



## IN DEFENSE OF DEFERRED PROSECUTION AGREEMENTS

**Jake A. Nasar\***

### INTRODUCTION

What bothers me isn't that fraud is not nice. Or that fraud is mean. For fifteen thousand years, fraud and short sighted thinking have never, ever worked. Not once. Eventually you get caught, things go south. When the hell did we forget all that?<sup>1</sup>

Following the financial crisis of 2008, law makers along with the public and media sought to hold corporations and their leadership accountable for the wide spread conduct that triggered the market

---

\* New York University School of Law, Class of 2017.

<sup>1</sup> The Big Short (Paramount Pictures 2015) (Mark Baum talking about the cause of the financial crisis).

crash.<sup>2</sup> The government responded with new legislation to make bringing charges for corporate crime easier<sup>3</sup> and increased investigations into corporate wrongdoing.<sup>4</sup> However, despite the increase in enforcement, federal prosecutors remain hesitant to bring indictments due to the potential for collateral consequences. Specifically, prosecutors are concerned that an indictment could cause the corporation to fail.<sup>5</sup>

The concern of collateral consequences is perhaps most apparent in the 2003 conviction and subsequent collapse of the major accounting firm Arthur Andersen for its role in obstructing the investigation into Enron's widespread accounting fraud.<sup>6</sup> Following Arthur Andersen's collapse, 28,000 people innocent of wrongdoing lost their jobs.<sup>7</sup> This led to public outcry of prosecutorial overreaching, which in turn led the Department of Justice ("DOJ") to rethink how it deals with corporate crime instead of only indicting or

---

<sup>2</sup> See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS (Jan. 9, 2014); Peter J. Boyer, *Why Can't Obama Bring Wall Street to Justice?*, NEWSWEEK (May 6, 2012, 1:38 PM), <http://www.newsweek.com/why-cant-obama-bring-wall-street-justice-65009>.

<sup>3</sup> See, e.g., Tim Bakken, *Dodd-Frank's Extension of Criminal Corporate Liability Through the Foreign Corrupt Practices Act: Enabling Whistleblowers and Monitoring Conflict Minerals*, 36 PACE L. REV. 1, 2-3 (2015) ("[T]he Dodd-Frank Act provides lucrative financial incentives for corporate agents who reveal wrongdoing within corporations.").

<sup>4</sup> James B. Comey, Director, Fed. Bureau of Investigation, *Confronting Corporate Crime*, Remarks at the New York City Bar Third Annual White-Collar Crime Institute (May 19, 2014), <https://www.fbi.gov/news/speeches/confronting-corporate-crime>.

<sup>5</sup> See, e.g., Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1295 (2014) (discussing some DOJ officials concern of solving the HSBC case without causing the bank to shut down).

<sup>6</sup> Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109-10 (2006)

<sup>7</sup> Golumbic & Lichy, *supra* note 5, at 1296.

declining to bring charges.<sup>8</sup> This refocus left room for a new policy that could stop corporate wrongdoing while avoiding the “Andersen Effect.”<sup>9</sup>

Within the United States legal system, corporations can be held as individuals, however Arthur Andersen taught us that the repercussions from indicting a company are different than those from indicting a person. Therefore, corporate prosecutions should be dealt with differently than individual prosecutions. Enter the practice of Deferred Prosecution Agreements (“DPAs”). In corporate prosecutions, DPAs are used instead of an indictment to subject a corporation to remedial reforms and fines.<sup>10</sup> In exchange for entering the agreement, the prosecutor files but never brings formal charges against the corporation.<sup>11</sup> Since their adoption, DPAs have been an effective alternative tool to combat corporate crime by addressing corporate culture and incentives while also holding corporations accountable.

This Paper will argue that, even though DPAs can be improved by judicial oversight, the practice of using them should continue to be encouraged. Further this Paper will explore the modern techniques of using DPAs to address corporate criminality and examine the implications those techniques have on corporations. Section I will provide an explanation of DPAs including how they are structured and how they fit into our legal system as voluntary agreements filed with the court. Section I will also outline the history

---

<sup>8</sup> *Id.* See generally Memorandum from Eric Holder, Deputy Att’y Gen., to All Component Heads & U.S. Att’ys, (June 16, 1999), <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.pdf> [hereinafter Holder Memo].

<sup>9</sup> See Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 314 (2007) (using the term “Andersen Effect” to refer to “the collateral damage from a conviction in which innocent employees unconnected to the wrongdoing lose their jobs and investments in the firm.”).

<sup>10</sup> Golumbic & Lichy, *supra* note 5, at 1299-1300.

<sup>11</sup> *Id.*

of DPAs, detailing how they were originally used only sparingly and after Arthur Andersen became a common practice for federal prosecutors, showing that in recent years DPAs have been used more than ever.

Section II will analyze the wide-ranging benefits that DPAs provide in investigating, punishing and rehabilitating offender corporations. Section II will further analyze some common provisions of DPAs, showing how DPAs hold corporate offenders responsible for their misdeeds while avoiding any negative collateral effects. Additionally, Section II will highlight the beneficial effects of DPAs which range from proscriptions on management and business practices to increase compliance to independent monitors. Furthermore, Section II will show that DPAs incentivize companies to cooperate and facilitate charges against individuals. Finally, Section II will discuss the punitive and deterrent goals DPAs achieve through fines as well as other social benefits achieved by unrelated terms.

Section III will review the principal criticisms raised by opponents of DPAs as used within the corporate context. These criticisms include charges as to the lack of articulable guidance in how and when to apply DPAs, as well as accusations that DPAs allow prosecutorial excess. DPAs have also been deemed by some commentators as ineffective because they do not hold the offender accountable. Section III will conclude by outlining the responses to these critiques, explaining why DPAs' burdens are outweighed by their benefits.

Section IV will focus on the recent developments surrounding suggested improvements to DPAs. As this section will show, the major proposal for enhancing the impact of DPAs is increased judicial oversight. Section IV will analyze the arguments in favor of judicial oversight and will delineate the value such oversight would add to the DPA process. Section IV will conclude by discussing the appellate courts' recent opposition to the notion of increased oversight.

Finally, Section V will discuss the need for future analysis of DPAs' effectiveness, as well as analyze potential future developments in store for DPAs under the new administration. Section V will predict that DPAs will continue to play an important role in corporate prosecutions. The paper concludes by opining that, despite their challenges, in light of all the evidence, DPAs are in fact effective tools for prosecutors and should be encouraged.

## I. MECHANICS AND EVOLUTION OF THE MODERN DPA

### A. WHAT IS A DPA?

A DPA is an agreement between a prosecutor and a defendant company in which the company waives an indictment, admits criminal liability, and agrees to perform certain actions over a period of time<sup>12</sup>, which usually consist of fines and internal changes.<sup>13</sup> In exchange, the prosecutor "defers" or sets aside the criminal charges and—provided the defendant company complies with its end of the agreement—dismisses the case as if the charges were never brought.<sup>14</sup> If the defendant corporation fails to comply with the agreed upon terms, however, then the charges against it will proceed, with the company's admission and the company's cooperation being used against it.<sup>15</sup>

DPAs contrast with traditional guilty pleas. One reason for the contrast is the role of the court and judge. DPAs initially file criminal charges with the court, and the final DPA terms must be judicially approved.<sup>16</sup> The standard of judicial review is extremely low. Unlike

---

<sup>12</sup> *Id.*

<sup>13</sup> See Steven R. Peikin, *Deferred Prosecution Agreements: Standard of Corporate Probes*, N.Y. L.J., January 31, 2005, <http://www.newyorklawjournal.com/id=900005422568>.

<sup>14</sup> See, Golumbic & Lichy, *supra* note 5, at 1299.

<sup>15</sup> See *id.* at 1300.

<sup>16</sup> *Id.* at 1300-01.

guilty pleas, in which the court is a substantive gatekeeper to ensure voluntariness, the court's authority for DPAs is granted under the Speedy Trial Act,<sup>17</sup> which only requires that DPAs be brought to the court for approval without specifying judicial involvement in creating the terms.<sup>18</sup> Therefore, judges end up acting as a rubber stamp and almost always approve the terms.<sup>19</sup>

Part of what permits this limited role of judges – and what makes DPAs so effective – is that DPAs' terms are viewed as voluntarily reached, regardless of the difference in bargaining power. The government essentially holds all the cards, as the company wants to avoid the consequences of an indictment at any costs.<sup>20</sup> However, DPAs are arguably like any other area of plea agreements in that the government uses its discretionary charging ability to bargain with an informed defendant in order to resolve the case.<sup>21</sup> In the non-corporate context, pleas with defendants facing life imprisonment or death are still viewed as voluntary and so, some contend, the same logic should apply to corporations as well.<sup>22</sup>

In addition to DPAs, there is another type of agreement called a Non-Prosecution Agreement (NPA). NPAs are similar to DPAs but do not require filing criminal charges with the court.<sup>23</sup> This distinction may result in a dramatic difference in the volume of DPAs

---

<sup>17</sup> *Id.* at 1300.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1301.

<sup>20</sup> Michael Yangming Xiao, *Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J.L. & PUB. POL'Y 233, 240-41 (2013).

<sup>21</sup> See Jennifer Arlen, *Prosecuting Beyond the Rule Of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, J. LEGAL ANALYSIS 191, 194 (2016), <https://academic.oup.com/jla/article/8/1/191/1752200/Prosecuting-Beyond-the-Rule-of-Law-Corporate>.

<sup>22</sup> Arlen, *supra* note 21, at 194 n. 9.

<sup>23</sup> David Debold & Kyle C. Barry, *Consistency in Non-prosecution and Deferred Prosecution Agreements: A Lesson from the World of Federal Sentencing*, 20 FED. SENT'G REP. 331, 331 (2008).

vis a vis NPAs in different time periods.<sup>24</sup> In DPAs the government halts, and subsequently dismisses, corporate charges if the offending company is compliant.<sup>25</sup> In NPAs, however, the government agrees not to bring any charges at all in exchange for the corporation following the agreement.<sup>26</sup> Despite these procedural differences, NPAs bring the same terms and structure as DPAs, making them extremely similar.<sup>27</sup> Therefore, both agreements raise analogous policy concerns.<sup>28</sup>

#### B. HISTORY LEADING TO THE MODERN DPA

DPAs were not always used in the corporate criminal context. DPAs first came into practice in 1960 and were originally intended as an alternative for nonviolent minor offenders to avoid prison while still admitting guilt, making restitution, and preventing further wrongdoing.<sup>29</sup> DPAs were aimed at first-time drug addicts and like offenders to get them help yet keep them out of the criminal justice system.<sup>30</sup> Up until 1992, DPAs were not primarily used against defendant corporations.<sup>31</sup> Instead, a prosecutor's choice for corporate crime was binary: indicting or declining to bring charges.<sup>32</sup>

---

<sup>24</sup> Peter Spivack & Sujit Raman, *Regulating the New 'Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 163–64 (2008).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> For purposes of this paper, "DPA" should be read to include both DPAs and NPAs.

<sup>29</sup> Benjamin M. Greenblum, Note, *What Happens To A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. LAW REV. 1863, 1866 (2005).

<sup>30</sup> *Id.* This is still thought of as the primary purpose of DPAs, however it is used in that context very rarely. *Id.* at 1866 n.15 (noting that in 2002, only 1.5% of drug cases not prosecuted were deferred).

<sup>31</sup> *See id.* at 1871-72.

<sup>32</sup> Golumbic & Lichy, *supra* note 5, at 1301.

The DPA first entered the corporate context in 1992, in relation to the investigation of Solomon Brothers.<sup>33</sup> Solomon Brothers was charged with submitting false bids to purchase treasury notes in violation of the False Claims and Sherman Acts.<sup>34</sup> Instead of being prosecuted, Solomon agreed to pay \$290 million in fines, continue its cooperation, remove responsible senior management officials, and implement compliance procedures.<sup>35</sup> The DOJ touted this agreement as a victory in securing justice while avoiding negative collateral consequences.<sup>36</sup> However, for the next decade this novel approach of applying DPAs to corporate offenders was considered to be reserved only for the most extremely special cases.<sup>37</sup> The prevailing mindset remained that prosecutors should either indict or decline to bring charges.<sup>38</sup>

The event that brought DPAs into the mainstream in corporate cases was also perhaps the biggest event in history of DPAs: the conviction and implosion of the major accounting firm Arthur Andersen. In 2002, Arthur Andersen was convicted for obstruction of justice for the destruction of files related both to the Enron investigation and the violation of a prior settlement with the Securities and Exchange Commission (“SEC”) investigation from the year before.<sup>39</sup> Arthur Andersen actively attempted to reach an agreement with the DOJ but refused to admit wrong doing as a

---

<sup>33</sup> Golumbic & Lichy, *supra* note 5, at 1302.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Press Release, U.S. Dep’t of Justice, Department of Justice and SEC Enter \$290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), [https://www.justice.gov/archive/atr/public/press\\_releases/1992/211182.pdf](https://www.justice.gov/archive/atr/public/press_releases/1992/211182.pdf).

