Chapter Six

Deferred Prosecution and Non-Prosecution Agreements

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DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

"[Deferred and non-prosecution] agreements can border on the extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can lead to abuse, and not just in the extravagant amounts of money the corporations are forced to pay."

Former Attorney General Dick Thornburgh
March 17, 2007

Overview. Historically, federal prosecutors have had three basic options when handling criminal cases. They could decline to prosecute their targets, file charges and extract a plea agreement, or proceed to trial. In recent years, however, a more controversial weapon has been wielded by prosecutors against the corporate community: pretrial diversion in the form of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).

The authority to enter into these agreements is found in the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(2). That provision provides that the time limits under the Act are suspended during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."

Once sporadically used for individuals in minor criminal matters, pretrial diversion is being used more frequently to resolve corporate criminal cases. These agreements are essentially one-sided arrangements crafted by prosecutors with unchecked power, and "agreed" to by their corporate targets. There is no formal guilty plea or conviction; rather, the company usually acknowledges wrongdoing and agrees to cooperate with the government's ongoing investigation, pay massive fines or penalties, reform its business operations, and comply with other specified and varied conditions, often under the watchful eye of an expensive "corporate monitor" selected or strongly recommended by the prosecutor. In return, at the end of a "probationary" period that usually lasts from one to three years, the government agrees to drop the charges against the company if prosecutors, in their sole unreviewable discretion, believe the company has not violated the terms of the agreement.

At the same time, prosecutors have largely ignored pretrial diversion as an option for

resolving cases against company employees, executives, or other individuals accused of violating regulatory offenses. Instead of declining prosecution or referring the case to the agency for civil or administrative remedies, which should be the preferred outcome, prosecutors generally disregard the option of pretrial diversion for individuals, file criminal charges, and effectively extort unfair plea agreements or convictions that often result in excessive prison terms under the Sentencing Guidelines.

NPAs generally do not require an admission of guilt from the targeted company because the prosecutor does not file criminal charges. NPAs are often quite informal and usually come in the form of a letter from the U.S. Attorney's Office signed by both parties. On the other hand, the more frequently employed DPAs require a more complex procedure. Prosecutors file criminal charges (the company having waived its right to indictment by a grand jury), but "defer" prosecuting the case as long as the company complies with certain conditions specified in the DPA. The conditions usually are more detailed and burdensome than those found in NPAs. Because criminal charges are filed, DPAs read much more like pleadings and are more formal in nature. For example, the DPA that the accounting firm KPMG entered into in 2005 (discussed below) numbered 28 pages, not including the Statement of Facts (another 10 pages), and the criminal information (another 34 pages).

Because of their almost limitless charging discretion, prosecutors are able to exercise powerful leverage over their corporate targets. To avoid indictment and not risk conviction either by a jury or plea agreement, companies seek and prefer pretrial diversion despite its heavy price. A criminal investigation and indictment alone could have enormous adverse consequences even if a company were ultimately acquitted at trial. For example, under federal procurement regulations, companies under investigation or indictment are suspended from applying for or receiving government contracts, subsidies, and assistance — effectively suspending any and all of their government-related business. Publicly traded corporations typically face a sharp drop in share value and debilitating class action lawsuits. A conviction could effectively result in a corporate death sentence, harming innocent employees, stockholders, and the economy. Accordingly, federal prosecutors can dictate harsh DPA and NPA terms and conditions, even if the underlying case is weak and even if any individuals charged are acquitted.

Growing Trend of Pretrial Diversion. The first corporate NPA was entered into in May 1992 with Salomon Brothers, resulting in a civil penalty of $290 million for improperly auctioning Treasury securities. The first DPA was made with Armour of America in 1993, which required only a $20,000 civil penalty and a corporate compliance program, but no admission of criminal or civil liability for an arms export violation. In 1997, DOJ established general guidelines for U.S. Attorneys to consider in deciding whether to use pretrial diversion, but they were designed more for individuals than corporations, and allowed for inconsistent application. *See* U.S. Attorneys' Manual § 9-22.010 (1997).

