Legal Policy Report
No. 19 March 2015

WITHOUT LAW OR LIMITS

The Continued Growth of the Shadow Regulatory State

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Published by Manhattan Institute

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Companies cannot be sent to jail, so all a court can do is say you will pay 'x.' We can say: 'you will also have a monitor and will do all sorts of other things for the next five years, and if you don't do them for the next five years then you can still be prosecuted.' . . . In the United States system, at least, it is a more powerful tool than actually going to trial.[1]
—U.S. Assistant Attorney General Leslie R. Caldwell, December 2014

Who runs the world's most lucrative shakedown operation? The Sicilian mafia? The People's Liberation Army in China? The kleptocracy in the Kremlin? If you are a big business, all these are less grasping than America's regulatory system. The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company.[2]
—The Economist, August 2014

Over the last ten years, American prosecutors have emerged as a new force regulating businesses, both domestic and foreign. A series of out-of-court—indeed, non-court—"settlements," known as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), have imposed on businesses both hefty "fines" (totaling more than $30 billion in the last six years) and extensive, specific mandates from the U.S. Department of Justice (DOJ) that affect management and business practices. Without any adjudication to establish wrongdoing and without any judicial oversight, businesses have agreed through these settlements to remove or replace key officers and directors; to change sales, marketing, or compensation plans; and to appoint new officers or independent "monitors" reporting to prosecutors but paid by the companies. We at the Manhattan Institute have dubbed the new world of DPAs and NPAs "the shadow regulatory state."

Just how new is the shadow regulatory state? The first federal NPA was entered into between the DOJ and Salomon Brothers in May 1992. In the first decade of these agreements' existence, the federal government entered into 14 DPAs and NPAs. In the last decade, the government entered into 303. The U.S. government agreed to one NPA in the first Bush administration, 11 DPAs and NPAs in the Clinton administration, 130 in the George W. Bush administration, and 190 in the first six years of the Obama administration.

Just how broad is the shadow regulatory state's reach? Since the beginning of 2010, 16 of the 100 largest U.S. businesses by revenues have been under the supervision of federal prosecutors through a DPA or an NPA—as have another 13 of the world's 300 largest companies headquartered outside the United States.

This report focuses on DPAs and NPAs reached between the U.S. government and businesses or individuals in 2014. Last year, federal prosecutors entered into 30 DPAs or NPAs with companies. In addition, the Securities and Exchange Commission entered into an NPA with an individual—the second such arrangement in American history, following one in November 2013. Total fines and penalties collected under DPAs and NPAs in 2014 totaled $5.1 billion.

Through specific case studies, this report explores three key issues that arise under the shadow regulatory state:

1. Enforcement efforts can undermine compliance. As shown through a plea agreement, a DPA, an NPA, and a cease-and-desist settlement entered into between the U.S. government and Hewlett-Packard and its foreign subsidiaries, federal prosecutors often punish companies notwithstanding extensive compliance programs, even when the companies self-report offenses and even when "rogue" employees go to extraordinary lengths to hide misconduct from their employers. Such a "strict liability" enforcement strategy may deter companies from developing effective compliance regimes.

2. The DPA-NPA process lacks definite terms and judicial oversight. As shown through the federal government's decision to extend a two-year DPA with Standard Chartered Bank for an additional three-year term, without any proffered evidence of additional wrongdoing, federal prosecutors' authority in the DPA-NPA process is supreme. These agreements typically grant prosecutors the sole authority to determine whether an agreement has been breached. Indeed, the Department of Justice argues that federal judges have no authority over DPAs, beyond ensuring that such agreements comply with the terms of the Speedy Trial Act.

3. The DPA-NPA process is ill-suited for application to individuals. One concern about the increased use of DPAs and NPAs by the federal government is that they give prosecutors broad powers over businesses, notwithstanding that, more often than not, no individual is ever prosecuted for any underlying offense alleged in the agreement. The recent decision of the Securities and Exchange Commission to apply DPAs and NPAs to individuals—acquiring significant authority over people's lives and retaining the ability to prosecute, essentially at prosecutors' discretion—is a troubling new application of this power. The NPA reached with an unnamed individual in a 2014 insider-trading investigation exemplifies these concerns, as the alleged misconduct itself most likely does not constitute insider trading under current law.

Notwithstanding the lack of judicial oversight in the shadow regulatory state, two judges asserted new authority over this process in 2014—continuing a trend observed in 2013. Ultimately, however, reforming the shadow regulatory state requires legislative action. Part IV of this report discusses one proposed solution, the Accountability in Deferred Prosecution Act, sponsored by U.S. Representative Bill Pascrell, Jr. (D-N.J.). Although this proposed legislation does not go far enough to address some of the serious problems with DPAs and NPAs, the legislation would add substantial clarity, transparency, and oversight, as compared with current practice, and is a great starting point for much-needed reform.

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About the Authors

JAMES R. COPLAND is director of and senior fellow with the Manhattan Institute's Center for Legal Policy, which seeks to develop and communicate novel, sound ideas on how to improve the civil- and criminal-justice systems. Copland has testified before the U.S. Congress and has authored many policy white papers, book chapters, and articles in journals, including the *Harvard Business Law Review* and *Yale Journal on Regulation*, as well as opinion pieces in newspapers including the *Wall Street Journal*, *National Law Journal*, and *USA Today*. He speaks regularly on civil and criminal-justice issues; has made hundreds of media appearances in outlets including PBS, Fox News, MSNBC, CNBC, Fox Business, Bloomberg, C-Span, and NPR; and is frequently cited in news articles in periodicals such as the *New York Times*, *Washington Post*, *Economist*, and *Forbes*. In both 2011 and 2012, Copland was named to the National Association of Corporate Directors' *Directorship* 100 list, designating the individuals most influential over U.S. corporate governance.

Prior to joining the Manhattan Institute, Copland was a management consultant with McKinsey and Company in New York. He earlier served as a law clerk for Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. He has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. Copland received JD and MBA degrees from Yale, where he was an Olin Fellow in Law and Economics; an MSc in the politics of the world economy from the London School of Economics; and a BA in economics with highest distinction and highest honors from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.

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Without Law or Limits

The Continued Growth of the Shadow Regulatory State

James R. Copland & Isaac Gorodetski

INTRODUCTION

In August 2014, the British news magazine *The Economist* ran a cover story headlined "The Criminalisation of American Business."[3] The magazine's editors led with the following provocative claim:

> Who runs the world's most lucrative shakedown operation? The Sicilian mafia? The People's Liberation Army in China? The kleptocracy in the Kremlin? If you are a big business, all these are less grasping than America's regulatory system. The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company.[4]

Although the process through which the U.S. government takes corporate money is certainly more legitimate than the tactics embraced by the Mafia, the reach of what we have called America's "shadow regulatory state"—and have explored in various contexts in eight earlier Center for Legal Policy reports (see box, page 4)—certainly exceeds the scope and global reach of any other government regulatory scheme witnessed since the genesis of capitalist democracy.

Others, in addition to ourselves and the editors at *The Economist*, have begun to notice. In May 2014, the Administrative Conference of the United States held a workshop on this subject featuring senators, conference members, academics, attorneys, and thought leaders (including coauthor Copland).[5] At the workshop, NYU law

professor Rachel Barkow, one of President Obama's appointees to the conference, suggested that government prosecutions may be engaging in an illegitimate end run around established administrative law processes.[6] In autumn 2014, law professor Brandon Garrett of the University of Virginia—the academic most focused on the subject of this report—released a book on the topic, *Too Big to Jail: How Prosecutors Compromise with Corporations*.[7]

The principal government tactics examined in this report are the deferred prosecution agreement ("DPA") and the non-prosecution agreement ("NPA"), the mechanisms through which the government has increasingly come to resolve criminal allegations against large publicly traded companies. DPAs and NPAs are pretrial diversion programs in which the government declines to prosecute a defendant in a written agreement; the two types of agreements are distinct only in that DPAs, as opposed to NPAs, involve cases in which charges have been formally filed.

Though the names of these agreements sound rather sterile—indeed, innocuous—the powers assumed by the government under these agreements can be vast. DPAs and NPAs are notable not only for the financial penalties levied without any guilty plea or adjudication—civil fines and forfeitures totaled $30 billion over the last six years alone[8]—but also for their sweep, in terms of both the number of sizable companies affected and the modifications to business practice that such agreements regularly impose. Federal prosecutors regularly require companies to make wholesale changes to personnel and business practices, including:

- The firing of key employees—including chief executives—and directors
- The hiring of new corporate officers to monitor companies' "compliance" with legal rules
- The hiring of corporate "monitors" with significant powers, wholly independent of the company and reporting to the prosecutor
- The modification of existing compensation plans
- Significant shifts in sales and marketing practices
- The implementation of new training programs
- The adoption of exhausting reporting requirements between the company and prosecutor

These agreements typically include provisions vesting sole authority to determine whether a company has complied with or breached its terms with the prosecutor, absent judicial review. Indeed, the federal Department of Justice (DOJ) takes the legal position that judges' sole power with respect to DPAs is to ensure their compliance with the Speedy Trial Act.[9] (Because NPAs do not involve the formal filing of charges, they do not come before a judge.)

Why do companies enter into DPAs and NPAs, given the severity of the terms that they often include? In many cases, they have little choice: various federal statutes contain collateral consequences in the event of a corporate criminal conviction, or even indictment—including debarment from government contracts, exclusion from reimbursement under government-run health programs, or loss of licenses required to operate[10]—that would constitute an effective corporate death sentence for the company facing prosecution. After the federal government indicted the former "Big Five" accounting firm Arthur Andersen in 2002 in a prosecution related to its bookkeeping for the defunct energy firm Enron, the partnership quickly collapsed;[11] that the U.S. Supreme Court ultimately overturned the accountancy's conviction[12] offered little solace to its displaced employees, customers, and creditors.

Prosecutors like to enter into DPAs and NPAs because they not only avoid the risk of an Andersen-style corporate collapse and avoid the risk of trial but also because these agreements afford government attorneys tools to modify, control, and oversee corporate behavior that they could never achieve through actual adjudication of criminal claims. During a question-and-answer session at the launch event of the Foreign Bribery Report for the Organisation for Economic Co-operation and Development, U.S. Assistant Attorney General Leslie R. Caldwell admitted as much:

> Companies cannot be sent to jail, so all a court can do is say you will pay 'x.' We can say: 'you will also have a monitor and will do all sorts of other things for the next five years, and if you don't do them for the next five years then you can still be prosecuted.' . . . In the United States system, at least, it is a more powerful tool than actually going to trial.[13]

DPAs and NPAs are of relatively recent provenance. The first such agreement reached between the federal government and a business was a May 1992 non-prosecution agreement resolving antitrust claims that the DOJ had filed with Salomon Brothers.[14] Initially, such agreements were comparatively rare, but in recent years, they have become commonplace. Prior to the George W. Bush administration, the federal government had entered into 12 DPAs and NPAs; through eight years of the Bush administration, 130; and in the first six years of the Obama administration, 190. Over the last decade, the DOJ and other federal agencies have entered into at least 303 DPAs and NPAs with domestic and foreign businesses.[15]

A broad cross-section of the largest businesses worldwide has been acting under the supervision of federal prosecutors. Since the beginning of 2010, the federal government has entered into DPAs and NPAs with the parent companies or subsidiaries of 16 of the 100 largest U.S. companies by revenues, as ranked by *Fortune* magazine: Archer Daniels Midland, CVS Caremark, Fannie Mae, Freddie Mac, General Electric, Google, Hewlett-Packard, Johnson & Johnson, JPMorgan Chase, Merck, MetLife, Pfizer, Tyson Foods, United Parcel Service, United Technologies, and Wells Fargo.[16] Over the same period, such agreements have also been reached between the United States government and another 13 companies headquartered outside the U.S. that rank in *Fortune*'s Global 300: Barclays Bank, Daimler, Deutsche Bank, Deutsche Telecom, GlaxoSmithKline, HSBC, ING, Lloyds Banking Group, Lufthansa, Marubeni, Royal Bank of Scotland, Royal Dutch Shell, and Toyota.[17]

The increased use of DPAs and NPAs as a federal government enforcement tool should not be taken to imply that the government has adopted these tactics in lieu of more traditional mechanisms, such as corporate plea agreements and civil settlements. A forthcoming study by economists at George Mason University finds that even as the incidence of DPAs and NPAs has exploded, the number and dollar cost of corporate plea agreements has risen in turn.[18] In addition, the dollar cost of corporate civil settlements has gone up substantially in recent years, according to a forthcoming study by Navigant Consulting, conducted for the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce;[19] this holds true even excluding civil settlements with financial institutions, the number and cost of which have risen markedly in the years following the 2008 financial-market collapse.[20] Moreover, there is doubtless an interaction effect between the threat of criminal prosecution and the civil-settlement regime: the potential for an indictment brings companies to the settlement table in the civil context, too. In addition to examining DPAs and NPAs, this report will explore in more detail the government's $16.65 billion civil settlement reached with Bank of America in late summer 2014 over allegations relating to the bank's marketing and sale of mortgaged-backed securities—the largest such agreement ever reached between the U.S. government and a private party.[21]

This report focuses on DPAs and NPAs entered into in 2014. **Section I** takes a quantitative look at DPAs and NPAs entered into in 2014, in comparative context. **Section II** takes a qualitative look at a selection of these agreements, and their extensions, that shed light on policy concerns: a plea agreement, DPA, and NPA reached with subsidiaries of Hewlett-Packard; the extension of a DPA with Standard Chartered Bank; and the SEC's application of DPAs and NPAs to individuals. Section II also looks at the mammoth civil settlement reached between the DOJ and Bank of America. **Section III** looks at new instances in which judges have attempted to assert themselves in overseeing DPAs. **Section IV** discusses legislation introduced in Congress intended to improve DPA/NPA practices and concludes with a broader policy discussion.

