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2015 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)

F. JOSEPH WARIN, MICHAEL DIAMANT & MELISSA FARRAR

F. Joseph Warin is a Partner and Chair of Gibson, Dunn & Crutcher's Washington, D.C. Office's Litigation Department. Mr. Warin also serves as co-chair of the firm's White Collar Defense and Investigations Practice Group. Michael S. Diamant is a Partner in the Washington, D.C. office, and his practice focuses on white collar criminal defense, internal investigations, and corporate compliance. Melissa Farrar is an Associate in the firm's Washington, D.C. office, and she currently practices in the Litigation Department. Contact: fwarin@gibsondunn.com or mdiamant@gibsondunn.com.

2015 came in like a lion, bringing with it remarkable policy changes regarding corporate non-prosecution agreements (NPA) and deferred prosecution agreements (DPA). The Department of Justice's (DOJ's) leadership has articulated new bright-line approaches to post-resolution conduct, including the unprecedented step of revoking an NPA. The judiciary has edged further toward a more interventionist role in DPA oversight. Finally, as we previously predicted, the first of dozens of anticipated NPA resolutions have emerged from the DOJ Tax Division's August 2013 "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks" (the "DOJ Tax Swiss Bank Program").

This article summarizes highlights from the NPAs and DPAs of the first half of 2015, and addresses shifts in the treatment of NPAs and DPAs by all three branches of government.

NPAs and DPAs in 2015

In the first six months of 2015, the DOJ entered into five DPAs and 23 NPAs. In addition to DOJ's 28 agreements, the Securities and Exchange

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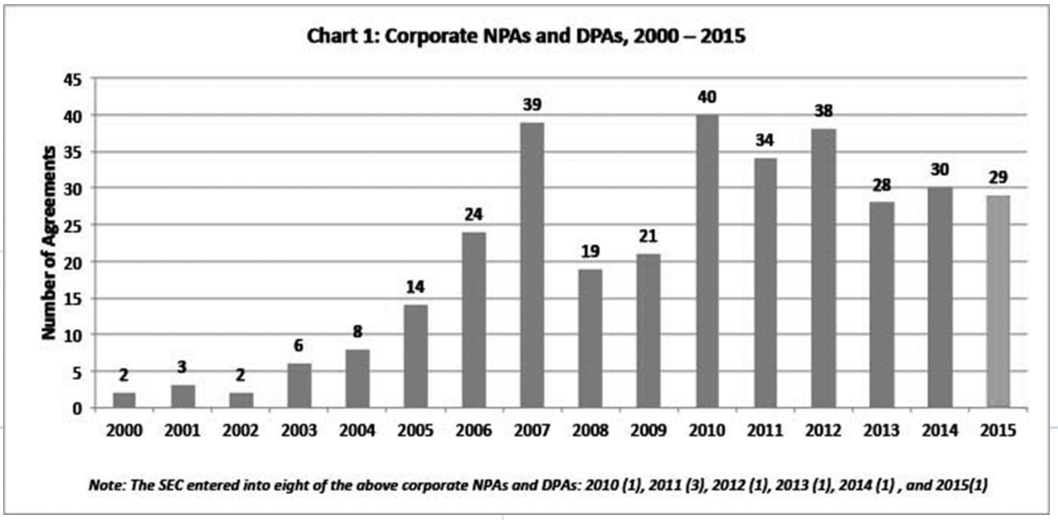
Commission (SEC) entered into one DPA in the first part of 2015, bringing its total overall NPA and DPA count to eight. This year's 29 year-to-date overall agreements vastly exceeds agreement counts from recent years, with 2014 seeing 13, and 2013 seeing 12 by this time of the year. Indeed, 2015's NPA and DPA count has already exceeded the overall number of NPAs and DPAs in 2013, when there were only 28, and it is closely approaching last year's overall count of 30. This is in large part due to the rollout of NPA resolutions under the DOJ Tax Swiss Bank Program, which account for 15 of the 29.



