Law, Crime and Law Enforcement

Corporate Crime and the Use of Deferred and Non-Prosecution Agreements

Isobel E. Gilbert
Editor

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LAW, CRIME AND LAW ENFORCEMENT

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PREFACE

Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, and may also require companies to hire an independent monitor to oversee compliance. This book provides observations on corporate crime and the use of deferred and non-prosecution agreements.

Chapter 1 - This chapter is edited and excerpted testimony by John Conyers, Jr. before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 2 - This chapter is edited and excerpted testimony by Eileen R. Larence before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 3 - This chapter is edited and excerpted prepared testimony by Christopher J. Christie before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 4 - This chapter is edited and excerpted testimony by Gary G. Grindler before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 5 - This chapter is edited and excerpted testimony by Chuck Rosenberg before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 6 - This chapter is edited and excerpted written testimony by Vikramaditya Khanna before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 7 - This chapter is edited and excerpted testimony by Rep. Frank Pallone, Jr. before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 8 - This chapter is edited and excerpted testimony by Bill Pascrell, Jr. before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on June 25, 2009.

Chapter 9 - This chapter is edited and excerpted testimony by Eileen R. Larence before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on November 19, 2009.

Chapter 10 - This chapter is edited and excerpted testimony by Gill M. Soffer before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on November 19, 2009.

Chapter 11 - This chapter is edited and excerpted written testimony by Brandon L. Garrett before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary on November 19, 2009.

Chapter 12 - Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution. In June and November 2009, GAO testified on DOJ's use and oversight of DPAs and NPAs, and this chapter discusses additional findings, including (1) the extent to which DOJ has used DPAs and NPAs to address corporate misconduct and tracks use of these agreements, (2) the extent to which DOJ measures the effectiveness of DPAs and NPAs, and (3) the role of the court in the DPA and NPA process. GAO examined 152 DPAs and NPAs negotiated from 1993 through September 2009 and analyzed DOJ data on corporate prosecutions in fiscal years 2004 through 2009. GAO also interviewed DOJ officials, prosecutors from 13 DOJ offices, 20 company representatives, 11 monitors who oversee company compliance, and 12 federal judges. While not generalizable, these results provide insight into decisions about DPAs and NPAs.

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Chapter 1

OPENING STATEMENT OF CHAIRMAN JOHN CONYERS, JR., BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW, HEARING ON "ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS"

Our nation is in the midst of one of the worst economic crises since the Great Depression. As we have bailed out some of the biggest financial institutions and corporations, it's come to light that many of these recipients of taxpayer dollars engaged in fraud or otherwise irresponsible activities. Given these circumstances, I applaud this subcommittee's examination of corporate pre-trial agreements, a tool at the Justice Department's disposal to deter and prevent corporate crime. Corporate pre-trial agreements are commonly labeled either deferred or non-prosecution agreements. The two kinds of agreements are functionally the same except in one respect. In the typical deferred prosecution agreement, a criminal charge is filed, and the corporation acknowledges and accepts responsibility for the criminal wrongdoing set forth in the charging instrument. In the typical non-prosecution agreement, no charging document is filed, and the investigation remains pending until the corporation fulfills the terms of the agreement.

Both pre-trial agreements provide for the prosecution to be deferred for a period of time, usually from one to two years, provided that the corporation fulfills its obligations under the agreement and does not engage in further misconduct. In addition, these agreements usually require the payment of a fine, implementation of stringent corporate governance and compliance measures, cooperation with the government's ongoing investigation, waivers of speedy trial rights and statute of limitations defenses, and consent to external oversight by an independent monitor approved by the government. After media reports detailing questionable Bush Justice Department appointments of independent monitors surfaced in January 2008, the Judiciary Committee began an investigation into the Department's use of deferred and non-prosecution agreements. We soon learned that the lack of guidelines in this area led to vast discrepancies across jurisdictions in the terms of agreements and in monitor selection. In response to our concerns, the Department issued some guidelines on monitor selection in March 2008 and mandated the collection and tracking of deferred and non- prosecution agreements. Although there has been some progress with respect to greater transparency, uniformity, and accountability in deferred and non-prosecution agreements, more needs to be done. There remain at least three issues that I believe we should address.