Previous Manhattan Institute Research on the Subject

This report is the third installment in a series looking at the rise of deferred and non-prosecution agreements, following a May 2012 report by coauthor James Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*,[22] and a February 2014 report by both authors, *The Shadow Lengthens: The Continuing Threat of Regulation by Prosecution.*[23]

Coauthor Copland began his study of federal DPAs and NPAs in a December 2010 report, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*,[24] which explored the broader question of corporate criminal liability in historical and international perspective. That paper followed a 2009 report by former Center for Legal Policy senior fellow Marie Gryphon (Newhouse), *It's a Crime? Flaws in Federal Statutes That Punish Standard Business Practice*,[25] which explored the erosion of criminal-intent standards in the federal criminal law and the implications of that erosion on businesses. In 2013, the Manhattan Institute's Center for Legal Policy published two shorter reports expanding on aspects of this phenomenon: one by Copland and Paul Howard, director of the Institute's Center for Medical Progress,[26] examining federal criminal enforcement applied against pharmaceutical companies' marketing and communications about drug uses outside those on labels approved by the federal Food and Drug Administration (FDA); and one by criminal defense attorney Paul Enzinna,[27] examining trends in federal enforcement under the Foreign Corrupt Practices Act (FCPA). In 2014, Copland and Gorodetski authored or coauthored two reports applying these principles in the state context, focusing on North Carolina and Michigan.[28]

I. 2014 TRENDS

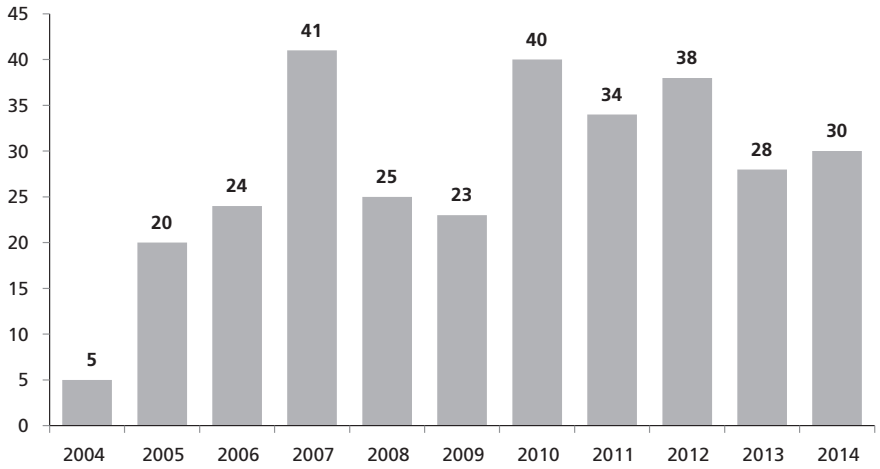
The federal government entered into 30 DPAs and NPAs with businesses in 2014, with fines and penalties totaling more than $5 billion—in each case, largely in line with recent trends.[29] Since 2005, the number of federal DPAs and NPAs entered into with businesses has ranged from 20 to 41 annually, and fines in the last six years have ranged annually from $2.9 billion to $9 billion. In addition to highlighting the overall trends in the number of agreements and fines levied, section I examines the types of crimes alleged in such agreements—with a special focus on the Foreign Corrupt Practices Act (FCPA)[30]—the structure of the agreements, and the federal prosecuting divisions and agencies involved.

Trends in Number of DPAs and NPAs and Fines Levied

The 30 federal DPAs and NPAs entered into between the federal government and businesses are up slightly from 2013, when 28 such agreements were reached. In addition, the Securities and Exchange Commission (SEC) entered into an NPA with an individual in 2014—following the first such agreement, structured as a DPA, in 2013—as discussed more fully in section II. Since 2005, the federal government has annually entered into at least 20 such agreements. (See **Figure 1**.[31])

The $5.1 billion in fines and penalties imposed under federal DPAs and NPAs in 2014 was the third-highest total on record, behind only 2009 ($5.3 billion) and 2012 ($9.0 billion). (See **Figure 2**.[32]) Of this sum, $2.9 billion came from agreements with just two companies. JPMorgan Chase agreed to $1.7 billion in fines and penalties, pursuant to its DPA stemming from the bank's alleged violation of the Bank Secrecy Act in serving as a cash depository for Bernie Madoff's Ponzi-style investment scheme;[33] and Toyota agreed to $1.2 billion in fines and penalties, pursuant to its DPA resolving fraud charges brought by the federal government that charged the company with making false disclosures concerning alleged defects in its automobiles causing "sudden acceleration."[34]

Figure 1. Federal DPAs and NPAs, 2004–14



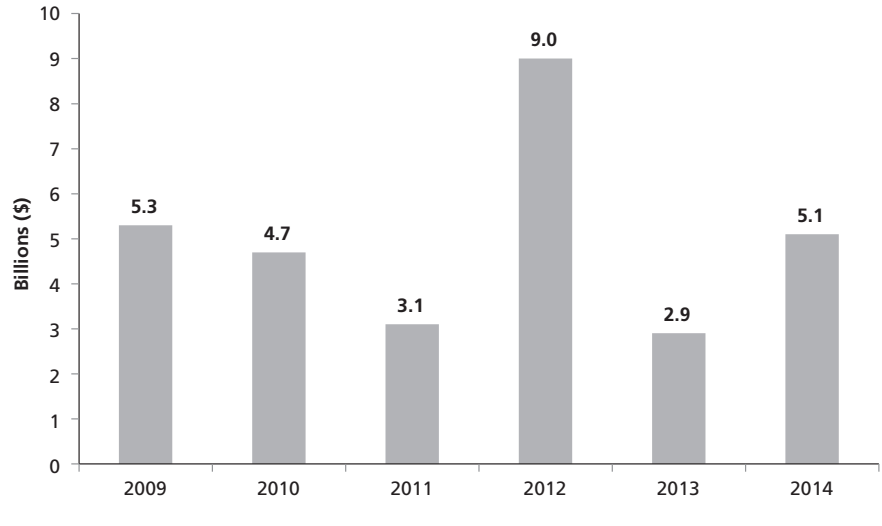
DPA and NPA Trends: Crimes Alleged

Although DPAs and NPAs entered into involved a variety of alleged conduct, a majority of such agreements in 2014 centered on either purported frauds or alleged violations of the FCPA.[35] (See **Figure 4**.[36]) The percentage of DPAs and NPAs premised on general fraud allegations—including securities and accounting fraud but excluding health care–specific frauds, false statements, public corruption, and violations of the False Claims Act[37]—continues to rise: 33 percent of all DPAs and NPAs in 2014 involved fraud allegations, up from 28 percent in 2012–13 and 20 percent in 2010–11.

DPA and NPA Trends: Agreement Structure

In 2014, two-thirds of federal agreements not to prosecute companies were structured as DPAs (20 total agreements), and one-third were structured

Figure 2. Total Fines and Penalties Imposed Under DPAs and NPAs, 2009–14



Special Focus: Foreign Corrupt Practices Act

Alleged FCPA violations[38] continue to make up a significant percentage of all DPAs and NPAs entered into between companies and the federal government.[39] In 2014, 23 percent of federal DPAs and NPAs involved the FCPA, down from 25 percent in 2012–13 and 38 percent in 2010–11.[40] The average value of monetary resolutions recovered in such government actions, however, reached a record high of $156,610,000 in 2014—almost doubling the average recoveries in 2013 and far surpassing the $21,710,000 average in 2012.[41] (See **Figure 3**.[42]) Criminal fines and civil disgorgements agreed to in DPAs and NPAs in 2014 are a large part of this recent spike,[43] headlined by the DOJ's December 2014 agreements to resolve FCPA allegations with Alstom, a French power company, which involved a fine of $772,290,000.[44]

What is the FCPA?

The FCPA creates civil and criminal penalties for businesses and individuals who pay bribes to foreign officials.[45] Enacted in 1977, the FCPA is intended to prevent American-based businesses from gaining a competitive advantage abroad by buying regulations and government contracts. Implicitly, the statute is rooted in American idealism and in the belief that American interests are fostered, in the long run, by the rule of law abroad.

Although the FCPA's core purposes are noble, its scope, as enacted by Congress, was not without bounds. The statute specifically exempts "facilitating payments" designed "to expedite or secure the performance of a routine governmental action by a foreign official."[46] Congress's intent in enacting the FCPA was clearly to deter American companies from buying foreign influence on a large scale—but not to police all foreign bribes potentially paid by U.S. businesses. Given the powerful incentives that businesses have to enter into DPAs and NPAs, however, federal prosecutors have very broadly interpreted the FCPA's scope—and limited its express exemption—effectively insulating it from judicial review.[47]

Figure 3. Average Fines and Penalties Imposed in FCPA Dispositions, 2005–14

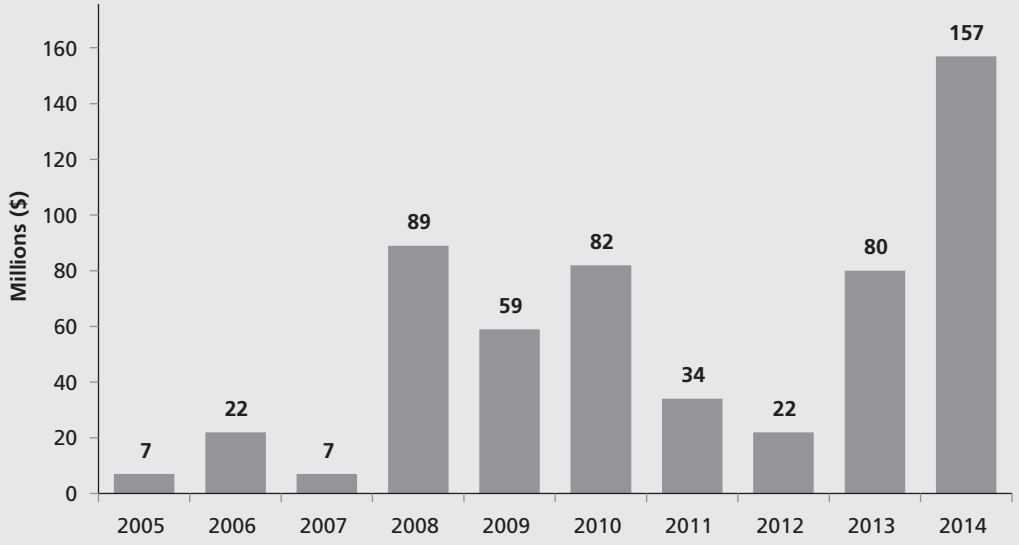
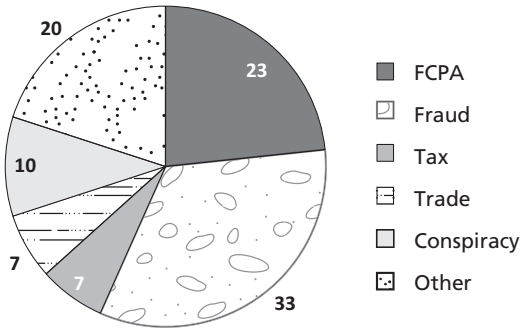


Figure 4. Types of Federal DPAs and NPAs, 2014



as NPAs (ten total agreements). The share of agreements involving a DPA is up somewhat from recent patterns: in both the 2010–11 and 2012–13 periods, 55 percent of agreements were structured as DPAs. Only five agreements reached in 2014 involved the appointment of a corporate monitor—down from nine in each of 2012 and 2013—though another 14 agreements included various "self-reporting" requirements, and two of the 30 agreements entered into in 2014 are under seal and unavailable.

DPA and NPA Trends: Prosecuting Divisions Involved

Thirteen of the 30 corporate DPAs and NPAs entered into in 2014 emanated from the main DOJ, in six cases on its own and in the other seven in conjunction with the SEC, the Commodities Futures Trading Commission, the Federal Bureau of Investigation, or the U.S. Attorney's Offices for the District of Columbia, New Jersey, or the Southern District of New York. Eight of the main DOJ's agreements involved the Fraud Section, two the Antitrust Division, two the Tax Division, and one the Consumer Protection Branch. The U.S. Attorney's Offices most active in entering into DPAs and NPAs in 2014 were those for the District of Columbia (five agreements), the Southern District of New York (four), and the Southern District of California (three).[48]

In 2014, the SEC continued to be active in entering into DPAs and NPAs—a practice initiated as an enforcement tool in 2010. Last year, the SEC entered into an NPA with Bio-Rad Laboratories, jointly with the DOJ's Fraud Section, to resolve alleged FCPA violations;[49] and it entered into a DPA on its own accord with Regions Financial Corporation to resolve alleged accounting fraud.[50] In addition, for the second straight year, the SEC entered into an agreement of this type with an individual, as will be discussed in more detail in section II.

