

# **SWEETHEART DEALS, DEFERRED PROSECUTION, AND MAKING A MOCKERY OF THE CRIMINAL JUSTICE SYSTEM: U.S. Corporate DPAs Rejected on Many Fronts**

Peter R. Reilly\*

*Corporate Deferred Prosecution Agreements (DPAs) are contracts negotiated between the federal government and defendants to address allegations of corporate misconduct without going to trial. The agreements are hailed as a model of speedy and efficient law enforcement, but also derided as making a “mockery” of America’s criminal justice system stemming from lenient deals being offered to some defendants. This Article questions why corporate DPAs are not given meaningful judicial review when such protection is required for other alternative dispute resolution (ADR) tools, including plea bargains, settlement agreements, and consent decrees. The Article also analyzes several cases in which federal district courts express misgivings about having to approve, in accordance with recent appellate court rulings, DPAs they would otherwise have likely rejected for being overly lenient. Finally, the Article describes how several foreign countries have turned away from using U.S.-style corporate DPAs in favor of fashioning their own programs with mechanisms to ensure effective transparency, judicial oversight, and public interest accountability. The Article tracks the myriad ways in which critical rule-of-law elements have been integrated into these burgeoning corporate DPA programs worldwide, thereby providing models of how the United States and other countries can work to ensure their own programs conform with rule-of-law and separation-of-power principles.*

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\* Associate Professor, Texas A&M University School of Law; J.D., Harvard Law School; LL.M., Georgetown University Law Center; Hewlett Fellow in Conflict Resolution and Legal Problem-Solving, Georgetown University Law Center (2002–2005). I would like to thank the faculty and staff of the Texas A&M School of Law library—especially Malikah Hall—for the key role they play in my research. I would also like to thank the Editors of the *Arizona State Law Journal* for their excellent work in improving this piece. All errors are my own.

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## INTRODUCTION

According to the U.S. Department of Justice, Deferred Prosecution Agreements (DPAs) “occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”<sup>1</sup> The agreements are negotiated contracts between the government and corporate entities accused of possible misconduct.<sup>2</sup> In broad terms, when the government alleges transgression, the entity is required to admit wrongdoing, cooperate with the government, pay a financial penalty, and bolster corporate compliance programs to avoid future misconduct.<sup>3</sup> In exchange, the government agrees to hold prosecution in abeyance for a set time period (usually several years), thereby giving the accused entity an opportunity to fulfill the terms of the agreement.<sup>4</sup> In the end, if all the provisions of the DPA are successfully achieved, the government will set aside the prosecution and not pursue the matter again.<sup>5</sup>

DPAs were first used in the United States in the early 1900s as a way to quickly and efficiently address low-level misdemeanor crimes like retail theft—especially when committed by juveniles or first-time offenders.<sup>6</sup> The agreements were oftentimes combined with counseling, training, and job-placement programs to assist the defendant.<sup>7</sup> The use of DPAs in addressing

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1. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.200 (2015), <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.200> [hereinafter U.S. ATTORNEYS’ MANUAL].

2. See Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 80 n.16 (2006) (“DPAs are essentially contracts between the government and a corporate criminal in which the government agrees not to prosecute a corporation in return for a list of concessions.”).

3. 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); Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 53 (2014).

4. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 745 (D.C. Cir. 2016).

5. It is possible for agreements to go beyond these basic provisions. See F. Joseph Warin & Peter E. Jaffe, Commentary, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 ANDREWS WHITE-COLLAR CRIM. REP., no. 12, Sept. 2005, at 4–5 (suggesting that “[o]ne of the most appealing aspects of [DPAs] is the ability to tailor each one according to the specific needs of the respective parties, with both sides bargaining for what they hold most dear”).

6. Paola C. Henry, Note, *Individual Accountability for Corporate Crimes After the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform*, 6 AM. U. BUS. L. REV. 153, 157–58 (2016); Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J. L. ETHICS & PUB. POL’Y 631, 642–43 (2014).

7. Wallace D. Loh, Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 827 (1974).

allegations of more serious misconduct by corporate entities and the individuals who run them has been far more recent, with the first agreement being signed in 1994.<sup>8</sup> DPAs have enabled a largely administrative system of criminal justice to thrive in the corporate context<sup>9</sup>—a system that at times seems concerned more with achieving efficiency and certainty-of-outcome than with dispensing justice. Indeed, many nations reject U.S.-style corporate DPAs because the agreements fail to adhere to basic rule-of-law principles such as transparency of process, judicial oversight, public interest accountability, and separation-of-powers.

