The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective

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I. Introduction

Ten years ago, in June 1999, the U.S. Department of Justice (DOJ) issued the Principles of Federal Prosecution of Business Organizations (the "Principles") to articulate and standardize the factors to be considered by federal prosecutors in making charging decisions against corporations.[1] The Principles—which were amended several times over the past decade—have had a significant impact on the fate of corporations being investigated for possible criminal misconduct.

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To mark the ten-year anniversary of the Principles, we examined recent DOJ corporate criminal prosecutions to assess whether any broad trends could be observed about the current state of corporate criminal prosecutions.[2] While it is difficult to generalize, one observation is that corporate cooperation now appears to be presumed by DOJ, rather than be viewed as a potentially decisive factor for granting a more lenient resolution to the company under investigation. Another discernible trend may be an increasing focus by DOJ on the adequacy of corporate compliance systems, either as a factor to consider under the Principles in charging the corporation criminally, or as an on-going condition of a settlement agreement to be administered by an independent monitor. The case that best exemplifies these observations is, in our view, the recent criminal prosecution of Siemens AG, Europe's largest electronics and engineering concern, where DOJ itself acknowledged the "extraordinary" cooperation provided by the corporation, but nonetheless required the corporation to plead guilty to felony violations of the Foreign Corrupt Practices Act (FCPA) and imposed an independent monitor for four years to oversee the company's corporate compliance system as part of the plea agreement.[3] This case is discussed further in Section III.

Of course, cooperation remains an important component of any corporate response to a DOJ investigation. Companies may be well-advised, however, to increase their focus on the development and implementation of world-class corporate compliance systems. Such a system not only may prevent or detect misconduct by employees, but may better position the company for leniency under the Principles—in the form of alternative settlements such as deferred prosecution agreements (DPA) or non-prosecution agreements (NPA)—in the unfortunate event of a DOJ criminal investigation.

II. Background

A. The Evolution of the Principles

The Principles comprise a set of nine factors to guide federal prosecutors "on investigating, charging, and negotiating a plea or other agreement with respect to corporate crimes."[4] Although the Principles share many factors with the U.S. Corporate Sentencing Guidelines, the Principles differ from the Sentencing Guidelines in that they do not create a formulaic decision-making process.[5]

The original Principles that were issued in 1999 were known as the "Holder Memo" because the memo was authored by then-Deputy Attorney General Eric Holder, Jr. At the time, the Holder Memo's factor that received the most attention from corporations was cooperation, presumably because cooperation likely was a factor over which a corporation under investigation could exert greatest control. Indeed, the Holder Memo expressly instructed federal prosecutors to consider, when evaluating the corporation's cooperation, whether the corporation waived the attorney-client privilege or advanced legal fees to culpable employees.[6] This, of course, led to many companies waiving privilege in order to obtain leniency from DOJ, even though such practices received some criticism.[7]

The first-revised Principles, issued by then-Deputy Attorney General Larry D. Thompson in 2003 (known as the "Thompson Memo"), came on the heels of the Enron and WorldCom scandals and only heightened the pressure on corporations. The Thompson Memo not only permitted federal prosecutors to consider waiver of privilege as part of cooperation, but encouraged them to scrutinize "the authenticity of a corporation's cooperation,"[8] including by considering whether the corporation, while "purporting to cooperate," actually impeded the investigation.[9] Corporations, in turn, were compelled to demonstrate the "authenticity" of their cooperation by resorting to increasingly creative measures, such as conditioning legal fees for employees embroiled in the investigation on their agreement to provide testimony to prosecutors.[10]

The intense pressures on corporations to demonstrate "authentic" cooperation abated in 2006, only after judicial intervention. In *United States* v. *Stein*, the Hon. Lewis A. Kaplan held that prosecutors in the U.S. Attorney's Office

for the Southern District of New York violated the Fifth and Sixth Amendment rights of KPMG employees by coercing KPMG, as part of its cooperation with the criminal investigation, to condition payment of the employees' legal fees on the employees' willingness to be interviewed by the Government.[11] Soon after the *Stein* decision, Senator Arlen Specter introduced legislation to prevent prosecutors from considering the waiver of the attorney-client privilege in their prosecution decisions.[12]

