Deferred Prosecution Agreements: Implications for Corporate Tax Departments

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Tax enforcement is back in vogue. In the past few years, the Internal Revenue Service has dramatically ramped up its compliance functions. The budget for tax enforcement has increased, additional agents are on board, and the tax community is witnessing an increase in examination, tax litigation, and criminal investigation activity. The IRS has become more aggressive in pursuing companies, law firms, and accounting firms through the examination and summons processes.[1] The agency is also coordinating efforts more closely with the Department of Justice and the invigorated Office of Professional Responsibility. Thus, potential consequences are more serious than ever for companies and corporate tax departments that have failed to adhere to the tax laws.

This enhanced focus on tax compliance is, in part, an outgrowth of corporate scandals such as Enron and WorldCom, which led to reforms such as the Sarbanes-Oxley Act of 2002[2] and several enforcement provisions in the American Jobs Creation Act of 2004.[3] The reform movement has prompted companies to re-examine, strengthen, and enforce internal control mechanisms and similar procedures. Meanwhile, the Department of Justice has vigorously pursued individuals and corporations alleged to operate outside of the law.

Most recently, the government has devoted substantial attention to tax shelter abuses, and the most prominent such case arises from the New York grand jury investigation into shelters promoted by the accounting firm KPMG and others. This investigation remains ongoing, but in recent months it has produced two related events. One is the indictment of 19 individuals, most of them former senior personnel at KPMG. The other was the decision by the Justice Department not to indict KPMG as a firm, as it had done in an Enron-related case involving Arthur Andersen, but instead to enter into, with KPMG, a deferred prosecution agreement (DPA). Pursuant to this DPA, the government filed a criminal charge against the firm and KPMG admitted extensive wrongdoing, but the Justice Department agreed to "defer" prosecution of the case and to dismiss the charge if KPMG pays specified stiff penalties and implements certain new reforms and enhanced standards.

DPAs have been around for many years, and the Justice Department is using deferred prosecution increasingly to dispose of complex corporate criminal investigations. In tax investigations, however, DPAs have been rare, and while the KPMG agreement has many features common to other DPAs, it contains other provisions unique to tax enforcement. Given these developments, both the concept of deferred prosecution and the KPMG agreement itself warrant further examination.

This article focuses on the implications these DPA arrangements may have for corporations and corporate tax executives. After a background discussion concerning corporate criminal matters and the wide latitude given federal prosecutors in dealing with entities, the article discusses (1) the general nature of DPAs and how they work as a matter of process and practice, (2) the specific provisions of the KPMG DPA, and (3) the ways a DPA might affect a company's tax department and its tax officials.

Background

The implications for company tax departments of enhanced law enforcement attention on corporate wrongdoing has been previously discussed in *The Tax Executive*.[4] In a nutshell, the government technically can prosecute entities as a whole if a director, officer, or employee engages in criminal conduct in the scope of their employment and the entity benefits from such actions.[5] In nearly every corporate criminal investigation, tax or otherwise, where even a single employee has engaged in wrongful conduct, the government can usually amass sufficient evidence to meet this low threshold and, if the prosecutor so chooses, to indict the company as a whole.

Accordingly, in many such investigations, the issue often is not whether the company technically broke the law, but rather whether, in the sound exercise of prosecutorial discretion, the government should charge the company with a crime or dispose of the case by other means. Generally, prosecutors have the option (1) to decline criminal prosecution altogether, (2) to enter into plea negotiations with the company, (3) to pursue a criminal charge against the entity through a trial and either conviction or acquittal, or (4) to enter into a deferred prosecution arrangement. Short of a declination, a DPA is often an acceptable alternative to criminal prosecution, which can lead to devastating results, as occurred the Andersen case.