<sup>37</sup> Golumbic & Lichy, *supra* note 5, at 1304.

<sup>38</sup> *Id.*

<sup>39</sup> Elizabeth K. Ainslee, *Indicting Corporations Revisited: Lessons of The Arthur Andersen Prosecution*, 43 Am. CRIM. L. REV. 107, 107 (2006).

firm.<sup>40</sup> In return, the DOJ refused the firm's settlement proposal and brought an indictment.<sup>41</sup>

Andersen was convicted at trial, and was sentenced to pay \$500,000 on top of the seven million dollar civil settlement already paid to the SEC.<sup>42</sup> The real punishment, however, was the firm's probation status and prohibition from auditing public companies.<sup>43</sup> For a public auditing company to be unable to audit equated to a death sentence.<sup>44</sup> Still, only one employee went to prison for corruption related to the charges, and the ones to really suffer for the company's misconduct were those furthest removed from any wrongdoing.<sup>45</sup> About 28,000 U.S. employees lost their jobs when Arthur Andersen went out of business, and the firm's shareholders suffered major losses.<sup>46</sup>

As America watched one of the top accounting firms crumble, huge political backlash arose as many accused the government of having engaged in excessive conduct.<sup>47</sup> This backlash placed the DOJ in a difficult situation. The DOJ needed to strike a balance between holding companies accountable for their actions while preventing a

---

<sup>40</sup> Golumbic & Lichy, *supra* note 5, at 1307.

<sup>41</sup> *Id.*

<sup>42</sup> Ainslie, *supra* note 39, at 108.

<sup>43</sup> See Lawrence D. Funder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 14-15 (2006) ("With the criminal indictment, Anderson [sic] could no longer audit public companies.").

<sup>44</sup> Ainslie, *supra* note 39, at 108 ("There was, however, a clear causal connection between the firm's felony conviction and its consequent inability to audit public companies, an inability that, for a public accounting firm, amounted to death.").

<sup>45</sup> *Id.* at 108-09. The only person to go to prison for the obstruction charge was David Duncan, a partner at the firm who admitted to ordering his auditors to destroy documents in direct violation of the SEC injunction and document request. See Dan Ackman, *Duncan Fingers Former Firm*, FORBES (May 14, 2002, 8:53 AM), <http://www.forbes.com/2002/05/14/0514topnews.html>.

<sup>46</sup> Ainslie, *supra* note 38, at 108.

<sup>47</sup> Golumbic & Lichy, *supra* note 5, at 1308.

repeat of what happened to Andersen.<sup>48</sup> Eventually, that balance came through as a new policy outlined in then-Deputy Attorney General Larry Thompson's memorandum (the "Thompson Memo"), which laid out guidelines for corporate prosecutions and included a pivotal shift: it allowed pretrial deferrals, or DPAs, to reward a corporation's authentic cooperation.<sup>49</sup> Although the Thompson Memo did not specifically instruct federal prosecutors to use DPAs in corporate criminal cases, it confirmed that DPAs could be used in such context.<sup>50</sup> This, combined with the fear of causing another situation like Andersen, paved the way for wide scale adoption of DPAs in the corporate criminal cases.<sup>51</sup>

Since Andersen's collapse and the adoption of the Thompson Memo, DPA use has skyrocketed in the corporate context, becoming a prominent technique to handle corporate crime.<sup>52</sup> Before 2003, the DOJ entered into a total of seven corporate DPAs.<sup>53</sup> Comparably, since 2004, the DOJ executes an average of thirty DPAs per year.<sup>54</sup>

---

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* at 1309.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See Peikin, supra* note 13, at 4.

<sup>53</sup> Golumbic & Lichy, *supra* note 5, at 1309-10; GIBSON, DUNN & CRUTCHER LLP, CLIENT ALERT: 2015 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAs) AND DEFERRED PROSECUTION AGREEMENTS (DPAs) 2-3 (2016), <http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>.

<sup>54</sup> Elkan Abramowitz & Jonathan Sack, *The 'Civil-izing' of White-Collar Criminal Enforcement*, 249 N.Y.L.J. 87 (2013); GIBSON, DUNN & CRUTCHER, *supra* note 53, at 2 (showing grid of all corporate DPAs from 2000 to 2015).

Most notably, 2015 alone had 100 DPAs.<sup>55</sup> This is a huge increase, with around 400 completed since 2001.<sup>56</sup>

As the amount of DPAs in use implies, the modern DPA has much appeal to prosecutors. One major benefit is that DPAs avoid collateral consequences like the Andersen Effect.<sup>57</sup> For example, DPAs do not include harmful mandatory debarment or probation that would go along with a guilty plea.<sup>58</sup> DPAs still allow the DOJ to enforce the changes it wants, however.<sup>59</sup> Given a corporation's desire to avoid the Andersen Effect, it will rush into DPAs giving prosecutors the leverage to strike deals to effect real change within the company.<sup>60</sup> Additionally, since DPAs allow prosecutors to deal directly with defendants instead of the court, they increase cooperation and reduce turnaround time.<sup>61</sup> This leads to a more effective resolution of cases and saves limited prosecutorial resources.<sup>62</sup> Since the emergence of the modern DPA, prosecutors have avoided another Arthur Andersen-like crisis, and yet have used the terms within DPAs to effectuate positive changes.

In addition to the substantial increase in DPAs, their terms have become much more severe, often requiring stiff monetary fines and admissions of guilt that were not present before.<sup>63</sup> Though DPAs can vary, their impact on a corporation's structure and operations can be significant. The key terms seen in modern DPAs usually require a

---

<sup>55</sup> GIBSON, DUNN & CRUTCHER, *supra* note 53, at 2. It should be noted that 75 of those DPAs were from one DOJ case, known as the Tax Swiss Bank Agreements. *Id.* at 2-3.

<sup>56</sup> Golumbic & Lichy, *supra* note 5, at 1310; GIBSON, DUNN & CRUTCHER, *supra* note 53, at 2.

<sup>57</sup> Abramowitz & Sack, *supra* note 54.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Xiao, *supra* note 20, at 245.

<sup>61</sup> *Id.* at 243.

<sup>62</sup> *Id.*

<sup>63</sup> Golumbic & Lichy, *supra* note 5, at 1310.

company to (i) admit responsibility for its wrong doing, (ii) implement changes to management, (iii) follow changes to permitted business practices, (iv) apply new policies and compliance programs, (v) agree to an internal investigation and cooperate with the government, (vi) identify and/or fire responsible individuals, (vii) insert an independent monitor, (viii) pay restitution and/or fines, and (ix) agree to unrelated terms.<sup>64</sup> The following Section will explore these terms in greater depth and will analyze how effective these terms have been at confronting corporate crime.

## II. THE EFFECTIVENESS OF DPAS

### A. CHANGES TO MANAGEMENT AND CORPORATE GOVERNANCE

In addition to preventing collateral consequences, a DPA can affect the culture within corporations by changing management practices to prevent recidivism. A corporation's culture essentially means how its internal and external dealings are managed.<sup>65</sup> If prosecutors can change how a company behaves, they can prevent further crime and push out some of the causes for the criminal conduct.<sup>66</sup> One way that prosecutors can achieve this is by changing who oversees the corporation and/or the responsibilities those people have.

In one study of 271 DPAs from 1993 to 2013 ("The Kaal-Lacine Study"), thirty-eight percent (103 DPAs) required changes to the

---

<sup>64</sup> See Peikin, *supra* note 13; Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 47 (2010).

<sup>65</sup> See *Definition of Corporate Governance*, INVESTOPEDIA, available at: <http://www.investopedia.com/terms/c/corporategovernance.asp>.

<sup>66</sup> Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, THE BUSINESS LAWYER, 70, 22-23 (2014) (supporting the notion that DPAs improve corporate governance) [hereinafter The Kaal-Lacine Study].

company's board of directors,<sup>67</sup> the body with the last say in corporate governance.<sup>68</sup> These changes can take a variety of forms. Of the 103 DPAs, eight percent changed how the board was structured by creating new board committees with a focus on compliance.<sup>69</sup> Additionally, three percent mandated the appointment of independent directors to the board to undertake corporate governance reform.<sup>70</sup> In addition to adding directors, DPAs also allow prosecutors to oust current board directors or senior management members.<sup>71</sup>

DPAs cannot only change the membership of companies' boards, but can also affect boards responsibilities, such as reporting and oversight. Reporting can require the board of directors to appoint a senior official to review transactions and ensure they are compliant with the company's law abiding policies.<sup>72</sup> That senior official then makes a report of his findings, which the board reviews.<sup>73</sup> More than thirty percent of the DPAs that required board changes in the Kaal-Lacine Study also imposed increased reporting requirements on the board.<sup>74</sup> The other responsibility change is monitoring, which can require the board to regularly check its compliance controls and procedures to ensure that the company is not breaking the law.<sup>75</sup> In

---

<sup>67</sup> *Id.* at 35.

<sup>68</sup> See *Board of Directors- B of D*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/boardofdirectors.asp>.

<sup>69</sup> The Kaal-Lacine Study, *supra* note 66, at 36-37.

<sup>70</sup> *Id.*

<sup>71</sup> See JAMES R. COPLAND, THE SHADOW REGULATORY STATE: THE RISE OF DEFERRED PROSECUTION AGREEMENTS, CIV. JUST. REPORT 14 (May 2012), [http://www.manhattan-institute.org/html/cjr\\_14.htm](http://www.manhattan-institute.org/html/cjr_14.htm).

<sup>72</sup> See *id.* at 36.

<sup>73</sup> *Id.* at 36.

<sup>74</sup> The Kaal-Lacine Study, *supra* note 66, at 36.

<sup>75</sup> See *id.* at 39.

the Kaal-Lacine Study, approximately forty-six percent (124 DPAs) of the total study imposed additional monitoring obligations.<sup>76</sup>

Increased responsibilities apply not only to the board but to senior management as well. About thirty percent (81 DPAs) in the Kaal-Lacine study imposed additional oversight responsibilities on senior management.<sup>77</sup> Moreover, as demonstrated above, senior management plays an important role in reporting as they review corporate transactions and bring the information to an independent board committee.

Illustrating both the changes to the board and to management's responsibilities is the DPA of ABB Ltd. In 2010, ABB Ltd. ("ABB"), a major technology corporation, entered into a DPA after admitting guilt to foreign corrupt practice (FCPA) charges for bribing Mexican officials with around 1.9 million dollars over seven years.<sup>78</sup> Under its DPA, ABB's board was required to create an independent audit committee tasked with reviewing all oversight related to anti-corruption.<sup>79</sup> Additionally, the independent committee had to appoint and review the work of a senior official tasked with overseeing anti-corruption laws standards and policies.<sup>80</sup> This senior official would report his findings to the independent committee and

---

<sup>76</sup> *Id.* at 38.

<sup>77</sup> *Id.*

<sup>78</sup> Press Release, Department of Justice, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay \$19 Million in Criminal Penalties (Sept. 29, 2010), <https://www.justice.gov/opa/pr/abb-ltd-and-two-subsidiaries-resolve-foreign-corrupt-practices-act-investigation-and-will-pay>.

<sup>79</sup> Deferred Prosecution Agreement at App. C ¶ 5, *United States v. ABB Ltd.*, No. 4:10-cr-00665, doc. 10-2, 24 (S.D. Tex. Sept. 29, 2010) [*hereinafter* "ABB Ltd DPA"].

<sup>80</sup> *Id.* Additionally, during the duration of probation the committee was required to report any criminal findings to DOJ while the DPA is in effect. *Id.* at App. D ¶ 24. The benefit of that is keeping DOJ involved in the process as the company roots out any further corruption.

had to be given sufficient autonomy to perform his job without repercussion.<sup>81</sup>

The structural changes to the firm's independent audit committee, as well as the new oversight, was designed to ensure that ABB did not re-offend and would consider anti-corruption at its highest level. As shown by ABB and the other cases in the Kaal-Lacine Study, DPAs can be used to alter a company's decision makers. By altering the practices and values of those who are in charge, DPAs can incentivize good corporate governance and foster a focus on corporate reform instead of a return to illicit practices.

#### B. CHANGES TO BUSINESS PRACTICES

Another tremendous power that DPAs create is the ability to change the business practices of a company by limiting the conduct the company can engage in or excluding the company from certain programs. In the Kaal-Lacine Study, thirty percent (80 DPAs) included changes to a company's business practices.<sup>82</sup> These business changes can be substantial and vary in scope, and are usually connected to the nature of the company's alleged wrongdoing.<sup>83</sup> Business changes can include prohibitions from certain forms of business or with certain counterpart companies as well as obligations to create new facilities or redesign the company's accounting and financing procedures.<sup>84</sup>

One example of such changes is the case of German Bank. German Bank admitted to assisting high-net worth customers in evading over \$1 billion dollars in income taxes in the Southern District of New

---

<sup>81</sup> *Id.* at App. C ¶ 5

<sup>82</sup> The Kaal-Lacine Study, *supra* 66, at 34.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 34-35.

