

Deferred Prosecution Agreements and U.S. Approaches to Resolving Criminal and Civil Enforcement Actions

A Regime Characterized by Limited Judicial Involvement (Notwithstanding the Efforts of Judge Rakoff)

As the discussion swirls around proposals to introduce U.S.-style deferred prosecution agreements into the U.K. enforcement landscape,¹ it will be useful to take a close look at how those agreements have traditionally operated in the United States and examine where they fit in the panoply of vehicles available to U.S. prosecutors and regulators seeking to resolve enforcement actions short of trial.

As most know, deferred prosecution agreements — commonly referred to as “DPAs” — are mechanisms by which targets of U.S. criminal investigations can, with court approval, avoid criminal charges in exchange for their commitment to abide by the dictates of the DPA, including financial penalties and remedial measures. Often overlooked in the glare of the court’s imprimatur, however, is the fact that DPAs are usually hashed out with only minimal, if any, judicial involvement. Indeed, in most cases the judge’s stamp of approval comes at the very end of the process, is rarely controversial, and most often leaves the parties’ negotiated terms entirely undisturbed. The activism of Judge Rakoff in New York City (recently rebuked by an appellate court) has been linked to the DPA debate. Contrary to the public misperception, however, his ire was not ignited by a DPA or even in the context of a criminal case. Instead,

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¹ See Richard Alderman (Serious Fraud Office, Director), *Preventing Serious Economic Crime: the SFO's Priorities and Successes*, White Page Ltd in association with the Serious Fraud Office, Serious Economic Crime – A Boardroom Guide to Prevention and Compliance (2011), available at <http://www.serious economiccrime.com/ebooks/Serious-Economic-Crime.pdf> (“The SFO can do even more with greater powers - and I am pressing for them. I believe deferred prosecution would be a great tool for the SFO and it chimes well with my pledge to allow businesses, committed to acting ethically, to continue trading”).

what Judge Rakoff rejected was a consent decree proffered by the Securities and Exchange Commission to resolve a civil enforcement action.

As misperceptions abound, a review of the various options available under the U.S. model seems to be in order, particularly as the U.K. is contemplating U.S.-style DPA procedures. It behooves financial institutions, corporations, and other entities to have a firm grasp of how DPAs work in the United States, as well as the assortment of other civil and criminal enforcement resolution tools at the disposal of U.S. prosecutors and regulators.

Criminal and Civil Enforcement in the United States

First, for context, it may help to review a snapshot of the U.S. enforcement community, particularly with respect to actions affecting the financial sector.

In the United States, responsibility for enforcement of criminal laws rests with the Department of Justice (“DOJ”), which at the direction of the Attorney General investigates criminal activity through the Federal Bureau of Investigation, among a myriad of other law enforcement agencies under DOJ’s umbrella, and prosecutes criminal cases through 94 Offices of the United States Attorneys located in 50 states, the District of Columbia, Guam, the Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.² DOJ also occupies a prominent role in the civil enforcement landscape, most notably through its antitrust, civil, and tax divisions.³

The Securities and Exchange Commission (“SEC”) is authorized to enforce U.S. securities laws through civil enforcement actions in federal court or before an administrative law judge.⁴ The SEC has become increasingly active in recent years, forming specialized investigative units in areas of asset management (hedge funds, investment advisers, and private equity), market abuse (large-scale insider trading and high-volume and computer-driven trading strategies), various derivative products, and Foreign Corrupt Practices Act (“FCPA”) violations, among other high-priority areas of enforcement.⁵ To date, the SEC has brought 36 civil enforcement actions relating to conduct generally associated with the financial crisis, including concealment and improper-pricing claims relating to complex structured products, such as Collateralized Debt Obligations (“CDOs”), and claims addressing insufficient disclosure of mortgage-related risks.⁶ Another prominent U.S. regulator in the financial sector is the U.S. Commodity Futures Trading Commission (“CFTC”), which investigates and pursues civil actions relating to fraud, manipulation, and other abuses concerning commodity derivatives and swaps that threaten market integrity, market participants, and the general public.⁷ As an adjunct to their civil enforcement authority, the SEC, CFTC, and other regulators work closely with DOJ — and, indeed, law enforcement agencies around the globe — to bring criminal cases when appropriate.

