

THE SHADOW REGULATORY STATE AT THE CROSSROADS

Federal Deferred Prosecution Agreements Face an Uncertain Future

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Prior to joining MI, Copland was a management consultant with McKinsey and Company in New York. Earlier, he was a law clerk for Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Copland has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. He holds a J.D. and an M.B.A. from Yale, where he was an Olin Fellow in Law and Economics; an M.Sc. in the politics of the world economy from the London School of Economics; and a B.A. in economics from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.



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Contents

Executive Summary.....	4
Introduction.....	5
Quantitative Overview: Federal DPA and NPA Trends, 2016	7
Qualitative Analysis: Policy Issues Arising from DPAs and NPAs.....	9
Comparative Analysis: DPAs in the United Kingdom and France.....	16
Conclusion	19
Endnotes	21

Executive Summary

With a new administration running the Department of Justice (DOJ), the future of the “shadow regulatory state” is uncertain. The last 12 years have seen an unprecedented rise in the DOJ’s resolution of criminal cases against corporations through deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). This process has enabled federal prosecutors to gain significant oversight and control over many of the largest American businesses—including 18 of the 100 largest U.S. companies by revenues, since 2010.

DPAs and NPAs often involve wholesale changes to business practice—for example, firing and hiring top management personnel; creating new board committees; altering compensation schemes; and retooling sales and marketing strategies. These agreements regularly require the company to pay for “independent” monitors with vast oversight powers who report to government attorneys. No statute authorizes such sweeping government authority; the government would be able to insist on none of these changes to business practice if it successfully convicted the company in court.

What the government could do to a company in court, in many instances, is destroy it. Criminal prosecution can imperil companies’ ability to raise financing in debt and equity markets. Moreover, under federal statutes, a criminal conviction—or, in many cases, even indictment—could bar contractors from government business, exclude medical companies from federal reimbursement, or cost financial companies their licenses. Thus, most companies have little choice but to agree “voluntarily” to the government’s terms.

In 2016, the DOJ entered into 35 DPAs and NPAs—the most since 2012, excluding the many Swiss banks reaching common NPAs last year through a program resolving overseas tax claims. The Securities and Exchange Commission entered into two more. Total payments under these agreements were \$4.6 billion. In addition to large payouts, nine of the DPAs and NPAs entered into in 2016 placed a “corporate monitor” at the company, reporting back to the government. A plurality involved alleged violations of the Foreign Corrupt Practices Act (FCPA), which, in practice, empowers the government to police corporate activity abroad with little nuance about expected norms in non-U.S. environments.

This report analyzes the current state of play in federal use of DPAs and NPAs quantitatively, qualitatively, and comparatively. Case studies examine three 2016 agreements calling for hundreds of millions of dollars in company payouts to the federal government—involving the Dutch company VimpelCom’s business dealings in Uzbekistan, the U.S. company JPMorgan Chase’s hiring of interns related to the leaders of state-owned Chinese businesses, and the Japanese company Olympus’s efforts to sell equipment to U.S. and Latin American hospitals. In addition, the report looks at the second DPA entered into in the United Kingdom, as well as the new DPA law in France, and compares U.S. practice with those two countries, where DPAs are limited by statute and involve substantially more judicial oversight and transparency.

THE SHADOW REGULATORY STATE AT THE CROSSROADS

Federal Deferred Prosecution Agreements Face an Uncertain Future

Introduction

On June 5, 2017, U.S. attorney general Jeff Sessions issued a memorandum declaring that the federal Department of Justice (DOJ) would no longer be entering into settlement agreements that paid money to third parties, excepting restitution to victims and payment for outside legal and other professional services.¹ This new policy is salutary² and represents the strongest sign yet that there is indeed a “new era” at Justice under General Sessions. It is also a sign that the changes in DOJ policy are likely to go beyond the areas of drug and immigration enforcement that have consumed much of the public discussion.³

Beyond third-party settlements, the memorandum from General Sessions leaves open the question of how the DOJ may or may not reform what we have called the “shadow regulatory state.” Over the last dozen years, pretrial diversion programs that go by innocuous-sounding names—“deferred prosecution agreements” (DPAs) and “non-prosecution agreements” (NPAs)—have given federal prosecutors the power to gain substantial oversight and management powers over large corporations. The Sessions memorandum says that such agreements “are a useful tool for Department attorneys to achieve the ends of justice at a reasonable cost to the taxpayer.”⁴ But if the new administration is serious about scaling back federal regulation,⁵ it needs to take a more careful look at the shadow regulatory state that reaches virtually all corners of the American economy.

Deferred and non-prosecution agreements are settlements in which corporations agree to the government’s terms “voluntarily,” though under duress: the alternative is criminal prosecution. DPAs follow the filing of criminal charges against a corporation, whereas NPAs precede any such filing. These agreements empower government attorneys to modify, control, and oversee corporate behavior in ways they never could by taking the companies to court. And the agreements lack substantive judicial review, as well as transparency to the public and lawmakers.

Since the beginning of 2010, the federal government has entered into DPAs or NPAs with the parent companies or subsidiaries of 18 of the 100 largest U.S. companies by revenues, as ranked by *Fortune* magazine: Archer Daniels Midland, CVS Health, Fannie Mae, Freddie Mac, General Electric, General Motors, Google/Alphabet, Hewlett-Packard, Johnson & Johnson, JPMorgan Chase, Merck, MetLife, Pfizer, Tyson Foods, United Continental, United Parcel Service, United Technologies, and Wells Fargo.⁶ In addition, many large foreign companies have entered into DPAs or NPAs with the DOJ, including Barclays Bank, Daimler, Deutsche Bank, Deutsche Telecom, GlaxoSmithKline, HSBC, ING, Lloyds Banking Group, Lufthansa, Marubeni, Royal Bank of Scotland, Royal Dutch Shell, and Toyota.⁷

Indeed, the policing of corporate activity abroad engaged in both by U.S. and foreign companies with some “nexus” to the U.S. is the basis for a plurality of agreements under the 1977 Foreign Corrupt Practices Act (FCPA),⁸ notwithstanding a murky environment as to what constitutes a

corrupt practice in non-U.S. environments. The DOJ's assertion of authority over foreign entities for foreign conduct is often based on attenuated American ties, including so little as some transactions abroad denominated in dollars or the use of e-mails that were, at some point, routed through a U.S. server. Beyond the FCPA, corporations have regularly entered into DPAs and NPAs to settle tax, antitrust, and other fraud charges.

Total payouts under DPAs and NPAs since 2010 exceed \$35 billion, excluding sums paid out in parallel civil administrative settlements, monies paid to state and foreign governments involving the same or similar conduct, and piggyback civil lawsuits. Such monetary payouts are not necessarily tied to statutory fines, but money payouts would, of course, be possible were companies to decide to go to trial. But the vast regulatory powers that the government assumes over businesses through DPAs and NPAs have *no* statutory authorization and would *never* be permissible remedies in a court of law. Among the significant changes to business practices regularly required by DPAs and NPAs are:

- Firing key employees, including chief executives
- Hiring new corporate officers and setting up new company departments and board committees
- Hiring “independent” corporate monitors who are given broad investigatory and oversight powers but report to the government
- Modifying compensation plans
- Modifying sales and marketing practices

Under a DPA, corporations waive all constitutional, statutory, and procedural rights that might later be asserted in a defense at trial. DPAs and NPAs also regularly prohibit corporations from contradicting the prosecutors' alleged statements of fact in the future—even in private civil litigation. Under most DPAs' terms, the prosecutor alone is empowered to determine whether a company has breached its terms, with no judicial review.⁹ NPAs do not involve the formal filing of charges and thus never come before a judge.

Notwithstanding the sweeping nature of such agreements, companies regularly enter into DPAs and NPAs because the collateral consequences of criminal indictment and prosecution can be severe. These consequences can affect any company, given the cost of negative publicity, stock market and debt market reactions to uncertainty, and the distraction of key senior management. But collateral consequences are particularly acute for companies that do business with, or are regulated by, the federal government. Federal statutes contain serious collateral consequences in the event of a corporate criminal conviction, including exclusion from government-run health programs, debarment from gov-

ernment contracting, and loss of necessary operating licenses.¹⁰ In some cases, mere indictment is sufficient to lead to debarment or exclusion—often resting on administrative agencies' discretion. Companies that have a significant government nexus thus have little choice but to agree to the government's terms when facing possible prosecution.

In addition to companies, prosecutors worry about the collateral consequences of prosecution, particularly since the 2002 federal indictment of the accounting firm Arthur Andersen for its Enron bookkeeping. This indictment quickly led to Andersen's collapse.¹¹ The U.S. Supreme Court overturned the accountancy's conviction years later—little solace to the tens of thousands of employees who had lost their jobs.¹²

The explosive growth in DPAs and NPAs thus dates to 2004, two years after the collapse of Andersen and one year after then-U.S. deputy attorney general Larry Thompson issued a memorandum clarifying department practice, building on a 1999 memo issued by his Clinton-era predecessor Eric Holder. In 2005, the DOJ entered into 20 DPAs and NPAs—more than the total entered into in previous American history. The George W. Bush administration ultimately reached 130 such agreements. The Obama administration entered into 325.