York (“SDNY”).<sup>85</sup> The company entered into a DPA, which required it to pay a \$29 million dollar fine and placed permanent restrictions on its banking practices.<sup>86</sup> Specifically, the bank was precluded from developing and marketing any statutorily listed transactions, as well as participating in any transaction or strategy that has a significant tax component (without getting a neutral concurred opinion).<sup>87</sup> Additionally, the DPA required the bank to adopt a new transaction approval process for loan officers, including the review and approval by its tax director for anything tax related.<sup>88</sup> The DPA further obligated operational controls to prevent account officers from controlling banking transactions after the formal closing of the transactions.<sup>89</sup> In summary, entering the DPA led German Bank to both alter its practices and modify its infrastructure.

As the German Bank case demonstrates, DPAs can be used to get at the corporate offender’s exact conduct and prevent the conduct from reoccurring without putting the company out of business. It is possible that these changes to business practices or changes to management can have a lasting impact on a corporation and encourage lawful conduct going forward.<sup>90</sup>

### C. CHANGE IN COMPLIANCE PROGRAMS AND TRAINING

Rather than altering conduct or personnel, sometimes it is more effective to focus on implementing (or improving) a company’s compliance program. An effective compliance program can prevent

---

<sup>85</sup> Deferred Prosecution Agreement at ¶ 2, *United States v. HVB AG*, No. 1:12-cr-00080, 2 (S.D.N.Y. Feb. 13, 2006) [*hereinafter* “German Bank DPA”].

<sup>86</sup> *Id.* at ¶ 5.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> For example, the Kaal-Lacine Study, *supra* note 66, at 55, suggests that business changes, management changes, and cooperation in DPAs can overtime have a long-term impact on a company for the better.

further criminal conduct within a company.<sup>91</sup> A compliance program codifies regulatory and internal requirements and creates “a roadmap for actions” that should be taken to avoid run-ins with the law.<sup>92</sup> Clearly defined objectives and training programs help employees learn the law and create a culture of adherence to compliance standards.<sup>93</sup> Furthermore, compliance programs often include ways to measure ongoing adherence to the compliance code, usually enforced by a chief of compliance.<sup>94</sup>

DPA's have caused companies to implement significant reforms and adoptions in the area of compliance. In the Kaal-Lacine Study, seventy five percent of the DPAs (203 DPAs) contained provisions for new or expanded compliance programs.<sup>95</sup> Changes in compliance can take the form of updating a company's existing compliance program to be stronger (twenty seven percent of the Kaal-Lacine Study did so) or appointing a Chief Compliance Officer to oversee employees conduct (eleven percent of the study).<sup>96</sup> Additionally, other terms include changes to books and records provisions or implementation of rigorous compliance codes.<sup>97</sup> The most common compliance-related term in DPAs, however, relates to the improvement of communications and training in compliance policies for employees and directors.<sup>98</sup>

---

<sup>91</sup> Ron Kral, *Effective Corporate Compliance Programs*, CORP. COMPLIANCE INSIGHTS (Dec. 3, 2010), <http://www.corporatecomplianceinsights.com/effective-corporate-compliance-programs-ron-kral-candela>.

<sup>92</sup> *Id.*

<sup>93</sup> *See Id.*

<sup>94</sup> *See Id.*

<sup>95</sup> The Kaal-Lacine Study, *supra* note 66, at 44-45. Furthermore, the number of DPAs that require compliance has been consistently increasing since 2001 showing the heavy focus on their use. *Id.* at 45.

<sup>96</sup> *Id.* at 47.

<sup>97</sup> *Id.* at 46.

<sup>98</sup> *Id.* at 47. In the Kaal-Lacine Study, about forty-five percent of the DPAs that require compliance included terms for communication and training.

Undertakings of this sort can cause a corporation to act as its own internal investigator, rooting out or preventing misconduct in a way unattainable by the government. A prime example of this effect is the DPA of Shell Nigeria. Shell admitted to paying over \$2 million to its subcontractors to bribe the Nigerian Customs Services and circumvent the clearance process for their construction project, in violation of the Foreign Corrupt Practices Act ("FCPA").<sup>99</sup> As part of the DPA, Shell agreed to investigate and enhance its internal controls policies and procedures, including new more rigorous compliance codes and policies.<sup>100</sup> Additionally, Shell had to provide annual training and certification to all directors and relevant employees to ensure that its anti-corruption policies and procedures were effectively communicated.<sup>101</sup> During the DPA's three-year pendency, Shell had to report to the DOJ on its progress towards compliance and to strengthen compliance procedures when necessary.<sup>102</sup> Based on the heightened compliance standards imposed by the DPA, Shell now has an enhanced internal system to prevent future wrongdoing.

The Shell case illustrates how a DPA can enhance a company's focus on compliance, which can have wide-ranging benefits. Compliance can promote a company to behave ethically and educate its employees to not break the law.<sup>103</sup> It is thus a proactive, rather than reactive, approach to dealing with crime, which aims at preventing further harm.<sup>104</sup> By encouraging a company to educate itself on the law and enhance prevention and detection capabilities

---

<sup>99</sup> United States. v. Shell Nigeria Expl. and Prod. Co., No. 4:10-cr00767, B-2 (S.D. Tex. Nov. 4, 2010), <http://goo.gl/K1Z9XI>.

<sup>100</sup> *Id.* at C-1.

<sup>101</sup> *Id.* at C-5. This is in addition to a host of other requirements including a thirty million dollar fine and board changes to ensure oversight. *Id.* at 9.

<sup>102</sup> *Id.* at D-1.

<sup>103</sup> *Corporate Compliance Plan Produces Many Benefits*, AMERICAN MEDICAL NEWS (Nov. 5, 2007), <http://www.amednews.com/article/20071105/business/311059998/5/>.

<sup>104</sup> *Id.*

from the inside, a DPA's focus on compliance can help prevent corporate recidivism.

#### D. COMPANY COOPERATION

One of the most significant changes a DPA can influence is a company's willingness to cooperate with prosecutors. Cooperation can promote a company to self-police and can also expose valuable information to the government. Corporate crime is often complex, presenting investigators with significant challenges.<sup>105</sup> Persuading a company to cooperate can be one of the most effective ways for prosecutors to develop and expand an investigation. In the Kaal-Lacine Study, ninety-one percent of the DPAs (246 DPAs) from the twenty year period included cooperation agreements, staying consistently high in almost every year.<sup>106</sup> Of the DPAs that had cooperation agreements, moreover, seventy-eight percent (192 DPAs) required officers or managers to testify, and eighty percent (197 DPAs) required identifying and producing of documentation for further investigation of wrongdoing.<sup>107</sup> Furthermore, thirty six percent (89 DPAs) were obligated to either identify witnesses or produce knowledgeable employees or agents, and sixty three percent (155 DPAs) required the disclosure of all activities the prosecutor inquired into about the company, its officers, and employees.<sup>108</sup>

A DPA can encourage this cooperation because it rewards the company with less severe punishment.<sup>109</sup> One example of

---

<sup>105</sup> Golumbic & Lichy, *supra* note 5, at 1317 (citing Jean Eaglesham, *Financial Crimes Bedevil Prosecutors*, WALL ST. J., Dec. 6, 2011, at C1).

<sup>106</sup> The Kaal-Lacine Study, *supra* note 66, at 39-40.

<sup>107</sup> *Id.* at 41-42.

<sup>108</sup> *Id.*

<sup>109</sup> One study of available data on FCPA prosecutions from 2002 to 2011 found that most of the DPAs resulting in fines for corporate offenders under the sentencing guidelines arose from self-reporting. Sarah Marberg, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J.

cooperation is the 2012 FCPA case against Biomet, in which the company admitted to bribing government doctors in Argentina, Brazil and China.<sup>110</sup> Biomet voluntarily disclosed the violation to the government and entered into a DPA, which resulted in a reduced fine and the promise to continue cooperation.<sup>111</sup> Thus, the company's proactive cooperation allowed it to escape the harsher fines that could have been imposed on it and further allowed it to have a better position when dealing with the government.<sup>112</sup>

In addition to incenting companies to disclose information, cooperation can also unearth further illegal conduct through the information exposed to the government. For example, during the course of the Biomet agreement the company disclosed information that allowed the government to uncover an additional bribery scheme in Mexico.<sup>113</sup> The government made a status report to the court in 2016 explaining what it had found and revealing that the company had failed to maintain an effective compliance program.<sup>114</sup> Biomet swore that it was willing to cooperate and started negotiating with the government, the end result being a thirty million dollar fine and another three-year DPA being put into effect.<sup>115</sup> While

---

TRANSNAT'L L. 557, 583 (2012). The study concluded that a corporation engaged in criminal conduct is, especially when it believes its conduct is about to be uncovered, much better off self-reporting the criminal activity than not. *Id.* at 591.

<sup>110</sup> Deferred Prosecution Agreement at 14-20, *United States v. Biomet Inc.*, No. 1:12-cr-00080-RBW doc. 1-1, 14 (D.D.C. 2005), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/30/2012-03-26-biomet-dpa.pdf> [*hereinafter*, "Biomet DPA"].

<sup>111</sup> *Id.* at 3-5.

<sup>112</sup> Jody Godoy, *Zimmer Biomet To Pay \$30M For Breaching FCPA Deal*, LAW360 (Jan. 12, 2017, 9:40 PM), <https://www.law360.com/articles/880353/zimmer-biomet-to-pay-30m-for-breaching-fcpa-deal>.

<sup>113</sup> Richard L. Cassin, *DOJ: Biomet breached DPA*, THE FCPA BLOG (June 16, 2016), <http://www.fcpablog.com/blog/2016/6/16/doj-biomet-breached-dpa.html>.

<sup>114</sup> *Id.*

<sup>115</sup> Godoy, *supra* note 112.

cooperation initially allowed Biomet to escape a harsher fine, it also later enabled the government to discover future wrong doing and ensure that the DPA was actually being acted upon. This case, along with others in the Kaal-Lacine study, demonstrates how cooperation is a powerful tool that prosecutors can use to change a company's incentives and to uncover information necessary to expose further criminal conduct.

#### E. INDIVIDUAL ACCOUNTABILITY

DPAs go beyond simply punishing and reforming a corporation, they also can be instrumental in holding individual employees responsible. As part of a firm's cooperation with the government, companies are typically compelled to furnish information about individual employees associated with the suspected criminal conduct.<sup>116</sup> Additionally, companies often terminate employees as a result of evidence unearthed during the course of such cooperation, regardless of whether individual charges are brought.<sup>117</sup>

There is good reason to surmise that more individuals will be held criminally and civilly responsible through the corporate cooperation provisions of DPAs. In 2015, then-Deputy Attorney General Sally Yates announced new DOJ policies that could significantly change the way corporations cooperate with the government.<sup>118</sup> The so-called "Yates Memo" laid out the DOJ's new policy in six steps.<sup>119</sup> The steps for prosecutors to take include that they (i) should give

---

<sup>116</sup> The Kaal-Lacine Study, *supra* note 66, at 40.

<sup>117</sup> *Id.* at 29. In the study, seventeen percent of companies cooperating already terminated any employees engaged in the conduct. *Id.* at 31.

<sup>118</sup> STEVEN M. KAUFMAN, MORRISON & FOERSTER LLP, CLIENT ALERT: THREE KEY TAKEAWAYS FROM DOJ'S NEW YATES MEMO ON INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING 1 (Sept 15, 2015), <http://govcon.mofo.com/false-claims-act/three-key-takeaways-from-doj-s-new-yates-memo-on-individual-accountability-for-corporate-wrongdoing/>.

<sup>119</sup> *Id.*

cooperation credit to companies only when they identify culpable individuals and all relevant information about their misconduct, (ii) criminal and civil investigations on individuals should be aimed at wrongdoing of employees and senior executives from the state, (iii) criminal and civil authorities should communicate early on to coordinate strategy, (iv) prosecutors should not enter into DPAs or resolutions with companies that protect individual wrongdoers unless rare exception, (v) should only bring corporate prosecution forward if have written out a plan for individuals as well and both must be done within the statute of limits unless rare exception, and (vi) civil actions primary focus should be on individuals and should not be based on if the individual can pay the judgment but rather if the case is provable in court.<sup>120</sup>

Spectators have analyzed both the Yates Memo's strong language and its even stronger implications. Some speculate that the memo will create an "all or nothing approach" and will lead to fewer DPAs, with cooperation reserved only for companies that can hand over individual offenders.<sup>121</sup> This all-or-nothing regime would differ significantly from previous DOJ practices in which individual accountability was just one of many factors reviewed to assess the extent of a company's cooperation.<sup>122</sup> Others believe that the number of DPAs will actually increase under the Yates Memo as prosecutors work out individual deals in tandem with deals for corporate

---

<sup>120</sup> DEBEVOISE & PLIMPTON, CLIENT UPDATE: THE "YATES MEMORANDUM": HAS DOJ REALLY CHANGED ITS APPROACH TO WHITE COLLAR CRIMINAL INVESTIGATIONS AND INDIVIDUAL PROSECUTIONS?, 2-3 (Sept 15, 2015), [http://www.debevoise.com/~media/files/insights/publication/2015/09/20150915\\_the\\_yates\\_memorandum\\_has\\_doj\\_really\\_changed\\_its\\_approach\\_to\\_white\\_collar\\_criminal\\_investigations\\_and\\_individual\\_prosecutions.pdf](http://www.debevoise.com/~media/files/insights/publication/2015/09/20150915_the_yates_memorandum_has_doj_really_changed_its_approach_to_white_collar_criminal_investigations_and_individual_prosecutions.pdf); Memorandum from Sally Quillian, Deputy Attorney Gen., DOJ, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) [*hereinafter* "Yates Memo"].