² See Offices of the United States Attorneys, Mission and Functions, *available at* <http://www.justice.gov/usao/eousa/mission.html> (last visited Mar. 19, 2011).

³ DOJ’s antitrust and tax divisions also pursue criminal cases. See, e.g., Tax Division – What We Do, *available at* http://www.justice.gov/tax/what_we_do.htm (last visited Mar. 19, 2012).

⁴ See The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, *available at* <http://www.sec.gov/about/whatwedo.shtml> (last visited Mar. 19, 2012).

⁵ *FY 2011 Year In Review*, U.S. Securities and Exchange Commission FY 2011 Performance and Accountability Report, *available at* <http://www.sec.gov/about/secpar/secpar2011.pdf#2011review>.

⁶ *Id.* at Appendix B.

⁷ See CFTC Organization, *available at* <http://www.cftc.gov/About/CFTCOrganization/index.htm> (last visited Mar. 19, 2012).

DOJ prosecutors have “great latitude” in determining whether to bring criminal charges, even when the investigation suggests that a crime has been committed.⁸ This prosecutorial discretion is guided by established DOJ principles that summarize “appropriate considerations to be weighed, and desirable practices to be followed, in discharging [the] prosecutorial responsibilities.”⁹ The general rule is that prosecutions should be brought when the conduct in question “constitutes a Federal offense and . . . the admissible evidence will probably be sufficient to obtain and sustain a conviction.”¹⁰ This principle, however, is tempered by additional considerations. For example, prosecutors can decline a prosecution, even where it is believed that a crime has been committed, if in their judgment there “exists an adequate non-criminal alternative to prosecution,” such as civil actions under the securities, customs, antitrust, or other regulatory laws.¹¹ Relevant factors include: what sanctions are available under these alternatives; the likelihood of such sanctions being imposed; and the effect of the alternative disposition on federal law enforcement interests.¹²

Special considerations impact a U.S. prosecutor’s calculations in determining whether to bring criminal charges against corporate entities. To be sure, DOJ guidelines emphasize that “vigorous enforcement of the criminal laws against corporate wrongdoers” can result in “great benefits for law enforcement and the public, particularly in the area of white collar crime,”¹³ and admonish prosecutors to “weigh all of the factors normally considered in the sound exercise of prosecutorial judgment” in assessing whether to charge non-corporate targets.¹⁴ However, additional factors come into play “due to the nature of the corporate person.”¹⁵ Thus, in conducting an investigation, determining whether to bring charges, and negotiating pleas and other agreements, prosecutors must consider the following factors in determining the proper treatment of a corporate target:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
- the existence and effectiveness of the corporation’s pre-existing compliance program;
- the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

⁸ See United States Attorneys Manual (“USAM”), Title 9 (Criminal Division), at 9-27.110(B), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.110 (“Federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice”).

⁹ *Id.*

¹⁰ *Id.* at 9-27.220(A).

¹¹ *Id.* at 9-27.220(A)(3).

¹² *Id.* at 9-27.250(A).

¹³ *Id.* at 9-28.200(A).

¹⁴ *Id.* at 9-28.300(A).

¹⁵ *Id.* (internal quotation marks omitted).

- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of the prosecution of individuals responsible for corporation's malfeasance; and
- the adequacy of remedies such as civil or regulatory enforcement actions.

In assessing these criteria, DOJ prosecutors have the flexibility to consider alternative resolutions that fall between declining prosecution of the corporation, on the one hand, and bringing a criminal charge, on the other. Such alternatives include DPAs and similar vehicles called non-prosecution agreements ("NPAs"), each of which the DOJ promotes as "occupy[ing] an important middle ground between declining prosecution and obtaining the conviction of a corporation."¹⁶ As the DOJ guidance explains:

Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement.¹⁷

Although DPAs and NPAs have been available to prosecutors for decades for actions targeting either individuals or corporations, only recently have these tools become commonplace in the resolution of criminal enforcement actions against corporate entities.¹⁸

