

Look Before You Leap: DPAs, NPAs, And The Environmental Criminal Case

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In our profession, we aim to keep a client from being indicted in the first place. This aim becomes an imperative when defending a corporation. An indictment in an environmental criminal case means public embarrassment and reputational damage. In addition to steep monetary penalties and years of probation, it may mean plummeting share price and suspension or termination of government contracts. With all these impacts in mind, the prospect of a Deferred Prosecution Agreement (DPA) or a Non-Prosecution Agreement (NPA) might simply be viewed as the next best thing to a declination. But these types of agreements—which have become prevalent over the last several years—cannot be entered into lightly. DPAs and NPAs have been applied in a wide variety of criminal cases, such as money laundering, public corruption, and, especially over the last two years, violations of the Foreign Corrupt Practices Act. *See* Lawrence D. Finder, Ryan D. McConnell, & Scott L. Mitchell, “Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreements: Cor-

porate Pre-trial Agreement Update—2008,” XXVIII Corp. Counsel Rev., at 2 (No. 1, May 2009) (“Betting the Corporation”). They are also common to fraud cases, such as bank fraud, securities fraud, tax fraud, and health care fraud.

For environmental criminal defense counsel weighing whether a DPA or NPA is in the corporate client’s best interests, counsel must be forewarned that, despite recent reforms, prosecutors still wield great discretion in this realm, that the agreement might place onerous demands on the company, and that the agreement, while staying and avoiding prosecution, might nevertheless invite other substantial consequences. That said, if vigorously negotiated and artfully drafted, a DPA or NPA can be an acceptable if unpalatable means with which to resolve a criminal case, if a declination of prosecution is not in the cards.

A. What DPAs And NPAs Are

1. DPAs and NPAs are species of federal pretrial diversion. U.S. Attys’ Man. 9-22.010; Crim. Resource Man. 712. Under a DPA the prosecutor charges a corporation in a criminal information but agrees to defer prosecution for a given period of time. If the corporation complies with the terms of the DPA, the prosecutor dismisses the charges. Under an NPA no charging document is filed provided that the company adheres to the agreement. Other than the presence or absence of the charging document, DPAs and NPAs often do not differ in terms of their demands on the companies that sign them.
2. DPAs and NPAs have become a “standard method” of settling major federal corporate criminal investigations, a trend that most agree is tied to the issuance of the Thompson Memorandum, which has undergone several transformations and is now incorporated into the U.S. Attorneys’ Manual. *See, e.g.*, “Corporate Deferred, Non-Prosecution Agreements Up 70 Percent in 2007,” Corp. Crime Rep. (Jan. 8, 2008) (“Corp. Crime Rep.”); Scott A. Resnik & Keir N. Dougall, “The Rise of Deferred Prosecution Agreements,” N.Y.L.J. (Dec. 18, 2006) (“Resnik & Dougall”); F. Joseph Warin & Peter E. Jaffe, “The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal for Reform,” 19 Andrews Litig.Rep. (Sept. 2005) (“Warin & Jaffe”). From 2002 to 2005 the Department of Justice (“DOJ”) entered into twice as many DPAs and NPAs as it had from 1992 to 2001. Lawrence D. Finder & Ryan D. McConnell, “Devolution of Authority: The DOJ’s Corporate Charging Policies,” 51 St. Louis U.L.J. 1, 1 (2006) (“Devolution of Authority”). From 2005 to 2006 DOJ chalked up twice as many DPAs and NPAs as it had in the previous two years. Lawrence D. Finder & Ryan D. McConnell, “Third Verse, Same as the First,” Corp.Couns. (March 27, 2007) (“Third Verse”). In 2007 DPAs and NPAs were up 70 percent over the previous year. Corp. Crime Rep., *supra* (citing Lawrence D. Finder and Ryan D. McConnell, “Annual Corporate Pre-Trial Agreement Update” (2007)). And although DOJ entered into only 16 DPAs and NPAs in 2008 (a 40 percent decrease from 2007), it is unclear yet whether the decrease was simply a temporary blip or something more. Betting the Corporation, *supra*. Whatever the case, DPAs and NPAs have been regarded as the key tool in DOJ’s “bold new mission” to secure structural corporate reform. Brandon L. Garrett, “Structural Reform Prosecution,” 93 Va.L.Rev. 853, 858 (2007). They also have been referred to as the prosecutor’s “new weapon of choice.” F. Joseph Warin & Andrew S. Boutros, “Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform,” 93 Va.L.Rev. In Brief 121, 121 (2007) (“A View from the Trenches”).

3. As explained below, new DOJ guidance governs the availability of DPA and NPAs and their terms.
 - a. The following provisions have become common to these agreements:
 - i. Recitation of allegedly illegal acts and/or an admission of wrongdoing.
 - ii. Continuing promise to cooperate with the prosecutor.
 - iii. Promise to operate lawfully.
 - iv. Waiver of any statute of limitations.
 - v. Waiver of all rights to a speedy trial.
 - vi. Acknowledgment that the agreement does not bind any other federal agency.
 - vii. Acknowledgment that the agreement may be publicly disclosed.
 - viii. Provision stating that the company's employees or agents will not publicly contradict the agreement.
 - ix. Provision stating that upon breach the company will be subject to prosecution and that the agreement's statement of facts, which effectively establish the company's guilt, will be admissible.
 - b. DPAs and NPAs often contain other more onerous provisions discussed below. These provisions include community service, monetary penalties, corporate monitoring, and, in some cases, agreements to waive privilege. These provisions provide the "bite" of a DPA or NPA, a fact amply illustrated by recent DPAs from the environmental criminal context.

