A Rare Antitrust Deferred Prosecution Agreement From DOJ

By **Peter Huston and Alex Bourelly** (June 14, 2019)

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The Department of Justice routinely relies on deferred prosecution agreements and nonprosecution agreements to resolve corporate criminal investigations. Since 2004, the DOJ has entered into an average of 33 such agreements per year. These agreements allow companies to avoid what can be cataclysmic consequences of pleading guilty. From the government's perspective, they provide an admission of wrongdoing, cooperation with the investigation, payment of a fine and assurance of an improvement of a company's compliance program.

While DPAs and NPAs are popular among the DOJ's Criminal Division and U.S. attorneys' offices around the country, the DOJ's Antitrust Division has been very reluctant to enter into such agreements, believing that they undercut the division's unique and successful corporate leniency program.

Accordingly, it is noteworthy that the Antitrust Division recently announced that it has entered into its first DPA with a company other than a bank. Is it a sign of more to come? It's possible that Antitrust Division Assistant Attorney General Makan Delrahim was referring to closer alignment with the Criminal Division and U.S. attorneys' offices on DPA/NPA policy when he recently stated that, "[i]n line with the Department of Justice and its other components" the Antitrust Division "can and must do more to reward and incentivize good corporate citizenship."[1]

The Antitrust Division's recent DPA is with Heritage Pharmaceuticals Inc. resolving exposure resulting from the DOJ's long-running investigation into price-fixing in the generic drug industry. The DPA resolves Heritage's criminal antitrust exposure and the Civil Division's False Claims Act allegations. It will allow Heritage to avoid the mandatory exclusion from federal health care programs that would accompany a guilty plea. Under the DPA, Heritage will pay a $225,000 criminal penalty, $7 million in reimbursement to the federal government, and will continue to cooperate fully with the ongoing investigation.

The Heritage DPA represents the first acknowledgement of wrongdoing by a corporation in the Antitrust Division's probe of the generic pharmaceutical industry despite an investigation that has been going on since 2014. It is unclear if similar agreements will follow for other generic manufacturers being investigated.

The more significant question raised by the DPA, however, is whether it signals a broader openness to such agreements by the Antitrust Division if the target of an investigation can demonstrate that a guilty plea would effectively result in severe harm to the company (and thus consumers), for example due to regulations that bar the government from doing business with entities that have pled guilty to a felony.

What Are Deferred Prosecution Agreements and Nonprosecution Agreements?

Criminal investigations against a corporation can generally be resolved in one of five ways:

- A declination, where the government concludes its investigation without bringing any criminal prosecution;

- An NPA, where the government agrees not to file criminal charges in exchange for negotiated agreement to comply with enumerated conditions for a period of time;

- A DPA, where the government files criminal charges through information, but "defers" prosecution in exchange for a negotiated agreement to comply with enumerated conditions for a period of time (if the company complies the charges are dismissed);

- A plea agreement, where the company (or often, a subsidiary) admits to specific wrongdoing and a criminal conviction is entered; or

- Litigation, where the grand jury returns an indictment and the case is litigated to dismissal or verdict.

A declination is obviously the best outcome for a target corporation. However, where a declination is not an option, an NPA or DPA is often the next best alternative because they avoid a criminal conviction. These agreements should not be entered into casually, however, because prosecutors have enormous discretion in crafting the terms which can be onerous and have significant financial and reputational consequences.

The DOJ does not have a standard template for NPAs and DPAs and they can vary along several dimensions, including (1) the entities covered by the resolution; (2) the duration of the agreement; (3) the scope of the release language; (4) what conduct constitutes breach of the agreement; (5) how breaches can be cured; and (6) reporting obligations (for example, a monitorship, self-reporting or nothing). All of these aspects are theoretically subject to negotiation between company counsel and the prosecutors.

In practice, the DOJ is often in a superior bargaining position and may be largely able to dictate the terms. For this reason, DPAs and NPAs have been criticized as particularly subject to potential abuse.

The Antitrust Division's Leniency Program and Its Relationship to NPAs and DPAs

The Antitrust Division's corporate leniency program, which has been in place in its current form since 1993, automatically affords full amnesty from prosecution to the first (but only the first) corporation to come forward, report involvement in an antitrust crime, accept responsibility and fully cooperate with the government's investigation. Amnesty is also provided to all current officers, directors and employees of the company, assuming they also cooperate.

