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2014 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements



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The U.S. Department of Justice's ("DOJ") and U.S. Securities and Exchange Commission's ("SEC") aggressive use of negotiated settlements, including non-prosecution agreements ("NPA") and deferred prosecution agreements ("DPA"), to resolve allegations of corporate wrongdoing shows no signs of abating. In 2014, DOJ and the SEC collectively formed at least 30 corporate NPAs and DPAs, with associated recoveries totaling over $5.1 billion; this continued a strong trend favoring their use since 2000, when DOJ issued only two.

In December of last year, U.S. Assistant Attorney General for DOJ's Criminal Division, Leslie Caldwell, highlighted the importance of negotiated resolutions that allowed DOJ to "impose reforms, impose compliance controls, and impose all sorts of behavioral change."[1] She concluded: "In the United States system at least [settlement] is a more powerful tool than actually going to trial." Two developments in the NPA and DPA arena in 2014 have underscored Caldwell's point. First, DOJ took the rare step in 2014 of extending three NPA and DPA agreements that were set to expire for terms of up to three years to support on-going investigations; and second, many in the judiciary have taken note of DPAs in recent years and—in part because of their finality in lieu of trial—begun subjecting DPA terms to substantially increased scrutiny.

The following first briefly offers an overview of the corporate NPAs and DPAs released publicly in 2014, and then discusses these two key developments in greater detail.

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DPAs and NPAs in 2014

In 2014, DOJ entered into 19 DPAs and ten NPAs. Three of the agreements classified as NPAs were issued

[1] Rahul Rose, Caldwell: Settlement a "More Powerful Tool Than Convictions," Global Investigations Review (Dec. 3, 2014), available at http://globalinvestigationsreview.com/article/2121/?utm_medium=email&utm_source=Law+Business+Research&utm_campaign=5094527_GIR+Headlines&dm_i=1KSF,316YN,E9U8QV,AWKBE,1.

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under different names, highlighting the degree of customization that the 94 U.S. Attorneys' Offices may apply to such agreements. Even so, these three negotiated settlements—DOJ's ''restitution and remediation agreement'' with SunTrust Mortgage, Inc., its ''side letter agreement'' with Stryker Corporation, and its ''criminal enforcement agreement'' with Pilot Travel Centers, LLC, d/b/a/ Pilot Flying J (''Pilot Flying J'')—all have the hallmarks of standard NPAs. Unlike traditional NPAs, the Pilot Flying J agreement attaches an unfiled criminal information, in lieu of a statement of facts, that DOJ is ''prepared to file'' in the event of a breach of the agreement, but the agreement has been included in the NPA statistic above because this criminal information was not filed as part of the settlement.[2]

In addition to DOJ's 29 agreements, the SEC entered into one DPA in 2014, marking the third SEC DPA since the SEC first began using the tool in 2011, and the seventh SEC NPA or DPA since the SEC's first use of the NPA in 2010. At 30 NPAs and DPAs, 2014 was consistent with prior years. Indeed, Gibson Dunn's database, containing details of 308 NPAs and DPAs entered into by federal prosecutors between Jan. 1, 2000, and Jan. 6, 2015, reflects that every year since 2008 has involved more than 20 NPAs and DPAs, and 2014 was no exception.

2014's 30 NPAs and DPAs also involved a substantial collective increase in monetary recoveries over 2013's 28 NPAs and DPAs, reaching over $5.1 billion in comparison to 2013's approximately $2.9 billion. 2014's recovery also notably exceeds the recovery in 2011 of $3.1 billion, which represented 34 NPAs and DPAs. Indeed, 2014's $5.1 billion in NPA and DPA recoveries either exceeds, or is consistent with, every prior year except for 2012, when 38 individual agreements resulted in an overall recovery of almost $9 billion. This high figure is due in part to the settlement of three large cases, each of which involved a recovery of more than $1.5 billion and up to $3 billion.

