

## **New Standards for Judicial Approval of Deferred Prosecution Agreements**

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While some recent judicial decisions critical of consent decrees between the SEC and corporate respondents have attracted extensive commentary and press attention, *see e.g., U.S. Securities and Exchange Commission v. Citigroup Global Markets, Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), to date courts and commentators have paid little attention to the separate question whether courts have power to scrutinize the terms of deferred prosecution agreements (DPAs) negotiated between the Department of Justice and corporations seeking to resolve criminal investigations. Thus, a ruling on July 1, 2013, by the U.S. District Court for the Eastern District of New York, which outlines in detail the legal grounds for judicial review of DPAs and approves a proposed DPA resolving a long-running investigation of HSBC, is both novel and important. *U.S. v. HSBC Bank USA, N.A. et al.*, 12 CR 763 — JG (E.D.N.Y. July 1, 2013).

Judge Gleeson's opinion in *HSBC* is the first carefully considered judicial ruling establishing the basis for a court's authority to review and approve a proposed DPA. Significantly, the Court finds that its "supervisory authority" is triggered by the joint request by DOJ and HSBC to approve the DPA, but the opinion also notes that in exercising this supervisory authority a court must show appropriate deference to the broad discretion of the Executive Branch, both as to whether to institute a criminal prosecution and as to how aggressively to prosecute any case in light of all relevant circumstances.

Consistent with such deference, the Court in *HSBC* determined to approve the DPA that DOJ and HSBC had negotiated, noting in particular that the DPA would "accomplish a great deal" by requiring HSBC to adopt and maintain a wide array of compliance enhancements and personnel changes to address the identified deficiencies in its anti-money laundering program, and to appoint a corporate compliance monitor to supervise HSBC's remedial measures. Judge Gleeson also ordered the parties to file quarterly reports with the Court concerning the progress of the DPA's implementation. Upon satisfactory completion by HSBC of the undertakings set forth in the DPA, it is expected the government would dismiss the pending charges at the end of the five-year term of the DPA.

It is impossible to predict whether other courts in future cases will view the *HSBC* opinion as a model for judicial review of proposed DPAs. What is certain, however, is that any company that is currently considering entering into a DPA to resolve a criminal investigation should study the *HSBC* model closely to ensure that any DPA it may enter into will satisfy potential judicial review under the *HSBC* principles.

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