 2012, the DOJ entered into a DPA with HSBC Bank USA, N.A. and HSBC Holdings PLC (together, "HSBC"). The government filed a criminal information against HSBC that included charges of willfully failing to maintain an effective anti-money laundering ("AML") program and willfully facilitating financial transactions on behalf of entities in sanctioned countries. HSBC admitted to the criminal violations and agreed to pay $1.92 billion in forfeiture and civil penalties, a record at that time for a money laundering case.

The DPA included a term of five years and required HSBC to retain a corporate compliance monitor to supervise its remedial measures and evaluate its ongoing compliance with relevant laws. The DPA stated that public disclosure of the monitor's reports could discourage cooperation, impede government investigations and otherwise undermine the objectives of the monitorship, and that, as a result, the reports were to remain nonpublic (with limited exceptions not relevant here).

The announcement of the DPA sparked a firestorm of opposition. Elected officials and commentators alike derided the deal as a "slap on the wrist," criticizing the DOJ for failing to prosecute the case against HSBC or bring criminal charges against any individual bank employees. Members of the public sent unsolicited letters to the court urging that the DPA be rejected. In response to the public controversy, Judge Gleeson requested briefing on whether the court had the authority to decide whether or not to approve the DPA.

The 2013 *HSBC* Decision

In July 2013, Judge Gleeson ruled that the court had the authority to conduct a substantive review of the terms of the DPA pursuant to its "supervisory power" over criminal proceedings.[3] (Our Client Memorandum discussing this opinion can be found here: http://www.paulweiss.com/media/1705771/8-july-13_alert.pdf.) The court acknowledged that its broad view of judicial authority in the DPA context was "novel."[4] But after asserting its supervisory power, the court concluded that "broad deference" was owed to the DOJ's charging decision and approved the DPA "without hesitation."[5]

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3 *U.S.* v. *HSBC Bank, USA, N.A., et al.*, No. 12 CR 763 (JG), 2013 WL 3306161, at *11 (E.D.N.Y. July 1, 2013) ("*HSBC I*").

4 *Id.* at *6.

5 *Id.* at *11. This decision has been followed in two subsequent cases, both in the United States District Court for the District of Columbia. In *United States* v. *Fokker Services B.V.*, the district court refused to approve a DPA, holding that it was "grossly

Foreshadowing what was to come, however, Judge Gleeson warned that "a pending federal criminal case is not window dressing" and that the court is not a "potted plant."[6] The court explained that "[b]y placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority."[7]

The Monitor's Report

In January 2015, HSBC's monitor issued his First Annual Follow-Up Review Report (the "Report"), which evaluated the bank's performance under the DPA. The Report is more than 250 pages long and is accompanied by six lengthy appendices. In April 2015, the DOJ filed with the court a six-page status report, which, according to Judge Gleeson, "purport[ed] to summarize the Monitor's conclusions."[8] Consistent with the court's prior admonition that "approval [of the DPA] is subject to a continued monitoring of its execution and implementation,"[9] and perhaps due in part to statements in the status report that the monitor had found that "historical cultural deficiencies continue[d] to pervade [HSBC's] operations," the court directed the government to file the full Report. The government subsequently did so under seal.

In November 2015, a private citizen named Hubert Dean Moore, Jr. wrote to Judge Gleeson *pro se* and requested access to the Report. Mr. Moore claimed that the Report would support claims he had made in a complaint filed with the Consumer Financial Protection Bureau relating to HSBC's refusal to modify the terms of his mortgage. The court construed Mr. Moore's letter as a motion to unseal the Report.

The Most Recent *HSBC* Decision

After considering letter briefs and hearing oral argument, the court held that the Report was a "judicial document" and that the public's First Amendment right to see it weighed in favor of unsealing it, subject to redactions and partial withholdings.[10]

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disproportionate" to the charged conduct. 79 F. Supp. 3d 160, 167 (D.D.C. 2015). The government has appealed this decision to the D.C. Circuit Court of Appeals. In *United States* v. *Saena Tech Corporation*, the court explored its supervisory authority with respect to two DPAs, but ultimately approved each of them. No. CR 14-66 (EGS), No. CR 14-211 (EGS), 2015 WL 6406266, at *29 (D.D.C. Oct. 21, 2015).

6 *HSBC I* at *5.

7 *Id.*

8 *HSBC II* at 3.

9 *HSBC I* at *11.

10 *HSBC II* at 1.