Settlements in 2014 also included several substantial figures, with eight of the 30 agreements featuring monetary components exceeding $100 million, of which two topped $1 billion. Two of these agreements related to Alstom, S.A.'s landmark FCPA settlement with DOJ totaling $772,290,000.[3]

The use of NPAs and DPAs is expected to continue apace in 2015, and their numbers may sharply increase as the DOJ Tax Division approaches resolution with approximately 100 Swiss banks that seek NPAs in connection with their participation in a DOJ tax disclosure and non-prosecution program.[4] This program, DOJ Tax Division's ''Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks'' (the ''Program''), rewards participating Swiss banks that ''have reason to believe [they] may have committed [certain] tax-related offenses'' in connection with ''U.S. Related Accounts'' (as defined by the Program) with NPAs for their cooperation and payment of penalties.[5] To date, no NPAs have been issued under the Program, but settlements are expected in the coming months.[6] Indeed, the Bank Leumi Group DPA, issued Dec. 22, 2014, foreshadows these agreements, with $157 million of the DPA's $270 million penalty attributed to Bank Leumi's Switzerland-based subsidiary and calculated according to the formula set forth under the Program.[7]

Extension of Non-Prosecution Agreements to Support Ongoing Investigations

In 2014, DOJ extended several NPA/DPA settlement agreements that had terms that were set to expire. This highly unusual retroactive alteration of such agreements affected NPAs held by Barclays Bank Plc. (''Barclays'') and UBS AG (''UBS''), both of which were extended by a term of one year, and a DPA held by Standard Chartered Bank (''Standard Chartered''), which was extended for three years. Standard Chartered also extended a similar DPA with the State of New York.[8]

Each of the three extended DOJ agreements contained standard language pledging broad cooperation with DOJ, including assisting with any investigation arising out of the conduct described in the agreements.[9] Each of the three agreements further acknowledged DOJ's right to prosecute upon finding that the company had committed a U.S. crime subsequent to the date of the agreement; that it had given false, incomplete, or misleading testimony or information at any time; or that it had otherwise violated the provisions of the agreement.[10] Consistent with this language, Barclays an-

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[2] SunTrust Mortgage Restitution and Remediation Agreement (July 3, 2014); Side Letter Agreement with Stryker Corporation (Aug. 29, 2014); Pilot Travel Centers LLC, d/b/a Pilot Flying J Criminal Enforcement Agreement ¶ 11 (July 10, 2014). We are aware of one other ''criminal enforcement agreement'' that functioned similarly to Pilot Flying J's, issued to Gibson Guitar Corporation in 2012. *See* Gibson Guitar Corp. Criminal Enforcement Agreement (July 27, 2012).

[3] The total penalty associated with the conduct underpinning the Alstom Grid and Alstom Power DPAs was paid by the parent company, Alstom S.A. Thus, while a total penalty of $772,290,000 is noted here, neither subsidiary was directly fined.

[4] *See Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Offshore Accounts: Hearing Before the Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov't Affairs*, **113th Cong. 4-5 (2014) (joint statement of James M. Cole, Deputy Attorney Gen. and Kathryn Keneally, Assistant Attorney Gen., Tax Div.).**

[5] Department of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, ¶¶ I.B.9, II (Aug. 29, 2013).

[6] Indeed, the Program, as initially drafted, anticipated resolutions by mid-2014. Department of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, ¶ II.B (requiring participating banks to submit letters of intent setting forth a plan for complying with all program requirements within 120 days of submittal, and further requiring submittal of letters of intent by Dec. 31, 2013); ¶ II.H (setting forth penalty requirements). (Aug. 29, 2013).

[7] Deferred Prosecution Agreement at 6:15-19, *United States v. Bank Leumi Le-Israel*, B.M., No. 14-CR-0731 (C.D. Cal. Dec. 22, 2014); *see also* Department of Justice Office of Public Affairs, *Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Assets in Offshore Bank Accounts* (Dec. 22, 2014). The Bank Leumi Group was under investigation by DOJ at the time of the Program's publication and was therefore ineligible to participate.

[8] Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. TIMES, Dec. 10, 2014.

[9] Barclays Bank Plc., Non-Prosecution Agreement, 2 (June 26, 2012); UBS AG, Non-Prosecution Agreement, 3 (Dec. 18, 2012); Standard Chartered Bank, Deferred Prosecution Agreement ¶¶ 6-7 (Dec. 10, 2012).