The American practice of entering into DPAs and NPAs is an international outlier. Many advanced nations, among them Germany, do not permit any criminal prosecution of companies whatsoever; crimes are committed by individuals, and corporate infractions are civil offenses. In the last few years, both the United Kingdom and France have passed laws permitting DPAs or their equivalent. But British and French practices depart significantly from American norms. The only alleged crimes that can result in DPAs in Britain or France are economic crimes such as fraud, bribery, and money laundering. And both countries have established clear policies for judicial involvement and judicial review in the DPA process—with judges signing off at both the onset and close of negotiations.

In our 2016 update on the shadow regulatory state, we noted uncertainty about the DOJ's future practice in this area. On September 9, 2015, U.S. deputy attorney general Sally Quillian Yates promulgated a memorandum building on those previously issued by Holder, Thompson, and their successors.¹³ Yates's memo emphasized that “criminal and civil corporate investigations should focus on individuals from the inception of the investigation” and that “corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct” before they are eligible for entering

into a DPA.¹⁴ With this renewed emphasis on individual prosecutions, it was unclear whether the DOJ would continue to pursue DPAs and NPAs aggressively.

The answer was yes, at least through the final year of the Obama administration. In 2016, the DOJ entered into 35 DPAs and NPAs, the largest number since 2011

Previous Manhattan Institute Research

This report is the fifth in a series looking at the rise of deferred and non-prosecution agreements. In 2012, the Manhattan Institute published a report by coauthor James Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*;¹⁵ subsequent reports followed in 2014 (*The Shadow Lengthens: The Continuing Threat of Regulation by Prosecution*, by Copland and Isaac Gorodetski);¹⁶ 2015 (*Without Law or Limits: The Continued Growth of the Shadow Regulatory State*, by Copland and Gorodetski);¹⁷ and 2016 (*Justice Out of the Shadows: Federal Deferred Prosecution Agreements and the Political Order*, by Copland and Rafael Mangual).¹⁸

Coauthor Copland began his study of federal DPAs and NPAs in a 2010 report, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*,¹⁹ which explored the broader question of corporate criminal liability in historical and international perspective. That paper followed a 2009 report by former Manhattan Institute senior fellow Marie Gryphon (Newhouse), *It's a Crime? Flaws in Federal Statutes That Punish Standard Business Practice*,²⁰ which explored the erosion of criminal-intent standards in the federal criminal law and the implications of that erosion on businesses. In 2012 and 2013, the Manhattan Institute published two shorter reports expanding on aspects of this phenomenon: one by Copland and Paul Howard, 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);²¹ and one by criminal defense attorney Paul Enzinna,²² examining trends in federal enforcement under the Foreign Corrupt Practices Act.²³ Copland has also authored or coauthored—in some cases, with Mangual—reports applying these principles in the state context, in North Carolina, Michigan, South Carolina, Minnesota, and Oklahoma,²⁴ as well as a book chapter on New York.²⁵

(excluding the banks that negotiated *en masse* settlements in the 2015 Swiss Bank Program that resolved U.S. government claims against Swiss banks that failed to disclose customer account information to American authorities). Total “fines” and “penalties” paid out under these 35 agreements exceeded \$4.6 billion. Reflecting a significant increase from the previous year, nine of the DPAs and NPAs entered into in 2016 involved the placement of a corporate monitor at the company, paid out of company coffers and reporting back to the government. Many more imposed other extensive reporting requirements, which in many cases can add to the expense of resolving criminal charges and/or investigations.

Whether there will be a change in practice with a new administration—apart from the elimination of third-party payments—remains in doubt. This report is intended to inform that policy debate with an examination of DPA and NPA practice and trends in more detail. The first section looks quantitatively at DPAs and NPAs entered into during 2016 and how they compare with those entered into historically, with a focus on the agreements' structure and baseline alleged offenses, as well as the DOJ's prosecuting divisions involved. The second section looks qualitatively at three of the largest agreements reached in 2016, including those with the Dutch company VimpelCom, a foreign subsidiary of the U.S. bank JPMorgan Chase, and the U.S. and foreign subsidiaries of the Japanese optical company Olympus. The third section looks comparatively at British and French practices, including the U.K.'s second DPA, entered into in 2016, and the new French law, enacted in December 2016, which enables such agreements. The fourth section concludes with a brief assessment of U.S. policy and practice in this area, in light of the earlier quantitative, qualitative, and comparative analysis.

Quantitative Overview: Federal DPA and NPA Trends, 2016

As discussed in last year's report, the federal government entered into a record number of DPAs and NPAs in 2015, but most of those were Swiss banks entering into NPAs as a part of the Swiss Bank Program.²⁶ Following the issuance of the Yates Memorandum on September 9, 2015, there was some question as to whether the government would continue to enter into DPAs and NPAs, in keeping with earlier practice. At least through the end of the Obama administration, the answer was a resounding yes.

DPA and NPA Trends: Number of Agreements and Monetary Penalties

The federal government entered into more DPAs and NPAs with businesses in 2016 than in any year since 2012, excluding settlements reached through the Swiss Bank Program (**Figure 1**). Total monetary payments by companies under DPAs and NPAs totaled \$4.6 billion—down somewhat from 2015 but in line with norms in recent years (**Figure 2**). Five companies entered into federal DPAs or NPAs that required financial payments exceeding \$500 million:

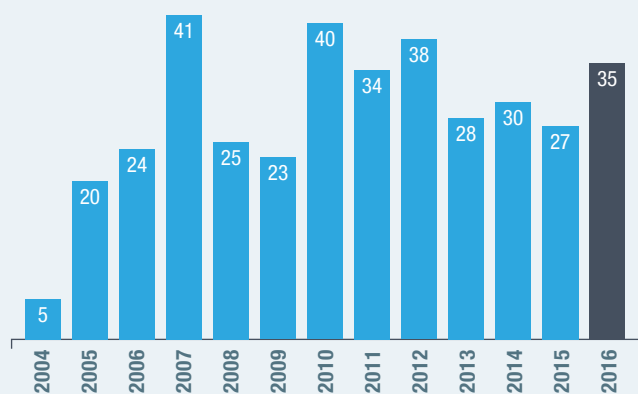
- A DPA with VimpelCom, a Bermuda telecommunications company headquartered in the Netherlands, resolving allegations that it had bribed Uzbeki officials

following the acquisition of a foreign subsidiary in Uzbekistan in 2006 (\$795 million)

- A DPA with Olympus Corporation of the Americas, a Pennsylvania medical-equipment company, resolving allegations that it had illegally awarded grants to hospitals and reimbursed travel for physicians as part of a kickback scheme that involved payments from Medicare and Medicaid (\$612 million)
- A DPA with the Swiss private bank Julius Baer, resolving alleged failure to make required reports to the U.S. government of American account holders that may owe tax liability, a parallel case to those resolved through the broader Swiss Bank Program (\$547 million)
- A DPA with Teva Pharmaceuticals, an Israeli company, resolving allegations that it and its subsidiaries had bribed foreign officials in Russia, Ukraine, and Mexico to increase sales of the company's multiple sclerosis drug Copaxone (\$519 million)
- An NPA with Tenet Healthcare, a Texas corporation that managed for-profit hospitals, resolving claims that it ran an illegal kickback scheme to support free health-care clinics in Georgia and South Carolina that, in turn, referred patients to Tenet-owned hospitals (\$513 million)

FIGURE 1.

Number of Federal DPAs and NPAs (Excluding Swiss Bank Settlements)

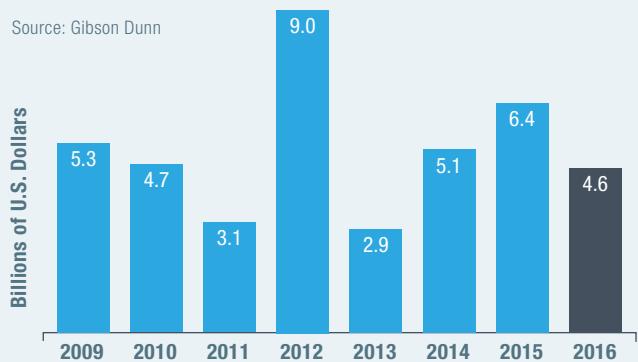


Source: U.S. Government Accountability Office, Corporate Crime, GAO-10-110, Dec. 2009; Gibson Dunn (see n. 39); UVA Database (see n. 6)

FIGURE 2.

Fines and Penalties Under Federal DPAs and NPAs

Source: Gibson Dunn



DPA and NPA Trends: Agreement Structure

In 2016, the federal government entered into 14 DPAs and 21 NPAs—a slightly higher proportion of NPAs than in recent years, excluding those in the Swiss Bank Program. (In 2016, 40% of agreements were structured as DPAs, as compared with between 52% and 67% in previous years.)

Indicative of a potentially significant trend, 25.7% of the

FIGURE 3.

