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EXPERT ANALYSIS

2013 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements — Part 2

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

NON-CONTRADICTION CLAUSES

Terms in NPAs and DPAs that limit statements about the conduct underlying settlements can affect a company's options in both court filings and public statements. On March 21, 2013, Standard Chartered Bank PLC Chairman Sir John Peace delivered a *mea culpa* that reverberated throughout the corporate world. Peace, in a company-issued statement, apologetically withdrew as "both legally and factually incorrect" comments he had made just three weeks earlier concerning the company's 2012 DPA involving alleged violations of U.S. sanctions laws.[1] Peace's sudden about-face highlighted a sometimes overlooked component of most NPAs and DPAs: the non-contradiction clause.

Standard Chartered entered into a DPA on Dec. 7, 2012, involving criminal violations of U.S. economic sanctions laws. The company admitted in the DPA's accompanying statement of facts that it "knowingly and willfully engaged in this criminal conduct."[2] During a March 5, 2013, press conference, however, Peace assured the media that the bank had committed "no willful act to avoid sanctions [laws]; you know, mistakes are made — clerical errors — and we talked about last year a number of transactions which clearly were clerical errors or mistakes that were made."[3]

According to media reports, within days, Justice Department officials threatened to revoke the company's DPA on grounds that Peace's statement violated the agreement's non-contradiction provision, which provides that SCB "shall not cause to be made ... any public statement contradicting the acceptance of responsibility ... or the facts described" in the agreement and its statement of facts. Under the agreement, such a statement would "constitute a willful and material breach" of the agreement.[4]

The Standard Chartered DPA's non-contra-diction clause follows a form the Justice Department has used numerous times during the past decade. For example, FirstEnergy Nuclear Operating Co. faced a comparable situation for allegedly contravening a similar non-contradiction clause.[5] In 2006 the company entered into a DPA over false statements it allegedly made to the Nuclear Regulatory Commission, involving the safety of the Davis-Besse Nuclear Power Station on the shore of Lake Erie in northwest Ohio.[6] FirstEnergy later filed consultant reports in related insurance-coverage arbitration. These reports concluded that FirstEnergy did not intentionally cause damage to the Davis–Besse reactor.

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Upon learning of these reports, the Nuclear Regulatory Commission reportedly invoked the DPA's non-contradiction clause and threatened to refer FirstEnergy to the Justice Department for breach of the agreement.[7] Stuck between a rock and a hard place, FirstEnergy reportedly chose to forgo its multimillion-dollar insurance claim rather than risk the government revoking the DPA for breach.[8] The examples of Standard Chartered and FirstEnergy demonstrate the "Sword of Damocles" effect that non-contradiction clauses may have on companies over the course of an NPA's or a DPA's duration.

Companies are hard-pressed to challenge non-contradiction clauses, and the government has the upper hand in evaluating potential breaches. Because typically the text of many agreements specifically reserves to the Justice Department "sole discretion" to determine whether a company has breached an NPA or a DPA, companies must rely largely on the government's good faith to enforce these clauses only in appropriate circumstances. If the government does find a breach, the risks may be substantial, including the negative publicity and accompanying risks of indictment. Avoiding the potentially calamitous collateral consequences that indictment can bring is a key factor underpinning the surge in the use of NPAs and DPAs in the past decade.

Non-contradiction clauses can necessitate carefully crafted corporate statements even on matters that barely skirt the substance of the allegations resolved in NPAs and DPAs, and recent agreements highlight the non-contradiction provisions' durability, with the non-contradiction language remaining largely consistent across agreements.[9] The October 2013 Diebold Inc. DPA, for example, contained non-contradiction language that is nearly identical to the language in the Standard Chartered agreement and previous Justice Department agreements from the past decade.[10]

Non-contradiction clauses are likely to remain standard provisions in NPAs and DPAs. They give the Justice Department a mechanism to hold companies accountable for post-agreement statements that the agency argues could otherwise undermine the effect and value of an NPA or a DPA, and they allow the government to send a message through what are often detailed statements of facts cataloging wrongdoing.

Moreover, in an era of increasing judicial scrutiny of DPAs, a well-crafted statement of facts may likewise help assure a court that an adequate factual basis for an agreement exists — similar to the requirements for a court to accept a guilty plea under Federal Rule of Criminal Procedure 11(b)(3).

As the role of the courts in scrutinizing and approving DPAs continues to evolve, it is conceivable that DPAs with both the shield of an adequate factual basis and the sword of a robust non-contradiction clause may stand a better chance of being accepted by the courts.

GOVERNMENT CONTRACTING DEBARMENT AND SUSPENSION RISKS

For companies that receive a substantial portion of their business from the federal government, debarment or suspension from federal contracting is among the most potentially damaging of the collateral consequences of indictment or conviction.