II. 2013–14 CASE STUDIES

In section II, we will focus on DPAs and NPAs reached between the federal government and two companies in 2014, as well as those reached between the SEC and two individuals in 2013 and 2014.

Our first example is a series of agreements reached between the DOJ and the SEC and computer firm **Hewlett-Packard** and its foreign subsidiaries. These agreements include a guilty plea agreement, a DPA, an NPA, and a cease-and-desist order. Like many such prosecutorial resolutions, these agreements implicate alleged violations of the FCPA. Taken together, they highlight the tension between government enforcement through the DPA process and effective corporate compliance: the companies were held to account organizationally for foreign bribes notwithstanding their robust compliance programs seeking to prevent such offenses; and notwithstanding the extraordinary efforts that the companies' employees took to avoid detection by their higher-ups, including delivery of large piles of cash, conversations on prepaid cell phones and private e-mail accounts, and surreptitious meetings conducted in silence using private-computer text messages.

Our second example involves not a new DPA but the extension of an existing DPA between the DOJ and **Standard Chartered Bank**, which purported to have resolved allegations that the bank facilitated transactions with entities doing business in countries sanctioned under U.S. law, including Iran, Sudan, Libya, and Burma. Prosecutors claim that the bank's

compliance programs remain insufficient to meet the DPA's goals and that the company may have been involved in additional offending conduct not disclosed to the government. The term of the agreement was extended from an originally negotiated two years to five, and the company was required to hire an independent corporate monitor, which it was not required to do in the original DPA. This example highlights the degree to which the DPA process lacks oversight or judicial review: the government reserves the ability to determine if a corporation has complied with an agreement's terms; in Standard Chartered's case, the government presented no evidence of non-compliance before requiring the company to more than double the term of its agreement and take on new obligations—a process that could presumably repeat itself, ad infinitum.

Our third example involves not corporate DPAs and NPAs but two such agreements reached with **individuals**, a new procedure first initiated by the SEC in late 2013. Although such agreements parallel existing plea agreements with "cooperation" clauses—much as corporate DPAs parallel corporate pleas—these agreements, like their corporate cousins, lack judicial oversight and offer the individuals entering into the agreement essentially no safeguards—including no guarantee that they will not ultimately be prosecuted for an alleged breach of the agreement, at the government's sole discretion. The extension of DPAs and NPAs to individuals, when such agreements are a specific outgrowth of the U.S. Sentencing Guidelines for Organizations,[51] raises significant new questions.

In addition to looking at the aforementioned DPAs and NPAs, section II offers a comparative look at the government's $17 billion *civil* agreement with **Bank of America**, resolving claims that the bank and its (subsequently acquired) subsidiaries fraudulently sold mortgage-backed securities in the run-up to the 2008 financial crisis. This agreement is not only the largest financial settlement ever reached between the U.S. government and a private party but also demonstrates the degree to which many of the same issues permeating the DPA-NPA process extend to the civil arena—including the DOJ's assumption of substantial powers with a legislative cast but no congressional authorization, including the restructuring of private contracts unrelated to the alleged conduct and the allocation of significant corporate funds to organizations and causes supported by prosecutors. This agreement, like most of its type, reserves to the government the power to file criminal charges even as it disposes of civil obligations—arguably highlighting the long shadow that prospective criminal prosecution casts over all negotiations between the federal government and businesses in the modern environment.

Enforcement vs. Compliance: The HP Agreements
Operative Statute: Foreign Corrupt Practices Act (FCPA)
Key Issue: Enforcement efforts can undermine compliance.

As noted in section I, the FCPA[52] is a major locus of federal criminal law enforcement. The agreement struck between the government and California-based Hewlett-Packard (HP) and its foreign subsidiaries, on April 9, 2014,[53] sheds significant light on the current state of DPAs and NPAs in the context of alleged FCPA violations. The government's resolution with HP takes several forms—including a guilty plea, DPA, NPA, and a cease-and-desist proceeding—and involves agreements with the parent company and three foreign subsidiaries, in Russia, Poland, and Mexico.[54]

Alleged Offenses

HP Russia entered into a plea agreement,[55] pleading guilty to felony violations of the FCPA's anti-bribery provisions prohibiting the offer, promise, or payment of "anything of value" to a "foreign official" in order to "obtain or retain business,"[56] as well as the FCPA's accounting provisions penalizing the failure to maintain accurate books and internal controls.[57] The alleged conduct in question was a bribery scheme orchestrated by five HP Russia executives and managers between 2000 and 2007 to bribe Russian government officials in order to "secure a large technology

contract with the Office of the Prosecutor General of the Russian Federation";[58] the company officials allegedly created a slush fund through which they funneled bribes.[59]

HP Poland agreed to a three-year DPA with the DOJ to resolve claims that it violated the FCPA's accounting provisions.[60] The violation stemmed from alleged underlying conduct whereby an identified HP Poland executive, between 2006 and 2010, made corrupt payments to a Polish government official in an effort to "secure and maintain millions of dollars in technology contracts with the Polish government."[61] In addition to the cash payments, HP Poland allegedly paid for various trips and gifts for the Polish official, such as a trip to Las Vegas, a private flight tour over the Grand Canyon, and numerous HP products given free of charge.[62] According to the agreement, the Polish official signed a $4.3 million contract with HP Poland on behalf of the Polish government shortly after receiving these gifts.[63] The Polish official allegedly continued to receive bribes in the form of direct cash payments, totaling approximately $600,000, and HP Poland continued to win the Polish government's business, worth about $60 million.[64]

HP Mexico entered into an NPA to resolve claims that it violated the FCPA by funneling bribes to Petróleos Mexicanos ("Pemex"), Mexico's state-owned petroleum company.[65] The agreement alleges a scheme whereby the company paid an "influencer fee" to a consultant, a portion of which would flow to Pemex's chief operating officer, to secure software sale contracts worth approximately $6 million.[66] According to the statement of facts, HP Mexico's executives deceived HP by having an approved intermediary join a transaction only to pass through payments to an unapproved consultant, who then passed payments on to the Pemex official. In addition, the agreement alleges that HP Mexico falsified its books and records to disguise the unauthorized payments as legitimate.[67]

In each of these three agreements, only HP's subsidiaries accepted responsibility and admitted to the facts alleged, though the parent company made certain guarantees about the subsidiaries' compliance with the agreements' terms.[68] HP itself, however, reached an agreement with the SEC,[69] relating to a cease-and-desist proceeding in connection with alleged violations of the FCPA's accounting provisions that occurred as a result of the admitted violations by the foreign subsidiaries.[70] Essentially, HP Russia, HP Poland, and HP Mexico each admitted to violating the FCPA's accounting provisions by falsely recording payments to government officials and third parties to obtain business as legitimate payments for services or commissions.[71] Because the publicly traded parent company relied upon and used those false financials in the preparation of its consolidated financial statements,[72] HP, by implication, violated the FCPA's accounting provisions.[73]

Agreement Terms

As part of its plea, HP Russia agreed to pay a criminal fine of $58,772,250.[74] In addition, the company agreed to adhere to an extensive set of compliance, training, and reporting requirements for a three-year term.[75]

In its DPA, HP Poland agreed to pay a $15,450,222 criminal fine.[76] The DOJ notably devoted a portion of the DPA to explain the calculation of the fine in an extended breakdown,[77] with numerous references to specific portions of the U.S. Sentencing Guidelines[78]—a reference seldom included in past agreements. The agreement also included appendixes detailing compliance, training, and reporting requirements[79] closely resembling those included in the plea agreement with HP Russia.[80]

During the three-year NPA, HP Mexico agreed to cooperate fully with the government and pay $2,527,750 in forfeiture.[81] The agreement, only four pages in length, specified various requirements to cooperate with the government, similar to those in the HP Poland and HP Russia agreements, and briefly enumerated various compliance and remediation requirements.[82]

In its deal with the SEC, HP agreed to disgorge $29 million in illicit profits,[83] as well as $5 million in prejudgment interest,[84] bringing the total payout across all the agreements to $108 million.[85] HP's agreement with the SEC also included similar reporting requirements to those in the DOJ agreements.[86] In addition, across all three agreements reached with the DOJ, HP itself agreed to guarantee the criminal fines owed,[87] as well as to ensure each subsidiary's adherence to the cooperation and compliance provisions.[88] To that end, HP must report progress updates to the government several times throughout the three-year term.[89]

Among the compliance terms the companies agreed to were the following, taken from the DPA reached with HP Poland:

- Maintaining a "clearly articulated and visible corporate policy against violations of the FCPA"
- Maintaining and/or establishing compliance policies aimed at preventing FCPA violations
- Conducting periodic reviews and risk assessment of the FCPA risks facing the company
- Assigning senior employees to oversee FCPA compliance
- Implementing periodic compliance training and certification of select departments and senior employees
- Maintaining and establishing internal reporting, testing, and enforcement of FCPA compliance policies[90]

The DPA also contains boilerplate provisions included in most agreements, such as:

- Disclosure requirements
- Making employees and others related to the company available for interviews and other proceedings
- An acceptance of responsibility and agreement with the statement of facts
- "Muzzle clauses" that require preapproval of any public statements that the company plans to release relating to the agreement
- A provision specifying that the DOJ retains the sole determination as to whether the agreement has been breached[91]

Agreements Unbounded by Time: The Standard Charter DPA Extension

Operative Statute: International Emergency Economic Powers Act (IEEPA)

Key Issue: The DPA-NPA process lacks definite terms and judicial oversight.

DPAs and NPAs operate over fixed terms during which a corporation must comply with a list of undertakings in order to trigger the government's assurance to either drop or not file criminal charges against the company—depending on the type of agreement.[108] On rare occasions,[109] prosecutors decide to extend the terms of an agreement;[110] in 2014, the

Issue I. Enforcement efforts can undermine compliance

Each agreement with HP and its foreign subsidiaries explicitly recognized that HP had extensive internal controls and compliance procedures in place, designed to deter the alleged conduct.[92] Specifically, the government acknowledged that during the time of the alleged FCPA violations:

- "HP policies prohibited corruption, self-dealing, and other misconduct."
- "HP's Standards of Business Conduct ('SBC') in effect during the relevant time specified company rules and regulations governing legal and ethical practices, preparation of accurate books and records, contracting, and approvals and engagement of third parties."
- "The SBC manuals specifically referenced the FCPA, and prohibited, among other things, corrupt payments, 'side letters,' 'off-the-books arrangements,' and 'other express or implied agreements outside standard HP contracting processes.' "
- The SBC applied to all of the foreign subsidiaries involved and the employees of those subsidiaries "received mandatory SBC training annually, among other training."[93]

The agreements stipulated, however, that these internal controls were not "adequate" and "were insufficiently implemented"—based on the circular logic that the company's compliance measures did not "prevent the conduct described."[94]

The alleged facts, however, demonstrate the lengths to which the HP subsidiaries' employees took to evade the companies' internal controls. HP Russia's employees set up a secret slush fund to pay bribes and concealed the scheme by facilitating payment through numerous foreign third parties and from various offshore bank accounts.[95] The company's plea agreement explicitly recognized that members of the conspiracy maintained two sets of books, one of which was an "off-the-books" version not shared with the parent company,[96] including "an encrypted, password-protected spreadsheet."[97] The agreement presented several examples of HP Russia executives approving transactions without authorization or the required review and providing false information when HP or external parties raised red flags.[98]

The conduct described in HP Poland's statement of facts reads like the plot of a John Grisham novel. The HP Poland executive at the center of the DPA delivered bags of cash to a Polish government official personally, over the course of several years, dropping them off at the official's home, a parking lot, or other random locations, to avoid being discovered.[99] The DPA states that the executive communicated "through anonymous e-mail accounts and prepaid mobile telephones" and that the executive would drive the official to a "remote location," and "the two would type messages in a text file, passing the computer between themselves . . . to avoid possible audio recording of the discussions by hidden devices, and to circumvent [HP's] internal controls."[100]

These facts call into question the basis of the government's assessment that HP's internal controls were inadequate.[101] According to the FCPA's accounting provisions, a company (specifically, an issuer of securities) must "devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances*"[102] that such transactions are properly recorded and "executed in accordance with management's general or specific authorization."[103]

In its 2012 guidelines interpreting the FCPA, however, the DOJ takes the position that under the statute, "a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company. Thus, if an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary's employees."[104] Although this interpretation correctly restates the traditional tort doctrine of *respondeat superior*,[105] applied by federal courts in the corporate criminal context,[106] the government's view seems in tension with the statutory requirement.

Moreover, holding a company strictly liable even in cases in which employees went to extraordinary lengths to circumvent companies' internal controls—by using anonymous private e-mails, prepaid "burner" cell phones, and encrypted secret financial records—at least arguably reduces the incentive for companies to self-monitor to comply with legal norms. In a 2009 report, The Conference Board openly worried that DPAs and NPAs, under the principles typically enforced at the time, were deterring companies from self-policing as rigorously as they should, since such agreements tended to give inadequate credit to companies' preexisting compliance programs: "From an ethics and compliance incentives perspective, publicly recognizing settlement-based programs (but not preexisting ones) in enforcement decisions is hardly optimal. In essence, it sends a message that the companies need not be concerned with compliance/ethics programs until after a violation, and thereby undercuts the important law enforcement policy of deterrence."[107]

DOJ took the extraordinary action of extending the length of terms in connection with three separate agreements.[111] The most notable case was the DOJ's amendment of its DPA with London-based Standard Chartered Bank,[112] in which prosecutors extended the term of the agreement—set to expire in 2014—by an additional three years.[113] Remarkably, the extension of Standard Chartered's DPA exceeds the original agreement's two-year term.