Number of Federal DPAs and NPAs Requiring Corporate Monitors

Source: Gibson Dunn

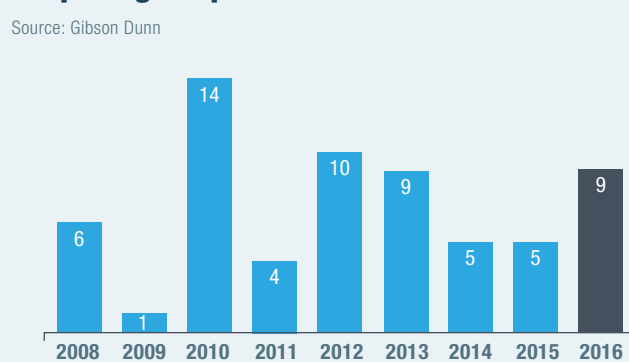
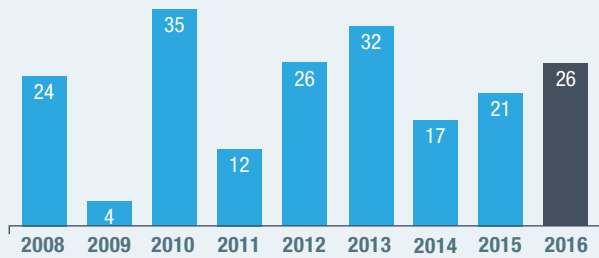


FIGURE 4.

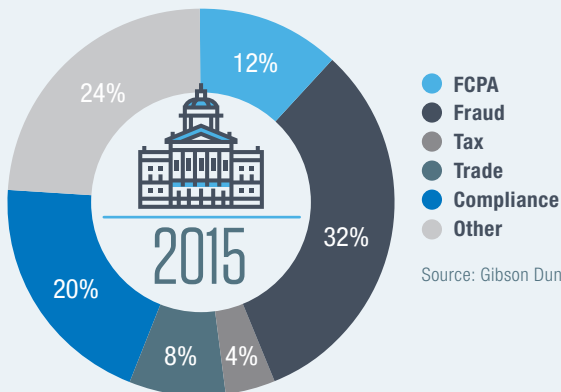
Percentage of Federal DPAs and NPAs Requiring Corporate Monitors



Source: U.S. Government Accountability Office; Gibson Dunn; UVA Database

FIGURE 5.

Types of Federal DPAs and NPAs, 2015 (Excluding Swiss Bank Settlements)



Source: Gibson Dunn

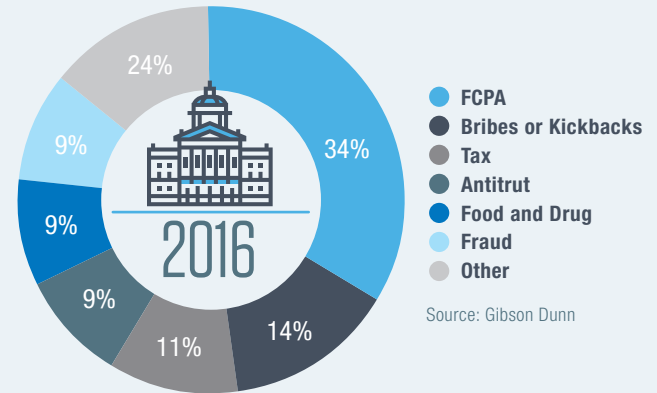
federal DPAs or NPAs entered into last year required companies to agree to a “corporate monitor” overseeing their business during the course of the agreement. This is the second straight year that has seen an increase in the percentage of agreements imposing such “corporate monitors” on defendant companies.

DPA and NPA Trends: Crimes Alleged

Whereas only 12% of federal DPAs and NPAs in 2015 involved alleged violations of the federal Foreign Corrupt Practices Act (Figure 5), alleged FCPA violations were the predicate for more than one-third of all agreements reached in 2016 (Figure 6), including the large VimpelCom and Teva Pharmaceuticals agreements. The next-most-common crimes resolved through DPAs were alleged kickback schemes, including those alleged in

FIGURE 6.

Types of Federal DPAs and NPAs, 2016



Source: Gibson Dunn

the large agreements involving health-care companies Olympus Corporation and Tenet Healthcare.

DPA and NPA Trends: Prosecuting Divisions Involved

The fraud section of the DOJ’s Criminal Division negotiated 13 of 35 DOJ DPAs and NPAs in 2016, seven alone and six in combination with a regional U.S. Attorney’s Office. All but two of these involved alleged FCPA violations. The DOJ’s Tax and Antitrust Divisions each negotiated three NPAs.

Aside from the fraud section, the most active government office entering into DPAs and NPAs in 2016 was the Brooklyn-based U.S. Attorney’s Office for the Eastern District of New York, which entered into five agreements (two DPAs and two NPAs) involving alleged criminal frauds, FCPA violations, and antigambling offenses. Other field offices entering into multiple DPAs or NPAs were the U.S. Attorney’s Office for the District of New Jersey (three) and for the Southern District of California (two). The Securities and Exchange Commission, which lacks independent prosecutorial authority but nevertheless has been actively negotiating DPAs and NPAs in recent years, entered into two FCPA-related NPAs.

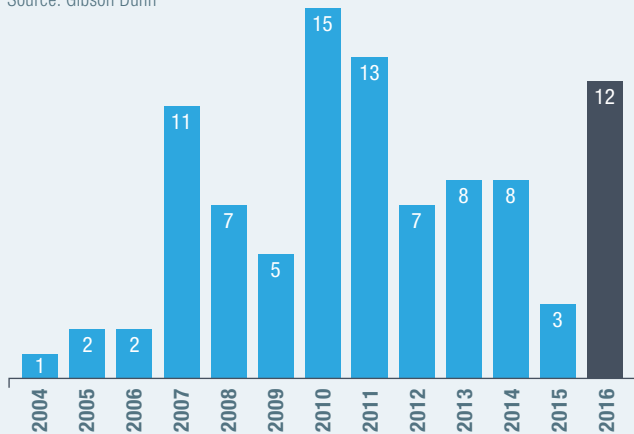
Qualitative Analysis: Policy Issues Arising from DPAs and NPAs

The two most common types of DPA and NPA entered into in 2016 involved alleged violations of the FCPA

FIGURE 7.

Number of Federal DPAs and NPAs Involving Alleged Violations of the Foreign Corrupt Practices Act

Source: Gibson Dunn



and the federal Anti-Kickback Statute in alleged conspiracies to defraud Medicare and Medicaid. This report first examines one DPA and one NPA resolving alleged FCPA violations: the \$795 million DPA with VimpelCom and a \$264 million NPA with JPMorgan Chase. The report then examines a third DPA under the FCPA that has a parallel alleged kickback scheme: a pair of DPAs with Olympus with payouts exceeding \$634 million.

Foreign Corrupt Practices Act Overview

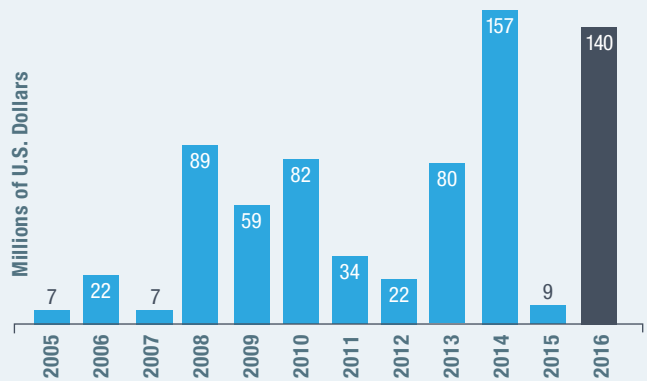
The 1977 Foreign Corrupt Practices Act²⁷ creates civil and criminal penalties for businesses and individuals who pay bribes to foreign officials. Congress's intent was clearly to deter American companies from buying foreign influence on a large scale—but not to police all foreign bribes potentially paid by U.S. businesses. Thus, the statute specifically exempts “facilitating payments” designed “to expedite or secure the performance of a routine governmental action by a foreign official.”²⁸ Notwithstanding this exemption, federal prosecutors have very broadly interpreted the FCPA's scope and limited its express exemption—a decision effectively insulated from judicial review, given companies' reluctance to take such matters to trial.²⁹

Alleged FCPA violations have constituted a significant percentage of all DPAs and NPAs entered into between companies and the federal government,³⁰ including 12% of all such agreements in 2015, 27% in 2014, and 29% in 2013. In 2016, 34% of all DPAs and NPAs negotiated by the DOJ involved alleged FCPA violations (and 38% of all federal DPAs and NPAs, including two negotiated by the SEC)—the greatest incidence of FCPA-related

FIGURE 8.

Average Fines and Penalties Imposed in FCPA Dispositions

Source: Gibson Dunn



enforcement since 2010 and 2011 (**Figure 7**). In 2016, the average penalty imposed through a DPA or NPA involving an alleged FCPA violation was \$140 million, significantly more than the average for all settlements (\$119 million) and more than in any previous year on record except 2014 (**Figure 8**).



Case Study 1: VimpelCom Ltd. DPA

Underlying Charges: FCPA violation³¹

Acceptance of Responsibility: Yes—accompanied by stipulation to Statement of Facts

Term of Agreement: Three years

Corporate Monitorship: Yes—three years

Total Monetary Penalties Paid Out: \$795,326,398.40 (\$460,326,398.40 to DOJ)³²

Summary of Alleged Offenses: VimpelCom is a Bermuda telecommunications corporation headquartered in Amsterdam, with annual revenues of \$9.78 billion.³³ The DOJ asserted jurisdiction based on the company's NASDAQ listing (VEON), because some of the payments passed through bank accounts located in New York, and because some of the individuals allegedly involved communicated using e-mail addresses that, at some point, were routed through U.S. servers.