<sup>121</sup> GIBSON, DUNN & CRUTCHER LLP, *supra* note 53, at 5.

<sup>122</sup> *Id.* at 5.

offenders.<sup>123</sup> Still, others believe the real change will be larger for civil actions than for criminal prosecutions. Considering the difficulty in proving the intent of individuals in large companies, where roles are compartmentalized and responsibility for the totality of a scheme can therefore be difficult to assign, some argue that the Yates Memo will not promote an increase in criminal prosecutions.<sup>124</sup> Proponents of this view nevertheless believe that there will be an increased focus on bringing civil actions against individuals because the burden of proof is lower in civil cases.<sup>125</sup>

The one agreed-upon notion is that there will be a larger focus on individuals, either criminally or civilly, in future corporate prosecutions after the Yates Memo.<sup>126</sup> Corporations should not expect cooperation credit unless they give over individual offenders.<sup>127</sup> Indeed, soon after publishing the Yates Memo, the DOJ inserted language in the US Attorney's Manual explaining that "one of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing."<sup>128</sup>

---

<sup>123</sup> *Id.*

<sup>124</sup> DEBEVOISE & PLIMPTON LLP, *supra* note 120, at 4. Indeed, the Yates Memo itself is candid about how difficult it is to prove criminal intent of individuals in cases of corporate criminality. *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Despite the views already discussed, many former U.S. Attorneys and white collar defense lawyers believe that the Yates Memo is just codifying the standard practice. GIBSON, DUNN & CRUTCHER LLP, *supra* note 53, at 5. Prosecutors want to prosecute; if they can bring charges against individuals they'll do it. However, even if the Yates Memo is turning costume into policy it will still be setting the standard higher than what current policy permits and so it may still affect whether corporations are able to get DPA agreements. *Id.* at 6.

<sup>127</sup> GIBSON, DUNN & CRUTCHER LLP, *supra* note 51, at 6; *see also* DEBEVOISE & PLIMPTON, *supra* note 120, at 4-5 (claiming the three take away points from the Yates Memo will be a higher bar for cooperation credit, longer more extensive cooperation, and increase in civil enforcement against individuals).

<sup>128</sup> Scott R. Grubman & Samuel M. Shapiro, *The "Yates Era" In Full Force The DOJ Fully Implements Yates Memo*, 31-SUM CRIM. JUST., Summer 2016 at 17, 18.

In addition, the DOJ provided guidance for when charges should be brought against individuals and added a requirement that prosecutors must memorialize when an individual is not charged.<sup>129</sup> This memo must provide an explanation for the declination and must be approved by the U.S. Attorney for that district or by the Deputy Attorney General in charge of the investigation.<sup>130</sup>

Industry experts suggest that companies would benefit from implementing changes in response to the Yates Memo. One commentator suggests that the best way for corporations to deal in the era of the Yates Memo is to focus on the needs of human resources to mitigate whistleblowing while also increasing liability coverage for employees.<sup>131</sup> Additionally, many agree that companies should update compliance programs to adapt to the new DOJ policy and focus on internal-prevention of criminal conduct through corporate policies.<sup>132</sup>

The Yates Memo has not been in effect for very long. Therefore, it remains to be seen what the memo's full impact on the use of DPAs will be.<sup>133</sup> It is unclear, for example, if the Trump Administration's

---

<sup>129</sup> *Id.* at 19. The DOJ also enlisted a compliance expert Hui Chen to overview agreements and ensure that real changes are made not just paper ones. Brandon Davis, *American Crime Story: Evaluating The Human Resources Impact of the Yates Memo And Its Impact On Employment-Related White Collar Prosecutions*, 63 *FED. LAW.*, July 2016, at 14, 16.

<sup>130</sup> Grubman & Shapiro, *supra* note 128 at 19.

<sup>131</sup> Davis, *supra* note 129, at 16-17.

<sup>132</sup> *See id.*; GIBSON, DUNN & CRUTCHER LLP, *supra* note 53, at 7 (emphasizing the DOJ's priority of compliance programs and giving guidance in what will suffice as a legitimate compliance program).

<sup>133</sup> As of now there is not enough evidence to determine if DOJ will only bring DPAs when individuals are charged. In 2015, of the four DPAs brought after the Yates Memo was announced only one (Swisher Hygiene) brought charges against a senior manager who was convicted on a guilty plea. Gibson, Dunn & Crutcher LLP, *supra* 53, at 4-5. However, these agreements followed right on the heels of the Yates Memo and so it is possible that the agreements were in the works before DOJ enacted any new policy. *Id.* It should also be noted that the forty-three NPAs brought in 2015 under the DOJ

focus on individual accountability in cases of corporate misconduct will remain as strong as the previous administration.<sup>134</sup> Given the policy implications discussed above, it would appear that the benefits from the Yates Memo will still have a role to play. Conditioned on any developments in DOJ policy, the Yates Memo's focus on individuals can create a positive new focus and bring an increase in individuals being held accountable in future DPAs.

#### F. INDEPENDENT MONITORS

To ensure that corporate offenders abide by the terms of their agreements, DPAs provide for the assignment of independent monitors. An independent monitor supervises a company's enactment of the DPA for a certain amount of time.<sup>135</sup> The independent monitor is typically an expert in compliance or ethics who is approved by the government and is paid by the defendant company.<sup>136</sup> Monitors are used in a wide range of white-collar cases,

---

Tax Swiss Bank Program required names of employees who served noncompliant "U.S. Related Accounts" and so the cases did fall under the policy of the Yates Memo. *Id.* at 4.

<sup>134</sup> Scott L. Fredricksen & Gregory Husisian, *White Collar Enforcement and the New Trump Administration: Your Top Ten Questions Answered*, FOLEY (Feb. 9, 2017), <https://www.foley.com/white-collar-enforcement-and-the-new-trump-administration-your-top-ten-questions-answered-02-09-2017/> (claiming that, though Trump has not spoken about his opinions on white collar crime, there is still good reason to think that the administration will continue to aggressively enforce white collar crimes).

<sup>135</sup> See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. LAW REV. 1713, 1714 (2007).

<sup>136</sup> See Julie DiMauro, *Deferred Prosecution Agreements: Working with the independent Monitor*, THOMSON REUTERS (May 5 2015), <https://blogs.thomsonreuters.com/answeron/deferred-prosecution-agreements-working-independent-monitor/>. More often than not, former regulators or prosecutors are chosen for the position and are preapproved by the government, maybe in part because the government holds the bargaining power in DPA agreements. Khanna & Dickinson, *supra* note 135, at 1722-23.

from securities fraud to FCPA to anti-money laundering.<sup>137</sup> Independent monitors are, of course, independent, meaning they cannot have any conflicts of interest with the monitored company.<sup>138</sup> Despite the long-term benefits from independent monitors, companies are not incentivized to use them on their own due to the associated short-term costs.<sup>139</sup> Therefore, it may be necessary for a DPA to mandate an independent monitor in order to incentivize the company to enact the required changes.<sup>140</sup>

Once a monitor is in place, they have vast powers and responsibilities under the broad language contained within most DPAs.<sup>141</sup> A good monitor helps a company devise a process to create and test policies for effective compliance.<sup>142</sup> Basically, the monitor acts as both a mentor and watchdog to the company.<sup>143</sup> In the end, all the monitor's findings and recommendations are reported to the government and any changes implemented under the monitor's supervision will at the very least be in effect for the remainder of the DPA, and probably afterward as well.<sup>144</sup>

An example of the vast responsibility independent monitors hold is the DPA of Siemens AG, which committed billions of dollars in bribes leading to a 2008 FCPA case.<sup>145</sup> The company paid historically

---

<sup>137</sup> See Khanna & Dickinson, *supra* note 135, at 1721-22.

<sup>138</sup> See DiMauro, *supra* note 136.

<sup>139</sup> See Khanna & Dickinson, *supra* note 135, at 1728-29. For many crimes, the mere threat of criminal sanctions for wrong doing does not alone incentivize a corporation to improve compliance or get an independent monitor and therefore it being required may be necessary. *See id.*

<sup>140</sup> *See id.* at 1729-30 (arguing that when fines alone are not sufficient to produce societal change we need to assign independent monitors to ensure the changes).

<sup>141</sup> *Id.* at 1724. This vast power is also due to the uneven bargaining power that prosecutors hold in forming the terms of DPAs. *See id.*

<sup>142</sup> See DiMauro, *supra* note 136.

<sup>143</sup> See Khanna & Dickinson, *supra* note 135, at 1720, 1724.

<sup>144</sup> *See id.* at 1725.

<sup>145</sup> Mike Koehler, *The Work of a Monitor and Checking in on Siemens*, CORPORATE COMPLIANCE INSIGHTS (January 24, 2013), <http://www.corporatecomplianceinsights>.

high fines and was required to appoint a monitor for a three-year period, during which time the monitor conducted four reviews.<sup>146</sup> In 2012, the DOJ notified the court that it had reviewed the monitor's findings each year and then again at the conclusion of the monitorship.<sup>147</sup> Through these reports, the government found that Siemens had satisfied its obligations.<sup>148</sup>

As explained in the Siemens AG monitor's reports, the monitor had conducted on-site and remote reviews of activities in twenty countries, conducted issue-specific reviews in nineteen additional countries, reviewed over 51,000 documents, met with over 2,300 employees, observed 180 company events, and spent 3,000 auditor days conducting financial studies and test.<sup>149</sup> In conjunction with this review, the monitor made 152 recommendations including changes to third-party risks, financial controls, compliance policy and training, a revised code of conduct, increased compliance personnel, and improved review processes for due diligence.<sup>150</sup>

While it is extremely difficult to effectuate corporate change, especially for a global company as massive as Siemens AG, there is evidence that the monitor assigned to Siemens created a real difference. In an annual filing to the SEC in 2012, Siemens explained how its compliance team found and reported evidence of public corruption.<sup>151</sup> These filings allowed the authorities to go after former

---

com/the-work-of-a-monitor-and-checking-in-on-siemens/; Deferred Prosecution Agreement, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367, 10 (D.C. 2008) [hereinafter "Siemens AG DPA"].

<sup>146</sup> Koehler, *supra* note 145.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

Siemens employees and to continue to investigate the matter.<sup>152</sup> Further, the independent monitor led to a strengthened compliance team<sup>153</sup> which, in turn, helped the company detect and remove further illegal conduct.<sup>154</sup> Siemens' DPA demonstrates how an independent monitor can improve corporate compliance and prevent recidivism. Thus, independent monitors are beneficial both to the corporation and to society based on the improvements and oversights they can impose on a corporation.<sup>155</sup>

#### G. FINES

Even if one is not convinced of the changes a DPA can bring to a corporation's culture, the fines they impose can be punitive and create a strong deterrent effect.

Fines can come in the form of restitution, penalties and/or forfeitures.<sup>156</sup> Restitution, whether criminal or civil, is designed to

---

<sup>152</sup> See *id.* Admittedly, the company has not caught everything as in 2013 an ex-compliance officer from their China office brought a Dodd-Frank whistleblower action alleging he discovered a kickback scheme and was fired in retaliation for it. Aruna Viswanatha et al., *Ex-compliance executive sues Siemens over alleged Asia bribery scheme*, THOMAS REUTERS (Jan 15, 2013), <http://www.reuters.com/article/us-siemens-bribery-lawsuit-idUSBRE90E0YZ20130115>. However, it should be noted that the suit was dismissed by the Southern District and Second Circuit due to standing issues related to extraterritoriality. See *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014) (holding anti-retaliation provision of Dodd-Frank Act does not apply extraterritorially).

<sup>153</sup> Koehler, *supra* note 145.

<sup>154</sup> Monitors do not blindly approve corporate conduct as there are many cases of corporations being reported by monitors for failing the DPA's terms. Two examples are the additional three hundred million dollars fine for Standard Chartered PLC when the monitor found the company failed to screen for the same conduct that originally got it in trouble or the 340 million dollar fine for Standard Chartered when the monitor found that the company's software missed millions of possible regulatory violations. DiMauro, *supra* note 136.

