Conversations With...

Winter 2016

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Inquiring into the Expanded Use of Deferred-Prosecution and Non-Prosecution Agreements

The Honorable Jay B. Stephens
The Honorable Larry D. Thompson

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, the Chairman of WLF's Legal Policy Advisory Board, **Jay B. Stephens**, directs a discussion with University of Georgia School of Law's **Larry D. Thompson** on two pre-trial diversion mechanisms that federal prosecutors frequently utilize in white-collar criminal enforcement.

The federal government's use of deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) related to investigations of business enterprises has expanded significantly in the past decade. Such agreements have implications for prosecution policy and the reach of federal enforcement agencies into business enterprises. They also potentially shift the balance of power between federal prosecutors and private parties, particularly by extending the administrative regulatory authority of enforcement agencies, by requiring continuing cooperative conduct from private businesses often through monitors, and by generally defining legal obligations and the parameters of the criminal law without the oversight of the judiciary.

DPAs and NPAs also have a significant impact on public and private companies, especially where the imposition of a monitor is involved. High costs, continuous external oversight of business decisions, and a concern that the government is exercising an operational role in managing private business are a few of the concerns that can flow from the use of such agreements. The renewed focus on the accountability of individuals and a company's cooperation in prosecuting its own employees could also affect the dynamic of negotiating and using such agreements.

Finally, remembering that DPAs and NPAs are rooted and used in the context of a criminal investigation, not a civil or administrative action, we should assess whether they meet the purposes of the criminal law or unnecessarily contribute to the "overcriminalization" of conduct and decisions in our society.

WLF discussed all of these issues and more with Mr. Thompson, the former Deputy Attorney General of the United States. Mr. Thompson draws upon his wealth of experience as a private attorney, a U.S. Attorney, and general counsel of PepsiCo to discuss the evolution and expanded use of deferred-prosecution agreements and non-prosecution agreements.

Jay Stephens: Larry, can you briefly describe DPAs and NPAs and explain their similarities and differences?

Larry Thompson: In the context of a federal criminal investigation, DPAs and NPAs are similar in that the Department of Justice requires a business organization to do certain things or take certain actions, like

The Honorable Jay B. Stephens
Chairman,
WLF Legal Policy Advisory Board
Of Counsel, Kirkland & Ellis LLP

The Honorable Larry D. Thompson
John A. Sibley Chair of Corporate and Business Law,
University of Georgia School of Law

"The focus of my memo [the Thompson memo] was incenting corporations and business organizations to cooperate with the government as much as possible. Cooperation was key."

establishing or modifying a compliance program, in exchange for the Department closing the investigation. DPAs typically involve actual criminal charges being filed against the organization but then being stayed and eventually dismissed.

After a period of time, if the organization fulfills its obligations under the agreement with the Department, NPAs allow a business organization to avoid the specter of criminal charges altogether, but again only after the organization has fulfilled its obligations under its agreement with the Department and at the end of a specified period of time. Also, as Judge Leon's opinion in the relatively recent *U.S. v. Fokker Services B.V.* case made clear, DPAs require court approval while NPAs do not. The government always retains the authority to not prosecute a case. [79 F. Supp. 3d 160 (D.D.C. 2015)]

Mr. Stephens: How do DPAs and NPAs differ from a traditional plea-bargain agreement?

Mr. Thompson: DPAs and NPAs are dramatically different. In a plea-bargain agreement, the defendant business organization admits to criminal wrongdoing on the record. A court will typically require a high-ranking official to enter an appearance and admit to the organization's wrongdoing. This act alone not only results in tremendous embarrassment, it also leads to sensational publicity and serious reputational harm. More importantly, the collateral consequences of a criminal conviction for a business organization can be devastating, including the possibility of extinction. A business organization that has been convicted of a crime faces damaging admissions in civil suits, license suspensions, government program debarment, and government benefit exclusions.

Mr. Stephens: Prior to the Principles of Federal Prosecution of Business Organizations memo that you issued as Deputy Attorney General of the United States in 2003, the DOJ made scarce use of these devices. Was the 2003 memo aimed at expanding their use?

Mr. Thompson: No, not really. And, you are correct about the limited use of DPAs and NPAs, before and even during my tenure as Deputy Attorney General. In fact, even today some of the litigating divisions of the Department use them only sparingly, namely the Antitrust and Environment and Natural Resources divisions. I do not believe the Principles of Federal Prosecution of Business Organizations issued during my tenure even mentioned DPAs or NPAs.