According to the Statement of Facts agreed to by VimpelCom, the company acquired the Uzbeki companies Unitel and Buztel in 2005 and 2006 in



an effort to gain entry into the Uzbekistan market. Buztel was partly owned through a company held by an Uzbekistan public official. As part of this alleged scheme, VimpelCom acquired Buztel for \$60 million, entered into a \$37.5 million partnership agreement with the foreign official's company, and, through a subsidiary, paid the company \$25 million to acquire 3G telecommunications rights. The minutes of VimpelCom's December 13, 2015, meeting of the board of directors' finance committee show that the company's management recommended purchasing Buztel as well as Unitel because Buztel would be an "entry ticket" into the Uzbekistan market. A member of the committee questioned whether the Buztel acquisition was necessary and expressly raised "FCPA issues." On the next day, the board approved both the Buztel and Unitel transactions under the condition that the company obtain an FCPA opinion from an international law firm. The law firm certified the Buztel deal—though, according to the Statement of Facts, the law firm was not aware of the foreign official's indirect Buztel ownership.

Agreement Terms:³⁴ The DPA executed by the DOJ and VimpelCom is characteristic of others entered into to resolve FCPA enforcement actions. Through the agreement, VimpelCom waives its rights: (1) to an indictment; (2) to face a speedy trial; (3) to object to (a) venue and (b) the admissibility of the statement of facts; (4) to assert an expiration of the statute of limitations applicable to any law that is broken during the term of the agreement; (5) to raise any constitutional, procedural, or evidentiary claim; and (6) to contradict publicly anything in the statement of facts, including in any adjudication, even if in an unrelated civil proceeding. The agreement also contains a broad self-disclosure requirement that covers "all factual information not protected by a valid claim of attorney-client privilege, work product doctrine, or applicable foreign laws ... and national security laws and regulations."

As is typical in such agreements, the VimpelCom DPA gives the DOJ sole discretion to determine whether any part of the agreement has been breached. The company also agreed to hire, at its own expense, an "independent" monitor, reporting to the government. Finally, the company agreed that the DOJ can block any sale or change in corporate form that the department, in its sole discretion, determines would frustrate the agreement.

Discussion: The VimpelCom DPA involves a foreign

company allegedly bribing foreign officials. The asserted jurisdictional hooks are broad enough to include virtually any multinational company operating anywhere in the world, so long as it ever: (a) engaged in dollar-denominated transactions anywhere worldwide; or (b) ever sent an e-mail routed through a U.S.-based server.

VimpelCom is accused of violating the FCPA because a few of the corporation's managers and executives working for its foreign subsidiary in Uzbekistan made acquisition, partnership, and contract payments to an Uzbeki company to the tune of \$114 million over the course of several years. What the DOJ characterizes as "bribes" were indirectly paid to the foreign official through a shell company owned by an associate of the official, as well as through other reseller companies that, in turn, made payments to other companies that, in turn, made payments to the shell company. The purposes of these transactions were allegedly concealed from the company through the creation of fake invoices and contracts for the purchase of various assets and

consulting and professional services. The DOJ asserts that these payments were necessary for the company to operate in Uzbekistan.

The company's board took significant steps to ensure that the underlying transactions were FCPA-compliant. The transactions were approved only after both in-house and outside counsel, who did FCPA-specific analyses, approved the deals—although the Statement of Facts alleges that those legal opinions were the product of incomplete disclosures to the firms involved. The most questionable elements of VimpelCom's conduct were engaged in by a handful of individuals working for a foreign subsidiary and went undetected by the company's Board and C-suite only because they were covered up against company policy. It is not inconceivable that VimpelCom might have avoided liability had it fought the charges in court—a choice that the company could not entertain, owing to the overwhelming collateral consequences of a corporate conviction.

The terms under which VimpelCom agreed to hire a corporate monitor seem to deviate from the criteria articulated in the DOJ's "Morford Memorandum" (see box on page 13). Under that memo, a DPA should install a corporate monitor only upon a determination that a company's compliance program requires alterations. VimpelCom implemented an upgraded compliance program before entering into the DPA, and the monitorship terms imply that the company may not

THE VIMPELCOM DPA
GIVES THE DOJ SOLE DISCRETION
TO DETERMINE IF THE AGREEMENT
HAS BEEN BREACHED.

need to make any alterations to the program to ensure its ongoing success.³⁵

Case Study 2: JP Morgan Securities (Asia Pacific) NPA³⁸

Underlying Charges: FCPA violation

Acceptance of Responsibility: Yes

Term of Agreement: Three years

Corporate Monitorship: No (extensive self-reporting requirements)

Total Monetary Penalties Paid Out: \$264,491,405³⁹

Summary of Alleged Offenses: JP Morgan Securities (Asia Pacific) is a Hong Kong company wholly owned by JPMorgan Chase, a Delaware corporation. In 2001, the parent company adopted a policy that “prohibited the hiring of children or relatives of clients and potential clients in order to obtain business.” The Asia-Pacific subsidiary distributed a questionnaire outlining compliance with this policy. Beginning in 2007, Asia-Pacific investment bankers hired “client-referred” interns, analysts, and associates in certain instances, using “incorrect, misleading, and untruthful responses to the Compliance Questionnaire,” and in apparent violation of the company’s internal policy. In the NPA, the DOJ contends that these hires violated the FCPA provision that prohibits “the giving of *anything of value* to any foreign official” for certain purposes, including “to assist such issuer in obtaining or retain-

ing business.”⁴⁰ In some cases, as in the VimpelCom settlement, the DOJ suggests that the officials initiated the referrals and made clear that JP Morgan’s business was contingent upon the hires.

Agreement Terms: In resolving the DOJ’s criminal investigation, JPMorgan Chase agreed to pay \$72 million as a “penalty” and to disgorge \$130,591,405 in profits. The company agreed to fire or force the resignations of six employees and to discipline 23 others, and it sanctioned certain current and former employees \$18.3 million. The company began conducting new FCPA-specific and other compliance training; more than doubled its compliance budget; agreed to various new compliance programs and internal controls insisted upon by the government; and adopted new, quite onerous, hiring practices.

In addition, the agreement contains a noncontradiction clause—rather standard in DPAs and NPAs—that prevents the company from contradicting the statement of facts under any circumstances, including in litigation. The agreement also contains significant disclosure requirements that extend to basically anything that the DOJ asks for, so long as it is not protected by attorney-client privilege or the work-product doctrine. The agreement terms require the company to consent to the DOJ’s decision to share such information with any other governmental authorities, including foreign governmental authorities.

In keeping with ordinary practice under these agreements, JPMorgan waives all objections on constitu-

DOJ Guidance on Corporate Monitorships

In deciding whether to utilize a “corporate monitor” in a federal DPA or NPA, the DOJ purports to follow terms spelled out in a 2008 memorandum by the then-acting U.S. deputy attorney general, Craig S. Morford. The “Morford Memorandum” articulates nine principles when drafting such corporate-monitorship provisions into DPAs or NPAs. In 2010, then-acting deputy attorney general Gary Grindler added a 10th principle in a supplemental guidance.

Two key considerations for determining whether to impose a corporate monitor in a DPA or NPA are: (1) whether the corporation has a robust or “effective” compliance program; and (2) whether the corporation has ceased operations in the area where the alleged criminal misconduct occurred.

Once the decision to impose a monitor has been made, the monitor is charged with overseeing not the entirety of a DPA but only those provisions “specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct.”³⁶ The monitor’s duties should be “no broader than necessary to address and reduce the risk of recurrence of the corporation’s misconduct.”³⁷ However, the Morford Memorandum’s seventh principle indicates that corporate monitors are required to report misconduct that they discover, irrespective of whether such misconduct is related to the offense underlying the DPA.

The Morford Memo purports to allow companies to push back against a monitor’s recommendations. But it indicates that the government has sole discretion to determine whether a company’s refusal to adopt the corporate monitor’s recommendation violates the terms of the DPA itself. This makes corporate pushback against the monitor’s recommendations a decision fraught with risk.

tional, procedural, or evidentiary grounds. The DOJ retains sole discretion to determine whether JPMorgan has fulfilled its obligations under the agreement. Potential breaches include the company failing to cooperate with the government or deliberately providing “false, incomplete, or misleading information”; or committing “any acts that, had they occurred within the jurisdictional reach of the FCPA, would be a violation of the FCPA.”

Discussion: Unlike VimpelCom, the parent company in this NPA is undeniably an American business. Still, the underlying facts of the JPMorgan NPA are somewhat odd, in the context of the FCPA. There may be very good reasons for a company not to hire interns and lower-level employees, with an eye toward cultivating good favor in its book of business; but such decisions are usually left to the company alone to police—not to federal attorneys in the U.S. Justice Department. As described by Mike Koeller, a professor at the Southern Illinois University School of Law who specializes in the FCPA: “The underlying activity is legal and socially acceptable in most situations. In fact, it is often called effective sales and marketing, wining and dining the customer, or maintaining goodwill. Yet when such activity is focused, directly or indirectly, on a ‘foreign official’ the U.S. government is inclined to call it bribery.”⁴¹

The individuals whom JPMorgan hired were not themselves foreign officials; but their relatives, as well as the “foreign officials” at issue in almost every instance, qualified as such only because they work for a government-owned corporation. As Koeller argues, the federal government’s standard in this area has “moved far, far away from ‘foreign officials’ being a ‘well-defined group of persons.’”⁴² China—where the violations in this case took place—has more than 100,000 government-owned companies.⁴³ One of those companies, an aircraft engine manufacturer named Aero Engine Corporation of China, has 96,000 employees—all of whom are presumably “foreign officials” with whom an American company cannot deal in many of the ways reasonable people regard as unobjectionable.⁴⁴ To be sure, there may be situations in which a company’s hiring decisions would constitute FCPA-level bribes; but there are significant competitiveness effects to a decision to criminalize the hiring of interns who may be related to client-company personnel whenever those companies are state-owned enterprises.