The Justice Department has published the criteria it uses in evaluating its options in a corporate criminal investigation.[6] In what has become known simply as the "Thompson Memorandum," named after the issuing Deputy Attorney General, the Department outlined the following primary factors:

1. The nature and seriousness of the offense;
2. The pervasiveness of wrongdoing within the corporation;
3. The corporation's history of misconduct;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, including disciplining or terminating wrongdoers;
7. Collateral consequences;
8. The adequacy of the prosecution of individuals for the corporation's malfeasance; and
9. The adequacy of civil or regulatory remedies against the corporation.[7]

The Thompson Memo explicitly recognizes deferred prosecution as an alternative disposition for corporate criminal investigations. It has also clearly affected both corporate and governmental responses to allegations of criminal wrongdoing — no major corporation caught engaging in accounting or securities fraud has been convicted of a crime since the fall of Andersen in June 2002,[8] and federal prosecutors have entered into twice as many DPAs with major American corporations in the last four years (23 agreements between 2002 to 2005) than they have in the previous 10 years (11, between 1992 to 2001).[9]

KPMG, notwithstanding its admission that the firm promoted a multi-billion criminal tax fraud, apparently presented a strong enough case on these factors to persuade senior Justice Department officials to enter into a DPA rather than pursue a felony conviction of the firm. Aside from the firm's extensive cooperation in the investigation (which provided much of the evidence leading to the indictment of its former personnel), its payment of more than $450 million in fines and penalties, and its implementation of major reforms, a prime rationale for a DPA was undoubtedly the prospect of the firm suffering an Andersen-like fate, with the result that only three major worldwide accounting firms would remain.[10]

What Is a Deferred Prosecution Agreement?

Fundamentally, a DPA is a contract between the government and a defendant, executed contemporaneously with the government's filing of a criminal charge alleging that the defendant has committed one or more federal crimes. Notwithstanding the filing of this charge, the government agrees to "defer" its prosecution of the charge through pre-trial and trial proceedings if the defendant adheres to various obligations outlined in the DPA. If the defendant satisfies the provisions of the DPA, at the conclusion of a specified term the government will move to dismiss the charge, leaving the defendant without a criminal record. In contrast, if the defendant breaches the DPA, the government is released from its promise to defer prosecution, and prosecutors would likely take the case to trial or negotiate a plea agreement.[11]

In the corporate context, DPAs contain provisions whereby a defendant agrees to perform various kinds of actions, grouped in the following categories:

- ***An admission of wrongdoing and an acceptance of responsibility.*** It is a primary and essential requirement for a corporate defendant, in order to obtain a DPA, to admit criminal wrongdoing. The company's admission will usually be quite specific, and contained in a document negotiated between prosecutors and counsel for the company. The admission is, in effect, a confession, potentially usable as evidence in subsequent proceedings involving the company, its employees or agents, and any co-conspirators. Indeed, the company's admission almost guarantees that the company would be convicted if the DPA falls apart and the case proceeds to trial. The admission also carries significant collateral consequences, particularly if there are potential or ongoing regulatory or civil actions arising from the same conduct that led to the criminal investigation, as is often the case.

- ***Payment of restitution and penalties.*** Most DPAs entail the company's payment of substantial sums of money. These amounts are often labeled as restitution to the government or to private victims, such as shareholders, and such restitution is almost never deductible. DPAs may also incorporate the payment of civil or regulatory penalties, taxes, interest, any compensation to the government for the costs of the investigation, and civil forfeitures.

- ***Cooperation in the government's continuing investigation, including its investigation into the company's employees.*** These provisions are standard in all DPAs. A company subject to a DPA is required to provide, indeed volunteer, all information relating to the matters under investigation; to use its best efforts to make employees available for government interviews; to refrain from assisting employees, officers and directors with their individual defenses; to decline to indemnify such persons for legal expenses if the individuals are not themselves cooperating with the government's inquiry; and to waive attorney-client and work product privileges. If the company has put itself in a position to close out the criminal inquiry with a DPA, it has often done all of these things already, so the DPA simply embodies the company's continuing obligation in an enforceable agreement.

- ***A promise against further prosecution, but a pledge to engage in no further wrongdoing.*** This aspect of the DPA is like a sentence of probation. The company promises to engage in no further criminal acts, and the government pledges not to prosecute the company for any wrongdoing arising from the investigation. Any breach of the company's assurance allows the government to prosecute the company not just for a new wrong, but also for the conduct that was the basis of the DPA. The government's side of this obligation is usually embodied in language extending protection from prosecution for matters relating to specified transactions, to matters described in the accompanying statement of facts, or in some cases to matters set forth in indictments or civil complaints against individuals affiliated with the company who may have already been prosecuted. Needless to say, this construct should encourage the company, before executing a DPA, to disclose any corporate actions that could conceivably be deemed criminal.

