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MI

REPORT

JUSTICE OUT OF THE SHADOWS

FEDERAL DEFERRED PROSECUTION AGREEMENTS AND THE POLITICAL ORDER

THE
SHADOW
REGULATORY
STATE

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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
I. Introduction.....	5
II. By the Numbers: Federal DPA and NPA Trends, 2015.....	7
III. Policy Issues Arising from DPAs and NPAs	10
IV. The First U.K. Deferred Prosecution Agreement and the Possibilities for U.S. Reform.....	14
Endnotes	18

Executive Summary

Each year, the Department of Justice (DOJ) and other federal agencies enter into scores of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) with businesses. They differ in form rather than substance. DPAs involve cases in which criminal charges have been filed, and the DOJ asserts that judicial oversight is limited to ensuring their compliance with the Speedy Trial Act, an understanding that was recently embraced by a federal appellate court. NPAs are entered into without the filing of any formal criminal charges, and no judge ever reviews their contents.

Federal DPAs and NPAs with corporations were unheard of for most of American history: the first was entered into between the DOJ and Salomon Brothers in 1992, the last year of the George H. W. Bush administration. Since then, their numbers have grown dramatically. Eleven DPAs and NPAs were entered into during the first Clinton administration, 130 during the George W. Bush administration, and 290 during the first seven years of the Obama administration.

Since the beginning of 2010, 17 of America's 100 largest companies, as ranked by *Fortune* magazine, have been operating under a DPA or an NPA. In 2015, the federal government entered into 100 such agreements—a record—and companies paid out more than \$6 billion under their terms without any guilty plea or adjudication. Seventy-five involved NPAs reached with banks under the “Swiss Bank Program,” a joint effort by the DOJ and the Swiss Federal Department of Finance to induce Swiss banks to turn over account and transaction data to the U.S. government to facilitate tax enforcement under the 2010 Foreign Account Tax Compliance Act. The three largest agreements in 2015 were DPAs with General Motors, Commerzbank, and Deutsche Bank, which involved total fines of \$900 million, \$1.5 billion, and \$2.4 billion, respectively.

The fines are the least unusual parts of these agreements. Were DPAs and NPAs limited to extracting monies from the corporate coffers, they would approximate normal criminal-law practices in which defendants regularly agree to avoid prosecution through paying civil penalties or various other types of trial diversion or plea arrangements. DPAs and NPAs that the government reaches with companies, however, involve significant oversight and supervision—even dramatic restructurings of business practice, including changing top management personnel and compensation; wholesale modifications of sales and marketing strategies; and the hiring of “independent” monitors with vast oversight powers, paid out of corporate coffers but reporting to prosecutors. No such changes to business practice are authorized by statute. Nor would they be a punishment available to the government after a corporate conviction.

Faced with threatened criminal charges, most companies agree to settle because the collateral consequences of a conviction (or often, even an indictment) are so harsh—in many cases, they amount to a corporate death sentence. When statutory provisions threaten to bar government contractors from doing business with the government, to exclude pharmaceutical companies from reimbursement under Medicare or Medicaid, or to strip banks of banking licenses and securities firms from securities trading, corporate officers and directors have little choice but to accept prosecutorial demands. Even without statutory collateral consequences, criminal prosecutions distract senior management, pummel stock prices, and can inhibit companies' capacity to obtain credit. For those who choose to resist, government prosecutors bring heavy pressure to bear. UPS agreed to a \$40 million NPA in 2013 for charges related to delivering packages from illegal Internet pharmaceutical companies. FedEx refused to enter into a DPA or an NPA and has been indicted under the same theory, with the government seeking \$1.6 billion in fines.

Some of the DPAs and NPAs discussed in this report involve legitimate government and prosecutorial interests. The government has a strong interest in preventing tax evasions, so the policy rationale underlying the Swiss Bank Program is understandable. The conduct underlying the General Motors DPA—the sale and marketing of vehicles with faulty ignition switches, for years after the defect was known—was reprehensible. Even so, DPAs and NPAs raise serious legal and policy issues. By examining four cases, this report focuses on the kinds of issues that regularly arise:

- 1. National sovereignty.** The DOJ regularly polices activities by foreign corporations, with little apparent regard for the foreign-policy implications of its efforts.
- 2. Free speech.** DPAs and NPAs often require companies to agree to statements of facts and include “non-contradiction clauses” that restrict corporate speech, including in civil litigation.
- 3. Deputizing private businesses to undertake law-enforcement activities.** The DOJ uses the threat of prosecution to enlist corporations to police misconduct—even that of third-party contractors and vendors—without clear statutory authorization.
- 4. Lack of judicial oversight and transparency.** NPAs lack any judicial oversight and DPAs' judicial review is limited to enforcing the procedural terms of the Speedy Trial Act, which means that the DOJ's actions are essentially unilateral.

JUSTICE OUT OF THE SHADOWS

FEDERAL DEFERRED PROSECUTION AGREEMENTS AND THE POLITICAL ORDER

I. Introduction

Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are pretrial diversion programs that the federal government has increasingly used to resolve criminal allegations against large publicly traded companies. NPAs are entered into before a charge is formally levied; DPAs are entered into after a charge has been filed. Although DPAs may generally be more complex and involve higher fines and penalties, the principal distinction between the two types of agreements is nomenclature and procedure, rather than substance.

We at the Manhattan Institute have dubbed the new federal practice of controlling corporate behavior through DPAs and NPAs “the shadow regulatory state,” but the practice, to some extent, is emerging from the shadows. In addition to MI’s continuing efforts to shine light on these agreements (see box), *The Economist* magazine and Public Citizen each attacked the practice in the summer of 2014—the former comparing the government’s practice to mafia shakedowns¹ and the latter suggesting that these agreements let companies off too easy.² University of Virginia law professor Brandon Garrett also published a book on the subject, *Too Big to Jail: How Prosecutors Compromise with Corporations*,³ in the fall of 2014.

On April 15, 2015, Senator Elizabeth Warren of Massachusetts joined Public Citizen’s critique from the left, claiming that DPAs and NPAs are “get-out-of-jail-free cards for the biggest corporations in the world.”⁴ Of course, companies cannot go to jail, but the DOJ—responding to Warren and other critics who have suggested that the government was pursuing high-profile and high-dollar settlements with companies at the expense of prosecuting individual wrongdoers for crimes—issued a clarifying memorandum on September 9.⁵ The memo, issued by U.S. deputy attorney general Sally Quillian Yates, was the fifth such directive since 1999, when Eric Holder (then deputy attorney general under President Clinton) set in motion the DOJ’s modern DPA practice.⁶ 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.⁷

It is too soon to assess the impact of the Yates memorandum, but the regulatory impact of federal DPAs and NPAs is already vast. Unknown before 1992 and rare before 2004, the federal government entered into 100 such agreements in 2015. Since the beginning of 2010, the federal government has entered into DPAs or NPAs with the parent companies or subsidiaries of 17 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, General Motors, Google, Hewlett-Packard, Johnson & Johnson, JPMorgan Chase, Merck, MetLife, Pfizer, Tyson Foods, United Parcel Service, United Technologies, and Wells Fargo.⁸

These agreements often cover a broad scope of business activity and regularly mandate significant changes to business practices, such as firing key employees, including chief executives, and modifying compensation plans; hiring new corporate officers or “outside” corporate monitors that are given broad investigatory and oversight powers but report to the prosecutor; and modifying sales and marketing practices. Their terms regularly constrain corporations from contradicting the prosecutors’ alleged statements of fact in the future—placing the corporate officers’ speech and even defense tactics in civil litigation under the discretion of prosecutors. Finally, DPAs typically vest with the prosecutor sole authority to determine whether a company has complied with or breached their terms. The DOJ takes the legal position that judges’ only power with respect to DPAs is to ensure their compliance with the Speedy Trial Act.⁹ NPAs never come before a judge because they do not involve the formal filing of charges.