Anti-Kickback Statute Overview

The original federal Anti-Kickback Statute was enacted as part of the Social Security Amendments of 1972⁴⁵ and later strengthened in 1977 through the Medicare-Medicaid Anti-Fraud and Abuse Amendments.⁴⁶ The Office of the Inspector General subsequently de-

veloped extensive rules and safe harbors under statutory authority.⁴⁷

Under the statutory scheme, it is a felony to offer or pay “any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person . . . to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program.”⁴⁸ To prove a violation of the statute, the government must show intent under a “knowing and willful” standard, though it need not establish actual knowledge of an Anti-Kickback Statute violation.⁴⁹ Federal courts interpreting the statute have divided over whether the government must show that the “primary purpose” of illegal payments was to generate referrals,⁵⁰ or whether “one purpose” may suffice.⁵¹

In 2016, the federal government entered into two agreements under this statute that deferred prosecution: a DPA between the DOJ’s Civil Division and the U.S. Attorney’s Office for the District of New Jersey with Olympus Corporation (in addition to a parallel DPA alleging FCPA violations by the company’s overseas subsidiaries); and an NPA between the DOJ’s Criminal Fraud Division and the U.S. Attorney’s Office for the Northern District of Georgia with Tenet Health-care.



Case Study 3: Olympus Corporation of the Americas DPAs

Underlying Charges: FCPA and Federal Anti-Kickback Statute⁵²

Acceptance of Responsibility: Yes

Term of Agreement: Three years

Corporate Monitorship: Yes (three years)

Total Monetary Penalties Paid Out: \$634,800,000

Summary of Alleged Offenses: Olympus Corporation is a Japanese company making camera equipment as well as medical equipment for doctors and hospitals. Olympus Corporation of the Americas is a New York subsidiary corporation principally located in Pennsylvania. Other of the company’s international subsidiaries are Olympus Latin America and Olympus Optical do Brazil, which distribute supplies and equipment made at the U.S. subsidiary in the Caribbean, Central America, and South America.

Beginning around 2007, the American company’s

grant committee made research grants to foundations controlled by hospitals that were customers of the company. The Statement of Facts agreed to by the company in the DPA specifies \$155,000 in grants awarded and specifies some evidence that company insiders viewed the grants as useful in securing the hospitals' business. The Statement of Facts also alleges that the companies paid for five doctors to visit Japan for medical conferences, and paid one such doctor—who was president of a professional organization—a \$10,000 speaking honorarium. The Statement of Facts also alleges that the company on occasion would “loan” expensive medical equipment free of charge to doctors and hospitals viewed to be potential or significant customers and that it paid at least one doctor believed to be influential in a hospital's purchasing decisions \$112,000 in consulting fees. According to the DPA, the “conspiracy” helped the company obtain some \$600 million in sales, generating a gross profit of \$230 million.

Over a similar period, the Latin American subsidiary identified “key opinion leaders” in the region who might influence decisions to purchase Olympus products and hired them to run training centers for the company. The company paid these individuals \$65,000 annually and offered them discounts on Olympus equipment. The company also offered a “miles program” to these individuals that facilitated their travel, including travel unrelated to training. The Statement of Facts asserts that the total value of these payments, including the miles program, was almost \$3 million, and that the company realized more than \$7.5 million in profits through the program.

Agreement Terms: The company entered into a DPA with the DOJ and a simultaneous Customer Integrity Agreement with the federal Department of Health and Human Services. It agreed to pay \$306 million in criminal penalties and an additional \$306 million as part of a concurrent civil settlement agreement. The company also paid \$22.8 million under the FCPA-related DPA with the foreign subsidiaries.

In addition, the company agreed to hire a new chief compliance officer and an executive director of medical affairs and to make 19 new compliance hires. It agreed to establish a Corporate and Social Responsibility Department and a Compliance Committee, and it replaced all members of its grant committee. And it agreed to

hire independent counsel and third parties to conduct a compliance-related risk assessment.

On top of these new hires and expenses, the company agreed to hire, at its own expense, an “independent” monitor reporting to the federal government—as well as any consultants, accountants, or other professionals the monitor deems fit to hire (though the company can dispute the budget for the latter with the U.S. Attorney's Office). The monitor has the power under the agreement to review all the company's payments, grants, consulting contracts, and dealings with any agents or business partners. The company is required to adopt *all* recommendations made by the monitor, subject to appeal only to the U.S. Attorney's Office.

Similar to most such agreements, the Olympus DPA includes a noncontradiction clause that prohibits the company from making “any public statement contradicting any fact” in the Statement of Facts, or be deemed in breach of the agreement. This prohibition extends to any civil litigation or regulatory disposition. As is usually the case, the government is the sole arbiter judging whether the agreement has been breached.

UNDER THE
GOVERNMENT'S THEORY,
THE U.S. DOJ IS SERVING
TO REGULATE PROCUREMENT PRACTICES FOR
STATE-RUN HEALTH-CARE PLANS WORLDWIDE.

Discussion: The FCPA-related agreements reached with the Olympus subsidiaries demonstrate some of the same issues present in the JPMorgan case. The U.S. government's jurisdiction under the FCPA hinges on the fact that Brazil has a socialized health-care

system and that the other Latin American countries involved have substantially public systems. Under the guise of the FCPA, the DOJ is policing alleged “payola”-style schemes⁵³ by foreign subsidiaries of foreign companies that have U.S. manufacturing operations. The alleged offenses were based not on payments to “foreign officials” as most people would normally understand the term but rather on the fact that the individuals receiving payments, as well as miles benefits from the companies, worked for government-run medical facilities.

Under the government's theory, the U.S. DOJ is serving to regulate procurement practices for state-run health-care plans worldwide—without any apparent consideration of the possible costs and benefits of its decisions. It is far from clear, based on law-and-economics theory, that the DOJ's FCPA theory is consistent with the most efficient procurement practices for foreign state-run health systems.⁵⁴ Moreover, the total cost of

the investigation and negotiation of Olympus's alleged FCPA offenses likely exceeded the total amount spent on its training centers and mileage program (less than \$3 million), if not the total profits that the DOJ alleges it made from the program (\$7.5 million).

The total sums involved in responding to the domestic anti-kickback portion of the Olympus case may also exceed the rather modest grants, travel and speaking fees, and honoraria alleged in the Statement of Facts—though not the alleged company profits of \$230 million. Notably, the cost of the penalty paid by Olympus Company of the Americas—\$612 million—exceeds the total sales that the company allegedly generated through its allegedly illegal promotional program. Of course, that sales figure, while agreed to by the company in the Statement of Facts, was never reviewed by a judge.

What the Olympus case shows is just how much the federal government micromanages the provision of health care in the U.S., notwithstanding the purportedly “private” nature of the American system. To be sure, Olympus's U.S. subsidiary undoubtedly had an inadequate compliance program prior to the investigation, and some of its practices clearly fell within those prohibited under U.S. law and regulation. And the federal government has at least some interest in ensuring that the products used in hospitals that are reimbursed under Medicare and Medicaid are supplied based on medical need and price, rather than personal perks given to hospital administrators and physicians.⁵⁵

Still, at least some of the practices engaged in by Olympus, if not the vast majority, seem rather innocuous. “Loaner” programs allowing hospitals to try out equipment before entering into large-scale purchasing decisions hardly shock the conscience, and such “try it out” equipment loans are commonplace in private-sector procurement. The cost of investigating and overseeing the grant committee surely exceeds \$155,000, the total value of research grants that it awarded that the government sees fit to question. And flying customers to overseas conferences in a corporation's home country, and entertaining them there, is the sort of behavior regularly engaged in by private-sector companies. In the aggregate, Olympus Corporation of the Americas is paying more than \$612 million, has hired at least 20 personnel and two senior executives, is

paying hefty sums to a corporate monitor who reports to the government for three years, and has created and shuffled board-level committees—because it directed less than \$200,000 in research grants to hospitals that were customers, flew a handful of doctors to conferences in Japan, and loaned equipment for tryout to hospitals that were considering large-scale purchases.