B. Case Illustrations Of DPA And NPA Consequences

1. *FirstEnergy DPA*
 - a. On January 20, 2006, the FirstEnergy Nuclear Operating Company ("FirstEnergy") settled allegations that it had knowingly made false statements to the Nuclear Regulatory Commission ("NRC") to convince the NRC that its nuclear power plant in Toledo, Ohio, was safe to operate. U.S. DOJ, "FirstEnergy News Release, Nuclear Operating Company to Pay \$28 Million Relating to Operation of Davis-Besse Nuclear Power Station" (Jan. 20, 2006), www.usdoj.gov/usao/ohn/news/20January%202006.htm. The reactor vessels of the plant were vulnerable to cracking. In August 2001, following reports of cracked reactor vessel lids, the NRC required power plant operators to report on their plant's susceptibility to cracking, their efforts to detect cracking, and their plans for addressing cracking in the future. Operators were required to inspect their reactors for signs of cracking by December 31, 2001, or else otherwise justify their operation beyond that date.
 - b. FirstEnergy submitted five letters to the NRC, contending that its past inspections were adequate to assure safe operation until a prescheduled shutdown in March 2002. To persuade the NRC that the plant was safe to operate, the letters misrepresented that certain inspections had been conducted when in fact they had not. Ultimately the NRC agreed that the plant could continue functioning until the shutdown. During the shutdown workers discovered a pineapple-sized hole in one of the reactor lids, caused by corrosive reactor coolant that had leaked through a crack.

- i. To help ensure that the reactor's radioactive core does not overheat and melt down, engineers use a pressurized, acid-laden coolant. Any leaking of this coolant, however, presents a potential rust problem. NRC regulations and Davis-Besse's corrosion control program require routine inspection of the reactor for corrosion. By the time that the rust hole was discovered in March 2002, more than 900 pounds of dry, rusty acid deposits from leaking coolant had piled up on the reactor. This evidence was inconsistent with FirstEnergy's representations to the NRC that the reactor head had been inspected and was in good shape. John Mangels, *Claim May Retrigger Criminal Probe: FirstEnergy's Insurance Case Contradicts NRC on Davis-Besse*, Cleveland Plain Dealer (June 8, 2007).
- c. FirstEnergy settled the case with a DPA. Any discussion of the agreement's noteworthy provisions must begin with its penalty of \$23 million. FirstEnergy News Release, *supra*. The company also agreed to spend an additional \$4.3 million on an array of community service projects. *Id.* Among other things, FirstEnergy donated \$800,000 to a wetlands restoration project at the Ottawa National Wildlife Refuge, \$550,000 of improvements to the refuge's visitor center, \$500,000 of communication systems upgrades to the Ottawa County Emergency Management Association, \$500,000 for the development of energy efficient technologies at the University of Toledo, and \$1 million to extend a towpath trail at the Cuyahoga Valley National Park. These financial provisions were on top of a \$5.4 million civil penalty, described as "the largest ever imposed in U.S. nuclear history." *Id.*; Tom Henry, *FirstEnergy to Pay \$28 Million Fine for Lying; Davis-Besse's Punishment Largest in Nuclear History*, Toledo Blade (Jan. 21, 2006).
- d. The DPA also required FirstEnergy to assist DOJ in its prosecution of individual FirstEnergy employees. Specifically FirstEnergy agreed to waive any claim of privilege "by providing copies of witness interview summaries previously disclosed to the United States for inspection in the event that the United States brings prosecution of individuals." Deferred Prosecution Agreement between FirstEnergy, Environmental Crimes Section ("ECS"), and the U.S. Attorney for the Northern District of Ohio (on file with the authors). On October 30, 2007, ECS and the U.S. Attorney successfully prosecuted a former manager of the plant for his role in the false statement case. On May 1, 2008, the former manager was sentenced to four months' home confinement, three years' probation, 200 hours of community service, and a \$7,500 fine. U.S. DOJ, "Former FirstEnergy Nuclear Operating Company Employee Sentenced for Lying to the Nuclear Regulatory Commission" (May 1, 2008), www.usdoj.gov/opa/pr/2008/May/08-crt-365.html. A second defendant was acquitted. A third, a former engineer at the plant, was tried and convicted on August 26, 2008. This former engineer was sentenced on February 7, 2009, to three years' probation and a \$4,500 fine. Tom Henry, *U.S. Approves Earlier Return to Nuclear Job by Ex-Engineer*, Toledo Blade (July 21, 2009).
- e. Note also that a public relations impact can be traced to the DPA. Like many agreements, the FirstEnergy DPA contains a "non-contradict provision," stating that the company will not publicly disagree with anything in the document. The non-contradict provision states: "FirstEnergy agrees that it shall not, through its attorneys, agents, or employees, make any statement, including in litigation, contradicting the statements of facts, or its representations in this agreement." *Id.* When FirstEnergy subsequently filed suit against its insurance company over the crack, news media questioned whether FirstEnergy's stance in its insurance case ran afoul of the non-contradict

provision. This required FirstEnergy to publicly distinguish the company's admissions in the DPA from its litigation position in the insurance case. John Mangels, *Claim May Retrigger Criminal Probe: FirstEnergy's Insurance Case Contradicts NRC on Davis-Besse*, Cleveland Plain Dealer (June 8, 2007).

i. FirstEnergy's insurance suit required it to contend that it did nothing to intentionally cause corrosion damage at its Davis-Besse plant. The DPA's statement of facts, however, contained FirstEnergy's admission that it had, among other things, failed for years to properly implement its corrosion control program. *Id.*