In response to these judicial and legislative rebukes, then-Deputy Attorney General Paul McNulty revised the Principles in 2006 by forbidding prosecutors from seeking information protected by the attorney-client privilege without first establishing a legitimate need for the information.[13] The most recent version of the Principles—the "Filip Memo"—issued by then-Deputy Attorney General Mark Filip in 2008—completely removed consideration of a waiver of the attorney-client privilege and the payment of employees' legal fees as factors in corporate charging decisions.[14] Under the most recent version of the Principles, then, cooperation by a corporation simply means disclosure of all relevant factual information to investigators, but does not require waiver of any privileges.[15]

B. Increasing Use of NPAs, DPAs and Independent Monitors

Separately, since 2003, DOJ has turned increasingly to alternative settlement agreements such as NPAs and DPAs to resolve corporate criminal investigations. A study published by the Government Accountability Office (GAO) in June 2009, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreement* ("Preliminary Observations"),[16] observed that DOJ recently "has made more use of [DPAs and NPAs]," in which prosecutors may "require companies to hire an independent monitor to oversee compliance."[17] Indeed, the GAO found that in 26 of the 57 DPAs and NPAs reviewed as part of its study, an independent monitor was imposed by DOJ on the corporation to monitor compliance procedures.[18]

This trend may be, in part, due to the public outcry over the rapid demise of Arthur Andersen following the DOJ's indictment and conviction of Arthur Andersen for obstruction of justice in 2002. Not only was Arthur Andersen's conviction ultimately overturned by the U.S. Supreme Court,[19] but the indictment of Arthur Andersen caused unfair harm to the thousands of innocent employees and shareholders of Arthur Andersen. Resorting to NPAs and DPAs with independent monitors allows DOJ to maintain oversight over corporations that engaged in misconduct, without putting such companies out of business.

An independent monitor's typical responsibility is "to assess and monitor a corporation's compliance with [the] terms of the agreement . . . and reduce the risk of recurrence of the corporation's misconduct."[20] DOJ sought to articulate its rationale for requiring independent monitors in a March 2008 memo issued by then-Acting Deputy Attorney General Craig Morford ("Morford Memo").[21] The Morford Memo noted that independent monitors are not employees or agents of the corporation or the government, but rather act as third-party advocates,[22] and benefit corporations by providing "expertise in the area of corporate compliance from an independent third party."[23] At the same time, according to the Morford Memo, the corporation's shareholders, its employees, and the public "benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace."[24]

For most companies, however, independent monitors can substantially increase the cost of a DOJ settlement because companies must bear the expenses incurred in retaining an independent monitor, which can be substantial.[25] Moreover, company officials interviewed as part of the recently released GAO study complained that they had "little leverage to negotiate fees, monitoring costs, or the monitor's roles and responsibilities with the monitor" because the monitor had the power to conclude that the company was not in compliance with its agreement with DOJ.[26]

There are also problems arising from the current absence of any defined DOJ criteria for selecting corporate monitors.[27] Typically, the selection process for an independent monitor is set forth in the NPA or DPA, and permits input from the federal prosecutors and the corporation without any clear guidelines.[28] In a recently publicized case, the hiring of former Attorney General John Ashcroft as an independent monitor by Zimmer, Inc., which was under investigation by a U.S. Attorney who had served under Mr. Ashcroft, came under great criticism for potential conflict of interest, especially when it was discovered that Mr. Ashcroft had received $28 million from Zimmer for an 18-month independent monitor contract.[29] The GAO has recommended that the Deputy Attorney General "adopt internal procedures to document both the process used and reasons for monitor selection decisions,"[30] and the DOJ recently agreed to adopt internal procedures to document the process for the selection of corporate monitors.[31]

III. Case Study: Siemens

As noted above, we believe that the recent criminal prosecution of Siemens for FCPA violations exemplifies the above recent trends in corporate prosecutions, i.e., cooperation alone may not be sufficient to obtain leniency, and the increasing focus on the adequacy of a company's compliance systems not only in charging decisions, but as part of a settlement.