As demonstrated by the Chart below, NPAs and DPAs have played an increasingly important and consistent role in resolving allegations of corporate wrongdoing since 2000. There have typically been at least 20 agreements per year since 2006, with highs reached in 2007 and 2010 at 39 and 40 agreements, respectively. This year, with 29 agreements already on the books and the promise of dozens more through the DOJ Tax Swiss Bank Program, it is highly likely that 2015 will substantially exceed historical highs. Indeed, in 2007, at this point in the year, only 17 agreements had been publicized; in 2010, there had been only 11.

In addition, the total monetary recoveries related to NPAs and DPAs from 2000 through the present have shown a steady, if somewhat erratic, growth. At over $4.2 billion, this year's agreements—as in 2014—have already exceeded the overall recovery value for 2013, which was approximately $2.9 billion. This is due in large part to a single DOJ DPA with Deutsche Bank AG, which involved a recovery of $2.37 billion, and several other settlements in the millions and hundreds of millions. Of course, these figures do not include the $2.52 billion recovered this year by DOJ through plea agreements with four international banks in connection with alleged foreign exchange rate manipulation.

Although the tone at the DOJ has shifted in recent months with respect to NPAs and DPAs, these figures leave no doubt that NPAs and DPAs continue to be important resolution tools. Indeed, these negotiated agreements have touched some of today's largest and most successful corporations, either through parent companies or their subsidiaries. Due to the sheer size and complexity of these organizations, NPAs and DPAs are crucial in allowing companies that are otherwise good corporate citizens to continue to do business while implementing the significant reforms, reporting, and ongoing cooperation that these agreements typically require.

Shifts in NPA and DPA Treatment by the Executive, Congress and the Judiciary

Over the past several months, the use of NPAs and DPAs in concluding corporate regulatory in-

vestigations has received heightened scrutiny and attention in all levels of government. The intensified scrutiny of these agreements has sparked a larger debate about not only the appropriate use of such enforcement tools by regulators, but also the political and policy motivations underlying the increased criticism coming from politicians.

Recent Enforcement Official Statements Regarding NPAs and DPAs

The enforcement and rehabilitative efficacy of NPAs and DPAs continues to be touted by officials closest to corporate enforcement actions. As US Assistant Attorney General Leslie Caldwell recently explained, through these agreements, "in cases against companies, we are frequently able to accomplish as much as, and sometimes even more than, we could from even a criminal conviction."[1] Indeed, an NPA or DPA with a corporation enables enforcement authorities to continue to impact and monitor a company's compliance program and culture long after settlement. Enforcement advantages posed by these agreements include the imposition of remedial measures and improved compliance policies and practices, securing assistance from a corporation in ongoing investigations, as well as the use of monitors and/or periodic reporting to help ensure a corporation continues to abide by the terms of the agreement.[2]

Even while acknowledging the force of NPAs and DPAs in holding corporations accountable and altering their future behavior, DOJ has also tempered its conviction favoring their use. As stated in a recent speech by Assistant Attorney General Caldwell:

> **When we suspect or find non-compliance with the terms of DPAs and NPAs, we have other tools at our disposal, too. We can extend the term of the agreements and the term of any monitors, while we investigate allegations of a breach, including allegations of new criminal conduct. Where a breach has occurred, we can impose an additional monetary penalty or additional compliance or remedial measures.**[3]

Perhaps most significantly, she indicated that "the Criminal Division will not hesitate to tear up a DPA or NPA and file criminal charges, where such action is appropriate and proportional to the breach."[4] Indeed, this message was punctuated by the revocation of an NPA earlier this year. Whether this revocation represents an anomaly or will lead to further such terminations among still-outstanding NPAs and DPAs is a question that remains to be answered. Importantly, however, DOJ's signaling of its intention to terminate prior agreements where subsequent misconduct occurs, should—at the very least—caution current NPA- and DPA-holders. Shifting the paradigm to revoking agreements fails to recognize that global companies with tens of thousands of employees cannot practically have every employee on lockdown.

