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The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform

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A Tale of Two Press Releases

"U.S. Decides Not to Prosecute Shell" proclaimed the bold-lettered and underlined caption of a June 29 press release from the U.S. attorney for the Southern District of New York.[1] U.S. Attorney David N. Kelley explained that his office had elected not to prosecute Royal Dutch/Shell plc. for its admitted overstatements of hydrocarbon reserves in Securities and Exchange Commission filings, because, among other things, Shell:

- Self-reported the violations and otherwise fully cooperated with the government's investigations;
- Promptly resolved its SEC liability arising out of the same conduct in the form of a $120 million settlement; and
- Substantially enhanced its relevant compliance programs.[2]

"Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years" proclaimed the bold-lettered, caps-locked and underlined caption of a Jan. 6 press release from the Department of Justice's Criminal Division.[3] Although you would never know it from the press release, which, unlike Shell's, reads more like an indictment, the DOJ noted in its deferred prosecution agreement with Monsanto that it elected to defer prosecution for Monsanto's admitted violations of the Foreign Corrupt Practices Act because, among other things, Monsanto:

- Self-reported the violations and otherwise fully cooperated with the government's investigations;
- Promptly resolved its SEC liability arising out of the same conduct in the form of a $500,000 settlement; and
- Substantially enhanced its relevant compliance programs.[4]

So in Shell and Monsanto we have two blue-chip, highly regarded public companies: each discovered a violation of federal law; each immediately initiated an internal investigation and promptly self-reported to federal authorities who, in each instance, had theretofore been unaware of the conduct; each cooperated fully with the investigations of both the DOJ and the SEC; and each substantially remedied its respective compliance program. Yet one corporation walked away with the disconcerting prospect of conducting 36 months of business under the shadow of a deferred criminal information and a corporate monitor, while the other was let off with a good talking to.

Oh, and did we mention that Shell, the one admonished to "go forth and sin no more," admitted to a misreporting scheme that allegedly cost investors billions of dollars,[5] while Monsanto, the one with the hammer-shaped cloud hanging over its head, admitted to a failed five-figure bribery attempt that, in the end, cost no one but itself?

A Void in DOJ Policy

When the Department of Justice determines that it has sufficient evidence to bring a criminal case against a corporate entity, it has a wide-array of options available. It can:

- Proceed with the prosecution by seeking an indictment or entering into a plea agreement with the company;
- Decline to prosecute the company on public-policy grounds ("declination of prosecution");
- Enter into a deferred prosecution agreement with the company; or
- Enter into a non-prosecution agreement with the company.

In the words of then-Assistant Attorney General Christopher A. Wray, the ramifications of the DOJ's choice can literally mean "the difference between life and death for a corporation."[6] In recognition of what is at stake in these matters, the DOJ has established guidelines in an attempt to ensure uniformity in charging decisions across the 94 U.S. Attorney's Offices and six "Main Justice" divisions. However, there is a gaping void in current DOJ policy that leads to results as disparate as those discussed in the introductory section. If these policies are not revised, the injustices of unequal application of law to corporations will continue to plague our federal criminal justice system.

The underlying problem to which these disparities are attributable can be traced to the ill fit of the DOJ's traditional principles of prosecution,[7] which were crafted with individual and not corporate defendants in mind, to the new era of corporate fraud enforcement. Although criminal prosecution of corporate entities is not a completely new phenomenon, post-Enron, the Department of Justice embraced this option in a way like never before. But without Main Justice guidance readily applicable to corporate prosecutions, the stage was set for disparate and uneven corporate prosecution policies to spring up in government offices across the United States.

This tide was partially stemmed in January 2003 with the release of the "Thompson memorandum,"[8] a department-wide policy statement addressing the factors all federal prosecutors are to consider in determining whether to bring criminal charges against a corporate entity. These factors include the:

- Nature and seriousness of the offense;
- Pervasiveness of the wrongdoing within the corporation;
- The corporation's history of similar conduct;
- The corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate with government agents;
- Existence and adequacy of the corporation's compliance program;
- The corporation's remedial actions;
- Collateral consequences of prosecution;
- Adequacy of prosecuting the responsible individuals; and
- Adequacy of civil and administrative remedies.[9]

The Thompson memorandum instantly became an invaluable resource for white-collar practitioners because it gave us a concrete framework from which to advise our clients in responding to government inquiries, as well as a basis for protesting with Main Justice certain outlier stances taken by individual prosecutors.[10] However, since the issuance of the Thompson memorandum there has been a dramatic increase in the utilization of deferred-prosecution agreements,[11] to which Thompson makes only the most fleeting of references.[12] This trend, while overall a very positive one as compared to the disastrous alternatives (*i.e.*, Arthur Andersen), that have regressed DOJ policy to the pre-Thompson days of 100 different flavors of justice.