Standard Chartered entered into the original two-year DPA with the DOJ and the Manhattan district attorney in December 2012, to settle allegations that it knowingly and willfully conspired to "engage in transactions with entities associated with sanctioned countries, including Iran, Sudan, Libya, and Burma," in violation of the International Emergency Economic Powers Act (IEEPA).[114] To avoid prosecution, the bank agreed to:

- Self-report its conduct, terminate all conduct at issue, and cooperate in the investigation
- Forfeit $227 million and settle all outstanding civil and criminal claims with the U.S. government related to the agreement's alleged underlying conduct
- Demonstrate its future good conduct and fully comply with the international Anti-Money Laundering and Combating Financing of Terrorism best practices and the Wolfsberg Anti-Money Laundering Principles for Correspondent Banking[115]

According to the DOJ, Standard Chartered made significant progress during the original two-year term of the agreement to meet its obligation to "undertake the work necessary to further enhance and optimize its sanctions and compliance programs."[116] The bank created a board committee tasked with overseeing financial crime compliance, hired new leadership and staff to bolster legal and financial crime compliance, implemented rigorous U.S. sanctions compliance policies, and trained relevant employees on complying with relevant laws and regulations.[117]

Despite the bank's efforts, prosecutors concluded that its "U.S. economic sanctions compliance program has not yet reached the standard required by the DPA," although prosecutors did not elaborate or provide specific examples of the bank's purported compliance deficiencies.[118] Prosecutors also announced that they had evidence obtained from an unrelated investigation that Standard Chartered may have violated U.S. sanctions laws and regulations, after the time period covered by the original agreement, which the bank failed to disclose.[119]

In light of these unspecified allegations, the DOJ formally amended Standard Chartered's DPA to extend the agreement by three years, to allow an investigation into the evidentiary findings.[120] Although the DOJ's original DPA with Standard Chartered had not contained a provision expressly permitting the extension of the agreement,[121] it did provide the DOJ with the authority to break its commitment not to prosecute the bank if it violated U.S. sanctions laws via transactions other than those disclosed in the 2012 DPA.[122] Moreover, as in most DPAs, the terms of the agreement vested sole discretion for determining whether the company had breached the agreement with the DOJ.[123] In addition to extending the period covered by Standard Chartered's DPA by 150 percent, prosecutors added the requirement that the bank retain an independent monitor over the prospective three-year period to oversee the implementation of U.S. sanctions-related compliance programs and policies.[124]

Individual Enforcement: The Herckis and Insider-Trading Agreements

Operative Statutes: Securities Act of 1933, Securities and Exchange Act of 1934, Investment Advisers Act of 1940
Key Issue: The DPA-NPA process is ill-suited for application to individuals.

Although the SEC lacks independent prosecutorial authority, the SEC in 2010 added DPAs and NPAs to its enforcement tool kit,[149] purportedly to "strengthen [its] enforcement program by encouraging greater cooperation from individuals and companies in the agency's investigations and enforcement actions."[150] Of the nine such agreements that the SEC has subsequently entered into, two have involved individuals

Issue 2. The DPA-NPA process lacks definite terms and judicial oversight

Although there is no evidence to suggest that the DOJ's concerns about Standard Chartered's implementation of the terms of its DPA are ill-founded, the process, whereby prosecutors decided to more than double the time span under which the bank was subject to oversight, had no judicial review to ensure that the terms of the extension were fair and appropriate.[125] Prosecutors merely presented the bank's amended agreement as "notice" to the court in order to secure an extended exemption of Standard Chartered's right to a speedy trial.[126] The district court did not review the appropriateness of the extension procedurally;[127] did not request details to corroborate the DOJ's claim that the bank's efforts to enhance its compliance were inadequate;[128] did not request to examine the evidence that the DOJ claimed that it had obtained indicating a possible undisclosed "historical violation" of U.S. sanctions law by Standard Chartered;[129] did not ask the DOJ to show that extending the terms of the DPA was preferable to other alternatives;[130] and did not ask the DOJ how the role of the newly appointed independent monitor would overlap with that of a monitor retained by the bank in its separate 2012 settlement with New York State financial authorities over allegations related to similar conduct.[131]

The government's decision to extend the terms of Standard Chartered's agreement—without conclusive evidence that the bank had committed violations that it did not disclose[132]—is an alarming strategy, especially given the lack of judicial oversight. In essence, prosecutors can hold companies hostage to expiring agreements in order to conduct continuing fishing expeditions for criminal violations—and, in the case of banks like Standard Chartered, prosecutors can threaten the company with the loss of its U.S. banking license if the company refuses to go along. During those three years, the bank will be forced to divert considerable resources away from its business operations to facilitate this open investigation, above and beyond that contemplated in the original agreement with the government.[133]

In essence, the DOJ acts not only as prosecutor but also as judge and jury in every step of the DPA process.[134] Highlighting the extraordinary degree of control that this process gives prosecutors over business leaders are the steps to which the DOJ subjected Standard Chartered's chairman, John Peace, when it deemed him to have run afoul of the original agreement's "muzzle clause" in 2013, prior to the announced extension. The clause, standard in DPAs, prohibited public statements by the company or its employees contradicting the agreement.[135] In a conference call with reporters in 2013, Peace responded to a question by asserting that the bank's violations were not willful but "mistakes that were made," principally "clerical errors."[136] The bank's lawyers were concerned about these remarks and self-reported them to the DOJ. In response, prosecutors spent over a week negotiating with the bank over the wording of the retraction before the DOJ finally approved the statement,[137] and DOJ lawyers required Peace to travel to Washington, D.C., to deliver his statement recanting his earlier offhand remarks in person to prosecutors.[138] There was no review, judicial or otherwise, over this enforcement authority exercised by the DOJ and New York State prosecutors.[139]

The constitutional right to a speedy trial,[140] the Speedy Trial Act,[141] and statutes of limitations attached to nearly all criminal law are specifically designed to protect potential criminal defendants from perpetual jeopardy of prosecution, without time bounds.[142] The DOJ takes the express position that courts' *only* supervisory authority in reviewing DPAs is to ensure that prosecutors have temporally complied with Speedy Trial Act waivers.[143] Judges have not always agreed—notably, Judge John Gleeson of the Eastern District of New York, who, in a 2013 opinion approving HSBC's DPA, warned of the injustices that could result from the imbalance of power between the government and a defendant party to a DPA.[144] Judge Gleeson noted that it would be unlikely that a defendant company would "rais[e] a purported impropriety," given the risk that speaking up might derail the agreement with the government,[145] and he asserted that, to protect a defendant from such injustices, federal courts had an inherent power to review the substantive provisions of DPAs.[146] (For a fuller discussion of recent judicial assertions of power over the DPA process, see section III.)

In addition to the DOJ's decision to extend Standard Chartered's DPA in 2014, prosecutors announced that NPAs previously reached with Barclays and UBS, related to the alleged manipulation of benchmark interest rates, would be extended for an additional year.[147] Given that NPAs, unlike DPAs, do not require judicial approval of speedy trial waivers,[148] even notice of the government's extensions was not submitted to a court, and the justifications for the DOJ's decision are unclear. It is also unclear whether extending DPAs and NPAs will emerge as a new strategy for prosecutors or whether such extensions will remain rare, as has historically been the case.

rather than companies, one entered into in each of the last two years.[151]

Herckis Agreement

In November 2013, the SEC broke new ground by entering into its first DPA with an individual.[152] Scott J. Herckis, a certified public accountant and former fund administrator for a hedge fund with approximately 25 investors and $6 million in assets, agreed to a DPA to settle allegations of securities fraud.[153]

According to the agreement, Herckis voluntarily self-reported the fraud to the SEC, produced "voluminous documents," and helped SEC staff understand how the fraud was perpetrated.[154] After Herckis's disclosure, the agency filed an emergency action and froze more than $6 million of the fund's assets to compensate allegedly defrauded investors.[155] The SEC charged Berton Hochfeld, the fund manager who had hired Herckis, with securities fraud, and Hochfeld pleaded guilty to criminal charges of securities fraud and wire fraud in a related criminal proceeding.[156]

In return for Herckis's "significant cooperation,"[157] the SEC agreed to a five-year deferred prosecution. At the conclusion of the term, the SEC agrees to drop all enforcement actions and proceedings relating to Herckis's alleged "aiding and abetting" of the securities fraud that he self-reported.[158] Rather than containing provisions relating to compliance, reporting, and training, as is typical in a corporate DPA, the SEC enumerated a list of prohibitions and undertakings for the term of the agreement[159]—such as prohibiting Herckis from associating with a "broker, dealer, investment adviser, or registered investment company," from serving as a fund administrator, and from providing services to hedge funds.[160] Additionally, Herckis agreed to pay approximately $50,000 in disgorged profits and prejudgment interest.[161]

Insider-Trading Agreement

In April 2014, the SEC entered into its first NPA with an undisclosed individual,[162] who was involved in a convoluted insider-trading web.[163] An executive at the Internet retail company formerly known as GSI Commerce, Christopher Saridakis, leaked news of the company's impending acquisition by eBay to two family members and two friends, and he encouraged them to purchase GSI stock.[164] Saridakis's two friends then leaked news of the merger to their own friends and family, which spurred further tips down the line. After the merger, GSI's share price rose significantly in value—thus enriching the network of tippees who purchased stock as a result of the information and advice.[165]

The SEC charged Saridakis and five traders with insider trading after "extensive cooperation from some of the tippees."[166] (Saridakis was also charged criminally by the U.S. Attorney's Office for the Eastern District of Pennsylvania.)[167] In the case of one tippee, who was three levels removed from Saridakis and provided "early, extraordinary and unconditional cooperation," the SEC entered into an NPA.[168] The SEC did not disclose the identity of the tippee or the terms of the NPA, other than that the individual agreed to disgorge his trading profit of approximately $32,000.[169]

III. JUDICIAL RESPONSES

Although the DOJ asserts that federal judges have no supervisory authority over DPAs,[188] apart from ensuring that the timing of the agreements have not violated the terms of the Speedy Trial Act,[189] a few judges have recently subjected these agreements to more extensive scrutiny. As noted in our 2014 report, Judge John Gleeson of the Eastern District of New York issued a decision in 2013 invoking the court's inherent "supervisory power" to assert judicial authority to review a DPA's substantive provisions.[190] Also in 2013, Judge Terrence Boyle of the Eastern District of North Carolina initially rejected a DPA between the government and WakeMed, agreeing to approve the agreement only after it was amended.[191] In 2014, two more federal judges asserted their authority over the DPA process: Judge Richard Leon of the U.S. District Court for the District of Columbia, who rejected a DPA between the government and

Issue 3. The DPA-NPA process is ill-suited for application to individuals

That the SEC enters into DPAs and NPAs at all is a strange extension of the agency's power, given that it lacks independent criminal enforcement authority.[170] The SEC's use of the DPA-NPA model in cases involving individuals is stranger still: DPAs and NPAs are tools that were created in the wake of the U.S. Sentencing Guidelines for Organizations,[171] specifically to provide an avenue for enforcing criminal laws against corporations without the collateral consequences of trial and conviction, which could have significant effects on the broader economy.[172] The British Parliament, in enacting a 2013 law empowering Crown Prosecutors and the Serious Fraud Office to enter into DPAs,[173] explicitly limited their use to business organizations.[174]

Individuals charged with criminal violations are typically offered plea agreements, which, unlike DPAs, do not require years of prospective compliance and are clear at the outset with regard to the benefit received for cooperation.[175] Boilerplate provisions present in virtually all DPAs and NPAs are untested outside the corporate context and raise potentially troubling implications for individuals not charged with any crime. Large corporations regularly agree to continue "full" and "truthful" cooperation with the government for the term of the agreement—including participation in any proceedings conducted by other government agencies, the production of any requested nonprivileged documents, and testifying at trial[176]—but they do so with the benefit of armies of lawyers on staff to discharge cooperation requirements.

The idea that individuals under these agreements will be under the thumb of the SEC's broad terms of continuing cooperation over the course of several years—five years, in Herckis's case—seems unjust, particularly given the government's insistence that it alone can determine whether an individual has complied with the terms of the agreement, and the individual has no assurance that the government could not change its position and pursue a criminal action. It is also unclear what coordination, if any, the SEC has engaged in with the DOJ in reaching its individual DPAs and NPAs—and there is no apparent assurance that an individual's cooperation with the SEC will be credited in any manner in any ultimate criminal proceeding.[177]

Moreover, much as the DPA-NPA model has allowed prosecutors to stretch the substantive limits of the law to pursue actions against corporations,[178] it may do so in the individual context, too. Three days before the NPA in the GSI Commerce case was publicized, the U.S. Court of Appeals for the Second Circuit heard arguments on the issue of insider-trading liability;[179] in December 2014, the court issued a ruling limiting the scope of insider-trading liability.[180] In a case in which two portfolio managers were found guilty of insider trading despite being several levels removed from the insider, the court reversed their convictions—ruling that the government failed to prove that the traders knew that the tip was obtained illegally and in exchange for personal gain to the insider.[181] The ruling calls into question whether, given the facts available, the government could successfully prove that the individual who entered into the NPA in the GSI Commerce case was criminally liable for insider trading.[182] The SEC itself admitted that he was a "downstream individual" (or a "remote tippee")[183] and that it would be difficult to prove that the individual knew that the information was obtained illegally and for Saridakis's personal benefit. Yet the SEC could conceivably use the DPA-NPA process to end-run this substantive legal limit on insider-trading prosecutions by railroading individuals fearful of the potential risks, and collateral consequences, of criminal trial—outside substantive review by judges, for an indefinite period, and with no real assurances to the individual involved.

