Westlaw Journal
WHITE-COLLAR CRIME
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 28, ISSUE 7 / APRIL 2014

EXPERT ANALYSIS

2013 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (Part 1)

By F. Joseph Warin, Esq., Brendon Fleming, Esq., and J. Matt Williams, Esq.
Gibson, Dunn & Crutcher

This commentary is the first of two parts discussing non-prosecution agreements and deferred prosecution agreements. Part 1 discusses NPA and DPA trends in 2013. Part 2 will discuss recent developments relating to two collateral issues companies may face in connection with NPAs and DPAs: non-contradiction clauses in these agree-ments and potential consequences for government contractors to consider prior to entering into them.

Since NPAs and DPAs[1] emerged in the early 1990s, and especially in the past decade, U.S. federal prosecutors have them as tools to address allegations of corporate misconduct. Prosecutors and companies alike have concluded that these agreements are an appropriate avenue for resolving even the most challenging allegations in targeted, efficient ways. NPAs and DPAs exact meaningful punishment, often through steep financial penalties and rigorous compliance reforms, while avoiding the serious collateral consequences of federal criminal convictions. Prosecutors view them as effective, tempered alternatives to criminal indictments and convictions, on the one hand, and prosecutorial declinations, on the other.

The use of NPAs and DPAs has increased markedly during the past decade. From 2000 through 2004, the U.S. Department of Justice entered into an average of about four agreements per year, topping out at eight in 2004. Each subsequent year, however, DOJ figures have been in the double digits, averaging 28 agreements per year, with only two years that saw fewer than 20 agreements.

Since 2000, the DOJ has entered into 273 publicly disclosed NPAs and DPAs[2] that have led to monetary penalties totaling more than $40 billion.[3] Of those 273 agreements, 252 have been executed since Jan. 1, 2005. The U.S. Securities and Exchange Commission, which also has embraced these agreements as resolution tools, has entered into six such agreements with companies since 2010. In 2013, the SEC entered into its first DPA with an individual.[4]

The increased use of these types of agreements in recent years has prompted heightened judicial scrutiny of DPAs (which, unlike NPAs, are filed in court along with criminal charges that remain pending during the deferral period). For example, U.S. District Judge Jed S. Rakoff of the Southern District of New York recently questioned the use of NPAs and DPAs without related prosecutions of any individuals whose conduct resulted in corporate liability.[5]

"[T]he future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing," Judge Rakoff argued.[6] "Just going after the company is also both technically and morally suspect."[7]

The authors of this article routinely represent corporations and executives in criminal investigations. We respectfully disagree with Judge Rakoff's characterization of the current environment and believe

that corporate compliance undertakings are often substantive, not cosmetic. Criticism and judicial scrutiny aside, these agreements are now a fixture in the federal corporate law-enforcement regime, and all indications suggest that their use will hold steady in the foreseeable future.

NPAS AND DPAS IN 2013

In 2013, the DOJ entered into 27 agreements resolving a wide variety of alleged conduct spanning multiple DOJ units. Of these 27 agreements, 12 were NPAs and 15 were DPAs. In addition to the DOJ's agreements, the SEC entered into one corporate NPA, its first involving the Foreign Corrupt Practices Act. Although the total number of agreements in 2013 is less than the number in 2012, the decrease should not be taken as a sign that NPAs and DPAs are waning as prosecutorial tools. On the contrary, the DOJ's 27 agreements made 2013 the fifth consecutive year in which at least 20 agreements were executed.

The trend in monetary penalties is similar. In eight of the last nine years, from 2005 through 2013, total monetary penalties associated with NPAs and DPAs topped $1 billion. Chart 1 below shows that NPAs and DPAs remain a key tool to resolve allegations of corporate misconduct, with the number of agreements in 2013 falling squarely within a range that has come to represent the norm. The charts and figures below are derived from Gibson Dunn's database containing details of 279 NPAs and DPAs entered into by federal regulators between Jan. 1, 2000, and Jan. 6, 2014.

U.S. federal prosecutors have used NPAs and DPAs as tools to address allegations of corporate misconduct.

The 27 agreements from 2013 resulted in monetary penalties amounting to nearly $2.9 billion, as shown in Chart 2 below. The 2013 total fell short of the 2012 record, which was driven in part by several particularly extraordinary fines. The 2013 penalties reflect the DOJ's appetite for eye-popping fines.

Beginning in 2005, the first year settlements topped $1 billion and the first year the DOJ's number of agreements climbed out of the single digits (to 14, up from eight the previous year), average annual penalties have totaled about $4 billion, with five years, including 2013, below that figure, and four above it. The total 2013 monetary penalties, therefore, are in the typical range for recent years.

