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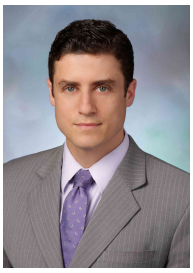
The HSBC DPA: A Former DoJ Prosecutor's Perspective by Adam S. Lurie and Keith M. Gerver



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The deferred prosecution agreement ("DPA") is once again facing criticism, this time in connection with the Department of Justice's (the "DOJ") decision to enter into a DPA with HSBC Bank USA, N.A. and HSBC Holdings plc (together, "HSBC") for violations of the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act.

On March 6, 2013, Senator Chuck Grassley, the Ranking Member of the Senate Judiciary Committee, questioned Attorney General Eric Holder regarding the HSBC DPA and the Department's use of DPAs in other cases. At the hearing, Senator Grassley described certain financial institutions as "too big to fail" and "too big to jail." In response to Senator Grassley, the Attorney General acknowledged that some financial and banking institutions are simply "so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy."

Prosecutors, in the exercise of prosecutorial discretion, consider a host of factors when determining whether to pursue criminal charges against individuals, corporations, and financial institutions. Beyond the standard factors to consider when deciding whether to bring charges against an individual including the sufficiency of the evidence, the likelihood of success at trial, and the probable deterrent and rehabilitative effects of conviction, to name a few, internal Department guidelines—known as the Principles of Federal Prosecution of Business Organizations—direct prosecutors to take into account additional factors related to companies. These include the pervasiveness of wrongdoing within the corporation, the corporation's willingness to cooperate, the existence and effectiveness of the corporation's compliance program, and potential collateral consequences of the kind identified by the Attorney General. Collateral consequences may include harm to shareholders, employees, pension holders, and, more generally, to the broader economy. Indeed, as former Assistant Attorney General Lanny Breuer said last September:

> In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects... In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets is a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement.

Thus, the Attorney General's comments to Senator Grassley reflect well-established Department policy.

The Attorney General's acknowledgement, however, has added fuel to fire for those troubled by the proliferation of DPAs. Many critics of DPAs believe that corporations view the penalties associated with DPAs as merely a "cost of doing business" and are thus a weak deterrent. Others have expressed concern when a DPA has not required a corporation to admit wrongdoing or have worried that DPAs undermine the accountability of individual corporate employees.

Such criticisms, however, do not sufficiently account for the many benefits that accrue from the use of DPAs. As former Assistant Attorney General Breuer made clear in his September 2012 speech, criminal indictment is a "blunt instrument" when combatting corporate crime, as the prosecution of former accounting giant Arthur Anderson—and its resulting collapse—clearly demonstrated. Indeed, DPAs are not get-out-of-jail-free cards, but an enforcement device that the Justice Department may employ to extract serious concessions from corporate wrongdoers in exchange for deferring a criminal prosecution that might unduly impact constituencies that extend far beyond the corporation's shareholders.

In addition, any breach of a DPA can result in the full prosecution of the company, and the Department may use all of the companies' admissions in the DPA against the company in any such prosecution. Further, DPAs with corporations in no way limit the ability of the DOJ and Securities and Exchange Commission (the "SEC") to pursue charges against individual defendants when warranted by the evidence. Indeed, as Breuer stated in September, "individual wrongdoers can never secure immunity through the corporate resolution." For example, DOJ pursued individual prosecutions against former employees of Siemens and Alcatel-Lucent on charges related to violations of the Foreign Corrupt Practices Act, and BDO, for tax related crimes.

DPAs offer many of the same benefits of a guilty plea, if not more. Aside from requiring corporations to admit wrongdoing which is the trend today, DPAs generally require companies to agree to cooperate in the government's investigation and pay stiff monetary penalties. HSBC, for example, must pay $1.9 billion. DPAs also offer a way for the DOJ and SEC to require key changes in corporate culture. For instance, by requiring the creation and maintenance of corporate compliance programs, DPAs force companies to address more effectively the legal risks that accompany their business pursuits. This, of course, is a primary goal of the criminal justice system—to deter and prevent additional crime.

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