Special Focus: The Bank of America Settlement Agreement

On August 21, 2014, the DOJ announced a record $16.65 billion agreement, resolving claims alleging that Bank of America improperly concealed the risks of mortgage-related securities when it sold them to large institutional investors before and after the 2008 financial meltdown.[184] The agreement followed on the heels of similar agreements announced earlier in 2014 with JPMorgan Chase ($13 billion) and Citigroup ($7 billion) over parallel alleged conduct.[185] These agreements resolve civil, not criminal, claims—and, indeed, expressly reserve potential criminal action in the future—but the agreements include many similar provisions to those commonly seen in DPAs and NPAs.

Bank of America's August 2014 agreement was the 19th such settlement resolving various civil claims and lawsuits related to the financial meltdown, with a total tab of almost $75 billion.[186] The August settlement, like the earlier giant mortgage-securitization settlements reached with JPMorgan Chase and Citigroup for similar alleged conduct, does not directly involve mortgage-lending abuses during the latter stages of the housing bubble but rather the claim that the bank sold mortgage-backed securities with risks that the bank was aware of but failed to disclose. The counterparties to these sales were not ordinary investors but sophisticated parties—insurance companies, pension funds, university endowments, and the like, including the government-sponsored enterprises the Federal National Mortgage Association (FNMA, or Fannie Mae) and the Federal Home Loan Mortgage Corporation (FHLMC, or Freddie Mac). The alleged transactions occurred before and after the financial crisis, and involved not only Bank of America itself (to the total of an alleged $850 million) but primarily its subsequently acquired subsidiaries, Countrywide and Merrill Lynch.

The $16.65 billion Bank of America settlement resolves civil claims with the federal government and various states; $9.65 billion of this amount is allocated as follows:

- $8.2 billion to the federal government, of which:
  - $5 billion is a civil monetary penalty, primarily to resolve alleged violations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[187]
  - $1 billion resolves claims of the Federal Deposit Insurance Corporation (FDIC)
  - $800 million resolves claims of the Federal Housing Administration
  - $1.4 billion resolves claims by the SEC, the Government National Mortgage Association (Ginnie Mae), and various *qui tam* plaintiffs
- The remainder to seven state governments

On top of these government payouts, the Bank of America settlement forces the bank to allocate $7 billion to "consumer relief" credits, including:

- Loan principal write-downs, with a cap of $2.15 billion for nonperforming loans and $3 billion for performing and home-equity loans ("extra" credits can be awarded under certain conditions)
- Loans underwriting new "affordable housing" developments, with a minimum of $100 million allocated (and substantial extra credits awarded on a dollar-for-dollar basis to discharge toward the $7 billion consumer-relief total)
- Grants to community-development and housing groups; the bank must give a minimum of $50 million to community-development funds or institutions, $30 million to legal-aid groups fighting foreclosures, and $20 million to various government-sanctioned housing-activist groups

As these breakdowns suggest, almost half the "fines" imposed on Bank of America in its civil settlement are not payments to the government but rather "consumer relief" payments directed by the DOJ. These distributions are *not* restitution payments to victims of Bank of America's alleged conduct, the array of sophisticated institutional in-

vestors that the bank was accused of misleading when selling them securities packaging bundles of home mortgages. Instead, Bank of America's consumer-relief money under the settlement agreement goes to forgiving principal on consumers' home loans, for giving money to various administration-favored nonprofit groups (including housing and other community-activist and legal-aid organizations), and for funding "affordable" housing developments for low-income families.

Whether banks should be writing off billions of dollars of loans at the government's behest is a debatable policy question. So, too, is whether various nonprofit organizations—including community-development funds or institutions, legal-aid groups fighting foreclosures, and various housing-activist groups—should receive funding from the federal government and whether the government should push banks to subsidize affordable housing development. But the debate over the appropriateness of such funding is one that would seem to fall within Congress's authority, not within the discretion of DOJ lawyers.

Fokker Services B.V., a Dutch aerospace services provider;[192] and Judge Emmet Sullivan, also of the D.C. District Court, who held up a DPA between the government and Saena Tech, a South Korea–based military contractor.[193]

The Fokker Agreement

The rejected Fokker DPA would have settled allegations that the Dutch company sent more than "1,100 separate illegal shipments of parts and components used in aircraft aviation and navigation systems," over the course of five years, to countries subject to U.S. sanctions—namely, Iran[194]—in violation of the International Emergency Economic Powers Act.[195] In an agreement set to last 18 months, Fokker Services agreed to accept and acknowledge responsibility for the alleged conduct, to cooperate with the government, to implement new compliance programs and policies, and to pay a $10.5 million criminal fine.[196] The company also agreed to pay an additional $10.5 million to other regulatory agencies—such that its total payout equaled the approximately $21 million of gross revenue that the company booked from the shipments in violation of U.S. export laws.[197]

Echoing Judge Gleeson in 2013, Judge Leon—who has a record of asserting judicial authority aggressively in connection with civil settlements over FCPA violations[198]—rejected arguments from both the government and Fokker that his role in reviewing DPAs was limited to speedy trial review, which he interpreted as a request for the "Court to serve as a rubber stamp."[199] According to Judge Leon, the "Court must consider the public as well as the defendant. After all, the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly lenient prosecutorial action, or overzealous prosecutorial conduct."[200]

In Judge Leon's opinion, the length of the term of the Fokker DPA was too short, and its monetary penalty was too lenient.[201] In addition, he objected to the government's decision not to require Fokker Services to appoint an independent corporate monitor or report to the government or the court about its implementation of new compliance programs.[202] Expressly calling into question the appropriateness of the government's exercise of prosecutorial discretion in this case, Judge Leon concluded that the DPA would "undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies."[203]

Despite his strongly worded rejection, Judge Leon did invite the parties to submit a modified DPA for his consideration.[204]

The Saena Tech Agreement

The proposed DPA between the DOJ and Saena Tech involved allegations that the South Korean company had bribed U.S. Army contractors for business.[205] Out of concern that the DPA was a "sweetheart deal" for a Saena Tech executive involved in the bribery scheme, Judge Sullivan requested the government to provide guidance on his authority to reject the DPA in consideration of the fairness and reasonableness of its provisions.[206]

As it has argued in other courts, the government contended that the judge's singular role was to grant a delay to the Speedy Trial Act,[207] to exclude the requirement that the trial must start within 70 days of the date that prosecutors bring charges.[208] Otherwise, the government contended, "courts would become 'super-prosecutors' undermining the separation of powers."[209]

To evaluate a different position, Judge Sullivan appointed University of Virginia law professor Brandon Garrett to examine the same question with regard to the role of the court in the DPA context.[210] Garrett disagreed with the government's argument, citing the Speedy Trial Act, the federal sentencing guidelines, and the court's inherent supervisory authority as established by Judge Gleeson: "In deciding whether to approve a deferred prosecution agreement, a court should conduct an individualized examination whether it is reasonable, fair, comports with the goals of the sentencing guidelines and is in the public interest."[211]

Additionally, in his reply to another request for guidance by Judge Sullivan with regard to the court's role after a DPA has been approved, Garrett argued that the judge could require regular status reports to oversee the implementation of the DPA by the company.[212]

Thus, it appears that the landscape of the judicial role in the DPA process is shifting. The consequence of such a shift is unknown. One potential consequence could be that the government starts to favor the use of NPAs rather than DPAs in order to avoid the courts, although the 2014 data do not evidence that trend. Another potential result is that the legislature steps in to clarify the role of the courts via statute—perhaps to create a review process similar to the U.K. law created in 2013.[213] It does seem likely, however, that at least some federal judges will continue to question that they lack any meaningful oversight role in the DPA process, absent contrary legislation or appellate court guidance.

IV. LEGISLATIVE RESPONSE AND POLICY CONCLUSIONS

Concern with the problems associated with the government's use of DPAs and NPAs has spread beyond judges, attorneys, and academics to Capitol Hill. In 2008, certain leaders in Congress—among them Vermont senator Patrick Leahy and New Jersey congressman Frank Pallone—challenged the DOJ to establish new policies governing the hiring of independent corporate monitors.[214] Another New Jersey congressman, Bill Pascrell, Jr., has been trying to advance legislation to reform the DPA process, also since 2008.[215]

Pascrell's most recent legislation to this effect, the Accountability in Deferred Prosecution Act of 2014, cosponsored by three other House Democrats, died in the second session of the 113th Congress.[216] However, with an increasing number of judges speaking critically against aspects of the DPA process[217] and a new U.K. law establishing DPAs with a process that contrasts significantly with the U.S. model,[218] the push to reform DPAs and NPAs may pick up momentum in the coming years.

The Accountability in Deferred Prosecution Act sets out to "regulate the process by which the DOJ allows U.S. Attorneys to engage in pretrial agreements with corporate offenders and award federal monitoring contracts."[219] The proposed bill has several major components:

- ***DOJ Guidelines.*** The bill calls on the attorney general to "issue public written guidelines" for DPAs and NPAs to standardize various aspects of the process. Among the guidelines sought are:

Pascrell's Bill vs. the U.K.'s DPA Law

In 2013, the British Parliament enacted the Crime and Courts Act, which, in part, established the practice of and rules for entering into DPAs in the U.K.[233] Our 2014 report on DPAs and NPAs explores this new law in more detail.[234] To date, no British DPA process has been initiated publicly.[235]

Rep. Pascrell's Accountability in Deferred Prosecution Act parallels Parliament's 2013 Crime and Courts Act but has significant differences:

- **Limitations on scope of crimes for DPAs.** The U.K. law limits the use of DPAs to business entities (rather than individuals)[236] and to economic crimes (rather than environmental or health infractions regularly resolved by American prosecutors via DPAs).[237]
- **Specification of judicial process.** The U.K. law establishes the role of the courts in a much more specific and detailed manner than the Accountability in Deferred Prosecution Act. The U.K. law carefully specifies a two-tiered hearing process,[238] and it expressly specifies the role of courts in cases of an alleged breach, alteration, or termination of a DPA.[239] In every decision that a U.K. court makes in relation to a DPA, the judge must explain his reasoning and eventually make it available to the public.[240] In contrast, the Accountability in Deferred Prosecution Act introduces judicial review in a much more open and general, rather than systematic, fashion.[241]
- **Prosecutorial code of practice requirements.** The U.K. law, in its mandated Code of Practice, features a required test that prosecutors must apply to determine whether a DPA is appropriate under the circumstances.[242] First, in the evidentiary stage, prosecutors must evaluate whether they have enough evidence that the corporation has committed a crime to justify continuing an investigation into the conduct.[243] Second, in the "public interest" stage, prosecutors must determine that "public interest would be properly served" by entering into a DPA rather than prosecuting a corporation, taking into account a list of factors, including "the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade," the risk of debarment from entering into government contracts, and the corporation's cooperation with the investigation.[244] The proposed House bill includes no such requirement.
- **Substantive judicial review requirements.** Both the U.K. law and the Accountability in Deferred Prosecution Act require judges to consider each agreement in light of the interests of justice,[245] but the U.K. law goes further, requiring that judges also consider whether the terms of the DPA are "fair, reasonable and proportionate."[246]

1. Specification of the circumstances that warrant the appointment of a corporate monitor
2. Clarification of the circumstances in which various "terms and conditions"—such as the imposition of monetary penalties and compliance requirements—are appropriate
3. Guidance on how the DOJ determines whether a company breached an agreement
4. Articulation of the factors used by the DOJ in deciding to employ an NPA rather than a DPA[220]

The goal of mandating guidelines is to "promote uniformity"[221] in a process where agreements—though sharing some similar standard terms—could vary significantly without much explanation from the government justifying that variance.