Comparative Analysis: DPAs in the United Kingdom and France

Until recently, the U.S. was alone in its large-scale pursuit of DPAs and NPAs. Indeed, many foreign nations' laws do not permit criminal prosecutions of corporate entities in any form.⁵⁶ 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.⁵⁷ The new British DPA practice took effect in 2014,⁵⁸ and the first British DPA was entered into in 2015 and discussed in last year's report.⁵⁹

In December 2016, France enacted the Law on Transparency, Fight against Corruption and Modernization of Economic Life,⁶⁰

commonly referred to as the “Sapin II” bill, after its principal advocate, French minister of finance Michel Sapin.⁶¹ The bill was seen in France as a response to criticisms about the country's lack of action taken against large French corporations to address allegedly corrupt practices—particularly with respect to conduct engaged in abroad, along the lines of that policed by the U.S. FCPA.⁶²

Deferred Prosecution Agreements in Britain

Under the U.K.'s deferred prosecution law, corporate criminal prosecutions require a showing of intent,⁶³ including evidence that such intent is attributable to someone representing the “directing mind and will of the company.”⁶⁴ The U.K.'s DPA authority is statutorily limited to economic crimes such as fraud, bribery, and money laundering—a far narrower scope of offenses than regularly invoked in the U.S.⁶⁵ The U.K. DPA Code of Practice sets out a two-stage test to determine whether a DPA is appropriate in the given circumstances:⁶⁶ (1) an evidentiary test;⁶⁷ and

THE U.K.'S DPA AUTHORITY IS STATUTORILY LIMITED TO ECONOMIC CRIMES SUCH AS FRAUD, BRIBERY, AND MONEY LAUNDERING—A FAR NARROWER SCOPE OF OFFENSES THAN REGULARLY INVOKED IN THE U.S.

(2) a “public interest” test requiring prosecutors to weigh “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.”⁶⁸

Judges review both phases of the process;⁶⁹ negotiations between prosecutors and the company must be well documented;⁷⁰ negotiations can proceed only with a judge’s approval, spelled out in a written, reasoned opinion.⁷¹ Any negotiated DPA is not effective until the judge approves the application and articulates the reasons for the decision, in open court.⁷² The statute ties any monetary penalties levied to the fine that a court would levy on the company if it pleaded guilty to the offense,⁷³ and statutory provisions spell out explicitly the process of appointing any corporate monitor, under judicial supervision.⁷⁴



Case Study 4: “XYZ” Ltd. DPA⁷⁵

Underlying Charges: Conspiracy to corrupt; conspiracy to bribe; failure to prevent bribery

Acceptance of Responsibility: Yes

Term of Agreement: 3–5 years⁷⁶

Corporate Monitorship: No

Total Monetary Penalties Paid Out: £6,553,085 (\$8,572,746 on the agreement date); of this penalty, £6,201,085 is a disgorgement of gross profits, almost £2 million of which is to be paid by the “innocent” parent company, “ABC”⁷⁷

Summary of Alleged Offenses: “XYZ” company is a small-to-medium-size enterprise based in the U.K. that does business abroad. Through a small group of four to seven employees and agents, the company offered or paid bribes to secure 28 contracts in foreign jurisdictions. All charges stem from the company’s self-reporting, following an internal investigation triggered by XYZ’s acquisition. The government and company agree that “there is no direct evidence of any illegal agreement between the agents concerned and the purported recipients of bribes,”⁷⁸ but e-mail correspondence in the record includes euphemisms for illegal conduct.

Judicial Analysis: As noted, a DPA in the U.K. must go before a judge at multiple stages in the process, unlike in U.S. practice. The judge overseeing the DPA for XYZ was Sir Brian Leveson, the same judge who oversaw the first British DPA with Standard Bank in 2015. Judge Leveson applied a six-factor test pursuant

to the enabling statute:

1. *Seriousness of offense.* Because the alleged scheme at issue took place over the course of eight years, the conduct was described by Judge Leveson as “endemic.” Moreover, the bribes in question were offered by company agents rather than solicited by foreign officials (as in the JPMorgan and Vimpel-Com cases). Thus, factor 1 seemed to weigh in favor of prosecution; although the fact that the bribes were allegedly instigated by XYZ’s *agents*, as opposed to at the behest of the corporation itself, seemed to mitigate this finding.
2. *Self-reporting.* Judge Leveson gave substantial weight to the fact that XYZ self-reported. In the eyes of the judge, “had it not been for the self-report, the offending might otherwise have remained unknown.”⁷⁹ Coupled with XYZ’s cooperation, factor 2 militated “very much in favour” of approving the DPA.⁸⁰
3. *Defendant’s criminal history.* Given that this was the corporation’s first offense, this factor weighed in favor of approving the DPA.
4. *Corporate compliance program.* The judge weighed this factor in the company’s favor. Prior to and during the period in which the offenses occurred, XYZ had no corporate compliance program—unsurprising, for a company its size—but after being acquired by ABC Corporation, the company implemented a compliance program that uncovered the alleged conduct, which led to the self-report.
5. *Changes in personnel and culture.* This factor also weighed in favor of XYZ because relationships with the offending agents were severed, and the acquisition of the company by ABC changed the corporate culture.
6. *Non-penal consequences.* The sixth and final factor is “whether a prosecution and conviction is likely to have disproportionate non-penal legal consequences for an organization.” The judge determined that this factor weighed heavily in the company’s favor: XYZ was in dire financial straits, “operating on an ‘economic knife-edge,’ ” and a conviction would lead to the company’s debarment from public contracting in the U.K. Both these facts, the court recognized, would risk XYZ’s solvency and, as a consequence, the interests of its workers, suppliers, and the broader community.⁸¹

Agreement Terms: In addition to more than £6.5 million in financial penalties, XYZ is bound by cooper-

ation and compliance terms under the agreement:

Cooperation. XYZ must cooperate in all matters relating to the conduct arising out of the circumstances at issue.

Compliance. XYZ will undertake a review of its existing internal compliance controls, policies, and procedures and implement any necessary changes. The Chief Compliance Officer will prepare annual reports that will be submitted to the British authorities detailing the anticorruption prevention measures and their implementations.

The company is required to reimburse the U.K. Serious Fraud Office—the enforcement agency—for the costs of its investigation.

Discussion: As was the case with the first DPA in the U.K., discussed in last year’s report,⁸² the new British process for entering into DPAs affords companies substantially more due process. In addition, the U.K. procedures give companies a strong incentive to comply with the law and self-report, given the express treatment given to compliance and self-reporting in the multifactor judicial analysis reviewing the DPA. Such considerations—as well as the analysis of whether a DPA is in the broader interests of justice⁸³—are presumably considered by U.S. prosecutors as they decide whether to enter into a DPA or NPA, but their assessments are never subjected to independent judicial review. Moreover, as suggested by the masked corporate names in the 2016 British DPA, companies in the U.K. are afforded the ability to mask their identities when entering into such agreements, with judicial approval.

In general, many disclosure and cooperation requirements in the U.K. mirror U.S. practice, including requirements that XYZ disclose information and materials in the company’s custody, possession, or control that are not subject to valid claims of privilege or other applicable legal protection. However, the U.K. disclosure provisions are more carefully cabined—and tied specifically to an enacted Code of Practice.⁸⁴ That DPAs’ terms are traceable to a statute that went through the political process is a marked departure from U.S. practice, where these complex negotiations with sweeping regulatory effect are treated as matters of prosecutorial discretion and have, to date, never been considered by Congress.

The New French Deferred Prosecution Law

The new Sapin II law⁸⁵ enacted at the end of last year in France prohibits conduct similar to that covered by the FCPA in the United States. The French law is unique in that it also imposes a significant compliance burden

on large companies *irrespective* of whether they have committed a violation; *and* any deviation from or failure to implement any aspect of the required compliance measures is a prosecutable offense under the act.

The new French compliance program applies to “companies that employ at least 500 people or that are part of a group with at least 500 employees and have an annual gross profit exceeding EUR 100 million.”⁸⁶ Required compliance measures include:⁸⁷

- A code of conduct defining and illustrating the types of prohibited behaviors—notably, bribery or influence peddling
- An internal system of alerts designed to enable employees to report any violations
- A regularly updated “risk mapping” designed to identify, analyze, and rank the company’s exposure to bribery-related risks
- An assessment of clients, providers, and intermediaries in light of the risk mapping
- A system of accounting controls designed to ensure that the company’s books and accounts are not used to conceal bribery
- A training system for managers and employees exposed to bribery risks
- Disciplinary sanctions against employees in case of violation of the code of conduct
- Internal control procedures to assess the efficiency of the compliance program

The mandatory prospective compliance program under the new French law departs from U.S. practice in the foreign-bribery arena (though such compliance requirements do exist in other specified areas of U.S. law, such as the corporate-governance rules enacted under the 2002 Sarbanes-Oxley Act).⁸⁸ In addition, the new French Anti-Corruption Agency created by Sapin II “will have the power to obtain any document or information on the company’s premises” to fulfill its mission of controlling and overseeing the implementation of compliance programs within the companies that are covered by the legislation.⁸⁹ In many ways, then, the new French law is substantially more sweeping than U.S. practice under the FCPA—at least for companies that have not yet come under investigation.

The French DPA Process

Sapin II authorizes public prosecutors to enter into a “public interest judicial agreement”—in essence, a DPA—with an entity accused of corruption, trading in influence, or laundering the proceeds of tax fraud.⁹⁰ Thus, notwithstanding the *ex-ante* regulatory sweep of Sapin II’s compliance provisions, the scope of criminal offenses that can result in a DPA in France—as in the U.K.—is much more limited than in the United States.