DPAs and NPAs in Actions Against Corporations

As noted earlier, DPAs are agreements that resolve criminal enforcement actions without the prosecution of charges; they are publicly filed with the court in anticipation of a judge's endorsement of the DPA's terms.¹⁹ Under the agreement, the prosecutor agrees to withhold prosecution of a criminal charge, so long as the corporation abides by the DPA's terms during a probationary period of usually two or three years. The DPA typically calls for cooperation with the prosecutor's ongoing investigation (usually against individuals), payment of restitution and/or a fine, and various measures to remediate the wrongdoing and ensure future compliance.²⁰ A criminal charging instrument accompanies the DPA, and the corporation typically accepts responsibility for those allegations in some form, but the DPA mandates dismissal of the charges at the end of the probationary term if there is compliance. In the event of a breach by the corporation, the prosecutor is free not only to pursue the criminal charges, but also to seek contempt remedies, in light of the court's endorsement. A vital consideration for a prosecutor contemplating a DPA resolution is whether the corporation has voluntarily disclosed the wrongdoing in an effective and timely manner.²¹ From the

¹⁶ *Id.* at 9-28.200(B).

¹⁷ *Id.* at 9-28.1000(B).

¹⁸ See Andrew Weissmann, *Non-Prosecution Agreements – They Are Useful Devices*, The National Law Journal (May 5, 2008), http://www.jenner.com/system/assets/publications/822/original/NLJ_Weissmann_050508pdf.pdf?1313790730.

¹⁹ See, e.g., Letter from Justice Department to Eric Dubelier (Apr. 8, 2011), http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/johnson.pdf (DPA agreement between Johnson & Johnson and DOJ in which Johnson & Johnson

agreed to pay fine of \$21.4 million and adoption and maintenance of remedial measures; DOJ agreed not to prosecute so long as DPA terms are complied with); see also *SEC v. Johnson & Johnson*, Civ. Action No. 1:11-cv-00686 (D.D.C. Apr. 8, 2011) (settlement of \$48.6 million with SEC, settled civil complaint charging FCPA anti-bribery violations and FCPA books and records and internal controls violations).

²⁰ See John A. Gallagher, *Legislation is Necessary for Deferred Prosecution of Corporate Crime*, 43 Suffolk U.L. Rev. 447 (2010).

²¹ See Alan S. Gutterman, *Business Counselor's Law and Compliance Practice Manual*, BCLCPM § 20:24 (2011).

corporation's perspective, a DPA can be a lifesaver, reducing or avoiding debilitating collateral consequences associated with prosecution — such as, reputational harm, debarment, or insolvency, to name only the most obvious.²²

NPAs are similar to DPAs, but are neither accompanied by a criminal charge nor formally filed with the court.²³ In this sense, NPAs are far more preferable from the corporation's standpoint.²⁴ NPAs often involve some form of allegations, to be sure — perhaps set forth in an accompanying statement of facts, acknowledged by the corporation — but no charge is filed and the prosecutor commits in the agreement itself not to prosecute the corporation, so long as there is compliance with the NPA's terms, which usually track those found in DPAs — namely, cooperation, restitution, fine, and remediation. As one might imagine, NPA treatment is usually favored by prosecutors for less culpable conduct. Resolution of FCPA enforcement actions, for example, have resulted in DPA treatment for a subsidiary that carried out the conduct in question and NPA treatment for the subsidiary's largely passive parent, which shared responsibility only under a theory of vicarious liability.²⁵ Although NPAs are not endorsed by the court, and thus do not have the injunctive power of DPAs, prosecutors can be expected to have criminal charges at the ready in the event of a breach of an NPA.²⁶

DPAs and NPAs have been used with increasing frequency in the United States and at a rate that largely corresponds with a recent spike in U.S. enforcement actions against corporate entities.²⁷ The correlation is not surprising, as these “middle ground” resolution vehicles provide the parties greater flexibility to settle high-stakes matters often marked by significant complexity. From the perspective of an entity with criminal exposure, being offered any resolution option other than criminal prosecution is a tremendous benefit. Avoiding the debarment consequences of prosecution alone can be enough to save a troubled corporation from extinction, making a DPA or NPA a lifeline worthwhile to the target at virtually any cost.²⁸ From a prosecutor's perspective,

²² See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: the Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095 (2006) (“alternative resolutions, which are less punitive and entail reduced collateral harm, give prosecutors far more flexibility to strike the proper balance between punishing and deterring criminal conduct on the one hand and encouraging and rewarding voluntary disclosures and cooperation on the other.”); see also USAM at 9-28.1000 (Collateral Consequences: Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts... where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism”).