• ***Judicial Review.*** Under the bill, a DPA would take effect only after a judge determines that "it is consistent with the guidelines for such agreements and is in the interests of justice."[222] The judge's role would not cease after the approval of a DPA. Rather, the parties to the agreement would be required to file quarterly progress reports with the court[223] and to review the implementation or termination of an agreement on a motion of any party.[224]

• ***Disclosure.*** The agreements, once approved, would be made public on the DOJ's website pursuant to the bill's public disclosure requirements.[225]

• ***Compliance Monitors.*** The proposed law calls for the attorney general to promulgate rules governing the selection of corporate monitors[226] and for those rules to provide for the creation of a national list of "organizations and individuals who have the expertise necessary to serve as independent monitors."[227] The bill would also make the appointment of a corporate monitor subject to court approval[228] and punish violations of conflicts of interest in such appointments.[229]

• ***Non-Restitution Third-Party Appropriations.*** The bill takes a step to address the concern that DPAs sometimes require a company to pay money to charitable organizations or nonprofits[230] by prohibiting such payments when they are "unrelated to the harm caused by the defendant's conduct that is the basis for the agreement."[231]

• ***Applicability to NPAs.*** The bill provides at the outset that all the requirements enumerated by the law that apply to DPAs apply to NPAs as well.[232]

Assessment and Policy Conclusions

This report outlines three key issues with current DPA and NPA practice:

1. Strict corporate criminal liability, combined with the lack of an effective compliance defense, may lead corporations to be punished for employees' misconduct, even if the corporation actively sought to discourage such misconduct and could not reasonably have prevented it; as such, the incentive to craft the most effective compliance programs may be diminished.
2. The absence of judicial review and transparency in the decision to enter into DPAs and NPAs, to structure such agreements' terms, to determine whether such agreements have been breached, and to extend the agreements permits prosecutors to oversee corporations for indefinite periods—notwithstanding speedy trial principles and statutes of limitations—without any check on their discretion.
3. The SEC's application of the DPA-NPA process to individuals, despite that agency's lack of independent prosecutorial authority, raises hosts of questions about the appropriateness of terms developed for organizations in an individual context.

In addition to these issues, the Bank of America civil settlement is a particularly good example of the lack of standards limiting the substance of DPAs and NPAs and parallel civil agreements—which often empowers the DOJ to act with broad regulatory and legislative powers, including the power to restructure unrelated contracts and appropriate corporate funds to organizations or causes unrelated to the injuries alleged. Other policy concerns developed in earlier reports in this series—including prosecutors' use of these agreements to skirt procedural and substantive legal limits on their authority that would be cabined at trial, the potential that such agreements may impose significant social costs on the domestic polity that prosecutors are ill-equipped to assess, and that the global sweep of enforcement actions involves potential foreign-policy implications well outside the purview of the DOJ and the SEC—remain trenchant.[247]

There is no "silver bullet" process that could ameliorate each of these issues, in light of the need for prosecutors and companies alike to avoid the collateral consequences of prosecution, but Representative Pascrell's Accountability in Deferred Prosecution Act is a strong starting template for reforming the DPA process. The bill specifically addresses the lack of judicial oversight that is highlighted as an issue in the DPA process in this report. Pascrell's bill would also significantly limit prosecutors' ability to act as "mini appropriators" without legislative authorization—although, notably, only in the criminal DPA-NPA context. (The DOJ could still employ such tactics in the civil-settlement context, as witnessed in the Bank of America agreement.) Although the judicial-oversight provisions could be better specified—as in the parallel U.K. legislation (see box, page 19)—and although the bill fails to address the other two is-

sues raised in this report (the lack of a compliance defense—Issue 1; and the application of the DPA process to individuals—Issue 3), the legislation would add substantial clarity, transparency, and oversight, as compared with current practice.

By applying its terms to non-prosecution agreements as well as to deferred prosecution agreements, the Accountability in Deferred Prosecution Act could be challenged as infringing on the principle that the executive branch has the "absolute discretion not to prosecute."[248] Even Judge Gleeson, in his notable decision imposing the court's inherent supervisory power to oversee the government's DPA with HSBC, conceded that an NPA is "not the business of the courts."[249] On the other hand, DPAs and NPAs are not merely exercises in the discretion not to prosecute but rather the use of the threat of government prosecution to compel concrete actions on the part of individuals or corporations targeted by prosecutorial inquiry—absent opportunity for judicial review. In crafting a policy response, legislators are naturally loathe to embrace a detailed process for DPAs, only to have prosecutors skirt the process by shifting all such negotiations to an NPA framework. Of course, as the Bank of America settlement demonstrates, even including NPAs in any process would not preclude the DOJ or agencies from negotiating sweeping agreements resolving civil infractions. That said, civil enforcement actions do not trigger the same collateral consequences as do criminal prosecutions, which can trigger the loss of banking licenses,[250] debarment from government contracting,[251] and exclusion from reimbursement under Medicare.[252] Therefore, many companies can better afford to risk a civil trial or an administrative adjudication than a criminal prosecution.

On the whole, in addition to the procedural and oversight reforms suggested in the Accountability in Deferred Prosecution Act, we remain convinced that substantive limits on the scope of criminal liability are paramount in aligning the DPA/NPA process with the public interest. Oversight and transparency can go only so far when companies are essentially caught between Scylla and Charybdis, so the most comprehensive body of reforms would:

- Cabin the reach of criminal law to corporations (by limiting the scope of corporate criminal liability to the most serious offenses and eschewing lesser regulatory crimes, as in the U.K. law)
- Modify the range of employee conduct that can be applied vicariously to corporations in a criminal context (by limiting vicarious liability to apply only to the actions of high-ranking officers or, alternatively, by allowing corporations to fight the imputation of criminal liability from lower-level employees through an effective compliance defense)
- Afford companies the ability to fight a criminal prosecution in court by removing the effective corporate death sentence applied to indictment or conviction (by limiting statutory collateral consequences)[253]

Although the Accountability in Deferred Prosecution Act does not go far enough to address some of the serious problems with the DOJ's use of DPAs and NPAs—let alone some of the enterprising extensions of this process by the SEC, including its application to individuals—it remains a great starting point for much-needed reform. The bill's cosponsors, all Democrats, may seek reform because they feel companies, and culpable executives and employees at those companies, are getting off too easily for criminal conduct (the same concern animating most of the judicial inquiries into these agreements to date.)[254] Yet even if one disagrees and feels that the victims of the fast-and-loose application of DPAs and NPAs by the government are the companies targeted and their shareholders—not to mention the broader public, given the potentially serious social costs generated by these agreements[255]—the need for reforming the system is apparent. One hopes that this bipartisan issue can generate bipartisan support.

Endnotes

[1] Thomas Fox, *DPAs and NPAs – Powerful Tools in the Fight Against Corruption*, FCPA Compliance and Ethics Blog (Dec. 8, 2014, 12:01 AM), https://tfoxlaw.wordpress.com/2014/12/08/dpas-and-npas-powerful-tools-in-the-fight-against-corruption/ (citing Rahul Rose, *Caldwell: Settlement a "More Powerful Tool" Than Convictions*, Global Investigations Rev. (Dec. 3, 2014), *available at* http://globalinvestigationsreview.com/article/2121/caldwell-settlement-more-powerful-tool-convictions).

[2] Editorial, *The Criminalisation of American Business*, Economist, Aug. 30, 2014, *available at* http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion.

[3] *Id.*

[4] *Id.*

[5] *May 13, 2014 Criminal Law and the Administrative State, Written CLE Materials*, Admin. Conf. of the U.S. (May 06, 2014, 1:19 PM), https://www.acus.gov/newsroom/administrative-fix-blog/may-13-2014-criminal-law-and-administrative-state-written-cle.

[6] *See Administrative Conference of the U.S.*, Livestream, *available at* http://new.livestream.com/ACUS/events/3021597 (last visited Mar. 6, 2015).

[7] *See* Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations (Harv. Univ. Press 2014); *see also* Brandon L. Garrett and Jon Ashley, *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last visited Mar. 6, 2015) [hereinafter "UVA Database"]; *Garrett, Brandon L.'s Scholarly Papers*, Social Science Research Network (SSRN), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=492985 (last visited Mar. 9, 2015); Josh Kovensky, *UVA Law Professor Traces History of Deferred Prosecution Agreements at Cato Institute Talk*, Main Justice (Dec. 5, 2014, 4:43 PM), http://www.mainjustice.com/2014/12/05/uva-law-professor-traces-history-of-deferred-prosecution-agreements-at-cato-institute-talk/.

[8] *See 2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, Gibson Dunn (Jan. 6, 2015), http://www.gibsondunn.com/publications/pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx [hereinafter "Gibson Dunn Year-End 2014"].

[9] Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. § 3161, *et seq*.).

[10] *See, e.g.*, 48 C.F.R. § 9.406-2; 42 U.S.C. § 1320a-7; 7 U.S.C. § 252.

[11] *See* Daniel Diermeier et al., *Arthur Andersen (C): The Collapse of Arthur Andersen*, Kellogg Case Publishing (2011), *available at* http://www.kellogg.northwestern.edu/kellogg-case-publishing/case-search/case-detail.aspx?caseid=%7B88a8b60a-e2f4-42dc-ab6f-a94a518c5079%7D.

[12] Arthur Andersen LLP v. U.S., 544 U.S. 696, 698 (2005).

[13] Thomas Fox, *supra* note 1.

[14] *See* Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasuries Securities Case (May 20, 1992), http://www.justice.gov/atr/public/press_releases/1992/211182.htm [hereinafter "Salomon NPA"].

[15] *See* U.S. Gov't Accountability Office, GAO-10-110, DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness (Dec. 2009), *available at* http://www.gao.gov/new.items/d10110.pdf (last visited Mar. 8, 2015) [hereinafter "GAO 10-110"]; *see also* Gibson Dunn Year-End 2014, *supra* note 8; UVA Database, *supra* note 7.

[16] *Compare* UVA Database, *supra* note 7, *with* Fortune 500 2014, *available at* http://fortune.com/fortune500/ (last visited Mar. 6, 2015).

[17] *Compare* UVA Database, *supra* note 7, *with* Global 500 2014, http://fortune.com/global500/ (last visited Mar. 2, 2015).

[18] *See* Cindy R. Alexander & Mark A. Cohen, *An Empirical Analysis of Non-Prosecution and Deferred Prosecution Agreements* 23 & tbl. 3, Searle Civ. J. Inst., Oct. 9, 2014 (draft) (on file with author) (showing, concurrent with rise in number of DPAs and NPAs, that number of federal plea agreements with publicly traded companies was 19 per year from 1997–2002, 17 per year from 2003–06, and 29 per year from 2007–11).

[19] Preliminary data for this report were presented by Navigant managing director Jeff Nielsen at *ILR's 15th Annual Legal Reform Summit*, on October 24, 2014. *See The Enforcement Prism: Principled Prosecution or Profiteering?*, Video, http://www.instituteforlegalreform.com/resource/the-enforcement-prism-principled-prosecution-or-profiteering/ (last visited Mar. 11, 2015). This study's authors have confirmed with the Navigant authors that these conclusion hold true for the forthcoming final report.

[20] *See id*. This study's authors have confirmed with the Navigant authors that these conclusion hold true for the forthcoming final report.

[21] *See* Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading [hereinafter "Bank of America Press Release"].

[22] James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Manhattan Inst. for Pol'y Res., Civ. Just. Rep. No. 14 (May 2012), *available at* http://www.manhattan-institute.org/html/cjr_14.htm (last visited Mar. 6, 2015).

[23] James R. Copland & Isaac Gorodetski, T*he Shadow Lengthens: The Continuing Threat of Regulation by Prosecution*, Manhattan Inst. for Pol'y Res., Leg. Pol'y Rep. No. 18 (Feb. 2014), *available at* http://www.manhattan-institute.org/html/lpr_18.htm#.VPoCokKR9UQ (last visited Mar. 6, 2015).

[24] James R. Copland, *Regulation by Prosecution: The Problems with Treating Corporations as Criminal*s, Manhattan Inst. for Pol'y Res., Civ. Just. Rep. No. 13 (Dec. 2010), *available at* http://www.manhattan-institute.org/html/cjr_13.htm (last visited Mar. 6, 2015).

[25] Marie Gryphon, *It's a Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, Manhattan Inst. For Pol'y Res., Civ. Just. Rep. No. 12 (Dec. 2009), *available at* http://www.manhattan-institute.org/html/cjr_12.htm (last visited Mar. 6, 2015).

[26] James R. Copland & Paul Howard, *Off-Label, Not Off-Limits: The FDA Needs To Create a Safe Harbor For Off-Label Drug Use*, Manhattan Inst. for Pol'y Res., Issue Brief No. 15 (Dec. 2012), *available at* http://www.manhattan-institute.org/pdf/ib_15.pdf (last visited Mar. 6, 2015).

[27] Paul Enzinna, *The Foreign Corrupt Practices Act: Aggressive Enforcement and Lack of Judicial Review Create Uncertain Terrain for Businesses*, Manhattan Inst. for Pol'y Res., Issue Brief No. 17 (Jan. 2013), *available at* http://www.manhattan-institute.org/html/ib_17.htm#.VPotlEKR9UQ (last visited Mar. 6, 2015).

[28] *See* James R. Copland & Isaac Gorodetski, *Overcriminalizing The Old North State: A Primer and Possible Reforms for North Carolina*, Manhattan Inst. for Pol'y Res., Issue Brief No. 28 (May 2014), *available at* http://www.manhattan-institute.org/html/ib_28.htm#.VPot40KR9UQ (last visited Mar. 6, 2015); James R. Copland, Isaac Gorodetski & Michael J. Reitz, *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan*, Manhattan Inst. for Pol'y Res., Issue Brief No. 31 (Oct. 2014), *available at* http://www.manhattan-institute.org/html/ib_31.htm#.VPot30KR9UQ (last visited Mar. 6, 2015).

[29] *See* Gibson Dunn Year-End 2014, *supra* note 8.