Authority for suspension and debarment

The Federal Acquisition Regulations prohibit federal "[c]ontractors debarred, suspended, or proposed for debarment" from receiving contracts and bar federal agencies from seeking offers from such contractors, awarding contracts to them or agreeing to subcontracts with them, "unless the agency head determines that there is a compelling reason for such action."[11] Such debarments and suspensions generally apply across the entire federal government.[12]

Debarments are for fixed periods and generally may last for up to three years.[13] A suspension is, practically speaking, a temporary debarment that lasts for the duration of any investigation, litigation or agency determination to settle the debarment determination.[14] For cases in which an investigation or litigation lasts longer than three years, a suspension may actually exceed the standard maximum term for a debarment.

Suspension is recognized as "a 'serious action' that should only be imposed on the basis of an indictment or 'adequate evidence' of the existence of grounds for debarment, and where

'immediate action' is necessary to protect the Government's and public's interests."[15] This "adequate evidence" standard is a lower threshold than the "preponderance of the evidence" standard required for debarment.[16]

Suspension and debarment considerations also can be important for entities that do not rely on government contracts if they receive grant funding or participate in cooperative agreements with the U.S. government. The "nonprocurement common rule," or NCR, establishes the protocol for "governmentwide nonprocurement suspension and debarment" of entities engaged in transactions with the U.S. government involving grants or cooperative agreements.[17]

Despite the potentially harsh collateral consequences of suspension and debarment, these processes are not punitive and are not designed to punish contractors (for example, no fines accompany them). Instead, they serve to help ensure that the government only contracts with "presently responsible" entities.[18] As a result, when proper grounds exist, suspension and debarment are permitted *but not required* under the Federal Acquisition Regulations and NCR.

Federal agencies may exercise discretion in determining whether to suspend or debar a contractor, akin to Justice Department prosecutors' discretion in determining whether to indict a company, decline prosecution, seek a plea agreement, or enter into an NPA or a DPA. An agency should not debar or suspend a *presently* responsible contractor, even if grounds — based on past conduct — do exist. "In determining whether a contractor is presently responsible, an agency looks to the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors counseling against exclusion."[19]

Grounds for debarment under the FAR include "(1) a conviction or civil judgment for fraud or the commission of a criminal offense, (2) a serious violation of the terms of a government contract, subcontract, or transaction (established by a preponderance of the evidence), or (3) any other cause so serious or compelling in nature that it affects an entity's 'present responsibility.'"[20]

Consequences of suspension and debarment

A company that avoids a criminal judgment by entering into an NPA or a DPA has not necessarily eliminated suspension and debarment concerns. Rather, such concerns should inform a company's handling of a criminal investigation in multiple ways. For example, a DPA may be less helpful for a company seeking to avoid suspension and debarment than an NPA, because DPAs generally require the company to consent to the filing of formal criminal charges — typically a criminal information, waiving indictment — which remain on the court's docket for the duration of the agreement and until the government seeks, and the court grants, dismissal of the charges following the successful conclusion of the deferral period.[21]

The pendency of criminal charges against a company is particularly relevant to "presently responsible" determinations because, under the FAR, contractors must certify whether they are "presently indicted for, or otherwise criminally [] charged by a governmental entity with" various allegations, including "commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) contract ... or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, [or] tax evasion."[22]

Therefore, a company entering into a DPA and that has formal criminal charges pending against it on a court's docket for any of the classes of offenses enumerated in the FAR would be required to certify that it was presently indicted for purposes of responsibility determinations.

However, the FAR do *not* require a contractor to make a certification regarding *settlement* of *unfiled* criminal allegations. Therefore, companies that agree to an NPA may certify that they are not presently indicted or criminally charged with a crime within the meaning of the FAR. Similarly, companies that successfully complete deferral periods under their DPAs and have the criminal charges dismissed could thereafter certify they are not presently indicted or criminally charged, as defined by the FAR.

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Addressing suspension and debarment in negotiations

One tactic that can help companies mitigate unintended suspension and debarment consequences flowing from an NPA or a DPA is to conduct parallel discussions with government debarment and suspension officers during the pendency of the NPA or DPA negotiations and, if feasible, to have the relevant officer review the agreement before its execution.[23] In some instances, as Abt Associates did in 2007, it may be possible to memorialize specific assurances against suspension and debarment in the NPA or DPA.[24]

Or, it may be possible to negotiate a compliance side agreement with the relevant government customer setting forth explicit assurances, as Skedco Inc. did with the U.S. Army in 2013. The side agreement stated that "[t]he Army has determined that the terms and conditions of this Agreement provide adequate assurance that the interests of the government will be sufficiently protected to preclude the necessity of debarment or suspension of Skedco."[25]

CONCLUSION

The government's recent enforcement of non-contradiction clauses amplifies the need for a sophisticated, multidisciplinary and long-term approach to NPA or DPA negotiations. Companies that contract with the federal government or receive financing from federal sources should tread carefully in evaluating potential resolutions to allegations of corporate wrongdoing.