The rise in DPAs and NPAs can be largely traced to the federal government’s ill-fated indictment of Arthur Andersen in 2002 for its Enron bookkeeping. The indictment prompted the former “Big Five” accounting firm to collapse,¹⁰ long before the U.S. Supreme Court overturned its conviction.¹¹ Hoping to head off such collapses in the future, deputy attorney general Larry Thompson released a January 2003 memorandum that called for corporate and DOJ cooperation,¹² and the shadow regulatory state was born.

As they are in little position to fight a federal prosecution, companies regularly accede to NPAs and DPAs. Various federal statutes contain serious collateral consequences for a company in the event of a corporate criminal conviction, or even an indictment. These include loss of rights to enter into government contracts, to be reimbursed by government-run health programs, or to maintain licenses required to operate.¹³ Such prospective penalties give prosecutors enormous leverage because an unsuccessful criminal defense would, in many instances, constitute an effective corporate death sentence. Like Don Corleone, the DOJ is essentially making companies an offer they can’t refuse.¹⁴

Section II of this report looks quantitatively at DPAs and NPAs entered into in 2015. **Section III** looks qualitatively at various DPAs, NPAs, enforcement actions, and judicial rulings with an eye toward key policy issues. **Section IV** looks at the first DPA entered into by the United Kingdom, which recently authorized DPAs by statute, with requirements of procedural fairness and transparency largely lacking in U.S. practice, and concludes with possibilities for congressional reforms.

Previous Manhattan Institute Research on the Subject

This report is the fourth 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 and 2015 (*Without Law or Limits: The Continued Growth of the Shadow Regulatory State*, by Copland and Gorodetski).¹⁷

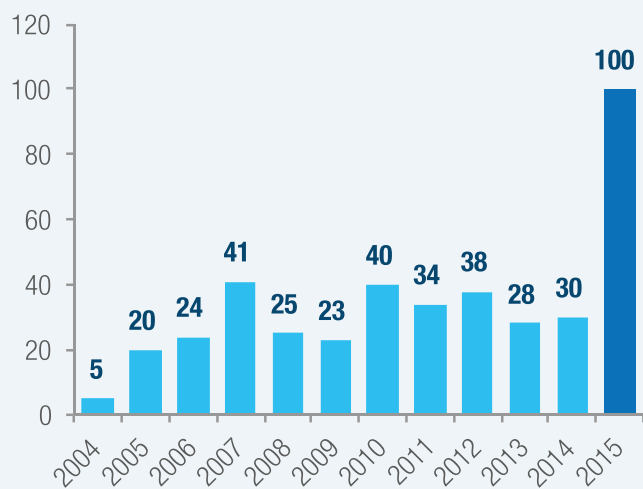
Coauthor Copland began his study of federal DPAs and NPAs in a 2010 report, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*,¹⁸ which explored the broader question of corporate criminal liability in historical and international perspective. That paper followed a 2009 report by former Manhattan Institute senior fellow Marie Gryphon (Newhouse), *It’s a Crime? Flaws in Federal Statutes That Punish Standard Business Practice*,¹⁹ 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 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);²⁰ and one by criminal defense attorney Paul Enzinna,²¹ examining trends in federal enforcement under the Foreign Corrupt Practices Act (FCPA).²² Copland has also authored or coauthored reports applying these principles in the state context, in North Carolina, Michigan, South Carolina, and Minnesota,²³ as well as a book chapter on New York.²⁴

II. By the Numbers: Federal DPA and NPA Trends, 2015

In 2015, the federal government entered into a record 100 DPAs and NPAs with businesses in 2015, well over twice as many as any previous year (**Figure 1**). This large increase was driven by the large number of settlements reached through the Swiss Bank Program, which involved 75 banks; excluding the Swiss Bank Program, the federal government entered into only 25 DPAs and NPAs—slightly fewer than in recent years but well within the norm over the past decade (**Figure 2**). Following the Yates memorandum on September 9, 2015, the government entered into only five DPAs and NPAs, excluding the Swiss Bank Program, through year-end, below recent trends. The government did, however, announce the majority of the Swiss Bank Program agreements during the period—43 of 75 NPAs—so it would be premature to conclude that the Justice Department is turning away from the DPA model post-Yates.

FIGURE 1.

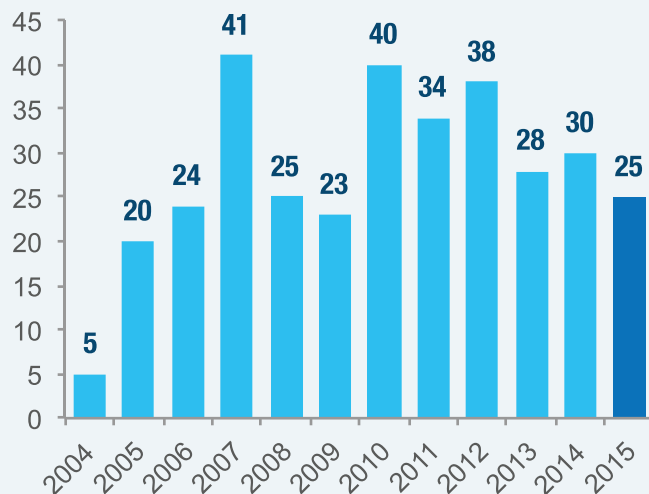
Federal DPAs and NPAs, 2004–15



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

FIGURE 2.

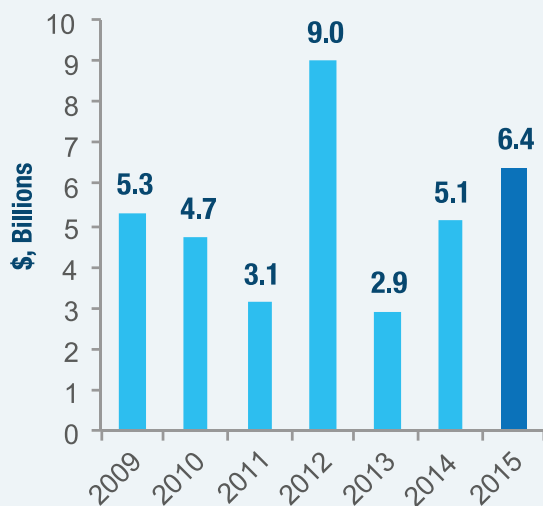
Federal DPAs and NPAs, 2004–15 (Excluding the Swiss Bank Agreements in 2015)



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

FIGURE 3.