First; should corporate deferred and non-prosecution agreements be eliminated from the options within a prosecutor's discretion? In the wake of the 2002 criminal conviction and subsequent collapse of Arthur Andersen LLP, deferred and non-prosecution agreements became a popular tool of President Bush's Justice Department. Although the Supreme Court eventually reversed Arthur Anderson's conviction, the firm, during the interim, ultimately dissolved and 28,000 people lost their jobs. To avoid these types of unintended collateral consequences, the Justice Department sought a middle ground between seeking corporate convictions and declining to prosecute corporations accused of wrongdoing. As a result, the number of deferred and non-prosecution agreements rapidly increased and peaked in 2007 with 40 such agreements. This rate vastly exceeds the 140 of such agreements entered into since 1993

In response to such expansive use of these agreements, Mary Jo White, the former U.S. Attorney for the Southern District of New York who orchestrated one of the first deferred prosecution agreements in 1994, recently expressed concern about prosecutors' increased reliance on this law enforcement tool. She recommends that they be phased out completely because she believes

prosecutors are ignoring the option to decline prosecution. Others question whether these agreements serve the interests of justice. Through the criminal prosecution of a corporation— as opposed to just the accused employees—a prosecutor may seek to deter and prevent similar behavior throughout an entire industry.

I hope today's witnesses will be able to assure me that these agreements do not must result in just "a slap on the wrist," but instead lead to meaningful deterrence and the prevention of corporate crime. The goal of these agreements should be to cause corporations to actually reform their behavior.

Second; if these agreements remain an option for corporate prosecutions, are the guidelines issued last year by the Department sufficient for providing accountability, transparency, and uniformity in the process? As you may recall, Craig S. Morford, then-acting deputy attorney general, issued guidance in March 2008 on the selection and use of monitors in deferred and non-prosecution agreements with corporations on the eve of this subcommittee's hearing last year. By no means comprehensive, the guidance concerned monitor-related provisions that focused on: (1) the selection of monitors; (2) the scope of a monitor's duty; and (3) the duration of the agreement. Notably, these guidelines did not address whether a deferred prosecution agreement or a non-prosecution agreement should be used or how these agreements should be structured.

Additionally, the March 2008 guidance failed to rein in the tremendous leverage that the government and the monitor have over a corporation entering into an agreement. Corporations facing criminal prosecution have an unfair choice. They can either risk a conviction and a possible corporate death sentence after trial or be coerced into accepting the terms and fees the monitor and prosecutor believe are appropriate.

Third, has the abuse or the appearance of abuse in the system been completely eliminated? For example, I find New Jersey U.S. Attorney Christopher Christie's appointment of former Attorney General John Ashcroft to be a corporate monitor in the Zimmer Holdings case to be particularly troubling. That appointment was made with no public notice, no bidding, and with no input from a neutral judge or the company subject to the monitoring.

Reportedly, Mr. Ashcroft received $52 million for 18 months of work as a result of this appointment. And, even more astoundingly, these fees were essentially non-negotiable. Especially in light of the fact that Mr. Ashcroft

supervised Mr. Christie while he was attorney general, this arrangement presents the appearance of cronyism.

I am also concerned with a provision in the agreement deferring prosecution in the Bristol- Myers Squibb case where U.S. Attorney Christie required Bristol-Myers Squibb to endow a chair in business ethics at his *alma mater*, Seton Hall. This extraordinary restitution had nothing to do with the underlying criminal conduct. Furthermore, I am troubled by the fact that lucrative monitor contracts are not generally available to all interested attorneys. Last May, *The New York Times* reported that at least 30 of the 41 monitors appointed in deferred prosecution agreements since 1994 were former government officials and 23 were former prosecutors.

In light of these concerns, I am pleased that the Subcommittee on Commercial and Administrative Law is revisiting the Justice Department's use of corporate deferred and non- prosecution agreements. When the Committee last considered this issue in March 2008, former Attorney General John Ashcroft's testimony unfortunately left us with more questions than answers.

I hope that today's testimony will be more informative as we collectively consider the best path forward for deferred and non-prosecution agreements. I welcome Representatives Pallone and Pascrell to the Judiciary Committee and thank them for their leadership on this issue.