2. OMI DPA

- a. On February 8, 2006, Operations Management International, Inc. ("OMI")—a company in the business of operating municipal wastewater treatment plants—settled allegations that its New Haven and Norwalk facilities had violated the Clean Water Act in the District of Connecticut. The allegations concerned "selective reporting," that is, reporting to regulators only clean samples and burying dirty ones. In New Haven for two years OMI laboratory technicians identified but did not report an unspecified number of samples that exceeded the facility's Clean Water Act permit. Likewise in Norwalk for two years OMI technicians failed to report "slugs" of sludge that were routinely washed out of the facility. News Release, U.S. Attorney's Office, District of Conn., "OMI and U.S. Enter into Deferred Prosecution Agreement" (Feb. 8, 2006), www.usdoj.gov/usao/ct/Press2006/20060208.html.
- b. OMI settled the allegations with a DPA. Several provisions are noteworthy. First, the company agreed to commit \$6 million to a comprehensive nationwide overhaul of its compliance operations. *Id.* The changes included increasing personnel and resources dedicated to environmental compliance, providing additional compliance training to OMI personnel, and scheduling audits at each of OMI's 116 facilities. OMI also cleaned house at the Connecticut facilities, terminating the managers and installing improved state of the art equipment.
- c. OMI agreed to a form of corporate monitoring. For a two-year period of time OMI agreed to quarterly audits of its Connecticut facilities. OMI further agreed to provide the U.S. Attorney with copies of the audit results.
- d. OMI agreed to donate \$2 million in community service. OMI paid \$1 million to endow a chair of environmental studies at the U.S. Coast Guard Academy and \$1 million to the greater New Haven Water Pollution Control Authority.

C. Collateral Consequences Of DPAs And NPAs

1. In addition to complying with the terms of the agreement, a company often must face collateral consequences, some significant, that flow from its execution.
2. *Disclosure On Public Filings*
 - a. A detailed analysis of securities law is outside the scope of this article, but if the client is a public company, entering into a DPA may trigger SEC reporting requirements. This assumes that the company has not already disclosed the fact of the government's investigation. For example, FirstEnergy

and OMI's parent corporation, CH2M Hill, both disclosed their DPAs under the "Legal Proceedings" sections of their 10-Ks. *See* FirstEnergy's 10-K for the year ending Dec. 31, 2006, <http://investors.firstenergycorp.com/phoenix.zhtml?c=102230&p=irol-sec10k>; CH2M Hill's 10-K for the year ending Dec. 31, 2006, www.secinfo.com/d11MXs.uD5a.htm.

- b. Item 103 of Regulation S-K governs the disclosure of legal proceedings. 17 C.F.R. §229.103 (2009). Generally Item 103 requires disclosure of pending material legal proceedings that are not ordinary and routine to the business. Moreover, Item 103 contains specific language directed at administrative and legal proceedings (i) arising under any law that regulates the discharge of materials into the environment or (ii) arising under any law enacted for the purpose of protecting the environment. *Id.* Those proceedings must be disclosed if:
 - i. The proceedings are material to the business or to the financial condition of the registrant; or
 - ii. The proceedings primarily involve a claim for damages—or involve potential monetary sanctions, capital expenditures, or charges to income—that exceeds 10 percent of the current assets of the company and its subsidiaries; or
 - iii. A governmental authority is a party and the proceedings involve potential monetary sanctions unless the company reasonably believes that such proceedings will result in no monetary sanctions or in monetary sanctions, exclusive of interests and costs, of less than \$100,000.00. *Id.*
- c. Item 303 of Regulation S-K could also overlap to compel disclosure of a DPA. 17 C.F.R. §229.303 (2009). Item 303 specifies the requirements for the company's "Management and Discussion Analysis," a narrative explanation that accompanies the financial reports. Item 303 requires disclosure and discussion of any known "commitments" that will have a material effect on a firm's financial condition or results of operation. CH2M Hill disclosed the fact of its DPA under the "Commitment and Contingencies" section of its 10-K for 2006. *See* CH2M Hill's 10-K for the year ending Dec. 31, 2006, www.secinfo.com/d11MXs.uD5a.htm.
- d. Finder, McConnell, and Mitchell, some of the ablest commentators following the DPA and NPA trend, add that a company may be obligated to file an NPA, which is not filed in court, in its securities filings as a "material definitive agreement." *Betting the Corporation*, *supra*, at 4, n.6.
- e. Obviously, that a DPA or NPA may trigger SEC reporting requirements requires counsel to work closely with whoever prepares a client's public filings. This may include assisting with the drafting of the disclosures themselves.

3. *Subsequent Litigation*

- a. Put simply, DPAs and NPAs may provide a perfect template for a civil complaint. *See* Third Verse, *supra*, and Devolution of Authority, *supra*, at 25. This may be particularly true with respect to shareholder litigation, where a DPA or NPA could encourage a putative plaintiff to dig through a company's prior public filings in search of a cause of action. A DPA or NPA may provide a plausible factual basis for a complaint. The agreement's statement of facts could be admissible as an admission. And any privileged information that the company provided to the government as part of a DPA or NPA likely renders that information discoverable by a plaintiff; by providing the infor-

mation to the government the company waives the privilege. The voluntary disclosure to a third party of purportedly privileged communications waives the privilege. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991).

4. *Suspension And Debarment*

a. For many clients—particularly those who do business with government—debarment is the most ruinous consequence that could potentially flow from a DPA or NPA. While this article focuses on the consequences of federal suspension and debarment, many states and municipalities have similar, or even stricter, suspension and debarment laws.

i. Debarment refers to the prohibition of certain contractors from bidding on or receiving new government contracts or new participation in federal loans, grants, or other federal assistance programs. 48 C.F.R. §9.405(a). Suspension refers to the temporary exclusion of a contractor before debarment. An agency may suspend a contractor upon any “adequate evidence” of a cause for debarment. *Id.* §9.407-2(b). Indictment for any of the offenses listed as causes for debarment is adequate evidence for suspension. *Id.* As a result suspension can be imposed automatically if a company is indicted.

ii. While a DPA or NPA saves a client from mandatory statutory debarment, which ordinarily follows an environmental criminal conviction under the Clean Water Act or Clean Air Act, it may not protect against federal discretionary debarment or suspension.