[30] 15 U.S.C. § 78dd-1, *et seq.*

[31] *See* GAO 10-110, *supra* note 15; Gibson Dunn Year-End 2014, *supra* note 8; UVA Database, *supra* note 7.

[32] *See* Gibson Dunn Year-End 2014, *supra* note 8.

[33] Deferred Prosecution Agreement, U.S. Dep't of Justice, RE: JPMorgan Chase Bank, N.A. (Jan. 6, 2014), *available at* http://www.gibsondunn.com/publications/Documents/JPMorgan_Chase_Bank_NA_DPA.pdf (last visited Mar. 6, 2015).

[34] Deferred Prosecution Agreement, U.S. Dep't of Justice, RE: Toyota Motor Corporation (Mar. 19, 2014), *available at* http://www.gibsondunn.com/publications/Documents/Toyota_DPA.pdf (last visited Mar. 6, 2015).

[35] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, *et seq.*

[36] *See* Gibson Dunn Year-End 2014, *supra* note 8; UVA Database, *supra* note 7.

[37] False Claims Act, Pub. L. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729 3733 (2012)).

[38] 15 U.S.C. § 78dd-1, *et seq.*

[39] *See* Copland, *supra* note 22; Copland & Gorodetski, *supra* note 23; Enzinna, *supra* note 27.

[40] Gibson Dunn Year-End 2014, *supra* note 8, at Appendix.

[41] *2014 Year-End FCPA Update*, Gibson Dunn (Jan. 5, 2015), http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-Update.aspx [hereinafter "Gibson Dunn 2014 Year-End FCPA"].

[42] *Id.*

[43] Gibson Dunn Year-End 2014, *supra* note 8, at Appendix.

[44] *Id.*; Gibson Dunn 2014 Year-End FCPA, *supra* note 41.

[45] 15 U.S.C. § 78dd-1, *et seq.*

[46] 15 U.S.C. § 78dd-1(b), 78dd-2(b), 78dd-3(b).

[47] *See* Enzinna, *supra* note 27; 15 U.S.C. § 78dd-1, *et seq.*

[48] Gibson Dunn Year-End 2014, *supra* note 8, at Appendix.

[49] Non-Prosecution Agreement, U.S. Dep't of Justice, RE: Bio-Rad Laboratories, Inc., (Nov. 3, 2014), *available at* http://www.gibsondunn.com/publications/Documents/Bio-Rad-NPA.pdf (last visited Mar. 7, 2015).

[50] Deferred Prosecution Agreement, U.S. Securities and Exchange Comm., Regions Financial Corporation, (Jun. 10, 2014), *available at* http://www.gibsondunn.com/publications/Documents/Regions_DPA.pdf (last visited Mar. 7, 2015).

[51] United States Sentencing Comm., Guidelines Manual, ch. 8 (Nov. 2014) (*available online at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf).

[52] 15 U.S.C. § 78dd-1, *et seq.*

[53] Press Release, U.S. Securities and Exchange Comm., SEC Charges Hewlett-Packard with FCPA Violations: Company to Pay $108 Million to Settle Civil and Criminal Cases (Apr. 9, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VP767kKR9UQ (last visited Mar. 9, 2015) [hereinafter "HP SEC Press Release]; *2014 Mid-Year FCPA Update*, Gibson Dunn (Jul. 7, 2014), http://www.gibsondunn.com/publications/pages/2014-Mid-Year-FCPA-Update.aspx [hereinafter "Gibson Dunn Mid-Year FCPA 2014"]; Press Release, U.S. Dep't of Justice, Hewlett-Packard Russia Pleads Guilty to and Sentenced for Bribery of Russian Government Officials (Sep. 11, 2014), http://www.justice.gov/opa/pr/hewlett-packard-russia-pleads-guilty-and-sentenced-bribery-russian-government-officials (last visited Mar. 9, 2015) [hereinafter "HP DOJ September Press Release"].

[54] *Id.*

[55] Plea Agreement, U.S. Dep't of Justice, ZAO Hewlett-Packard A.O., (Apr. 7, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao/hp-russia-plea-agreement.pdf (last visited Mar. 9, 2015) [hereinafter "HP Russia Plea Agreement"].

[56] 15 U.S.C. § 78dd-1(a)(1)(B), (2)(B), 3(B).

[57] 15 U.S.C. § 78m(b).

[58] *See* HP DOJ September Press Release, *supra* note 53.

[59] *See id.*; *see also* HP Russia Plea Agreement, *supra* note 55, at Exhibit 5.

[60] *See* Press Release, U.S. Dep't of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery (last visited Mar. 9, 2015); Deferred Prosecution Agreement, U.S. Dep't of Justice, Hewlett-Packard Polska, SP. Z.O.O., (Apr. 9, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-polska/hp-poland-dpa.pdf (last visited Mar. 9, 2015) [hereinafter "HP Poland DPA"].

[61] HP Poland DPA, *supra* note 60, at Attachment A.

[62] *See Id.*

[63] *See Id.*

[64] *See Id.*

[65] Non-Prosecution Agreement, U.S. Dep't of Justice, RE: Hewlett-Packard Mexico, S. de R.L. de C.V., (Apr. 9, 2014), *available at* http://www.gibsondunn.com/publications/Documents/HPMexico-NPA.pdf (last visited Mar. 9, 2015) [hereinafter "HP Mexico NPA"].

[66] *Id*.

[67] *See Id*.

[68] *See* HP Russia Plea Agreement, *supra* note 55; HP Poland DPA, *supra* note 60; HP Mexico NPA, *supra* note 65.

[69] *See* HP SEC Press Release, *supra* note 53; U.S. Securities and Exchange Comm., Order Instituting Cease-And-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act Of 1934, Making Findings, and Imposing a Cease-and-Desist Order *In re* Hewlett-Packard Co., (April 9, 2014), *available at* http://www.sec.gov/litigation/admin/2014/34-71916.pdf (last visited Mar. 9, 2015) [hereinafter "HP SEC Order"].

[70] HP SEC Order, *supra* note 69.

[71] *See Id.*

[72] *See Id.*

[73] *See Id*.

[74] HP DOJ September Press Release, *supra* note 53; HP Russia Plea Agreement, *supra* note 55, at Exhibit 5.

[75] HP DOJ September Press Release, *supra* note 53; HP Russia Plea Agreement, *supra* note 55, at Exhibits 3 & 4.

[76] HP Poland DPA, *supra* note 60, at 6-7.

[77] *See Id.*

[78] *See Id.* (citing U.S. Sentencing Guidelines, *supra* note 51).

[79] *See Id.* at Attachments D & E.

[80] *Compare id.* at Attachments D & E *with* HP Russia Plea Agreement, *supra* note 55, at Exhibits 3 & 4.

[81] HP Mexico NPA, *supra* note 65.

[82] *See Id.*

[83] HP SEC Order, *supra* note 69, at 2.

[84] HP SEC Order, *supra* note 69.

[85] HP DOJ September Press Release, *supra* note 53; HP SEC Press Release, *supra* note 53.

[86] *See* HP SEC Press Release, *supra* note 53.

[87] *See* HP Russia Plea Agreement, *supra* note 55; HP Poland DPA, *supra* note 60; HP Mexico NPA, *supra* note 65.

[88] *See id.*

[89] *See id.*

[90] HP Poland DPA, *supra* note 60, at Attachment D.

[91] HP Poland DPA, *supra* note 60.

[92] *See* HP Russia Plea Agreement, *supra* note 55; HP Poland DPA, *supra* note 60; and HP Mexico NPA, *supra* note 65.

[93] *Id.*

[94] *Id.*

[95] *See* HP Russia Plea Agreement, *supra* note 55, at Exhibit 5.

[96] *Id.*

[97] *Id*.

[98] *See Id.*

[99] *See* HP Poland DPA, *supra* note 60, at Attachment A.

[100] *Id*.

[101] *See* Mike Koehler, *HP Enforcement Action – Where To Begin?*, FCPA Professor (Apr. 15th, 2014), http://www.fcpaprofessor.com/hp-enforcement-action-where-to-begin (last visited Mar. 12, 2015).

[102] 15 U.S.C. § 78m(b)(2)(B).

[103] *Id*.

[104] *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Division of the U.S. Dep't of Justice and the Enforcement Division of the U.S. Securities and Exchange Comm. (Nov. 14, 2012), *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter "FCPA Guide"].

[105] *Black's Law Dictionary 126* (9th ed. 2009) (defining *respondeat superior* as "[t]he doctrine holding an employer or principle liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency").

[106] *See* New York Central R. Co. v. United States, 212 U.S. 481 (1909).

[107] Ronald E. Berenbeim & Jeffrey M. Kaplan, *Ethics and Compliance Enforcement Decisions — the Information Gap*, at 3 (The Conference Board Executive Action Series, No. 310, June 2009).

[108] *See* Copland, *supra* note 22.

[109] *See* Gibson Dunn Year-End 2014, *supra* note 8.

[110] *See, e.g.*, *2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, Gibson Dunn (Jan. 4, 2012), http://www.gibsondunn.com/publications/pages/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.aspx; Press Release, U.S. Dep't of Justice, Wright Medical Technology, Inc. Deferred Prosecution Agreement with Government Extended for 12 Months (Sept. 15, 2011), http://www.justice.gov/usao/nj/Press/files/Wright%20Medical%20DPA%20Extension.html (last visited Mar. 10, 2015).

[111] *See* Gibson Dunn Year-End 2014, *supra* note 8.

[112] Amended Deferred Prosecution Agreement, U.S. Dep't of Justice, Standard Chartered Bank (Dec. 9, 2014), *available at* http://www.mainjustice.com/wp-admin/documents-databases/208-1-U.S.-v.-Standard-Chartered-Bank—Filing—Dec.-9-2014.pdf (last visited Mar. 10, 2015) [hereinafter "Amended SCB DPA"].

[113] *See id*.

[114] Deferred Prosecution Agreement, U.S. Dep't of Justice, Standard Chartered Bank (Dec. 10, 2012), *available at* http://www.steptoe.com/assets/htmldocuments/1.%20114-1-Standard-Chartered-Bank-DPA(2).pdf (last visited Mar. 10, 2015) [hereinafter "Original SCB DPA"]; International Emergency Economic Powers Act of 1977, Pub. L. No. 95–223, 91 Stat. 1626 (codified as amended at 50 U.S.C. §§1701–1707).

[115] *See* Original SCB DPA, *supra* note 114, at 2–8.

[116] *Id.* at Exhibit A 42; *see* Amended SCB DPA, *supra* note 112, at 2–3.

[117] *See* Amended SCB DPA, *supra* note 112, at 2–3.

[118] Id. at 3.

[119] *See id.* at 3.

[120] *See id.* at 3.

[121] *See* Original SCB DPA, *supra* note 114.

[122] *See id.* at 7–8.

[123] *See id.* at 8.

[124] *See* Amended SCB DPA, *supra* note 112, at 3.

[125] *See generally id.*

[126] *See id.* at 1.

[127] *See generally id.*

[128] *See generally id.*

[129] *See generally id.*

[130] *See generally id.*

[131] *See generally id.*; *see also* Christopher M. Matthews & Rachel Louise Ensign, *U.S. Extends Scrutiny of Standard Chartered: Prosecutors Investigate Employees for Criminal Violations Related to Iran Sanctions*, Wall St. J.,Dec. 9, 2014, *available at* http://www.wsj.com/articles/u-s-officials-to-extend-duration-of-2012-standard-chartered-settlement-1418149314.

[132] *See generally* Amended SCB DPA, *supra* note 112.

[133] *See generally id.*

[134] *See generally* Copland, *supra* note 22.

[135] *See* Brent Kendall, David Enrich & Margot Patrick, *Standard Chartered Recants, Apologizes*, Wall St. J., Mar. 21, 2013, *available at* http://www.wsj.com/articles/SB10001424127887324103504578374264058926442; Original SCB DPA, *supra* note 114, at 10–11.

[136] Kendall, Enrich & Patrick, *supra* note 135.

[137] *See id.*

[138] *See id.*

[139] *See id.*

[140] U.S. Const. amend. VI. (stating "the accused shall enjoy the right to a speedy and public trial").

[141] 18 U.S.C. § 3161, *et seq*.

[142] *See* Charles Doyle, *Statutes of Limitation in Federal Criminal Cases: An Overview*, Cong. Research Serv. (Oct. 1, 2012), *available at* http://fas.org/sgp/crs/misc/RL31253.pdf ("The Constitution's speedy trial clause protects the criminally accused against unreasonable delays between his indictment and trial. . . . [T]he majority of federal crimes are governed by the general five year statute of limitations.").

[143] *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *2 (E.D.N.Y. July 1, 2013) [hereinafter "HSBC Opinion"] (quoting the government's Memorandum in Support of the DPA as stating, "In connection with a DPA, once a defendant has made an appearance and the speedy trial clock has begun to run, as it has here, the Court has the authority to determine whether to grant or deny a speedy trial waiver . . . .") (available online at http://www.justice.gov/usao/nye/pr/2013/doc/HSBC%20Memorandum%20and%20Order%207.1.13.pdf).

[144] *See id.*

[145] *Id.* at 11.

[146] *See id.* at 6-8, 11.

[147] *See* Gibson Dunn Year-End 2014, *supra* note 8.