My memo did refer, for the first time, to pretrial diversion for a corporation. Pretrial diversion has been available for use by prosecutors for a long time. Under pretrial diversion, in an appropriate case, a matter is diverted or taken out of the criminal system subject to an agreement on certain terms and conditions with the government. The focus of my memo was incenting corporations and business organizations to cooperate with the government as much as possible. Cooperation was key.

DPAs and NPAs were first discussed in the 2008 revision of the Principles because of the specter of collateral consequences. The Department was appropriately concerned with the need to avoid harm to innocent third parties like shareholders and employees as much as possible when a business organization is charged with a crime.

Mr. Stephens: As you note, that memo associated prosecutors' use of pre-trial diversion with voluntary cooperation. Did it inspire the type of increased cooperation that DOJ sought from corporations? Do such pre-trial diversion mechanisms remain an effective "carrot" for cooperation?

Mr. Thompson: From the standpoint of a former prosecutor who dealt with many white-collar cases, I can tell you that real and meaningful cooperation has been sometimes difficult and many times elusive—despite the obvious benefit to a business organization when it is not criminally charged. I actually do not have a full understanding of why this happens.

Many lawyers have legitimate privilege concerns when attempting to engage and cooperate with the government. I have seen a few others who were more concerned with protecting individuals inside the business organization and did not understand that their professional obligations went to the entity and not individual potential targets. However, at the end of the day, authentic and real cooperation, where the government understands the facts, is almost always a good thing for an organizational client. Then, if the situation warrants it, counsel should work diligently to negotiate and structure an appropriate and balanced agreement with the government, whether it be a pre-trial diversion agreement, DPA or NPA.

Mr. Stephens: What are the negative ramifications of using pre-trial diversion as an incentive for corporate cooperation?

Mr. Thompson: The coercive effect of prosecutors' sometimes leveraging their tremendous bargaining power under the threat of criminal prosecution in an attempt to secure some type of inappropriate or ill-conceived cooperation is something counsel should always be aware of and try to avoid.

For example, prosecutors might insist on some type of organizational "cooperation" that may involve some unnecessary "admissions" or non-contradiction clauses that will be extremely detrimental in collateral civil litigation. Or they might even inappropriately insist on the firing or removal of an employee whose role in the matter under investigation is not fully understood by management. Of course, in the past, privilege waivers were routinely used as a condition of cooperation in formal pre-trial diversion agreements, DPAs, and NPAs.

Mr. Stephens: The effectiveness of a company's corporate compliance program has become a major factor in the use of DPAs and NPAs, and DOJ's crafting of their terms. Are prosecutors in the best position to judge what programs are "effective," and then to prescribe measures in these agreements to address the shortcomings?

Mr. Thompson: While it is obviously good that prosecutors insist on an increased focus on compliance and ethics programs from organizations with problems, what exactly constitutes an effective compliance and ethics program is often beyond the expertise or core competency of prosecutors. The Department's Criminal Division understands this issue and has recently brought on an individual with expertise in compliance and ethics to help it evaluate these programs.

However, we must avoid a cookie-cutter approach to determining what constitutes effective programs. Effective compliance programs will vary from one industry to another and by the history and development of cultures within organizations. I have found that exemplary cultures within organizations often develop differently.

For example, the Department's past unthinking position that a Chief Compliance Officer should never report to a General Counsel made no sense. After Sarbanes-Oxley, it is clear that the General Counsel's ultimate fiduciary responsibility is to the organization and not to the CEO or management. Many investigative matters

"The coercive effect of prosecutors' sometimes leveraging their tremendous bargaining power under the threat of criminal prosecution in an attempt to secure some type of inappropriate or ill-conceived cooperation is something counsel should always be aware of and try to avoid."

"[T]here will inevitably be someone who does not follow the rules. This is just the nature of things. I have to say that an effective compliance and ethics program is really planning for the inevitable compliance failure. How the organization handles that failure will test the program's effectiveness."

involve complex legal issues, and it may be more practical, efficient, and effective for the CCO to report to the GC, of course, as long as the CCO has a high degree of independence and unfettered access to the CEO and Board.

We should focus on the substance of these programs and relationships and not just the form. DPAs and NPAs often have provisions for a monitor to be appointed and oversee an organization's compliance with the terms of the agreement. Experienced monitors can be very helpful in this regard. Also, using organizations like the Ethics and Compliance Initiative, which has a tremendous amount of knowledge and experience with these programs, can be extremely helpful.

Mr. Stephens: In using DPAs and NPAs as an incentive for voluntary corporate compliance, DOJ tries to avoid chilling self-reporting. Does the Department consistently achieve this delicate balance?