(1) Both the Clean Air Act and the Clean Water Act include statutory debarment provisions. *See* 42 U.S.C. §7606(a) (Clean Air Act); 33 U.S.C. §1368(a) (Clean Water Act). These provisions are nearly identical. Both provide for facility-specific debarment. They prohibit federal agencies from contracting with any person convicted of a criminal violation of the Clean Air or Clean Water Act “if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person.” *Id.* Under the Clean Air Act, however, the EPA has the discretion to extend the debarment “to other facilities owned or operated by the convicted person.” 42 U.S.C. §7606(a). Under both the Clean Air Act and the Clean Water Act debarment lasts until the EPA “certifies that the condition giving rise to such a conviction has been corrected.” *Id.*; 33 U.S.C. §1368(a).

b. Discretionary debarment or suspension lies entirely within an agency’s judgment. Discretionary debarment is meted out in three general circumstances:

i. Upon conviction or civil judgment for a listed offense (such as fraud, false statements, or embezzlement) or any other offense that indicates a lack of “business integrity” or “business honesty” that affects the company’s “present responsibility” (violations of environmental law have been held to qualify). *See* Jeff Eckland, William Roberts, et al., 4 ABA Env’tl Crimes & Enforcement Committee News 11, 12-13 (No. 1, Oct. 2002) (citing cases). The EPA has held that “an environmental crime provides cause to debar ‘where there is a reasonable connection between the misconduct and performance or business integrity’ of the contractor.” *Id.* at 13 (citing *In re Marine Shale Processors, Inc.*, 1991 WL 866840 (EPA GD) (unpublished)). The EPA reasoned that “a company’s criminal

conduct and evidence of its irresponsibility ‘constitutes a threat to the Government’s interests.’” *Id.* at 14.

- ii. Upon willful failure, or a history of failure, to perform the terms of a government contract.
 - iii. Upon “any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.” 48 C.F.R. §9.406-2.
- c. An agency has discretion to suspend a contractor based on “adequate evidence” of any of the three above-listed grounds, including upon indictment for any listed offense or other offense that indicates a lack of business integrity or honesty that affects a company’s present responsibility. 48 C.F.R. §9.407-2.
- d. Upon conviction or civil judgment for a listed offense, a DPA or NPA could possibly lead to suspension or debarment in one of two ways. First, a DPA or NPA could qualify as a “conviction.” Agencies use either the definition of “conviction” found under the Office of Management and Budget (“OMB”) Guidelines on Government-wide Suspension and Debarment or the narrower definition found under federal acquisition regulations. *See* 2 C.F.R. §180.920 (OMB Non-Procurement Regulation defining “conviction” as “a judgment or any other determination of guilt of a criminal offense[,] including a plea of nolo contendere[,] or [a]ny other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt”); 48 C.F.R. §2.101 (federal acquisition regulation defining “conviction” as “a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere”).
- i. According to the OMB a “conviction” is not only a judicial determination of guilt but also:

Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

2 C.F.R. §180.920 (a)-(b) (2009).
- e. The definition covers DPAs. Whether NPAs are also covered likely depends on whether the agency debarring official finds that the agreement contains “an admission of guilt.”
- f. Note that indictment provides adequate evidence for discretionary suspension. A zealous debarring official likely will consider the filing of a criminal information (which often accompanies the filing of a DPA) as tantamount to issuance of an indictment by a grand jury. Suspension proceedings could follow immediately thereafter.
- g. To prevent suspension or debarment trouble from coming to pass, in some cases counsel have successfully approached debarring officials prior to signing a DPA or NPA to discuss whether the agreement will affect their client’s status as a presently responsible contractor. Some DPAs and NPAs apparently memorialize the debarring official’s conclusion that the DPA or NPA does not disturb the company’s status as presently responsible. *See* Deferred Prosecution Agreement between

KPMG and U.S. Attorney's Office for the Southern District of New York (¶21), www.corporate-crimereporter.com/documents/kpmgdeferred_000.pdf.

D. Negotiating And Drafting DPAs And NPAs

1. Nothing beats a declination. But when a prosecutor removes that option from the negotiating table, and when counsel believes that indictment of the company is likely, a DPA or NPA may present an acceptable resolution. The task is to convince the prosecutor that a DPA or NPA, rather than indictment and conviction, will best serve the interests of justice. Resnik & Dougall, *supra*.

2. *New DOJ Policies And Prosecutorial Discretion*

a. Over the last year DOJ has promulgated new guidance concerning DPAs and NPAs, namely: (i) new language appearing in the U.S. Attorneys' Manual concerning whether or not to enter into the agreements; (ii) the "Morford Memorandum," which deals with the selection of corporate monitors in DPAs and NPAs; and (iii) a memorandum by former Deputy Attorney General Mark Filip prohibiting "extraordinary restitution." Each of these items is covered briefly below. Despite the new guidance, prosecutors still wield considerable discretion with respect to the availability of, and the terms appropriate to, DPAs and NPAs, especially in the environmental criminal realm.

b. In 2008 DOJ updated and codified its corporate charging policy—formerly known as the "Holder," "Thompson," and "McNulty" Memoranda—in the U.S. Attorneys' Manual. *See* "The Principles of Federal Prosecution of Business Organizations," U.S. Attys' Man., 9-28.000, 9-28.200B (Aug. 2008). The principles originated in a 1999 memorandum promulgated by then-Deputy Attorney General Eric E. Holder. The Holder Memo, as it became known, was modified by Deputy Attorneys General in successive administrations. *See, e.g.*, Larry D. Thompson, Memorandum for Heads of Department Components and All United States Attorneys Re: Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003); Paul J. McNulty, Memorandum for Heads of Department Components and All United States Attorneys Re: Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006).

i. The charging policy (called "The Principles of Federal Prosecution of Business Organizations") previously gave short shrift to DPAs and NPAs but now states:

[w]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.