- ***Undertaking of certain specified corporate reforms.*** It is with this provision that DPAs often get creative depending on the nature of the offense under investigation. If the case involves accounting fraud, for example, the DPA may require significant corporate restructuring, new internal controls, enhanced internal oversight, and more frequent reporting to regulatory authorities than may be required in normal circumstances. Often, DPAs also require the company to create or strengthen compliance departments and employee ethics and training programs, including the adoption of a clear chain for workers to report suspected fraudulent activities (such as a toll-free number). As discussed below, the KPMG agreement contains many unique reform components.

- ***Appointment of an outside monitor or consultant.*** DPAs often, but not always, contain a provision for the engagement of a "monitor" from outside the company. The monitor usually has wide leeway to recommend changes within the company, the hiring or firing of individuals, or the implementation or cessation of certain business practices. The monitor is selected by agreement between prosecutors and the company or appointed by the court, and has specified obligations to report to prosecutors and/or the court at regular periods. The company is responsible for compensating the monitor and related staff. Needless to say, such monitors — operating in a context where the government can decide to push ahead with criminal charges for non-compliance with a DPA — have enormous leverage. A less burdensome provision might require the engagement of an outside consultant, also at the company's expense, to evaluate certain corporate reforms and report to prosecutors or the court.

- ***Regulatory sanctions.*** If a company operates with certain licenses or privileges or is a major government contractor, a DPA may provide for partial sanctions such as periods of suspension or debarment, or other limitations on the scope of the company's business.

- ***Other procedural components.*** DPAs also contain provisions that protect the government in the event of the company's breach. These steps include the company's waiver of statute of limitations defenses, its right to a speedy trial, and a waiver of any double jeopardy arguments. If the DPA falls apart, and the government prosecutes the criminal charge, the company will be unable to assert these and similar defenses.

- ***Miscellaneous provisions.*** Other components of a DPA may include an agreement as to the terms of the government's and the company's respective press releases, or charitable contributions or the performance of community service by the company.

A company's breach of a DPA almost guarantees a criminal conviction. Most DPAs provide that prosecutors can determine, in their sole or barely reviewable discretion, whether a defendant has violated any material term of the agreement. If this happens, the government may have intermediate remedies, such as extending the term of the DPA, but prosecutors can also decide to have the case proceed to a criminal disposition, either through a guilty plea or a trial. The corporate defendant has almost no prospects for obtaining a successful result since its admission of wrongdoing in the DPA is in practical terms a confession, admissible in any subsequent proceedings.[12]

An alternative to a DPA is a decision by prosecutors to enter into a "Non-Prosecution Agreement." Under a NPA, the government decides that it is not going to prosecute the company in exchange for certain corporate promises, many of which might be similar to those that would be included in a DPA. The material difference is that the government does not file and then defer prosecution of a criminal charge; it simply declines to prosecute altogether. But the government often retains by agreement the right to change its mind about not prosecuting the company if the company fails to follow through on certain promises. Whether the government agrees to a NPA, as opposed to a DPA, depends on the company's performance under the Thompson Memorandum factors, and sometimes, the government will agree to a NPA only where the company voluntarily disclosed its own discovery of wrongdoing before any governmental inquiry began.

While the burdens of satisfying a DPA can be onerous, the alternative — criminal proceedings and a possible felony conviction — can be catastrophic. Such a result can produce a public relations nightmare, the loss of business, automatic suspension or debarment from government contracts, the loss of required licenses or privileges, enormous fines and restitution under federal sentencing guidelines, and, as in the case of Andersen, cessation of the company's business altogether. These factors often make a DPA, however taxing, a satisfactory result for a company in criminal jeopardy.