Seven agreements in 2013 included monetary penalties of $100 million or more, including one cross-border settlement topping $1 billion. These large settlements resolved various types of conduct in 2013, including FCPA violations, tax charges and antitrust allegations. Such settlements reinforce the versatility of NPAs and DPAs in addressing complex and challenging corporate criminal matters.

The 27 agreements reported in 2013 cover a variety of types of conduct, ranging from allegations that have historically dominated the ranks of these agreements — allegations of fraud and violations of the FCPA and the Food, Drug and Cosmetic Act, for example — to statutes apparently making their first appearances in a corporate NPA or DPA, such as the Occupational Safety and Health Act. Table 1 below shows the 2013 agreements broken down according to the primary legal allegations and violations they resolved.

The DOJ and the SEC have continued their coordination on FCPA matters, with the SEC entering into its first FCPA NPA. Another first for the SEC came in November 2013, when it entered into its first DPA with an individual.[8] In addition to the SEC's expanded use of NPAs and DPAs in 2013, many different DOJ units entered into NPAs or DPAs. The fraud section of the DOJ's Criminal Division was involved in 11 agreements in 2013 — more agreements than any other DOJ unit.

Around the United States, 19 U.S. attorneys' offices were involved in a combined 22 agreements. That figure reflects the expanding breadth of their use across the country, paralleling the trend for them to reach an ever increasing variety of conduct. A number of U.S. attorneys' offices, including in the District of Arizona, the District of South Dakota and the Eastern District of Washington, entered into what were apparently their first publicly available agreements in 2013. The U.S. attorney's office for the District of Puerto Rico also executed its first DPA in February 2013.[9]

Several agreements executed in 2013 required the companies entering into them to engage an independent corporate monitor, as was typical in many agreements in earlier years. Of the

27 DOJ agreements, six included monitorship provisions. Four of those six agreements involved FCPA allegations — a noteworthy increase as compared with 2012, when there were only two FCPA agreements with such provisions, and 2011, when there was only one.

Three of the 2013 monitorship provisions, however, established "hybrid" monitorships.[10] In those cases, the monitorship provisions facilitate the independent monitor serving for the first half of the agreement period (18 months in a three-year deferral period, for example), with the prospect of the company thereafter taking over for the monitor in a self-monitoring and reporting arrangement for the duration.[11]

Agreements in recent years also have required monitorships and monitorship-like arrangements outside the FCPA context. The 2012 DPA with HSBC Bank USA and HSBC Holdings, which Judge John Gleeson of the U.S. District Court for the Eastern District of New York approved in July 2013, required the engagement of an independent corporate compliance monitor in connection with the bank's anti-money-laundering and trade sanctions controls. New York attorney Michael G. Cherkasky was selected as monitor and began his tenure July 22, 2013, assisted by a monitor team of more than 60 people.[12]

Among the agreements in 2013, the DOJ's DPA with ConvergEx Group LLC, which resolved allegations of wire and securities fraud, also required the company to engage an independent ethics and compliance consultant to examine its ethics and compliance program.[13] Distinct from agreements requiring traditional monitorships, the ConvergEx agreement places the onus on the company itself, rather than on the consultant, to report to the DOJ, at the DOJ's request, about the company's "remediation and implementation of any compliance program and internal controls, policies, and procedures that relate to compliance with the securities laws and other criminal laws prohibiting fraud."[14]

In addition to the ConvergEx agreement, six agreements in 2013 required some measure of self-reporting, with two of those agreements (or related settlement documents) requiring the retention of a compliance consultant or auditor. As monitorship and monitorship-like requirements continue to appear in NPAs and DPAs covering a variety of allegations, the government demand for monitorships as a means of scrutinizing and enhancing compliance efforts is poised to grow in prominence, as it did during the earlier wave of FCPA compliance monitorships.

The use of NPAs and DPAs has increased markedly during the past decade.

CONCLUSION

In 2013, NPAs and DPAs remained at the forefront of corporate criminal enforcement in the United States. U.S. prosecutors and regulators continued the steady use of these agreements during the past decade and turned to this approach more than two dozen times in 2013. The regularity and stability of the DOJ's use of NPAs and DPAs, along with the SEC's adoption of the agreements in its Cooperation Initiative and the versatility of their application to a broad spectrum of corporate criminal allegations have helped the agreements become go-to tactics in the federal enforcement strategy. These agreements have led to average monetary penalties of more than $4 billion per year.