[10] Barclays Bank Plc, Non-Prosecution Agreement, 2-3 (June 26, 2012); UBS AG, Non-Prosecution Agreement, 4 (Dec. 18, 2012); *see also* Standard Chartered Bank, Deferred Pros-

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nounced in its July 30, 2014 Form 6-K SEC filing that it had entered into a letter of agreement with DOJ giving DOJ until June 27, 2015, to ''make a determination under the NPA solely as to whether any of Barclays trading activities in the foreign exchange market during the two year period [of the NPA's application] constituted a 'United States crime . . . .' ''[11] UBS similarly agreed with DOJ to extend its NPA for a period of one year in connection with an ongoing investigation.[12]

Standard Chartered, which executed a DPA in 2012 to resolve charges of trade sanctions violations surrounding its facilitation of payments on behalf of sanctioned customers, announced a three-year extension of this DPA on Dec. 9, 2014.[13] Notably, the length of this extension eclipses that of the original DPA, which itself lasted for a period of only 24 months.[14] Standard Chartered announced that the reason for this extension was its cooperation with ''an ongoing U.S. sanctions-related investigation'' for which additional time was needed to determine whether violations had occurred.[15]

These extensions serve as an important reminder that NPAs and DPAs, like any other agreement, may be subject to extension or revision at any time to suit the particular investigative or compliance needs of the parties.

Judicial Oversight of Deferred Prosecution Agreements

The increasing prominence of DPAs as a means of addressing corporate criminal conduct also has not escaped the notice of the judiciary. Unlike NPAs, DPAs are filed in court and thus are subject to judicial oversight. In the past, a judge's participation in a DPA was largely limited to holding the related case in abeyance for the term of the agreement and excluding time under the Speedy Trial Act. Once the defendant fulfilled its obligations under the agreement to the satisfaction of prosecutors, the judge dismissed the case with prejudice. In recent years, however, a growing number of judges have sought to expand their role in this process and have begun scrutinizing DPA terms.

Two recent DPAs in particular—Saena Tech Corporation's (''Saena Tech'') agreement with the U.S. Attorney's Office for the District of Columbia resolving domestic bribery charges and Fokker Services B.V.'s (''FSBV'') agreement with that same office in connection with export control violations—have seen much more active involvement by judges. In both cases, judges have requested extensive briefing on the scope of their authority to approve the DPAs and required greater factual support justifying the agreements. The result has been a longer, more drawn-out process, in which the initial agreements are very much at risk of rejection by the courts. Indeed, the FSBV agreement was rejected by Judge Richard Leon of the U.S. District Court for the District of Columbia earlier this month as ''grossly disproportionate'' to the conduct alleged.[16] It remains to be seen whether these cases foreshadow more robust judicial supervision of DPAs that companies may expect in the future.

Saena Tech

In April 2014, the government filed its DPA with Saena Tech, a South Korean corporation, in the U.S. District Court for the District of Columbia. In its DPA, Saena Tech admitted to giving cash and gifts to a U.S. Army Contracting Officer to obtain subcontracts on the prime contract that official was managing.[17] The company also agreed to pay a $500,000 penalty and implement a compliance and ethics program. In return for Saena Tech's full and truthful cooperation and continued compliance with the agreement, the government agreed to conditionally release the defendant corporation from criminal liability, and it also agreed not to prosecute Saena Tech's Managing Director, Jin Seok Kim, who was directly implicated in the bribery scheme. The government's primary basis for entering into the agreement was that Saena Tech had assisted the investigation by voluntarily producing documents and making Kim, a South Korean citizen, available for interview. According to the government, during his interview, Kim ''provided the investigation with considerable amounts of relevant and helpful evidence regarding illegal conduct involving a former public official . . . .''[18]

