November 19, 2009

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

Re: H.R. 1947 and the Hearing on Transparency and Integrity in Corporate Monitoring

Dear Chairman Cohen and Ranking Member Franks:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing to supplement our letter, dated June 25, 2009, regarding the Department of Justice's use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) for business organizations, and to re-emphasize two specific concerns highlighted by H.R. 1947, the pending Accountability in Deferred Prosecution Act of 2009.

NACDL does not oppose H.R. 1947 generally. We believe that this legislation could result in more uniform decision-making by the Department of Justice as to how and when to use DPAs and NPAs, as well as the standardization of agreement terms. Since this bill would require the Attorney General to establish certain procedures to ensure the independence and accountability of corporate monitors, NACDL also believes that H.R. 1947 could positively address some of the well-publicized problems of overcompensated or ethically conflicted monitors. We do have concerns, however, regarding the mandates contained in Sections 7 and 8 of this bill.

First, Section 7 of H.R. 1947 mandates judicial approval and oversight of all DPAs and NPAs. Specifically, this bill requires that a court determine whether a DPA or NPA is consistent with the guidelines that will be established concerning such agreements and further whether the agreement is "in the interests of justice." The phrase "in the interests of justice" is undefined by the bill.[1] Section 7 also requires the parties to file quarterly reports with the court detailing

[1] While the phrase "in the interests of justice" is completely undefined, NACDL believes that the term must, at a minimum, be interpreted as requiring a determination as to whether the government's choice of the use of a DPA or NPA in lieu of a declination of prosecution altogether is appropriate. In the current regime of vicarious corporate criminal liability, DPAs and NPAs can be an important alternative for a corporation that would otherwise

"progress made toward the completion of the agreement" and describing any "concern . . . about the implementation of the agreement." While the bill does not explicitly so state, the bill would seem to require the court to review such reports and involve itself in assessing the parties' progress toward completion, as well as adjudicating or otherwise involving itself with any "concern" raised in such reports. Finally, this section mandates that, on motion of any party or the monitor, the court review and take any appropriate action "to assure that the implementation or termination is consistent with the interests of justice."

DPAs and NPAs reflect what are, in effect, decisions by the Executive Branch to decline prosecution. NACDL believes that Article III judicial review of such inherently executive decisions would be inappropriate. In addition, judicial oversight is unnecessary because DOJ and a corporation that is the subject of an investigation are themselves in the best position to determine whether the terms of a DPA or NAP are appropriate. Further, inasmuch as DPAs and NPAs are often the culmination of complex and long-term investigations, mandatory judicial oversight would result in a significant burden on the judiciary. In fact, the extensive evidentiary hearings, court filings, and judicial exercises of fact-finding and decision-making that would likely be required could lead the government or a company under investigation to reject an otherwise appropriate and desirable DPA or NPA.

Second, Section 8 of H.R. 1947 mandates public disclosure of all DPAs and NPAs on the Department of Justice's website. While NACDL appreciates Congress' desire to create a level of transparency regarding these agreements, we are not in favor of the wholesale mandated public dissemination and disclosure that would be required by this bill. Avoiding the economically destructive effects of an indictment and lengthy criminal proceedings is one of the main motivations for a business organization to enter into a DPA. Automatic publication of all of the terms of these agreements is contrary to that purpose and would like diminish some of a business organization's incentive for entering into such an agreement.

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be criminally charged and suffer ruinous criminal sanctions and collateral consequences from conviction. Moreover, these agreements can be used to pinpoint areas in which an organization is in need of compliance reform. Since it is rarely, if ever, "in the interests of justice" to incapacitate a legitimate business organization, DPAs and NPAs should serve as a legitimate alternative to criminal prosecution to further the goals of deterrence, restitution, and reformation. DPAs and NPAs between the Department of Justice and business organizations should not be used, however, as substitutes for civil remedies or for declining criminal prosecution. While there are certainly cases in which organizations should be punished, criminal sanctions should be reserved for cases in which there is serious, widespread fraud that involves criminal intent, and in which civil remedies are insufficient to affect a just result. The overbroad use of criminal sanctions, whether through indictment or alternative resolution like DPAs and NPAs, dilutes the deterrent effect and devalues the prescriptions of criminal enforcement.

With respect to NPAs, there is an even greater concern about the automatic disclosure requirement.[2] An NPA is a decision to *not* prosecute a company or individual. If the government has chosen not to prosecute, the public disclosure of the fact that the government had investigated the person or entity is harmful to the reputation of the person or entity, without any clear benefit to anyone else.

NACDL believes that the Department of Justice can and should publically disclose relevant information relating to its use of DPAs and NPAs but believes that this can be done without actually publishing all agreements in their entirety. For example, DOJ could release statistics and data on the number of such agreements, the specific nature of the alleged crimes, the amount of fines levied, the compliance terms, and information relating to the selection and use of monitors. This would satisfy the desire for transparency in a useful manner without sacrificing a significant incentive for business organizations to enter into DPAs and without undermining the privacy and reputational concerns of those who enter into NPAs.

As expressed above, NACDL does not oppose this legislation generally. Rather, we believe that it could result in positive changes to the manner of entering into and executing DPAs and NPAs. We are deeply concerned, however, about the potentially negative effects that the mandates in Sections 7 and 8 could have on this system. NACDL believes that revising these sections to provide judicial review only in the event of a breach and mandated publication only of general statistics, not DPAs and NPAs in their entirety, will fully satisfy the goals of this legislation without sacrificing the effectiveness and efficiency provided by DPAs and NPAs generally.

On behalf of NACDL, I encourage you to consider these recommended revisions as this bill moves through the legislative process. Thank you for considering our views.

Respectfully,

Cynthia Hujar Orr
President, National Association of Criminal Defense Lawyers

[2] It is arguably unclear whether H.R. 1947 requires public disclosure of NPAs. Section 8 only specifically references the public disclosure of DPAs. Section 3 of the bill, however, states that an NPA is subject to *all* the Act's requirements and is legally equivalent to a DPA, so therefore Section 8 could be reasonably interpreted as requiring the public disclosure of all NPAs.