Originally, DPAs were used primarily for individual criminal defendants.[13] Over time, however, the DPA has gained favor with federal prosecutors, who are now increasingly entering into such arrangements specifically tailored to a company's conduct and structure. DPAs help prosecutors build cases against other defendants, often produce huge monetary payments to the government and to victims, and promote changes in the way corporations do business. For a company, a deferred prosecution disposition is almost always far more favorable than a criminal conviction, whether by guilty plea or after a trial.

The KPMG Agreement: Use of a Deferred Prosecution Agreement to Resolve a Criminal Tax Investigation

In August 2005, KPMG admitted to engaging in a criminal fraud that generated at least $11 billion dollars in phony tax losses and cost the United States at least $2.5 billion in evaded taxes. Instead of prosecuting the firm, however, the U.S. Attorney's Office for the Southern District of New York entered into a deferred prosecution arrangement with KPMG; the agreement was embodied in a letter from prosecutors to the firm's counsel.[14] Simultaneously, the government filed a criminal charge against KPMG, largely tracking the firm's confession, but prosecutors agreed to defer pursuing the case, and ultimately to dismiss the charge, if KPMG complied in full with the terms of the agreement.

The KPMG DPA contains many standard provisions similar to those described above. These include: (1) KPMG's specific and detailed admissions of its criminal acts, set forth in a statement of facts executed by the firm and attached to the DPA;[15] (2) the firm's payment of $456 million, non-deductible and not covered by insurance;[16] (3) full cooperation in the continuing tax shelter investigation being conducted by the IRS and federal prosecutors; and (4) the implementation of an enhanced compliance and ethics program. Importantly, the DPA also contained unique provisions in the context of the tax issues that were the underpinnings of the entire inquiry. These warrant some specific and additional consideration.

First, there are the details of the firm's factual admissions regarding the underlying tax shelter transactions. Among the admissions KPMG made was that it defrauded the government by devising, marketing, and implementing fraudulent tax shelters such as "BLIPS" and "OPIS," that it fraudulently concealed tax shelters, and that it prepared and filed fraudulent tax returns that showed phony tax losses.[17] KPMG also admitted that it drafted false and fraudulent statements of facts underlying the shelters, issued opinions that contained statements that KPMG and its clients knew were not true, impeded the IRS by failing to produce documents and misrepresenting its role in the shelters, made sham attorney-client privilege claims, and made false claims that their clients had entered into the transactions for investment purposes only when the clients' true motivation was to obtain a tax loss.[18] KPMG further agreed not to make any claims or take any positions in subsequent proceedings that contradicted these admissions.

These admissions are in stark contrast to positions taken by taxpayers who participated in the transactions for which KPMG was sanctioned. While many taxpayers have accepted settlement proposals by the IRS,[19] others are fighting the IRS and are in litigation.[20] These same taxpayers have filed or threatened KPMG with substantial civil claims alleging, among other things, that the firm engaged in fraud in the way it promoted and recommended tax shelter transactions to its clients. Moreover, the criminal charges pending against 19 individuals, most of them former KPMG employees, allege their participation in the very same fraud that KPMG has acknowledged. These individuals are defending their actions vigorously and point, for example, to the absence of any judicial ruling that the shelters deemed fraudulent in the KPMG admission actually do not work as a matter of substantive tax law.[21]

In entering into the DPA, KPMG acknowledged criminal wrongdoing in a set of specific, detailed, and unequivocal admissions. This document will ripple through the many other disputes relating to the specific tax shelters at issue. The IRS and Justice Department will attempt to use KPMG's admissions as evidence in litigation with taxpayers on the merits of the shelters, taxpayers may use it as part of their underlying fraud claims against KPMG, and the prosecutors will attempt to use it in their criminal proceedings against KPMG's former employees. Criminal tax cases — as with many white collar investigations — often entail numerous parallel and collateral proceedings, and the KPMG case is no exception. The consequences of KPMG's admissions for the related civil and criminal litigation will be far reaching.