Mr. Thompson: There will always be legitimate limitations associated with effective compliance and ethics programs. All organizations have people who are not that smart or who may be ethically challenged. An organization must work hard to implement and administer its program. There must be proper training, communication, and consistent discipline. The organization must allocate sufficient resources to the program.

Notwithstanding doing all this, there will inevitably be someone who does not follow the rules. This is just the nature of things. I have to say that an effective compliance and ethics program is really planning for the inevitable compliance failure. How the organization handles that failure will test the program's effectiveness.

A DPA involving Hewlett-Packard contained a stipulation that the company's compliance program was ineffective simply because it did not prevent an employee from breaking the rules. That is simply unrealistic if the company has done everything it should have, including allocating sufficient resources and using best practices, in implementing its program. Have you ever seen a city anywhere in the world with, say, 25,000 people without a police force? Non-compliant people will, unfortunately, always be with us.

Mr. Stephens: Can DPAs and NPAs in fact be effective tools for achieving corporate compliance without empowering DOJ to act as an administrative compliance regulator of the private sector?

Mr. Thompson: Absolutely. When structured and implemented properly, and without overreaching by prosecutors, DPAs and NPAs can be powerful tools for achieving effective compliance and ethics programs within business organizations. Prosecutors will need to rely more on experienced and knowledgeable compliance and ethics professionals rather than their own preconceived and often wooden notions as to what constitutes an effective program.

Mr. Stephens: Commentators on pre-trial diversion agreements have described DPAs and NPAs as a "middle ground" between declining to prosecute and prosecution. That depiction gives rise to two criticisms. The first is that DPAs and NPAs lead to "overcriminalization," that is, seeking criminal sanctions where administrative or civil remedies may be more appropriate. Is this a valid criticism?

Mr. Thompson: This is absolutely a valid criticism. DPAs and NPAs should never be used as a substitute for a criminal declination. Professor David Uhlmann of the University of Michigan Law School has written an excellent article which comprehensively details the overuse of DPAs

and NPAs by the Department. [Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295 (2013)] Professor Uhlmann quite properly points out that prosecutors should never leverage the threat of criminal charges to coerce a business organization into entering a DPA or NPA.

Abusing such leverage is contrary to our Rule of Law. If, at the end of the day, a case does not warrant criminal prosecution, the prosecutor should basically put down her pen. Of course, the government is free to pursue non-criminal alternatives like civil enforcement under certain circumstances. To do otherwise is classic overcriminalization. Every case, no matter the facts, then becomes a criminal case that ends with a "notch in the belt" for prosecutors and the inevitable DPA or NPA.

Mr. Stephens: On the other hand, some argue that DPAs and NPAs improperly focus on preventing future wrongdoing rather meting out punishment. What are your thoughts on that?

Mr. Thompson: Since 1909, when the Supreme Court rendered its opinion in the *New York Central Railroad* case, the law of the land is that a business organization can be criminally charged for the acts or omissions of its employees or agents within the scope of their employment. [*N.Y. Central and Hudson River R.R. Co. v. U.S.*, 212 U.S. 481 (1909)] Prosecutors are not free to ignore the law of the land. In appropriate situations, it is entirely proper, indeed necessary, to reflect society's condemnation of the offending behavior through criminal charges. Situations involving loss of life, massive environmental calamities, and widespread and adverse economic loss are ones where criminal prosecution of a business organization should definitely be considered. But, prosecutors must make principled decisions. The detailed factors laid out in The Principles of Federal Prosecution of Business Organizations guide prosecutors as to when a non-criminal alternative to a case is preferable to criminal charges. If no criminal charges are warranted, that should end the case for prosecutors.

Mr. Stephens: You noted earlier that DPAs must be judicially approved. What is DOJ's position on the extent of judicial oversight required?

Mr. Thompson: In the *Fokker Services* case I previously mentioned, Judge Leon describes the government's position on judicial oversight as one where the court's role is "extremely limited." In another part of his opinion, he notes the parties' positions as wanting the court to "rubber stamp" the agreement.

Mr. Stephens: Recently we have seen an effort to increase judicial engagement in the DPA/NPA resolution process. Is this helpful in counterbalancing DOJ's effort to extend its reach into the private sector and to define the law by administrative decision making? How does DOJ see this development?

Mr. Thompson: Given the Department's position in the *Fokker* case, I do not believe it would support much of an increase in judicial involvement in DPA or NPA negotiations. Judicial involvement may—and I stress *may*—serve to check the Department's sometimes seeming exercise of raw power in coercing a party to enter into an agreement. However, judges, by and large, have no more business experience than prosecutors. If a DPA or NPA is appropriate in a given case, I would favor more private ordering between the parties.