From 1992 through 2002, there were only 11 corporate DPAs and 7 NPAs, totaling 18 agreements, or an average of less than 2 per year. However, after the creation of the Corporate Fraud Task Force in 2002 following the Enron scandal, the subsequent indictment and collapse of Arthur Andersen LLP, and the issuance of the Thompson Memorandum in January 2003, overly aggressive prosecutors increasingly turned their sights on companies

and their executives for criminal prosecution. The number of DPAs and NPAs rose accordingly. The Thompson Memo's inclusion of alternative resolutions to indictment for companies that have cooperated with DOJ as a prosecutorial option may have also spurred more DPAs and NPAs. During the five-year period from 2003 to 2007, there was a record number of 55 DPAs and 30 NPAs, a total of 85 agreements, or an average of 17 per year. Most of those were entered into over the last two years. In 2006, there were 20 agreements, whereas in 2007, there were 38, almost a 100 percent increase.

Approximately 60 percent of those agreements involved alleged violations of federal health care laws, food and drug laws, and the Foreign Corrupt Practices Act (FCPA). As for environmental offenses, the current head of DOJ's Environmental Crimes Section, Stacy Mitchell, stated on March 7, 2008 at the ABA Annual Institute on White Collar Crime that she does not believe in DPAs, and that if DOJ is not going to prosecute, then the matter should be referred for civil disposition. However, she also said her section will continue to follow the Holder, Thompson, and McNulty Memos, which contemplate the use of DPAs. Nevertheless, as these overall numbers reflect, there is a growing trend to use DPAs and NPAs, which will continue so long as aggressive prosecutors target companies and hold them vicariously liable for the wrongdoing of their employees.

While DPAs are generally used by DOJ for resolving criminal cases against corporations, they have been used recently in a few cases to settle charges against corporate executives *after* indictment where the government's case was particularly weak. For example, DPAs were entered into by DOJ with Frank Quattrone of Credit Suisse in 2006, and with four executives of Reliant Energy Services, Inc. in 2007.

DOJ's Corporate Leniency Policy: Stolt-Nielsen. In addition to NPAs and DPAs, there are other pretrial diversion programs that are sometimes used either by the Justice Department or certain government agencies for specific areas of the law. For example, in August 1993 the Antitrust Division of DOJ instituted a Corporate Leniency Policy whereby a corporation is given amnesty if it is the first to come forward to report illegal anti-competitive activity with other companies, cooperates with the government investigation, and makes restitution to any injured parties.

However, as one major company quickly discovered, immunity from prosecution under this policy is not guaranteed. In January 2003, Stolt-Nielsen, S.A., a shipping company, entered into a Conditional Leniency Agreement (a form of NPA) with DOJ, reciting that the company had terminated its anticompetitive activity involving customer allocation as soon as it was discovered and agreeing to cooperate in the government's investigation. On March 2, 2004, without any warning, DOJ decided to revoke the agreement because it believed that Stolt-Nielsen continued its anticompetitive practices after March 2002, the date the company represented that it had ceased the activity.

Stolt-Nielsen sued the government in district court to enforce the amnesty agreement and prevailed; unfortunately, the decision was reversed on appeal. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 494 (2006). In a dubious opinion, the Third Circuit held that DOJ's claim — that Stolt-Nielsen breached the conditions of the leniency agreement — was not subject to preindictment review, absent specific provision in the agreement to the contrary. In short, Stolt-Nielsen had to wait until it was indicted before it could seek any judicial review.

DOJ subsequently indicted Stolt-Nielsen, which, in turn, renewed its challenge. On November 29, 2007, the district court sharply rebuked DOJ for precipitously revoking the immunity agreement and dismissed the indictment. The court found that DOJ simply did not prove that Stolt-Nielsen failed to take prompt action to terminate its anticompetitive activity or that the company breached the agreement in any way. *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp. 2d 609 (E.D. Pa. 2007). On December 21, 2007, the Justice Department wisely announced that it would not appeal the dismissal, likely sensing an unfavorable outcome.