As an initial matter, the court brushed aside in a footnote the parties' arguments that the Report had no bearing on the dispute concerning Mr. Moore's mortgage. The Report, the court found, "could have no useful information for Mr. Moore, and he—as a member of the public—would still have a right to see it."[11]

The court determined that the Report qualified as a "judicial document" because it was "relevant to the performance of the judicial function and useful in the judicial process."[12] Although the Justice Department argued that the DPA contemplated no role for the court regarding the monitor's work (or, for that matter, the filing of the monitor's reports with the court), Judge Gleeson pointedly disagreed, stating that "[m]y job is to oversee the unfolding of the criminal case that the government chose to file in my court."[13] He reasoned that he would not be able to perform his oversight role without receiving at least "some updates" about the bank's compliance with the DPA.[14]

The court next held that, under the applicable First Amendment test, both "experience and logic" supported public access to the Report.[15] With regard to the "experience" prong, the court recognized that little relevant historical evidence existed because the government did not begin to employ DPAs with companies until the early 1990s. Nevertheless, the court found that a DPA is, "at its core, a substitute for a plea agreement or trial," to which the public has historically been granted access.[16]

The court also held that "logic" supported releasing the Report. Noting the "heavy public criticism" leveled against the DPA, the court stated that it was "appropriate and desirable for the public to be interested and informed in the progress of the arrangement between DOJ and HSBC that the government chose to make the centerpiece of a federal criminal case."[17]

The court acknowledged that, even if a First Amendment right of access attaches to a judicial document, the court could seal the document in whole or in part based on specific findings that closure is essential to "preserve higher values and is narrowly tailored to serve that interest."[18] HSBC and the Justice Department (which relayed submissions by the monitor, the Federal Reserve Board, the UK's Financial

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[11] *Id.* at 3 n.4.

[12] *Id.* at 4.

[13] *Id.* at 6.

[14] *Id.* at 4.

[15] *Id.* at 7.

[16] *Id.*

[17] *Id.* at 10.

[18] *Id.*

Conduct Authority and two other foreign regulators) put forward four arguments in support of keeping the Report under seal.

First, the parties argued that public disclosure could chill the willingness of bank employees to cooperate with the monitor. The court, however, held that redactions designed to ensure the anonymity of employees would "easily alleviate" these concerns. Second, the parties contended that the Report could provide a "road map" that criminals could use to exploit vulnerabilities in the bank's AML and sanctions controls, but the court found that much of the Report's information is "generalized or would otherwise likely be unhelpful to a would-be money launderer," and that redactions would address any remaining concerns.[19] Third, the government argued that public disclosure could negatively affect the effectiveness of monitors in future cases. Judge Gleeson gave these concerns little weight, observing that the government did not have to file a DPA and suggesting that judicial supervision of a DPA is a price that the government simply must pay.

Finally, the government argued that public disclosure could strain the cooperation being provided by foreign regulators, whose agreement to allow the monitor access to the bank's non-U.S. operations was based on assurances of confidentiality. The court generally "credit[ed]" these concerns, and ordered that five of the six appendices of the Report dealing with the bank's foreign operations would remain sealed. But the court found that appropriate redactions could address these concerns with respect to the Report itself and the appendix that focused on the United States.

Analysis

Perhaps the most notable feature of the court's decision is its expansive approach to the First Amendment right of public access to judicial documents: the court found that any person has a right to obtain a monitor's report that has been filed with a court in connection with a DPA, and that no showing of need for the report's information is required. We would not be surprised if this decision encourages journalists, civil litigants and curious citizens to file applications requesting disclosure of monitor reports in other cases.

It remains to be seen whether other courts will follow Judge Gleeson's ruling. It is possible that other courts would give more weight to the arguments advanced by the Justice Department and other regulators concerning the harms that could result from the public disclosure of a monitor's report. Judge Gleeson's reasoning placed great trust in the the ability of redactions to address these harms, but other courts may credit the argument that the willingness of bank employees and regulators to cooperate with monitors may nevertheless be chilled given that they have no control over the final redactions.

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[19] *Id.* at 11.

In addition, the ruling appears to leave open the argument that a monitor's report is not within the ambit of the First Amendment's right of public access if it has not been filed with the court. DPAs do not typically require monitor reports to be filed with courts, although they often call for status reports to be presented to the court. Indeed, the Report at issue here was provided to the court only after Judge Gleeson specifically directed that it be filed. It is not clear that other courts will decide to require the filing of voluminous monitor reports, particularly where such filing is not contemplated by the DPA, no clear judicial role has been established with respect to the contents of those reports and such filing might in turn require public disclosure.

Finally, the *HSBC* decision is consistent with the trend toward increasing judicial scrutiny of settlements between the government and corporations that we have observed in recent years. We expect that, in the future, the possibility that a corporate compliance monitor's report might be subject to public disclosure will be a factor to be carefully considered by prosecutors, regulators and corporate defendants when they evaluate the advantages and drawbacks of entering into deferred prosecution agreements and negotiate the terms of such agreements. For example, the risk of disclosure may give these parties a shared incentive to craft terms whereby monitors produce higher level summary reports to the DOJ and other regulators, and these agencies rely to a greater extent on meetings and other mechanisms to obtain more detailed information about the company's compliance efforts.

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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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