NPAs and DPAs and Congress

The most outspoken congressional voice scrutinizing NPAs and DPAs as tools for the resolution of enforcement actions has been US Senator Elizabeth Warren (D-Mass.). In an April 15 policy speech, Sen. Warren slammed NPAs and DPAs as so-called "get-out-of-jail-free cards."[5] The thrust of her argument is that because NPAs and DPAs are tethered to paying a fine—rather than being held accountable in court—the agreements undercut any meaningful deterrence against future misconduct that otherwise would have been achieved by going to trial.[6] With her specific targeting of recidivists, some have noted that—in the lead-up to the 2016 presidential election—"[Sen. Warren's] timing suggests a renewed effort to pull Democrats to the left on Wall Street reform as the party waits to see what position Hillary Clinton will take on the matter."[7]

Whether the underlying motivation for this position is election-centered, policy-driven, or both, Sen. Warren has argued that—at a minimum—a company that already has an existing agreement should not be offered a new one for new misconduct.[8] As she argues, by merely paying a financial penalty, corporations can repeatedly skirt the criminal justice system and other deterrent factors that would be available through the trial and conviction process.[9] The underlying assumption of this reasoning, however, is that monetary fines are the prima-

ry—and perhaps only—deterrent factor of NPAs and DPAs, which is completely wide of the mark.

Our firm, as a principal architect and counsel for many corporations negotiating NPAs and DPAs, fundamentally disagrees with Sen. Warren's mistaken surface treatment of these critical tools for corporate reform.[10] Indeed, fines are typically only one of many requirements imposed by NPAs and DPAs, not least of which are the establishment of rigorous compliance program reforms and tighter accounting and internal control measures, the appointment of third-party monitors to oversee company operations, required self-investigation and reporting, and continuing investigation support.[11] Some agreements even contain provisions that go so far as to alter corporate board composition and bar participation in certain markets.[12] To suggest that such far-ranging and lingering measures are inherently easier for organizations to weather than a guilty plea misapprehends how corporations function. But more importantly, this mindset confuses corporations, juridical persons only, with real persons who can be punished in the same manner as an individual. Overly harsh penalties against the corporate entity will merely incentivize its best professionals to jump ship, while innocent shareholders and local communities are left holding the bag as the company is destroyed or permanently crippled.

We also take issue with Sen. Warren's suggestion that prosecutors are "timid" in the face of large corporations and unwilling to prosecute.[13] To the contrary, in our experience, DOJ and the SEC have been nothing but zealous in their investigation and advocacy. What Sen. Warren forgets is that due process and the presumption of innocence must rule the day: rather than practice pitchfork justice, the men and women of DOJ and the SEC must use all tools available to calibrate resolutions to corporate missteps, and prosecute only when the evidence, and the violation, so require.

It is with caution that we await further developments in this arena. We believe that NPAs and DPAs serve as valuable tools for the government to address misconduct in a nuanced manner, and for corporate entities to calibrate their compliance programs to avoid future violations. The monetary penalties, remedial actions, cooperation with the government, and compliance program enhancements that attend most of these agreements (and often are part of an iterative settlement process) place both enforcement authorities and corporate entities in positions that achieve both accountability for past transgressions and deterrence for potential future ones.

Update on Judicial Oversight of Deferred Prosecution Agreements

Previously, we have noticed and discussed the growing trend of federal judges actively exploring different legal bases for evaluating the substance of DPAs and approving or rejecting them based on their merits. Although traditionally courts have not actively scrutinized the terms of these agreements, a growing chorus of judges has voiced concern about performing such a limited function with respect to DPAs, which have become one of the more prominent tools for policing corporate misconduct. Furthermore, while typically courts have held in abeyance any term-by-term examination of these agreements, there are indications that judges may seek to assert a greater role in overseeing the implementation of DPAs as well.