Also similar to the British system, all French DPAs must be reviewed and approved by a “Court of First Instance”⁹¹ after a public adversarial hearing. Companies also have the option of opting out of an agreement within 10 days of court approval.⁹² Financial penalties under the French DPA system are statutorily required to be “proportionate to the facts and profits derived from the offense, capped at 30% of the company’s average annual revenue for the previous three years.” All such agreements will also require the defendant company to indemnify, within one year, any identified victims. The statute also authorizes agreements that “implement a compliance program” for a period of up to three years.⁹³

Under the French DPA law, companies will not be required to admit guilt—a substantial departure from U.S. norms, in which companies regularly admit to a specified statement of facts that they cannot depart from, even from follow-on private litigation or in public press statements. Notwithstanding a settlement under the French law, company representatives “may still be held liable for the offenses committed.”⁹⁴

Conclusion

With a new administration in the White House, the shadow regulatory state is at a crossroads. General Sessions’s June 5 memorandum is correct in observing that DPAs and NPAs can be “a useful tool” for resolving corporate criminal allegations. Such agreements are certainly superior, in many instances, to indictments and prosecutions that could, owing to statutory collateral consequences, lead to the dissolution of large business enterprises that employ tens of thousands of employees, buy and sell from other companies, and constitute the investment portfolios of working and retired Americans’ pension plans.

Yet the need for DPAs and NPAs hardly implies that current U.S. practice is ideal and not in need of reform, beyond the much needed decision to eliminate settlement payouts to third parties. This report highlights some of the major problems with current DPA and NPA practice in the United States.

There is no inherent problem with businesses agreeing to settle cases without going to court, any more than with individuals doing so. But just as the multiplica-

tion of criminal laws combined with exceptionally long prospective sentences often leads innocent individual defendants to enter plea bargains,⁹⁵ so do corporations regularly enter into DPAs or NPAs even when legitimate defenses might have been raised in court, given that a criminal conviction might be a corporate death sentence. As discussed in this report, VimpelCom entered into a DPA in 2016, even though it might have plausibly argued in court that it should not be liable as a corporation for FCPA violations in Uzbekistan, since its board contemplated FCPA issues, and an outside international law firm wrote a legal opinion signing off on the challenged business transaction. Similarly, JPMorgan might plausibly have argued that its decision to hire interns and other low-level employees who were related to Chinese officials fell outside the FCPA, particularly given that executives at state-owned enterprises might not constitute “foreign officials” under the statute.

Were DPAs and NPAs limited to the paying of penalties to the government to resolve offenses, corporate decisions to forgo available legal defenses and settle their claims would be rather unremarkable. But such agreements go much further and give the government historically deep levels of ongoing oversight over the internal operations of major businesses—oversight not necessarily limited to policing the asserted conduct underlying the rationale for the agreements. Such oversight might have significant consequences with broad political or economic implications unforeseen by the young attorneys negotiating these agreements. In the Olympus Corporation of the Americas DPA, the DOJ

essentially asserts a bright-line rule that medical suppliers cannot loan out their equipment free of charge to prospective customers—a rule that might adversely affect the cost and quality of U.S. health care.

The \$512 million Tenet Healthcare NPA mentioned, but not studied in detail, in this report involved the for-profit hospital provider’s decision to sponsor free clinics that principally offered prenatal and maternal care to undocumented Latina mothers and pregnant women, given that these clinics also referred patients to Tenet hospitals. If such arrangements are forbidden under the federal Anti-Kickback Statute, what incentive do companies like Tenet have to offer free health care to vulnerable populations of pregnant women?

The British and French examples discussed in this report show that there are alternatives to current U.S. practice. The most notable distinction between

DPAs AND NPAs GIVE THE GOVERNMENT HISTORICALLY DEEP LEVELS OF ONGOING OVERSIGHT OVER THE INTERNAL OPERATIONS OF MAJOR BUSINESSES.

U.S. practice and the new DPA systems in Britain and France involves the foreign systems' insistence on clearly defined statutory boundaries and significant judicial oversight and review. Although U.S. law limits judicial incursion on prosecutorial discretion in charging decisions, Congress could limit the DOJ's ability to coerce defendant companies to take actions that are not defined expressly as statutory penalties—creating an avenue for potential judicial oversight.⁹⁶ Outside of congressional action, the DOJ could take internal steps limiting the scope of remedies used in DPAs and NPAs. DOJ rules should also require collaboration with other executive branch agencies—including Treasury, Commerce, and State—when such

remedies may create domestic or foreign collateral consequences.

The Sessions memorandum is an important step forward in curbing abuses in DOJ practice. Let's hope that it is only the first step.



Endnotes

- ¹ Atty. Gen. Jefferson B. Sessions, *Memorandum Re: Prohibitions on Settlement Payments to Third Parties* (June 5, 2017).
- ² For a discussion of the problem of settlement payouts to third parties, see Paul J. Larkin Jr., *Testimony Before the H. Judiciary Comm. Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, Feb. 26, 2015; Theodore H. Frank, *Statement Before the H. Judiciary Comm. Subcomm. on Regulatory Reform, Commercial, and Antitrust Law: Oversight of the Justice Department's Mortgage Lending Settlements*, 114th Cong. Feb. 12, 2015; James R. Copland & Isaac Gorodetski, *Bank of America Settlement the Latest—and Largest—Example of the Shadow Regulatory State*, Westlaw Commentary, Oct. 2014. For a discussion of the constitutional issues stemming from such payouts, see *Keepseagle v. Perdue*, 2017 U.S. App. LEXIS 8559 (D.C. Cir., May 16, 2017) (Rogers Brown, J., dissenting).
- ³ Laura Jarrett, *Jeff Sessions Ushers in "Trump Era" at the Justice Department*, CNN, Apr. 13, 2017.
- ⁴ See Sessions Memorandum, *supra* note 1.
- ⁵ Jacob Pramuk, *Trump Tells Business Leaders He Wants to Cut Regulations by 75% or 'Maybe More,'* CNBC, Jan. 23, 2017.
- ⁶ Cf. Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, Univ. of Va. Sch. of Law (cataloging federal organizational prosecution agreements) with Fortune 500 Companies 2017: Who Made the List, *Fortune*, 2017 (last visited Apr. 1, 2017) (listing companies on the Fortune 500 list for 2017).
- ⁷ See UVA database, *supra* note 6.
- ⁸ See 15 U.S.C. § 78dd-1 (2015).
- ⁹ See *United States v. HSBC Bank, USA, N.A.*, 2013 WL 3306161 (E.D.N.Y., July 1, 2013) ("Both parties assert that the Court lacks any inherent authority over the approval or implementation of the DPA. They argue that the Court's authority is limited to deciding, in the present, whether to invoke an exclusion of time under the Speedy Trial Act").
- 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).
- ¹² See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005).
- ¹³ Eric Holder, *Memorandum Re: Bringing Criminal Charges Against Corporations* (June 16, 1999); Larry D. Thompson, *Memorandum Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003); Paul J. McNulty, *Memorandum Re: Principles of Federal Prosecution of Business Organizations*; Mark Filip, Letter to Senators Patrick J. Leahy and Arlen Specter (July 9, 2008).
- ¹⁴ See Sally Quillian Yates, *Memorandum Re: Individual Accountability for Corporate Wrongdoing* (Sep. 9, 2015).
- ¹⁵ 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).
- ¹⁶ James R. Copland & Isaac Gorodetski, *The Shadow Lengthens: The Continuing Threat of Regulation by Prosecution*, Manhattan Inst. for Pol'y Res., Leg. Pol'y Rep. No. 18 (Feb. 2014).
- ¹⁷ James R. Copland & Isaac Gorodetski, *Without Law or Limits: The Continued Growth of the Shadow Regulatory State*, Manhattan Inst. for Pol'y Res., Leg. Pol'y Rep. No. 19 (Mar. 2015).
- ¹⁸ James R. Copland & Rafael A. Mangual, *Justice Out of the Shadows: Federal Deferred Prosecution Agreements and the Political Order*, Manhattan Inst. for Pol'y Res. (June 2016).
- ¹⁹ James R. Copland, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*, Manhattan Inst. for Pol'y Res., Civ. Just. Rep. No. 13 (Dec. 2010).
- ²⁰ 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).
- ²¹ 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).
- ²² 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).
- ²³ 15 U.S.C. § 78dd-1, et seq.
- ²⁴ See, generally, Manhattan Inst. for Pol'y Res., *Overcriminalizing America*.
- ²⁵ See James R. Copland, *What's Wrong—and Right—with New York Criminal Law*, ONE NATION UNDER ARREST 173 (Paul Rosenzweig & Brian W. Walsh, eds., 2010).
- ²⁶ See *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, Gibson Dunn (Jan. 5, 2016).
- ²⁷ Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494, codified as amended at 15 U.S.C. §§ 78-dd-1 (2010).
- ²⁸ 15 U.S.C. § 78dd-1(b), 78dd-2(b), 78dd-3(b).
- ²⁹ See Enzinna, *supra* note 22.
- ³⁰ See Copland, *supra* note 15; Copland & Gorodetski, *supra* note 16; Enzinna, *supra* note 22.
- ³¹ 15 U.S.C. §§ 78dd-1, 78m(b)(2)(A)&(B), 78m(b)(5), 78ff(a), 78m(b)(2)(B).
- ³² \$460,326,398.40 of this sum was under the DPA itself, \$40 million of which was criminally forfeited.
- ³³ DPA, U.S. Dep't Justice, *Re: United States v Vimpelcom Ltd. Deferred Prosecution Agreement*, Feb. 10, 2016.