Corporate Integrity Agreements (CIAs). In addition to DOJ's Antitrust Corporate Leniency Policy, the Departments of Defense (DOD) in 1986 and Health and Human Services (HHS) in 1994 developed Corporate Integrity Agreements (CIAs). Under these settlement agreements, which are akin to NPAs, companies doing business with those federal agencies agree to disclose fraud and other wrongdoing, provide periodic reports over a five-year period, and institute corporate compliance and reform programs. In return, the companies avoid being suspended or debarred from future government contracts and likely avoid being referred to DOJ for criminal prosecution. In some cases, CIAs are used in conjunction with DPAs. The use of CIAs by the Office of Inspector General of HHS rose sharply from only four CIAs in 1994 to a peak of 233 in 1998, with a current rate of approximately 100 per year.

Many of the CIAs provide for set penalties if the company fails to comply with its terms, as interpreted by HHS. As in their DPA counterparts, many of the terms in CIAs are burdensome, intrusive, or of questionable validity. For example, many CIAs ban off-label marketing by pharmaceutical and medical device companies, which infringes on their First Amendment commercial free speech rights and effectively precludes a judicial challenge to the ban. To underscore the power of HHS to enforce this questionable ban, as discussed in Chapter One, Purdue Frederick and three of its corporate officers were forced to plead guilty in May 2007 for "unlawful" pharmaceutical marketing practices by lower-level employees, of which they were unaware. In late 2007, HHS began proceedings to exclude these executives from working for the company.

Criticism of Abusive DPAs and NPAs. Precisely because a targeted company is facing ruinous liability both criminally and civilly, there is a great deal of compulsion and economic duress that forces companies to accede to prosecutors' demands on the conditions they insert into DPAs and NPAs, no matter how burdensome. Accordingly, some have argued that doctrines of duress and unconscionability, which courts have used to void commercial contracts, may also be used in the criminal context. *See* Candace M. Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through The Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007). Indeed, in the interest of justice and fair dealing, courts generally impose a higher standard of good faith and fair dealing when the government, rather than a private party, is setting the conditions.

The terms and conditions of DPAs can vary widely from one case to the next, and from one prosecutor to another. Some terms, such as the payment of restitution and an agreement to comply with the law in the future, are generally non-controversial, although they can become problematic. For example, a company's agreement to comply with the law includes all corporate employees; thus, a minor breach of any regulatory offense by any employee can

negate the DPA.

Other terms, drawn from the nine charging factors in the Thompson Memo and those specified in the U.S. Sentencing Guidelines Corporate Compliance Program, raise more serious questions and go well beyond the sanctions that otherwise could be imposed by a court even if the company were prosecuted and found guilty of an offense.

For example, forbidding a company from publicly denying aspects of their "wrongful" conduct raises both First Amendment and business concerns. In a 2006 DPA settling government charges about the safety conditions at its nuclear power plant, FirstEnergy Nuclear Operation Company paid $28 million in fines and penalties for the alleged violations and agreed not to dispute the company's culpability. However, the company subsequently submitted a $200 million claim to its insurer for the corrosion damage that led to the charges giving rise to the DPA. Questions were then raised as to whether FirstEnergy's otherwise routine submission of an insurance claim violated the DPA, which forbade the company from denying the charges that it was responsible for the plant's damage.

Corporate counsel and commentators have identified the following features of DPAs and NPAs to be of particular concern and in need of being addressed:

1. ***Waiver of Attorney-Client Privilege***.

One of the more objectionable conditions found in many agreements requires the corporation to waive attorney-client and work product privileges. Encouraged by the Thompson Memo, which spawned a "culture of waiver" (discussed in greater detail in Chapter Five), prosecutors often require waivers to facilitate their ongoing investigation of possible wrongdoing by company employees and to make it easier to verify the company's compliance efforts. However, since the issuance of the McNulty Memo in December 2006, which was intended to formalize requests for waivers by prosecutors, only about 10 percent of the DPAs and NPAs have contained express waiver requirements. Most of the remainder, though, have a provision that waiver could be required per the McNulty Memo guidelines. *See* LAWRENCE D. FINDER & RYAN D. MCCONNELL, AM. BAR ASS'N, WHITE COLLAR CONFERENCE, ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE-2007 (March 2008).

