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Too Soft on Corporate Crime?

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Deferred Prosecution Agreements in the Wake of Goldman Sachs and the Malaysian Bribery Scandal

** By Adina Feder*



Goldman Sachs Group Inc. (“Goldman Sachs” or “Goldman”), a global banking behemoth, was finally struck with financial penalties of \$3.3 billion due to its participation in a Malaysian bribery scheme.[1] The Bank admitted to paying more than \$1.6 million in bribes to prominent government officials to obtain lucrative business from 1 Malaysia Development Berhad (“1MDB”), a Malaysian owned sovereign wealth fund.[2] In exchange for the bribes, Goldman became the lead adviser on energy acquisitions and underwrote three bond offerings for approximately \$6.5 billion, earning the Bank hundreds of millions in revenue.[3] Goldman admitted that there were red flags surrounding the transactions, including “the [excessive] amount of money made from relatively plain bond deals” and the involvement of corrupt Malaysian financier, Jho Low.[4] Yet somehow, they flew under Goldman’s radar even after purportedly comprehensive review by five internal committees.[5] The fund’s shady business spurred investigations in the U.S., the U.K., Singapore, Malaysia and Hong Kong.

[6] Goldman's Malaysian subsidiary, ("GS Malaysia"), has now pled guilty to conspiring to violate anti-bribery provisions in the Foreign Corrupt Practices Act ("FCPA"), and the parent company entered into a deferred prosecution agreement ("DPA") with the Department of Justice, culminating in what has been referred to as the "largest monetary penalty ever assessed under corporate criminal bribery law." [7]

Critics argue that after years of litigating this cataclysmic financial scandal, a mere DPA as punishment is underwhelming. [8] The deal, while costing Goldman \$600 million in disgorgement and \$2.3 million in fines, "allows Goldman Sachs and its executives [to] evade additional criminal prosecution." [9] DPAs have become increasingly popular in corporate crime proceedings, allowing prosecutors to file criminal charges but stay or dismiss those charges after a period of time if the company fulfills the agreement obligations. [10] As such, commentators claim DPAs are "too soft on corporate crime." [11] However, after the Enron scandal, the DOJ has stated it seeks to "reform corrupt corporate cultures-that is to effect widespread structural reform – rather than to indict, to prosecute and to punish." [12] The query is whether DPAs inspire big corporations to actually reform, or merely allow big players such as Goldman Sachs to evade prosecution and keep on operating as they were with a small slap on the wrist. [13]

In the past, perhaps it was true that DPAs had no bite due to a lack of individual accountability, but here, Goldman did not get off so easily. [14] Likely in reaction to public opposition to DPAs, the government has now begun to charge individual corporate directors, and did so here. [15] Moreover, despite all the critiques DPAs receive, they allow "prosecutors [to] avoid the difficulties and uncertainty in trying a corporate criminal," and "foster cooperative relationships between prosecutors and delinquent corporations." [16]

Given Goldman Sachs' position in the global sphere, a "lack of consequences for criminal corporate behavior" approach is neither beneficial nor advantageous to both the corporation and its clientele and can cause financial ruin. However, when paired with individual corporate accountability, perhaps a DPA is more effective than we thought.

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[1] Press Release, *Goldman Sachs Resolves Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion*, dep't of justice (Oct. 22, 2020) <https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion>. See also Michael Balsamo & Ken Sweet, *Goldman Sachs subsidiary pleads to US charges in IMDB probe*, AP News (Oct. 22, 2020) <https://apnews.com/article/politics-malaysia-najib-razak-asia-538f0543e305ccf31b665c3fca6c01bf>.

