U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAY 15 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Mr. Chairman:

This responds to your letter, dated January 10, 2008, which requested information concerning the use of deferred prosecution agreements by the Department as a means of resolving cases against companies that have been investigated for or charged with corporate criminal conduct. As you know, the Department participated in a panel of witnesses who gave extensive testimony before the Subcommittee on Commercial and Administrative Law on March 11, 2008, concerning "Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?" One day earlier, the Department issued nine Principles for the Selection and Use of Monitors in Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) with Corporations (the "Monitor Principles"). We hope that these principles and testimony have addressed many of your questions, and we write today to provide additional data concerning the use of these agreements in the context of criminal investigations and prosecutions. We are sending a similar response to Chairwoman Sanchez and Representative Pascrell, who joined in your letter to us.

The decision to enter into a corporate DPA or an NPA, like the decision to file criminal charges against a corporation (or the decision to not prosecute, defer prosecution of, or file charges against an individual), is made by individual United States' Attorney's Offices and litigating components within the Department. This approach is guided, as always, by the generally applicable Principles of Federal Prosecution, as well as by the more specific Principles of Federal Prosecution of Business Organizations. DPAs are typically predicated upon the filing of a formal charging document by the government, and the agreements are submitted to the appropriate court. In the vast majority of situations, DPAs are filed on the public docket and are not sealed by the court. It is therefore not the case, as your letter asserts, that DPAs "have been completely shielded from review by either the Legislative or Judicial branches of government." The Department has also entered into non-prosecution agreements ("NPAs") with corporations. The principal distinction between DPAs and NPAs, as those terms are used here, is that the latter agreements are not accompanied by the filing of formal charges, and they are maintained by the parties rather than being filed with a court.

In an effort to comply with the spirit, as well as the text, of your letter, we are providing you with copies of 85 DPAs and NPAs collected from United States Attorney's Offices around the country. We believe that this collection, contained on the enclosed compact disc, represents the large majority of the agreements entered during the time period referenced in your letter (as well as some entered prior to 2003), and that they are the best source of the particular information sought by the Committee, specifically, the nature of the crime investigated or charged, the length of the agreement, the amount of fines levied, the terms of the compliance agreement, and details concerning the retention and use of a third party monitor. We note that, of the 85 agreements provided, approximately half involved the use of a monitor. We will supplement this response if we locate additional agreements that fall within the scope of the Committee's request.

While, in absolute terms, the number of agreements has increased since the beginning of this decade, that number is relatively small compared to the number of criminal convictions the Department has obtained in the area of corporate fraud. For example, from 2002 to 2007, the Department secured several hundred fraud convictions against corporations. By contrast, in that same period, the Department has identified fewer than 100 agreements with corporations arising out of fraud investigations. Agreements have been used in a variety of contexts including securities fraud, money laundering, Foreign Corrupt Practices Act violations, and others. The terms of an agreement are determined by the particular facts and circumstances in a given case.

As a review of the documents will demonstrate, the obligations imposed upon the corporation in a DPA or NPA generally include: (1) the payment of restitution to victims and/or financial penalties to the government; (2) cooperation by the corporation with ongoing government investigation of potentially culpable individuals and/or other corporations; and (3) the implementation of an ethics and compliance program, including internal controls, that will effectively prevent, detect, and respond to any future misconduct. In exchange, the government agrees to defer prosecution of the corporation for a defined period of time, usually from one to five years. If the corporation satisfies the obligations imposed by the agreement within that time period, then the government will not proceed with a prosecution. If the corporation materially fails to comply with the agreement, then the government has the discretion to go forward with a prosecution and, in most cases, to use the admissions of the corporation to prove the case.

DPAs and NPAs occupy an important middle ground in the resolution of corporate crime cases that may have distinct advantages over simply declining prosecution, which may allow a corporate criminal to escape without consequences, or charging and convicting a corporation and producing – but often only after significant delay and diversion of resources – a result that may have negative consequences for innocent third parties who played no role in the criminal conduct, were unaware of it, or were unable to prevent it, including employees, pensioners, shareholders, creditors, customers, and the general public. These agreements typically require the payment of restitution to victims and/or financial penalties to the Treasury long before such payments could be obtained, in most cases, through formal charging, protracted litigation, and

inevitable appeals. The agreements promote the public interest in ferreting out crime by encouraging corporate cooperation in obtaining the evidence necessary to prosecute individuals and other corporations who have engaged in misconduct. Perhaps most importantly, by requiring solid ethics and compliance programs, the agreements encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates. Thus, these agreements can help restore the integrity and preserve the financial viability of a corporation that had descended into corruption and criminal conduct. And this is all done while preserving the government's ability to prosecute recalcitrant corporations if the agreement is materially breached.