Forcing companies to waive these venerable privileges deters employees from seeking advice about internal problems they may have uncovered, from taking corrective action, or from implementing compliance programs already in place, lest those communications are turned over to prosecutors in some future investigation. No court could require a company to waive its privileges as part of any sentence if the company were found guilty of an offense, yet such conditions have become standard fare in many DPAs and NPAs.

2. ***Cooperation with Prosecutors***.

Another objectionable feature of many DPAs is the open-ended and ill-defined requirement that the corporation fully cooperate with the prosecution and not protect allegedly culpable employees. In essence, the corporation has been effectively deputized to assist prosecutors in carrying out their investigative duties, which unfairly pits the employer against its employees. This DPA condition has forced companies to discharge or punish certain employees; to refrain from entering into joint defense agreements between the company and targeted employees; and to

deny or limit the amount of defense fees advanced for the employees' defense, even though payment of fees is either contractually required or routinely provided for, as a matter of company policy. Such restrictions have been applied not just to employees who have been indicted, but also to those whom the government merely suspects of wrongdoing.

For example, in August 2005, DOJ and KPMG entered into a DPA regarding tax shelter plans that it had offered to its clients but failed to register with the IRS. The DPA required that KPMG, among other things, shut down its tax practice; pay fines, restitution, and penalties totaling $456 million; and fully cooperate with the investigation. The prosecutor grilled the company before entering into the agreement about whether KPMG intended to advance defense fees of its partners, as its policy and practice had previously allowed. Although there was no express provision in the DPA precluding the company from paying the attorney's fees of its targeted partners, KPMG was pressured to curtail the payment of defense fees to its employees.

As Judge Lewis Kaplan concluded in the criminal case against the indicted employees, "KPMG refused to pay [the employees' defense fees] because the government had the proverbial gun to its head." *United States v. Stein*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006). The court subsequently dismissed the indictments against 13 of the 16 KPMG employees, finding that their constitutional rights to counsel and due process were violated by the government. 495 F. Supp. 2d 390 (S.D.N.Y. 2007). The *Stein* case is further discussed in Chapter Five.

3. ***Lack of Principled, Predictable, and Uniform Standards***.

DPAs and NPAs have also been roundly criticized because of the inconsistent and unpredictable manner in which the 93 U.S. Attorney's Offices determine whether to decline a prosecution, enter into a DPA, NPA, or file charges. There are no governing standards or guidance to U.S. Attorneys on selecting pretrial diversion. Moreover, as noted, even if pretrial diversion is chosen, the terms of a DPA or NPA can vary widely from case to case. Consider, for example, the following two seemingly similar cases that resulted in grossly disparate agreements in neighboring U.S. Attorney's Offices.

The U.S. Attorney's Office in the Southern District of New York in Manhattan investigated Shell Oil Company for securities fraud relating to the overstatement of its oil and gas reserves by almost 25 percent. In June 2005, the company entered into an NPA where there were no charges filed, no admission of guilt was extracted, and the company agreed to reasonable conditions to cooperate with prosecutors and comply with the law.

Across the river, the U.S. Attorney in Newark, New Jersey, Christopher Christie, investigated Bristol-Myers Squibb (BMS) for a similar securities charge of inflating its sales and earnings. Yet in June 2005, Christie required BMS to enter into a DPA with a long list of onerous terms in sharp contrast to the Shell Oil case. In addition to "codifying" the investigative and remedial steps that BMS had already begun to undertake when it discovered the problem, BMS was further required to admit guilt; cooperate fully with the government; accept an independent monitor for two years; pay a record $300 million in restitution (in addition to approximately $539 million BMS had already agreed to pay to its shareholders); appoint a non-executive Chairman of the Board and another Board member approved by Christie; and endow a chair in business ethics at Seton Hall University

Law School, the alma mater of the U.S. Attorney. *See also* 2006 DPA with Operations Management International, Inc. ($1 million to help endow Chair at U.S. Coast Guard Academy).