Two decisions in particular from 2015 encapsulate this trend: *United States v. Fokker Services* and *United States v. HSBC Bank*. In *United States v. Fokker Services*, Judge Richard Leon of the US District Court for the District of Columbia rejected Fokker Services B.V.'s (FSBV) DPA with the US Attorney's Office for the District of Columbia, based on his inherent powers "to supervise the administration of criminal justice among the parties before the bar."[14] In *United States v. HSBC Bank*, although Judge John Gleeson of the Eastern District of New York (EDNY) ultimately approved a DPA between HSBC and the US Attorney's Office for EDNY for alleged violations of anti-money laundering and sanctions laws and regulations, he has continued to exercise close supervision of HSBC's compliance with the terms of that agreement.[15]

NOTES

1. Leslie R. Caldwell, Assistant Att'y Gen, U.S. Dep't of Justice, *Remarks at the New York University Center on the Administration of Criminal Law's*

Seventh Annual Conference on Regulatory Offenses and Criminal Law (Apr. 14, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-center.

2. *Ibid*.
3. *Ibid*.
4. *Ibid*.
5. *See* Sen. Elizabeth Warren, *The Unfinished Business of Financial Reform*, Remarks at the Levy Institute's 24th Annual Hyman P. Minsky Conference, 4 (Apr. 15, 2015), *available at* http://www.warren.senate.gov/files/documents/Unfinished_Business_20150415.pdf.
6. *Ibid*.
7. Barney Jopson & Gina Chon, *Anti-Wall Street Senator Lambasts Bank Non-Prosecution Deals*, Fin. Times, Apr. 15, 2015, *available at* http://www.ft.com/intl/cms/s/0/bce88134-e394-11e4-9a82-00144feab7de.html.
8. *See Misbehaving Banks Must Have Their Day in Court*, Fin. Times, April 19, 2015, *available at* http://www.ft.com/intl/cms/s/0/f26a9acc-e515-11e4-a02d-00144feab7de.html#axzz3cOiMZaLN.
9. *Ibid*.
10. *See* F. Joseph Warin, *Senator Warren, Let the 'Cops' Do Their Jobs,* The Hill (Apr. 27, 2015, 4:00 p.m.), http://thehill.com/blogs/congress-blog/economy-budget/240042-senator-warren-let-the-cops-do-their-jobs, also *available at* http://www.gibsondunn.com/publications/Documents/Warin-Senator-Warren-Let-The-Cops-Do-Their-Job-The-Hill-04.27.2015.pdf.
11. *Ibid*.
12. *E.g., United States v. Aibel Group Ltd.*, Deferred Prosecution Agreement, H-07-005, at 6 (Jan. 4, 2007) (implementing a revised compliance and governance structure including the appointment of an independent executive board member, the establishment of a compliance committee, and the engagement of outside compliance counsel); TNT Software LLC NPA, ¶ 6-7 (May 5, 2015) (expressly prohibiting certain sweepstakes-related activities without expressing any opinion as to the legality of such conduct, and further requiring written notice to the U.S. Attorney's Office if TNT should engage in any sweepstakes activity not covered by the prohibition).
13. Warren, *The Unfinished Business of Financial Reform*.
14. *United States v. Fokker Services B.V.*, 36 Int'l Trade Rep. (BNA) 1666, 2015 WL 729291 at *3 (D.D.C. Feb. 5, 2015) (quoting *U. S. v. Payner*, 1980-2 C.B. 749, 447 U.S. 727, 735 n. 7, 100 S. Ct. 2439, 65 L. Ed. 2d 468, 80-2 U.S. Tax Cas. (CCH) P 9511 (1980)).
15. *U.S. v. HSBC Bank USA, N.A.*, 2013 WL 3306161 at *6 (E.D.N.Y. July 1, 2013).