The tempered approach of using NPAs and DPAs to address serious criminal allegations has helped enforcement officials and responsible companies alike bolster corporate compliance culture and root out malfeasance while avoiding devastating collateral consequences that could visit harm on innocent shareholders, employees and the economy as a whole. In 2014, companies seeking NPAs and DPAs to resolve allegations of misconduct will continue to face these and other collateral issues.

NOTES

[1] Statement of Sir John Peace, Chairman, Standard Chartered PLC (Mar. 21, 2013).

[2] Standard Chartered Bank DPA, Exh. A ¶ 2 (Dec. 7, 2012).

[3] Louise Armitstead, *Standard Chartered Forced to Apologise for Calling US Sanction Breaches a 'Clerical Error,'* Telegraph, Mar. 21, 2013.

[4] Standard Chartered Bank DPA ¶ 12 (Dec. 10, 2012).

[5] Joseph G. Block & David L. Feinberg, *Look Before You Leap: DPAs, NPAs and the Environmental Criminal Case*, ALI-ABA Bus. Law Course Materials Journal, at 9–10 (February 2010).

[6] Press Release, U.S. Dep't of Justice, FirstEnergy Nuclear Operating Company to Pay $28 Million Relating to Operation of Davis–Besse Nuclear Power Station (Jan. 20, 2006).

[7] Tom Henry, *Regulators Skeptical of Davis–Besse Report*, Toledo Blade, May 19, 2007; Tom Henry, *NRC 'Disappointed' in Davis–Besse Insurance Claim*, Toledo Blade, June 28, 2007.

[8] Tom Henry, *FirstEnergy Drops Insurance Claim*, Toledo Blade, Dec. 8, 2007.

[9] *See, e.g.,* Parker Drilling DPA ¶ 19 (Apr. 16, 2013); Bashas' Inc. NPA ¶ 11 (Aug. 30, 2013); Diebold Inc. DPA ¶ 21 (Oct. 22, 2013).

[10] *See, e.g.,* AmSouth Bancorp. DPA ¶ 3 (Oct. 12, 2004); AEP Energy Services DPA ¶ 3 (Jan. 25, 2005); Vulcan Sports Media Inc. NPA ¶ 4 (Jan. 19, 2006); Blue Cross & Blue Shield of Rhode Island NPA ¶ 37 (Dec. 13, 2007); The Country Club of Jackson, Miss., DPA ¶ 6 (Feb. 6, 2008); Tacos de Mexico DPA ¶ 3 (May 13, 2009); Spectranetics Corp. NPA ¶ 6 (Dec. 17, 2009); CSK Auto Corp. NPA, at 3 (Aug. 30, 2011).

[11] 48 C.F.R. § 9.405(a) (2013).

[12] 48 C.F.R. § 9.406-1(c) ("A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the government, unless the agency head or designee ... states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.").

[13] 48 C.F.R. § 9.406-4(a)(1) (debarments "[g]enerally ... should not exceed 3 years").

[14] Joseph D. West et al., Suspension & Debarment, Briefing Papers: Second Series, August 2006 at 5; 48 C.F.R. § 9.407-4(a) (suspensions last "for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in [48 C.F.R. § 9.407-4]").

[15] Suspension & Debarment, at 5 (citing and quoting 48 C.F.R. § 9.407-1(b) and 2 C.F.R. § 180.700).

[16] *Id.*

[17] Office of Mgmt. & Budget, Memorandum to the Heads of Executive Departments and Agencies; Governmentwide Nonprocurement Suspension and Debarment, 53 Fed. Reg. 19160 (May 26, 1988).

[18] Suspension & Debarment, at 3–4.

[19] *Id.* at 4.

[20] *Id.* (citing 48 C.F.R. §§ 9.406-1(a), 9.407-1(b)).

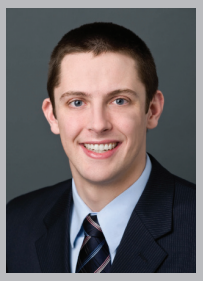
[21] *See, e.g.,* Craig S. Morford, Memorandum for Heads of Department Components and United States Attorneys, 1 n.2 (Mar. 7, 2008) (explaining that a DPA is "predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court"); Letter from Michael J. Garcia, U.S. Attorney for the Southern District of New York, to Amy M. Burgert, Counsel to ESI Entm't Sys., Re: ESI – Deferred Prosecution Agreement (June 3, 2008) ("ESI consents to the filing of a one-count information ... in the United States District Court for the Southern District of New York.").

[22] 48 C.F.R. § 52.209-5(a)(1)(i)(C), (B) (2013).

[23] Block & Feinberg at 22.

[24] *Id.* at 22–23; Abt Associates DPA, "Compliance Agreement" att., at 5 (Dec. 28, 2006).

[25] Skedco DPA (Oct. 8, 2013), att. C., at 4 & 6.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