<sup>155</sup> Khanna & Dickinson, *supra* note 135, at 1728.

<sup>156</sup> Peikin, *supra* note 13, at 2-3.

make the injured parties whole again.<sup>157</sup> Forfeitures involve the government taking any property gained from the illicit activity.<sup>158</sup> Monetary penalties are punitive sanctions designed to substitute for the fact that companies cannot be incarcerated for their offenses.<sup>159</sup> The DOJ often compels companies to many penalties on top of forfeiture and/or restitution to the victims.<sup>160</sup>

The punitive component of fines needs to be controlled, however, to mitigate the risk of punishing innocent employees and shareholders.<sup>161</sup> For this reason, prosecutors generally do not impose punitive sanctions that are greater than the amount the company would have to pay if it had been convicted and sentenced.<sup>162</sup> Accordingly, prosecutors often collect the same fines as they would have through convicting the corporation, and do so without leaving

---

<sup>157</sup> *Id.*

<sup>158</sup> *Criminal Forfeiture*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Criminal+Forfeiture> (last visited Oct. 15, 2017).

<sup>159</sup> *Id.*

<sup>160</sup> Spivack & Raman, *supra* note 24, at 182.

<sup>161</sup> *Id.* at 183. An illustration of these principles is the DPA with international automobile company Daimler AG. Upon a former employee accusing the company of bribery, Daimler disclosed information to the DOJ which exposed violations of the FCPA. Deferred Prosecution Agreement, *United States v. Daimler AG*, No. 1:10-cr-00063, 3 (D.C. 2010) [*hereinafter* "Daimler AG DPA"]. In negotiating a DPA with Daimler, DOJ determined the appropriate monetary penalty to \$93,600,000, which was 20% below the applicable fine range based on Daimler's cooperation. *Id.* at 6. DOJ imposed a significant punishment on the company but also was afforded the discretion of taking Daimler AG's cooperation into account to reach a desired outcome.

<sup>162</sup> Spivack & Raman, *supra* note 24, at 183. These fines will be determined by a sentencing range calculated through the U.S. Sentencing Guidelines, where the defendant corporation's culpability can increase the amount paid from a base fine for the offense. Sarah Marberg, *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J. TRANSNAT'L LAW 557, 571 (2012). For corporations, the base is determined by the greatest of the value of the unlawful payment, the value of the benefit received or to be received in return for the unlawful payment, or the consequential damages resulting from the unlawful payment. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2C1.1(d)(1)).

the amount to the judiciary or having to expend the energy on a conviction.<sup>163</sup>

In addition to enabling a measured form of corporate punishment, fines can help achieve a deterrent effect. This is so because corporations, as rational economic actors, will not engage in criminal behavior when the penalty is too costly. DPAs promote specific deterrence – deterrence applied to the entity charged<sup>164</sup> – when the fine is greater than or equal to the benefit of the crime divided by the probability of sanction.<sup>165</sup> This is because the crime occurs only when the benefit outweighs the fine times the chance of detection.<sup>166</sup> Therefore, large fines like those in DPAs would want to be avoided and will deter criminal conduct when there would be no payoff.

Large fines also achieve general deterrence, the fear of punishment prevents people in society at large from engaging in the criminal behavior.<sup>167</sup> Most companies want to know exactly where the line is in order to avoid run-ins with the law and will monitor the punishments imposed on competitors that break that law.<sup>168</sup> Those companies will adjust their own behavior when they see severe punishments imposed on their bad-acting competitors, further influencing the market.<sup>169</sup> This coincides with the idea of deterrence

---

<sup>163</sup> Peikin, *supra* note 13, at 5.

<sup>164</sup> European Commission, General deterrence vs. specific deterrence, (Oct. 16, 2017) [https://ec.europa.eu/transport/road\\_safety/specialist/knowledge/speed\\_enforcement/general\\_introduction\\_to\\_traffic\\_law\\_enforcement/general\\_deterrence\\_vs\\_specific\\_deterrence\\_en](https://ec.europa.eu/transport/road_safety/specialist/knowledge/speed_enforcement/general_introduction_to_traffic_law_enforcement/general_deterrence_vs_specific_deterrence_en).

<sup>165</sup> Arlen, *supra* note 21, at 155.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. ONLINE 121, 122 (2007).

<sup>169</sup> See Panel Discussion, *Bigger Carrots and Bigger Sticks: Issues and Developments in Corporate Sentencing*, 11 FORDHAM J. CORP. & FIN. L. 161, 167 (2006) (claiming “Prosecuting the corporation criminally . . . gives an opportunity to send a very powerful message of deterrence . . . that can resound throughout an industry and can even have effects across the entire economy”).

in law and economics: a company will act in its best financial interest. So, one of the benefits for the government in imposing fines through DPAs is to reduce the incentives for corporations to commit crimes.

An example of how large fines can achieve sufficient deterrence is the DPA between the U.S. Attorneys for the District of New Jersey and pharmaceutical company Bristol-Myers Squibb. Bristol-Myers Squibb admitted to securities fraud for overstating its pharmaceutical sales in SEC reports.<sup>170</sup> In turn, the company had to pay \$50 million in restitution and pay a civil settlement of \$100 million.<sup>171</sup> On top of this, the company was required to pay \$300 million to compensate its shareholders.<sup>172</sup> In the end, Bristol Myers Squibb paid severely for its criminal actions. Perhaps such a huge financial burden put other pharmaceutical companies in New Jersey on watch as well.<sup>173</sup> Whether they are utilized to achieve specific deterrence, general deterrence, or both, fines are a powerful component of DPAs and are an integral part in holding corporate defendants accountable for their crimes.

#### H. SOCIALLY BENEFICIAL UNRELATED TERMS

The deterrence and punishment achieved by fines are not the only social benefit offered in DPAs.<sup>174</sup> Some agreements also offer terms

---

<sup>170</sup> Deferred Prosecution Agreement, *United States v. Bristol-Myers Squibb*, 2, (D.N.J. June 13, 2005) [*hereinafter* "Bristol-Myers Squibb DPA"].

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 6.

<sup>173</sup> Bristol Meyers along with the other orthopedic device companies charged in New Jersey in 2007 made up over ninety-five percent of the hip and knee surgical implants market. Spivack & Raman, *supra* note 24, at 183 n.142. This gives credence to the idea that the industry as a whole had to hear the message that the illicit conduct Bristol Meyers engaged in would not be tolerated.

<sup>174</sup> The way fines are used can have social benefits. Funds received from DPA-related fines that exceed what is necessary to reimburse victims, or funds received in cases where the victim is hard to identify, go into our treasury department to be dispersed through government programs. Kathleen Pender, *When government fines companies*,

for the corporation to strengthen its commitment to the community. These terms can vary widely and can have financial implications for the defendant corporation. Often, they have nothing to do with the underlying offense but are intended to improve the company's standing within the community by addressing some public need.<sup>175</sup>

One example of socially beneficial terms comes from the DPA of New York Racing Association, Inc. ("NYRA"). NYRA admitted to falsifying tax returns and attempting to defraud the United States.<sup>176</sup> The company entered into a DPA and underwent significant restructuring performed by an independent monitor.<sup>177</sup> Additionally, the DPA contained terms calling for the installation of slot machines with profits going toward funding public education in the state.<sup>178</sup> Thus, the NYRA DPA was leveraged to promote the state's policy goals.<sup>179</sup>

DPA terms creating social benefits is admittedly not the strongest argument for DPAs, mostly because these terms arguably involve too much discretion in the hands of prosecutors.<sup>180</sup> In other words,

---

*who gets cash?*, S.F. CHRONICLE (2010), <http://www.sfgate.com/business/network/article/When-government-fines-companies-who-gets-cash-3189724.php>. These funds can be deployed in creative and arguably utilitarian ways; an example is the Manhattan District Attorney's Office which has donated large sums from Bank settlements and DPA cases his office participated in to criminal justice projects and research. See James C. McKinley Jr., *Cyrus Vance Has \$808 Million to Give Away*, N.Y. TIMES (2015), <https://www.nytimes.com/2015/11/08/nyregion/cyrus-vance-has-dollar-808-million-to-give-away.html>.

<sup>175</sup> Spivack & Raman, *supra* note 24, at 174 n.83 (citing to the example of Bristol-Myers Squibb who endowed a new chair at Seaton Hall School of Law on its own volition as a term in its DPA).

<sup>176</sup> Deferred Prosecution Agreement, *United States v. N.Y. Racing Ass'n*, No. 03-1295, 1-2 (E.D.N.Y. Dec. 11, 2003) [*hereinafter* "NYRA DPA"].

<sup>177</sup> See *id.* at 3-4, 7.

<sup>178</sup> *Id.*

<sup>179</sup> Spivack & Raman, *supra* note 24, at 174.

<sup>180</sup> See BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS*, 77 (Belknap Press of Harvard University Press, reprint ed. 2014).

prosecutors have too much latitude to induce behavior that has nothing to do with the underlying offense, which in turn permits the government too much control over corporate decisions.<sup>181</sup> Still, socially beneficial terms may bolster the usefulness of DPAs by fostering the company's reputation while benefiting the community as a whole.<sup>182</sup> These improvements stand in stark contrast to other areas of criminal enforcement in which people are sent into the criminal justice system with little benefit produced for society.<sup>183</sup>

Unrelated terms are similar to the other DPA terms in that they induce a corporation to perform beneficial acts. As examined throughout these subsections, DPAs have varied terms that can help improve both a company and the society around it. In sum, from improving society through the use of fines and socially beneficial terms, to improving corporations with monitors and business changes, DPAs can have a wide range of effects on corporations and are a valuable tool in the prosecution of corporate crime.

### III. CONS: CRITICISMS OF DPAs AND RESPONSE

#### A. DPAs ARE NOT SUFFICIENTLY SPECIFIC TO BE EFFECTIVE

Despite the many positive attributes of DPAs, the practice has been criticized by various viewpoints. One such criticism charges that DPAs are too vague, with no clear standard for companies or the

---

<sup>181</sup> Following the Bristol Meyers case discussed earlier, *supra* note 170, there was criticism that money was paid to U.S. Attorney Christie's alma mater which seemed to be a conflict of interest. *Supra* note 180. In response, the DOJ adopted a new rule that DPAs should not include terms requiring the payment to persons or organizations that are not a victim of the crime or redressing the harm caused. *Id.*

<sup>182</sup> Spivack & Raman, *supra* note 24, at 174 n.83.

<sup>183</sup> Khanna, *supra* note 135, at 1728 arguing that fines are the least costly form of punishment on society in comparison to imprisonment) (citing A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984)).

government to follow.<sup>184</sup> Critics contend that the DOJ has no realistic guidance for the government or companies implementing DPAs.<sup>185</sup> Due to this lack of guidance, many DPAs have similarly vague terms, which may not fit for every kind of company.<sup>186</sup> For example, terms mandating a corporate monitor who specializes in compliance may not be beneficial to a company charged with a consumer protection violation.<sup>187</sup> The monitor, in all likelihood, will fail to redress the specific corporate misbehavior at hand.<sup>188</sup> Therefore, some argue that when prosecutors micro-manage a company based on loosely defined agreements, they go beyond their purview and only succeed in hurting the targeted company.<sup>189</sup>

Critics also contend that the lack of specificity in guidelines for entering DPAs creates uneven results. The guidelines for DPAs can vary from district to district, even for the same offense.<sup>190</sup> This

---

<sup>184</sup> Lawrence A. Cunningham, *Deferred Prosecution Agreements Are Too Generic to Be Effective*, N.Y. TIMES (Nov. 11, 2014), <http://www.nytimes.com/roomfordebate/2014/11/11/do-deferred-prosecutions-keep-banks-honest-or-let-them-cheat/deferred-prosecution-agreements-are-too-generic-to-be-effective>.

<sup>185</sup> Arlen, *supra* note 22, at 205.

<sup>186</sup> Cunningham, *supra* note 184.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See Golumbic & Lichy, *supra* note 5, at 1312-13 (citing John C. Coffee Jr., *Deferred Prosecution: Has it Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13) (claiming that prosecutors' knowledge is limited to bringing charges not in managing a company and so a company's profits can be harmed). Some would contend that prosecutors understanding the firm culture better and making individualized determinations for each agreement would be better served and better enforceable than the current agreements used. Cunningham, *supra* note 184.