With no central guidance setting forth what factors merit a deferred-prosecution agreement, vis-à-vis a non-prosecution agreement, vis-à-vis a declination of prosecution, the question of what policies are most effective will be visited and revisited, with both similar and disparate results, throughout the Department of Justice. The only way to remedy this problem is to amend the Thompson memorandum at the departmental level so as to cabin prosecutorial discretion and the inevitably incongruent results that accompany it.

Consistency Matters

Admittedly, our argument is premised on the notion that the exercise of substantial individual discretion by federal prosecutors is undesirable in complex corporate investigations. If you do not buy into this premise then obviously you will not agree with the conclusion. So just in case you do not wish to take our word for it, we offer those of the last attorney general:

> Federal criminal law and procedure apply equally throughout the United States. As the sole federal prosecuting entity, the Department of Justice has a unique obligation to ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the

> same standards and treated in a consistent manner.[13]

We could not have said it better ourselves. "Fundamental fairness" does require that similarly situated corporate defendants receive similar treatment in any one of the six divisions and 94 U.S. Attorney's Offices that make up the prosecutorial arm of the U.S. government. Quite simply, a corporation's fate should not depend upon the office in which its file happens to land. We are not advocating a more stringent corporate prosecutorial policy such that Shell should have been prosecuted, but rather, we are urging a more uniform application of common prosecutorial principle throughout the Justice Department.

Much to its credit, the Justice Department has established official policies that provide guidance to federal prosecutors at each critical stage of the criminal-enforcement process in deciding whether to prosecute,[14] what charges to file once the decision has been made to prosecute,[15] and in deciding what sentence to advocate for in a plea agreement or after a conviction at trial.[16] Now, it just needs to close the loophole that has developed with the increased employment of deferred-prosecution agreements.

Some Proposed Attributes of the DOJ Memorandum

Of course it is easy enough to knock the DOJ for leaks in its policies but in this section we make some suggestions as to what we believe a revised Thompson memorandum should look like.

The revised policy should explicitly set forth what factors the DOJ considers relevant in determining whether a corporation should receive a traditional declination of prosecution, a non-prosecution agreement or a deferred-prosecution agreement. Right now, declinations of prosecution, non-prosecution agreements and deferred-prosecution agreements are all over the map, both literally and figuratively. As illustrated in the opening section, a similar set of operative cooperation facts may earn a company a drastically different result in the U.S. Attorney's Office for the Southern District of New York than in the Criminal Division of Main Justice.[17] Moreover, even if one is able to ensure that receipt of a similar category of disposition (*i.e.,* a deferred-prosecution agreement) for similar conduct, this does not guarantee similar results.

For example, a deferred-prosecution agreement in most districts is certain to result in a concurrent filing of a criminal information in U.S. District Court, coupled with a motion to hold it in abeyance during the deferral period.[18] But that is not necessarily the case everywhere: American Electric Power Inc., for example, was recently able to negotiate a deferred-prosecution agreement with the Criminal Division of Main Justice in which no criminal charges were filed.[19] By this agreement, AEP agreed to undergo a 15-month probationary period, publicly acknowledged a statement of facts prepared by the government and paid a $30 million civil fine.

Compare this to a recent non-prosecution agreement between the U.S. Attorney's Office for the Eastern District of New York and Symbol Technologies Inc.[20] in which Symbol was forced to agree to a three-year probationary period, acknowledge a statement of facts and that these facts constituted a violation of federal law, pay $139 million in civil penalties, and adopt extensive corporate reform measures to be implemented under the watch of an independent monitor, and you get the curious result that some non-prosecution agreements are quite possibly more oppressive than some deferred-prosecution agreements.