In December 2008, Siemens AG, Europe's largest electronics and engineering company, entered into a plea agreement to resolve bribery investigations being conducted simultaneously by the DOJ and by German authorities. In the DOJ plea agreement, Siemens agreed to

plead guilty in the United States to two counts of criminal violation of the books and records and the internal controls provisions of the FCPA, and to pay a record combined fine and penalty of $800 million to the U.S. authorities. Combined with an additional $856 million paid to the German authorities, Siemens paid a total fine of $1.6 billion.[32]

DOJ required Siemens to plead guilty to felonies despite acknowledging that Siemens provided "extraordinary" cooperation during DOJ's investigation, including by conducting an internal investigation "of unprecedented scope"[33] that included "virtually all aspects of [Siemens'] worldwide operations,"[34] and by sharing the results of such an investigation with the governmental authorities.[35] According to published reports, Siemens paid an estimated $275 million in legal fees for the internal investigation, which involved over 297 lawyers from Debevoise LLP, who billed over 354,000 hours.[36] In addition, Siemens reportedly paid $470 million to Deloitte & Touche to assist in the internal investigation.[37]

Such extraordinary cooperation and expenditure, however, were not enough for Siemens to resolve the criminal investigation with a more lenient resolution, such as a DPA or an NPA. The extraordinary size and frequency of the bribe payments undoubtedly weighed heavily on the scale. Interestingly, the DOJ expressly noted the gross inadequacies of Siemens's compliance systems in its charging documents. In the Criminal Information filed against Siemens, DOJ charged that Siemens's internal compliance policies and procedures were nothing more than "paper program"[38] and that, "for much of its operations across the globe, bribery was nothing less than standard operating procedure for Siemens."[39] DOJ also found that Siemens's compliance systems were understaffed and small for the scale of its operations, that Siemens's senior management ignored potential corruption issues and failed to adequately investigate such issues, and that Siemens "engaged in systematic efforts to falsify its corporate books and records and circumvent existing internal controls."[40]

As a result, in addition to the guilty plea and the record fine, DOJ prosecutors required Siemens in the plea agreement to improve its compliance policies and procedures, and to hire an independent monitor for four years to ensure, among other things, that Siemens implements an effective system of corporate governance.[41] For example, the Siemens independent monitor is charged with evaluating the corporation's internal controls, record keeping, and compliance programs.[42] The monitor is obligated under the plea agreement to issue a written report making recommendations to improve the effectiveness of Siemens's compliance programs.[43] Siemens would have an opportunity to comment on any recommendations,[44] but would have to adopt the report's recommendations, unless the recommendations were "burdensome, . . . impracticable, costly or otherwise inadvisable."[45] Finally, the plea agreement requires Siemens to retain independent U.S. counsel to advise the independent monitor in the carrying out of his duties.[46] Such an undertaking undoubtedly will add a significant expense and burden on Siemens for the next four years.

IV. Conclusion

Our review of recent DOJ prosecutions demonstrates that one clear effect that the Principles have had on corporate criminal investigations over the last decade is to hammer in the point that corporations must cooperate fully in DOJ investigations. What is not clear, in light of the recent amendments to the Principles to reign in the definition of "cooperation," is whether cooperation alone is enough to make the difference between a guilty plea or an alternative settlement such as an NPA or a DPA.

