

## Deferred Prosecution Agreements: Ray of Hope or Guilty Plea By Another Name?

Prosecutors have turned increasingly to deferred prosecution agreements in recent years to resolve major corporate criminal disputes. But the name may promise more than the resolution delivers.

By Joan McPhee



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Over the last several decades, the arc of corporate criminal prosecutions has trended steadily and relentlessly toward ever more expansive corporate criminal liability and increasingly harsh, often draconian, punishment. The demise of the once-preeminent accounting firm Arthur Andersen LLP stands as perhaps the paradigmatic example of both the breadth of corporate criminal liability — more than 95 percent of the firm's employees had no involvement in the alleged misconduct that led to the firm's indictment — and the severity of the potential punishment. Notwithstanding the U.S. Supreme Court's subsequent reversal of Arthur Andersen's conviction, the indictment alone effectively delivered a "corporate death sentence" to the firm, and Arthur Andersen in fact dissolved in the wake of the criminal charges.

Against this historical backdrop, the federal government's recent willingness to permit corporations to enter into deferred prosecution agreements (DPAs) has emerged as a bright light in an otherwise stark landscape, a beacon that carries with it the promise of a kinder, gentler era of corporate criminal resolutions. While one need look no further than the disparate fates of Arthur Andersen and KPMG LLP (the most recent beneficiary of a deferred prosecution agreement) to appreciate the significance of this development, the potential availability of a deferred prosecution disposition does not alter the balance of power between the corporation and the government in the resolution of corporate criminal disputes. Accordingly, DPAs afford no panacea for the excesses of aggressive corporate criminal prosecutions. Indeed, DPAs, coupled as they often are

with the absence of any judicial oversight, may themselves become vehicles for prosecutorial abuse.

Corporate counsel must therefore proceed with caution, scrutinize the terms of any proposed DPA, and weigh carefully whether such a disposition is as desirable as it may at first blush appear.

### **A Door Is Opened**

Traditionally applied as part of the Department of Justice's Pretrial Diversion Program to resolve minor criminal cases against non-violent individual offenders, DPAs did not become fashionable in the corporate criminal arena until issuance of the "Thompson Memo," in the wake of the Arthur Andersen debacle, in early 2003. With its emphasis on the authenticity of a corporation's cooperation and explicit recognition that pretrial diversion "may be considered" for a corporation in the course of the government's investigation, the Thompson Memo is generally recognized to have opened the door to the recent rise in corporate deferred prosecution resolutions.

Since publication of the Thompson Memo, a dozen DPAs have been entered into between the government and a corporate entity. In the typical DPA, a criminal charge is filed, whether by indictment, information or criminal complaint, and the corporation acknowledges and accepts responsibility for the criminal wrongdoing set forth in detail in the charging instrument. Prosecution is then deferred for a period of time, usually from one to two years, provided the organization fulfills its obligations under the DPA and does not engage in further misconduct. The obligations imposed pursuant to the DPA can be onerous

and typically include payment of a substantial monetary penalty, implementation of stringent corporate governance and compliance measures, cooperation with the government's ongoing investigation (often requiring waivers of the corporation's attorney-client privilege and work-product protection), waivers of speedy trial rights and statute of limitations defenses, and agreement to external oversight by an independent monitor approved by the government.

If the corporation complies with all of its obligations under the DPA throughout the term of the agreement, the government then dismisses the criminal charges with prejudice. Should the corporation fail to fulfill any of its obligations or engage

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in further misconduct during the specified period, however, the criminal charges remain "live," and the company is subject to prosecution in a context where conviction — given the written admission of criminal wrongdoing in the DPA — is all but a foregone conclusion.

### **Risks Versus Rewards**

While a DPA does offer a literal deferral of prosecution, in the sense that the machinery of conviction is paused, DPAs do not typically

afford a corporation the ability to avoid, or even to defer, many of the harshest potential consequences of a criminal prosecution or conviction. In this regard, the term "deferred prosecution" is somewhat of a misnomer. Thus, while it will almost always be preferable — all other things being equal — for a corporation *not to* plead, rather than *to* plead, guilty to a crime, the analysis is not as simple or as straightforward as might initially appear. Three factors complicate the mix.

### **1 A DPA typically requires an admission of criminal wrongdoing.**

As such, the DPA, much like an indictment or criminal conviction, may subject corporations in highly regulated industries, such as government contractors or healthcare providers, to what may be the harshest punishment of all: exclusion and/or debarment from continued participation in government programs or contracts. While mandatory exclusion and debarment provisions may be triggered only upon conviction, permissive exclusion and debarment remedies, with consequences equally harsh, may be imposed upon "adequate evidence" that the provider or contractor engaged in prohibited conduct. Arthur Andersen was suspended from government contracting by the General Services Administration based upon the strength of the allegations in the indictment alone. In addition, in at least five reported cases, individual defendants were excluded from participation in federal healthcare programs following their admission to criminal wrongdoing and

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notwithstanding that their prosecutions had been held in abeyance or “deferred.” Thus, startlingly enough, the potential for exclusion and/or debarment, with all of their attendant consequences, is not necessarily obviated by the prosecutor’s agreement to defer prosecution. Corporate counsel must therefore negotiate and satisfactorily resolve the corporation’s potential exposure in this regard as though the prosecution were proceeding apace.

