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2011 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

To Our Clients and Friends:

During the past decade, the U.S. Department of Justice ("DOJ") has increasingly relied on Deferred Prosecution Agreements ("DPAs") and Non-Prosecution Agreements ("NPAs") to resolve allegations of corporate criminal misconduct. Indeed, Gibson Dunn negotiated a DPA for a major retailer more than a decade ago. DPAs and NPAs (collectively "settlement agreements" or "agreements") occupy a middle ground between a guilty plea that results in a company's criminal conviction, and a declination that leaves the matter to a civil or regulatory resolution. By entering into such an agreement, a company agrees to prevent further violations of the law and often to undertake specific compliance and cooperation obligations in exchange for DOJ's agreement to forgo indictment and prosecution. DPAs and NPAs are similar in form and substance in most respects except one. With DPAs, DOJ typically files criminal charges in federal court, while with NPAs, nothing is filed with the court as long as the company complies with the terms of the settlement agreement.[1] In 2010 and 2011, the U.S. Securities and Exchange Commission ("SEC") also began using DPAs and NPA to resolve civil corporate misconduct allegations in lieu of its traditional settlement methods.[2]

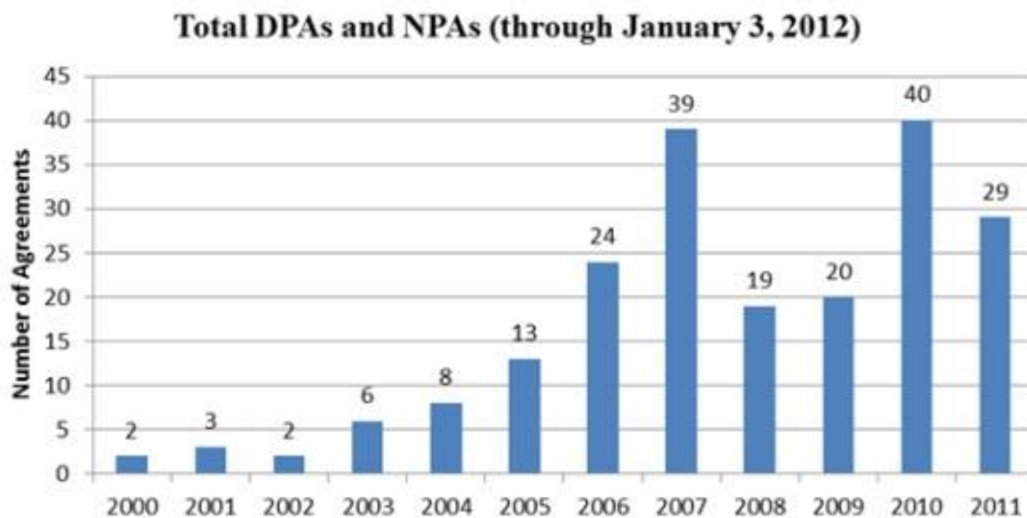
The advantages of DPAs and NPAs are that they enable prosecutors to obtain substantial fines and impose meaningful remediation and compliance conditions on companies that engage in wrongdoing, while allowing the companies to continue operating without the possible negative collateral consequences of prosecution--e.g., suspension or debarment from contracting with government entities and/or international development organizations such as the World Bank, liquidation of the company, loss of jobs and benefits for employees not involved in the misconduct, and loss of beneficial services in the marketplace.

Despite these potential benefits, the increased use of settlement agreements remains subject to criticism. From a company's perspective, the threat of indictment can force a company to agree to a DPA or NPA based on the government's perception of alleged misconduct even under novel, expansive, or unlitigated theories of liability. In addition to substantial financial penalties, wholesale management changes and ongoing compliance and cooperation obligations accompanying these agreements can place heavy and commercially disadvantageous burdens on otherwise law-abiding companies. Frequently, the allegations of misconduct arise from a small number of individuals within the company's larger ranks. At the same time, some argue, mistakenly in our view, that DPAs and NPAs mask more serious criminal behavior.

Although DPAs and NPAs have substantial long-term consequences for corporations, as we discuss below, these agreements are a central tool in resolving allegations of corporate misconduct. DOJ's increased use of these agreements, and their expansion to other agencies such as the SEC, means that companies involved in government investigations should carefully weigh the costs and benefits of entering into corporate settlement agreements.

DPAs and NPAs in 2011

As shown in the chart below,[3] of the publicly available agreements from 2011, DOJ and the SEC together entered into 29 agreements reflecting 8 general violation types. While 29 agreements is a decrease from the record set in 2010, it reflects a continuing increase in the baseline average number of agreements in recent years. More tangibly, the dollar value of agreements reached in 2011 is substantial, with companies paying approximately $3.01 billion in fines, penalties, and related civil settlements through a combination of DPAs and NPAs and related civil settlements negotiated in coordination with the DOJ and/or SEC resolutions.