Second, the DPA includes a number of provisions tailored to the type and substance of tax advice that KPMG can provide in the future. The firm must cease its advisory service to wealthy individuals and the majority of its compensation and benefits tax practice by early 2006, and with exceptions, it will not prepare tax returns or provide tax advice to certain types of individual clients.[22] The firm must also cease participation in the development, marketing, or sale of pre-packaged tax products, and it must not participate in the marketing of opinions on abusive tax shelters.[23]

The KPMG DPA also embodies and enhances new Circular 230 regulations on tax shelter opinions, imposing stricter controls on the firm than exist for other accounting firms. For example, the DPA requires that KPMG refrain from issuing any "covered opinions" with respect to any "listed transaction" or from providing any tax services under "any conditions of confidentiality."[24] The firm also agreed that it will not charge or accept fees subject to "contractual protection" and that, with certain exceptions, it will charge only by the hour.

One of the more interesting provisions of the DPA is KPMG's agreement to comply with "minimum opinion thresholds" for any tax opinions issued, or tax returns prepared, after October 17, 2005. These thresholds impose a higher standard than required by existing law. For example, normally, a taxpayer's reporting position on a federal tax return need have only a "realistic possibility of success on the merits."[25] KPMG, however, has agreed to higher standards on returns it prepares. For any reporting position concerning a transaction that has been "listed," or whose "principal purpose" is tax avoidance, KPMG will adopt only reporting positions that "should" prevail. Moreover, for individuals and small private businesses, KPMG has generally agreed to take reporting positions only if it is "more likely than not" that such positions would be sustained. (The "realistic possibility" standard remains in place for KPMG prepared returns with respect to other transactions for large private, and all public, companies.) Similar provisions govern any "covered opinions" issued by KPMG.[25A] The DPA also imposes restrictions on KPMG's ability to defend "listed" and certain other transactions in representing clients before the IRS.

These sorts of provisions provide clear evidence of how a DPA can affect the way a firm does business. At bottom, KPMG has agreed to impose standards on itself that exceed the requirements imposed by the Internal Revenue Code, Circular 230, and related Treasury Regulations. Only time will tell whether these restrictions adversely affect KPMG's business relating to the provision of U.S. tax services or, alternatively, whether they set a new and higher bar for other firms to meet in a more compliance-focused tax world. In either event, the nature of KPMG's business changed fundamentally as a result of negotiations between its lawyers and federal prosecutors in the criminal tax investigation.

Third, KPMG is required to engage and submit to an independent monitor with extensive power for at least three years. The monitor, already appointed by the supervising court,[26] will review KPMG's compliance with the DPA, its implementation of the enhanced compliance and ethics program, and its observance of the restrictions on the firm's tax practice, tax opinions and reporting positions. The monitor has almost unlimited access to information and personnel within the company, and may compel an interview with any KPMG personnel. KPMG personnel must cooperate with the monitor or face dismissal, and the DPA expresses the intent "that the provisions regarding the Monitor's jurisdiction, powers and oversight authority and duties be broadly construed."[27] The Monitor is also empowered to recommend changes, and KPMG agreed to "adopt all recommendations submitted by the Monitor" unless the federal prosecutors in New York agree with the firm's objections. The Monitor will report to prosecutors upon various developments, but no less than once every four months.

The provisions regarding the Monitor's appointment and authority have far-reaching implications for KPMG. The Monitor has almost unlimited authority to dig into the operation of the firm's activities, recommend changes (including the hiring and firing of specific personnel), and shadow almost all aspects of the firm's tax practice. In substance, the Monitor is a representative of the U.S. Attorney, and he will represent the eyes and ears of the federal prosecutors, in-house, for the foreseeable future.

Fourth, KPMG agreed, in the context of the criminal investigation and the DPA, to enter into a closing agreement with the IRS. In a criminal tax investigation, this is somewhat unusual. Traditionally, during a criminal tax investigation, the IRS suspends related civil examination or collection activity. In the context of resolving a criminal tax case the government rarely agrees to a "global" settlement that disposes of related civil tax issues.

Recently, the IRS has begun to blur the line between criminal tax and related civil examination processes, and the KPMG agreement provides a tangible example of this growing trend in a context that appears to benefit both the government and the firm. For both sides, the closing agreement means that they will not have to devote considerable resources following the criminal tax case to pursuing, or defending against, civil penalties relating to KPMG's promotion of and participation in the tax shelters. On the other hand, the government, in negotiating civil penalties with the looming threat of a criminal sanction, certainly has greater negotiating leverage than it would otherwise have.