²³ See, e.g., Letter from Justice Department to Leo Cunningham (Dec. 31, 2009), <http://www.law.virginia.edu/pdf/faculty/garrett/utstarcom.pdf> (NPA agreement between UTStarcom, Inc. and DOJ in which UTStarcom agreed to pay a penalty of \$1.5 million and cooperate fully with DOJ, FBI, and SEC in the investigation, while DOJ agreed not to criminally prosecute UTStarcom if the terms of the NPA were complied with; the NPA was based in part on (a) UTStarcom's voluntary self-disclosure, (b) cooperation with SEC, and (c) remedial efforts taken).

²⁴ See *Developments in White Collar Criminal Law and the “Culture of Waiver,”* 14 Berkeley J. Crim. L. 199 (2010).

²⁵ Compare *United States v. Magyar Telekom, Plc.*, No. 11-cr-00597 (E.D. Va. Dec. 29, 2011) (deferred prosecution agreement resolving FCPA enforcement action against subsidiary establishing, among other things, an agreed fine range of \$72.5 to \$145 million), <http://www.millerchevalier.com/portalresource/MagyarDPA>, with Letter to Mary Jo White, dated Dec. 29, 2011 (embodying Non-Prosecution Agreement for Deutsch Telekom AG, parent of Magyar Telekom), <http://www.millerchevalier.com/portalresource/DeutscheNPA>.

²⁶ See Leonard Orland, *The Transformation of Corporate Criminal Law*, Brooklyn Journal of Corporate, Financial & Commercial Law, 1775 PLI/Corp 63, 76 (2006).

²⁷ See generally Scott A. Resnik & Keir N. Dougall, *The Rise of Deferred Prosecution Agreements*, New York Law Journal (Dec. 18, 2006), available at http://dougallpc.com/pdf/The_Rise_of_Deferred_Prosecution_Agreements.pdf.

²⁸ See Leslie Wayne, *Hits, and Misses, In War on Bribery*, New York Times (Mar. 11, 2012), at BU1 (quoting Siemens AG's general counsel as stating that, since the resolution of the U.S. enforcement actions, the corporation has “been compliant with every anticorruption law around the world,” and that the corporation's “experience shows it pays off to pay attention to these issues”); see also, *Science Applications International Corporation Reaches Settlement with U.S. Attorney and City of New York in CityTime Matter* (Mar. 14, 2012), available at <http://investors.saic.com/phoenix.zhtml?c=193857&p=irol-newsArticle&ID=1672672> (under terms of deferred prosecution agreement SAIC

DPA and NPAs promote efficiency because they permit resolution of enforcement actions short of resource-depleting trials, without sacrificing prosecutorial objectives of punishment, deterrence, and rehabilitation.²⁹ Recently, the natural appeal of these tools led the SEC to use a DPA for the first time to resolve a civil enforcement action.³⁰

Despite the increased popularity of these alternative resolution tools, DPAs and NPAs are not without critics. Some accuse the DOJ and SEC of heavy-handedness, suggesting they are preying on defenseless corporations who have "at-all-costs" incentives to avoid criminal charges, even where their exposure for wrongful conduct is largely peripheral.³¹ Others, however, write off DPA and NPA resolutions as too "soft" on corporate criminality, particularly in the wake of the financial crisis.³² Critics generally long for more care in the exercise of prosecutorial discretion, preferably with increased judicial oversight and legislative guidance.³³ Rarely, though, do commentators wrestle with the implications of judicial involvement in the already fragile process of achieving DPA and NPA resolutions.

In the United Kingdom, it remains to be seen how these hurdles will be overcome, if indeed deferred prosecution agreements are implemented. Mr. Alderman of the Serious Fraud Office expressed his support last March for adopting the U.S. model:

I see that the US is some years ahead of us. . . . It is no secret that I find the model of deferred prosecutions attractive. . . . [T]here are some who say that this allows a corporation to buy its way out of a criminal prosecution. . . . Nevertheless, deferred prosecutions are . . . the best answer to a complicated and very real problem.³⁴

Despite this support, the road ahead may be tricky. For instance, U.K. law forbids prosecutors from negotiating sentencing with a defendant, which is firmly within the province of the courts.³⁵ This fundamental U.K. proposition is at odds with the core manner in which DPAs and NPAs are negotiated in the United States. It stands to reason that if DPAs debut in the U.K., the process will be different from that in the United States.

agreed to pay \$500.4 million in restitution and penalties; SAIC's CEO John Jumper stated: "We welcome this settlement as an important step in our efforts to move forward as a better, stronger company dedicated to the highest standards of ethics and performance for our customers.").

