

## EXPERT ANALYSIS

### 2014 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements (Part 1)

By F. Joseph Warin, Esq., Michael Diamant, Esq., and Melissa Farrar, Esq.  
*Gibson, Dunn & Crutcher*

This first installment of a two-part series discusses trends in deferred prosecution agreements and non-prosecution agreements in 2014. Part 2 will address two interesting developments that occurred last year relating to the role of independent monitors in the settlement process. These developments help to define the scope of an independent monitor's confidentiality interests and shed light on the potential for post-settlement imposition of corporate monitoring requirements.

The U.S. Department of Justice and the U.S. Securities and Exchange Commission continue to use DPAs and NPAs aggressively. The developments of the past year leave no doubt that such resolutions are a vital part of the federal corporate law enforcement arsenal, as they afford the government an avenue to punish and reform corporations accused of wrongdoing.

Leslie Caldwell, assistant attorney general for the DOJ's Criminal Division, commented in early December on the importance of negotiated resolutions, noting that they enable the DOJ to "impose reforms, impose compliance controls, and impose all sorts of behavioral change."<sup>1</sup> Indeed, the DOJ and the SEC have frequently used negotiated resolutions, including DPAs and NPAs, to require companies to implement an effective compliance program. As Caldwell concluded, "In the United States system at least [settlement] is a more powerful tool than actually going to trial."

A number of developments that occurred last year with respect to negotiated resolutions show that the traditional hallmarks of DPAs and NPAs, including post-settlement compliance and reporting obligations, are here to stay.

#### DPAS AND NPAS IN 2014

In 2014, the DOJ and SEC entered into 20 DPAs and 10 NPAs. These included a "restitution and remediation agreement," a "criminal enforcement agreement," and a "side letter agreement."<sup>2</sup> Although these three NPAs were issued under different names, the difference appears to be more related to form than function.

The DOJ's "restitution and remediation agreement" with SunTrust Mortgage Inc., its "side letter agreement" with Stryker Corp. and its "criminal enforcement agreement" with Pilot Travel Centers LLC (which does business as Pilot Flying J — which is reminiscent of the agency's 2012 agreement with Gibson Guitar — all include the nuts and bolts of standard NPAs. The Pilot Flying J agreement, however, goes further than typical NPAs by attaching an unfiled criminal information, in lieu of a statement of facts, that the DOJ is "prepared to file" if the agreement is breached.<sup>3</sup> The variety of NPAs and DPAs underscores that these are bespoke agreements created by the 94 U.S. attorneys' offices.

The SEC entered into one of the 20 DPAs in 2014, marking its third DPA since it began using the tool in 2011 and seventh NPA or DPA since its first use of the NPA in 2010. At 30 NPAs and DPAs, 2014 was consistent with prior years, exceeding the number of NPAs and DPAs issued in 2013 by two.

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These 30 agreements produced \$5.1 billion, a substantial increase over the approximately \$2.9 billion generated in the previous year.

Thus, NPAs and DPAs continue to be an effective vehicle for resolving allegations of corporate misconduct. Indeed, the value to the government of DPAs and NPAs was highlighted this year when the DOJ extended two NPAs with Barclays Bank and UBS AG, respectively, and one DPA with Standard Chartered Bank to conclude continuing investigations while the agreements were still in force.<sup>4</sup>

The decade-long trend favoring the use of these settlement tools is expected to explode in 2015, particularly as the DOJ's tax division approaches resolution with about 100 Swiss banks participating in the division's "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks."

This tax disclosure and non-prosecution program, which was initiated in August 2013, rewards participating Swiss banks that "have reason to believe [they] may have committed [certain] tax-related offenses" in connection with "U.S. Related Accounts" (as defined by the program) with NPAs in exchange for their cooperation and payment of penalties.<sup>5</sup>

No NPA has yet been issued under the program. Initial deadlines for resolution were set in mid-2014, and settlements are likely forthcoming.<sup>6</sup> The Bank Leumi Group DPA, issued Dec. 22, foreshadows this group. With respect to this DPA, \$157 million of a \$270 million penalty was attributed to Leumi Private Bank, the Switzerland-based subsidiary of Bank Leumi Le-Israel, and was calculated according to the program's formula.<sup>7</sup>

This trend will merit close attention in 2015 and beyond, particularly as increased judicial scrutiny of DPAs puts potential pressure on the negotiation of settlement conditions. Judicial involvement in the DPA process has thus far been limited to holding cases in abeyance for the terms of DPAs and excluding time under the Speedy Trial Act. However, today's judiciary has expressed a keen interest in becoming more involved and assessing settlement terms.

Indeed, two DPAs signed in 2014 — Saena Tech Corp.'s agreement with the U.S. attorney's office for the District of Columbia resolving domestic bribery charges and Fokker Services' agreement with the same office in connection with export control violations — were met with probing inquiries by the judges overseeing them, and it remains unclear whether the initial agreements will withstand the level of judicial scrutiny applied.<sup>8</sup>

The charts and figures shown here are derived from Gibson Dunn & Crutcher's database, which provides details relating to 308 NPAs and DPAs entered into by federal prosecutors between Jan. 1, 2000, and Jan. 6, 2015. Chart 1 shows the continuing trend favoring the use of NPAs and DPAs since 2000, when the DOJ issued only two.