<sup>190</sup> See F. Joseph Warin & Peter E. Jaffe, *Rolling the Dice in Corporate Fraud Prosecutions*, 33 NO. 3 LITIGATION 12 (discussing how different prosecutors handle the same crime differently and so companies' punishment will vary by where they set up their business). Compare the Bristol-Meyers case discussed above, *supra* page 455, to the same year in the U.S. Attorney for SDNY where that office announced they chose not to bring charges against Shell Oil Company for overstating their books and basically engaging in the same type of securities fraud as Bristol-Meyers Squibb. Warin & Jaffe, *supra* note 191, at 14.

variation can make companies unsure of which rules to follow and can cause a company to think twice about where they want to set up shop.<sup>191</sup> In 2007, for example, there were no DPAs in the SDNY that included an independent monitor, and yet every DPA in New Jersey did include an independent monitor.<sup>192</sup> Two companies committing the same actions in different jurisdictions, therefore, would have been subject to different punishments.<sup>193</sup> These uneven results threaten to undermine the DOJ's desire to implement cooperation.<sup>194</sup> Specifically, corporations will not want to cooperate when it is uncertain what benefits they will receive or what terms they will be subject to.<sup>195</sup>

#### B. DPAs ALLOW FOR PROSECUTORIAL EXCESS

Critics contend that the absence of specific guidelines regarding the structuring of DPAs allows prosecutors to exercise too much unchecked discretion, which goes against fundamental notions of fairness. Unlike legislation or regulation, which require extensive legal processes, DPAs are set up by individual prosecutors' offices, often without opposition.<sup>196</sup> Therefore, the terms within a DPA can be determined by an individual prosecutor's discretion.<sup>197</sup> This, some argue, violates the rule of law.<sup>198</sup> Under the rule of law, executive

---

<sup>191</sup> *Id.*

<sup>192</sup> Spivack & Raman, *supra* note 24, at 173.

<sup>193</sup> Warin & Jaffe, *supra* note 190, at 14.

<sup>194</sup> *Id.* at 15.

<sup>195</sup> *Id.*

<sup>196</sup> Arlen, *supra* note 22, at 205. Even the little amount of judicial influence that currently exist has been resisted by the DOJ. *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

officials' power is tethered by ex-ante limitations on scope and/or by allowing ex-post oversight of official action.<sup>199</sup>

Critics of DPAs contend that these agreements fail both ex-ante and ex-post restraints.<sup>200</sup> The rule of law poses that executive officials should have a limited specified scope to either designate, interpret, or enforce a particular regulation.<sup>201</sup> DPAs fail scope restraints because prosecutors have the ability to create, impose, and enforce rules on an individual company.<sup>202</sup> Additionally, the "rubber stamping" of DPA agreements by judges discussed above<sup>203</sup> provides only miniscule oversight and does not qualify as real oversight required for rule of law.<sup>204</sup> Based on this, the argument concludes that DPAs fail the rule of law and that enforcement is left to the whims of men and women instead of the law.<sup>205</sup>

If unrestrained by the rule of law, prosecutors can rely on their own moral compass to guide their almost unchecked discretion in creating DPAs.<sup>206</sup> This process of deciding based on ideology, even well intentioned, is troubling and is not a trustworthy way to reach

---

<sup>199</sup> *Id.* at 206-207. Scope is normally limited by giving officials only the power to designate, interpret, or enforce a particular regulation, often executive actors are specifically described their roles so they do not overreach. *Id.* at 208. Oversight as the name implies means that the actors decision is reviewable either by another executive or the judiciary to see if it was within scope. *Id.* at 209.

<sup>200</sup> *Id.* at 214.

<sup>201</sup> *Id.* at 208.

<sup>202</sup> *Id.* at 214.

<sup>203</sup> See *supra* notes 15-21 and accompanying text.

<sup>204</sup> Arlen, *supra* note 22, at 214. One may argue that the company itself is an opposing party but that argument quickly fails. Even though the agreements are viewed as voluntary, corporations have such high stakes in avoiding an indictment and risking an Anderson effect that the government has full power to set the terms and the company will still settle no matter the cost. Erik Paulsen, Note, *Imposing limits on Prosecutorial Discretion in Corporate Prosecution Agreement*, 82 N.Y.U. L. Rev. 1434, 1458-59 (2007).

<sup>205</sup> *Id.* at 205-06.

<sup>206</sup> *Id.* at 216.

fair results.<sup>207</sup> DPAs, some contend, permit prosecutors to take on the added role of judge, punishing the corporation without a trial or sentencing. Furthermore, many duties imposed on a targeted firm could not be imposed through the normal litigation process had the corporation not entered into the DPA.<sup>208</sup> This has led some to label DPAs as overreaching.<sup>209</sup> Thus, critics suggest DPAs should not be used given their potential for prosecutorial excess.

### C. DPAs DO NOT HOLD OFFENDERS ACCOUNTABLE

Not all critics think that DPAs provide prosecutors with too much power in corporate criminal prosecutions. In fact, some critics contend that DPAs achieve too little in holding corporate offenders accountable.<sup>210</sup> Critics on this end of the spectrum believe the sanctions do not achieve sufficient punishment or deterrence.<sup>211</sup> In addition, these critics also believe that DPAs do not effectively

---

<sup>207</sup> See *id.* at 216. An example is Bristol-Meyers Squibb, the company donated to the then-U.S. Attorney's alumna mater of Seton Hall and though it was socially beneficial the clear ties to the lead Jersey prosecutor Chris Christie would at the least make some question if there was a personal benefit from his office based on the allotted discretion. *Id.* at 214. Note however, as stated above, Bristol Meyers Squibb was the one to suggest the endowment. See *supra* notes 137-145 and accompanying text.

<sup>208</sup> *Id.* at 200.

<sup>209</sup> See *id.* at 200. What makes matters worse, as stated in the subsection above, is that DPAs can be created arbitrarily with the terms imposed being completely different depending on the prosecutor who brings the charges. See generally Warin & Jaffe, *supra* note 191.

<sup>210</sup> Jed S. Rakoff, *Justice Deferred Is Justice Denied*, N.Y. REV. (Feb 19, 2015), <http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/>. This view point is expressed less often than the view in the first two sections but it is still a popular perspective. Spivack & Raman, *supra* note 24, at 187-88; Golumbic & Lichy, *supra* note 5, at 1312.

<sup>211</sup> See Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 19 (2012).

achieve structural or cultural changes and in affect amount to little more than a publicity stunt.<sup>212</sup>

To support the notion that DPAs are ineffective, critics point to corporate actors who re-offend after entering a DPA. One such example is the case against Pfizer Inc. In 2002, Pfizer entered into a DPA after one of its subsidiaries paid massive bribes in order to get a drug approved.<sup>213</sup> As part of the DPA, Pfizer had to create compliance mechanisms that would alert the board of directors to illegal marketing activity.<sup>214</sup> Two years later, however, Pfizer was again facing prosecution for similar marketing activities from the same subsidiary.<sup>215</sup> The company again entered into a second DPA.<sup>216</sup> Three years after the second DPA, further criminal market activities were uncovered at another subsidiary.<sup>217</sup> A third time, Pfizer entered into a DPA.<sup>218</sup> Despite these three DPAs, in 2009 the government implicated Pfizer's parent company in similar activity of bribing doctors to promote off label brands.<sup>219</sup> Perhaps shockingly, the DOJ once again entered into a DPA, this time with the parent

---

<sup>212</sup> Rakoff, *supra* note 210. SDNY District Judge Jed S. Rakoff takes an even further view, that charging a company - a fictional entity - is pointless because only individuals commit crimes and it achieves nothing besides hurting innocent parties. *See id.* Rakoff claims going after corporate culture by emphasizing compliance is not the solution because the concept of corporate culture is ill defined and some level of aggressiveness is inherent to a corporation. *Id.* However, not all critics agree with this thinking as others claim DPAs are still effective in some regard at addressing corporate culture. *See generally* Garrett, *supra* note 180 (concluding that tighter enforcement of DPAs will make them effective).

<sup>213</sup> Rakoff, *supra* note 210.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

corporation.<sup>220</sup> This very extreme case lends powerful support for critics to tout the ineffectiveness of DPAs.<sup>221</sup>

One reason that the DPAs were ineffective in the Pfizer case, and perhaps in other instances, is the lack of individual accountability.<sup>222</sup> In two-thirds of all DPAs, charges are not brought against individual offenders.<sup>223</sup> This fact is concerning, because it prompts the question: who is actually being held accountable in corporate prosecutions?<sup>224</sup> A recent example is the 2014 case of JP Morgan, who admitted to mishandling and failing to report suspicious transactions relating to the Bernie Madoff Ponzi scheme.<sup>225</sup> JP Morgan entered into a DPA and paid two billion dollars in penalties.<sup>226</sup> Despite the major fines, critics contend the agreement is further evidence of the DOJ's hesitation to bring charges against megabanks and executives, a mentality often coined "too big to jail."<sup>227</sup> Critics are concerned that until individuals are held to their actions, the criminal activity will continue because going after the company alone is not a strong enough deterrent to prevent wrongdoing if individuals are able to walk away.<sup>228</sup>

---

<sup>220</sup> *Id.*

<sup>221</sup> As far as the research uncovered to write this paper, no other example has been found where a DPA is so flagrantly ignored or where so many future proceedings are brought. Therefore, it may be fair to assume this case is an outlier.

<sup>222</sup> No high-ranking executives were prosecuted in any of the Pfizer cases. Rakoff, *supra* note 211.

<sup>223</sup> Garrett, *supra* note 180, at 13.

<sup>224</sup> Rakoff, *supra* note 210.

<sup>225</sup> See Ben Weyl, *JP Morgan Settlement Proves Some Are "Too Big to Jail," DOJ Critics Contend*, CQ ROLL CALL, Jan. 9, 2014, 2014 WL 68264.

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* The term "too big to jail" originated out of the 2008 financial crisis and the DOJ's failure to prosecute any individuals while still implying that the banks may have played a culpable role. Rakoff, *supra* note 2. When it came to the 2008 financial crisis, many speculated that the reason no charges were brought was because of the difficulty of proving intent. Rakoff, *supra* note 2.

<sup>228</sup> Weyl, *supra* note 225.

Some critics argue that even if DPAs achieve major structural reform and prevent recidivism, failing to jail individual offenders creates inequitable treatment within the criminal justice system. U.S. Senator Elizabeth Warren highlighted this view when she publicly chastised the DOJ for entering into a DPA with HSBC for significant money laundering and sanctions violations.<sup>229</sup> Senator Warren argued HSBC should have pled guilty instead of entering into the DPA.<sup>230</sup> Additionally, she claimed that it is “fundamentally wrong” that a person caught with a single ounce of cocaine could face serious prison time or life in prison, yet when someone launders billions of dollars for drug cartels the offender’s company pays a fine, and the offender gets to go home.<sup>231</sup>

Rather than enter into DPAs that are unfair and ineffective, critics contend these cases should be handled the same as any other criminal investigation. Specifically, prosecutors should bring charges against culpable individuals and turn lower-level actors into cooperators to assist in eventually reaching higher-ranking offenders.<sup>232</sup> Critics argue that this approach would have a greater impact on corporate criminal wrongdoing than DPAs’

---

<sup>229</sup> Golumbic & Lichy, *supra* note 5, at 1322.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* These remarks stemmed from the 2012 DPA for HSBC, which was accused by the government of having so under-funded its anti-money laundering programs to increase profits that it unwittingly helped launder hundreds of millions in drug cartel money. *Id.* at 1318. One alleged reason for DOJ offering the DPA was that if they did not, HSBC would most likely fail and be dissolved, having catastrophic effect on many innocent people and the economy. *See id.* at 1320. HSBC entered into the DPA, having to pay massive fines and reform its compliance, along with many employees and directors being relieved of their jobs. Deferred Prosecution Agreement, *United States v. HSBC Bank USA, NA*, No. 1:12-cr-00763, 5-17 (E.D.N.Y. 2012) [*hereinafter*, “HSBC DPA”].

<sup>232</sup> Rakoff, *supra* note 210.

“prophylactic” remedy, because charging individuals would hold the guilty parties accountable and ensure real change.<sup>233</sup>

In sum, DPAs face dual threads of criticism—one for perceived leniency for corporate wrongdoers and another for allowing prosecutors too much power over corporations. Regardless of which viewpoint critics put forth, many believe that the detriments of DPAs outweigh the benefits that they provide.

#### D. RESPONSE TO CRITICISM

Like most areas of the law, DPAs are not perfect. Contrary to what critics claim, however, DPAs achieve overwhelmingly positive outcomes that outweigh their disadvantages. This section will respond to the principal criticisms that have been raised with respect to DPAs.<sup>234</sup> This section will be divided into the charge that DPAs do too much and then on the charge that DPAs do too little.

##### 1. *Response to DPAs Doing Too Much*

The first major criticism<sup>235</sup> is that DPAs are not sufficiently specific to be enforceable. This critique fails to consider the management changes<sup>236</sup> and business changes<sup>237</sup> typically included in DPAs, which carry specific terms. As discussed above, these terms can be tailored to particular business practices such that there is little question as to their meaning.<sup>238</sup> Furthermore, when the agreement entails something outside a prosecutor’s purview, he or she generally

---

<sup>233</sup> *Id.*

<sup>234</sup> It cannot be understated that all the criticisms raised were thoughtful and had their own merit; it is not this paper’s goal to undermine their positions but rather seeks to defend DPAs as a practice in our society even in light of those allegations.

<sup>235</sup> Discussed *supra* at page 456.