In form and function, DPAs have close similarities to plea bargains: they are both alternative dispute resolution (ADR) mechanisms wherein the government offers the defendant an opportunity to negotiate an out-of-court resolution to the matter instead of going to trial.<sup>10</sup> Judge Joseph Goodwin, in deciding to reject a plea agreement in *United States v. Stevenson*,<sup>11</sup> states the following:

The United States criminal justice system . . . was never intended to place all the power of accuser, judge, and jury into the hands of the

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8. In 1994, Mary Jo White, then the United States Attorney for the Southern District of New York, entered into a DPA with Prudential Securities. Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1873 (2005).

9. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2142 (1998) (“Perhaps every criminal defendant could have a jury trial when jury trials were rougher and readier procedures, when most defendants did not have legal counsel, when the substantive law was simpler, and when defendants’ procedural rights were rudimentary. But as the procedural complexity of the formal due process model increases, it becomes natural for the law to seek more efficient solutions, and over time such solutions have evolved into a de facto administrative system.”).

10. In plea deals, the accused agrees to accept guilt (unless it’s an *Alford* plea) and conviction without a trial in exchange for a lesser charge or sentence from the government. Similarly, in a DPA, the accused agrees to accept a host of provisions negotiated with the government—including paying a fine, strengthening internal compliance measures, etc.—in exchange for the dismissal of all charges upon successful completion of those provisions. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003) (explaining that in *Alford* pleas, “defendants plead guilty while simultaneously protesting their innocence”); Ellen S. Podgor, *Disruptive Innovation in Criminal Defense: Demanding Corporate Criminal Trials*, 69 MERCER L. REV. 825, 832–33 (2018) (explaining that companies are quick to resolve cases through DPAs and non-prosecution agreements because “[p]aying a fine and resolving the matter brought against them offers, like most plea agreements, finality with a defined result”); Greenblum, *supra*, note 8 at 1869 (explaining that in plea bargaining, “[a] guilty plea results in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial”) (citation omitted).

11. *United States v. Stevenson*, No. 2:17-CR-00047, 2018 WL 1769371, at \*1 (S.D.W. Va. Apr. 12, 2018).

government. Criminal justice in this country was meant to be a balanced system that regulates the investigation, formal accusation, adjudication of guilt and innocence, and punishment of crimes. All aspects of this system were carefully considered and debated by the Founders to ultimately be memorialized for their fundamental value in our Constitution.<sup>12</sup>

Despite the court’s warning, that is precisely what occurs with DPAs: the government acts as accuser, judge, and jury.<sup>13</sup> Yet there is a critical difference between DPAs and plea bargains: in plea agreements, the court is permitted to approve or reject the negotiated deal based on a meaningful review of its substantive terms.<sup>14</sup> (As the court states in *United States v. Miller*, Rule 11 of the Federal Rules of Criminal Procedure “contemplates the rejection of a negotiated plea when the district court believes that the bargain is too lenient, or otherwise not in the public interest. *This power of review protects against erosion of the judicial sentencing power.*”)<sup>15</sup> On the other hand, when DPAs are used, courts are not permitted to make that kind of assessment—i.e., courts are not permitted “to call balls and strikes”<sup>16</sup> like neutral umpires, reviewing deal terms negotiated between the government and defendant to ensure fairness and reasonableness. Such independent oversight by a court is necessary not only to protect against ‘erosion of the judicial sentencing power,’ but also to protect the wider public interest—particularly in criminal matters.<sup>17</sup> It is this lack of meaningful judicial review that led one federal district court judge to state during a DPA approval hearing, “I have absolutely no choice in this matter, no discretion whatsoever . . . . I’m obliged to swallow the pill, whether I like it or not.”<sup>18</sup> Moreover, it is this lack of meaningful judicial review that other countries tend to reject as they work to

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12. *Id.* at \*9; *see also id.* at \*9 n.77 (“Four of the ten Amendments contained in the Bill of Rights regulate the investigation, accusation, trial, and punishment of criminal conduct. *See* U.S. Const. amends. IV, V, VI, VIII.”).

13. *See infra* Part I.C.

14. *See* FED. R. CRIM. P. 11(c)(3)–(5).

15. *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983) (emphasis added) (citations omitted).

16. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Cir.) (“I will remember that it’s my job to call balls and strikes and not to pitch or bat.”). *See generally* Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012).