**2 There is no reason to assume that a DPA will result in lower restitution payments or monetary penalties than would be imposed upon prosecution and conviction.**

A DPA is essentially a contract between the government and the corporation and, as such, may afford greater latitude to the government to fashion restitution payments and monetary penalties without judicial oversight and irrespective of the constraints otherwise imposed by statutory maximums, sentencing guidelines and restitution provisions. DPAs thus arguably provide prosecutors with a preferred vehicle for extracting large monetary payments from corporations.

DPAs have, in fact, typically carried hefty price tags as a condition of the government’s agreement. By way of example, Bristol-Myers Squibb Co. paid \$300 million and KPMG \$456 million as part of their respective deferred prosecution agreements.

Given this reality, it behooves corporate counsel to pay particular attention to the terms of a proposed DPA to ensure that the assumed benefits are not outweighed by disproportionate monetary terms.

**3 DPAs typically do not defer, and instead may operate to hasten, the imposition of corporate compliance, cooperation and monitoring requirements.**

Even a cursory review of the terms of corporate DPAs entered into since January 2003 — replete as they are with extensive compliance provisions, required waivers of the attorney-client privilege and work-product protection, and expensive, intrusive outside monitoring requirements — makes clear

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that DPAs rival or surpass post-conviction corporate integrity agreements in terms not only of required cooperation and compliance, but also government intrusiveness into corporate governance and decision-making. Thus, for example, in recent DPAs, the government has required changes in the composition and structure of the corporation’s board of directors, dismissal and replacement of specified officers and employees, creation of new business units and elimination of others, changes in certain business processes, and the implementation of new policies and procedures for designated business areas.

While corporate compliance and integrity are undeniably desirable

outcomes, not only for the government but also for the corporation and its stakeholders, excessive government intrusion into the affairs of the corporation poses a unique set of risks and business vulnerabilities for the organization. Inherently difficult to quantify or assess with precision, these risks represent yet another potential counterweight to the perceived benefits of a DPA.

### **One Size Doesn’t Fit All**

Given the array of potential pitfalls, DPAs should not be entered into lightly. Moreover, effective negotiation of the terms of the DPA is critical; while all DPAs share certain common elements, the actual terms vary substantially. Thus, the term of the agreement may range anywhere from 12 months to several years (compare Banco Popular de Puerto Rico’s 12-month DPA with New York Racing Association Inc.’s 18-month DPA with America Online Inc.’s 2-year DPA with Monsanto Co.’s 3-year DPA with KPMG’s potential 5-year DPA).

Similarly, counsel have achieved varying degrees of success in negotiating for less, rather than more, detail in the factual statements in their agreements. Because such statements, in accordance with standard DPA terms, are fully acknowledged and cannot be denied, careful negotiation of the requisite factual recitation is essential, and particularly so given the potential for follow-on civil litigation.

Yet another element of DPAs where terms vary significantly is with regard to required waivers of the corporation’s attorney-client privilege and work-product protection. Thus, while PNC ICLC Corp., AOL, Bristol-Myers Squibb,

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KPMG and others were required to waive the attorney-client privilege and work-product protection for specified privileged materials, Banco Popular, MCI WorldCom and AmSouth Bancorporation all successfully negotiated for terms that required, as part of their ongoing cooperation, only the production of non-privileged materials.

Finally, the degree to which the government inserts itself into matters of corporate governance and business operations spans a broad spectrum, from minimal intrusion, in the case of the PNC DPA, for example, to deeply intrusive restructuring of not only board-level and senior management positions, but also business functions, as in the case of the Bristol-Myers Squibb, NYRA and KPMG DPAs.

While good negotiating skills on the part of corporate counsel may make a material difference in the terms of a DPA, the deeper problem, as Columbia University law professor John C. Coffee, Jr. recently observed in *The National Law Journal*, “lies in the danger that power corrupts and that prosecutors are starting to possess something close to absolute power.” Given the breadth of the corporate criminal liability doctrine and the potentially devastating consequences of a criminal conviction or even indictment, it is the rare corporation today that has a meaningful right to a jury trial in the resolution of its corporate criminal disputes with the government. While a criminal plea necessarily entails relinquishment of the right to a jury trial, DPAs are even further removed from the salutary environment of the public courtroom.

Negotiated as they typically are in

a conference room between a federal prosecutor and corporate counsel, DPAs are entered into by and large without benefit of any judicial oversight or other mechanism for ensuring prosecutorial accountability. Recent abuses of the process by which deferred prosecutions are negotiated and agreed to — for example, requiring Bristol-Myers Squibb to endow a chair in business ethics at the law school from which the federal prosecutor received his law degree or requiring MCI WorldCom to “use good faith and reasonable commercial efforts” to add 1,600 employees to its workforce in Oklahoma — underscore the need for reform.

And so, while the arrival of corporate deferred prosecution resolutions is on balance a welcome development, corporate counsel should not expect any time soon to find themselves liberated from the travails, with which they have become all too familiar, of negotiating from a position of extreme vulnerability for leniency from a powerful, largely unaccountable, government adversary.

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