<sup>236</sup> See *supra*, note 65-81 and accompanying text.

<sup>237</sup> See *supra*, note 82-90 and accompanying text.

<sup>238</sup> See *supra*, note 65-90 and accompanying text.

assign an independent monitor, which will allow for a more specific review of the corporation.<sup>239</sup>

While the terms of DPAs are sufficiently specific, their application is left solely to individual prosecutors' offices, which raises the legitimate potential for prosecutorial abuse.<sup>240</sup> Nevertheless, the potential for arbitrary conduct on the part of prosecutors is mitigated by the fact that prosecutors' offices provide themselves with guidance, which is designed to reduce subjectivity. For example, the Thompson Memo, discussed above<sup>241</sup> provides additional guidance for when prosecutors should bring charges and enter into DPAs.

Besides guidance like the Thompson Memo, both prosecutors and defense counsel can rely on past practices to guide what to expect in DPAs going forward. Lending support to reliance on past practices is the fact that defense firms often rely on prior DPAs and the DOJ's policies in order to anticipate possible punishments and the conduct that will qualify as cooperation.<sup>242</sup> Accordingly, there is some guidance to the implementation of DPAs and thus protect

---

<sup>239</sup> See *supra*, note 135-55 and accompanying text.

<sup>240</sup> See generally Peikin, *supra* note 13.

<sup>241</sup> See *supra* note 47-56 and accompanying texts. The Thompson Memo laid out eight factors to consider bringing charges against a company and so there is some guidance companies can follow. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components on Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), [http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20\\_privwaiv\\_dojthomp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf) [*hereinafter* the "Thompson Memo"]. The Thompson Memo laid out similar terms as the previous Holder Memo. *Id.* at 1305. The factors in the Holder Memo included: (i) the nature and seriousness of the offense; (ii) the pervasiveness of the wrongdoing within the corporation; (iii) the corporation's history of similar conduct; (iv) its timely and voluntary disclosure of wrongdoing and willingness to cooperate; (v) the adequacy of its compliance program; (vi) the corporation's remedial actions; (vii) collateral consequences; and (viii) the adequacy of non-criminal remedies. *Id.*; see also, Holder Memo, *supra* note 8.

<sup>242</sup> See generally GIBSON, DUNN & CRUTCHER LLP, *supra* note 17 (analyzing past DPAs and DOJ policy to give information for current clients to avoid liability).

corporations from much of the arbitrariness inherent in prosecutorial discretion.

One final argument proposed by critics who believe that DPAs do “too much” is that prosecutorial discretion in DPAs can lead to results that are substantively excessive and possibly abusive. One response to this critique is that prosecutorial discretion is extremely common within our justice system and does not presumptively lead to any different results in the context of DPAs in corporate prosecutions. Prosecutors are given almost full discretion when it comes to charging decisions and plea negotiations,<sup>243</sup> which are akin to DPAs in that they entail bringing charges. As with plea negotiations, the prosecutor holds most of the cards in the DPA context. Prosecutors normally do not abuse their discretion, however, as evidenced by the fact that as most plea agreements and DPAs tend to fall within the Sentencing Guidelines range.<sup>244</sup> DPAs thus allow for the same fines the company would face at trial or a guilty plea.<sup>245</sup> However, DPAs bring the added benefit of avoiding Arthur Andersen-like collateral consequences and encouraging reform and good corporate citizenship.<sup>246</sup>

---

<sup>243</sup> See *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”).

<sup>244</sup> See *supra* note 117-20 and accompanying text; N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, WASH. LAW. (Mar. 2005), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/march-2005-taking-the-stand.cfm> (conceding that prosecutors are fair minded in their charging decisions and that companies that find themselves getting attention from prosecutors are normally warranted).

<sup>245</sup> See Xiao, *supra* note 20, at 249-50 (comparing a case of DBE fraud resolved through DPA with a case of DBE fraud resolved through formal prosecution and concluding there is minimal difference in results in relation to seriousness of the fraud crime).

<sup>246</sup> See *id.* at 245 (arguing DPAs allow corporations to avoid the harsh realities that result from criminal proceedings). Critics still contend DPAs are different because the mandates prosecutors impose may not have been envisioned by Congress. See Arlen,

## 2. *Response to the Charge that DPAs are Not Doing Enough*

Another significant criticism of DPAs is that they are ineffective at holding the company and individuals accountable for their crimes. As for DPAs' effects on corporations, even most critics would concede that some form of DPA can help curtail corporate wrongdoing on a larger scale than simply pursuing individual offenders alone.<sup>247</sup> DPA terms ranging from business practices, to management and policy changes, to imposing independent monitors,<sup>248</sup> illustrate that DPAs can get at a corporation's conduct, in ways that traditional prosecution cannot, by mandating intricate reforms.<sup>249</sup> Furthermore, DPAs are more effective in dealing with a corporation than traditional prosecution because they achieve the desired result while avoiding the Andersen Effect.<sup>250</sup> Therefore, DPAs are still an effective tool when prosecuting a corporation.

---

*supra* note 21, at 222. Contrary to this argument, these changes can be seen as an improvement. Rather than following the intensely criticized model of mass incarcerating defendants or having a repeat of Arthur Andersen, DPAs allow for the criminal justice system to attempt to prevent recidivism yet avoid collateral consequences; creating adequate reforms and deterrence that benefit both the company and society.

<sup>247</sup> Arlen, *supra* note 21, at 203-04 (acknowledging setting ex ante rules that if broken result in large monetary fines is the most effective way to deal with corporate crime but adding that imposing mandates is only acceptable when the government cannot trust management to implement changes nor will they be incentivized by financial damage to the firm).

<sup>248</sup> See *supra* note 59-63 and accompanying text (listing the eight terms of DPAs examined by this paper).

<sup>249</sup> Xiao, *supra* note 20, at 246-47 (unlike a guilty plea, DPAs allow for massive corporate changes that could not be fixed otherwise but still requires an admission of wrongdoing).

<sup>250</sup> See *id.* at 245, 249-50. The DOJ is wise to not recklessly risk the evisceration of major companies, producing much more harm than it would good. Golumbic & Lichy, *supra* note 5, at 1341. However, this doesn't mean charges will never be brought when appropriate. DOJ rhetoric has long touted that no company is "too big to jail" and when a case can be proven beyond a reasonable doubt, the DOJ will not hesitate to hold a corporation accountable through prosecution. Jason M. Breslow, *Eric Holder*

As for the notion that more individual charges need to be brought, both critics and proponents can probably agree that DPAs should increase charges against individuals.<sup>251</sup> However, the DOJ's policy has taken these criticisms to heart and has reflected a new focus on individuals involved in corporate crime.<sup>252</sup> Specifically, the Yates Memo represents a genuine interest in holding individual offenders accountable in cases of corporate crime.<sup>253</sup> The exact implications of the Yates Memo may be unclear, but still the DOJ agrees with critics when it comes to encouraging individuals to be prosecuted in corporate criminal cases.<sup>254</sup>

Though DPAs can benefit from holding more individuals responsible, this section has analyzed that they can get to a corporation in ways traditional prosecution cannot to implement real reform. Additionally, these agreements are specific enough to be effective, and the small amount of guidance in place is no different than other areas of prosecution. For all these reasons, DPAs may not be perfect but their practice should continue given the vast benefits that accompany them.

---

*Backtracks Remarks on "Too Big to Jail"*, FRONTLINE (May 16, 2013, 2:15 PM), <http://www.pbs.org/wgbh/frontline/article/eric-holder-backtracks-remarks-on-too-big-to-jail/>.

<sup>251</sup> Compare Rakoff, *supra* note 210 (criticizing the use of DPAs because more individuals need to be held accountable) with David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1272-73 (2016) (arguing that the DOJ wants an increased focus on individuals and there has always been a priority to identify culpable individuals in this context).

<sup>252</sup> See Uhlmann, *supra* note 251 (arguing the DOJ's focus on bringing individual charges).

<sup>253</sup> See *supra* note 116-134 and accompanying text (discussing the Yates Memo).

<sup>254</sup> See generally Yates Memo, *supra* note 120; GIBSON, DUNN & CRUTCHER LLP, *supra* note 51; DEBEVOISE & PLIMPTON LLP, *supra* note 120 (arguing the Yates Memo could result in increased targeting of individuals in civil actions).

#### IV. IMPROVING DPAs: WHAT SHOULD BE DONE?

##### A. JUDICIAL OVERSIGHT: WHY IT HELPS

While there may be compelling responses to most of the criticism of DPAs, there is still room for improvement in the DPA framework. Aside from encouraging more charges against individuals,<sup>255</sup> the biggest improvement to DPAs would be to allow for increased judicial oversight. DPAs are overwhelmingly rubber stamped by judges who only ensure the agreement is in line with the Speedy Trial Act.<sup>256</sup> The Speedy Trial Act merely requires that DPAs be timely approved by the court but does not provide judges a specific role in drafting or guide what the agreement should look like.<sup>257</sup> Courts are therefore given very little ability to review the terms or question potential prosecutorial excess.<sup>258</sup>

Subjecting DPAs to enhanced judicial review would curb prosecutorial excess by increasing transparency and legitimacy within the DPA process.<sup>259</sup> With increased judicial oversight, judges could actively ensure that DPAs are neither too harsh nor too lenient,

---

<sup>255</sup> The idea of increasing the number of individuals being charged in DPA is supported both by critics and the DOJ. *See, e.g.,* Yates Memo, *supra* note 121; Rakoff, *supra* note 210. It is a concept that has been heavily discussed throughout this paper and so it does not need to be discussed further in this section. *See supra* notes 114-135 and accompanying text (discussing the Yates Memo and need for individual accountability); *see also supra* notes 247-254 and accompanying text (conceding support for increased individual accountability). Instead, this section will discuss the other major area of improvement: judicial oversight.

<sup>256</sup> *See supra* note 17-22 and accompanying text (discussing the standard of judicial oversight for DPAs and how it amounts to rubber stamping); *see also* Golumbic & Lichy, *supra* note 5, at 1300-01 (discussing district court practices of rubber stamping DPAs the same day they are presented for approval).

<sup>257</sup> *See* Golumbic & Lichy, *supra* note 5, at 1300; *see also* 18 U.S.C. § 3161 (1975).

<sup>258</sup> Greenblum, *supra* note 29, at 1884. In most DPAs, right to speedy trial along with other procedural aspects are waived. *Id.* at 1864. The effect of this is that defendant corporations waive judicial review of their terms and courts are left with no ground to investigate the DPA's substance given the lack of adversity. *Id.* at 1898.

<sup>259</sup> *See* Golumbic & Lichy, *supra* note 5, at 1342.

and could allow defendants expanded negotiation power.<sup>260</sup> Additionally, judges would be able to act as fiduciaries for those whose interests are not represented in DPAs—namely the employees, shareholders, and clients of the targeted corporations.<sup>261</sup> Further, prosecutors would not be deterred from entering into DPAs, but instead would need to be mindful that a backend check existed to ensure that “the interest of justice” would be best served.<sup>262</sup>

This suggested improvement was brought to life in the case of HSBC’s DPA with the DOJ in 2013.<sup>263</sup> In reviewing the proposed DPA, Judge Gleeson of the Eastern District of New York did not rubber stamp the DPA.<sup>264</sup> Instead, he deliberated over whether the deal should be allowed regardless of the fact that both HSBC and DOJ supported it.<sup>265</sup> In an unusual twenty page opinion, Gleeson approved the DPA but determined that the court’s review is not determined by the Speedy Trial Act.<sup>266</sup> Instead, Gleeson opined that the court can intervene based on its supervisory power.<sup>267</sup> However, the opinion concluded that this supervisory review would be extremely limited to where the defendant claims the criminal proceeding is improper or other narrow situations, which is unlikely to occur as it would derail the likelihood of entering into an agreement that the defendant wants.<sup>268</sup>

---

<sup>260</sup> See generally *id.* at 1344 (discussing the benefits of enhanced judicial review of DPAs).

<sup>261</sup> Greenblum, *supra* note 29, at 1901.

<sup>262</sup> See *id.* at 1903.

<sup>263</sup> Golumbic & Lichy, *supra* note 1, at 1318.

<sup>264</sup> *Id.* at 1327 (noting Judge Gleeson delayed approval of DPA for nearly seven months after it was presented).

<sup>265</sup> *Id.*

<sup>266</sup> See *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July, 2013).

<sup>267</sup> See *id.*

<sup>268</sup> See *id.* Gleeson also listed a few other narrow circumstances where the supervisory power may arise, those included: (i) violations of attorney-client privilege or work

Despite its many limitations, the HSBC case was unprecedented in that it opened the door for the notion that judges can review the substance of a DPA's terms.<sup>269</sup> However, it may not go far enough, as the Gleeson approach applies so stringently that it will only arise for the most outrageous DPAs.<sup>270</sup> Instead, a better alternative may be to establish express criteria by which for courts must evaluate all DPA agreements.<sup>271</sup> It remains to be seen if judicial review of a DPA's substantive terms will catch on as the standard for DPA approval.<sup>272</sup> However, proponents of judicial review have had set backs by those who oppose it.