²⁹ See Richard Deutsch, Andrews Kurth, Kara Altenbaumer-Price, *FCPA Prosecution: Lessons Learned from Deferred and Non-Prosecution Agreements*, 24 No. 19 Westlaw Journal Government Contract 11 (Jan. 24, 2011) ("DPAs and NPAs are perceived as a more efficient option than conviction. These agreements avoid the sometimes massive expenditure of manpower and other resources necessary for prosecuting cases involving mammoth corporations. Using these agreements also avoids difficult issues such as the suffering of innocent third parties and the general public due to the conviction of a major corporation").

³⁰ See SEC Press Release, *Tenaris to Pay \$5.4 Million in SEC's First-Ever Deferred Prosecution Agreement* (May 17, 2011), available at <http://www.sec.gov/news/press/2011/2011-112.htm>.

³¹ See Mike Koehler, *The Façade of FCPA Enforcement* (2010), at 933-39, available at <http://ssrn.com/abstract=1705517>; see also Washington Legal Foundation Chapter 6, Former Attorney General Dick Thornburgh: "[Deferred and non-prosecution] agreements can border on the extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can lead to abuse, and not just in the extravagant amounts of money the corporations are forced to pay," Mar. 17, 2007, available at <http://www.wlf.org/upload/chapter6DPAs.pdf>.

³² See Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach* (July 7, 2011), available at http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?_r=1&scp=1&sq=wisenberg&st=cse.

³³ Gallagher, *supra* note 21.

³⁴ See Richard Alderman (Serious Fraud Office, Director) Speech at London School of Economics (Mar. 30, 2011), available at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/london-school-of-economics-discussion-event.aspx>.

³⁵ See The Crown Prosecution Service – Sentencing Overview, http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/ (last visited Mar. 27, 2012) ("while the prosecution is expected to assist the judge with the facts for the purpose of assisting with the management of the case, it is not the task of the prosecution to negotiate credit for guilty pleas. That judgment is solely for the sentencing judge having heard submissions").

Resolution Tools in U.S. Civil Enforcement Actions

U.S. prosecutors and regulators typically resolve civil enforcement actions by either administrative settlements or court-approved consent decrees with injunctive relief.

Administrative settlements are reached outside of court and their terms do not, therefore, have injunctive force.³⁶ These settlements may or may not involve acceptance of responsibility for a set of allegations, but almost always include the corporation's agreement to pay a fine and take remedial action, possibly under the regulators' supervision.³⁷ The parties may seek to enforce the agreement's terms in a court with jurisdiction, but enforcement may be difficult because there is no presumption of validity or the type of judicial oversight that would follow from a court's endorsement.³⁸ On the other hand, operating outside of the realm of court supervision often provides the parties with more flexibility to fashion a resolution. For example, the parties can agree that the corporation will resolve the action by paying a fine and taking remedial action without accepting responsibility for any of the conduct at issue.

Alternatively, court-approved consent decrees are "subject to continued judicial policing,"³⁹ are presumed valid,⁴⁰ and are often considered more effective civil enforcement tools than administrative settlements because they are more readily enforceable in court.⁴¹ Consent decrees are, in essence, hybrids between contract and judicial injunctions: while they reflect the parties' agreement, a court must certify that the agreement is "fair, reasonable, and adequate."⁴² This injunction is a unique and critical component of a consent decree: it means that a court is effectively ordering the corporation to comply with the agreement's terms, typically involving payment of penalties and institution of remedial measures.⁴³ The result, as with DPAs in the criminal context, is that the agreement may be enforced in court, perhaps by seeking contempt or related sanctions.⁴⁴

³⁶ See, e.g., *In re Royal Dutch Shell plc and Shell Int'l Exploration and Prod. Inc.*, Administrative Proceeding File No. 3-14107 (Nov. 4, 2010), <http://www.sec.gov/litigation/admin/2010/34-63243.pdf> (SEC charged Panalpina, Pride International, Tidewater, Transocean, GlobalSantaFe Corp., Noble Corporation, and Royal Dutch Shell plc with widespread bribery of customs officials in more than 10 countries to receive preferential treatment and improper benefits during the customs process; settled administratively with agreement to disgorge profits of \$14 million USD and prejudgment interest of \$3,995,923 to U.S. Treasury); *In the Matter of Avery Dennison Corp.*, Administrative Proceeding File No. 3-13564 (July 28, 2009), <http://www.sec.gov/litigation/admin/2009/34-60393.pdf> (SEC charged Avery with FCPA violations by Avery's Chinese subsidiary and several entities Avery acquired; settled administratively with agreement to disgorge profits of \$273,213 and prejudgment interest of \$45,257 to U.S. Treasury).