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Chapter 2

CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

Eileen R. Larence

WHY GAO DID THIS STUDY

Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution, and may also require companies to hire an independent monitor to oversee compliance. This testimony provides preliminary observations on (1) factors DOJ considers when deciding whether to enter into a DPA or NPA and setting the terms of the agreements, (2) methods DOJ uses to oversee companies' compliance, (3) processes by which monitors are selected, and (4) companies' perspectives regarding the costs and role of the monitor. It also includes the results of GAO's recently completed work on DOJ's efforts to document the monitor selection process (discussed in objective 3). GAO reviewed DOJ guidance and 57 of the 140 agreements negotiated from 1993

(when the first 2 were signed) through May 2009; and interviewed DOJ officials, officials from 17 companies, and 6 monitors. While not generalizable, these results provide insight into decisions about DPAs and NPAs.

What GAO Recommends

GAO recommends that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions. DOJ agreed with our recommendation.

What GAO Found

Prosecutors in all 13 DOJ offices with whom GAO spoke said that they based their decision on whether to enter into a DPA or NPA on DOJ's principles for prosecuting business organizations, particularly those related to the company's willingness to cooperate, collateral consequences to innocent parties, and remedial measures taken by the company. However, prosecutors differed in their willingness to use DPAs or NPAs. In addition, prosecutors' varying perceptions of what constitutes a DPA or NPA has led to inconsistencies in how the agreements are labeled. In March 2008, DOJ issued guidance defining DPAs and NPAs, but this guidance is not consistently followed, in part because not all DOJ offices view it as mandatory. DOJ plans to determine the need to take additional steps to require consistency in the use of the labels DPA and NPA. While DOJ and companies generally negotiated the terms of DPAs and NPAs—such as monetary payments and compliance requirements—DOJ also considered other factors in its decisions, such as monetary gains to the company as a result of the criminal misconduct.

To ensure that companies were complying with the terms of the DPAs and NPAs, DOJ employed several oversight mechanisms, including the use of independent monitors, coordination with regulatory agencies, and other means. Of the 57 agreements GAO reviewed, 26 required the company to hire, at its own expense, an independent monitor. In the remaining agreements, DOJ relied, among other things, on reports from regulatory agencies or from monitors hired by companies under separate agreements with these agencies, and company certifications of compliance.

For the DPAs and NPAs GAO reviewed, even though DOJ was not a party to the contracts between companies and monitors, DOJ typically selected the monitor, and its decisions were generally made collaboratively among DOJ and company officials. Monitor candidates were typically identified through DOJ or company officials' personal knowledge or recommendations from colleagues and associates. In March 2008, DOJ issued guidance stating that for monitor selection to be collaborative and merit-based, committees should consider the candidates and the selection must be approved by the Deputy Attorney General. However, because DOJ does not require documentation of the process used or the reasons for particular monitor selection decisions, it will be difficult for DOJ to validate whether its monitor selection guidance-which, in part, is intended to instill public confidence-is adhered to.

Some company officials GAO spoke with reported that they had little leverage to address concerns about the amount and scope of the monitors' work and, therefore, would like DOJ to assist them. GAO in its ongoing work will assess this and other issues about the use and oversight of DPAs and NPAs.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate in today's hearing to discuss the Department of Justice's (DOJ) use and oversight of deferred prosecution and non-prosecution agreements. According to DOJ, one of its chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. Recent high-profile cases of fraud and mismanagement in the financial services sector have heightened the need for the government to determine the most appropriate tools it can use to punish and deter corporate crime. Federal prosecutors continue to prosecute company executives and employees, as well as companies themselves, for crimes such as tax evasion, securities fraud, health care fraud, and bribery of foreign officials, among others. However, over the past decade, DOJ has recognized the potential harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior. The failure of the accounting firm Arthur Andersen, and the associated loss of thousands of jobs following its indictment and conviction for obstruction of justice for destroying Enron- related records,[1] has been offered as a prime example of the potentially harmful effects of criminally prosecuting a company. To avoid serious harm to innocent third parties, DOJ guidance allows prosecutors to negotiate