U.S. Attys' Man. 9-28.1000.

- ii. The McNulty Memorandum stated only that “in some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government’s investigation.” The Memorandum then went on to refer prosecutors to the “principles governing non-prosecution agreements” found in the U.S. Attorneys’ Manual, but those sections of the Manual are designed for prosecutors enticing individuals to provide quid pro quo testimony against other individuals, a matter far different than whether pretrial diversion is appropriate for a cooperating company. *See e.g.*, U.S. Attys’ Man. 9-22.000 (Pretrial Diversion Program); 9-27.220 (Grounds for Commencing or Declining Prosecution); 9-27.600 (Entering into Non-prosecution Agreements in Return for Cooperation).
- c. The new language emphasizes that collateral consequences to a conviction are front and center as to whether the prosecutor should offer a DPA or NPA. Betting the Corporation, *supra*, at 18 (citing Peter Spivack & Sujit Raman, “Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements,” 45 Am.Crim.L.Rev. 159, 165-66 (Spring 2008) (subsequent citations omitted)). The new language thus offers defense counsel a new platform on which to base an argument that a DPA or NPA ought to be considered.
- d. At the same time that DOJ moved to clarifying circumstances in which DPAs or NPAs ought to be on the table, DOJ moved to prevent controversies that have sometimes attended the appointment of corporate monitors. One such controversy was the monitorship of Zimmer Holdings. Then–U.S. Attorney of New Jersey Christopher Christie chose his former supervisor, former Attorney General John Ashcroft, to be the corporate monitor. Under the agreement, Zimmer Holdings agreed to pay Ashcroft’s firm anywhere from \$28 to \$52 million. Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. Times (Jan. 10, 2008).
- e. In 2008 then–acting Deputy Attorney General Craig Morford specified in an eight-page memorandum (now nicknamed the Morford Memo) how corporate monitors—an increasing mainstay of DPAs and NPAs—are to be selected and what their role should be vis-à-vis the companies they supervise. Betting the Corporation, *supra*, at 9 (“Indeed, as we note below, forty percent of agreements in 2007 and 2008 involve corporate monitors or outside individuals tasked with ensuring that the company addresses the problems that resulted in the criminal inquiry and otherwise complies with the DPA or NPA.”).
- f. The Morford Memo explained that DOJ components, including U.S. Attorney’s Offices, must choose monitors by way of an established selection committee that reviews panels of (ideally) at least three qualified candidates. See Memorandum from Craig Morford, Acting Deputy Att’y Gen., U.S. DOJ, to Heads of Dep’t Components, 3-4 (Mar. 7, 2008), www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf. The Deputy Attorney General must approve the selection of the monitor, who must agree to be impartial and, to avoid a potential conflict of interest, not work for the company for at least a year following the monitorship. *Id.* at 3.
 - i. The Morford Memo specifies that the monitor, “an independent third-party, not an employee or agent of the corporation or the Government,” is to “assess and monitor a corporation’s compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct, and not to further punitive goals.” *Id.* at 2, 4. The monitor’s

role must be “to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation’s misconduct.” *Id.* Among other things, the Morford Memo also provides very general guidelines for when monitoring is advisable and factors for determining the proper duration for which a monitor ought to serve.

(1) The Memo provides: “[I]t may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.” *Id.* at 2

(2) Factors for determining the proper duration for which a monitor ought to serve include (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation’s history of similar misconduct; (4) the nature of the corporation’s culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences. *Id.* at 7-8.

- g. In 2008 DOJ also prohibited from DPAs and NPAs “extraordinary restitution”—provisions that have nothing to do with the conduct being punished. Memorandum from Mark Filip, Deputy Att’y Gen., to Holders of the U.S. Attorneys’ Manual, 1 (May 14, 2008), http://amlawdaily.typepad.com/amlawdaily/files/extraordinary_restitution_attach.pdf. For example, in the OMI DPA, OMI agreed to contribute \$1 million to endow a chair of environmental studies at the Coast Guard Academy. DOJ policy now provides that:

[p]lea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant’s criminal conduct.

Id.

- h. The policy is careful *not* to restrict the use of community service as a condition of probation for environmental prosecutions. *Id.* at 2. The policy directs U.S. Attorneys’ Offices contemplating such community service to consult with ECS, which has internal guidance designed to ensure that community service projects are narrowly tailored to each case’s facts and that any funds paid by a defendant as part of the community service portion of a sentence be directed to an entity in which the prosecutor has no interest that could give rise to a conflict and that is legally authorized to receive funds. *Id.*
- i. Notwithstanding all the above guidance, each of the Department’s divisions and the 93 offices of the U.S. Attorney remain free to develop their own policies on who receives DPAs and NPAs. Anecdotal evidence is that ECS has often turned a cold shoulder to such agreements, which, if true, can be unfortunate and inconsistent with the other sections of the Department.