³⁷ See, e.g., Department of Justice Reaches Agreement to Compensate Service Members for Wrongful Foreclosures (Feb. 9, 2012), <http://www.justice.gov/opa/pr/2012/February/12-crt-191.html>.

³⁸ See *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health*, 532 U.S. 598, n.7 (2001) ("Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal"); see also James T. O'Reilly & Caroline Broun, *Chapter 13. Settlement and Consent Decrees in CERCLA Actions*, 2 RCRA and Superfund: A Practice Guide, 3d § 13:10 (2011).

³⁹ *Kalamazoo River Study Group v. Rockwell Intern. Corp.*, 355 F.3d 574, 584 n.4 (6th Cir. 2004).

⁴⁰ See James T. O'Reilly & Caroline Broun, *Chapter 13. Settlement and Consent Decrees in CERCLA Actions*, 2 RCRA and Superfund: A Practice Guide, 3d § 13:10 (2011).

⁴¹ See DOJ Proposed Consent Decrees, http://www.justice.gov/enrd/Consent_Decrees.html (last visited Mar. 1, 2012); see also Rodney A. Smolla, *Awards of attorneys' fees – purpose and construction – qualification as the prevailing party*, 2 Federal Civil Rights Acts (3d ed.) § 16:2 (2011).

⁴² See *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); see also Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. Ill. L. Rev. 725 (1986).

⁴³ See Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. Ill. L. Rev. 725, 726 (1986).

⁴⁴ *Id.*

Consent decrees may also include a provision whereby the corporation neither admits nor denies the allegations embodied in the agreement.⁴⁵ Such a provision can be vital where the corporation resolving the enforcement action faces the threat of follow-on private lawsuits, such as a civil class action under U.S. securities laws. If the corporation were required to admit the allegations in order to resolve the enforcement action, it would likely be *collaterally estopped* from asserting otherwise-available defenses in subsequent lawsuits. The “neither admit nor deny” provision allows corporations to sidestep this *collateral estoppel* effect and, thus, alleviates a great disincentive to settling the civil enforcement actions.⁴⁶

Citigroup Case and Judge Rakoff’s Decision

The practice of settling U.S. enforcement actions that corporations “neither admit nor deny” — and, indeed, the underlying principle that accords parties ample discretion in settling such actions — was squarely in jeopardy in a Citigroup case before Judge Rakoff in the U.S. District Court in New York City.⁴⁷ Against the backdrop of the financial crisis, the SEC alleged that Citigroup violated civil provisions of U.S. securities laws by creating a \$1 billion fund to dump toxic mortgage-backed securities on misinformed investors.⁴⁸ The SEC and Citigroup agreed to resolve the matter by proposing a consent decree that would permanently restrain and enjoin Citigroup from future violations of the securities laws, and require disgorgement of \$160 million profit, \$30 million in pre-judgment interest, a \$95 million civil penalty, and compliance with various remedial undertakings.⁴⁹ The proposal allowed Citigroup to “neither admit nor deny” the SEC’s allegations.

Judge Rakoff rejected the proposal, in large measure because of its “neither admit nor deny” aspect, which the judge found to deprive the court of “even the most minimal assurance that injunctive relief [to be imposed] has any basis in fact.”⁵⁰ The judge sharply criticized the SEC’s practice of allowing corporations to settle without admitting the allegations:

a proposed Consent Judgment that asks the Court to impose substantial injunctive relief, enforced by the Court’s own contempt power, on the basis of allegations unsupported by any proven or acknowledged facts whatsoever, is neither reasonable, nor fair, nor adequate, nor in the public interest.⁵¹

The SEC has appealed the ruling and a recent preliminary ruling by the appellate court bodes well for the SEC.⁵² In granting this request — which sought to delay the underlying case before Judge Rakoff during the pendency of the appeal — the appellate court found that the SEC was likely to succeed on the merits of its arguments to overturn Judge Rakoff’s rejection of the parties’

⁴⁵ See, e.g., EDNY Press Release, *Court-Approved Consent Decree Resolves U.S. Civil Claims* (Apr. 19, 2011) <http://www.justice.gov/usao/nye/pr/2011/2011apr19.html>.