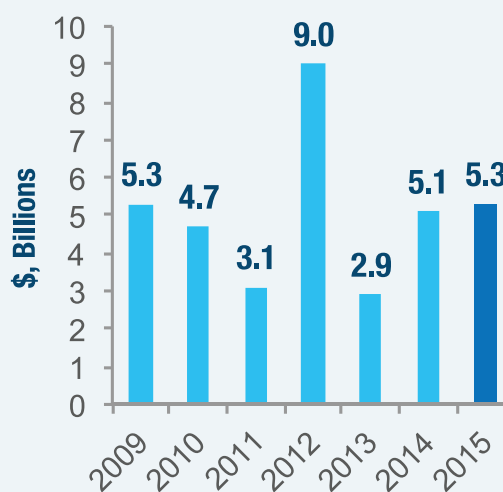
Fines and Penalties Under Federal DPAs and NPAs, 2009–15



Source: Gibson Dunn

FIGURE 4.

Fines and Penalties Under Federal DPAs and NPAs, 2009–15 (Excluding the 2015 Swiss Bank Agreements)



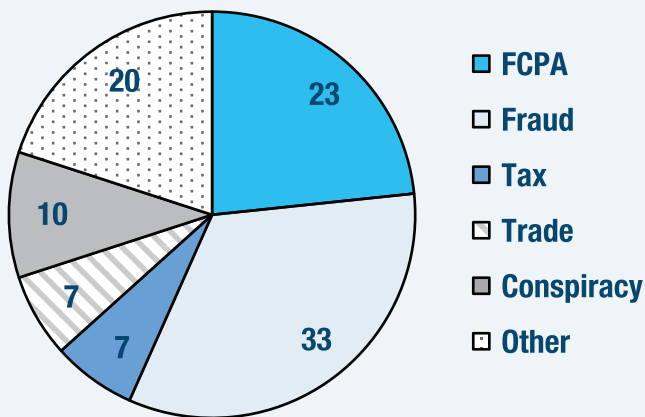
Source: Gibson Dunn

The amount of fines and penalties imposed under federal DPAs and NPAs in 2015, \$6.4 billion, was higher than any other year on record save 2012 (**Figure 3**).²⁵ Even excluding the Swiss Bank Program agreements, the fines and penalties were at near-record levels (**Figure 4**). Three settlements each individually approached or exceeded \$1 billion in fines:

- ◆ A September 16, 2015 agreement with **General Motors** resolving criminal allegations that the company committed wire fraud and schemed to defraud a federal regulator, relating to the company's manufacture of faulty ignition switches (\$900 million)
- ◆ An April 23, 2015 agreement with **Deutsche Bank** resolving criminal allegations that the company committed wire fraud and antitrust violations, relating to the company's alleged scheme to fix interest rates including the London Interbank Offered Rate (LIBOR) (\$625 million to resolve claims with the Department of Justice and a total of \$2.4 billion in overall settlements with various government entities, foreign and domestic)
- ◆ A March 11, 2015, agreement with **Commerzbank** resolving criminal allegations that the company violated the International Emergency Economic Powers Act (IEEPA) and the Bank Secrecy Act, relating to the company's processing of transactions with companies doing business with Iran (almost \$1.5 billion in total fines and forfeitures)

FIGURE 5.

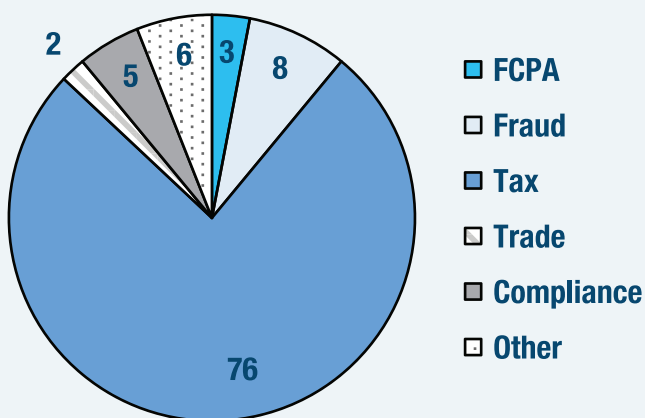
Types of Federal DPAs and NPAs, 2014 (%)



Source: Gibson Dunn

FIGURE 6.

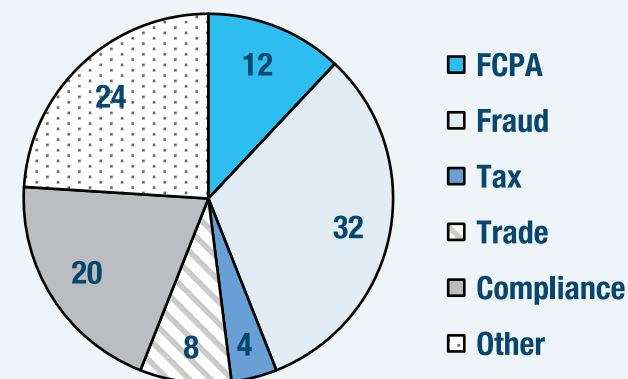
Types of Federal DPAs and NPAs, 2015 (%)



Source: Gibson Dunn

FIGURE 7.

**Types of Federal DPAs and NPAs, 2015 (%),
Excluding Swiss Bank Agreements**



Source: Gibson Dunn

Crimes Alleged

In contrast with 2014—when most federal DPAs and NPAs involved alleged frauds and violations of the federal Foreign Corrupt Practices Act (**Figure 5**)—76 percent of 2015 agreements involved tax offenses, all but one of which were under the Swiss Bank Program (**Figure 6**). Excluding the Swiss Bank Program agreements, 32 percent of DPAs involved various fraud allegations (**Figure 7**)—in line with 2014 (33 percent) and up from 28 percent in 2012–13 and 20 percent in 2010–11.

Agreement Structure and Prosecuting Divisions

Excluding the Swiss Bank Program settlements, 13 of 25 agreements in 2015 were structured as DPAs and 12 as NPAs. All Swiss Bank Program agreements were structured as NPAs. In comparison, two-thirds of 2014 agreements involved DPAs, as did 55 percent of agreements reached between 2010 and 2013. None of the Swiss Bank Program agreements involved the appointment of a corporate monitor, but ten of the remaining 25 agreements did, more than in any of the three preceding years.