- ³⁴ *Id.*
- ³⁵ *Id.* According to the VimpelCom DPA: “[The Monitor] may focus on those areas with respect to which the Monitor wishes to make recommendations, if any, for improvement or which the Monitor otherwise concludes merit particular attention.” I.e., the DOJ is acknowledging that an independent monitor might well determine that no improvements need be made; but whether a monitor is imposed is supposed to be based on a determination that improvements do need to be made.
- ³⁶ Craig S. Morford, *Memorandum Re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (Mar. 7, 2008).
- ³⁷ *Id.*
- ³⁸ NPA, U.S. Dep’t Justice, Re: *JP Morgan Securities (Asia Pacific) Limited Criminal Investigation*, Nov. 17, 2016.
- ³⁹ According to the agreement, the penalties amount to \$72 million and a disgorgement of profits amounting to \$130,591,405. See *2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, Gibson Dunn (Jan. 4, 2017).
- ⁴⁰ 15 U.S.C. § 78dd-1(a).
- ⁴¹ *Why the Meaning of “Foreign Official” Matters*, FCPA Professor, Nov. 2, 2016.
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ *Id.* To the extent that the DOJ insists on such a broad interpretation, the FCPA as applied may be overbroad. In *Yates v. United States*, the Supreme Court applied a statutory provision in the corporate-governance-related Sarbanes-Oxley Act of 2002 that prohibited the destruction, alteration, or mutilation of “any ... tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” The Court ruled that the provision could not be applied to the decision of a commercial fisherman to throw back undersize fish in an apparent attempt to evade federal fisheries enforcement.
- ⁴⁵ See Pub. L. 92-603, 86 Stat. 1329 (1972).
- ⁴⁶ See Pub. L. 95-142, 91 Stat. 1175 (1977).
- ⁴⁷ See *Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute; Final Rule*, 64 Federal Register 63,518, Nov. 19, 1999.
- ⁴⁸ 42 U.S.C. § 1320a-7b(b)(2)(B).
- ⁴⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6402(f)(2), 124 Stat. 119 (2010).
- ⁵⁰ See, e.g., *U.S. v. Greber*, 760 F.2d 68, 69 (3rd Cir. 1985), cert. denied, 474 U.S. 988 (1985); *U.S. v. Davis*, 132 F.3d 1092 (5th Cir. 1998); *U.S. v. Kats*, 871 F.2d 105 (9th Cir. 1989); *U.S. v. McClatchey*, 217 F.3d 823 (10th Cir. 2000).
- ⁵¹ See, e.g., *U.S. v. Bay State Ambulance and Hospital Rental, Inc.*, 874 F.2d 20, 32 (1st Cir. 1989).
- ⁵² See 42 U.S.C. § 1320a-7b.
- ⁵³ In a classic article, Nobel laureate Ronald Coase defended the economic efficiency of “payola” arrangements. See Ronald Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & Econ. 269 (1979).
- ⁵⁴ See *id.*
- ⁵⁵ Nevertheless, the efficiency of some such arrangements is likely, depending on their structure. See *id.*
- ⁵⁶ See Copland, *supra* note 19.
- ⁵⁷ See U.K. Crime and Courts Act, 2013, c. 44, § 45, sch. 17.
- ⁵⁸ Peter Luscomb, *Deferred Prosecution Agreements Are on the Way*, Financial Director, Oct. 9, 2013.
- ⁵⁹ See Copland & Mangual, *supra* note 18.
- ⁶⁰ *Loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, No. 2016-1691, French Official Gazette, No. 0287 (Dec. 10, 2016); see Gibson Dunn, *supra* note 39.
- ⁶¹ Benedicte Graulle et al., *The Sapin II Bill: A Potential Game-Changer in French Corruption Enforcement*, Jones Day, May 2016.
- ⁶² *Id.*
- ⁶³ Samuel Rubinfeld, *U.K. to Release Guidance on Deferred-Prosecution Agreements*, WALL STREET J., June 26, 2013.
- ⁶⁴ *Corporate Prosecutions*, Crown Prosecution Service, U.K.; *2013 Mid-Year FCPA Update*, Gibson Dunn, June 8, 2013 [hereinafter Gibson Dunn 2013 Mid-Year]. An exception to the U.K.’s identification principle are its rules involving bribery, which were recently modified in 2010. See Section 7 (1) Bribery Act 2010 Failure of commercial organization to prevent bribery (“A relevant commercial organization (“C”) is guilty of an offence ... if a person (“A”) associated with C bribes another person intending to obtain or retain business for C.... But it is a defence for C to prove that C had in place adequate procedures”); Patrick Rappo et al., *UK Legislation Permitting Deferred Prosecution Agreements Is Approved*, Steptoe & Johnson LLP, Apr. 29, 2013.
- ⁶⁵ See Rappo et al., *supra* note 64.
- ⁶⁶ *Deferred Prosecution Agreements Code of Practice*, Serious Fraud Office.
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*
- ⁶⁹ See Gibson Dunn 2013 Mid-Year, *supra* note 64.
- ⁷⁰ *Id.*
- ⁷¹ See U.K. Crime and Courts Act, *supra* note 57, sch. 7, part 1, ¶ 7(2).

- ⁷² See *id.*, sch. 7, part 1, ¶¶ 8(3), 8(6).
- ⁷³ See *id.*, sch. 7, part 1, ¶ 5(4); *Code of Practice*, *supra* note 66, at 15.
- ⁷⁴ See *id.* at 12–13.
- ⁷⁵ Redacted Approved Judgment, *Serious Fraud Office v. XYZ Ltd.*, Aug. 7, 2016.
- ⁷⁶ *Id.* at ¶ 35.
- ⁷⁷ See *id.* at ¶¶ 46–61, which lay out in detail how the fines and disgorgement requirements were calculated pursuant to the formula set out in the statute that authorizes DPAs as a means to settle criminal disputes between the government and corporate entities.
- ⁷⁸ *Id.* at ¶ 8.
- ⁷⁹ *Id.* at ¶ 25.
- ⁸⁰ *Id.* at ¶ 27.
- ⁸¹ *Id.* at ¶ 32.
- ⁸² See Copland & Mangual, *supra* note 18.
- ⁸³ See *Code of Practice*, *supra* note 66, at 17.
- ⁸⁴ See *id.* at 10.
- ⁸⁵ *Loi relatif à la transparence*, *supra* note 60.
- ⁸⁶ See Graulle, *supra* note 61, at 2.
- ⁸⁷ Ludovic Malgrain & Jean-Lou Salha, *Update on Sapin II* (White & Case, Jan. 10, 2017).
- ⁸⁸ See, generally, Sarbanes–Oxley Act of 2002, Pub.L. 107–204, 116 Stat. 745.
- ⁸⁹ Malgrain & Salha, *supra* note 87.
- ⁹⁰ Gibson Dunn, *supra* note 39, at 13–14.
- ⁹¹ *Id.* at 14.
- ⁹² *Id.*
- ⁹³ Malgrain & Salha, *supra* note 87.
- ⁹⁴ *Id.*
- ⁹⁵ See Lucian E. Dervan & Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013); see also Lucian E. Dervan, *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J. L. ECON. & POL'Y 645 (2011).
- ⁹⁶ See Mark Chenoweth, *DC Circuit's "Fokker" Decision Preserves the Separation of Powers, but Raises a Concern About DPAs*, FORBES.COM, Apr. 11, 2016.

Abstract

This report analyzes the current state of play in federal use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Case studies examine three 2016 agreements involving hundreds of millions of dollars in company payouts to the federal government—involving the Dutch company VimpelCom’s business dealings in Uzbekistan, the U.S. company JPMorgan Chase’s hiring of interns related to the leaders of state-owned Chinese businesses, and the Japanese company Olympus’s efforts to sell equipment to U.S. and Latin American hospitals. The report looks also at the U.K.’s second DPA law and France’s new DPA law.

Key Findings

1. In 2016, the DOJ entered into 35 DPAs and NPAs—the most since 2012, excluding the many Swiss banks reaching common NPAs last year through a program resolving overseas tax claims. The Securities and Exchange Commission entered into two more. Total payments under these agreements were \$4.6 billion.
2. In addition to requiring large payouts, nine federal DPAs and NPAs in 2016 placed a “corporate monitor” in the company (at company expense) who reported back to the government. No statute authorizes such sweeping government authority over internal company operations, nor would the government be able to insist on changes to business practice if it successfully convicted the company in court.
3. In 2016, a plurality of the agreements involved alleged violations of the Foreign Corrupt Practices Act (FCPA), which, in practice, empowers the government to police corporate activity abroad with little nuance about expected norms in non-U.S. environments.
4. There are alternatives to current U.S. practice. Deferred prosecution agreements in Britain and France are subject to significant judicial oversight and review and must follow clearly defined statutory boundaries. Although U.S. law limits judicial incursion on prosecutorial discretion in charging decisions, Congress could limit the DOJ’s ability to coerce defendant companies to take actions that are not defined expressly as statutory penalties—creating an avenue for potential judicial oversight. The DOJ could take internal steps limiting the scope of remedies used in DPAs and NPAs. DOJ rules could, and should, also require collaboration with other executive branch agencies—including Treasury, Commerce, and State—when such remedies may create domestic or foreign collateral consequences.