

Criticism Of DPAs and NPAs Is Unwarranted

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The U.S. Department of Justice has received increasingly heightened criticism for its use of deferred-prosecution agreements (DPAs) or non-prosecution agreements (NPAs) in recent weeks. The New York Times recently criticized DPAs as what they view as the “government’s preferred approach to corporate crime [with] scant, if any, deterrent effect.” Noted white collar attorney Michael Volkov, in his Corruption, Crime & Compliance blog, seems to agree, decreeing that “Prosecutors should either bring a case or decline to bring a case. There is no reason to establish middle grounds.”

These commentators could not be more wrong — there is every reason to establish middle grounds.

Deferred prosecution agreements and non-prosecution agreements serve incredibly important purposes, but their real effects and the appropriateness of their use cannot be ascertained from public documents. Typically, an individual or corporation entering into a DPA or NPA will make some statement — be it in court or as a stipulation of fact — that describes the criminal conduct, but such statements do not come close to describing the totality of the crimes involved.

Additionally, because these agreements usually come before any hearings and almost always before trial, there is no publicly available information on what evidence the government has, how strong that evidence is, and there is scant information about the defendant or the victims. Thus, critics simply are not in a position to really determine the appropriateness of concluding prosecutions in this manner.

This makes it particularly difficult to know how severe a penalty is needed in any one case to deter any thoughts of further criminal conduct. There are numerous consequences of a felony conviction that simply are not appropriate for all criminals. The statutorily apparent ones for individuals like loss of voting rights are only the tip of the iceberg (indeed, many people might even choose to give up their “right” to be called for jury duty).

Much more severe are the financial consequences, which for individuals include the loss of professional licenses, the possibility of being evicted from their home, the likely loss of their job and extreme difficulty of getting any future work; and for corporations the consequences could include credit downgrades, loan defaults, civil suits, and other financial consequences that sound the death knell for the company — leading to the loss of jobs not only in the specific area of the company accused of wrongdoing, but for all its departments and business. One simply has to look at Arthur Andersen, whose conviction was ultimately overturned, but for which the very existence of the case not only shut down its United States business, but its entire international practice as well.

Many of these consequences are perfectly appropriate for convicted felons and companies that knowingly and pervasively carry out criminal acts, but automatically triggering them for any individual or any company who commits a federal felony, leads to dire consequences that are not always in the interests of justice.

¹ NY Times, For UBS, A Record Of Averting Prosecution, July 20, 2012.

² <http://corruptioncrimelaw.com/2012/09/re-examining-corporate-criminal-prosecut-70916>

Also unseen many times from the critics' eyes is the key role DPAs and NPAs play in the prosecution of much more culpable actors than those to whom such DPAs or NPAs are given. In one of the few publicized matters involving such agreements, the NPA entered into by the U.S. Attorney for the Southern District of New York with Diamondback Capital in a case involving insider trading led to the company's extensive cooperation that cemented the prosecution against the employees at Diamondback and their co-conspirators who were the most culpable for the insider trading at issue. Meanwhile, Diamondback Capital, in addition to their cooperation, agreed to forfeit \$6 million in profits.

Diamondback also entered into a stipulation of facts and should Diamondback commit any further wrongdoings or violate the DPA, it can be easily reprosecuted for its original conduct. The DPA thus effectively allowed the government to ensure that ill-gotten gains were forfeited, solidified the case against the key wrongdoers, and ensured Diamondback's almost certain convictions were it to return to any criminal activity.

The Diamondback DPA also removed any litigation risk — a consideration that is present in any case, no matter how strong. While it is appealing to state that those guilty of a crime should be convicted and those not guilty should not be charged, these things are rarely that simple. In any trial, no matter how solid the proof, there is always a risk that the countless hours spent investigating and prosecuting the case will all go to waste with the simple utterance of "not guilty," broadcasting to criminals that they can get away with their crimes and preventing any restitution to the victims. This is yet another one of the unseen aspects of criminal litigation that the public generally (and DPA critics in particular) are either unaware of or choose to ignore.

By using DPAs and NPAs, prosecutors can protect the public through a variety of resources including strict monitoring, confinement, drug and psychiatric treatment for individuals, curtailing a company from practicing in certain areas, and payments of restitution all without taking any litigation risks. Only the prosecutor can balance the litigation risks with the appropriate punitive and ameliorative measures — armchair quarterbacking from critics without all of the facts about the investigation is an exercise in futility.

Prosecutors thankfully have a wide panoply of tools at their disposal. As demonstrated by their use of DPAs and NPAs, their aim is not just to ratchet up convictions, but to mete out justice, protect the public, and make sure victims are paid restitution. As the only ones who know all the relevant facts, they alone can determine the appropriate balance to strike in fulfilling these goals. Curtailing the tools they have at their disposal for these ends would only hamper their ability to make sure that justice is ultimately served.

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