- i. This is unfortunate because in some cases (voluntary disclosure cases excluded) and as the updates to the U.S. Attorneys' Manual now make clear, DPAs or NPAs may represent a just resolution for a company willing to cooperate, reform, and remedy past misconduct, and for which an indictment could bring ruinous consequences. Furthermore, many elements of DPAs and NPAs resemble concessions that ECS seeks through traditional plea bargaining. For example, DPAs or NPAs often contain such elements as compliance reform, corrective action, supplemental environmental projects, and corporate monitoring. These are elements that often appear in ECS-obtained guilty pleas. *See* Christopher A. Wray & Robert K. Hur, "Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice," 43 *Am.Crim.L.Rev.* 1095, 1160-61 (Summer 2006) ("Wray & Hur"). With DPAs and NPAs, ECS could accomplish these same goals without indicting, which can pose a risk of harm to innocent shareholders and to employees.
- ii. It has been Joe Warin's trenchant criticism that the lack of central guidance regarding what factors "merit a [DPA], vis-à-vis a [NPA], vis-à-vis a declination," has been a recipe for inconsistent, disparate prosecutions. *See, e.g.*, Warin & Jaffe, *supra*, at 1 (contrasting declination of Royal Dutch/Shell PLC with DPA of the Monsanto Co. and going on to state that "'Fundamental fairness' does require that similarly situated corporate defendants receive similar treatment in any one of the six divisions and [93] U.S. Attorney's Offices that make up the prosecutorial arm of the U.S. government. Quite simply, a corporation's fate should not depend upon the office in which its file happens to land.").
- iii. On the other hand, the FirstEnergy case, which ECS handled with the U.S. Attorney's Office for the Northern District of Ohio, is precedent that ECS will sometimes agree to pretrial diversion. *Cf.* Wray & Hur, *supra*, at 1157-58 (contending that these factors recommend for consistent standards for prosecutorial discretion).
 - (1) Other ECS DPAs include: (i) the 1995 Doyon Drilling Inc. case, in which the company pled guilty to more than a dozen misdemeanor counts and ECS (working jointly with the U.S. Attorney's Office for Alaska) deferred prosecution on felony CERCLA and RCRA charges and (ii) the 2002 Ashland Inc. case, in which the company pled guilty to two misdemeanors and ECS (working with the U.S. Attorney's Office for Minnesota) deferred prosecution of a felony charge of violating the Clean Water Act. For overviews of these cases, and other significant declination, NPA, and DPA cases, *see* Barry M. Hartman, "The Internal Investigation: Cooperation and the McNulty Memorandum" (October 2007), www.klgates.com/files/Publication/bd857b29-8966-4630-9110-40ea94107242/Presentation/PublicationAttachment/4a5a5398-507b-45d6-8214-427c097f1629/Presentation_Criminal_Enforcement_of_Environmental_Laws_Oct_4_2007.pdf
- j. Only time will tell whether ECS will change its apparent course under the new guidance. To our knowledge, there have been no environmental criminal DPAs yet under the new DOJ guidance. Until then, guidance on whether and under what circumstances an environmental criminal case may be resolved through pretrial diversion could be particularly valuable to the many companies subject to criminal environmental law. Dense, complex, and demanding regulations in the environmental field invite slip-ups and, unfortunately, short-cutting. Once a violation occurs, a case could

easily, though not predictably, “go criminal,” as environmental authorities have an array of civil, administrative, and criminal remedies available for nearly any violation. Once a case has gone criminal, a conviction is a stubborn possibility because most environmental offenses are crimes of general intent. *Cf.* Wray & Hur, *supra*, at 1157-58 (contending that these factors recommend consistent standards for prosecutorial discretion). Until DOJ issues guidance specific to environmental criminal cases, or until DOJ offers more companies DPAs or NPAs for environmental criminal offenses, counsel and corporate clients will be left uncertain as to the availability of pretrial diversion in this field.

- k. In the meantime, practically speaking, counsel will likely be pitching a DPA or NPA to a line prosecutor from one of the 93 U.S. Attorney’s Offices, which handle 70 to 75 percent of all environmental criminal cases. John F. Cooney, “Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach,” 96 *J.Crim.L. & Criminology* 435, 438 (2006). In planning such a move, defense counsel should know that prosecutors still have few rules to guide their discretion on who will get a DPA or NPA and what provisions it will contain. *See, e.g.*, preguidelines critique in F. Joseph Warin & Jason C. Schwartz, “Deferred Prosecutions: The Need for Specialized Guidelines for Corporate Defendants,” 23 *J.Corp.L.* 121, 129 (1997). The overall lack of central guidance on these topics may continue to yield disparate prosecutions and provisions that go well beyond what a judge could order, such as supersized monetary penalties and onerous compliance monitoring regimens. *A View from the Trenches, supra*, at 121, 123-24.

3. *Negotiating And Drafting A DPA Or NPA*

a. *Negotiating The DPA Or NPA*

- i. Given the discretion still reserved to prosecutors in this area, and factoring in the exposure of one’s client, counsel may have limited leverage to argue for a DPA or NPA. Put colloquially, counsel will likely be on the “begging side of the table.” That said, a pitch for a DPA or NPA will likely focus on one of two documents: (i) the 1991 “Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator” or (ii) the Principles of Federal Prosecution of Business Organizations.

- (1) These documents—as well as others, such as the EPA Audit Policy—are concrete mechanisms by which a company (for example, a cooperating company that has voluntarily disclosed its noncompliance) may demonstrate that it is entitled to a declination of prosecution. *See, e.g.*, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, www.justice.gov/enrd/Factors_in_Decisions.html (“if a company fully meets all of the criteria, the result may be a decision not to prosecute the company criminally”); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” 65 *Fed.Reg.* 19618, 19620 (Apr. 11, 2000) (“In accordance with EPA’s Investigative Discretion Memo dated January 12, 1994 [commonly known as “the Devaney Memorandum”], EPA generally does not focus its criminal enforcement resources on entities that voluntarily discover, promptly disclose and expeditiously correct violations...When a disclosure that meets the terms and conditions of

this Policy results in a criminal investigation, EPA will generally not recommend criminal prosecution for the disclosing entity.”).

ii. In many cases, violators of environmental law voluntarily disclose their violations to EPA or DOJ, qualifying them cases for an outright declination. *Id.* In more complicated voluntary disclosure cases the 1991 “factors” give guidance to a prosecutor attempting to value a company’s disclosure and subsequent cooperation. The prosecutor must consider:

(1) The quality of the company’s disclosure and whether it occurred before an investigation had already uncovered noncompliance.

(2) The quality and extent of the company’s cooperation with the investigation.