17. *See United States v. Orthofix, Inc.*, 956 F. Supp. 2d 316, 325 (D. Mass. 2013) (suggesting considerations of public interest are “heightened” in the context of the criminal law).

18. Arraignment at 10, *United States v. U.S. Bancorp*, No. 18-cr-150 (S.D.N.Y. Feb. 22, 2018), ECF No. 9.

develop and implement their own DPA programs—programs with increased judicial safeguards for the accused and general public alike.<sup>19</sup>

This Article attempts to shed light on issues surrounding the ongoing rejection of U.S.-style corporate DPAs—rejection by foreign countries intent on developing their own DPA programs with comparatively greater judicial oversight, and also rejection by U.S. judges, academics, legislators, and other legal experts who question the constitutionality of DPAs (e.g., do they create a ‘dual system of justice?’), who question whether DPAs interfere with fundamental rule-of-law and separation-of-power principles (e.g., do they allow the government to encroach upon powers, such as sentencing powers, that should remain exclusively in the province of a court?), and who question the effectiveness of the agreements within the context of the general purposes of criminal law (e.g., are DPAs effective regarding the extent to which they deter corporate crime, appropriately punish criminal acts, protect the public, rehabilitate bad actors, and provide restitution to victims?).

The conclusion reached after considering these and related questions is clear: The time has come for the United States Congress to reject the status quo by reforming the nation’s corporate DPA program. Congress must balance the scales of justice to ensure rule-of-law and separation-of-power principles in addressing allegations of corporate misconduct through deferred prosecution. Hopefully, any reform process will include investigating DPA programs being drafted and implemented by courts and legislative bodies in other countries<sup>20</sup>—programs that could serve as models for how U.S. corporate DPAs might be improved.

This Article will proceed in three parts. Part I will discuss the following: advantages and disadvantages of using DPAs in addressing allegations of corporate misconduct; a district court’s role in the DPA approval process; warnings set forth by a variety of legal experts, all suggesting that corporate DPAs in their current form present serious rule-of-law shortcomings; and,

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19. Ben Morgan, Joint Head of Bribery and Corruption within U.K.’s Serious Fraud Office, stated in a recent speech:

The entire [DPA] process is only effective if, after full scrutiny, it is approved by the court. This is a key and distinguishing feature of the UK DPA system. The judge is asked to give a declaration; first, that disposal of the matter by way of a DPA is in the interests of justice; and secondly that the terms are fair, reasonable and proportionate.

Ben Morgan, Joint Head of Bribery and Corruption, Address at Seminar for General Counsel and Compliance Counsel from Corporates and Financial Institutions (Mar. 7, 2017).

20. See Sandra Day O’Connor, Assoc. Justice, U.S. Supreme Court, Remarks at Southern Center for International Studies (Oct. 28, 2003) (“I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues.”).

finally, specific concerns judges have expressed regarding corporate DPAs, including several recent DPA cases illustrating those concerns. Part II analyzes DPA programs that are new (or in the process of being developed and implemented) in Australia, Canada, and the United Kingdom, focusing on aspects of the programs that ensure effective transparency, judicial oversight, and public interest accountability. Part III argues it is time for the United States Congress to take action in reforming the current situation and analyzes two Congressional bills—the Accountability in Deferred Prosecution Act, as well as the Ending Too Big to Jail Act—to see what role such legislation, if passed, might play in bringing about reform. This Part also takes a broader look at lessons learned from analyzing newly devised corporate DPA programs within other countries, and how those lessons could best be factored into reform activities taking place in the United States. The Article concludes with a brief summary of how and why it is now time for the United States to take action in reforming its corporate DPA program.

## I. THE U.S. CORPORATE DPA PROGRAM

### A. *Advantages and Disadvantages*

In the United States, DPAs have “become a mainstay of white collar criminal law enforcement.”<sup>21</sup> Professor Julie O’Sullivan calls their increased use part of the “biggest change in corporate law enforcement policy in the last ten years.”<sup>22</sup> Federal prosecutors have long-touted their strengths, with former Assistant Attorney General Lanny Breuer suggesting that “in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea.”<sup>23</sup> Yet, while the U.S. government continues to use DPAs to address an ever-expanding variety of alleged corporate misconduct,<sup>24</sup>

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21. Lanny A. Breuer, Assistant Attorney Gen., Dep’t of Justice, Address at the New York City Bar Association (Sept. 13, 2012), <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>.