As might be expected in light of the Swiss Bank Program, the vast majority of the 2015 agreements—75 NPAs—were led by the DOJ’s Tax Division. The DOJ’s Fraud Division entered into two agreements, one DPA and one NPA, the former the massive agreement with Deutsche Bank resolving alleged interest-rate (LIBOR) price fixing. The most active U.S. attorney’s offices entering into DPAs or NPAs in 2015 were:

- ◆ The Eastern District of North Carolina, which entered into four NPAs with software companies resolving allegations that their antigambling compliance efforts were inadequate
- ◆ The Central District of California, which entered into two DPAs and one NPA resolving allegations under the False Claims Act, money-laundering “suspicious activities” compliance, and environmental claims
- ◆ The Eastern District of New York, which entered into one DPA and one NPA with two construction companies to resolve alleged overbilling frauds
- ◆ The Southern District of New York, which entered into one DPA and one NPA over fraud claims, including the General Motors ignition-switch DPA

The Securities and Exchange Commission entered into only one DPA in 2015, with a Florida engineering firm accused of paying bribes in Qatar.

III. Policy Issues Arising from DPAs and NPAs

Four case studies taken from recent DPAs and NPAs illustrate the serious legal and policy issues that arise from the Department of Justice's growing use of these agreements.

- 1. National sovereignty.** The DOJ's enforcement activities against foreign corporations for foreign conduct implicates foreign policy. The **Swiss Bank Program**, for example, contradicted a formal vote of the Swiss federal legislature.
- 2. Free speech.** "Non-contradiction" clauses in DPAs and NPAs restrict corporate speech, including in civil litigation. The **General Motors DPA** highlights this issue, as plaintiffs' lawyers suing the company civilly invoked ambiguous language in the agreement to pressure the company to drop an otherwise-available legal defense.
- 3. Deputizing private businesses.** The DOJ enlists corporations to police alleged misconduct, including that of third-party contractors and vendors, without clear statutory authorization. The **FedEx prosecution** illustrates this issue, while also demonstrating the degree of pressure that the DOJ places on corporate defendants to settle.
- 4. Lack of judicial oversight and transparency.** NPAs lack any judicial oversight, and DPAs' judicial review is limited to enforcing the procedural terms of the Speedy Trial Act, which means that the DOJ's actions are essentially unilateral. The recent appellate court decision in the **Fokker case** illustrates the problem.

CASE STUDY 1: THE SWISS BANK PROGRAM

Of the 100 corporate NPAs and DPAs entered into by the federal government in 2015, 75 were entered into pursuant to the Swiss Bank Program.²⁶ This program was formally announced on August 29, 2013, when U.S. deputy attorney general James M. Cole and Manuel Sager, the Swiss ambassador to the U.S., signed a joint statement between the DOJ and the Swiss Federal Department of Finance. The program is an effort by the U.S. government to flush out tax cheats by inducing banks in Switzerland—which, owing to its traditionally rigorous privacy laws, had served as a haven for U.S. citizens to hide money abroad—to turn over financial and other data to the American government.

Background

In 2010, Congress enacted the Foreign Account Tax Compliance Act (FATCA),²⁷ intended "to make it more difficult for U.S. taxpayers to conceal assets held in offshore accounts."²⁸ Among its provisions were requirements that foreign financial institutions identify U.S. account holders and report the "name, address, and TIN of each account holder,"²⁹ as well as account balances and transactions.³⁰ In 2012, Switzerland, along with other foreign countries, announced that it would be negotiating an agreement with U.S. authorities.³¹ The Swiss Bank Program is, in essence, an intergovernmental agreement between the U.S. and Switzerland to implement FATCA.

Prior to the passage of FATCA, the DOJ had entered into a 2009 DPA with UBS, which included a \$780 million settlement, re-

solving allegations that this Swiss-based global bank had "conspir[ed] to defraud the United States by impeding the IRS."³² The threat of additional aggressive U.S. enforcement actions—in combination with shifting sentiments at the Organisation for Economic Co-operation and Development (OECD) and the European Commission³³—created pressure for the Swiss government to relax the nation's long-standing privacy standards. On June 19, 2013, however, the Swiss Federal Parliament rejected proposed legislation, the Lex USA agreement, to facilitate compliance with FATCA.³⁴ Swiss bank stocks plummeted in response.³⁵ The Swiss Federal Department of Finance then issued a model order, on July 3, to facilitate Swiss banks' cooperation with U.S. authorities,³⁶ and the Swiss ambassador signed the joint statement the following month.

Program Structure

The Swiss Bank Program's expressed goal is "to provide a path for Swiss Banks that are not currently the target of a criminal investigation ... to obtain resolution concerning their status in connection with the [DOJ]'s overall investigations, and to assist the [DOJ] in its law enforcement efforts."³⁷ Banks already under criminal investigation were not eligible for the program. These included Credit Suisse, which entered into a guilty plea and paid out \$2.8 billion in fines to U.S. federal and state authorities in May 2014,³⁸ and Julius Baer, which announced in early 2016 that it was holding \$550 million in reserves related to expected fines under the investigation.³⁹

Issue 1: Conflict with National Sovereignty

As discussed in previous reports, U.S. enforcement through DPAs and NPAs is notable for its global sweep. Agreements have targeted foreign subsidiaries of foreign companies for conduct abroad, premised on a U.S. nexus as remote as dollar-denominated transactions or e-mails routed through a U.S.-based server.⁴⁶ The Swiss Bank Program, however, is based on a clear U.S. interest: enforcement of tax laws against evasion. Even so, the U.S. essentially forced its will on the Swiss polity, whose elected representatives rejected legislation imposed from abroad. Although the ultimate compromise developed with Swiss officials resulted in a more orderly and predictable process than is typical for DPAs, the agreement nevertheless contradicted the will of the Swiss Parliament. Even if such strong-arm tactics may be defensible for tax-collection purposes, the ability for DOJ attorneys to interfere with foreign sovereigns raises core issues of international diplomacy that demand careful consideration. At a minimum, State Department and other foreign-policy arms of the executive branch need to be consulted in such cases.

Under the program, banks that determined that they had reason to believe that they were in noncompliance with U.S. tax authorities could register as “Category 2” banks by the end of 2013.⁴⁰ Such banks were to seek NPAs and pay fines according to a strict schedule based on maximum values of affected accounts.⁴¹ Initially, 106 banks signed up as Category 2 banks, though many later withdrew after determining that they did not have noncompliant accounts.⁴² Through the end of 2015, the U.S. government collected \$1.36 billion in fines from 75 participating Swiss banks—more than \$18 million per bank.