Thus, what appeared to be two similar securities violations involving two companies resulted in grossly disparate dispositions. As a pair of leading experts in this area have complained, "[c]ompanies [and their counsel] should not be required to guess blindly at the results of their cooperation in government-steered criminal investigations, nor should their fate rest in the random lot of what prosecutor or office they happen to draw." F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*," 93 VA. L. REV. IN BRIEF 107, 116 (June 18, 2007). To remedy this unpredictable practice, Messrs. Warin and Boutros have proposed, along the lines suggested in the Recommendations below, that DOJ establish clear and consistent guidance for all U.S. Attorneys and Main Justice to follow in deciding whether to use pretrial diversion and what the terms should be.

4. ***Lack of Judicial Review***.

As previously discussed, because of the imbalance in the bargaining positions between the government and the corporation, prosecutors are able to use economic duress to exact burdensome and unnecessary conditions in DPAs. To make matters worse, there is no effective judicial review to determine whether the conditions of a DPA or NPA were reasonable ones, were the result of economic duress, or whether DOJ's decision to unilaterally declare a breach and proceed with prosecution was justified.

Nevertheless, many corporations reluctantly prefer to operate under this sword of Damocles rather than risk the adverse collateral consequences to the company, its innocent employees, and its shareholders from a prosecution and possible conviction. If DOJ even threatens to revoke the agreement because it believes the terms of the DPA are not being fully complied with, the corporation will accede to the prosecutor's wishes and conform its response and behavior to forestall a revocation of the agreement, no matter how unreasonable DOJ's position is. For this reason, there has never been a revocation of a DPA or NPA, except in the Stolt-Nielsen case, because DOJ has the unreviewable power to impose its interpretation of the terms of the agreement. On the other hand, if DOJ were to decide to terminate a plea agreement for lack of compliance, a court would review DOJ's claim to determine if the alleged breach were intentional or material. Accordingly, the lack of judicial involvement over whether there was a breach is a serious problem that should be addressed.

5. ***Appointment and Powers of Monitors***.

Another growing criticism of DPAs is the manner of appointing monitors and the power they wield in overseeing the company's compliance with the terms of the DPA. The monitors are usually retired federal judges, former prosecutors, or other experienced persons that are selected by the U.S. Attorney, but appointed by the court.

Company executives and managers are required to file regular reports with the monitor on meeting compliance requirements. The monitor, however, does not report to the court but to the U.S. Attorney instead. Thus, the monitor, who may have little or no experience with the company's operation, has assumed, in effect, certain managerial powers over the company. This arrangement can interfere with corporate governance and can affect both

management's and shareholders' rights. For example, in September 2006, the monitor appointed to oversee the DPA with BMS, former federal judge Frederick B. Lacey, as well as U.S. Attorney Christopher Christie "recommended" to the Board of Directors to fire its CEO and General Counsel, which it did, even though the recommendation had nothing to do with the original securities violation or a finding that DPA had been violated.

The issue of how monitors are selected came to a head in September 2007 when Christie entered into four related DPAs and one NPA with five medical supply companies charged with anti-competitive practices. In a no-bid contract, the U.S. Attorney selected five monitors to be paid by each of the companies subject to the agreements. One of the monitors selected by Christie to oversee Zimmer Holdings DPA was his former boss, Attorney General John Ashcroft, and Ashcroft's consulting firm. This agreement provided that Zimmer would pay as much as $52 million in fees to Ashcroft's firm over a period of just 18 months. While Ashcroft may indeed be a suitable monitor, the selection drew widespread publicity and raised issues of cronyism because there is no judicial oversight in the appointment process.

Congressional Response. On December 17, 2007, U.S. Rep. Bill Pascrell, Jr. (D-NJ) proposed a Statement of Principles that DOJ should use in crafting DPAs. This was a direct response to the lack of standards governing the terms of DPAs and appointment of monitors, especially with respect to the DPAs by the U.S. Attorney for New Jersey with Bristol-Myers Squibb and the five medical supply companies. In brief, Congressman Pascrell's proposal would require written guidelines for DPAs; restore judicial oversight on the terms of the DPA and selection of the monitor; require the Executive Office of the United States Attorneys to screen and select monitors; and provide full disclosure of the terms of all DPAs.