Pre-DPA Approval Judicial Review and Authority

Judge Emmet Sullivan of the U.S. District Court for the District of Columbia first voiced his concerns over the DPA at a July 17, 2014 hearing. Throughout the hearing, Judge Sullivan said that the agreement had the effect of formally immunizing Kim from prosecution and he questioned the fairness of this outcome given that individuals at Saena Tech with far less involvement in the bribery scheme had been given lengthy prison sentences. The government contended in response that Kim had come to the U.S. of his own volition, volunteered critical information that the government would not have discovered otherwise, including several hundred thousand dollars' worth of previously unknown illicit payments, and promised to provide critical testimony in an upcoming criminal trial of other participants in the scheme.[19] Nevertheless, Judge Sullivan characterized the agreement as a ''sweetheart deal'' for Kim. Although Judge Sullivan did not comment on the fairness of the deal with respect to the corporation, he sought guidance on his authority to reject the DPA on the grounds of ''fundamental fairness,'' adding that his was not a ''rubber stamp'' court. Unsatisfied with the government's response that the court's role was limited to procedural aspects, Judge Sullivan issued an order shortly after the hearing appointing Brandon Garrett, a professor at the University of Virginia School of Law, to

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ecution Agreement ¶¶ 8-10 (Dec. 10, 2012) (acknowledging the government's right to prosecute for ''willful and material breaches'').

[11] Barclays Plc and Barclays Bank Plc, Report of Foreign Private Issuer, Form 6-K, Ex. 99-.1, Financial Statement Notes (July 30, 2014).

[12] UBS Group AG, Form 6-K, n. 14(8) (Oct. 28, 2014).

[13] Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. Times, Dec 10, 2014.

[14] Standard Chartered Bank, Deferred Prosecution Agreement ¶ 4.

[15] Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. Times, Dec. 10, 2014.

[16] Memorandum Opinion, *U.S. v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL, 12 (D.D.C. Feb. 5, 2015).

[17] Saena Tech DPA, att. A, at 2-4 (April 16, 2014).

[18] *Id.* at ¶ 4 (April 16, 2014).

[19] Transcript of Hearing, *United States v. Saena Tech Corporation*, No. 1 1:14-cr-00066-EGS (D.D.C. July 17, 2014).

''provid[e] the Court with advocacy on questions regarding the scope of the Court's authority, if any, to consider the fairness and reasonableness of a deferred prosecution agreement in deciding whether to accept or reject such an agreement.''[20]

Prior to Professor Garrett's submission, the government filed a supplemental briefing arguing that the court's sole task in approving DPAs was to determine whether to exclude time under a subsection of the Speedy Trial Act that provides:

> Any period of delay during which prosecution is deferred by the attorney for the [g]overnment pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct [] shall be excluded [] in computing the time within which the trial of any such offense must commence.

18 U.S.C. § 3161(h)(2). The government admitted that while ''case law is barren'' with respect to the standard for court approval of the exclusion, legislative history suggests that the court's role is limited to verifying that the real purpose of the agreement is to allow the defendant to demonstrate good conduct, as opposed to staving off an impending trial date.[21] In addition, the government asserted that the Court could not invoke its supervisory powers, which were not unlimited.[22] The government emphasized that by passing judgment on the merits of DPAs, courts would become ''superprosecutors,'' undermining the separation of powers.[23]

Professor Garrett disagreed with the government's position. In his view, § 3161(h)(2) ''provides a court with clear and express authority to decide whether or not to approve such a deferred prosecution agreement, including with reference to the fairness and reasonableness of its terms.''[24] Professor Garrett argued that the fact that such agreements can only proceed ''upon 'the approval of the court' makes that discretion clear.'' According to Professor Garrett, court oversight is especially necessary when the government agrees to defer prosecution of corporations. The text of the provision itself says that time may be excluded, with court approval, ''for the purpose of allowing the defendant to demonstrate good conduct.'' Professor Garrett argued that, given the increased complexity of measuring a corporation's good conduct, active judicial supervision is necessary to ensure that the defendant demonstrates such good conduct through, for example, continued cooperation with the government or the adoption of governance reforms to improve compliance.[25]

Professor Garrett also recommended using the standard for plea agreement approval to inform a court's decision to approve or reject a deferred prosecution agreement. As he noted, ''judges may generally reject plea agreements 'when the district court believes that [the] bargain is too lenient, or otherwise not in the public interest.' ''[26] Professor Garrett also emphasized that because a plea agreement with an organization raises so many distinct issues, including issues relating to enforcement priorities, third parties, regulators and ongoing supervision, many courts have conducted individualized assessments of proposed agreements beyond simply ascertaining whether a corporation is entering into the deal knowingly and voluntarily.[27] Professor Garrett cited several examples of corporate plea agreements being heavily scrutinized, and in some cases rejected, because they were not in the public interest, the victims objected to the agreement—or, most saliently, the corporation was required to pay a fine but immunity was offered to a culpable individual.[28] He recommended that in deciding whether to approve DPAs, courts should adopt the same case-by-case approach they use with plea agreements and assess whether the DPA is ''reasonable, fair, comports with the goals of the Sentencing Guidelines [for Organizations], and is in the public interest.''[29]