22. O’Sullivan, *supra* note 3, at 77 (“The biggest change in corporate law enforcement policy in the last ten years has been the plunge in criminal convictions of large organizations, and the DOJ’s consistent use of [deferred prosecution] agreements to dispose of criminal wrongdoing.”).

23. Breuer, *supra* note 21.

24. DPAs have been used to address a full range of alleged corporate misconduct, including various types of fraud and trade offenses, as well as allegations of violations of the Foreign Corrupt Practices Act, the Controlled Substances Act, the False Claims Act, and the Food, Drug & Cosmetic Act. *2013 Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, GIBSON, DUNN & CRUTCHER LLP (July 9, 2013),

commentators have suggested the agreements have serious rule-of-law deficiencies. As Professor Jennifer Arlen puts it, “[T]he [U.S. Department of Justice] has effectively granted authority to individual prosecutors’ offices to use [DPAs] to create duties, interpret them, and enforce them, without either adequate constraint on their authority to create duties or effective oversight, internal or external.”<sup>25</sup>

Professor Jimmy Gurulé is more succinct in his criticism, saying that U.S.-style corporate DPAs can make a “mockery of the criminal justice system.”<sup>26</sup> Clearly, there is disagreement as to whether the good that can result from employing DPAs outweighs the bad, and a fair amount of writing has explored their advantages and disadvantages. Regarding advantages, the agreements can be a means to: speedy and efficient dispute resolution;<sup>27</sup> the implementation of improved corporate compliance programs inside companies;<sup>28</sup> the imposition of monetary penalties for alleged corporate misconduct;<sup>29</sup> fewer collateral consequences of traditional prosecution being suffered by innocent third parties (including a company’s employees, customers, and shareholders);<sup>30</sup> and increased cooperation being provided by companies during government investigations.<sup>31</sup>

Regarding disadvantages, the agreements can lead to: the government focusing on addressing institutional instead of individual misconduct;<sup>32</sup>

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<http://www.gibsondunn.com/publications/Pages/2013-Mid-Year-Update-Corporate-Deferred-Prosecution-Agreements-and-Non-Prosecution-Agreements.aspx>.

25. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 231 (2016).

26. Carrick Mollenkamp & Brett Wolf, *HSBC Might Pay \$1.8 Billion Money Laundering Fine*, REUTERS (Dec. 5, 2012), <https://www.reuters.com/article/us-hsbc-moneylaundering-settlement/exclusive-hsbc-might-pay-1-8-billion-money-laundering-fine-sources-idUSBRE8B500Z20121206>.

27. See Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1458 (2007).

28. See Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 112 (2014).

29. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 1, 11 (2009), <https://www.gao.gov/assets/300/299781.pdf>.

30. *Id.* at 37.

31. See David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013).

32. See Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014) <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> (“[T]he failure to prosecute those responsible [for the Great Recession] must be judged one of the more egregious failures of the criminal justice system in many years.”).

excessive government bargaining power in the DPA negotiation process with target companies;<sup>33</sup> the appearance that alleged wrongdoers can “essentially buy their way out of a conviction”;<sup>34</sup> the creation of company-specific internal reform measures by government attorneys who sometimes lack training and expertise in corporate governance;<sup>35</sup> a decrease in public access to information and guidance regarding permissible legal conduct since DPAs resolve matters without public trials, published court decisions, or binding judicial precedent;<sup>36</sup> and possible decreases in public involvement, transparency of judicial process, and adherence to rule-of-law and separation-of-power principles in addressing corporate misconduct.<sup>37</sup>

### B. The Court’s Role in Approving DPAs

In the United States, two recent federal appellate court rulings—*United States of America v. Fokker Services B.V.* (“*Fokker*”)<sup>38</sup> and *United States of America v. HSBC Bank USA, N.A.* (“*HSBC Bank*”)<sup>39</sup>—have set the parameters for a federal district court’s role in approving and implementing corporate DPAs. In *Fokker*, the United States Court of Appeals for the D.C. Circuit held that a district court’s role in approving a DPA is limited to performing the following narrow and circumscribed function: “to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial

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33. See Paulsen, *supra* note 27, at 1434.

34. Philip Urofsky, Hee Won Moon & Jennifer Rimm, *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don’t Break What Isn’t Broken—The Fallacies of Reform*, 73 OHIO ST. L.J. 1145, 1170 (2012).

35. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 112 (2007); see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 936 (2007) (“Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries.”); Paul E. McGreal, *Corporate Compliance Survey*, 64 BUS. LAW. 253, 260–61 (2008) (discussing the use of DPAs to enact various governance reforms within companies).

36. Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act*, 7 J.L. ECON. & POL’Y 137, 139 (2010); Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 443 (2009).

37. Arlen, *supra* note 25, at 227; Connor Bildfell, *Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases*, 20 CAN. CRIM. L. REV. 161, 180 (2016).

38. 818 F.3d 733 (D.C. Cir. 2016).

39. 863 F.3d 125 (2d Cir. 2017).

Act's time constraints."<sup>40</sup> Therefore, said *Fokker*, when reviewing a DPA for possible approval pursuant to 18 U.S.C. § 3161(h)(2), a federal district court must "confine[ ] its inquiry to examining whether the DPA served the purpose of allowing [the defendant] to demonstrate its good conduct."<sup>41</sup> In *HSBC Bank*, the United States Court of Appeals for the Second Circuit reinforced the *Fokker* ruling, stating: "[A] district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise."<sup>42</sup>

The practical impact of *Fokker* and *HSBC Bank* is clear, certainly in the D.C. and Second Circuits, and probably well beyond: if a federal prosecutor offers a DPA to a corporate defendant, and that defendant accepts the deal, a district judge is not permitted to reject the deal due to disagreement with its substantive terms. In effect, the agreement must be approved without meaningful judicial review.<sup>43</sup> Moreover, as other courts are confronted with similar legal issues in the future, *Fokker* and *HSBC Bank* will likely be highly influential in the disposition of those cases because "judicial interpretations of statutes, once rendered, enjoy heightened stare decisis effect, sometimes referred to as a 'super-strong' presumption of correctness."<sup>44</sup> This has already occurred in the Fourth Circuit, where a district court judge approved a DPA even though he thought there was a risk the DPA would "provide insufficient deterrence to companies which otherwise would permit fraud, or fail to

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40. *Fokker*, 818 F.3d at 744. The Speedy Trial Act—18 U.S.C. §§ 3161–3174—mandates that a defendant's trial begin within seventy days after indictment, but excludes from that seventy-day limit "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2) (2018). It is that exemption that enables the government to resolve cases using DPAs.

41. *Fokker*, 818 F.3d at 747.

42. *HSBC Bank*, 863 F.3d at 129.

43. See Mark. A. Rush et al., *BNA Insights: Imbalance of Power: Federal Prosecutors' Nearly Unilateral Discretion to Resolve Allegations of Corporate Misconduct After D.C. Circuit Panel Overrules District Court's Rejection of Deferred Prosecution Agreement in U.S. v. Fokker*, 48 SEC. REG. & L. REP. 1005 (2016), reprinted at K&L GATES: STAY INFORMED [http://www.klgates.com/files/Publication/e2083b66-ea77-458a-bd88-aced48a16ecc/Presentation/PublicationAttachment/8426cc68-bb99-40a5-899eb89f064ad73b/spfokker\\_srlr\\_516.pdf](http://www.klgates.com/files/Publication/e2083b66-ea77-458a-bd88-aced48a16ecc/Presentation/PublicationAttachment/8426cc68-bb99-40a5-899eb89f064ad73b/spfokker_srlr_516.pdf) ("Relying upon the Separation of Powers doctrine, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously held, in no uncertain terms, that district court judges are not empowered to reject deferred prosecution agreements ("DPAs") because they disagree with the prosecutors' charging decisions or elements of the agreement." (emphasis added)).

44. Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1828 (2015) ("[W]hen it comes to reexamining judicial interpretations of statutes, courts tend to be extremely deferential to established prior constructions." (emphasis omitted)).

prevent fraud, by its senior officials in the future.”<sup>45</sup> The judge said that although the issue before the court had not yet been addressed by the appellate court sitting directly above (i.e., the United States Court of Appeals for the Fourth Circuit), the standard set by *Fokker* made it clear to the judge that he “*must* approve the DPA and grant the motion.”<sup>46</sup> It appears the die has been cast, and it is this lack of meaningful judicial review during the DPA approval process, along with related rule-of-law deficiencies, that are the focus of the remainder of this Article.