In addition to financial recoveries, NPAs under the Swiss Bank Program have standard 48-month oversight terms and requirements that participating banks:

- ◆ Waive statutes of limitation and speedy trial rights in the event of any subsequent prosecution
- ◆ Detail cross-border business for U.S.-related accounts
- ◆ Provide information including account ownership, value, and transactions
- ◆ Retain certain records for ten years
- ◆ Provide “all necessary” information for the U.S. to draft treaty requests to seek account information
- ◆ Testify or provide the information needed in order to enable the U.S. to use evidence obtained in criminal, civil, or regulatory proceedings—mostly at the banks’ own expense

The program is expressly with banks, not individuals,⁴³ but is ultimately designed to prevent future tax evasion and empower U.S. authorities to recover funds from individuals who evaded past taxes, utilizing Swiss bank accounts. An October 2015 article in the *Wall Street Journal* reported that the IRS had already collected over \$8 billion from more than 54,000 U.S. taxpayers with undeclared accounts since the program’s inception in 2013, though it is not clear how much of that total was collected as a result of information collected through the Swiss Bank Program. However, according to the same article, the U.S. government reportedly stated that it was “mining the extensive data uncovered by the program, including the destination of funds transferred out of Swiss accounts, to pursue leads around the world.”⁴⁴ Individual recoveries can be quite high, with fines as much as 50 percent to 100 percent of all assets in the unreported account.⁴⁵

CASE STUDY 2: THE GENERAL MOTORS DPA

On September 16, 2015, Preet Bharara, the U.S. attorney for the Southern District of New York, announced a DPA with General Motors (GM), resolving criminal allegations that the company committed wire fraud and engaged in a scheme to conceal a deadly safety defect from the National Highway Traffic Safety Administration (NHTSA).⁴⁷ These fraud charges stem from the well-publicized recall, beginning in February 2014, of what eventually amounted to millions of GM-manufactured vehicles worldwide due to faulty ignition switches.⁴⁸ Crashes attributable to these faulty switches have been linked to at least 124 deaths and 275 injuries.⁴⁹

Background

Ignition switches manufactured for various GM-produced automobiles—including the Chevrolet Cobalt, Chevrolet HHR, Pontiac G5, Pontiac Solstice, and Saturn Ion—were produced with too-low torque. Under certain conditions, the faulty switch could accidentally turn off the car’s ignition, as well as cause airbags not to deploy.

According to the statement of facts that GM admitted to in its DPA, GM delayed reporting the ignition-switch defect to the NHTSA⁵⁰ until February 2014, at least 20 months after the

company discovered the problem—well in excess of the five-day reporting requirement for knowledge of defects “related to motor vehicle safety.”⁵¹ The statement of facts also declares that GM defrauded consumers after being made aware of the defective switch through its advertisements.⁵²

Although GM stopped directly selling cars equipped with the defective switch in the spring of 2012, these models continued to sell indirectly through contracted auto dealers, with accompanying affirmative advertising, until the time of the recall. GM conducted its first recall of about 700,000 vehicles in February 2014, after the 15th company-acknowledged death and a number of serious injuries.⁵³

DPA Provisions

GM agreed to forfeit \$900 million to the United States,⁵⁴ waived any right to file a claim in court or contest the forfeiture, and issued an assurance that GM would not claim a tax deduction or tax credit with regard to any fine or forfeiture pursuant to the DPA. The company admitted that it had failed to disclose to its U.S. regulator and the public a potentially lethal safety defect and that it had misled American consumers about the safety of its products affected by the defect. In addition, the company committed:

- ◆ To conduct a swift and robust internal investigation
- ◆ To cooperate fully and actively with the attorney general, the FBI, the Department of Transportation, the Office of the Special Inspector General for the Troubled Asset Relief Program, the NHTSA, and any other designated agency of the government⁵⁵
- ◆ To appoint, cooperate with, provide office space and facilities to, and pay compensation to and expenses for an independent monitor

The company expressly acknowledged that the agreement would not prevent further prosecutions for criminal tax violations. GM also committed not to contradict the DPA’s Statement of Facts in its external litigation proceedings. The agreement runs for a period of three years from the date of the DPA’s signing.⁵⁶

Subsequent Litigation and the Non-Contradiction Clause

GM hired Ken Feinberg, who had managed the September 11 Victims Compensation Funds and the claims facility for the BP Deepwater Horizon oil spill, to administer claims based upon the faulty ignition switch and set aside \$625 million to compensate victims.⁵⁷ Feinberg considered 4,343 claims—including 474 deaths—and after rejecting 92 percent of them,

allocated funds to the estates of 124 individuals killed in crashes deemed attributable to the switch and 274 additional injury claims.⁵⁸

Inevitably, some individuals alleging that they had been injured by switch-related crashes opted for litigation rather than Feinberg’s claim facility. In one such case, GM initially filed a motion seeking to dismiss a claim arising from a May 2014 crash because the plaintiff had not prevented the car from being destroyed after the crash—such that the “black box” in the car could not be accessed to determine whether the switch’s power had failed.⁵⁹ The attorney representing the plaintiff sent a letter to U.S. Attorney Preet Bharara asserting that the motion violated the terms of the DPA’s non-contradiction clause—GM’s commitment not to contradict the Statement of Facts in external litigation—because the DPA at one point observed that analysis of the black boxes of other cars of the same model had proved “unilluminating.”⁶⁰ Within hours, the company withdrew its motion, informing the court, “Please know that ... GM fully stands by the Statement of Facts [in the DPA].”⁶¹

Issue 2: Speech, Litigation, and Non-Contradiction Clauses

The maneuvering over GM’s motion to dismiss a damage claim highlights the degree to which criminal prosecutors exert influence over subsequent corporate speech and litigation strategy through DPAs. Because prosecutors reserve for themselves the sole discretion of determining what constitutes a breach of the agreement, a company accused of violating a non-contradiction clause is at the mercy of prosecutors’ judgment. There may be valid reasons for establishing a factual baseline for subsequent litigation in some cases, including those involving catastrophic injuries due to a defect that caused a car crash. Still, the “black box” issue in GM’s case shows how a DPA clause can be used as a weapon to develop litigation even absent evidence of causation. According to a survey by the law firm Gibson Dunn, 119 of 130 DPAs and NPAs issued in 2014 and 2015 contained non-contradiction clauses.⁶²

CASE STUDY 3: THE FEDEX PROSECUTION

In general, large companies have capitulated to federal criminal inquiries and entered into DPAs or NPAs when possible. In a pending case in California, however, FedEx is fighting a federal indictment.⁶³ This dispute bears watching, as it illustrates the breadth of authority that the DOJ asserts through criminal laws, the degree to which it attempts to “deputize” corporations to seek out criminal misconduct, and the leverage that it assumes to push companies to capitulate.

In 2013, the government entered into an NPA with FedEx’s main competitor, UPS, resolving claims related to the transportation and distribution of controlled substances.⁶⁴ The statement of facts did not allege that UPS had delivered packages containing heroin or cocaine but rather that it had made shipments to customers from companies that had operated Internet pharmacies illegally selling pharmaceuticals to end users. In its NPA, UPS agreed to forfeit \$40 million and provide the government with information to facilitate its investigation of illegal Internet pharmacies.