Combining 2010 and 2011 settlement agreements, the total amount of corporate payouts is a jaw-dropping $7.6 billion. The sheer dollar value of resolving allegations of misconduct through DPAs and NPAs then is the banner headline for 2010 and 2011. In those years combined, at least 5 settlements equaled or topped $500 million, and a total of 13 settlements topped $200 million. Key drivers of these enormous settlement amounts include aggressive prosecution of Food, Drug, and Cosmetic Act ("FDCA") violations by the U.S. Attorney for the District of Massachusetts and other offices as part of DOJ's Health Care Fraud Prevention and Enforcement Action Team ("HEAT") initiative; DOJ's Antitrust Division game-changing use of NPAs to resolve bid-rigging violations in the municipal bond market; and record-breaking Foreign Corrupt Practices Act ("FCPA") settlements, with 8 of the top 10 FCPA settlements in dollar terms (most involving DPAs or NPAs) coming in 2010 and 2011.

Health Care Settlements

While alleged FDCA violations in 2010 and 2011 comprise about 10% of the total number of agreements, health care violations have emerged as the largest dollar value settlements in recent years. In 2011, pharmaceutical giant Merck & Co., Inc. settled criminal and civil charges with the U.S. Attorney for the District of Massachusetts relating to its promotion and marketing of the painkiller Vioxx, which was withdrawn from the marketplace in September 2004. Marking an end to this long-running investigation, Merck agreed to pay a criminal fine of more than $321 million and its

subsidiary, Merck, Sharp & Dohme, agreed to plead guilty to a misdemeanor criminal charge that the company introduced a misbranded drug into interstate commerce. The company also agreed to settle a related civil case for $628 million and enter into a five-year Corporate Integrity Agreement with the U.S. Department of Health and Human Services that, among other things, requires senior management to complete annual compliance certifications and obligates Merck to post information on its website about its promotional payments to physicians.

Merck's settlement documents, which reflect the now-standard process for resolving FDCA violations in the District of Massachusetts, included an NPA, called a "side letter agreement," in which the U.S. Attorney's Office agrees not to prosecute Merck for any other violations related to the company's promotion of Vioxx. The U.S. Attorney's NPA carves out certain crimes and entities from the settlement, including FCPA charges by DOJ's Fraud Section, tax charges by DOJ's Tax Division or the Internal Revenue Service, or prosecution by any state or local enforcement authorities. In entering into this NPA, the U.S. Attorney's Office secured a "Global Side Letter Agreement" for Merck from the DOJ Criminal Division, confirming the somewhat less than global nature of the NPA. NPAs arising out of the Massachusetts U.S. Attorney's Office are a local breed tailored for the many FDCA violations prosecuted by that Office and differ substantially from similar agreements with other offices; most notably every "side letter agreement" NPA is preceded by a guilty plea from a subsidiary. The value of these NPAs to the parent company, however, cannot be understated given the risk of debarment from participating in state and federal Medicare and Medicaid programs that companies can face if convicted of an FDCA violation.[4]

The U.S. Attorney's Office for the District of Massachusetts has replicated these types of blockbuster settlements during the last several years. In 2010, that Office entered into similar prosecution deals, including guilty pleas for subsidiaries and NPAs for the parent corporation, with a number of other pharmaceutical companies for off-label marketing (Elan Corp., Forest Laboratories, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc.) for a total of nearly $600 million in fines and penalties and related civil settlements as well as the prosecution of GlaxoSmithKline for adulterated drugs resulting in a settlement worth $750 million. In 2009, Pfizer Inc. paid $2.3 billion to settle claims with that Office that the company promoted Bextra and several other drugs for unapproved uses and dosages and received a similar non-prosecution side letter agreement. And the trend appears set to continue. In November 2011, GlaxoSmithKline reported that it had agreed to pay approximately $3 billion to settle civil and criminal investigations into its sales practices for numerous drugs by various DOJ entities, including the U.S. Attorney's Office for the District of Massachusetts.[5] Although no settlement documents have yet been released, this announcement continues a trend in recent years of record settlements being reached with subsidiaries under the umbrella of NPAs for a corporate parent--thereby staving off the worst consequences of prosecution--and yielding approximately $6 billion in fines and penalties.

In another health care-related settlement, Google Inc. entered into an NPA with the U.S. Attorney for the District of Rhode Island and agreed to forfeit $500 million for allowing online Canadian pharmacies to place advertisements through its AdWords program, thereby targeting consumers in the United States. According to the agreement, the result of this advertising was the unlawful importation of controlled and non-controlled prescription drugs into the United States. In its NPA, Google agreed to augment its compliance and ethics program and adopt additional safeguards to identify and screen

out foreign pharmacies from placing advertisements through the company and self-report on its compliance protocols quarterly for the duration of the two-year agreement.

Proliferation of Entities Using Settlement Agreements

Between 2007 and 2010, DOJ Fraud Section agreements settling FCPA charges constituted the bulk of the agreements, representing between approximately 21% and 38% of the agreements each year. In 2011, the trend continued with DOJ Fraud inking approximately 41% of the year's total settlement agreements for FCPA violations. Beyond DOJ Fraud, however, other entities are increasingly using settlement agreements, particularly NPAs, to resolve investigations of corporate misconduct. As noted in our 2010 year-end and 2011 mid-year reviews, the SEC's Division of Enforcement and DOJ's Antitrust Division have begun to use settlement agreements on a systematic basis to resolve such matters, albeit with starkly different approaches to fines.