Mr. Stephens: Would enhanced judicial oversight of DPAs lead to a wholesale

"[P]rosecutors should never leverage the threat of criminal charges to coerce a business organization into entering a DPA or NPA. Abusing such leverage is contrary to our Rule of Law. If, at the end of the day, a case does not warrant criminal prosecution, the prosecutor should basically put down her pen . . . . To do otherwise is classic overcriminalization."

reduction in DPAs, or a more selective use of them?

Mr. Thompson: Clearly, a court should be concerned with and not approve a "sweetheart deal" between the government and a business corporation. However, enhanced judicial oversight would probably reduce the number of DPAs offered to organizations. Without some overall, concrete framework to follow, I would be uncomfortable with too much judicial involvement in DPAs.

Judges simply do not have the time to develop as detailed an understanding of the facts of a complex case as the parties have. Moreover, a judicial decision in the context of a DPA would most likely be almost unreviewable and would be based, as all such decisions are, on a judge's life experiences, which may not involve much exposure to or knowledge of business organizations.

Mr. Stephens: The recently released Principles of Federal Prosecution of Business Organizations memo by Deputy Attorney General Yates [the "Yates memo"] emphasized prosecution of individuals, especially corporate executives. DOJ has never utilized DPAs and NPAs for individuals. Will an increased DOJ focus on executives change that practice? Should such pre-trial diversion be used with individuals?

Mr. Thompson: I do not believe the Department will ever use DPAs or NPAs for individuals, although I understand that on at least two occasions the SEC has entered into DPAs with individuals. The Yates memorandum focused on, as a condition to receiving cooperation credit, a business organization's identification of all individuals involved in wrongdoing regardless of their position and the organization's providing the government all relevant facts about the individuals' misconduct.

"I do not believe the Department [of Justice] will ever use DPAs or NPAs for individuals . . . . You have either a rogue employee or wrongdoing that was addressed appropriately through the organization's pre-existing compliance program. Every criminal case involving an executive or employee need not and should not end with a DPA or NPA [for the business organization]."

The Department has a well-established procedure for dealing with certain individuals under these circumstances which, as you note, is pretrial diversion. Pretrial diversion would be the appropriate way to deal with certain potential defendants. Low-level employees, first-time offenders, individuals who cooperated with the government and individuals who simply made a mistake could all be candidates for pretrial diversion. High-level individuals whose conduct is deliberate and serious and who profit from their misconduct should be prosecuted with their cases being resolved by trial or plea agreement.

Mr. Stephens: Will the focus on individuals obviate the appropriateness of using DPAs and NPAs for the enterprise?

Mr. Thompson: This is an excellent question. If a business organization has a state-of-the-art compliance and ethics program and cooperates with the government under the terms of the Yates memo, there really should not be a need to resolve an investigation involving the organization with a DPA or NPA. You have either a rogue employee or wrongdoing that was addressed appropriately through the organization's pre-existing compliance program. Every criminal case involving an executive or employee need not and should not end with a DPA or NPA.

Mr. Stephens: What process occurs within DOJ or U.S. Attorneys' offices when a DPA or NPA is being considered and crafted?

Mr. Thompson: Quite frankly, the process has not been very transparent or consistent. Within the Department, the various litigating divisions handle DPAs and NPAs differently. The process also varies among the U.S. Attorney Offices. The Department has issued guidance about the selection of corporate monitors to address criticism that

the selection process was flawed and riddled with favoritism.

Mr. Stephens: How can in-house and outside counsel most effectively participate in decision-making at DOJ or within U.S. Attorneys' offices regarding a company's DPA or NPA?

Mr. Thompson: Counsel involved in negotiating DPAs and NPAs should have a thorough understanding of all the facts of their case and compare their facts with other negotiated DPAs and NPAs. Counsel should focus on DPAs and NPAs entered into by the relevant Department component and industry-specific DPAs and NPAs. If line prosecutors are insisting on novel terms that go beyond the Department's expertise or authority, then counsel should not hesitate to engage supervisory Department or U.S. Attorney Office officials. Attempting to use the DPA or NPA process as some sort of "backdoor" regulatory effort is really a form of abuse of prosecutorial authority.

Mr. Stephens: In negotiating a DPA or NPA resolution, what are the considerations regarding a corporate monitor that must be considered?

