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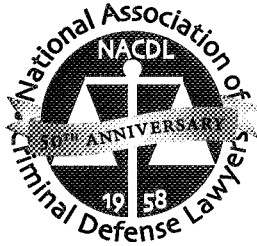
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June 25, 2009

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The Honorable Steve Cohen
Chairman
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

Re: Hearing on Deferred Prosecution Agreements

Dear Chairman Cohen and Mr. Franks:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing regarding the Department of Justice's use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) for business organizations. The Department of Justice does not publish statistics regarding its use of these agreements. However, an analysis of publicly available sources demonstrates that the Department of Justice has dramatically increased its use of such agreements to obtain monetary penalties and other concessions from business organizations since 2003. These agreements often lack avenues for judicial review of alleged breaches, exact large fines, contain vague terms requiring unlimited cooperation (including waiver of the organization's attorney-client privilege), and encourage or require violations of the rights of the organization's employees.

Despite the flaws in many of these agreements, they can serve a valuable function. In the current regime of vicarious corporate criminal liability, such agreements can be an important alternative for a corporation that would otherwise be criminally charged and suffer ruinous criminal sanctions and collateral consequences from a conviction. Moreover, these agreements can be used to pinpoint areas in which an organization is in need of compliance reform. Accordingly, DPAs and NPAs, when properly deployed, serve laudatory goals of criminal law enforcement. Since it is rarely, if ever, in the interests of justice to incapacitate a legitimate business organization, DPAs and NPAs can serve as appropriate alternatives to criminal prosecution while furthering the goals of deterrence, restitution, and reformation.

"LIBERTY'S LAST CHAMPION"

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DPA and NPA between the Department of Justice and business organizations should not be used, however, as substitutes for civil remedies or declinations of criminal prosecution. Many federal civil enforcement agencies have expertise in helping regulated firms develop compliance and corporate governance programs, in extracting restitution, in imposing civil fines, and in administering other elements of settlements. In many cases, it is more appropriately the role of these agencies, rather than DOJ, to oversee forward-looking remedies.

NACDL believes that the following principles represent best practices for government enforcement officials and defense counsel when drafting DPAs or NPAs for organizations. These principles are necessary to protect the rights of shareholders and private business owners, while insuring that U.S. markets are safe from fraud and other criminal wrongdoing:

1. Monetary penalties that are extracted as a result of DPAs and NPAs should be in amounts that are commensurate with actual harm or actual gain, and should be no greater than necessary to achieve restitution and deterrence.
2. DPAs and NPAs should be available to business organizations regardless of size, type of organization, or ability to pay criminal fines.
3. DPAs and NPAs should have well-defined terms that govern an organization's cooperation. Agreements should be drafted to avoid undue interference with the day-to-day workings of the organization. The terms that should be drafted with care and specificity include, but are not limited to, the scope of documents that are required for government or monitor review, the organization's future obligations for reporting types of internal wrongdoing, the oversight responsibilities of a monitor if one is appointed, the extent of any compliance-related reforms, and the presence of corporate governance reforms.
4. DPAs and NPAs should not contain terms that are likely to cause violations of the rights of current and former employees. The waiver of the organization's attorney-client privilege, which results in the production of employees' non-immunized statements to the government, should not be a prerequisite to entering into a DPA or NPA. Additionally, agreements should not include promises to "cure" statements by employees who allegedly contradict facts to which the organization has agreed by firing or otherwise punishing the employee. Agreements should not include promises to fire or otherwise sanction employees who assert their rights during government investigations, and they should not require organizations to cease paying the attorneys' fees of their employees.
5. DPAs and NPAs should provide for judicial review by an Article III court only in the event of breach. Pre-approval by an Article III court and continued supervision of a DPA or NPA is not preferable and should not be required.

6. Monitors should be selected based on their experience within the organization's industry and with the particular violation at issue. The individual selected to be a monitor should avoid all actual or apparent conflicts of interest. Monitors should have duties that are no broader than necessary to accomplish specific compliance-related reforms.
7. Monitors should not have the authority, actual or constructive, to fire employees of the organization or members of the organization's governance team.
8. An organization's objection to any part of the compliance reform that is recommended by the monitor should not *ipso facto* be considered as part of the organization's compliance with the agreement. Rather, proposed compliance reform should be structured in consultation with the organization's board of directors or ownership. If any objections or differences remain, the Department of Justice's role should be that of a mediator, not an enforcement body. Ideally, compliance reform should be negotiated *before*, and set forth in, a DPA or NPA.
9. Monitors should not be required to have unfettered access to the organization's material, including material that is protected by the attorney-client privilege or work-product doctrine.

In addition to the aforementioned principles, NACDL is troubled by the lack of transparency relating to DPAs and NPAs. The Department of Justice does not release information regarding these agreements to the public. While recent studies conducted by defense attorneys find that the number of deferred prosecution agreements have dramatically increased since 2003, the Department of Justice has not released information that educates the public as to the true number of such agreements, nor any relevant data relating to these agreements. NACDL believes that the Department of Justice should publicly disclose relevant information relating to its use of DPAs and NPAs, including, but not limited to, the length of such agreements, the specific nature of the alleged crimes, the amount of fines levied, the compliance terms, and information relating to the use of monitors.

Respectfully,



John Wesley Hall
President, National Association of Criminal Defense Lawyers