In 2014, the direct and indirect uses of NPAs and DPAs remain among the top corporate prosecution issues to watch, as they reach new conduct in the United States and continue to facilitate cross-border cooper-ation among law enforcement agencies. Part 2 will discuss recent developments relating to non-contradiction clauses in these agreements.

NOTES

[1] The U.S. DOJ distinguishes between NPAs and DPAs on the basis of the procedures by which they are adopted. DPAs are filed in federal court along with a charging document (*e.g.*, a criminal information) and are subject to judicial approval, whereas NPAs are letter agreements between the DOJ and the entity or entities subject to an NPA. *See* Craig S. Morford, Memorandum for Heads of Department Components and United States Attorneys, 1 n.2 (Mar. 7, 2008). Over the years, the terminology has been refined, and the current bright-line distinction between NPAs and DPAs was much more opaque in the past.

From 2005 through 2013, total monetary penalties associated with NPAs and DPAs topped $1 billion.

[2] Our experience indicates that it is likely that other NPAs and DPAs have not been publicly disclosed. Gibson Dunn has executed NPAs that have not been made public. In some instances, the DOJ declines to disclose the agreements publicly. In November 2013 a University of Virginia School of Law researcher filed a lawsuit under the Freedom of Information Act against the DOJ seeking access to a 2012 NPA between ABC Professional Tree Services and the U.S. attorney's office for the Southern District of Texas. The complaint, which seeks an order requiring the immediate disclosure of the agreement, argues that the researcher is "statutorily entitled to the disclosure" of the agreement and that the DOJ "has improperly withheld the requested records in violation of the law and in opposition to the strong public interest in understanding the judicial system and why admitted wrongdoers are not criminally prosecuted." Complaint at 1, *Ashley v. U.S. Dep't of Justice,* No. 13-cv-01873-KBJ (D.D.C. Nov. 26, 2013).

[3] Monetary penalties, as detailed in the appendix, may include amounts beyond an NPA or a DPA itself. Global settlements negotiated in connection with an NPA or a DPA will sometimes include criminal and civil fines and penalties imposed by the DOJ, the SEC, and/or other regulators and enforcement agencies; disgorgement payments; forfeiture amounts; restitution requirements and civil settlements related to DOJ and/or SEC resolutions.

[4] Although we do not report statistics on NPAs and DPAs entered into by individuals, the SEC's entry into its first individual DPA in 2013 marks a noteworthy expansion of their use in the SEC's Cooperation Initiative.

[5] Hon. Jed S. Rakoff, Why Have No High-Level Executives Been Prosecuted in Connection with the Financial Crisis?, Address Before the New York City Bar Ass'n 17 (Nov. 12, 2013).

[6] *Id.*

[7] *Id.*

[8] Press Release, U.S. Sec. and Exch. Comm'n, SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013).

[9] That office was also involved in and is referenced in a 2003 DPA with Banco Popular de Puerto Rico, but attorneys in the DOJ's asset forfeiture and money laundering section executed the agreement without any signatories from the U.S. attorneys' office. *See* Banco Popular de Puerto Rico DPA (Jan. 13, 2003).

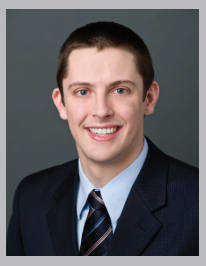
[10] Jeffrey Benzing, Self-Monitoring and Hybrids More Common as U.S. Credits FCPA Compliance, JUST ANTI-CORRUPTION (May 10, 2013).

[11] *Id.*

[12] Letter from Loretta E. Lynch, U.S. Attorney for the Eastern District of New York, to U.S. District Judge John Gleeson, *United States v. HSBC Bank USA,* No. 12-CR-763 (E.D.N.Y. Sept. 30, 2013).

[13] ConvergEx Group LLC DPA ¶ 13 (Dec. 12, 2013).

[14] *Id.*


F. Joseph Warin (L) is co-chair of **Gibson, Dunn & Crutcher**'s white-collar defense and investigations practice group and chair of the litigation department in the firm's Washington office. He is a former federal prosecutor. **Brendon Fleming** (C), an associate in the firm's Washington office, has significant experience representing institutions and individuals in connection with monitorships, white-collar matters and government investigations at the federal, state and local levels. **J. Matt Williams** (R), also an associate in the firm's Washington office, regularly represents corporations, officers and directors in connection with the False Claims Act, the Foreign Corrupt Practices Act and health care fraud matters.