Legal Opinion Letter

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PROPOSAL SEEKS MORE OVERSIGHT OF JUSTICE DEPARTMENT'S PRE-TRIAL DIVERSION AGREEMENTS

by
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On April 2, 2009, Rep. William Pascrell (D-NJ) introduced a bill—H.R. 1947, the Accountability in Deferred Prosecution Act—to address the lack of standards governing Deferred Prosecution Agreements ("DPAs") and Non-prosecution Agreements ("NPAs"). These agreements are pre-trial diversion contracts entered into by the government—usually the Department of Justice ("DOJ")—and a potential corporate defendant. Under the terms of a DPA, the government files criminal charges against a company, but holds prosecution of the charges in abeyance. If the company satisfactorily honors the terms of the DPA, the government moves to dismiss the charges. Companies that enter DPAs are required to stipulate to "facts" that constitute criminal conduct. Typically, DPAs require substantial monetary penalties and the adoption of specified corporate governance and/or compliance procedures. Companies also pledge to cooperate with the government's ongoing investigations and often agree to fund extensive external oversight by a corporate monitor.

Unlike with DPAs, no charges are filed against companies that enter NPAs so long as they comply with specified sanctions. If a company that enters an NPA is eventually deemed by the government to have abided by the terms of the agreement, then the company avoids prosecution. Contrary to civil agreements or consent decrees, the courts have no supervisory role with regard to DPAs or NPAs.

Until recently, DOJ had no written standards governing the terms of DPAs or NPAs. On March 7, 2008, DOJ released a Memorandum by Acting Deputy Attorney General Craig Morford—commonly referred to as the "Morford Memo"—that provides internal guidance to prosecutors on drafting DPAs and NPAs. DOJ has also recently amended the Principles of Prosecution of Business Organizations to address attorney-client privilege and work product protection issues in connection with these agreements. These documents fail to address a number of issues and, significantly, they offer merely internal guidance with no legal enforceability.

In its current form, H.R. 1947 would:

•Require the Attorney General to issue standards and guidelines regarding the following DPA/NPA provisions: when a corporate monitor is warranted, the duties and authority of the monitor and to whom the monitor owes those duties; the means of establishing the terms of an agreement, including the use of monetary penalties, restitution, civil settlements and post-monitoring conditions; whether the agreement should include compliance and ethical requirements as set forth in section 8B2.1 of the Sentencing Guidelines; the process for determining compliance with the agreement as well as the

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method for determining breach; the extent of joint involvement of regulatory agencies; the duration of the agreement; what constitutes "cooperation" required by the company and its employees, if any; and the circumstances under which an NPA should be used rather than a DPA;

•Require the Attorney General to establish rules for the selection of corporate monitors in connection with DPAs, including a rule that provides for the creation of a national list of those who are determined to be qualified to serve as monitors through a public, competitive process, and also establishing a fee schedule for the compensation of monitors and their staff;

•Place a number of restrictions on agreements, such as restricting payments to third parties unrelated to harm caused by the company and barring attorneys related to the prosecution of the case from selecting the monitor;

•Require the appropriate United States District Court to determine whether the agreement is consistent with the guidelines and is "in the interests of justice;"

•Require each party and the monitor to submit to the court quarterly reports that detail progress made towards the completion of the agreement as well as any concerns with implementation of the agreement;

•Require the monitor to provide the court with a final itemized statement of work done and compensation earned;

•Provide for judicial review of the implementation or termination of the agreement upon motion of either party or the monitor; and

•Require public disclosure of deferred prosecution agreements.[1]

H.R. 1947 could result in more uniform decision-making by DOJ as to how and when to use these agreements, as well as the standardization of agreement terms. It would also require the Attorney General to establish certain procedures to ensure the independence and accountability of corporate monitors. This could address some of the well-publicized problems of overcompensated or ethically conflicted monitors. The bill does, however, raise other questions. First, the legislation could result in DOJ issuing guidelines that curtail the use of DPAs and instead favor indictment. Second, DOJ might issue guidelines that have negative consequences for companies or their employees. Unlike previously introduced bills, H.R. 1947 does not purport to establish any particular factors for DOJ lawyers to consider when determining the appropriateness of entering into a DPA or NPA. Third, the bill's mandated public disclosure of all DPAs on the DOJ website would likely please some parties who find transparency beneficial, but would draw objections from others who consider public disclosure a disincentive to entering into the agreements—particularly in the case of non-prosecution agreements.

Lastly, the bill seeks to require the intervention of a court in what has traditionally been a negotiation between the government and a company. A requirement that a court determine whether the agreement is consistent with the government's own guidelines and whether it is "in the interests of justice"—a phrase that is left undefined—is likely to draw criticism from those on both sides of the negotiating table. Congress may wish to consider whether it is wiser to require judicial review only upon the event of an alleged breach of the agreement.

[1]It is unclear whether H.R. 1947 requires public disclosure of NPAs. Section 8, which sets forth the statutory provisions related to public disclosure, only specifically references the public disclosure of DPAs. Section 3 of the bill, however, states that an NPA is subject to all the Act's requirements and is legally equivalent to a DPA.

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