DOJ's increasing focus on the adequacy of compliance systems in charging decisions provides some room for corporations to seek to distinguish themselves in the unfortunate event of a criminal investigation. Implementing and maintaining a state-of-the-art compliance system not only helps a company to prevent and detect criminal wrongdoing, but also would better position the company in negotiations with DOJ. Moreover, such a company may have a better chance of talking DOJ out of imposing a costly independent monitor than a company that does not have an adequate compliance system.

Endnotes

1. Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys (June 16, 1999) [hereinafter *Holder Memo*], *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.
2. For this article, all DOJ press releases concerning corporate criminal prosecutions for the period from May 2006 through the present, and related documents, were reviewed.
3. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008) [hereinafter *Siemens' Press Release*], *available at* http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html.
4. *Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office) [hereinafter *Preliminary Observations*], *available at* http://www.gao.gov/new.items/d09636t.pdf.
5. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 8A-8C (2004), *with* Memorandum from Mark R. Filip, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, U.S.A.M. §§ 9-28.700 (Aug. 28, 2008) [hereinafter *Filip Memo*], *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.
6. *Holder Memo*, *supra* note 1, § VI.
7. *See, e.g.*, Philip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, U.S. ATT'YS' BULL., May 2002, at 19, 21-22, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5002.pdf.

8. Memorandum from Larry D. Thompson, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.
9. *Id.* § VI.
10. *See Filip Memo*, *supra* note 5, § 9-28.710 (acknowledging that "a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection").
11. *United States* v. *Stein*, 435 F. Supp. 2d 330, 367-73 (S.D.N.Y. 2006), *aff'd on other grounds*, 541 F.3d 130 (2d Cir. 2008).
12. *See* Attorney Client Privilege Act of 2006, S. 30, 109th Cong. (2006). The bill stalled in the Senate.
13. Memorandum from Paul J. McNulty, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, § VII (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.
14. *Filip Memo*, *supra* note 5, § 9-28.710.
15. *Id.* § 9-28.700-760.
16. *Preliminary Observations*, *supra* note 4.
17. *Id.* at 1.
18. *Id.* at 19.
19. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).
20. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Dep't of Justice, on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corps. to Heads of Dep't Components, § I (Mar. 7, 2008) [hereinafter *Morford Memo*], *available at* http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf.
21. *Id.*
22. *Id.* § III.A.
23. *Id.* § I.
24. *Id.*
25. *See Preliminary Observations*, *supra* note 4, at 28-29.
26. *Id.* at 29.
27. *Id.* at 6. Recently proposed legislation aims to promote uniformity in the use of NPAs and DPAs, and what such agreements should contain. Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong., § 4 (2009), *available at* http://www.opencongress.org/bill/111-h1947/text.
28. *Preliminary Observations*, *supra* note 4, at 23.
29. Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008, *available at* http://www.nytimes.com/2008/01/10/washington/10justice.html.
30. *Preliminary Observations*, *supra* note 4, at 30.
31. *Id.*
32. *Siemens' Press Release*, *supra* note 3.
33. *Id.*
34. Department's Sentencing Memorandum at 2, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 12, 2008).
35. *Siemens' Press Release*, *supra* note 3.
36. Michael D. Goldhaber, *Cheap at the Price*, AM. LAW., May 2009, at 86.
37. *Id.*
38. Criminal Information ¶ 39, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 12, 2008) [hereinafter *Siemens's Criminal Information*].
39. *Siemens's Press Release*, *supra* note 3 (quoting Acting Assistant Attorney General Matthew Friedrich).
40. *Siemens' Criminal Information*, *supra* note 38, at ¶¶ 65-88, 89.
41. Statement of Offense, Attachment 2 ¶ 1, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C. Dec. 12, 2008).
42. *Id.*
43. *Id.* Attachment 2, ¶ 5.
44. *Id.* Attachment 2, ¶ 6.
45. *Id.* Attachment 2, ¶ 5.
46. Plea Agreement ¶ 12, *United States v. Siemens Aktiengesellschaft*, No. CR-08-367 (D.D.C Dec. 15, 2008).

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