The government rejected Professor Garrett's analysis. The government argued that there was no statutory authority for judicial consideration of DPAs, noting that the standard for plea agreement—based on Federal Rule of Criminal Procedure 11—was a stand-alone rule that did not apply to DPAs.[30] Instead, § 3161(h)(2), which applied to DPAs, was intended to ''strengthen[] the supervision over persons released pending trial,'' and established only time periods to be excluded in calculating when the case must be brought to trial.[31] The government asked ''how strengthening supervision over persons released pending trial relates to empowering judges to reject corporate deferred prosecution agreements based on notions of fairness and reasonableness, particularly since corporations cannot be detained pending trial.''[32] The government argued that the legislative intent was never to tie the court approval requirement to the fairness and reasonableness of the agreement.[33] Citing the Second Circuit's recent decision in *SEC v. Citigroup Global Markets*, 752 F.3d 285, 297 (2d Cir. 2014), the government stressed that even in cases where the Court has statutory authority to review settlements for fairness and reasonableness, its inquiry

[20] Order Appointing Amicus Curiae, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. July 22, 2014).

[21] Government's Supplemental Brief at 6-7, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 8, 2014) (citing *United States v. HSBC*, No. 12-CR-763 (E.D.N.Y. July 1, 2013)).

[22] *Id.* at 8, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 8, 2014).

[23] *Id.* at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 8, 2014) (quoting *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973)).

[24] Memorandum of Law of *Amicus Curiae* Law Professor at 2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[25] *Id.* at 2-3, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[26] *Id.* at 17-18, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[27] *Id.* at 18, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[28] *Id.* at 18, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[29] *Id.* at 19, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[30] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29 2014).

[31] *Id.* at 2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

[32] *Id.* at 2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

[33] *Id.* at 3-4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

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is limited to determining whether the settlement is procedurally proper.[34]

Post-DPA Approval Judicial Review and Authority

In a Sept. 5, 2014 minute order, Judge Sullivan asked the government and Professor Garrett to address: (1) whether, after approving an exclusion of time pursuant to § 3161(h)(2), a Court has authority to hold a defendant in contempt for violating DPA provisions; and (2) whether a Court may order a party to comply with the terms of a DPA during a colloquy regarding that party's understanding of the agreement and relinquishment of its constitutional and statutory right to a speedy trial.[35] If a Court possessed such authority, violations of the DPA could subject either Saena Tech or Kim to prosecution, fine or imprisonment under the statute for criminal contempt, 18 U.S.C. § 401, and Federal Rule of Criminal Procedure 42.[36]

The government argued that criminal contempt sanctions are inapplicable to DPAs.[37] A necessary requirement for a contempt order is a court order that is ''clear and reasonably specific.''[38] In the government's view, such an order cannot be issued in the DPA context because the Court's lawful order would be confined to approving or disapproving the parties' agreement to exclude time from computation under the Speedy Trial Act, rather than addressing the merits of the DPA.[39] For similar reasons, the government also claimed that the Court does not have the authority ''to impose conditions designed to assure'' the defendant's compliance with the DPA.[40] A criminal DPA, by its terms, gives prosecutors the authority to assess compliance, which is a necessary part of prosecutorial discretion.[41] Finally, the government claimed that the Court does not have a basis in its supervisory authority to condition the exclusion of time on a defendant's compliance with the terms of the agreement; conditioning the exclusion of time on a party's compliance with the DPA ''is not essential to the Court's function, particularly when the defendant is not raising an impropriety or otherwise requesting the Court's exercise of its supervisory authority.''[42]

In his own filing, Professor Garrett noted that there was an alternative means by which a Court could ensure that a DPA was faithfully implemented: if the terms of an agreement state that in the event of a breach the case may return to the docket for prosecution, and the judge requires status reports on implementation of the DPA, then the Court would be in a position to know of any potential breach, return it to its calendar, and cease tolling under the Speedy Trial Act.[43]

While Judge Sullivan has not decided whether he has the authority to reject the DPA outright for its perceived lack of fairness, *Saena Tech* is instructive as it demonstrates the murkiness of the courts' authority to reject DPAs on such grounds.

