



Vol. 16 No. 2

March 7, 2008

PROPOSAL ON DEFERRED PROSECUTION MERITS CLOSE MONITORING

by
Stephanie A. Martz

On January 22, 2008, Rep. Frank Pallone (D-NJ) introduced a bill to address one of the most important and controversial issues facing potential corporate defendants today: The lack of standards governing Deferred Prosecution Agreements. Deferred Prosecution Agreements (“DPAs”) are contracts that potential corporate defendants enter into with the government (typically the Department of Justice) in order to avert criminal charges. Unlike civil settlement agreements or consent decrees, such as those typically entered into with civil enforcement agencies, DPAs are not supervised by a court. Therefore, if a potential defendant is thought to have violated a DPA, it is the Department of Justice alone, and not a judge, that determines whether the agreement was in fact violated and what sanction the party must face. Usually, the “end-game” sanction is indictment. DPAs typically require a potential defendant to agree to extensive oversight by an “independent” corporate monitor, who often has complete access to both privileged and non-privileged material; to agree to an allocation of facts that indicate the party’s guilt and may implicate individual employees; and to agree to a spate of corporate governance reforms – among a wide variety of other terms.

Currently, the Department of Justice has no written standards governing the terms of DPAs and when they should be offered to potential corporate defendants. Therefore, the bill, H.R. 5086, would:

- Require the Attorney General to issue guidelines delineating when DPAs are appropriate;
- Establish the following factors as “appropriate”: (1) the potential harm of entering into a DPA to employees, shareholders, and stakeholders; (2) the corporation’s degree of cooperation, including the willingness to provide documents and make available witnesses; (3) “remedial actions” such as dismissal of employees, acknowledgement of wrongdoing, payment of restitution, and other “structural” changes; (4) the availability of criminal charges against specific employees; (5) the availability of sufficient alternative punishments or remedial actions pursuant to a DPA;
- Require judicial approval by the appropriate United States District Court; and
- Provide that all DPAs must have corporate monitors selected by a U.S. district court judge or magistrate judge from a pre-qualified list of firms or individuals; and that the monitors must submit compliance reports to the court.

The bill would fill a vacuum that exists with regard to standards for DPAs, and might result in more uniform agreements – which could lead to simpler negotiations for both parties and more predictability for defendants. It also builds into DPAs some definitive procedural protections for

defendants. However, the bill does raise other questions. First, pursuant to the legislation, DOJ might choose to issue guidelines that curtail the availability of DPAs and instead favor indictment. Second, some of the unintended consequences of the “appropriate factors” should be carefully vetted; for example, the availability of criminal charges against specific employees could incentivize companies to “sell out” employees in inappropriate situations. Third, the bill does not explain how or by whom corporate monitors will be “pre-qualified,” and *requires* corporate monitors in all agreements, regardless of the wishes of the parties or the actual necessity. These are merely some of the issues with which Congress will have to grapple as this bill moves forward.

Stephanie A. Martz is Director of the National Association of Criminal Defense Lawyers’ (NACDL) White Collar Crime Project.

About WLF and the COUNSEL’S ADVISORY

The Washington Legal Foundation (WLF) is the nation’s largest non-profit, free enterprise public interest law and policy center. WLF litigates *and* publishes in order to advocate legal policies that promote economic growth, job creation, and the civil liberties of business. As a 501(c)(3) tax exempt organization, WLF relies upon the charitable support of individuals, businesses, associations, and foundations to fund its programs.

This COUNSEL’S ADVISORY is one of WLF’s seven publication formats. Its purpose is to inform the free enterprise community about a development in the legal policy world that can be favorably impacted by the immediate involvement of legal experts and business and community leaders.

For more information on the Washington Legal Foundation, please contact Daniel J. Popeo, Chairman, at (202) 588-0302.

**Washington Legal Foundation
on the World Wide Web:**

<http://www.wlf.org>