A year after entering into its first-ever NPA, the SEC entered into its second and third NPAs in December 2011 to resolve securities fraud allegations against the government-owned housing agencies Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Reinforcing a trend noted in our past updates, the SEC's NPAs appear to be vehicles to formally secure extensive cooperation from companies without unduly penalizing its stakeholders for conduct that is attributable to individual employees. All three of the SEC's NPAs resolved alleged misconduct without *any* fines and accompanied the SEC's announcement of enforcement proceedings against senior company executives. In its NPAs with the housing agencies, the SEC noted that it "considered the unique circumstances presented by the companies' current status, including the financial support provided to the companies by the U.S. Treasury [representing an ownership stake by the federal government of up to 79.9%], the role of the Federal Housing Finance Agency as conservator of each company, and the costs that may be imposed on U.S. taxpayers" had the entities been required to pay a fine.[6]

After entering into just four NPAs in the mid-2000s, in 2011 DOJ's Antitrust Division dramatically increased the usage of these agreements entering into four NPAs as part of a five-year investigation into alleged bid rigging in the municipal bond market. Since our mid-year update, Wachovia Bank N.A. and GE Funding Capital Market Services Inc. entered into NPAs with the Antitrust Division and agreed to pay approximately $148 million (excluding a related civil settlement) and $70.3 million, respectively, to the Division and the SEC. The Antitrust Division, in conjunction with the SEC, previously obtained approximately $525 million in settlements from JPMorgan Chase and UBS through NPAs in 2011 and from Bank of America through the Division's Corporate Leniency Program in late 2010. To date in this investigation, the Antitrust Division has criminally charged at least 18 individuals, 10 of whom have pleaded guilty, and the SEC has settled charges with a handful of individuals. Although the Antitrust Division's prior use of NPAs was rare and lacked any clear policy objective, the proliferation of agreements this year likely reflects the Antitrust Division's recognition of the serious collateral consequences that result from filing criminal charges, especially charges against a federally licensed and chartered bank.

Demand for Independent Compliance Monitors Differs Dramatically by Jurisdiction

Another noteworthy trend is the significant reduction in the number of independent compliance monitors required in 2011. This year, only two companies were required to retain independent compliance monitors as a condition of their settlement agreements in contrast to at least nine in 2010. JGC Corporation, one of the only foreign companies to settle FCPA allegations this year and the one with the largest financial penalty at $218.8 million, was required to hire a compliance monitor. Maxim Healthcare Services, Inc.'s agreement with the U.S. Attorney's Office for the District of New Jersey also required a monitor, which is unsurprising given that every DPA or NPA ever entered into by that Office has required a monitor.

A corollary trend is the increase in self-monitoring and self-reporting requirements--most notably in FCPA settlements, but also in a variety of other settlements. For example, Google's NPA required it to report to the Food and Drug Administration on its compliance efforts on a quarterly basis for two years. Such monitoring and reporting requirements are almost prerequisites for health care settlements under the FDCA, which commonly have Corporate Integrity Agreements ("CIAs") with the Office of Inspector General of the U.S. Department of Health and Human Services ("HHS") that also contain multiyear independent review requirements. Historically, CIAs have been less controversial than DOJ-mandated monitors because of HHS's mission, and because they attended most FDCA settlements and their standards were generally consistent between agreements. Similarly, periodic self-certification by companies of compliance milestones is now a regular feature of FCPA settlements.

Settlement Agreements Carry Continuing Obligations and Potential Consequences on Related Civil Litigation

Despite the understandable tendency to view entry into a DPA or NPA as the conclusion of a government investigation, signing an agreement does not permit a company to put the investigation behind it. To the contrary, entry into an agreement is likely to involve significant long-term obligations that carry material costs and risks for the company for several years.

Accordingly, companies should view settlement agreements as significant, but preliminary, steps down a multi-year path of compliance and remediation. Since 2000, the average length of DPAs and NPAs is approximately 28 months with the longest agreement at 60 months and the shortest at 6 months.[7] In 2011, prosecutors extended the duration of DPAs of two companies. Although this is a relatively infrequent occurrence, as discussed below, in at least one instance the company replaced the CEO and several other top executives at the behest of the independent compliance monitor and the U.S. Attorney's Office that prosecuted the case.

Additionally, settlement agreements often contain statements of fact, which companies usually agree they will not contradict as part of the settlement. These factual stipulations can lead to collateral issues in related litigation, providing a roadmap and potential admissions for civil suits. Companies hoping to achieve a comprehensive settlement may consider including non-governmental stakeholders to decrease the risk of successive civil litigation. For example, faced with FCPA investigations by DOJ and the SEC and several related shareholder derivative law suits, SciClone Pharmaceuticals, Inc. took the novel approach of settling the shareholder suits by agreeing to improve its accounting and internal

controls to better comply with the FCPA in the future, thereby resolving a potential lingering issue while simultaneously improving its negotiating position with the prosecutors. Accordingly, a company entering into a settlement agreement must be alert to how an agreement can affect related litigation and ensure the agreement is part of a comprehensive litigation strategy.

New Jersey's U.S. Attorney's Office Extends Two DPAs

The U.S. Attorney's Office for the District of New Jersey has proven itself to be the most robust and active enforcer of DPAs. As discussed in our 2011 mid-year update, that Office has declared two companies in breach of their agreements in recent years, including Wright Medical Group, and the Office recently extended the term of an existing DPA with a third company, Exactech, Inc.

Exactech, Inc.