### C. Red Flags

Red flags relating to corporate DPAs have been spotted by highly trained legal experts across the board—in academia, Congress, the judiciary, and private practice. This includes Professor John Coffee’s warning regarding a prosecutor’s excessive control over the DPA process (“the deeper problem lies in the danger that power corrupts and that prosecutors are starting to possess something close to absolute power”);<sup>47</sup> Professor Richard Epstein’s statement that DPA agreements can “turn[] the prosecutor into judge and jury, thus undermining our principles of separation of powers”;<sup>48</sup> Congressman Bill Pascrell, Jr.’s similar warning that DPAs give prosecutors “unmitigated power to be the judge, the jury and the sentencer”;<sup>49</sup> and Judge Rosemary Pooler’s comment (in her concurring opinion in *HSBC Bank*) that through DPAs, “the prosecution exercises the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from

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45. *United States v. Transport Logistics Int’l, Inc.*, No. 18-CR-00011, at \*2 (D. Md. Apr. 2, 2018) (order granting motion for speedy trial). In the case, the defendant was to pay a criminal penalty that was less than ten percent of the amount contemplated by the U.S. Sentencing Guidelines. In addition, “the corporation did not self-report the violations, and there remain members of the Board of Directors who oversaw, or failed to oversee, the company during the time period of the fraud.” *Id.*

46. *Id.* at \*3 (emphasis added).

47. John C. Coffee Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT’L L.J. (July 25, 2005), <https://advance.lexis.com/api/permalink/0297df7d-4897-4eb7-a38a-902445b51634/?context=1000516>.

48. Richard A. Epstein, Commentary, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14; see Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. ON LEGIS. 543, 547 (2015) (“DPAs undermine the rule of law by facilitating a shadow system of adjudications away from any oversight.”).

49. *Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 5 (2008) (statement of Rep. William Pascrell, Jr.).

the courts.”<sup>50</sup> Similar conclusions were conveyed by a Yale Law Journal note published in 1974 (concluding that “[p]retrial diversion encroaches on judicial sentencing authority”<sup>51</sup>), as well as by several attorneys from private practice, writing that “a DPA amounts in sum and substance to a guilty plea *and* a conviction; the corporate defendant must . . . [also] typically subject itself to government oversight for the length of the deferral period—in essence a probationary period.”<sup>52</sup> It appears, then, that many of the actions performed by a prosecutor during the DPA process—actions that are the functional equivalents of adjudicating guilt, sentencing, and determining periods of probation—are duties and functions that would normally fall within the province of a court or jury.

It seems ill-advised for the law to continue developing in a manner that permits an absence of meaningful judicial oversight in the context of corporate DPAs when such oversight protection has been a hallmark of traditional litigation and various alternative dispute resolution processes—including plea bargains, settlement agreements, and consent decrees. In all those areas, judicial oversight plays an instrumental role in protecting public interest and ensuring a check on prosecutorial power.

First, in traditional litigation, when a judge reaches the point of delivering the sentence (meaning after conviction and after he or she has considered U.S. Sentencing Guidelines and various factors pursuant to 18 U.S.C. § 3553(a)),<sup>53</sup> the judge might decide to issue a sentence more in line with a different charge—a much-needed check on prosecutorial power.

Second, in reviewing plea agreements, judges may, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, accept or reject the agreements set before them.<sup>54</sup> Even when a detailed and specific plea deal has been negotiated and agreed upon by prosecutor and defendant, the judge “should . . . reach an *independent* decision on whether to grant charge or

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50. United States v. HSBC Bank USA, 863 F.3d 125, 143 (2d Cir. 2017).

51. Loh, *supra* note 7, at 843–44.

52. Rush et al., *supra* note 43.

53. FED. R. CRIM. P. 11(b)(1)(M).

54. FED. R. CRIM. P. 11(c)(3); *see* Missouri v. Frye, 566 U.S. 134, 148–49 (2012) (“[A] defendant has no right to be offered a plea, nor a federal right that the judge accept it.” (citations omitted)); United States v. Robertson, 45 F.3d 1423, 1439 (10th Cir. 1995) (“There can be little doubt that rejecting a plea agreement due to the court’s refusal to permit the parties to bind its sentencing discretion constitutes the exercise of sound judicial discretion.”); United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983) (“Rule 11 [of the Federal Rules of Criminal Procedure] . . . contemplates the rejection of a negotiated plea when the district court believes that the bargain is too lenient, or otherwise not in the public interest. This power of review protects against erosion of the judicial sentencing power.” (citation omitted)).

sentence concessions.”<sup>55</sup> Judge Joseph Goodwin, in *United States v. Stevenson*,<sup>56</sup> explains how he rejected proffered plea agreements in two previous cases after determining that neither plea was in the public interest.<sup>57</sup>

