

# THE SODERQUIST CENTER

## **Deferred-Prosecution Agreements Raise Ethics Questions**

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Ethics questions continue over the U.S. Department of Justice's tactics in prosecuting white-collar crimes. The most recent controversy concerns the use of deferred-prosecution agreements. The controversy intensified recently when a medical supply company's deferred-prosecution agreement obligated it to pay \$52 million in monitoring fees to former U.S. Attorney General John Ashcroft's consulting firm, The Ashcroft Group LLC.

### **Indictments avoided**

A deferred-prosecution agreement allows a company under criminal investigation to avoid indictment by paying a specified amount of money. The payment is a criminal fine or civil penalty. Prosecutors often require a company to satisfy shareholder litigation claims. In addition, the company agrees to an outside monitor to oversee the agreement. The government spares no expense when obligating a company to spend money on its compliance measures, as seen with Ashcroft's consulting firm.

Unlike plea bargains, a deferred-prosecution agreement does not need judicial approval. Federal prosecutors file criminal charges against the company, but dismiss the charges after the company fulfills the agreement's terms.

### **Recent surge**

In the past six years federal prosecutors obtained guilty verdicts or pleas in 1,200 white-collar crime cases but offered few deferred-prosecution agreements. In the past three years, however, federal prosecutors made 50 deferred-prosecution agreements with companies, 38 of those in 2007.

The change in tactics arose out of widespread public and congressional concern over the damage caused when the federal government indicts a company. An indictment can destroy a company, as happened with Enron's former accounting and auditing firm Arthur Andersen. Although the U.S. Supreme Court eventually cleared Arthur Andersen of obstruction-of-justice charges, the Court's ruling came too late to save the company and its 28,000 employees' jobs. Shareholders and other third parties suffer as the indicted company collapses.

When used ethically, a deferred-prosecution agreement benefits a company by giving it a chance to survive allegations of wrongdoing. An agreement also limits collateral damage to innocent third parties caused by a company's indictment.

### **Unethical Practices**

Some federal prosecutors, however, use deferred-prosecution agreements unethically. Deferred-prosecution agreements should not funnel monitoring fees to a former attorney general's consulting firm. At the least, the act appears improper.

Prosecutors also often combine the offer of a deferred-prosecution agreement with unethical practices. Prosecutors use the threat of indictment and offer of a deferred-prosecution agreement as leverage to force a company to waive its constitutional rights. As explained in two earlier Ethics Matters' columns, federal prosecutors threaten a company with an indictment if it refuses to waive the attorney-client privilege or pays the legal fees of its employees under investigation.

The offer of a deferred-prosecution agreement depends on the company giving in to the government's demands.

Sometimes a company agrees to the government's demands, even when it is doubtful the government could successfully prosecute the company because of a lack of evidence of criminal intent. The company agrees to the burdensome deferred-prosecution agreement out of fear of an indictment.

Deferred-prosecution agreements are tough enough without prosecutors unethically leveraging them to gain more concessions from companies.