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## **MILBERG, LLP's POST-INDICTMENT DEAL: NEW DOJ APPROACH TO CRIMINAL SETTLEMENTS?**

by  
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On June 16, 2008, Milberg, LLP, the law firm formerly known as Milberg Weiss, entered into a "Case Disposition Agreement" resolving the criminal case that had resulted in the filing of an indictment in May 2006 alleging that the firm had engaged in a scheme to provide secret kickback payments to named plaintiffs in its class action lawsuits. This agreement contained elements commonly found in the deferred prosecution, or non-prosecution, agreements used by the Department of Justice to resolve corporate criminal cases, such as a large financial penalty, a court-approved monitor, and ongoing cooperation. This unique post-indictment disposition, however, also set forth terms that were more favorable to the defendant company than in recent corporate fraud cases. The agreement allowed Milberg to distance itself from the partners' criminal behavior, permitted Milberg to continue to exist as a law firm, and allowed for continued cooperation without having to waive any attorney-client privilege. Ironically, by waiting until after the indictment had been filed to reach agreement with the Department of Justice, Milberg may have brokered a more favorable deal than had they accepted a deferred prosecution agreement prior to indictment.

The Case Disposition Agreement differed from most deferred prosecution agreements in several respects. First, as noted above, Milberg was not required to waive its attorney-client privilege as part of its ongoing cooperation. According to published reports, the issue of waiver was a significant factor that had precluded pre-indictment resolution of the case. Second, Milberg was able to admit in its statement of facts that the partners who engaged in the conspiracy took affirmative steps to withhold their illegal activity from other members of the firm, thus protecting current attorneys from potential ethical issues and ramifications in taking on class action cases in the future. Third, Milberg's \$75,000,000 fine was spread out over a five-year period, during which time the firm will have the ability to continue litigating and seeking settlement of class action lawsuits in order to pay off the fine. Fourth, by waiting until after the resolution of the cases against the former Milberg Weiss partners and others, Milberg was able to diminish the amount of future cooperation that would be necessary to comply with the terms of the agreement. Finally, if the United States Attorney's Office determines that a breach of the agreement has occurred, unlike other recent corporate deferred prosecution agreements, Milberg is explicitly permitted to appeal any such determination from the United States Attorney's Office all the way up to the highest management within the Department of Justice.

It remains to be seen whether this agreement reflects a new approach by the Department of Justice to deferred and non-prosecution agreements, or whether the terms of this agreement were merely the result of hard bargaining and timing, given that the Department of Justice had already obtained significant prison sentences and fines from Melvin Weiss, William Lerach and others, and ongoing cooperation may not have been as important. At the very least, the Milberg agreement provides new insight into the ability of a corporate entity to withstand the scrutiny and stigma resulting from an indictment and still be able to resolve the case in a manner that allows continued viability in the marketplace.

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