In essence, the Antitrust Division offers an automatic NPA to the first company to confess and cooperate. Beyond this, the Antitrust Division has been on record as disfavoring NPAs and DPAs because they potentially undermine the leniency program which the division touted in the past as the sole means for a culpable defendant to avoid a conviction. The leniency program seeks to disrupt cartels by sparking a race to confess, working on the carrot and stick principle. The carrot is the prospect of full amnesty and the stick is the risk of large penalties for those that are not first in the door. When culpable parties who do not meet the criteria for leniency get a DPA or NPA it dilutes both the carrot and stick aspect of the program.

In the early part of this decade the Antitrust Division entered into a few NPAs with banks in connection with cartels involving municipal bonds and Libor. In 2013, the division entered into its first ever DPA. The agreement was with the Royal Bank of Scotland PLC for its role in an alleged price-fixing conspiracy to manipulate Yen Libor and Swiss Franc Libor.

RBS was not entitled to immunity under the division's corporate leniency program. It nevertheless secured the DPA in part due to the "potential collateral consequences of proceeding with a prosecution" (a reference to the major problems a felony conviction would cause banking regulators). Following the DPA, the then-deputy assistant attorney general in charge of the division's criminal program found it necessary to make clear that the division did not consider there to be any general "exception for financial institutions permitting the use of NPAs or DPAs," and reiterated the division's policy against such agreements. He noted RBS' extraordinary compliance efforts and extraordinary cooperation with the investigation.

Generally, however, the Antitrust Division relied on the leniency program to incentivize compliance, noting that "[r]eceiving leniency is the ultimate credit for having an effective compliance program."[2] A month before the Heritage DPA, however, Assistant Attorney General Delrahim stated that "going forward ... leniency will no longer be the only benefit" from an effective compliance program.[3]

In addition to providing a vehicle to reward compliance programs, a less doctrinaire stance toward DPAs may supply the Antitrust Division with an opportunity to bolster its sagging criminal statistics. While the division filed criminal cases against an average of 21 corporations per year in the period between 2008 and 2016, in 2017 the division filed against only eight corporations, and in 2018 it filed against only three corporations. While total fines exceeded $1 billion in each of fiscal years 2012, 2013, 2014 and 2015, the fines dropped off dramatically in 2016 to $399 million, and dropped off again for fiscal 2017 to $67 million. They rebounded a bit to $193 million in 2018, according to unofficial figures, but are still a long way from their high point.

DPAs (but not NPAs) count as case filings. Both DPAs and NPAs have been proven ways to gather up large fines in other components of the DOJ. In 2018, for example, monetary recoveries related to corporate NPAs and DPAs yielded $8.1 billion (a near record). A corporate target that otherwise might not consider admitting guilt and opening its check book to pay a large fine because of the collateral consequences of a felony conviction might be nudged to do so if a DPA or NPA were on the table.

On the other hand, if the Antitrust Division becomes known for a liberal NPA/DPA policy, a potential leniency applicant may not feel the same urgency to take advantage of the leniency program. Why rush to secure the first-in leniency spot if a criminal conviction might still be avoided later through an NPA or DPA? The Antitrust Division is already facing

scrutiny for changes to its "Frequently Asked Questions" publication regarding the leniency program which the defense bar perceived as making the program less predictable and transparent.

Given these tensions, don't expect a dramatic shift toward NPAs and DPAs at the Antitrust Division. In order to be considered for an NPA or DPA a corporate target will have to make a strong showing of dramatic negative consequences beyond the normal stigma that any corporation could show from a criminal conviction.

In addition, a corporation should not expect the division to consider NPAs or DPAs unless the corporation can demonstrate that it has made significant improvements toward a gold-standard compliance program. Lastly, the division will expect full and complete cooperation implicating others and payment of a significant fine.

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[1] Assistant Attorney General Makan Delrahim, "Remarks at the American Bar Association in Buenos Aires." May 10, 2019.

[2] Deputy Assistant Attorney General Brent Snyder, "Compliance is a Culture, Not Just a Policy," Remarks as Prepared for the International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop, New York, NY, September 9, 2014, reprinted at https://www.justice.gov/atr/file/517796 /download.

[3] Assistant Attorney General Makan Delrahim, "Remarks at the American Bar Association in Buenos Aires." May 10, 2019, reprinted at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-american-bar-association.