The policy should cabin, within very broad parameters, the types of conditions that federal prosecutors may demand as conditions of deferred- and non-prosecution agreements. One of the most appealing aspects of both deferred- and non-prosecution agreements is the ability to tailor each one according to the specific needs of the respective parties, with both sides bargaining for what they hold most dear. The attorney-client and work product privileges, for example, may be waived entirely or waived only with respect to a limited set of documents or not waived at all.

Admissions of culpability may be explicit as to legal guilt, limited to the acceptance of a statement of facts without a legal conclusion or simply an acknowledgement that the DOJ has accumulated evidence of corporate malfeasance. Monetary penalties may be styled as criminal fines, civil penalties, contributions to victim restitution funds, or deemed satisfied by prior payments to settle administrative enforcement orders or class-action litigation.

But, as encouraging as the ingenuity shown by both government and defense counsel in negotiating these agreements has been, there are also several recent examples that perhaps push the envelope of appropriate decorum. For example, as a condition of its deferred-prosecution agreement, Bristol-Myers Squibb was required by the U.S. attorney for the District of New Jersey to endow a chair of corporate ethics at the Seton Hall University School of Law, which, coincidentally or not, just happened to be the U.S. attorney's alma mater.[21] In another recent case, the attorney general for the state of Oklahoma mandated that MCI Inc., the successor to WorldCom Inc., create 1,600 new jobs in his state over the 10 years following its entry into a deferred-prosecution agreement.[22]

Although there is certainly nothing inherently objectionable about either charitable donations to institutions of higher education or the infusion of new jobs into local economies, allowing prosecutors to leverage their bargaining power to compel such acts, especially when they are of local or personal significance, smacks of Tammany Hall politicking. Extraneous conditions that do not relate to the core behavior being condemned cheapens public respect for the criminal justice system by creating the perception that negotiations are unprincipled.

As Columbia University law professor John Coffee recently noted, "The deeper problem [of such conditions] lies in the danger that power corrupts and that prosecutors are starting to possess something close to absolute power [in negotiating deferred-prosecution agreements]."[23] Professor Coffee suggests that the authority of prosecutors to "do good" while parleying in such agreements should be internally cabined by DOJ policymakers to probation-like conditions that reduce the risk of future criminality on the part of the defendant. We agree but would simply clarify that any such regulation should not interfere with the power to impose victim-specific restitution provisions.

Allegations of breach should be resolved judicially. All deferred- and non-prosecution agreements provide for termination (spelled p-r-o-s-e-c-u-t-i-o-n) upon material breach by the defendant. This is certainly unremarkable in and of itself but somewhat more disconcerting is a provision common to virtually all such agreements insisting that the DOJ be the sole and final arbiter of whether a breach has in fact occurred. A recent case involving a corporation enrolled in the DOJ's Antitrust Amnesty Program sheds some light on the due-process implications of these provisions.

The DOJ's Antitrust Division runs its own unique corporate leniency initiative, commonly known as the Amnesty Program, whereby the first (and only the first) corporation to self-report an antitrust conspiracy and cooperate with the division receives immunity from prosecution. Stolt-Nielsen S.A., a worldwide shipper of specialty chemicals, approached the Antitrust Division in late 2002 with evidence of a conspiracy it had been involved with to allocate tanker markets. Stolt-Nielsen was accepted into the Amnesty Program in early 2003 by way of a letter agreement that expressly reserved to the division the right to unilaterally declare a breach by Stolt-Nielsen and void the deal in its entirety.

One year after accepting Stolt-Nielsen into the program, the Antitrust Division informed the company that it was revoking the agreement based on its belief that the company had materially misstated the extent of its involvement in the conspiracy. Shortly thereafter, the division announced its intent to indict Stolt-Nielsen but the company beat them to the courthouse and filed a civil action in the Eastern District of Pennsylvania, seeking a pre-indictment judicial hearing on the alleged breach. The division, participating in the hearing over its own objection, argued that there was no precedent for a federal court to enjoin the executive branch from presenting an indictment to a grand jury, and furthermore, that Stolt's due-process rights could be adequately protected in a post-indictment hearing.

The judge, taking it upon himself to remedy the "no precedent" part, held that due process required that Stolt be afforded a pre-indictment hearing on the alleged breach and, proceeding to the merits, found in the company's favor and enjoined the Antitrust Division from seeking the indictment.[24] The division filed an appeal and the case is currently pending before the 3d Circuit with oral arguments scheduled for September.