(3) The existence, quality, and scope of the company’s preexisting environmental compliance program and whether it demonstrates a strong commitment to environmental compliance.

(4) The pervasiveness of the noncompliance, the existence and use of internal disciplinary procedures, and the extent of any effort to remedy any ongoing noncompliance. Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, www.justice.gov/enrd/Factors_in_Decisions.html.

iii. The guidance operates on a sliding scale. If a company satisfies many of the factors (and satisfies them to a strong degree), then it will likely receive a pass for its disclosure and cooperation. The fewer factors that a company satisfies (and the less convincing its showing as to each), the less likely the prosecutor will be lenient.

iv. In those circumstances where the company has voluntarily disclosed, but counsel senses that indictment is likely because the company’s performance on other of the factors has been deficient, a DPA or NPA could provide a compromise resolution, as the U.S. Attorneys’ Manual now recognizes. The compromise could be presented as advancing DOJ’s policy of punishing misconduct without deterring compliance programs, audit programs, or voluntary disclosure. *See id.*

(1) Again both DOJ and EPA seek to reward voluntary disclosure. *See, e.g.*, U.S. Attys’ Man. 9-28.750 (noting ECS and EPA’s “voluntary disclosure programs in which self-reporting, coupled with remediation...may qualify the corporation for amnesty or reduced sanctions”); Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, U.S. EPA, to all EPA Employees Working In Or In Support of the Criminal Enforcement Program (January 12, 1994) (explaining that “EPA policy strongly encourages self-monitoring, self-disclosure and self-correction,” and that “a violation that is voluntarily disclosed and fully and promptly remedied...generally will not be a candidate for the expenditure for scarce criminal investigative resources”); 65 Fed.Reg. 19618, 19620.

v. Companies that have not voluntarily disclosed the fact of a violation will likely pitch a DPA or NPA as part of a presentation under the Principles of Federal Prosecution of Business Organizations found in the U.S. Attorneys’ Manual. The Manual directs prosecutors to weigh the following factors when evaluating whether a corporation should be charged:

- (1) Nature and seriousness of the offense.
- (2) Pervasiveness of wrongdoing within the corporation.
- (3) Corporation's history of similar conduct.
- (4) Corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.
- (5) Existence and adequacy of the corporation's pre-existing compliance program.
- (6) Corporation's remedial actions.
- (7) Collateral consequences on shareholders, employees, pension holders, and the public impact of a prosecution.
- (8) Adequacy of the prosecution of the individuals responsible for the corporation's malfeasance.
- (9) Adequacy of remedies such as civil or regulatory enforcement actions. U.S. Attys' Man. 9-28.300.

vi. A declination is warranted if a corporation can strongly satisfy these factors. If the corporation cannot, counsel could suggest a DPA or NPA as a resolution that credits the company's significant efforts with respect to a given factor or factors and at the same time preventing some of the collateral consequences that follow a corporate conviction. Counsel also could present a DPA or NPA as an augmentation of an already robust civil or administrative enforcement remedy. By itself a civil or administrative penalty might not persuade a prosecutor that the company has paid an adequate price for its misconduct. But a DPA or NPA in which the company agrees to pay a monetary penalty, perform supplemental environmental projects, and improve compliance systems (perhaps at significant cost) may be enough to convince others that the company has squared its debt.

vii. If the DPA or NPA is successfully pitched, the negotiation process has really just begun. Counsel's task then is to hash out those terms that best exemplify the company as having cooperated in the past, being prepared to cooperate in the future, and busily mending its ways for past misconduct; all this, while doing one's best to avoid overly oppressive conditions.

b. *Drafting The DPA Or NPA*

i. As Joe Warin has written, "One of the most appealing aspects of both [DPAs and NPAs] is the ability to tailor each one according to the specific needs of the respective parties, with both sides bargaining for what they most hold dear." Warin & Jaffe, *supra*. With respect to drafting DPAs and NPAs, the old saying "he who drafts, prevails" may not apply at its full force but is still a good maxim by which to work.

ii. Counsel should propose the first draft. Even if it is true that prosecutors have nearly "unbridled discretion" to make pretrial diversion as onerous as they please, it is also true that with defense-team drafting, counsel can better shape a favorable impression of their client, perhaps construe facts in a favorable fashion, and eliminate some possible collateral consequences. Indeed,

in some rare circumstances, counsel may be able to author a settlement in which the company acknowledges responsibility for its behavior but “denies that it was engaged in wrongdoing” and informs that it has settled only because it wanted to “avoid the delay, uncertainty, inconvenience, and expense of protracted litigation.” Sue Reisinger, “Prosecution Agreements, Complete with Denials,” Nat’l L.J. (Jan. 7, 2008). This article notes that in September 2007 the U.S. Attorney for New Jersey entered into four DPAs and one NPA with five manufacturers of orthopedic implants for alleged violations of the anti-kickback provision in the Medicare fraud statute, all with accompanying civil settlements. In the DPAs and NPA, each company acknowledged responsibility for its behavior but denied any illegal misconduct in the attached civil settlements.