[148] *See* Copland & Gorodetski, *supra* note 23, at Issue 5.

[149] *See* Press Release, U.S. Securities and Exchange Comm., SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-6.htm [hereinafter "SEC Press Release on DPAs"].

[150] *Id.*

[151] *See Publications Page*, Gibson Dunn, http://www.gibsondunn.com/publications/default.aspx (select "topic" drop-down menu and select "Deferred and Non-Prosecution Agreements") (calculation is based on data from Gibson Dunn Year-End Updates on Corporate Deferred Prosecution Agreements from 2010–14).

[152] *See* Press Release, U.S. Securities and Exchange Comm., SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540345373#.VMZfPi7CeB0 [hereinafter "Herckis Press Release"].

[153] *See id.*; Deferred Prosecution Agreement, U.S. Securities and Exchange Comm., Scott Jonathan Herckis 3 (Nov. 8, 2013), *available at* http://www.sec.gov/news/press/2013/2013-241-dpa.pdf (last visited Mar. 10, 2015) [hereinafter "Herckis DPA"].

[154] *Id.* at 4.

[155] *See id.* at 4.

[156] *See id.* at 3.

[157] Herckis Press Release, *supra* note 152.

[158] Herckis DPA, *supra* note 153.

[159] *See id.* at 5–6.

[160] *Id.* at 5.

[161] *See id.* at 5.

[162] *See* Press Release, Securities and Exchange Comm., SEC Charges Six Individuals with Insider Trading in Stock of E-Commerce Company Prior to Acquisition by eBay (Apr. 25, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541642140#.VMZ5vy7CeB0 [hereinafter "Insider Trading Press Release"].

[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *Id.*

[167] *See* Press Release, U.S. Dep't of Justice, Former EBay Exec Charged With Insider Trading (Apr. 25, 2014), http://www.justice.gov/usao-edpa/pr/former-ebay-exec-charged-insider-trading.

[168] Insider Trading Press Release, *supra* note 162.

[169] *See id.*

[170] *See* Linda Chatman Thomsen, *International Institute For Securities Market Development 2005 Program*, U.S. Securities Exchange Comm., *available at* http://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf ("The securities laws prohibit fraudulent conduct both criminally and civilly, but the Commission is responsible only for civil enforcement and administrative actions.").

[171] *See generally* U.S. Sentencing Comm., Guidelines Manual, *supra* note 51, at ch. 8; Copland, *supra* note 22, at 2.

[172] *See id.*; U.S. Sentencing Comm., Supplementary Report on Sntencing Guidelines for Organizations (1991), *available at* http://www.ussc.gov/Guidelines/Organizational_Guidelines/Historical_Development/OrgGL83091.pdf.

[173] U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.) (available online at http://www.legislation.gov.uk/ukpga/2013/22/pdfs/ukpga_20130022_en.pdf).

[174] *See id.* at pt. 1, ¶ 4(1).

[175] *See* SEC Press Release on DPAs, *supra* note 149; *see also Plea Agreements and Sentencing Appeal Waivers—Discussion of the Law*, U.S. Dep't of Justice, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00626.htm (last visited Mar. 10, 2015); *Pleas of Guilty*, American Bar Association, Criminal Justice Section, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html (last visited Mar. 10, 2015).

[176] *See, e.g.*, Original SCB DPA, *supra* note 114, at 4–7.

[177] *See SEC Cooperation Is Still More Art Than Science*, Law 360 (Jan. 23, 2014, 1:36 AM), http://www.law360.com/articles/501660/sec-cooperation-is-still-more-art-than-science.

[178] *See* Copland & Gorodetski, *supra* note 23, at 8.

[179] *See* Ben Protess & Matthew Goldstein, *Appeal Judges Hint at Doubts in Insider Case*, N.Y. Times Dealbook (Apr. 22, 2014, 2:50 PM), http://dealbook.nytimes.com/2014/04/22/appeals-court-raises-doubts-about-governments-insider-trading-case/?_r=0.

[180] *See* United States v. Newman, 773 F.3d 438 (2d Cir. 2014) (available online at http://www.wlrk.com/docs/insidertradingconvictionsoverturned.pdf).

[181] *See id.*; *see also* Joe Palazolo, *5 Takeaways From the Insider Trading Ruling*, Wall St. J. (Dec. 10, 2014, 2:17 PM), http://blogs.wsj.com/briefly/2014/12/10/5-takeaways-from-the-insider-trading-ruling/.

[182] *Compare* Newman, 773 F.3d 438, *with* Insider Trading Press Release, *supra* note 162.

[183] Insider Trading Press Release, *supra* note 162.

[184] *See* Bank of America Press Release, *supra* note 21 (The full settlement agreement is available online at http://www.justice.gov/iso/opa/resources/962201482111116424175 95.pdf.).

[185] *See* Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement; Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (July 14, 2014), http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement.

[186] *See* Settlement Agreement, U.S. Dep't of Justice, Bank of America Corporation, Bank of America N.A. (Aug. 20, 2014), *available at* http://www.justice.gov/iso/opa/resources/339201482914115038524 1.pdf (last visited Mar. 10, 2015).

[187] Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1833(a).

[188] *See* HSBC Opinion, *supra* note 143; *see also* Alison Frankel, *Justice Department to Federal Judges: Get Off My Lawn*, Reuters (Aug. 29, 2014), http://blogs.reuters.com/alison-frankel/2014/08/29/justice-department-to-federal-judges-get-off-my-lawn/ (quoting DOJ brief as stating "[o]utside of that limited authority, the court has no reason or basis to consider the fairness or reasonableness of the deferred prosecution agreement").

[189] 18 U.S.C. § 3161, *et seq.*

[190] HSBC Opinion, *supra* note 143; *see also* Copland & Gorodetski, supra note 23, at 14.

[191] *See* Joe Carlson, *Judge Rejects Proposed WakeMed Settlement*, Modern Healthcare (January 18, 2013), http://www.modernhealthcare.com/article/20130118/NEWS/301189967; *see also Judge OKs WakeMed Fraud Settlement*, WRAL.com (Feb. 8, 2013), http://www.wral.com/judge-oks-wakemed-fraud-settlement/12084601/.

[192] *See* United States v. Fokker Services B.V., A2015 WL 729291 (D.D.C.) [hereinafter "Fokker Opinion"] (available online at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cr0121-22).

[193] See Gibson Dunn Year-End 2014, *supra* note 8.

[194] Fokker Opinion, *supra* note 192, at 1.

[195] 50 U.S.C. §§1701–1707.

[196] *See* Fokker Opinion, *supra* note 192, at 6–7.

[197] *See id.* at 11.

[198] *See U.S. Judge Rejects Fokker Sanctions Violations Deal*, Risk & Compliance J. (Feb. 5, 2015), http://blogs.wsj.com/riskandcompliance/2015/02/05/u-s-judge-rejects-fokker-sanctions-violations-settlement/tab/print/; *see also*

Christopher M. Matthews, *Judge Inserts Court Into SEC Deals*, Risk & Compliance J. (Jul. 26, 2013), http://blogs.wsj.com/riskandcompliance/2013/07/26/judge-inserts-court-into-sec-settlements/.

[199] Fokker Opinion, *supra* note 192, at 8.

[200] *Id.* at 10

[201] *See id.* at 12-13.

[202] *See id.* at 12.

[203] *Id.* at 13.

[204] *See id.* at 13.

[205] *See* Deferred Prosecution Agreement, U.S. Dep't of Justice, Saena Tech Corporation (Apr. 16, 2014), *available at* http://www.gibsondunn.com/publications/Documents/Saena-DPA.pdf (last visited Mar. 11, 2015).

[206] Gibson Dunn Year-End 2014, *supra* note 8.

[207] 18 U.S.C. § 3161, *et seq.*

[208] *Id.*; HSBC Opinion, *supra* note 143, at 8; *see also* Gibson Dunn Year-End 2014, *supra* note 8.

[209] Gibson Dunn Year-End 2014, *supra* note 8; *see* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) (asserting that "supervising prosecutorial decisions" could place courts "in the undesirable and injudicious posture of becoming 'superprosecutors'").

[210] *See* Gibson Dunn Year-End 2014, *supra* note 8.

[211] Frankel, *supra* note 188.

[212] Gibson Dunn Year-End 2014, *supra* note 8.

[213] U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.).

[214] *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the H. Subcomm. on Commercial and Administrative Law*, 110th Cong. (2008) (statement of Rep. Pallone); Press Release, Senator Patrick Leahy, On the New Policy from the Department of Justice on Selection and Use of Corporate Monitors (Mar. 11, 2008).

[215] *See 2014 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)* (July 8, 2014), http://www.gibsondunn.com/publications/pages/2014-Mid-Year-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx [hereinafter "Gibson Dunn Mid-Year 2014"]; *see also* Press Release, U.S. Rep. Bill Pascrell, Jr. (D-NJ-08), Pascrell, Pallone Judiciary Committee Leadership Introduces Accountability in Deferred Prosecution Act (Jul. 15, 2008), http://pascrell.house.gov/media-center/press-releases/pascrell-pallone-judiciary-committee-leadership-introduces [hereinafter "Pascrell Press Release"].

[216] H.R. 4540, 113th Cong. (2014) (available online at https://www.govtrack.us/congress/bills/113/hr4540).

[217] *See* Mike Koehler,*"A Pending Federal Criminal Case Is Not Window Dressing; Nor Is the Court…A Potted Plant,"* FCPA Professor (July 23, 2013), http://www.fcpaprofessor.com/a-pending-federal-criminal-case-is-not-window-dressing-nor-is-the-court-a-potted-plant; *see also* Mark A. Miller & Andrew George, *What Does the HSBC Ruling Mean for DPAs?*, Baker Botts LLP Compliance and Enforcement Report (Nov. 11, 2013), http://www.lexology.com/library/detail.aspx?g=e0a6ca4d-1c5c-4d37-8746-9ba103c623b6; Kara Scannell, *Top Judge Criticizes DoJ for Not Holding Individuals Accountable*, Fin. Times, Nov. 12, 2013, http://www.ft.com/intl/cms/s/0/db1923d0-4bd2-11e3-8203-00144feabdc0.html#axzz2u6HDsHM3; HSBC Opinion, *supra* note 143, at 2; Gibson Dunn Year-End 2014, *supra* note 8.

[218] *See* U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.).

[219] Pascrell Press Release, *supra* note 215.

[220] H.R. 4540, 113th Cong. § 4 (2014).

[221] *Id.* at § 4(a).

[222] *Id.* at § 7(a).
[223] *Id.* at § 7(b).
[224] *Id.* at § 7(c).
[225] *Id.* at § 8(a).
[226] *Id.* at § 5(a).
[227] *Id.* at § 5(b).
[228] *Id.* at § 5(c).
[229] *Id.* at § 6(b)-(c).
[230] *See* Paul Larkin, *The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties*, Heritage Foundation Legal Memorandum No. 141 (Oct. 23, 2014), *available at* http://www.heritage.org/research/reports/2014/10/the-problematic-use-of-nonprosecution-and-deferred-prosecution-agreements-to-benefit-third-parties.
[231] H.R. 4540, 113th Cong. § 6(a) (2014).
[232] *Id.* at § 3.
[233] *See* U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.).
[234] *See* Copland & Gorodetski, *supra* note 23, at 12–14.
[235] *See* Gibson Dunn Year-End 2014, *supra* note 8. (The authors confirmed this point with British authorities.)
[236] U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.) at pt. 1, ¶ 4(1).
[237] *See* Copland & Gorodetski, *supra* note 23, at 14 (citing *UK Legislation Permitting Deferred Prosecution Agreements Is Approved*, Steptoe & Johnson LLP (Apr. 29, 2013), http://www.steptoe.com/publications-newsletter-730.html).
[238] *See* U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.).
[239] *See id.* at pt. 1, ¶¶ 9-10.
[240] See *id.* at pt. 1, ¶¶ 7(2), 8(7).
[241] *See* H.R. 4540, 113th Cong. § 7 (2014).
[242] *See Crime and Courts Act 2013: Deferred Prosecution Agreement Code of Practice* (2013), Serious Fraud Office, *available at* http://www.sfo.gov.uk/about-us/our-policies-and-publications/deferred-prosecution-agreements-code-of-practice-and-consultation-response.aspx (last visited Mar. 11, 2015).
[243] *See id.*
[244] *Id.*
[245] *See* H.R. 4540, 113th Cong. § 7(a) (2014); U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.) at pt. 1, ¶ 7 (1)(a).
[246] *See* U.K. Crime and Courts Act, 2013, c. 22 § 45, sch. 17 (Eng.) at pt. 1, ¶ 7 (1)(b).
[247] *See* Copland, *supra* note 22; Copland & Gorodetski, *supra* note 23; Copland, *supra* note 24.
[248] HSBC Opinion, *supra* note 143 (citing ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 283 (1987)).
[249] *Id.* at 9.
[250] *See*, *e.g.*, 48 C.F.R. § 9.406-2.
[251] *See*, *e.g.*, 42 U.S.C. § 1320a-7.
[252] *See*, *e.g.*, 7 U.S.C. § 252.
[253] *See* Copland, *supra* note 24, at 9–11.
[254] *See* Pascrell Press Release, *supra* note 215.
[255] *See* Copland & Gorodetski, *supra* note 23, at 10.

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