Finally, with respect to settlement agreements and consent decrees, in reviewing agreements made in areas such as class actions, shareholder derivative suits, and certain kinds of bankruptcy matters, judges have historically had to ensure agreements were “fair, adequate, and reasonable.”<sup>58</sup> Even when consent decrees involve highly complex and technical areas like environmental cleanup issues under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), courts have historically had to ensure settlements were “reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.”<sup>59</sup>

The *Fokker* and *HSBC Bank* courts did not go in this same direction with respect to corporate DPAs—i.e., they did not rule that district courts, in considering approval of a DPA under the Speedy Trial Act, must carefully review the agreement terms to ensure they are “fair, adequate, and reasonable” (or some such language).<sup>60</sup> The danger, of course, is that if agreement terms cannot be considered during a DPA’s approval process, a court might end up giving its “stamp of approval to either overly lenient prosecutorial action, or overly zealous prosecutorial conduct.”<sup>61</sup> It appears this is what occurred in the *Fokker* matter<sup>62</sup>: The trial court, after carefully reviewing the agreement terms, rejected the proposed DPA for being “grossly disproportionate to the gravity” of the misconduct.<sup>63</sup> After the appellate court

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55. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 9 (3d ed. 1999) (emphasis added), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pleas\\_guilty.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf).

56. *United States v. Stevenson*, No. 2:17-cr-00047, 2018 WL 1769371, at \*1 (S.D.W. Va. Apr. 12, 2018).

57. *See United States v. Wilmore*, 282 F. Supp. 3d 937 (S.D.W. Va. Oct. 10, 2017); *United States v. Walker*, No. 2:17-cr-00010, 2017 WL 2766452 (S.D.W. Va. June 26, 2017).

58. *United States v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980).

59. *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (quoting H.R. REP. NO. 253, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042).

60. In the *Fokker* case, the United States Court of Appeals for the D.C. Circuit held that a district court’s role in approving a DPA is limited to performing the following narrow and circumscribed function: “to assure that the DPA in fact is geared to enabling the defendant to demonstrate compliance with the law, and is not instead a pretext intended merely to evade the Speedy Trial Act’s time constraints.” 818 F.3d 733, 744 (D.C. Cir. 2016). Such a circumscribed role prevents a trial court from judicially reviewing DPA agreement terms for fairness and reasonableness.

61. *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

62. *See infra* “Fokker DPA,” Part I.D.2.

63. *Fokker*, 79 F. Supp. 3d at 167.

ruled that the trial court had “significantly overstepped its authority” in rejecting the DPA,<sup>64</sup> the case was returned to the trial court, which then immediately approved the agreement. Clearly, this was a case in which a trial court provided its stamp of approval to what it thought was an overly lenient prosecutorial action.<sup>65</sup>

#### *D. Judges Rejecting U.S. Corporate DPAs*

The end of the previous section describes a case in which a trial court is essentially forced to approve a DPA that it thought was overly lenient. Moving forward, there will surely be similar cases: Trial courts approving DPAs in conformity with *Fokker* and *HSBC Bank*, yet giving that approval begrudgingly due to a belief that the agreements are overly lenient or overly zealous. Following are several examples of this situation playing out: DPAs that are approved by district courts in the face of clear reluctance to make such a ruling.

##### 1. U.S. Bancorp DPA

On February 12, 2018, U.S. Bancorp (USB) entered into a DPA, including a \$528 million penalty, with the Office of the U.S. Attorney for the Southern District of New York.<sup>66</sup> The criminal charges included two violations of the Bank Secrecy Act by USB’s subsidiary, U.S. Bank National Association (the “Bank”), for failures in filing suspicious activity reports, as well as failures in carrying out its anti-money laundering program.<sup>67</sup> The Office of the Comptroller of the Currency (OCC) examiner assigned to the Bank “repeatedly warned USB officials, including the [anti-money laundering officer], of the impropriety” occurring with respect to how the Bank’s monitoring programs were being managed; the examiner’s actions made it clear that senior level managers within the Bank were aware of ongoing problems with the monitoring programs.<sup>68</sup>

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64. *Fokker*, 818 F.3d at 747.

65. *See Fokker*, 79 F. Supp. 3d at 165 (“The parties are, in essence, requesting the Court to lend its judicial imprimatur to their DPA.”).

66. Press Release, U.S. Attorneys Office, S. Dist. of N.Y., U.S. Dep’t of Justice, Manhattan U.S. Attorney Announces Criminal Charges Against U.S. Bancorp for Violations of the Bank Secrecy Act (Feb. 15, 2018), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-us-bancorp-violations-bank>.