One final thought about these unique provisions of the KPMG agreement is that they are, in all likelihood, far more detailed than any sentence that might have been imposed had the firm been convicted of a criminal offense. A sentencing court can fine a convicted corporation and impose restitution requirements. It can also mandate certain actions as conditions of a corporate probation, but it would be unusual for a sentencing court to impose conditions at the level of specificity embodied in the obligations KPMG undertook in the DPA. The firm's willingness to agree to these provisions — like any company that enters into a DPA — underscores that the collateral pain inflicted on any corporation involved in a criminal case can far exceed the contours of whatever sentence a court might impose after a felony conviction.

Implications to Corporate Tax Departments

The growing trend to resolve corporate criminal cases through DPAs, as evidenced by the KPMG agreement, has implications for companies and for their corporate tax executives. Tax compliance officials in the government are looking aggressively at making criminal tax fraud cases where they can. Aggressive tax planning that might have presented a civil issue years ago may now be the subject of a criminal investigation. If such an investigation begins, the company has almost no choice but to cooperate extensively and to look for a way out that provides certainty and minimal pain; a DPA often does just that. Moreover, tax enforcement officials have become increasingly exposed to how a DPA provides the ability to compel cooperation with related inquiries and to have significant input into future corporate conduct.

Any DPA in a tax case can have a major impact on a company, depending on the nature and extent of the conduct involved. Deferred prosecution will always entail cooperation with any continuing investigation, an acknowledgement of wrongdoing, the payment of tax, interest, and civil penalties, and enhanced compliance and ethics programs and training. It might also impose other substantial changes on a corporation and its tax department, including (1) defining certain substantive transactional boundaries, (2) requiring, as the KPMG agreement, increased standards for reporting positions on company tax returns, (3) restructuring the tax compliance process, including, perhaps, specific personnel changes, (4) providing for increased oversight within the company of the tax compliance functions, and (5) directing the appointment of an outside monitor to supervise tax compliance procedures over a fixed period of time.

To some extent, given the alternative of a criminal tax felony conviction, a DPA often represents a satisfactory result, providing a quicker end to a long, invasive criminal investigation without a costly and publicized criminal trial. It avoids an Andersen-like collapse. It allows the company to retain important professional or business licenses and privileges, such as the ability to contract with the government. It provides job security for the vast majority of employees. At the same time, the government gets an admission of wrongdoing, cooperation, and restitution, and it can compel various reforms. In short, although DPAs often entail the imposition of stringent conditions, they often represent a compromise that produces benefits to both the government and the company.

Caution, however, is warranted. Federal prosecutors in negotiating a DPA have enormous leverage, and they are not necessarily well-versed in the details of operating a multi-national business or running a company's worldwide tax department. To be sure, negotiation of a DPA is an adversarial process, but ideally the goal should be for prosecutors and corporate representatives, operating in good faith, to agree on DPA provisions that achieve the government's restitution and reform-minded objectives while permitting the company to conduct business and maintain operations. The lack of a level playing field — federal prosecutors with full discretion to seek a company's indictment obviously have substantial leverage — means that sometimes a company must pay a heavy price even if only one or a few of its employees have "crossed the line" into the realm of potentially criminal conduct.

Conclusion

The "pendulum" of tax enforcement has swung back toward more rigorous and extensive government action, and tax departments are well advised to consider making changes in their compliance programs or undertaking new initiatives and processes to minimize the likelihood of being ensnared.[28] Sincere, substantive, and meaningful actions by senior tax management to ensure compliance and adherence to ethical practices are the best insurance against corporate wrongdoing.

DPAs provide an interesting resource of specific steps that a company may consider. While the KPMG agreement involved a professional firm that acknowledged participating in a large criminal tax fraud, there are lessons in its provisions for corporations. Strong and meaningful ethics and compliance programs, implementation of reporting standards that may even exceed what is required by law, and internal monitoring of the firm's business practices are steps that make enormous sense and are likely to become "best practices" for everyone involved in tax compliance.

