

Senator Warren, let the ‘cops’ do their jobs

By F. Joseph Warin

Recently, Sen. Elizabeth Warren (D-Mass.) lambasted the U.S. Department of Justice and the Securities and Exchange Commission, which she referred to as regulatory “cops,” for not holding financial firms “accountable.” Warren charged that the deferred prosecution agreements (DPA) and non-prosecution agreements (NPA) that the DOJ and the SEC have used to resolve allegations of wrongdoing don’t go far enough. As a liberal Democrat, a former federal prosecutor, and an attorney with 40 years’ experience on both sides of corporate criminal investigations, I say without equivocation that Warren is dead wrong. Her hyperbolic rhetoric that would paint our enforcement agencies as pushovers mischaracterizes the effective and nuanced tools they have developed to address allegations of corporate financial crime and is harmful to our national conversation.

Rather than go through the costly, resource-intensive, and years-long process of trial—the outcome of which is far from certain—these negotiated resolutions permit DOJ to extract precise, meaningful, and immediate reforms from companies that often could not be achieved through acrimonious prosecution. In exchange for the DOJ deferring or declining prosecution against a company, a company will typically pay a substantial fine and undertake significant structural and remedial actions. Warren’s comments about the DOJ and the SEC using these agreements to permit “big banks” to get off easy is wrong as a matter of both law and policy.

First, DPAs and NPAs are far more than “a slap on the wrist,” as Warren has characterized them. Unlike impossible fines and reputation-destroying convictions that might satisfy an unprincipled call for blood while wreaking havoc on otherwise salvageable and valuable sectors of our economy, the great strength of NPAs and DPAs lies in their precision. They allow the DOJ to target specific programs, behaviors,

and corporate ills, and eradicate them while preserving and enhancing the elements of these institutions that work. As the DOJ’s Assistant Attorney General for the Criminal Division recently noted, through DPAs and NPAs, the DOJ “can often accomplish as much as, and sometimes even more than, [it] could from a criminal conviction.”

The splashy fines that make headlines and have real impact on these banks’ bottom lines are the tip of the NPA/DPA enforcement iceberg. The DOJ uses NPAs and DPAs to impose substantial compliance programs, appoint third-party compliance monitors to oversee certain company operations, require continued self-investigation and reporting, and require banks to cooperate with open DOJ investigations. This cooperation—which often involves turning over millions of company files and giving the DOJ unfettered access to employees—enables the DOJ to determine just what went wrong and where, and identify the culpable wrongdoers within the company. This process of direct and targeted oversight, which extends far beyond the date an agreement is signed, allows the DOJ to ensure that a company’s compliance program is robust and prevent the next potential crime. Much more than trials, through improved compliance programs, DPAs and NPAs can prevent the next crime from ever occurring.

Second, Warren’s insinuation that prosecutors are “timid” and not vigorously investigating banks ignores the zealous advocacy and hard work by the men and women of the DOJ and the SEC. In my time in criminal law—on both sides of the discussion—never have I ever detected that the DOJ or the SEC has rolled over on prosecuting the crime of either a corporation or individual. Furthermore, it is important to note that there are myriad other tools in the DOJ’s enforcement toolbox through which the DOJ has extracted

over \$100 billion in fines from our largest banks for alleged fraud in recent years. In August 2014, for example, the DOJ announced its largest-ever recovery for financial fraud leading up to and during the financial crisis from one bank, totaling \$16.65 billion.

Finally, Warren forgets the foundation principles of our criminal justice system: due process, and the presumption of innocence. As the Supreme Court noted in 1895 in *Coffin v. United States*, “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Prosecutors have to be deaf to the pounding of the drums and the pitchforked mobs. The Department of Justice does not practice in a court of public opinion, or seek to be elected, but rather it practices in a court of law. Legal outcomes are based not on what may make the best sound bite on the floors of Congress, but are instead based on careful evidentiary analysis of the law following years of investigation. We must afford the DOJ and the SEC the deference they are due for making difficult decisions—often in the face of cries for blood from Congress—and applying the law based on the evidence and the facts, rather than what is politically popular.

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