Without any explanation or allegations of breach, on December 7, 2011, Exactech announced that it had voluntarily extended by three months the term of its one-year DPA at the request of the U.S. Attorney's Office for the District of New Jersey "to allow the monitor additional time to further test the implementation of compliance systems."[8] Unlike the case of Wright Medical, discussed below, the Office has not alleged any breach by Exactech of any terms of the DPA, and, other than extending its duration, none of the DPA's other terms were amended.

Wright Medical Group

The continuing saga of artificial-joint maker Wright Medical Group Inc. highlights the very real continuing obligations that a DPA and federal monitorship can entail. In September 2010, Wright Medical entered into a one-year DPA with the U.S. Attorney's Office for the District of New Jersey to resolve allegations of conspiracy to violate the Federal Anti-Kickback statute by using consulting agreements to pay kickbacks to doctors to induce them to use its hip and knee devices. Only eight months later, the company announced that the Office had accused the company of "knowingly and willfully committ[ing] at least two breaches of material provisions of [its] DPA," based on an internal investigation into wrongdoing that revealed "credible evidence of serious wrongdoing," the results of which the company was obligated to report to its independent monitor and the U.S. Attorney. The original DPA required the company to report to its independent monitor and the U.S. Attorney "any credible evidence" of violations of any criminal statute by the company, regardless of whether any such violations were material. Such a broad requirement exacerbates the risk of a company running afoul of regulators and places it at a substantial competitive disadvantage as it bears an obligatory reporting duty not shared by its competitors.

Following the allegation of a breach, Wright Medical conducted a reshuffling of its management, culminating in a one-year extension of Wright's DPA and the associated federal compliance monitor, even though the terms of the original DPA only provided for a maximum extension of six months. Many senior executives resigned, including Wright's CEO; General Counsel; Chief Compliance Officer; head of commercial operations for Europe, Middle East, and Africa; and Vice President of Clinical and Regulatory Affairs. Furthermore, Wright terminated its Chief Technology Officer for "failing to exhibit appropriate regard for the Company's ongoing compliance program."[9]

Company statements underscore the burden that a federal monitorship and related DPA obligations can impose on a company, particularly costs associated with bringing a company's sales force into compliance. In its November 2010 earnings release, Wright Medical reported that internal compliance changes necessary to comply with the terms of the DPA were affecting sales: "U.S. sales were negatively affected by distributor transitions and challenges associated with implementing enhancements to the Company's compliance processes."[10] Compounding the company's business disadvantages, company management explained that it cannot pursue sales as aggressively as it had in the past, which was tamping down earnings. The company's CEO said recently, "we have to be very careful how we operate and we have to be on the same page as our distributors and agents. And right now we think we are. But we have a vast network out there and we have to constantly keep an eye on that because we're in the situation with our DPA that we have to really be very, very careful."[11]

And these challenges had real costs to Wright Medical's bottom line. In one quarter, Wright spent $5 million (4.2% of net sales) associated with DPA compliance and the monitorship, up from a quarterly average of about $2.5 million, and $1.8 million of expenses associated with settlement of certain employment matters and the hiring of a new CEO.[12] Stated differently, the company attributed some part of a 1.7% increase in operating expense to "increased costs associated with our global corporate compliance program."[13] Due to the company's reported breach, these post-settlement expenses have doubled the length of the term of its federal compliance monitor and the company has incurred DPA-related costs nearly equal to that of the original penalty amount of $7.9 million.

Despite its internal management and compliance changes and related expenses, Wright Medical remains very much at the mercy of federal authorities. The U.S. Attorney's Office's statement on the DPA extension underscores the potential for a federal monitorship to be a powerful tool in pushing corporate reform. First Assistant U.S. Attorney J. Gilmore Childers explained, "[a]s a direct result of the federal monitorship, Wright has made significant and wide-ranging changes in corporate culture and tone at the top. Our Office is pleased with the extensive cooperation from the newly appointed interim senior management team. Today's extension will allow Wright to make the transition from interim to permanent senior management while still under the terms of the DPA and the surveillance of the federal monitor."[14] Clearly, the U.S. Attorney's Office is playing the role of kingmaker within the company, influencing the change in management and then underscoring the interim nature of the current management team.

The breadth of a federal monitorship is further captured by a recent statement by the company's newly appointed CEO, Robert Palmisano. Mr. Palmisano said that when he arrived at the company in September 2011,

> [I]t was surprising for me coming into the Company under the DPA as to everything that meant. . . . I certainly did understand. I did my research and I understood it to a certain extent, but it really is a process that kind of is omnipresent within the Company and everybody has to be on it, paying attention to it all the time. And we are.[15]

The lesson from Wright Medical's experience is that a company must view a DPA as the first step down the road toward compliance and must have a detailed plan in place to mitigate the significant risks[16] and costs associated with allegations of recidivism.

Entry into Settlement Agreements May Have Long-Term Consequences on Related Civil Litigation

An equally important consideration for a company considering a DPA or NPA is how any stipulations or admissions in those agreements can be used against the company in other forums by competitors, shareholders, state or local enforcement authorities, or foreign regulators. Little case law presently exists governing whether such agreements are admissible in collateral civil litigation.