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1 Audits of corporations with assets over $10 million increased in IRS fiscal year 2005, up 14 percent from fiscal year 2004, to 10,878. The coverage rate of 20 percent has rebounded significantly from that of 12 percent just two years ago. I*RS Improves Enforcement and Services in 2005*, Statement by IRS Commissioner Mark W. Everson, Nov. 3, 2005, at http://www.irs.gov/newsroom/article/0,,id=150358,00.html.

2 Pub. L. No. 107-204, 116 Stat. 745 (2002).

3 Pub. L. No. 108-357, 118 Stat. 1418 (2004).

4 Scott D. Michel, *Corporate Tax Departments and the New Focus on Corporate Criminality,* 55 Tax Executive 478 (Nov.-Dec. 2003).

5 U.S. Department of Justice, Memorandum from Deputy Attorney General Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), at (http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

6 *Id*.

7 Thompson Memorandum, *supra,* note 5.

8 *Crime Without Conviction: The Rise of Deferred and Nonprosecution Agreements*, Corporate Crime Reporter (Dec. 28, 2005) at http://www.corporatecrimereporter.com/deferredreport.htm.

9 *Id*.

10 Alison Bennett, Jordan Betz & Alison Carpenter, *KPMG Settles With Justice Department In Move To Defer Tax Prosecution*, Daily Tax Report (Aug. 30, 2005), at GG-1. Attorney General Alberto R. Gonzalez stated that the KPMG Agreement "reflects the reality that the conviction of an organization can affect innocent workers and others associated with the organization, and even have an impact on the national economy." *Id*. IRS News Release IR-2005-83 (Aug. 29, 2005).

11 U.S. Department of Justice, United States Attorney Manual, Chapter 9-22.010 (1997).

12 *Id*.

13 The criminal diversion program and its deferred prosecution agreement were originally used for juvenile and first-time offenders of "minor" crimes to free up prosecutorial resources to focus on "major" cases. *Id*.

14 *KPMG Deferred Prosecution Agreement* (August 2005), at http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20AGMT.pdf.; *see* Bryant Goldwyn, *KPMG Agrees to Pay $456 Million for Tax Shelter Violations; Nine Individuals Indicted for Tax Fraud*, CCH Fed. Tax Day (Aug. 30, 2005). The statement of facts may be found at http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20Statement%20of%20Facts.pdf.

15 Lynnley Browning, *Defendants File a Flurry of Motions Challenging the KPMG Tax-Shelter Case*, New York Times, (Jan. 13, 2006), at C3.

16 KPMG Deferred Prosecution Agreement, *supra* note 14, at ¶ 3. The penalty includes $100 million in civil fines for failing to register the tax shelters with the IRS, $128 million in criminal fines to disgorge fees earned by KPMG, and $228 million in criminal restitution for taxes lost by the IRS. The agreement prohibits the firm from taking a deduction for the $456 million penalty.

17 KPMG Deferred Prosecution Agreement, *supra* note 14, at ¶ 2.

18 *Practitioner' Corner: KPMG Indictments and Fines Demonstrate Government's Willingness to Take Criminal Action Against Tax Fraud*, CCH Fed. Tax Wkly, Sept. 1, 2005.

19 *IRS Collects $3.2 Billion from Son of Boss; Final Figure Should Top $3.5 Billion, IR-2005-37* (March 24, 2005), at http://www.irs.gov/newsroom/article/0,,id=137095,00.html.

20 *Jade Trading, LLC v. United State*s, Docket No. 03-21643T (United States Court of Federal Claims).

21 Sheryl Stratton, *Tax Professionals Indicted; KPMG Says Shelters Were Fraudulent,* Tax Notes, Sept. 5, 2005, at 1085.

22 KPMG Deferred Prosecution Agreement, *supra* note 14, at ¶ 6.

23 *Id.*

24 *Id.*

25 I.R.C. § 6694.

25A Circular 230, ¶ 10.35.

26 *KPMG to Pay $456 Million for Criminal Violations,* IR-2005-83, Aug. 29, 2005, at http://www.irs.gov/newsroom/article/0,,id=146999,00.html.

27 KPMG Deferred Prosecution Agreement, *supra* note 14, at ¶ 18.

28 Scott D. Michel, *supra* note 4 at 484-85.