FedEx refused to agree to the government’s terms—presumably, similar in scope to those agreed to by UPS—and now faces potential criminal fines in excess of \$1.6 billion (40 times UPS’s fine) as well as the forfeiture of any property used in connection with the alleged conduct (which could include planes, vehicles, and real property). The government also seeks to recover any property or money derived from the alleged conduct, though such revenues are minimal for a company of FedEx’s size: the indictment alleges that FedEx “received shipping payments totaling more than \$600,000 from the allegedly illegal online pharmacies” over a ten-year period.⁶⁵ In other words, federal prosecutors are seeking \$1.6 billion in fines from a company because the company has refused to deputize itself to seek out Internet shipments averaging, by the indictment’s terms, \$60,000 annually.⁶⁶

The government claims that FedEx had knowledge that the pharmacies using its shipping services were illegally distributing scheduled pharmaceuticals merely because some of the parent company’s affiliates were shut down by the government for such violations—placing the burden on FedEx to ferret out frauds that escaped the government’s and end users’ detection. FedEx complains that the responsibility to police the entities using its services should fall on the government, and not on corporate officers. The company has expressed its willingness to cease doing business with any pharmacies that are engaging in illegal activities and has asked the government for such a list—a list that the government, to date, has refused to provide.⁶⁷

Issue 3: Deputizing Companies

The UPS NPA and FedEx prosecution exemplify the intense pressure to settle that prosecutors bring to bear on companies: the staggering gap between UPS’s fine and that sought from FedEx sends a clear warning to companies not to challenge the DOJ. They also demonstrate the degree to which the DOJ is conscripting companies to act as law-enforcement agents. Some such actions have been authorized by statute, as in the record-keeping requirements of the Combat Methamphetamine Epidemic Act of 2005⁶⁸ that underlay the 2010 NPA with CVS.⁶⁹ (The pharmacy was accused of inadequately policing sales of nasal decongestants containing pseudoephedrine, which may be used to manufacture methamphetamines.) Although Congress also has enacted legislation governing the distribution of pharmaceuticals over the Internet—the Ryan Haight Online Pharmacy Consumer Protection Act of 2008⁷⁰—its applicability to package-delivery companies is ambiguous, at best.⁷¹

CASE STUDY 4: THE FOKKER DECISION

As discussed in previous reports in this series, judges have recently subjected these agreements to more extensive scrutiny, notwithstanding the DOJ’s assertion that federal judges have no supervisory authority over DPAs⁷² apart from ensuring that the timing of the agreements has not violated the terms of the Speedy Trial Act.⁷³ In April 2016, the D.C. Circuit Court of Appeals issued a decision, in *United States v. Fokker Services*,⁷⁴ which largely confirmed the DOJ’s view—meaning that DPAs will largely remain unsupervised by judges, absent congressional action.

Earlier Judicial Oversight Efforts

In 2013, Judge John Gleeson of the Eastern District of New York invoked the court’s inherent “supervisory power” to assert judicial authority to review a DPA’s substantive provisions;⁷⁵ and Judge Terrence Boyle of the Eastern District of North Carolina agreed to approve a DPA only after it was amended.⁷⁶ In 2014, Judge Emmet Sullivan of the D.C. District Court, in reviewing a DPA,⁷⁷ appointed University of Virginia law professor Brandon Garrett—a principal academic researcher on DPAs—to offer his own opinion on the scope of judicial review authority.⁷⁸ Garrett argued: “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.”⁷⁹

In 2014, another judge on the U.S. District Court for the District of Columbia, Richard Leon, rejected a DPA between the government and Fokker Services B.V.⁸⁰ On April 5, 2016, however, the D.C. Circuit Court of Appeals granted a writ of mandamus vacating the district court's order⁸¹—which will likely give substantial support going forward to the government's position that judicial powers to oversee the DPA process are narrow.

The Fokker Case

In 2010, Fokker, a Dutch aerospace-services provider, voluntarily approached the U.S. Departments of Treasury and Commerce and disclosed that it may have violated federal sanctions and export control laws concerning Iran, Sudan, and Burma. An internal investigation revealed that from 2005 through 2010, Fokker had netted a gross income of \$21 million from transactions that appeared to violate the U.S. International Emergency Economic Powers Act.⁸² In response, the company fired its president and demoted or reassigned other employees who had been involved in the transactions.

Fokker entered into an 18-month federal DPA and agreed to pay fines and penalties equaling the profits made by the admitted transactions—\$21 million—and implement a new compliance policy and continue ongoing cooperation with the U.S. government. On June 5, 2014, Fokker and the government filed a one-count information against Fokker, the DPA, and a joint motion for the exclusion of time under the Speedy Trial Act.

Judge Leon rejected arguments from both the government and Fokker that his role in reviewing DPAs was limited to speedy trial review, which he characterized as a “rubber stamp.”⁸³ Judge Leon opined that the length of the term of the Fokker DPA was too short and that its monetary penalty was too lenient.⁸⁴ He also objected to the government's decision not to require Fokker Services to appoint an independent corporate monitor.⁸⁵

The Court of Appeals granted a writ of mandamus that vacated the denial of the parties' Speedy Trial Act motion.⁸⁶ Because both the government and Fokker supported the DPA, the Court of Appeals appointed an attorney, Adam G. Unikowsky, to argue the cause in favor of Judge Leon's ruling.

The appellate decision, written by Judge Sri Srinivasan for a unanimous panel, emphasized that it had “no occasion to disagree (or agree) with [the lower] court's concerns about the government's charging decisions in [the] case.”⁸⁷ The court instead determined that the Speedy Trial Act's review power “did not empower the district court to disapprove the DPA

based on the court's view that the prosecution had been too lenient.”⁸⁸ The court emphasized the “constitutionally rooted principles” that protected the executive branch's “exercise of discretion over the initiation and dismissal of criminal charges,”⁸⁹ and it determined that the Speedy Trial Act's terms and structures did not suggest “any intention to subvert” those principles.⁹⁰

Issue 4: Lack of Judicial Oversight and Transparency

A significant difference between the DOJ's shadow regulation through DPAs and NPAs and the normal administrative process is that the latter, traditional form of regulation utilizes carefully defined rulemaking, with notice and comment periods, and clear channels for judicial review.⁹¹ The modifications to corporate conduct enabled through DPAs and NPAs, by contrast, accord prosecutors powers that they would lack, were they able to convict a company at trial—and lack any mechanism for judicial oversight to the agreements' substantive terms. Given the decision in *Fokker*, a strongly worded opinion from the appellate court principally tasked with administrative law review, the government's position that courts' review of DPAs' substantive provisions is restricted under the Speedy Trial Act is likely to find sway in other courts—meaning that courts will have little role to play, absent congressional action.