Under established law and Federal Rule of Evidence 408, statements made during settlement discussions generally cannot be used as admissions of proof of liability. Consistent with that approach, several federal courts have ruled that settlement agreements and consent decrees are inadmissible to prove the underlying facts of liability.[17] Further, civil settlements with the SEC routinely contain language that the defendant "neither admits nor denies" the Commission's charges. In a recent opinion regarding these neither-admit-nor-deny settlements, U.S. District Judge Jed Rakoff explained, "As a matter of law, an allegation that is neither admitted nor denied is simply that, an allegation. It has no evidentiary value and no collateral estoppel effect."[18] This means that, in the Second Circuit at least, "a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues . . . can not be used as evidence in subsequent litigation."[19]

The ability of an unrelated party to use in collateral litigation the statements of fact that typically accompany DPAs and NPAs is less clear. DPAs and NPAs often limit defendants' abilities to deny or contradict the allegations set forth in the agreement, including the statements of fact. For instance, agreements and statements of fact typically note that the defendant company accepts responsibility for the factual allegations and their employees' conduct. Further, companies are frequently, though not universally, prohibited from making any statements that contradict the allegations contained in the statement of facts or risk breaching the agreement; occasionally the agreements expressly permit a company to take "good faith positions" in civil litigation involving other parties.

Regardless of the admissibility of the allegations contained in a given DPA, the prohibition against contradictory statements can put corporate executives in a difficult position. For example, if a corporate executive is being deposed in a civil matter related to a matter that was the subject of a DPA or NPA, the opposing attorney need only ask the executive if the allegations contained in the statement of facts are completely true. The executive is then faced with the unenviable choice of denying the statement of facts and risking a breach of the agreement, or admitting to them and advancing the collateral civil suit. Google's Executive Chairman Eric Schmidt faced precisely this dilemma during a September 2011 hearing before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights when Mr. Schmidt was asked about the company's NPA. Mr. Schmidt equivocated, stating that the terms of the NPA prohibited him from discussing the case, a statement that was inaccurate and that Mr. Schmidt later corrected in a supplemental written response.[20]

In an opinion earlier this year, a lower state court in New York held that the factual stipulations in an NPA between a construction contractor and the District Attorney's Office resolving reckless endangerment charges stemming from a fire in Manhattan could not be used as admissions in a civil suit by the firefighters against the contractor.[21] In seeking admission, the firefighters argued that the defendant acknowledged responsibility for its actions, took various safety initiatives, and agreed not to

"challenge the factual recitation of its conduct and that of its employees as set forth in the [statement of facts]." The state court disagreed and concluded that the NPA and any statements contained within it were inadmissible "notwithstanding their culpable nature" because they "do not constitute admissions." Importantly, the NPA expressly permitted the defendant to make any public statement contradicting, excusing, or justifying the statement of facts "in connection with testimony or argument in any civil litigation or proceeding" related to the fire, and it "explicitly exclude[d] [the defendant's] testimonial obligations or its right to take legal or factual positions in litigation or other legal and/or administrative proceedings to which the [New York County District Attorney's Office] is not a party." Accordingly, the state court held that the "factual statements made by [the defendant] in the [NPA] do not constitute admissions binding on [the contractor] outside of the criminal proceeding." Significantly, the language in this particular NPA expressly permitting the defendant to contradict the statement of facts in civil litigation is not normally included in DPAs or NPAs with DOJ, but some jurisdictions provide more leeway than others.

As the above litigation makes clear, companies contemplating entering into DPAs or NPAs need to negotiate the language of any agreements carefully to decrease the difficulties that agreement might cause in related litigation.

U.K. Law Enforcement Authorities Consider Adopting Corporate DPAs to Resolve Corporate Criminal Investigations

The March 2010 sentencing of Innospec, Ltd brought into focus the status of corporate criminal prosecutions in the United Kingdom. Innospec had agreed to settle alleged FCPA and trade sanctions violations with U.S. and U.K. enforcement authorities--one of the first such coordinated global settlements with the U.K.'s Serious Fraud Office ("SFO")--for a fixed sum of $40.2 million, including $12.7 million to be paid to the SFO. But the prospect of future trans-Atlantic coordination dimmed when the British judge nearly rejected the settlement agreement as contrary to English law. Lord Justice Thomas, Britain's second-ranking criminal judge, explained that under English law, "The director of the SFO had no power to enter [a settlement agreement]" that prescribes a particular penalty and that the settlement, as far as it related to a specific fine amount, had "no effect" in English courts. He also remarked that the $12.7 million penalty paid to the SFO was "wholly inadequate" and should have been measured "in tens of millions." Nevertheless, Lord Justice Thomas approved the settlement "with considerable reluctance" because it was unfair to undermine this global settlement at this late stage, but warned that "no such arrangement should be made again." Going forward, Lord Justice Thomas indicated that English courts should sentence in accordance with English law--and disregard any pre-negotiated agreements in as far as they specify a penalty.[22]

In response, U.K. law enforcement officials, including the Director of the SFO, Richard Alderman, and the Solicitor-General, Edward Garnier QC, begun exploring alternatives to resolve corporate criminal investigations, including DPAs and, to a lesser extent, NPAs, in advance of seeking new legislation from Parliament. Both men have made comments in the last several months that suggest that DPAs will be adopted, in some form, in the U.K. in the coming years. At an October 17, 2011 event in London to discuss DPAs in the U.K., Mr. Alderman explained, "Tools such as deferred prosecution and early judicial involvement will allow us to work more efficiently and cost-effectively" and that the SFO is "in the process of convincing the government that these changes are needed, particularly with

regards to the Bribery Act implementation." Mr. Garnier said recently that "DPAs [in the U.K.] will be part of the criminal justice system and will be policed and controlled by the judiciary."[23]