- iii. Admittedly, those cases are exceedingly rare and perhaps even unprecedented. *Id.* (explaining that “[i]n not one of the 49 deferred prosecution agreements that the *Corporate Counsel*...has been able to identify, did the companies deny that their employees committed crimes”). But even if such rewards are not common, the high-stakes nature of the task always demands vigorous negotiation over word choice and painstaking word-by-word draftsmanship. The agreement and its statement of facts section will be read by regulators and reporters alike.
 - iv. A short non-exhaustive list of issues that could arise during the drafting and negotiating process follows.
- c. *Structural Reform.* A prosecutor may seek to introduce corporate monitoring in an effort to ensure that a company has changed its ways. Many DPAs require an independent monitor to all but reside at the company and to report on the company’s compliance efforts. *See, e.g.,* Devolution of Authority, *supra*, at 22-23. OMI was subjected to a lesser form of corporate monitoring when it agreed to be audited quarterly and to submit the results to the U.S. Attorney. OMI’s success in obtaining a less oppressive form of supervision may be attributable to its efforts to impose reform from within. It is clear from the DPA that OMI regarded its selective reporting case as an opportunity to clean house and to improve its operations and compliance systems. Those efforts likely made an impression on the U.S. Attorney. Accordingly, early in the negotiation process, counsel must give thought to those corporate improvements that would ensure that the misconduct could not again occur.
 - d. *Monetary Penalties.* A prosecutor may contend that a company must pay a price for the actions of its agents. These penalties, which may be quite sizeable, are purely in the prosecutor’s discretion. No statutory authority governs them. So in addition to negotiating a compromise sum, counsel might suggest that the penalty take the form of community service (taking care to ensure that such a plan will comply with the “extraordinary restitution” and ECS community service policies discussed above). For example, OMI completed two \$1 million community service projects, perhaps in lieu of paying a fine. Consequently the company paid a price but also was able to cast itself in a positive light. Similarly, in some cases, monetary penalties may be deemed satisfied by prior payment of administrative enforcement orders or other litigation.
 - e. *Suspension And Debarment.* As stated above, it is absolutely critical for companies who do business with the government to explore thoroughly the possible suspension and debarment consequences that could flow from execution of a DPA or NPA. The best practice likely will be to meet with a debarring official and to review an agreement before it is signed. Ideally a company can obtain

some assurance that its status will not change following execution of the agreement. This is apparently what KPMG accomplished in August 2005. Their DPA reads: “The Department of Justice’s debarring official has determined that KPMG is currently a responsible contractor. The debarring official has determined that suspension or debarment of KPMG is not warranted because KPMG has agreed to the terms of this deferred prosecution agreement.” KPMG Deferred Prosecution Agreement, *supra*, at ¶21.

- f. *Waiver of Privilege and Subsequent Litigation.* Several DPAs and NPAs require a company to waive privilege as to certain documents that are handed over to the government, though the Principles of Federal Prosecution of Business Organizations now prohibit prosecutors from asking companies to waive privilege. Many agreements have sought to preserve the privilege as to third parties by stating that “by producing materials to the government...the company does not waive the attorney-client privilege...as to any other party.” This is an attempt at a so-called selective waiver, which most courts reject. Most recently the U.S. Court of Appeals for the District of Columbia joined that majority view. *See* Winifred M. Weitsen & Geoffrey R. Garinther, “Death by a Thousand Cuts: Further Repudiation of Selective Waiver,” 10 *Crim.Litig.* (No. 1, Fall 2009) (citing *United States v. Williams Co.*, 562 F.3d 387 (D.C.Cir. Apr. 17, 2009)). Including such language is a good idea, particularly if counsel augments the language with a government promise to maintain confidentiality of the documents. A few courts have allowed selective waiver when both parties make efforts to maintain confidentiality. *See, e.g., Lawrence F. Jaffee Pension Plan v. Household Int’l, Inc.*, 244 F.R.D. 412, 413 (N.D. Ill. 2006) (citing cases). In the DPA context, OMI’s agreement stated that the U.S. Attorney “will maintain the confidentiality of the materials...and will not disclose them to any third party, except the extent that the office determines, in its sole discretion, that disclosure is otherwise required by law or would be in furtherance of the discharge of the duties and responsibilities of the office.” This language may help preserve the privilege as to third parties should subsequent litigation ensue.
 - i. Finally discussed is the state of the government’s policy with respect to waiver of attorney-client privilege and attorney work product. In the Holder Memo the government introduced the notion of a company’s waiving privilege as a gesture of its cooperation with a government investigation. Subsequently request for waivers by line prosecutors became more commonplace and perhaps an expected element of cooperation, much to the dismay of many companies and defense counsel. In the McNulty Memo, the government, perhaps in response to the controversy created by its waiver policy, stated that a waiver was not a prerequisite to a finding that a company cooperated with the government. Now the U.S. Attorneys’ Manual, which modified the McNulty Memo, prohibits federal prosecutors from asking for such waivers. Nevertheless, some defense counsel believe that, reading in between the lines, the government still expects a waiver under the guise of asking for the “facts known to the corporation” about the putative crime.

E. Conclusion

1. The great discretion reserved to prosecutors, ample precedent of onerous provisions, and real possibility of substantial collateral consequences can combine to make DPAs and NPAs practically as harmful as a guilty plea or a conviction after trial. The agreements simply cannot be considered a panacea for

every potential environmental criminal ill. For example, based on existing DOJ and EPA policies, it is difficult to imagine their appropriateness over an outright declination when a company has voluntarily disclosed and cooperated with the government's investigation. In sum, the agreements should likely be sought only in very limited circumstances: when a declination is unreachable, when a civil or administrative resolution cannot suffice, or when the consequences of indictment are ruinous. In those limited circumstances, one might attempt to convince the environmental prosecutor that a DPA or NPA will best serve the interests of justice. If counsel wins that battle, the task is to keep that victory from becoming Pyrrhic.

- a. When announcing the FirstEnergy DPA, former ECS Chief David Uhlmann remarked of the company that, "the corporate culture...is a very different one...than [what] it was," and that he could be "confident that the misconduct of the past will not be repeated." Tom Henry, *FirstEnergy to Pay \$28 Million for Lying: Davis-Besse's Punishment Largest in Nuclear History*, Toledo Blade (Jan. 21, 2006), www.toledoblade.com/apps/pbcs.dll/article?AID=/20060121/NEWS02/60121001; Wray & Hur, *supra*, at 1160 (quoting David M. Uhlmann, Chief, U.S. DOJ's ECS (Jan. 20, 2006)).

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