IV. The First U.K. Deferred Prosecution Agreement and the Possibilities for U.S. Reform

In light of the *Fokker* decision,⁹² the likelihood that the federal judiciary will exercise oversight of the Justice Department's DPAs and NPAs appears slim. However, congressional leaders on both sides of the aisle have begun to take notice. On the left, as discussed in Section I, Senator Elizabeth Warren has lambasted the DOJ for giving companies a “get-out-of-jail-free” card through DPAs.⁹³ The Yates memorandum, intended to emphasize the DOJ's focus on individual prosecutions,⁹⁴ may be a response to this criticism. Business groups and the criminal-defense bar have criticized the DOJ's practice as overreaching and overly focused on extracting fines rather than

ensuring justice.⁹⁵ Republicans in the House and Senate have decried overcriminalization and the assertion of criminal-regulatory actions for unintentional conduct, without congressional authorization.⁹⁶

The growing ranks of critics, left and right, might support reform based on increased transparency and judicial oversight—bringing justice out of the shadows. The United Kingdom has recently offered a potential template: the 2013 Crime and Courts Act, which adopted rules under U.K. law for entering into DPAs, which previously were unknown for corporations in Britain.⁹⁷ The first-ever British DPA was entered into in November 2015 between the British Serious Fraud Office (SFO) and Standard Bank, a South African financial-services company. This agreement highlights the differences between the U.K. and U.S. practice that could inform reform efforts here.

The U.K.’s Standard Bank DPA

The statement of facts presented by the British SFO observed that Standard Bank failed to prevent one of its subsidiaries operating in Tanzania from bribing Tanzanian government officials to acquire a government contract, in violation of the British Bribery Act of 2010. Standard self-reported the violation. After seeing a suspicious withdrawal of monies related to the Tanzanian subsidiary’s business, bank officials retained a law firm to conduct an internal investigation, which uncovered the fraud. Standard Bank reported the results of the internal investigation to the SFO, which entered into an agreement with the bank to defer prosecution, pending the satisfaction of certain conditions.

The DPA⁹⁸ is effective for three years. Under its terms, the bank must pay fines and penalties totaling just under \$33 million, which is calculated from:

- ◆ Disgorged profits stemming from the bribery (\$8.4 million)
- ◆ Services purchased by the Tanzanian government (\$7 million)
- ◆ A financial penalty (\$16.8 million)
- ◆ Prosecutorial costs (\$400,000)

The DPA was approved by Lord Justice Brian Leveson of the Southwark Crown Court, sitting at the Royal Courts of Justice. The court’s decision of approval⁹⁹ states that the financial penalty assessed in the DPA “must be ‘broadly comparable to the fine that a court would have imposed’ following conviction after a guilty plea.”¹⁰⁰

The DPA has various compliance provisions, as in U.S. practice: the bank must commission and submit to an independent review of its existing internal anti-bribery and corruption controls and implement the advice and recommendations in the independent reviewer’s final report. The independent reviewer and the SFO make an assessment of whether the compliance provisions terms have been met, but only initially: the SFO must file a “breach application” *with the court* to lift the suspension on the indictment, with notice to the bank, and the court must determine a breach to suspend the DPA.

Like most U.S. DPAs, the agreement requires the bank to admit its guilt and agree not to contradict the agreed-upon statement of facts in any public statements. Notably, however, the non-contradiction clause specifically exempts statements made during the course of a civil or regulatory legal action, although in the event of a breach, the agreed statement of facts is treated as an admission in any criminal proceedings that result from the offense alleged in the indictment.

Role of Judiciary

Under the terms of the Crime and Courts Act,¹⁰¹ British DPAs are subject to judicial oversight:

- ◆ After the terms of the agreement have been negotiated, a hearing must be held to ascertain whether the proposed DPA is “likely to be in the interests of justice” and whether “its proposed terms are fair, reasonable and proportionate.”
- ◆ After the hearing, the court can deny the request to approve the DPA. If it does, it must give reasons for doing so, though denial of the request does not foreclose further application by the parties.
- ◆ If the court grants the declaration, it must also give its reasons for doing so in open court, and then publish the DPA, the agreed statement of facts, the declaration of the court, and the court’s reasoning.

Assessment and Conclusion

As Judge Leveson, the judge who approved the Standard Bank DPA, noted: “In contra-distinction to the United States, a critical feature of the statutory scheme in the U.K. is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA.”¹⁰² It will take time, and additional DPAs, to assess whether the U.K. process will reach better outcomes than in the U.S. But in light of the recent *Fokker* decision, judicial oversight in the U.S. likely requires congressional action.

Legislation has been introduced in the House of Representatives to reform the DOJ's DPA practice in each congressional session since 2008. The Accountability in Deferred Prosecution Act of 2014, sponsored by Representative Bill Pascrell, Jr., would mandate many processes consistent with the British Crime and Courts Act,¹⁰³ such as requiring that the DOJ adopt public written guidelines for DPA practice, requiring substantive judicial review and oversight to determine that a DPA is "consistent with the guidelines for such agreements and is in the interests of justice," and requiring public disclosure of the agreements' terms.¹⁰⁴ Although the language of *Fokker* suggests constitutional separation-of-powers concerns about limiting prosecutorial discretion in charging decisions, Congress would presumably have the power to limit the DOJ's ability to coerce affirmative actions on the part of defendant companies that exceed statutory penalties—creating an avenue for potential judicial oversight.¹⁰⁵

Congress might consider additional reforms that could ameliorate some of the other policy concerns highlighted in this report. Investigations, prosecutions, and DPAs and NPAs involving foreign interests ought, at a minimum, to involve the State Department and other appropriate regulatory bodies to consider the foreign-policy implications of the DOJ's enforcement actions abroad. As in the British Standard Bank NPA, non-contradiction clauses could be interpreted as admissions in subsequent criminal investigations, without binding companies' ability to raise defenses in private civil litigation. And Congress should spell out with clarity the range of "self-policing" activities that are expected of private corporations, rather than passing open-ended laws that give undue discretion to prosecutors to punish corporate inaction.



Endnotes

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- ⁵² See GM DPA, *supra* note 47, at Exhibit B, Count 2, ¶ 11 ("To promote these sales and give customers assurance about the safety of the cars subject to its certified pre-owned program, GM made representations by means of interstate wires—that is, over the Internet—falsely assuring customers of the safety of the used cars they were purchasing.... In truth and in fact, and as GM well knew, cars equipped with the Defective Switch posed a potentially deadly safety threat related to the cars' ignition switches and keys.")
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⁶⁷ Patrick Fitzgerald, *Updated FedEx Response to Department of Justice Charges* (Aug. 15, 2014), available at <http://about.van.fedex.com/newsroom/global-english/updated-fedex-response-to-department-of-justice-charges>. The authors do not take a position on the propriety of the government demanding that a company cease doing business with a customer, absent a conviction against said customer or a preliminary showing of possible ongoing criminal activity contributed to by the services rendered by a company such as FedEx.

⁶⁸ Combat Methamphetamine Epidemic Act of 2005, Pub L 109-177 (2006), available at http://www.deadiversion.usdoj.gov/meth/pl109_177.pdf.

⁶⁹ Non-Prosecution Agreement, U.S. Dep't of Justice, Re: CVS Caremark Corp. (Oct. 13, 2010), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/cvs.pdf.