On January 22, 2008, U.S. Rep. Frank Pallone, Jr. (D-NJ) went a step further and proposed legislation (H.R. 5086) that would require the Attorney General to issue guidelines with respect to DPAs, thereby limiting the discretion of prosecutors. In particular, the features of the bill would require (1) DOJ to consider the potential harm of a DPA on innocent employees and shareholders; (2) judicial approval of the DPA; (3) appointment of federal monitors by a federal judge or magistrate and payment of the monitor according to a pre-approved fee schedule; and (4) judicial determination as to whether any of the terms of the DPA have been breached. In addition, congressional requests have been made to DOJ for more details about the no-bid contracts for the monitors. While there are separation of powers problems with some of these suggestions, there is widespread criticism of DOJ's practice in this area.

Responding to some of this criticism, on March 7, 2008, DOJ issued new guidelines on the selection, scope of duties, and duration of monitors. Memorandum from Craig S. Morford, Acting Deputy Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008). Under this new policy, the Deputy Attorney General would approve the appointment of monitors. This change in policy came just a few days before congressional oversight hearings were held on DPAs by the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law (March 11, 2008).

Conclusion. Prosecutors have sharply increased the use of pretrial diversion over the last five years against corporations. Although

DPAs and NPAs have prevented negative externalities that would otherwise ensue from prosecution, the terms imposed have raised serious questions about overreaching by federal prosecutors, which imposes additional costs on the corporation, its employees, and others. While DOJ has long exercised its authority under RICO to have monitors or receivers appointed to oversee labor unions whose leaders have been found guilty of racketeering, no similar authority exists for DOJ's close supervision of corporations that have entered into DPAs.

As Professor Brandon Garrett of the University of Virginia Law School concluded from his review of NPAs and DPAs "[f]ederal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, [sought] to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined." Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 936 (2007). With recent congressional interest in this subject, and DOJ's new policy on the appointment of monitors, a long overdue examination of the DPA practice has only begun.

RECOMMENDATIONS

1. DOJ should establish an advisory committee under the Federal Advisory Committee Act (FACA) consisting of prosecutors, corporate and defense counsel, and other interested parties to develop a transparent and consistent policy setting forth clear and uniform guidance for the use of pretrial diversion that will be considered by all U.S. Attorney's Offices and Main Justice in determining whether they will decline prosecution, or propose either a DPA or NPA. The Deputy Attorney General should review proposed decisions to use pretrial diversion to ensure consistency and curtail abuse. Corporations and defense counsel need predictability and guidance in making major decisions that could have enormous impact on the company, its employees, shareholders, and the economy.

2. DOJ should not limit the use of NPAs and DPAs to corporations but should also use them for individuals accused of regulatory offenses if DOJ rejects the use of administrative and civil remedies, and does not decline prosecution altogether.

3. DOJ should develop guidance that directs prosecutors to exercise their charging discretion regarding corporations in the following manner:

   A. Decline prosecution altogether if civil or administrative remedies are sufficient to remedy the violation, provide restitution, and deter future wrongdoing.

   B. If wrongdoing exists at the upper level management, but is isolated, an NPA should be used for the corporation when non-criminal remedies are not appropriate, but only if the company cooperates.

   C. If wrongdoing was widespread throughout the company, and remedial measures are likely to be effective, a DPA should be offered to the company with appropriate conditions that do not unduly interfere with corporate governance.

   D. If wrongdoing is widespread and the corporation is a repeat offender, only then should criminal prosecution be considered.

4. DPAs and NPAs should provide for pre-indictment review if DOJ claims that the corporation breached any of the terms or conditions.

REFERENCE MATERIALS

Note: A listing of WLF publications relevant to this chapter can be found in the Appendix.

Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007).

LAWRENCE D. FINDER & RYAN D. MCCONNELL, AM. BAR ASS'N, WHILE COLLAR CONFERENCE, ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE-2007 (March 2008).

Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies,* 51 ST. LOUIS L.J. 1 (2006).

Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 107 (June 18, 2007).

F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121 (1997).

Candace M. Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through The Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007).