At the October 17th event, the Solicitor-General stated his view that the United Kingdom's current system for resolving corporate criminal matters is "not working" because it is too slow and costly. Mr. Garnier further suggested that DPAs could prevent otherwise respectable and profitable businesses and their employees from being subjected to collateral consequences of prosecution. Accordingly he noted that DPAs would now be considered in all manner of corporate offenses, although traditional prosecutions of companies would still continue. Similarly, Director Alderman explained that he would encourage the SFO to begin negotiating DPAs at the early stages of investigations, to maximize the cost-savings and efficiency gained through DPAs, even before the evidence is available to conduct a formal assessment in advance of prosecution.

Conclusion

Seldom used a decade ago, DPAs and NPAs today are a leading instrument in the government's arsenal of fighting corporate crime. Although these agreements can help a company stave off some of the worst consequences of a criminal indictment or enforcement action, they are not quick-fix solutions. To the contrary, in addition to a hefty financial penalty, DPAs and NPAs often require extensive compliance and cooperation obligations and result in significant future costs and risks. Given that reality, a company facing a government investigation needs to craft a comprehensive strategy for achieving a settlement agreement on acceptable terms while educating its senior leadership on the potential long-term consequences of entering into a DPA or NPA arrangement.

Appendix A

The chart below summarizes the agreements that DOJ and the SEC entered in 2011 and additional agreements identified from 2010. The complete text of each agreement is hyperlinked in the chart.

2011 Deferred and Non-Prosecution Agreements							
Company	**Agency**	**Violation**	**Type**	**Penalty**	**Monitor**	**Voluntary Disclosure**	**Term**
Alpha Natural Resources Inc.	U.S. Attorney, Southern District of West Virginia	Mine Safety & Health Act Violations	NPA	$209,308,191	Self-Reporting	No	24 months
Aon Corporation	DOJ Fraud Section	FCPA	NPA	$16,309,020	No	Yes	24 months
Armor Holdings	DOJ Fraud	FCPA	NPA	$15,980,744	No	Yes	24

Company	Agency	Violation	Type	Penalty	Monitor	Voluntary Disclosure	Term
Inc.	Section						months
Baystar Capital Management, LLC (and Lawrence Goldfarb)	U.S. Attorney, Northern District of California	Fraud	DPA	$14,209,787	No	No	36 months
Bixby Energy Systems, Inc.	U.S. Attorney, District of Minnesota	Securities Fraud	DPA	$0	No	Yes	24 months
CommunityOne Bank, N.A.	DOJ Asset Forfeiture and Money Laundering Section; U.S. Attorney, Western District of North Carolina	Anti-Money Laundering Compliance	DPA	$400,000	No	No	24 months
Comverse Technology, Inc.	DOJ Fraud Section; U.S. Attorney, Eastern District of New York	FCPA	NPA	$2,808,501	No	Yes	24 months
CSK Auto Corporation	DOJ Fraud Section	Accounting Fraud	NPA	$20,900,000	No	No	24 months
Deutsche Telekom AG	DOJ Fraud Section; U.S. Attorney,	FCPA	NPA	$4,360,000	No	Yes	24 months

Company	Agency	Violation	Type	Penalty	Monitor	Voluntary Disclosure	Term
	Eastern District of Virginia						
Federal Home Loan Mortgage Corporation (Freddie Mac)	SEC	Securities Fraud	NPA	$0	No	No	No term
Federal National Mortgage Association (Fannie Mae)	SEC	Securities Fraud	NPA	$0	No	No	No term
GE Funding Capital Market Services, Inc.	DOJ, Antitrust Division	Antitrust	NPA	$70,251,762	No	No	12 months
Google Inc.	U.S. Attorney, District of Rhode Island	Pharma-ceutical Advertising	DPA	$500,000,000	Self-reporting	No	24 months
Islamic Investment Company of the Gulf (Bahamas) Limited	DOJ, Tax Division; U.S. Attorney, District of Massachusetts	Tax Evasion	NPA	$27,045,193	No	No	18 months
JGC Corp.	DOJ Fraud Section	FCPA	DPA	$218,800,000	Yes	No	24 months
Johnson & Johnson	DOJ Fraud Section	FCPA	DPA	$70,066,316	Self-Reporting	Yes	36 months
JPMorgan Chase & Co.	DOJ, Antitrust Division	Antitrust	NPA	$228,000,000	No	No	24 months

Company	Agency	Violation	Type	Penalty	Monitor	Voluntary Disclosure	Term
Magyar Telekom Plc.	DOJ Fraud Section; U.S. Attorney, Eastern District of Virginia	FCPA	DPA	$95,811,491	Self-reporting	Yes	24 months
Maxim Healthcare Services, Inc.	U.S. Attorney, District of New Jersey	Health Care Fraud	DPA	$151,423,599	Yes	No	24 months
Maxwell Technologies, Inc.	DOJ Fraud Section; U.S. Attorney, Southern District of California	FCPA	DPA	$14,350,890	Self-Reporting	Yes	36 months
Merck & Co., Inc.	U.S. Attorney, District of Massachusetts	Drug Misbranding	NPA	$950,000,000	Yes[a]	No	60 months[b]
Ocean Bank	U.S. Attorney, Southern District of Florida	Anti-Money Laundering Compliance	DPA	$10,988,136	No	No	24 months
Skanska USA Civil Northeast, Inc.	U.S. Attorney, Southern District of New York	False Claims Act	NPA	$19,600,000	No	No	24 months
Tamimi Global	U.S.	Kickbacks	DPA	$13,000,000	Self-	No	18