Fokker Services

Judicial consideration of a DPA between FSBV, a Dutch aerospace services provider, and the U.S. Attorney's Office for the District of Columbia also sheds light on potential pitfalls a corporate defendant can encounter even after prolonged settlement negotiations. In June 2010, FSBV disclosed to the government that it had violated export control laws by supplying certain manufacturing parts and technologies to U.S.-sanctioned countries, namely Burma, Iran, and Sudan, since 2005. According to the criminal information filed with the DPA, by knowingly engaging in prohibited transactions, FSBV realized $21 million in gross revenue and $5.9 in gross, pre-tax profits.[44] In June 2014, after extensive negotiation between the defendant and several government agencies, FSBV and the government reached a global settlement resolving the criminal and administrative investigations, in which FSBV would pay a total penalty of $21 million.[45]

Despite FSBV's extensive internal investigation with the assistance of outside counsel and disclosure of investigation results to the relevant agencies, Judge Richard Leon of the U.S. District Court for the District of Columbia expressed substantial discomfort over approving the DPA given the government's failure to prosecute individuals at the company, the size of the penalty, and—most significantly—ambiguity surrounding whether the defendant's disclosure was truly voluntary. As he did with respect to SEC's 2011 consent judgment with IBM concerning alleged Foreign Corrupt Practices Act violations by IBM, Judge Leon encouraged the parties into re-negotiating a new agreement that would surely be less favorable to FSBV. Judge Leon, a former federal prosecutor and white collar criminal defense attorney, is quite experienced in complex corporate criminal prosecution, including handling such proceedings against Siemens and Daimler.

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[34] *Id.* at 6, *United States v. Saena Tech Corporation,* No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014). Indeed, in *SEC v. Citigroup Global Markets*, the district court not only took issue with the SEC's supposed leniency, but also with the fact that Citigroup did not have to admit or deny liability. Interestingly, even though the Second Circuit later said in its reversal of the district court that admitting liability is not necessary for a consent judgment, the SEC has changed its policy to demand admissions of liability as a condition of settlement in certain cases in response to the judicial pushback it has received.

[35] Minute Order, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Sept. 5, 2014).

[36] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[37] *Id.* at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[38] *Id.* at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[39] *Id.* at 4-5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[40] *Id.* at 5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[41] *Id.* at 5-6, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[42] *Id.* at 7-8, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[43] Supplemental Memorandum of Law of *Amicus Curiae* Law Professor at 2-3, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 21, 2014).

[44] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 5, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014)

[45] *Id.* at 1-2, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

After four years of extensive investigation and protracted negotiations with the government, the matter was not completed. In a June 25, 2014 status conference, Judge Leon requested that the government submit a pleading ''setting forth why the DPA reached in this case adequately reflects the seriousness of the company's conduct and why this resolution serves the interests of justice.'' [46] In a July 7, 2014 memorandum, the government detailed its application of principles of corporate liability from the U.S. Attorney's Office Manual to this particular case.[47] It explained that although the nature and extent of the wrongdoing at issue was undoubtedly significant, there were mitigating factors that made the terms of the DPA appropriate.[48] First, the government noted that FSBV voluntarily disclosed its violations, and later turned over the results of an extensive internal investigation, to the government. Second, prosecutors acknowledged that since launching its internal investigation, FSBV adopted ''new and more effective internal controls and procedures, including robust enhancements to its current compliance program to prevent the recurrence of the criminal conduct at issue.'' Third, the government praised the comprehensiveness of the company's internal investigation, which included the review of more than 500,000 documents, interviews of 51 witnesses, and data collection on more than 20,000 transactions and 200,000 shipments. Finally, the government emphasized the collateral consequences of imposing a harsher fine on the company given its dire financial condition.[49]