[2] *Id.*; Gordon L. Clark et al. *Sovereign Wealth Funds: Legitimacy, Governance, and Global Power*, 14 *J. econ. geography* 226-27 (2013) (defining sovereign wealth funds as "special-purpose vehicles that invest sovereign assets in private financial markets."). See also Edwin M. Truman, Policy Brief PB07-6, *Sovereign Wealth Funds: The Need for Greater Transparency and Accountability*, Peterson Inst. Int'l Econ. (Aug. 2007) (discussing how "the management of these assets has become a major focus of national and international economic and financial policy because of their size, their lack of transparency, their potential to disrupt financial markets, and the risk that political objectives might influence their management."); Ahmadsari Alaudin & Zarifah Abdullah, *the IMDB Fund Scandal*, IMBRE Universiti Utara Malay. <http://cdr.uum.edu.my/bitstream/123456789/83/1/%28TC150-1%29%20THE%20IMDB%20FUND%20SCANDAL.pdf> (last visited Nov. 9, 2020).

[3] Deferred Prosecution Agreement at *8, *United States v. The Goldman Sachs Group Inc.*, Cr. No. 20-437 (MKB) (Oct. 22, 2020).

[4] Max Abelson & Sridhar Natarajan, *Lloyd Blankstein's Final Days at Goldman Clouded by IMD Scandal*, B

loomberg (Dec. 13, 2018 1:53 PM) <https://www.bloomberg.com/news/articles/2018-12-13/lloyd-blankfein-s-final-days-at-goldman-clouded-by-1mdb-scandal>.

[5]Dennis M. Kelleher, *Goldman Sachs and the IMDB Scandal*, harv. l. sch. f. corp. governance (May 14, 2019) <https://corpgov.law.harvard.edu/2019/05/14/goldman-sachs-and-the-1mdb-scandal/>; Yantoultra Ngui & Liz Hoffman, *Malaysia Charges Goldman Sachs Executives in IMDB Scandal*, wall street j. (Aug. 9, 2019 1:16 PM) <https://www.wsj.com/articles/malaysia-charges-goldman-directors-over-1mdb-scandal-11565342749>; Goldman Sachs (Malaysia) Sdn. Bhd., et al.; Notice of Application and Temporary Order, 85 FR 68105 (Oct. 27, 2020).

[6]Press Release, *Federal Reserve Board fines the Goldman Sachs Group, Inc. \$154 million for failure to maintain appropriate oversight, internal controls, and risk management with respect to 1Malaysia Development Berhad (IMDB)*, fed. res. board (Oct. 22, 2020) [https://www.federalreserve.gov/newsevents/pressreleases/enforcement20201022a.htm#:~:text=Sachs%20Group%2C%20Inc.,%24154%20million%20for%20failure%20to%20maintain%20appropriate%20oversight%2C%20internal%20controls,to%201Malaysia%20Development%20Berhad%20\(IMDB\)&text=The%20Federal%20Reserve%20Board%20on,the%20Goldman%20Sachs%20Group%2C%20Inc.](https://www.federalreserve.gov/newsevents/pressreleases/enforcement20201022a.htm#:~:text=Sachs%20Group%2C%20Inc.,%24154%20million%20for%20failure%20to%20maintain%20appropriate%20oversight%2C%20internal%20controls,to%201Malaysia%20Development%20Berhad%20(IMDB)&text=The%20Federal%20Reserve%20Board%20on,the%20Goldman%20Sachs%20Group%2C%20Inc.) See also Rachel Mortimer, *FCA and PRA slap Goldman Sachs with £97m fine*, ft advisor (Oct. 23, 2020)

<https://www.ftadviser.com/regulation/2020/10/23/fca-and-pra-slap-goldman-sachs-with-97m-fine/>.

[7]Jacob Bogage, *Goldman Sachs fined record \$2.9 billion to resolve IMDB bribery scheme*, wash. post (Oct. 22, 2020 3:15 PM)

<https://www.washingtonpost.com/business/2020/10/22/goldman-sachs-1mdb-record-fine/>.

[8]Press Release, *supra* note 1.

