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A Stern Reminder from *U.S. v. Fokker*: The Execution of a Corporate Deferred Prosecution Agreement May Not Be the End of a Corporate Prosecution

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The Rise of Deferred Prosecution Agreements

A phenomenon virtually foreign to the 20th Century, the use of pre-plea agreements by the Department of Justice (“DOJ”), typically in the form of a deferred prosecution agreement (“DPA”) (or a non-prosecution agreement (“NPA”)) to address corporate culpability has become the commonplace method for resolving a federal criminal investigation. The sheer growth in this form of result is illustrated by the numbers: in 2000, the DOJ entered into only two DPAs; in 2014, the government entered into 30 DPAs and NPAs. The application of a corporate DPA is not limited to any traditional industry or district boundary; whether it’s one of the country’s largest banks or a foreign chemical manufacturer, companies are now routinely hauled into federal court and made to surrender millions in fines and forfeitures, invest substantial additional resources in compliance controls and subject themselves to intense government oversight in the form a corporate monitor, all of which is considered palatable when compared to the alternative: a federal felony conviction. One fact is clear from this emerging practice: while resolving corporate criminal exposure through a DPA or NPA was once taboo, the practice is now widely accepted and must be thoroughly considered by any corporation under any sort of federal criminal investigation.

However, while DPAs have become more widely accepted, the financial penalties associated with them have become almost astronomical. In 2014, a pharmaceutical company was hit with fines and forfeitures totaling almost \$200 million, only for those fines to quickly be dwarfed by the \$1.2 billion penalty levied against an automobile manufacturer later that year. Fines approaching \$2 billion dollars have also been levied against two of the country’s largest banks. Further, the invasive practice of installing a corporate monitor is again becoming the norm. Not only are corporate monitors usually granted unfettered internal access, their role has become less passive: In one example, a company under a DPA was required to receive their monitor’s approval for routine matters, such as public statements on certain issues, and to adopt any recommendation submitted by the monitor, unless the Office of the Attorney General specifically agreed otherwise. These two trends make clear that while DPAs will continue to be employed by DOJ for criminal prosecutions, federal prosecutors are going to extract more punitive terms in exchange for foregoing prosecution.

Notwithstanding that DPAs continue to increase, accompanied by increased penalties, judicial scrutiny has also seen an uptick. In February 2015, D.C. Circuit District Judge Richard Leon broke the DPA-approval cadence when he rejected outright a DPA between the government and Fokker Services B.V. (“Fokker”) because of what he termed the

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agreement's "anemic[]" terms. This heightened judicial scrutiny, discussed in more detail below, highlights several key issues for any corporation faced with a decision regarding a potential DPA.

Judge Leon's Rejection of the Fokker DPA

On February 5, 2015, Judge Leon issued a scathing opinion rejecting the DPA put forward by DOJ and Fokker, the Dutch aerospace company. The DPA covered admitted violations of US law administered through the Department of Treasury's Office of Foreign Assets Control ("OFAC") and the Department of Commerce's Bureau of Industry Security ("BIS") forbidding certain business dealings with prohibited countries such as Iran, Sudan and Burma. Fokker's criminal conspiracy spanned a five-year period from 2005 to 2010, and included over 1,100 separate illegal shipments of aircraft parts and components subject to export control for national security and/or anti-terrorism reasons. Notably, this prosecution arose out of a Fokker internal investigation and a decision to self-report the discovered criminal conduct to DOJ.

Pursuant to the DPA, Fokker accepted and acknowledged responsibility for its conduct and the DOJ agreed to dismiss criminal charges with prejudice, provided that Fokker paid a \$10.5 million criminal penalty (plus an additional \$10.5 million civil fine), cooperated with authorities regarding the conduct at issue, implemented new compliance policies and complied with US export laws and the other terms of the agreement for 18 months. Although he gave passing acknowledgement to Fokker's voluntary disclosure, Judge Leon balked at the notion that the agreement was punitive enough, and he refused to "rubber stamp" an agreement he believed could cast doubt about the integrity of the judicial process: "In my judgment, it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies [Iran]."

Judge Leon took umbrage with several specific legal aspects of the DPA. As a threshold issue, and despite the company's precarious financial circumstances, the court found the monetary penalties did not inflict sufficient punitive measures on Fokker, as the \$21 million amounted essentially to a disgorgement of revenues from its illegal conduct. Further, even though the crimes represented recurring knowing and willful violations orchestrated at the highest levels of the company, there was no evidence on the record that any individual was prosecuted, and some culpable employees were not even fired for what Judge Leon viewed as egregious criminal conduct benefiting Iran during a "two-front War against terror in the Middle East." Finally, and perhaps most concerning to Judge Leon, this DPA lacked oversight, as its terms expired after a mere 18 months and DOJ did not insist on a monitor, which the judge apparently viewed as appropriate to ensure that further criminal conduct would not be tolerated.

In the end, Judge Leon concluded that, "the DPA presented here is grossly disproportionate to the gravity of Fokker Service's conduct in a post 9/11 world," and rejected the DPA, while affording the parties an opportunity to revise its terms and resubmit. Judge Leon opined that, at a minimum, he expected, "a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court to verify for it and the Government both that this rogue company truly is on the path to complete compliance."

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Now, Fokker is pursuing an appeal in an attempt to salvage an undoubtedly intensely negotiated DPA, a situation all the more harrowing for Fokker, as it has already entered into parallel civil settlements with OFAC and BIS.

Takeaways for Companies Contemplating DPAs

There is significant debate and uncertainty regarding the appropriate role of federal judges in the DPA approval process. The DOJ, the U.S. Securities and Exchange Commission and the companies with which they enter into agreements have argued for a more limited, procedural role in the approval process. Some federal judges, including Judge Leon, Judge John Gleeson (E.D.N.Y.) and Judge Jed Rakoff (S.D.N.Y.) have recently begun pushing back, refusing to act as either “rubber stamps” or “potted plants” and, instead, taking more substantive looks at the merits of DPAs. Unless and until a circuit court makes a definitive ruling on the court’s scope of authority in the DPA approval process, uncertainty will remain, and the level of scrutiny given to any DPA could depend largely on the assigned judge. All eyes are currently on the D.C. Circuit for this definitive ruling, as Fokker pursues its appeal of Judge Leon’s rejection, and also the position that DOJ will take at the appellate level, as it clearly has similar interests in having the district court reversed.

In the meantime, companies forced to accept a DPA to avoid further criminal prosecution must ensure their agreement can survive judicial scrutiny. Businesses should be proactive in developing a defensive factual and legal record, rather than simply relying on the government’s findings, as a method to demonstrate to the court that a vigorous process was followed, and that all evidence in mitigation, both factual and legal, must be considered as part of any judicial review of a DPA. In summation, companies must take great care to ensure the DPA is based on a sound and thoroughly developed factual record; contains monetary penalties that are no greater than necessary but that will be perceived as adequate in light of the factual circumstances; and provides a supervising court the appropriate assurances that the company will not engage in further criminal conduct.

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