

# surviving a Criminal Investigation

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## Defining Deferred Prosecution and Non-Prosecutions Agreements

**T**HE UNITED STATES DEPARTMENT OF Justice is committed to prosecuting corporate wrongdoing; a commitment that will not likely be diminished by the current recession. Indeed, the use of federal stimulus money to fund construction projects nationwide may bring the construction industry under particular scrutiny of federal agents and prosecutors. Expect that "the feds" will be on the lookout for any misuse of federal stimulus money, including any misappropriation of federal funds or fraud in connection with federally funded construction projects. Contractors under investigation may mount aggressive defenses that will result in the company avoiding prosecution altogether. At times, however, criminal sanctions will be unavoidable. This article discusses options that may soften the blow of a corporate prosecution and allow your company to live another day.

### A Typical Investigative Scenario

Here is a scenario your company might face: Your company has a federal contract to make improvements at a National Park site. The Department of Labor alleges company employees engaged in fraudulent conduct in procuring construction materials. Several employees have been subpoenaed to testify before the grand jury. Your company has pro-

duced thousands of documents to the government. The prosecutor has said the company itself is a target of the criminal investigation and will be indicted – a penalty you believe would be excessive for errant employee misconduct that was not sanctioned by the company. Your company's lawyers have urged prosecutors to decline a prosecution of the company, but to no avail.

If a corporate indictment and trial is not an option – because a trial conviction could be ruinous to your company – there may be room for you to negotiate the form that a prosecution will take. Your ability to negotiate an alternative to an indictment may have significant implications for your company.

### Deferred Prosecution Agreements

When an individual is under criminal investigation, the government generally has just two options: indict the individual, or not. But when a corporation is the target of a federal investigation, there is a third option, a midway point between indicting the company and declining prosecution, and it is known as a Deferred Prosecution Agreement (DPA).

In a DPA, the government files a criminal complaint against the corporation but agrees to dismiss those charges after a period of time assuming the company complies with the terms of the Agreement. In return: (1) the

company accepts responsibility for its criminal conduct by stipulating to a detailed factual statement; (2) the company pays a fine, which may be hefty; and (3) the company takes remedial measures such as instituting a corporate compliance program, and installing a monitor to oversee the company's compliance with the DPA. In recent years, the Department of Justice has entered into dozens of DPAs in cases involving a multitude of criminal offenses.

There is another type of agreement, similar to a DPA, called a Non-Prosecution Agreement (NPA), which does not involve the filing of charges against the company; where the government agrees not to prosecute so long as the corporation complies with the terms of the Agreement.

The "Filip Memo"

Back to our opening scenario. Despite the company's aggressive defense of the criminal investigation, you have failed to convince the government to decline a prosecution altogether. There will be some form of criminal sanction for the company. How do you convince the government that a DPA, rather than an indictment, is an appropriate resolution of the criminal investigation?

A good place to start is a DOJ document called "Principles of Federal Prosecution of Business Organizations," also known as the Filip Memo. The Filip Memo discusses several factors that prosecutors should consider in deciding how to resolve criminal investigations of business entities. The Filip Memo acknowledges that "it may be appropriate ...

to resolve a criminal case by means other than an indictment. Non-prosecution and deferred prosecution agreements ... occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."

"Collateral Consequences" of a Conviction

According to the Filip Memo, a critical factor in deciding whether the government will enter into a DPA is the collateral consequence of a corporate conviction; that is, the consequence a felony conviction will have on the company's innocent employees, shareholders, and pensioners. For instance:

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- Will an indictment have the effect of collapsing the company's stock price? That is a collateral consequence to innocent shareholders that prosecutors should consider.
- Will an indictment result in the company being debarred from eligibility for government contracts or federally funded programs? For example, if an indictment of a construction company would result in the company being debarred from participating in any federal contracts, the company might not survive. Such a potential death knell for the company is a collateral consequence which prosecutors should consider.

Good employee training and oversight should ensure your company never becomes the target of a criminal investigation. But should your company come under investigation, there may be alternative sanctions that will protect innocent employees and shareholders and allow the company to continue to thrive. Deferred Prosecution Agreements and Non-Prosecutions Agreement are such alternatives.■

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