Regardless of what happens on appeal, the DOJ should reconsider its insistence on retaining absolute pre-indictment discretion as to whether a breach of a deferred- or non-prosecution agreement has occurred. The burden to the government of allowing for a hearing on the alleged breach pre-indictment is not significantly greater in any case, and in those cases where the District Court does not agree with the DOJ's breach assessment, a policy of pre-indictment judicial intervention would save everyone's resources.

More significant, however, is the immediate and irreparable harm that will inevitably inure to the corporate defendant, its shareholders and employees, upon the mere public utterance of the words "breach" and "indictment." In light of what happened to Arthur Andersen, as a practical matter, most companies would do virtually anything to avoid having the DOJ unilaterally declare a breach in such a situation, thus rendering them defenseless to excessive demands by the government. Finally, there is precedent within the DOJ for allowing a putative corporate defendant to negotiate for a pre-indictment judicial resolution of an alleged breach. The U.S. attorney for the Southern District of Illinois has done so in two deferred-prosecution agreements.[25]

Deferred- and non-prosecution agreements should have terms of up to three years. Despite the fact that the U.S. Attorney's Manual explicitly caps deferred-prosecution agreements at 18 months, the DOJ has consistently required deferral periods of up to three years when dealing with corporations.[26] While such practice

may be inconsistent with the letter of DOJ regulations, we agree that 18 months will not always be a sufficient time period to measure a corporate entity's compliance with a deferred-prosecution agreement, especially those mandating significant structural reforms and the appointment of an independent monitor to oversee them.

As such, we believe that deferral periods should be capped at three years, leaving it to the parties of each individual agreement to negotiate a time frame appropriate to their particular circumstances. This reasoning is equally applicable to non-prosecution agreements.

Conclusion

While as white-collar defense attorneys we are keenly aware that in some circumstances increased discretion at the level of individual federal prosecutors may inure to the benefit of a particular corporate defendant, policy considerations underscoring fundamental fairness and balance mandate promulgation of a revised Thompson memorandum. The recent proliferation of declinations, non-prosecution agreements and deferred-prosecution agreements as alternatives to criminal prosecution of corporations is to be applauded.

No one wants another Arthur Andersen-style collapse and each of these alternatives has a role to play in the DOJ's mission to ensure that corporate misconduct is appropriately punished and the rights of victims are duly vindicated, but without unduly impacting upon the interests of innocent shareholders and employees. The inconsistent application of DOJ policies must be remedied through the promulgation of better-defined standards.

Notes

[1] *Available at* http://www.usdoj.gov/usao/nys/Press%20Releases/June%202005/Shell%20PR.pdf.

[2] *Id.* at 2.

[3] *Available at* http://www.usdoj.gov/opa/pr/2005/January/05_crm_008.htm.

[4] Deferred Prosecution Agreement Between the U.S. Dep't of Justice & Monsanto Co. ("Monsanto Deferred Prosecution Agreement") (Jan. 6, 2005), *available at* http://www.usdoj.gov/dag/cftf/chargingdocs/monsantoagreement.pdf.

[5] *See* Bernstein, Liebhard & Lifshitz LLP, Bernstein Liebhard Files Consolidated Amended Class Action Complaint in Royal Dutch/Shell Transport Securities Litigation (Sept. 14, 2004), *available at* http://www.bernlieb.com/royal/news_amended.html.

[6] Christopher A. Wray, U.S. Dep't of Justice, Prepared Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005), *available at* http://www.usdoj.gov/criminal/press_room/speeches/2005_3853_rmrkCrimLuncheon030205.pdf.

[7] *See, e.g.*, U.S. Attorney's Manual §§ 9-22.000 (Pretrial Diversion Program), 9-27.220 (Grounds for Commencing or Declining Prosecution) and 9-27.600 (Entering into Non-prosecution Agreements in Return for Cooperation), *all available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

[8] Larry D. Thompson, U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations ("Thompson Memorandum") (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. In all fairness to Thompson's predecessor, Eric H. Holder Jr., the Thompson memorandum was not cut from whole cloth, but rather revised an existing policy formulated by Holder several years earlier. *See* Eric H. Holder Jr., U.S. Dep't of Justice, Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html.