Websites:

HHS Listing of Corporate Integrity Agreements, *http://oighhs.gov/fraud/cia/index.*

Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines? Before the House Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary (March 11, 2008) (written testimony available at *http://judiciary. house.gov/oversight.aspx?ID=425.).*

TIMELINE: DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

1974:	Speedy Trial Act of 1974 provides for deferred prosecution agreements, approved by the court. 18 U.S.C. § 3161(h)(2).
1986:	Department of Defense (DOD) develops Corporation Integrity Agreements (CIAs) that provide for leniency for companies that self-report violations.
May 1992:	First DOJ Non-Prosecution Agreement (NPA) with a corporation entered into with Salomon Brothers.
Aug. 1993:	DOJ's Antitrust Division develops Corporate Leniency Policy providing immunity from prosecution if company is first to report an antitrust violation.
Dec. 1993:	First Deferred Prosecution Agreement (DPA) with a corporation entered into with Armour of America.
1996:	Health and Human Services (HHS) develops CIAs.
1997:	DOJ establishes general guidance for U.S. Attorneys using pretrial diversion, but guidance not geared for corporations.
Mar. 2002:	Arthur Andersen indicted in Enron scandal.
July 2002:	Corporate Fraud Task Force established by President Bush.
1992-2002:	18 NPAs and DPAs were made with DOJ over 10-year period.
2003-2007:	85 NPAs and DPAs were made with DOJ over 5-year period.
Jan. 2003:	Memorandum of Larry Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations.*
Jan. 2003:	Stolt-Nielsen, S.A. receives immunity agreement from DOJ's Antitrust Division.
Mar. 2004:	DOJ revokes Stolt-Nielsen immunity agreement; Stolt-Nielsen sues DOJ.
June 2005:	Shell Oil NPA for securities violation; mild conditions imposed by U.S. Attorney for the Southern District of New York. However, Bristol-Myers Squibb DPA for similar violation imposed by U.S. Attorney for New Jersey results in large fines and strict conditions, including the endowment of a chair in business ethics at Seton Hall University Law School, the alma mater of the U.S. Attorney.

Aug. 2005: KPMG DPA requires penalties of $456 million and full cooperation; KPMG limits advancement of defense fees to targeted employees.

Mar. 2006: Third Circuit rules that Stolt-Nielsen cannot seek pre-indictment review of immunity termination by DOJ. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d. Cir. 2006).

June 2006: Judge Kaplan rebukes DOJ for pressuring KPMG to withhold defense fees to targeted partners. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

July 2006: Operations Management International, Inc. DPA requires $1 million to help endow a Chair of Environmental Studies at the U.S. Coast Guard Academy.

Sept. 2006: The monitor overseeing the DPA with BMS and the New Jersey U.S. Attorney recommends that BMS fire its CEO and General Counsel, which it did, even though there was no finding of breach of the 2005 DPA.

Dec. 2006: McNulty Memo issued, curbing prosecutors' requests for waiver of privileges and withholding of defense fees to targeted employees.

Mar. 2007: DOJ resolves criminal indictments against Reliant Energy Services, Inc. and four executives with DPAs due to weakness of government's charges that the company and executives were manipulating California's energy market.

Sept. 2007: U.S. Attorney for New Jersey enters into separate DPAs with five medical supply companies, including Zimmer Holdings, and in a no-bid contract, appoints former Attorney General Ashcroft as a monitor who could receive up to $52 million in fees.

Nov. 2007: Court dismisses indictment against Stolt-Nielsen, ruling that company complied with terms of the NPA. *United States v. Stolt-Nielsen*, S.A., 524 F. Supp. 2d 609 (E.D. Pa. 2007). DOJ declines to appeal.

Dec. 2007: U.S. Rep. Bill Pascrell, Jr. (D-NJ) proposes written guidelines by DOJ for entering into DPAs and judicial oversight over appointment of monitors.

Jan. 2008: U.S. Rep. Frank Pallone, Jr. (D-NJ) introduces legislation (H.R. 5086) that would require the Attorney General to issue guidelines with respect to DPAs and judicial oversight over compliance with the DPA and appointment of monitors.

Mar. 2008: DOJ issues new guidelines regarding the selection and approval of monitors by the Deputy Attorney General. House Judiciary Subcommittee holds hearings on the issue.