Chart 2 demonstrates the trends in monetary recoveries over the past 14 years. As noted above, the 30 NPAs and DPAs issued in 2014 resulted in a collective recovery of more than \$5.1 billion. This exceeds the total recovered in 2013 by more than \$2 billion. It also notably exceeds the 2011 recovery of \$3.1 billion, which represented 34 NPAs and DPAs. The 2014 recovery dwarfs the amount recovered in 2008, when 19 NPAs and DPAs produced about \$300 million.

2012 was a banner year for NPAs and DPAs, when 38 agreements produced almost \$9 billion. But it also appears to have been an outlier, in part because it included three cases that individually produced between \$1.5 billion and \$3 billion.

Several of 2014's settlements also involved eye-catching figures, with eight of the 30 exceeding \$100 million. Alstom S.A.'s landmark Foreign Corrupt Practices Act settlement with the DOJ, which totaled \$772.3 million, accounted for two of the eight, and two others each topped \$1 billion.<sup>9</sup>

## CONCLUSION

2014 saw the continued steady use of NPAs and DPAs as a key mechanism for resolving allegations of corporate misconduct. NPAs and DPAs have remained a consistent and favored tool, with every year since 2008 producing more than 20 individual agreements.

Many of 2014's NPA and DPA recoveries were also notable for their size. One resolution (involving two DPAs) was the largest criminal FCPA recovery ever. Two other DPAs exceeded \$1 billion, and eight more exceeded \$100 million in associated recovery values.

With figures like these, recent statements by DOJ leadership promoting negotiated resolutions, and dozens of NPAs anticipated in connection with Swiss bank participation in the DOJ tax program, we can expect the trend in favor of NPA and DPA use to continue in coming years.

## NOTES

<sup>1</sup> Rahul Rose, *Caldwell: Settlement a "More Powerful Tool Than Convictions,"* GLOBAL INVESTIGATIONS REVIEW (Dec. 3, 2014), available at <http://bit.ly/1zoRuJW>.

<sup>2</sup> It is likely that there are other NPAs and DPAs that have not been publicly disclosed. Gibson Dunn has executed non-prosecution agreements that have not been made public. In some instances, the DOJ declines to publicly disclose the agreements.

<sup>3</sup> SunTrust Mortgage Restitution and Remediation Agreement (July 3, 2014); Side Letter Agreement with Stryker Corp. (Aug. 29, 2014); Pilot Travel Centers LLC, d/b/a Pilot Flying J Criminal Enforcement Agreement ¶ 11 (July 10, 2014). At least one other "criminal enforcement agreement" functioned similarly to Pilot Flying J's. That agreement was issued to Gibson Guitar Corp. in 2012. See Gibson Guitar Corp. Criminal Enforcement Agreement (July 27, 2012).

<sup>4</sup> Barclays Plc and Barclays Bank Plc, Report of Foreign Private Issuer, Form 6-K, Ex. 99-1 (July 30, 2014) ("In anticipation of the expiry of the two year period, Barclays and DOJ-FS entered into a letter agreement which: (1) gives DOJ-FS until 27 June 2015 to make a determination under the NPA solely as to whether any of Barclays trading activities in the foreign exchange market during the two year period from 26 June 2012 constituted the commission of a 'United States crime'; and (2) with respect to the ongoing investigation of those trading activities by DOJ-FS and DOJ-AD, extends Barclays' obligation to disclose non-privileged information in response to inquiries of the DOJ-FS to 27 June 2015. The two year period under the NPA has otherwise expired."); UBS Group AG, Form 6-K, n.14(8) (Oct. 28, 2014) ("UBS and the DOJ have agreed in principle to extend the terms of the NPA by one year to 18 December 2015.").

<sup>5</sup> Dep't of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, ¶¶ I.B.9, II (Aug. 29, 2013).

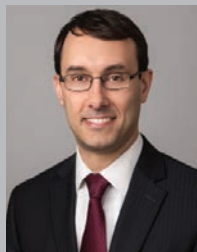
<sup>6</sup> *Id.* at ¶ II.B (requiring participating banks to submit letters of intent setting forth a plan for complying with all program requirements within 120 days of submittal, and further requiring submittal of letters of intent by Dec. 31, 2013), and ¶ II.H (setting forth penalty requirements).

<sup>7</sup> Deferred Prosecution Agreement at 6:15-19, *United States v. Bank Leumi Le-Israel*, No. 14-CR-0731 (C.D. Cal. Dec. 22, 2014); see also Press Release, Dep't of Justice, Office of Public Affairs, Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Assets in Offshore Bank Accounts (Dec. 22, 2014). The Bank Leumi Group was under investigation by the DOJ at the time of the program's publication and was therefore ineligible to participate.

<sup>8</sup> See generally Saena Tech Deferred Prosecution Agreement, att. A (Apr. 16, 2014); Transcript of Hearing, *United States v. Saena Tech Corp.*, No. 1:14-cr-00066-EGS (D.D.C. July 17, 2014).

<sup>9</sup> The total penalty associated with the conduct underpinning the Alstom Grid and Alstom Power DPAs was paid by the parent company, Alstom S.A. Thus, while a total penalty of \$772.3 million is noted here, neither subsidiary was directly fined.

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**F. Joseph Warin** (L) is co-chair of Gibson, Dunn & Crutcher's white-collar defense and investigations practice group and is chair of the litigation department in the firm's Washington office. He is a former federal prosecutor. **Michael Diamant** (C), a partner in the firm's Washington office, has broad experience in white-collar criminal defense, internal investigations and corporate compliance. **Melissa Farrar** (R), an associate in the firm's Washington office, is a member of its white-collar defense and investigations group and government contracts practice group.

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