⁷⁰ Ryan Haight Online Pharmacy Consumer Protection Act of 2008, 21 U.S.C. 829(e) (2008), available at <https://www.govtrack.us/congress/bills/110/hr6353/text>.

⁷¹ The Ryan Haight Act does create liability for distributing or delivering pharmaceuticals or "aiding and abetting" their distribution but only for doing so "knowingly and intentionally."

⁷² See United States v. HSBC Bank, USA, *supra* note 9.

⁷³ *Id.*

⁷⁴ United States v. Fokker Services, No. 15-3016 (D.C. Cir., Apr. 5, 2016), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/E7CE07715B86640185257F8C00512106/\\$file/15-3016-1607222.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/E7CE07715B86640185257F8C00512106/$file/15-3016-1607222.pdf).

⁷⁵ See United States v. HSBC Bank, USA, *supra* note 9; see also Copland & Gorodetski, *supra* note 16.

⁷⁶ See Anne Blythe & Joseph Neff, *WakeMed's Medicare Settlement with Feds Would Allow Confidential Reports*, NEWS & OBSERVER, Feb. 2, 2013, available at <http://www.reformconnow.com/press-room/9-wakemed-s-medicare-settlement-with-feds-would-allow-confidential-reports>; see also Matthew Burns, *Judge OKs WakeMed Fraud Settlement*, WRAL.COM, Feb. 8, 2013, available at <http://www.wral.com/judge-oks-wakemed-fraud-settlement/12084601>.

⁷⁷ Alison Frankel, *Justice Department to Federal Judges: Get Off My Lawn*, REUTERS, Aug. 29, 2014, available at <http://blogs.reuters.com/alison-frankel/2014/08/29/justice-department-to-federal-judges-get-off-my-lawn>.

⁷⁸ See *id.*

⁷⁹ *Id.*

⁸⁰ Memorandum Opinion, United States v. Fokker Services, 14-cr-121 (RIL) (Dist. D.C., Feb. 5, 2015), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cr0121-22.

⁸¹ United States v. Fokker Services, No. 15-3016 (D.C. Cir., Apr. 5, 2016), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/E7CE07715B86640185257F8C00512106/\\$file/15-3016-1607222.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/E7CE07715B86640185257F8C00512106/$file/15-3016-1607222.pdf).

⁸² International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-07 (2005)).

⁸³ See Memorandum Opinion, *supra* note 80, at 8.

⁸⁴ *Id.* at 12–13.

⁸⁵ *Id.* at 12.

⁸⁶ United States v. Fokker Services, *supra* note 81.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 10.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.*

⁹¹ See generally Administrative Procedure Act, 5 U.S.C. §§ 551–559, available at <https://www.law.cornell.edu/uscode/text/5/part-I/chapter-5>.

⁹² United States v. Fokker Services, *supra* note 81.

⁹³ See Warren, *supra* note 4.

- ⁹⁴ See Yates Memo, *supra* note 5.
- ⁹⁵ See, e.g., U.S. Chamber of Commerce Institute for Legal Reform & National Ass'n of Criminal Defense Lawyers Symposium, *The Enforcement Maze: Overcriminalizing American Enterprise*, May 26, 2016, available at http://www.instituteforlegalreform.com/uploads/sites/1/Agenda_NACDL-ILR_Law_Policy_Symposium_External_Agenda_5-13-16.pdf.
- ⁹⁶ Sen. Orrin Hatch, *It's Time for Criminal Justice, Mens Rea Reform*, speech (Sep. 25, 2015), available at <http://www.hatch.senate.gov/public/index.cfm/2015/9/hatch-it-s-time-for-criminal-justice-mens-rea-reform>; press release, Statement of Judiciary Committee Chairman Bob Goodlatte Markup of H.R. 4002, "Criminal Code Improvement Act of 2015" (Nov. 18, 2015), available at <https://judiciary.house.gov/press-release/statement-of-judiciary-committee-chairman-bob-goodlatte-markup-of-h-r-4002-the-criminal-code-improvement-act-of-2015>.
- ⁹⁷ U.K. Crime and Courts Act, 2013, c. 44, § 45, sch. 17. 241.242. 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>.
- ⁹⁸ Deferred Prosecution Agreement, Serious Fraud Office (U.K.), Re: Standard Bank (Nov. 30, 2015), available at <http://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>.
- ⁹⁹ Approved Judgment, SFO v. ICBC SB PLC (Nov. 30, 2015), available at http://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf.
- ¹⁰⁰ Sunil Gadhia et al., *The U.K. Serious Fraud Office's Historic Deferred Prosecution Agreement Resolving Bribery Act Charges*, BLOOMBERG BNA, Jan. 15, 2016, available at <http://www.bna.com/uk-serious-fraud-n57982066285>.
- ¹⁰¹ See U.K. Crime and Courts Act, *supra* note 97.
- ¹⁰² Terry Carter, *UK Approves Its First Deferred Prosecution Agreement in Bank's Bribery Case*, ABA J., Nov. 30, 2015, available at http://www.abajournal.com/mobile/article/uk_approves_its_first_deferred_prosecution_agreement_in_banks_bribery_case.
- ¹⁰³ Compare H.R. 4540, 113th Cong. (2014) with U.K. Crime and Courts Act, *supra* note 97.
- ¹⁰⁴ H.R. 4540, § 7.
- ¹⁰⁵ See Mark Chenoweth, *DC Circuit's "Fokker" Decision Preserves the Separation of Powers, but Raises a Concern About DPAs*, FORBES.COM, Apr. 11, 2016, <http://www.forbes.com/sites/wlf/2016/04/11/dc-circuits-fokker-decision-preserves-the-separation-of-powers-but-raises-a-concern-about-dpas/#3f2f9b444c95>.

Abstract

Each year, the Department of Justice (DOJ) and other federal agencies enter into scores of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) with businesses: DPAs involve cases in which criminal charges have been filed, and the DOJ asserts that judicial oversight is limited to ensuring their compliance with the Speedy Trial Act; NPAs are entered into without the filing of any formal criminal charges, and no judge ever reviews their contents. Faced with the threat of criminal charges, most companies agree to settle because the collateral consequences of a conviction (or often, even an indictment) are so harsh—in many cases, they amount to a corporate death sentence.

Key Findings

1. Since the beginning of 2010, 17 of America's 100 largest companies, as ranked by *Fortune* magazine, have been operating under a DPA or an NPA; in 2015, the federal government entered into 100 such agreements—a record—and companies paid out more than \$6 billion under their terms without any guilty plea or adjudication.
2. DPAs and NPAs that the government reaches with companies involve significant oversight and supervision—even dramatic restructurings of business practice, including changing top management personnel and compensation; wholesale modifications of sales and marketing strategies; and the hiring of “independent” monitors with vast oversight powers, paid out of corporate coffers but reporting to prosecutors.
3. DPAs and NPAs raise serious legal and policy issues, including those related to: national sovereignty; free speech; judicial oversight and transparency; and the desirability of deputizing private businesses to undertake law-enforcement activities.