Mr. Thompson: As I noted, the Department has issued guidance on the selection and use of monitors. Beyond this, monitor candidates must be carefully vetted by counsel for the business organization. A candidate's past relationship with the government, the candidate's experience in undertaking these kinds of assignments, their expressed or known views on business generally, and their reputations for professionalism and impartiality all should be considered. I have heard about unfortunate experiences where the monitor did not work out either for the government or the private party or even both.

Mr. Stephens: What are the short- and long-term impacts of a DPA or an NPA on a company, especially one that is publicly traded?

Mr. Thompson: Despite the concerns I have raised about the overuse of DPAs and NPAs, when appropriately entered into, they can have a tremendous positive short- and long-term impact on a business organization. In the short term, a company can put an embarrassing and distracting matter behind it. In the long term, an effective DPA or NPA can lead to a well-functioning and principled compliance and ethics system for a business organization. It will facilitate the cultivation of an organization-wide culture of ethics and compliance. It will even have the imprimatur of government. All of this is good. Especially for public companies, the markets will be reassured that effective preventative measures have been put into place, and confidence in the organization, its management, and its board can be restored.

Mr. Stephens: One more question to wrap this all up: What trends do you see in the government's use of DPAs and NPAs to resolve complex allegations, and what attitude changes have you seen in companies regarding their use?

Mr. Thompson: I see two key trends. One, DPAs will be used internationally. Recently, the United Kingdom's Serious Fraud Office announced its first DPA with Standard Bank PLC. Second, Congress will continue to monitor the Department's use of DPAs or NPAs to make certain they are used appropriately and are not vehicles for prosecutorial abuse. I'm especially concerned about overuse of DPAs, lack of standards and the Department mandating so-called standards in areas which it lacks expertise and has absolutely no regulatory authority. This reminds me of what Friedrich Hayek warned against long ago. Hayek

"If line prosecutors are insisting on novel terms that go beyond the Department's expertise or authority, then counsel should not hesitate to engage supervisory Department or U.S. Attorney Office officials. Attempting to use the DPA or NPA process as some sort of 'backdoor' regulatory effort is really a form of abuse of prosecutorial authority."

noted that while every law or regulation restricts, to some extent, individual freedom, what we must avoid is the unpredictable application of the law. When government does this, he noted, it "stultifi[es] individual efforts by ad hoc action."

"I'm especially concerned about overuse of DPAs, lack of standards and the Department [of Justice] mandating so-called standards in areas which it lacks expertise and has absolutely no regulatory authority. This reminds me of what Friedrich Hayek warned against long ago. Hayek noted ... what we must avoid is the unpredictable application of the law."

Mr. Stephens: Larry, thank you for participating in this discussion.

WLF's CONVERSATIONS WITH provides a forum for leading experts from business, government, academia, and the legal profession to discuss current legal policy issues. In these conversations our participants give frank thoughts on a wide range of important contemporary subjects.

WLF is a national, non-profit, public-interest law firm and policy center. We publish timely legal studies, engage in innovative litigation, and communicate directly to the public. To receive information about WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division at glammi@wlf.org.

The Honorable Jay B. Stephens retired in 2015 from Raytheon Company after serving for nearly 13 years as a member of the company's senior leadership team, including as Senior Vice President, General Counsel, and Corporate Secretary. Prior to joining Raytheon, Mr. Stephens had a distinguished career in the public and private sectors, serving as Associate Attorney General of the United States (2001-2002); United States Attorney for the District of Columbia (1988-1993); Deputy Counsel to the President of the United States (1986-1988); Deputy General Counsel of Honeywell International; and as a partner in the Washington office of Pillsbury, Madison & Sutro. In January 2016, Mr. Stephens joined Kirkland & Ellis LLP where he serves Of Counsel. He is Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

The Honorable Larry D. Thompson is the John A. Sibley Chair of Corporate and Business Law at the University of Georgia School of Law. He is a member of Washington Legal Foundation's Legal Policy Advisory Board. In December 2014, Mr. Thompson retired as senior vice president of government affairs, general counsel, and secretary for PepsiCo. Mr. Thompson previously served as a senior fellow with The Brookings Institution in Washington, DC. His government career includes serving in the U.S. Department of Justice as Deputy Attorney General and leading the department's National Security Coordination Council. Mr. Thompson was also chosen to head the Corporate Fraud Task Force, where he led, among others, the Justice Department's Enron investigation. Previously, he was a partner in the Atlanta law firm of King & Spalding, where he practiced in the antitrust and litigation departments. Mr. Thompson also served as the U.S. Attorney for the Northern District of Georgia. In 2009, *Ethisphere Magazine* recognized Mr. Thompson as "one of the most respected and admired general counsel in business today." He recently joined Atlanta-based Finch McCranie, LLP as Counsel.