⁴⁶ See F. Joseph Warin et al., *7FPotential Game-Changer At Two Years: the SEC’s Use of Deferred & Non-prosecution Agreements*, 16 No. 2 Wallstreetlawyer.com: Sec. Elec. Age 1 (2012).

⁴⁷ *S.E.C. v. Citigroup Global Mkts. Inc.*, No. 1:11-cv-07387-JSR (S.D.N.Y. Nov. 28, 2011).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Although this is not the first time a judge has rejected a proposed consent decree, Judge Rakoff’s opinion represents a distinct minority view among the U.S. judiciary. See Edward Wyatt, *Settlements Without Admissions Gets Scrutiny*, New York Times (Feb. 24, 2012), <http://www.nytimes.com/2012/02/25/business/neither-admit-nor-deny-settlements-draw-judges-scrutiny.html> (“of the roughly 2,000 cases the S.E.C. has filed over the last three years . . . a judge has required explanations of the proposed settlements fewer than 10 times”).

⁵² *S.E.C. v. Citigroup Global Mkts. Inc.*, Nos. 11-5227-cv, 11-5375-cv, 11-5242-cv (2d Cir. Mar. 15, 2012) (granting stay of directive setting case for trial; concluding that “S.E.C. and Citigroup have a strong likelihood of success in their joint effort to overturn the district court’s ruling,” and that parties showed serious, perhaps irreparable, harm sufficient to justify grant of stay, that the stay will not substantially injure any other persons interested in the proceeding, and that public interest is not disserved by grant of stay).

agreement. In so finding, the appellate court criticized Judge Rakoff for overstepping his bounds and intruding on the SEC's ample discretion to resolve its own enforcement actions.⁵³ For example, while noting that Judge Rakoff "believed it was a bad policy, which disserved the public interest, for the S.E.C. to allow Citigroup to settle on terms that did not establish its liability," the appellate court made clear that it was not "the proper function of federal courts to dictate policy to executive administrative agencies."⁵⁴

If the SEC's appeal is successful, as the preliminary appellate decision indicates, it will be a ringing endorsement of the longstanding U.S. practice of allowing corporations to settle civil enforcement actions without admitting or denying allegations of wrongdoing.⁵⁵ More fundamentally, such a ruling would solidify — and perhaps further prescribe — the limited role of courts in the settlement process in the United States (a policy that is, to note again, starkly at odds with traditional approaches in the U.K. and proposals for how DPAs would work if adopted there).

* * * *

As discussions of adopting U.S.-style DPAs in the U.K. continue to brew,⁵⁶ financial institutions, corporations, and other entities should be prepared to deal with the changes to the legal landscape, such as those that the advent of DPAs could bring. To this end, it will be useful to review the full scope of criminal and civil enforcement tools in a U.S. prosecutor or regulator's arsenal, including consent decrees that are being hotly debated in U.S. courts today.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ On January 6, 2012 the SEC announced a change in policy to its "neither admit nor deny" clause in consent decrees to no longer allow defendants to "neither admit nor deny" allegations raised against it by the SEC when the defendant has pled guilty, been convicted, or made substantive admissions in an NPA or DPA. Thus, for a vast majority of cases, the "neither admit nor deny" clause will remain. See Lisa Noller, *Regulatory: SEC Modifies Settlement Language for Cases Involving Criminal Convictions* (Jan. 25, 2012) <http://www.insidecounsel.com/2012/01/25/regulatory-sec-modifies-settlement-language-for-ca>.

⁵⁶ See Michael D. Goldhaber, *The Global Lawyer: The Corporate Criminal Plea Sails Overseas*, AM LAW DAILY (Oct. 18, 2011), <http://amlawdaily.typepad.com/amlaw-daily/2011/10/the-global-lawyer-the-corporate-criminal-plea-sails-overseas.html> (UK Solicitor General and Serious Fraud Office lobbying the Home Office and Justice Ministry to push for plea bargain bill through Parliament).

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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