Company	Agency	Violation	Type	Penalty	Monitor	Voluntary Disclosure	Term
Co., Ltd.	Attorney, Central District of Illinois	& Gratuities			Reporting		months
Tenaris, S.A.	SEC	FCPA	DPA	$5,428,338	No	Yes	24 months
Tenaris, S.A.	DOJ Fraud Section	FCPA	NPA	$3,500,000	No	Yes	24 months
Tyson Foods, Inc.	DOJ Fraud Section	FCPA	DPA	$5,214,477	Self-Reporting	Yes	24 months
UBS AG	DOJ, Antitrust Division	Antitrust	NPA	$160,300,000	No	No	24 months
Wachovia Bank, N.A.	DOJ, Antitrust Division	Antitrust	NPA	$185,078,591[c]	No	No	12 months
Additional Agreements from 2010*							
Alcatel Lucent, S.A.	DOJ Fraud Section	FCPA	DPA	$137,372,000	Yes	No	36 months
BL Trading, LLC	U.S. Attorney, District of Massachusetts	Fraud	DPA	$182,405	No	No	24 months
Elan Corporation Plc.	U.S. Attorney, District of Massachusetts	Drug Misbranding	NPA	$203,540,783	Yes[a]	No	60 months[b]
Forest Laboratories,	U.S. Attorney,	Drug Misbranding	NPA	$313,158,058	Yes[a]	No	60 months[b]

Company	Agency	Violation	Type	Penalty	Monitor	Voluntary Disclosure	Term
Inc.	District of Massachusetts						
GlaxoSmithKline LLC	U.S. Attorney, District of Massachusetts	Adulterated Drugs	NPA	$750,000,000	No	No	No term
Ortho-McNeil-Janssen Pharmaceuticals, Inc.	U.S. Attorney, District of Massachusetts	Drug Misbranding	NPA	$81,513,407	Yes[a]	No	60 months[b]
P.P. List Management & Transmonde U.S.A., Inc.	U.S. Attorney, District of Delaware	Fraud	DPA	$100,000	No	No	18 months
[Withheld]	U.S. Attorney, Eastern District of Michigan	Clean Air Act	NPA	$730,000	No	No	36 months

Agreements are included based on the earliest date stated on each agreement. DPAs require court approval, and certain agreements contained in this list have not yet received such approval. Penalties reflect the total amounts related to the enforcement action announced in conjunction with the settlement agreement.

a) The company must abide by the terms of a Corporate Integrity Agreement between the company and the Office of Inspector General of the Department of Health and Human Services, which has an external review requirement.

b) The NPA does not contain a term. The associated Corporate Integrity Agreement between the company and the Office of Inspector General of the Department of Health and Human Services has a term of five years.

c) This amount includes a $37 million settlement for related case, *In re Municipal Derivatives Antitrust Litigation* (MDL 1950), Motion for Approval of Settlement, No. 08-cv-2516, Docket No. 1638 (S.D.N.Y., Nov. 10, 2011).

* The following agreements, not widely available at the time of our 2010 Year-End Update, represent additional agreements entered into in 2010. Most of these agreements, though dated in 2010, were not submitted for court approval until early 2011.

Occasionally, corporate plea agreements also contain non-prosecution provisions, often for the corporate parent. *See, e.g.*, *United States v. Scios, Inc.*, Plea Agreement, No. 11-cr-00461-CRB, Docket No. 10, ¶ 10 (N.D. Cal. Oct. 5, 2011). Gibson Dunn does not include such agreements in its tally because they lack the comprehensive set of terms and conditions found in traditional DPAs and NPAs. Likewise, Gibson Dunn does not include federal DPAs or NPAs with individuals in its tally.

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[1] *See* Craig S. Morford, Memorandum for Heads of Department Components and United States Attorneys, n.2 (Mar. 7, 2008).

[2] As noted in *Gibson Dunn's 2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, and our client alert, *The SEC Uses an FCPA Case for Its First-Ever Deferred Prosecution Agreement*.

[3] Consistent with our past practice, we continue to update our count of agreements from prior years as we become aware of them. Because NPAs are not filed with a court and often are not reported publicly, their numbers are difficult to determine with precision. For consistency between DPAs and NPAs, we include agreements based on the earliest date stated on each agreement, regardless, in the case of DPAs, of when they are filed with and/or approved by a court.

[4] *See*, *e.g.*, 42 U.S.C. § 1320a-7 (Exclusion of Certain Individuals and Entities from Participation in Medicare and State Health Care Programs).

[5] Duff Wilson, *Glaxo Settles Cases with U.S. for $3 Billion*, N.Y. Times (Nov. 3, 2011).

[6] SEC Press Release, *SEC Charges Former Fannie Mae and Freddie Mac Executives with Securities Fraud; Companies Agree to Cooperate in SEC Actions* (Dec. 16, 2011).