[9] Thompson Memorandum, *supra* note 8, at § II(A).

[10] Although the DOJ views these guidelines as merely illustrative of internal policy, and thus not enforceable in a court of law (*see* U.S. Attorney's Manual § 9-27.150), the authors have generally found higher-level officials within the DOJ to be committed to ensuring their uniform application.

[11] By our count, 10 since Jan. 20, 2003 (the date of the Thompson memorandum), as compared to 10 in the nine years leading up to it.

[12] The entirety of the Thompson memorandum's reference to deferred prosecutions, which it calls "pretrial diversion," is as follows: "In some circumstances, therefore, granting a corporation immunity or amnesty or *pretrial diversion* may be considered in the course of the government's investigation." (emphasis added). § VI(B). The memorandum thus acknowledges the applicability of deferred prosecutions to the corporate defendants but makes no reference to the factors relevant to the grant of one vis-à-vis those for immunity.

[13] John Ashcroft, U.S. Dep't of Justice, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges and Sentencing ("Charge Bargaining Memorandum") (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

[14] *See* U.S. Attorney's Manual § 9-27.220; *see also* Thompson Memorandum, *supra* note 8, at § II(A).

[15] *See* U.S. Attorney's Manual § 9-27.300; *see also* Charge Bargaining Memorandum, *supra* note 13.

[16] *See* James B. Comey, U.S. Dep't of Justice, Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005), *available at* http://www.nacdl.org/public.nsf/MediaSources/Booker_Press/$FILE/DAGMemoonBooker1.pdf; *see also* Prepared Statement of Assistant Attorney General Christopher A Wray Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (advocating for reforms to the U.S. Sentencing Guidelines in light of the *Booker/Fanfan* decisions), *available at* http://judiciary.house.gov/media/pdfs/Wray021005.pdf.

[17] Moreover, the disparity may be inversely proportionate to the harm caused by the underlying criminal conduct.

[18] *See, e.g., Deferred Prosecution Agreement Between the U.S. Dep't of Justice & Bristol-Myers Squib Co.* ("BMS Deferred Prosecution Agreement") (June 15, 2005), *available at* http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/pdffiles/deferredpros.pdf.

[19] Deferred Prosecution Agreement Between the U.S. Dep't of Justice & Am. Elec. Power Inc. ("AEP Deferred Prosecution Agreement") (Jan 26, 2005), *available at* http://www.usdoj.gov/dag/cftf/chargingdocs/aepesagreement.pdf. That is certainly not to say, however, that the Criminal Division hasn't filed charges concurrently with other deferred prosecution agreements. *See, e.g.*, Monsanto Deferred Prosecution Agreement, *supra* note 4.

[20] Non-Prosecution Agreement Between the U.S. Attorney's Office for the E. Dist. of N.Y. & Symbol Techs. Inc. (June 3, 2004) (on file with authors).

[21] BMS Deferred Prosecution Agreement, *supra* note 18.

[22] *See* Okla. Office of the Attorney General, State to Gain 1,600 Jobs from WorldCom Agreement (Mar. 12, 2004), *available at* http://www.oag.state.ok.us/oagweb.nsf/0/5BC3BAA6BEBFA1D786256E550062044D!OpenDocument.

[23] John C. Coffee Jr., *Deferred Prosecution: Has it gone too far?*, NAT'L L.J., July 25, 2005, at 13.

[24] *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 562-63 (E.D. Pa. 2005).

[25] *See* Deferred Prosecution Agreement Between the U.S. Dep't of Justice & Sears Auto. Mktg. Servs. (Dec. 27, 2001); Deferred Prosecution Agreement Between the U.S. Dep't of Justice & BDO Seidman LLP (Apr. 12, 2002) (both on file with the authors). Mr. Warin was lead counsel to Sears in negotiating its agreement.

[26] *Compare*, U.S. ATTORNEY'S MANUAL § 9-22.010 ("The period of supervision is not to exceed 18 months.") *with, e.g.*, Monsanto Deferred Prosecution Agreement, *supra* note 4 (settihng a 36 month deferral period). In at least one instance, the DOJ has required a five-year deferral term. *See* Deferred Prosecution Agreement Between the U.S. Dep't of Justice & Doyon Drilling Inc. (April 1998) (on file with the authors).

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