Judge Leon was unmoved. At a July 9, 2014 hearing, he expressed concerns over what he believed to be a modest penalty and the failure to prosecute individuals. He also questioned the government's representation that this was truly a voluntarily disclosure, noting a *Bloomberg News* article that said that the government was aware of FSBV's wrongdoing in 2008 as a result of an investigation into another Dutch aerospace company for export control violations.[50] In light of these concerns, he ordered the parties to submit additional briefing on whether the disclosure was truly voluntary and the standard of review for a court reviewing a DPA.[51]

The parties addressed the thorny question of standard of review. They both acknowledged that the sole source of authority of the Court to oversee a DPA is the Speedy Trial Act, and that its only task was to determine whether to exclude time, not to review the substance of the agreement to determine whether the DPA ''serves the interests of justice.''[52] Both parties also concluded that the primary purpose of enabling courts to exercise broad supervisory powers is ''to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety.''[53] Yet both stressed that this power was not unlimited. The government emphasized that the supervisory powers were not implicated here because the question of whether the disclosures were voluntary is ''outside the Court's authority under any rubric of judicial authority.''[54] FSBV said that the Court's supervisory powers could not be invoked because there was no risk that by approving the agreement, the Court would be lending its imprimatur to some sort of impropriety.[55] Here, the agreement was the product of arm's-length, good-faith negotiation between the parties.[56]

Before Judge Leon evaluated the merits of the parties' standard of review arguments, the government notified the Court that it had received an affidavit of a Special Agent of the U.S. Department of Commerce's Bureau of Industry and Security, which called into question whether FSBV's disclosure was voluntary.[57] At an Aug. 21, 2014 status conference, Judge Leon, describing FSBV's allegedly voluntary disclosure as the ''linchpin or critical element, keystone to the deal,'' stated his reservations about the DPA, and said that he did not want to move forward in his ''evaluation'' of the deal with a crucial question such as this ''still laying fertile out there.''[58] Judge Leon has since made clear that, in his opinion, judicial review of DPAs includes an assessment of a DPA's merits.[59]

In a Sept. 30, 2014 filing, the government stated that it had interviewed 18 individuals and reviewed volumi-

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[46] *Id.* at 2, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[47] Section 9-28.300 of the U.S. Attorney's Manual sets forth nine factors to be considered in the context of a resolution of a corporate investigation: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, and whether corporate management was implicit in the wrongdoing, (3) the company's history of similar misconduct, (4) the company's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation, (5) the existence and effectiveness of the company's pre-existing compliance program, (6) the company's remedial actions, (7) the collateral consequences, (8) the adequacy of the prosecution of individuals responsible for the company's malfeasance, and (9) the adequacy of remedies such as civil or regulatory enforcement actions.

[48] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 7-8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[49] *Id.* at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[50] Andrew Zajac and Greg Farrell, *Fokker Iran Sanctions Deal Stalls on Judge's Concerns*, Bloomberg News, July 9, 2014.

[51] Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement with Fokker Services B.V. at 1, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[52] *Id.* at 10, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014); Fokker Services B.V.'s Memorandum in Support of the Deferred Prosecution Agreement with the Government at 2-4, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[53] *Id.* at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014) (quoting *United States v. HSBC Bank*, 2013 WL 3306161 at *6 (E.D.N.Y. July 1, 2013)); Fokker Services Memorandum in Support of the Deferred Prosecution Agreement with the Government at 5-6, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[54] Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement with Fokker Services B.V. at 15, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[55] Fokker Services B.V.'s Memorandum in Support of the Deferred Prosecution Agreement with the Government at 7-8, 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[56] *Id.* at 7, 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[57] Transcript of Status Conference at 8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Aug. 21, 2014).

[58] *Id.* at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Aug. 21, 2014).

[59] Memorandum Opinion, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Feb. 5, 2015).