[7] Certain NPAs, particularly healthcare NPAs from the U.S. Attorney's Office for the District of Massachusetts, do not have terms. Those NPAs, however, are predicated on the company hiring an independent compliance monitor for up to 60 months, as provided by the related CIA. Accordingly, companies should consider the effective term of those agreements to be the duration of that monitorship. For reference, DPAs or NPAs entered into by DOJ's Fraud Section can have terms as long as 48 months.

[8] Exactech, Inc., *Press Release: Exactech Announces Agreement with U.S. Attorney's Office Voluntarily Extends Term of Deferred Prosecution Agreement for Three Months* (Dec. 7, 2011).

[9] Wright Medical Group, Inc., *Press Release: Board of Directors of Wright Medical Group, Inc. Appoints Chairman David D. Stevens as Interim CEO* (Apr. 5, 2011).

[10] Wright Medical Group, Inc., *Press Release: Wright Medical Group, Inc. Reports 2011 Third Quarter Results and Provides Outlook for Remainder of Year* (Nov. 1, 2011).

[11] Wright Medical Group, Inc., *Transcript of Piper Jaffray Health Care Conference* (Nov. 29, 2011).

[12] Wright Medical Group, Inc., 10-Q (Nov. 2, 2011).

[13] Wright Medical Group, Inc., Earnings Conference Call for Q3 2011 (Nov. 2, 2011).

[14] Wright Medical Technology, Inc., *Press release: Deferred Prosecution Agreement With Government Extended For 12 Months* (Sept. 15, 2011).

[15] Wright Medical Group, Inc., *Transcript of Piper Jaffray Health Care Conference* (Nov. 29, 2011).

[16] The risk disclosures in Wright Medical's securities filings explain the dangers of non-compliance: "Our failure to comply with the Deferred Prosecution Agreement or the Corporate Integrity Agreement could expose us to significant liability including, but not limited to, extension of the term of the DPA, exclusion from federal healthcare program participation, including Medicaid and Medicare, which would have a material adverse effect on our financial condition, results of operations and cash flows, potential prosecution, including under the previously-filed criminal complaint, civil and criminal fines or penalties, and additional litigation cost and expense. A breach of the DPA or the CIA could result in an event of default under the Senior Credit Facility, which in turn could result in an event of default under the Indenture." Wright Medical Group, Inc., *Press Release: Wright Medical Group, Inc. to Participate in Upcoming September 2011 Healthcare Conferences* (Aug. 24, 2011).

[17] *See*, *e.g.*, *Bernheim v. Elia*, 05-cv-118A, 2010 WL 743887, at *8 (W.D.N.Y. Feb. 25, 2010) (statements made in settlement agreement inadmissible), *aff'd*, 410 F. App'x 407 (2d Cir. 2011); *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (consent decree may not be used to prove underlying facts of liability); *Oei v. Citibank, N.A.*, 957 F. Supp. 492, 516 (S.D.N.Y. 1997) (statements in settlement agreement inadmissible).

[18] *SEC v. Citigroup Global Markets Inc.*, 2011 WL 5903733 (S.D.N.Y. Nov. 28, 2011). Judge Rakoff's comments are in the context of his rejection of the SEC's proposed settlement with Citigroup, in which, per the SEC's long-running practice, the company was not required to admit or deny wrongdoing.

[19] *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).

[20] *See* Chris Castle, *Blame Bing Strategy Crumbles: Eric Schmidt "Takes the 5th" Under Questioning from Senator John Cornyn, Music Tech. Policy Blog* (Sept. 22, 2011); Supplemental Response of Eric Schmidt, Executive Chairman, Google Inc. to Senator Cornyn Before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on "The Power of Google: Serving Consumers or Threatening Competition?" (Sept. 21, 2011).

[21] *Borst v. Lower Manhattan Dev. Corp.*, No. 105375/08, 2011 WL 4193282 (N.Y. Sup. Ct., Sept. 6, 2011); Andrew Keshner, *Non-Prosecution Agreement Ruled Inadmissible in Suit*, N.Y. Law Journal (Sept. 17, 2011).

[22] Sentencing Remarks of Lord Justice Thomas, Regina v. Innospec Limited (Mar. 26, 2010), http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf

[23] Edward Garnier, *DPAs will provide effective tool for combating corporate crime*, Law Soc. Gazette (Oct. 6, 2011).

The White Collar Defense and Investigations Practice Group of Gibson, Dunn & Crutcher LLP successfully defends corporations, senior corporate executives, and public officials in a wide range of federal and state investigations and prosecutions, and conducts sensitive internal investigations for leading companies in almost every business sector. The Group has members in every domestic office of the Firm and draws on more than 125 attorneys with deep government experience, including numerous former federal and state prosecutors and officials, many of whom served at high levels within the Department of Justice and the Securities and Exchange Commission. Joe Warin, a former federal prosecutor, currently serves as the U.S. counsel for the compliance monitor for Siemens and as the FCPA compliance monitor for Alliance One International, and recently completed his role as the monitor for Statoil pursuant to a DOJ and SEC enforcement action. Debra Wong Yang is the former United States Attorney for the Central District of California, and recently completed her role as a monitor pursuant to a DOJ enforcement action.

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