In appropriate cases, DPAs and NPAs also may provide for the retention of an independent third party "monitor." A monitor may be particularly useful where the agreement requires the corporation to design or substantially re-design and effectively implement a broad ethics and compliance program and additional internal controls. In other cases, however, a monitor may not be needed, for varied reasons, such as where the corporation has ceased operations in the area where the criminal conduct occurred, or where the corporation has re-designed and effectively implemented appropriate compliance measures and internal controls before entering into the agreement with the government. In appropriate cases, the appointment of a corporate monitor can have distinct advantages for the government and the public. Monitors allow the government to verify, through the work of an independent observer, whether a corporation is fulfilling the obligations to which it has agreed. A monitor also may provide specialized expertise to oversee and ensure compliance with complex or technical aspects of a corporate agreement, in areas where prosecutors may lack such skills.

Also enclosed is a list identifying the monitors that were selected in the 41 of the 85 agreements we are providing where monitors were used. We are unable, however, to provide information in response to your request for information concerning the contracts, including dollar amounts, awarded to monitors. In each case listed, the monitor was retained by the corporation, which paid for the monitor along with the other costs of implementing the DPA or NPA. Monitors retained under corporate DPAs or NPAs are not government employees or agents, and they do not contract with or get paid by the government. Instead, monitor fees are generally negotiated between the corporation and the monitor. The government is generally not a party to these arrangements and we do not routinely receive the information you seek.

The Department continues to strive for the highest levels of professionalism and integrity in the investigation and prosecution of corporate fraud. Our recent issuance of the Monitor

Principles is part of that effort, as is our continued focus on aggressively rooting out corporate crime, but with due regard to the vulnerabilities of investors and the general public. We hope that this information is helpful. Please do not hesitate to contact this office if you would like assistance regarding this or any other matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: Honorable Lamar S. Smith
Ranking Minority Member

CORPORATE ENTITY	DATE	OFFICE or COMPONENT	Name
ABT Associates	2006	D. Mass.	Defense Contract Audit Agency
Aibel Group/Vetco Ltd.	2007	S.D. Tex.	Richard Weinberg
AIG	2006	E.D.Va.	James Cole
America Online	2004	E.D. Va.	James Robinson
Appalachian Oil Company Inc.	2007	W.D. Va.	Martin Anderson
Aurora Foods	2001	S.D.N.Y.	Aaron Marcu
Baker Hughes	2007	S.D. Tex., Fraud	Stephen Fishbein
Bank of New York	2005	E.D.N.Y., S.D.N.Y	George Stamboulidis
Biomet (Hip & Knee Replacement Industry)	2007	D. N.J.	David Kelley
Blue Cross Blue Shield of Rhode Island	2007	D. R.I., Public Integrity	Margaret Curran/Leonard Henson
Boeing	2006	E.D.Va., C.D.Cal.	George Babbitt Jr.
Bristol-Myers Squibb	2005	D.N.J.	Frederick Lacey
British Petroleum	2007	Fraud	Bart Schwartz
Business Objects	2005	E.D. Va.	Miles Ehrlich
CIBC	2003	Enron Task Force	Michael Considine
Computer Associates	2004	E.D.N.Y.	Lee Richards III
Depuy Orthopaedics (Hip & Knee Replacement Industry)	2007	D. N.J.	Debra Yang
Edward D. Jones	2004	E.D. Mo.	James Doty
Health South	2006	N.D. Ala.	Michael Useem
Ingersoll Rand	2007	Fraud	Jeffrey Kaplan
InVision Technologies	2004	Fraud	William Pendergast
JB Oxford Holdings	2000	C.D. Cal.	Arthur Andersen (unconfirmed)
KPMG	2005	S.D.N.Y.	Richard Breeden
Mellon Financial Corp.	2006	W. D. Penn.	George Stamboulidis
Merrill Lynch	2003	Enron Task Force	George Stamboulidis
Micrus	2005	Fraud	Jan Handzlik
Monsanto	2005	Fraud	Timothy Dickinson
MRA	2006	N.D. Fla., OPTF	Lori Pelliccioni
NETeller	2007	S.D.N.Y.	Navigant Consulting
NY Racing Assoc.	2003	E.D.N.Y.	Margaret Finerty & Neil Getnick
Paradigm	2007	Fraud	Saul Pilchen
Prudential Securities	1994	S.D.N.Y.	Kenneth Conboy
Roger Williams Medical Center	2006	D. R.I.	Margaret Curran/Leonard Henson
Schnitzer Steel	2006	D. Or.	James Asperger
Smith & Nephew (Hip & Knee Replacement Industry)	2007	D. N.J.	David Samson
Statoil	2006	S.D.N.Y.	Joseph Warin
Stryker (Hip & Knee Replacement Industry)	2007	D. N.J.	John Carley
Symbol	2004	E.D.N.Y.	Douglas Jensen
UMDNJ	2005	D. N.J.	Herbert Stern
York	2007	Fraud	David Newcom
Zimmer (Hip & Knee Replacement Industry)	2007	D. N.J.	John Ashcroft