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nous internal government communications surrounding the prior investigation giving rise to the suggestion that FSBV's disclosure was not voluntary, all in an effort to assuage Judge Leon's reservations.[60] This level of post-agreement investigation is unprecedented. The government again stressed that no case or investigation of FSBV was opened until after the June 2010 disclosure, all of the substantive investigative steps focused on FSBV were pursued after its disclosure, and no one has found any evidence that FSBV believed it was under investigation.[61] The government concluded by saying that the notion that FBSV was under investigation prior to June 2010 ''is based on the tautology that, because the United States government obtained some information through [another] investigation that indicated Fokker Services may have been involved in conduct in violation of U.S. export control laws, Fokker services was thereby 'under investigation.' ''[62] At an Oct. 29, 2014 status conference, however, Judge Leon remained unimpressed. He told the parties that they may have made ''too good a deal'' and that he would decide within a matter of weeks whether to reject it.[63] Furthermore, he told the parties that ''[y]ou probably would be wise to use your time in the next few weeks to have some discussion,'' over ''an alternative resolution that might be acceptable to the court[.]''[64]

It is unclear whether the parties heeded Judge Leon's suggestions and undertook efforts to adopt an alternative resolution. On Feb. 5, 2015, however, Judge Leon issued a memorandum opinion rejecting the DPA, noting that the ''grossly disproportionate'' nature of the agreement to the offenses alleged would ''undermine the public's confidence in the administration of justice.''[65] He continued, ''[s]urely one would expect, at a minimum, a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court . . . .''[66] Judge Leon left the door open to a revised agreement, stating only that he would not approve the DPA in its current form.[67] Judge Leon's consideration of this DPA underscores how critical a corporation's self-disclosure of misconduct is to both the government and, now, the courts. The case also illustrates the efforts courts may take to review all factors underlying the basis for an agreement.

The Trend Favoring Oversight

This probing by Judges Sullivan and Leon is part of a growing trend of oversight of DPAs by district courts. Judge John Gleeson of the Eastern District of New York, for example, issued a lengthy opinion in 2013 in *United States v. HSBC* discussing a court's power to oversee these agreements on the basis of its inherent authority to review matters on its docket.[68] Like Judge Sullivan in *Saena Tech*, Judge Gleeson did not find that subsection 3161(h)(2) of the Speedy Trial Act provided the standard for his review; instead, he relied upon his inherent supervisory authority to approve the DPA at issue.[69] At the same time, Judge Gleeson noted what he perceived to be the limits of the supervisory power, approving the DPA in part because ''[his] review of the DPA, and [his] knowledge of the actions that have been taken pursuant to the DPA thus far, reveal no impropriety that implicates the integrity of the Court and therefore warrants the rejection of the agreement.''[70] In approving the DPA, Judge Gleeson further noted his continuing authority to oversee its implementation and ordered quarterly reporting by the parties while reserving the right to hold further hearings or require additional appearances, if appropriate.[71]

With the increasing demand from the public and other stakeholders for the individuals responsible for corporate misconduct to be held personally accountable, courts will continue to find ways to exercise authority over these agreements. In particular, *Saena Tech* illustrates that DPAs that resolve charges against the corporation and while simultaneously immunizing officers suspected of wrongdoing are likely to attract heightened judicial scrutiny.

Conclusion

NPAs and DPAs remain a key vehicle for resolving allegations of corporate misconduct, with total annual recoveries—and even, at times, individual recoveries—reaching into the billions. Despite the potential for continued judicial scrutiny of the terms of DPAs, given the trend favoring the use of NPAs and DPAs, recent statements by DOJ leadership in support of negotiated resolutions, and the centerpiece role of NPAs in the DOJ Tax Program, it is highly likely that we can expect their heavy use to continue coming years.

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[60] Government's Status Report at 7-8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Sept. 30, 2014).

[61] *Id.* at 8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Sept. 30, 2014).

[62] *Id.* at 15, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Oct. 29, 2014).

[63] Christie Smythe, *Fokker Judge Says He May Reject Accord on Iran Sanctions*, Bloomberg News, Oct. 29, 2014.

[64] *Id.*

[65] Memorandum Opinion, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL, 12 (D.D.C. Feb. 5, 2015).

[66] Memorandum Opinion, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL, 13 (D.D.C. Feb. 5, 2015).

[67] Memorandum Opinion, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL, 13 (D.D.C. Feb. 5, 2015).

[68] United States v. HSBC Bank, 2013 BL 175499 (E.D.N.Y. July 1, 2013).

[69] *Id.* at *2-3.

[70] *Id.* at *7.

[71] *Id.* at *11.