[9]Nick Rummell, *Goldman Sachs Cops \$3 Billion Deal to Avoid Charges on Massive IMDB Fraud*, courthouse news serv. (Oct. 22, 2020)

<https://www.courthousenews.com/goldman-sachs-cops-3-billion-deal-to-avoid-charges-on-massive-1mdb-fraud/>.

[10]A corporation can avoid indictment by being put on ‘probation’ during which time the corporation must institute substantial reforms, and “cooperate with the government in helping them build a case against individual employees.” Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45am. crim. l. rev. 159, 160 (2008). Russell Mokhiber, *Twenty Things You Should Know about Corporate Crime*, 25corp. crim. rep. 25 (2007) (finding that “most corporate criminal prosecutions” are resolved via DPAs now).

[11]Rick Claypool, *DOJ is Soft on Corporate Crime but Prosecuting Protesters*, pub. citizen <https://www.citizen.org/article/doj-shows-its-still-soft-on-corporate-crime-while-pursuing-extreme-prosecutions-of-protestors/> (last visited Nov. 8, 2020) (arguing that the DOJ’s deferred prosecution agreement with Morgan Stanley was too lenient, and that “allowing rampant wrongdoing among the biggest banks like JPMorgan can result in financial disasters that devastate communities and threaten the global economy.”).

[12]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, 1104 (2006).

[13]Pamela Russell, *Statement on Goldman DOJ IMDB Settlement*, better markets (Oct. 22, 2020)

<https://bettermarkets.com/newsroom/statement-goldman-doj-1mdb-settlement> (“A DPA is meaningless unless actually enforced and the DOJ does not appear interested in enforcing them against Wall Street Banks.”).

[14]Press Release, *JPMorgan Chase & Co. Agrees To Pay \$920 Million in Connection with Schemes to Defraud Precious Metals and U.S. Treasuries Markets*, dep’t of justice (Sep. 29, 2020) <https://www.justice.gov/opa/pr/jpmorgan-chase-co-agrees-pay-920-million-connection-schemes-defraud-precious-metals-and-us>. See Russell, *supra* note 14 “ DOJ just settled JPMorgan Chase’s third criminal case with, among other things, a DPA, for manipulating two financial markets for years when a prior DPA was in place along with a probation agreement. Yet, DOJ settled JPMorgan’s third criminal proceeding without even mentioning the prior two criminal actions, the prior DPA or prior probation period, both of which appear to have been violated by JPMorgan Chase during the years it was manipulating the two financial markets.” See also Paola Henry, *Individual Accountability For Corporate Crimes After The Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform*, 6 Am. Univ. Bus. L. Rev. 153 (2017)(“While the DOJ cited the DPA settlement of \$3.2 billion as a victory in its attempt to hold banks accountable for the global financial crisis of 2008, there were no civil or criminal charges against any employees of Morgan Stanley, despite incriminating emails.”).

[15]See Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to All U.S. Att’y’s ET AL., *Individual Accountability for Corporate Wrongdoing*(Sep. 9, 2015) <https://www.justice.gov/dag/file/769036/download> (describing the Department of

Justice's new policy of individual accountability). *See also* Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. Times (Sep. 9, 2015) <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> ("Stung by years of criticism that it has coddled Wall Street criminals, the Justice Department issued new policies., that prioritize the prosecution of individual employees - not just their companies."); Gibson Dunn, *2020 Mid-Year Update On Corporate Non-Prosecution Agreements And Deferred Prosecution Agreements*, (Jul. 15, 2020) <https://www.gibsondunn.com/wp-content/uploads/2020/07/2020-mid-year-npa-dpa-update.pdf> (highlighting that many DPAs enforced against corporations this year also included civil and criminal individual corporate sanctions).

[16] Michael Yangming Xiao, *Deferred/Non Prosecution Agreements: Effective Tools To Combat Corporate Crime*, 23 *cornell j. l. pub. policy* 233, 242-43 (2014).