#### B. JUDICIAL OVERSIGHT: PUSHBACK FROM THE COURTS

The main enemy to court supervision has been the appellate courts. Federal district court judges have tried intervening to supervise corporate prosecution agreements. Each time, the circuit courts have intervened to frustrate such attempts at supervision.<sup>273</sup> An example is *United States v. Fokker Services B.V.*,<sup>274</sup> where District

---

product, (ii) when the remedy has no nexus to the crime, or (iii) when an independent monitor is selected solely on their relationship to the prosecutor. *See Id.*

<sup>269</sup> Golumbic & Lichy, *supra* note 5, at 1331.

<sup>270</sup> *Id.*

<sup>271</sup> *See id.* at 1342. At the least, judges should be able to come in to determine if an agreement has been breached, a decision currently left to the prosecutor, in order to get a neutral decision in a defined scope. *See generally* Greenblum, *supra* 29, at 1900 (arguing limiting judicial involvement to matters of breach overcomes many of the legal and practical obstacles to judicial involvement in deferred prosecution).

<sup>272</sup> Golumbic & Lichy, *supra* note 5, at 1331 (contemplating that, because the law of judicial review for DPAs is largely unwritten, it remains to be seen if more judges will take on this standard); *see also* GIBSON, DUNN & CRUTCHER LLP, *supra* note 53, at 10 (laying out multiple cases of judges trying to insert supervisory power over DPAs).

<sup>273</sup> Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, <https://www.nacdl.org/champion.aspx?id=44005>; GIBSON, DUNN & CRUTCHER LLP, *supra* 53, 11-12.

<sup>274</sup> *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

Judge Leon of the District of Columbia tried to argue that judges have a continual monitoring interest.<sup>275</sup> Judge Leon argued that one of the purposes for judicial supervision is to ensure the integrity of the court, and so the court was obligated to ensure the terms within the DPA do not amount to prosecutorial abuse of discretion.<sup>276</sup>

The D.C. Circuit overruled Leon's finding, reinforcing that, in reviewing the terms of DPAs, judges should only look for violations of the Speedy Trial Act.<sup>277</sup> The court reasoned that DPAs reflect charging decisions, which are for the prosecutor to determine, as compared to sentencing decisions, which fall to the judge.<sup>278</sup> Therefore, the court found that judges do not have a continual monitoring role in DPAs.<sup>279</sup>

As the D.C. Circuit's decision in *Fokker Services* illustrates, given current precedent, district courts are severely constrained in their ability to provide meaningful review to the terms of DPAs. Considering that it is unlikely for judicial review to be added by court precedent, the only way in which such review appears possible is for the Speedy Trial Act to be amended to expressly provide for such review.<sup>280</sup> Amendments of this sort have been proposed by Congress

---

<sup>275</sup> See *Fokker Services*, 79 F. Supp. 3d at 165.

<sup>276</sup> *Id.* In this case, Judge Leon noted to approve this DPA in which the corporation was "prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies" would "promote disrespect for the law." *Id.* at 167.

<sup>277</sup> *Fokker Services*, 818 F.3d at 742.

<sup>278</sup> *Id.* at 743.

<sup>279</sup> *Id.* A similar outcome was reached in the case *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *vacated and remanded*, 752 F.3d 285, 289 (2d. Cir. 2014), where Judge Rakoff of the Southern District of New York's review of a DPA was overruled by the Second Circuit. This time, the appellate court ruled that so long as the agreement is fair, reasonable, and is not a public disservice, it is presumed permitted. According to the Second Circuit, the district judge has the burden of showing the agreement would do the public a disservice. *Citigroup*, 752 F.3d at 296.

<sup>280</sup> *Columbic & Lichy*, *supra* note 5, at 1342.

in the past.<sup>281</sup> In 2009, Congress proposed the Accountability in Deferred Prosecution Act (“ADPA”) to promote uniform judicial oversight, but the statute was never voted out of committee.<sup>282</sup> Congressional action similar to the 2009 statute would be extremely desirable in improving the DPA framework given that it can add greater clarity and transparency.<sup>283</sup> However, such a reform will be left to time to determine and, similar to other aspects of DPAs, the question remains what developments the future will hold.

#### CONCLUSION

DPAs have become an increasingly powerful tool to curtail corporate offenders over the years. The use of DPAs in the corporate criminal context has skyrocketed since the collapse of Arthur Andersen and resultant political backlash.<sup>284</sup> Arthur Andersen brought attention to the significant collateral consequences that can happen when one indicts a company – namely harming innocent shareholders, employees, and the economy.<sup>285</sup> DPAs emerged as an answer because they allowed prosecutors to extract an admission of guilt from the corporation and achieve their desired remedies while avoiding the Andersen Effect.<sup>286</sup>

In addition to avoiding the Andersen Effect, DPAs have been widely embraced because of their ability to reform corporations. By mandating terms ranging from business and management changes to increases in compliance, DPAs are able to modify future corporate

---

<sup>281</sup> *Id.* at 1343.

<sup>282</sup> *Id.* at 1343.

<sup>283</sup> *Id.* at 1344 (arguing that judicial review would promote transparency and legitimacy so Congress should amend the Speedy Trial Act).

<sup>284</sup> See *supra* note 29-60 and accompanying texts.

<sup>285</sup> See *supra* note 29-60 and accompanying texts.

<sup>286</sup> See *supra* note 29-60 and accompanying texts. See also Golumbic & Lichy, *supra* note 5, at 1341.

culture and behavior.<sup>287</sup> DPAs also attempt to focus on individual accountability and uncover further wrongdoing through requiring the company's cooperation.<sup>288</sup> If these terms are not met, DPAs carry the threat of then prosecuting the corporation.<sup>289</sup> In order to ensure ongoing performance, generally the agreements even require an independent monitor.<sup>290</sup> Finally, the large fines that usually accompany DPAs help to achieve prosecutor's punitive and deterrent goals.<sup>291</sup> With DPAs, prosecutors have arguably achieved reform in a wide range of cases while avoiding a corporation's collapse.

Despite the vast benefits DPAs bring, they still have received criticism in the form of two perspectives. First, critics contend that DPAs do not have specific enough terms and guidelines thus leading to prosecutorial excess.<sup>292</sup> Critics therefore contend that DPAs violate the standards of the rule of law.<sup>293</sup> Secondly, critics contend that the reforms DPAs impose do not go far enough, because they are ineffective.<sup>294</sup> As to this first criticism, the discretion allowed in DPAs is no different than other areas of criminal law.<sup>295</sup> Additionally, past agreements create a form of precedent for prosecutors and defense attorneys to guide them.<sup>296</sup> As to the second line of criticism, through examining all the terms within DPAs, it is clear that the agreements

---

<sup>287</sup> See *supra* note 57-89 and accompanying texts.

<sup>288</sup> See *supra* note 102-134 and accompanying texts.

<sup>289</sup> See *supra* note 135-155 and accompanying texts.

<sup>290</sup> See *supra* note 135-155 and accompanying texts.

<sup>291</sup> See *supra* note 156-173 and accompanying texts.

<sup>292</sup> See *supra* note 184-195 and accompanying texts.

<sup>293</sup> See *supra* note 196-209 and accompanying texts.

<sup>294</sup> See *supra* note 210-233 and accompanying texts.

<sup>295</sup> See *supra* note 234-246 and accompanying texts.

<sup>296</sup> See *supra* note 234-246 and accompanying texts.

can and do achieve reform while avoiding the collateral consequences associated with prosecution.<sup>297</sup>

In the end, the benefit of DPAs outweigh the negatives raised by critics. There is still room for improvement, however. The two most significant opportunities for improvement are (i) that more individuals should be prosecuted, and (ii) there should be a decrease in the potential for prosecutorial abuse. The DOJ agrees that more individual charges should be brought, as evidenced by policies like the Yates Memo.<sup>298</sup> The best way to curb the potential for prosecutorial excess, moreover, would be increasing judicial review of DPA's terms with specific guidance for judges to follow.<sup>299</sup> This would have a range of benefits, including a greater sense of transparency and legitimacy in forming DPAs.<sup>300</sup> Many courts, like Judge Gleeson in the case of the HSBC DPA, have tried to insert greater judicial review but this view is narrow and has yet to be widely adopted.<sup>301</sup> Moreover, the main opponent to judicial oversight, has been the appellate courts, which have interpreted the Speedy Trial Act strictly, in a manner that has undermined any ability to apply meaningful judicial review.<sup>302</sup> Hope for improvement is not lost, as Congress is capable of amending the Speedy Trial Act to give judges a larger specified role in DPAs.<sup>303</sup> As for now, nothing suggests that Congress will take action anytime soon and so it is up to time to reveal the future of DPAs.

A common theme throughout this paper is that more time is needed to reach concrete conclusions. DPAs in the corporate context

---

<sup>297</sup> See *supra* note 247-248 and accompanying texts.

<sup>298</sup> See *supra* note 118-134 and accompanying texts.

<sup>299</sup> See *supra* note 255-272 and accompanying texts.

<sup>300</sup> See *supra* note 255-272 and accompanying texts.

<sup>301</sup> See *supra* note 263-272 and accompanying texts.

<sup>302</sup> See *supra* note 273-280 and accompanying texts.

<sup>303</sup> For an example of what such modifications to the Speedy Trial Act would look like, see Golumbic & Lichy, *supra* note 5, at 1343-44.

are still a relatively new phenomenon, and most of the examples in this paper have not been in existence for very long. The lasting effects that DPA reforms can have on a corporation have yet to be determined.<sup>304</sup> To further this point, most of the data collected for this paper – such as the Kaal-Lacine Study – specifically mention that the results are limited in their ability to predict the long-term consequences of DPAs.<sup>305</sup> Still, to the extent past offenders can stay out of the headlines and avoid recidivism the effectiveness of DPAs may be buttressed.<sup>306</sup>

Time will reveal not only the long-term effects of DPAs, but also how their use can change. Specifically, the practice of resorting to DPAs may be different in the Trump Administration. Given speculations that Trump wants to deregulate,<sup>307</sup> there are some concerns that the administration will not focus on white collar prosecutions or DPAs.<sup>308</sup> Despite these concerns, there is reason to believe—given Trump’s “tough on crime” rhetoric during the campaign—that the fight on corporate crime will be largely

---

<sup>304</sup> A company is probably not going to advertise its ability to not break the law, that would not be the best marketing strategy. And so a lot of the effects of DPAs are still hidden behind the scenes.

<sup>305</sup> The Kaal-Lacine Study, *supra* note 66, at 59.

<sup>306</sup> Hopefully, in the future, data will be available to statistically quantify the effects DPA provisions had on a company in a more definitive light. Thus far, the general consensus seems to be that DPAs at least achieve some reforms. *See supra* note 246-250 and accompanying text (stating that most critics even concede that DPAs are effective in changing a corporation’s culture even if they have to be improved).

<sup>307</sup> Ben Protess & Julie Hirschfield Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES (Feb. 3, 2017), [https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?\\_r=0](https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?_r=0).

<sup>308</sup> Phil Mattered, *Corporate Crime and the Trump Administration*, DIRT DIGGERS DIGEST (Jan 12, 2017), <http://dirtdiggersdigest.org/archives/5524> (claiming that Trump through Jeff Sessions, will not be hard on corporate crime); Sindu Sundar, *Will SDNY’s Independent Streak Falter Without Bharara?*, LAW 360 (Mar. 13, 2017), <https://www.law360.com/articles/901442> (claiming that, after firing US Attorney Preet Bahara the SDNY may have less autonomy in pursuing Wall Street and Albany corruption).

unaffected by the regime shift.<sup>309</sup> Therefore, it is probable that the DOJ and US Attorney's Offices will continue their efforts to investigate and hold corporations accountable.

It is safe to assume DPAs will continue to play a major role in the battle to hold companies accountable going forward given their vast benefits and effects. Even with the need for future developments, present cases laid out in the findings of this paper have shown that DPAs can achieve massive reforms while dealing with companies in a constructive, rather than destructive, way. In conclusion, DPAs are an extremely effective tool in combating corporate crime and their use should be encouraged.

---

<sup>309</sup> See Ben Protess & Matt Apuzzo, *Justice Department Toughened Approach on Corporate Crime, but Will That Last?*, N.Y. TIMES (Jan 12, 2017), <https://www.nytimes.com/2017/01/12/business/dealbook/justice-department-corporate-crime.html> (stating though Trump is pro-business, his populace policy are in line with being hard on corporate crime); Mark Hamblett, *Attorneys Expect SDNY White-Collar Focus Will Continue After Bharara*, N.Y. L.J. (Mar. 13, 2017), <http://www.law.com/newyorklawjournal/almID/1202781189492/> (stating that SDNY will continue its focus on white collar prosecutions despite Trump's firing of the former US Attorney Preet Bharara).