67. *Id.*

68. *Id.*

In addition, from October 2011 through November 2013, the Bank neglected to timely report suspicious banking activities of a customer named Scott Tucker.<sup>69</sup> The Bank had been put on notice that it was being used by Tucker to launder money from an illegal payday lending operation, and USB employees disregarded numerous indicators suggesting Tucker was using various Native American tribal companies to conceal his ownership of accounts at the Bank. For example, Tucker spent tens of millions of dollars from supposedly tribal-owned accounts on personal items and projects, including the purchase of a home in Aspen, Colorado, as well as the maintenance of a professional Ferrari racing team.<sup>70</sup> In addition, despite learning about a Federal Trade Commission lawsuit against the tribal companies and Tucker in April 2012, the Bank did not file a suspicious activity report regarding Tucker until it was served with a subpoena to do so in November 2013.<sup>71</sup> Tucker was ultimately convicted in October 2017 of various offenses associated with his illegal payday lending operation; he was later sentenced to nearly seventeen years in prison.<sup>72</sup>

At a hearing on February 22, 2018, the court reviewing the USB DPA said it was “troublesome” to see the government use a DPA to resolve a matter “in which a corporation . . . admits or, to all intents and purposes, admits the commission of felonies, [and] avoids criminal prosecution essentially by paying a fine.”<sup>73</sup> The economic impact of that fine would, the court surmised, likely be borne by company shareholders “while individuals who may be criminally responsible pay nothing.”<sup>74</sup> The court said it was “likely . . . that a consequence of the [DPA] is that individuals who committed the felonies on behalf of the bank . . . [will] walk away.”<sup>75</sup> The court said that “both the interests of deterrence and the interests of just punishment are better served in all or most cases by prosecution of the individuals responsible” and that “[i]f you really want to deter, the way to do it is to make the individuals pay the price for the crimes.”<sup>76</sup> Finally, apparently resigning himself to having to approve the DPA in conformity with *Fokker* and *HSBC Bank*, the court states

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69. *Id.*

70. *Id.*

71. *Id.*

72. Steve Vockrodt, *Payday Lender Scott Tucker Gets 16 Years, 8 Months in Prison for \$2 Billion Ripoff Scheme*, KAN. CITY STAR (Jan. 5, 2018), <https://www.kansascity.com/news/business/article193241289.html>.

73. Transcript of Arraignment at 8, United States v. U.S. Bancorp, No. 18-CR-150 (S.D.N.Y. Feb. 22, 2018), ECF No. 9.

74. *Id.* at 9.

75. *Id.* at 8.

76. *Id.* at 9.

at the conclusion of the hearing: “I understand from the precedence [sic] in the Second Circuit and in the D.C. Circuit, I have absolutely no choice in this matter, no discretion whatsoever . . . I’m obliged to swallow the pill, whether I like it or not.”<sup>77</sup>

## 2. Fokker DPA

Fokker Services B.V., a Dutch aerospace company, was charged with one count of conspiring to violate the International Emergency Economic Powers Act (IEEPA) by exporting aircraft parts and technologies to customers in the U.S.-sanctioned countries of Iran, Burma, and Sudan.<sup>78</sup> The activities took place between 2005 and 2010, during which time the company was “fully aware of the application of U.S. export laws, an issue which was repeatedly raised internally with the company’s management.”<sup>79</sup> Among the 1,153 shipments of aircraft parts “were 99 transactions involving Fokker Services’ customer, Iran Air, which was the subject of a special order from the U.S. Department of Commerce prohibiting Fokker or any third party from exporting U.S.-origin commodities to Iran Air or providing services to Iran Air.”<sup>80</sup> The company’s gross revenue for the illegal shipments was approximately \$21 million.<sup>81</sup> In order to avoid detection, company employees engaged in a number of wrongful behaviors and practices, including (1) failing to provide tail numbers from airplanes to repair service shops located in the United States; (2) scrubbing references to the country of Iran in written materials provided to repair service shops and company subsidiaries located in the United States; and (3) telling company employees to hide documents of Iranian transactions when the company was audited by the U.S. Federal Aviation Administration (FAA).<sup>82</sup>

In addition, this conduct was known and approved by the company’s senior corporate managers, as well as Fokker’s legal and export compliance

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77. *Id.* at 10.

78. Press Release, U.S. Attorneys Office, D.C., U.S. Dep’t of Justice, Fokker Services B.V. Agrees to Forfeit \$10.5 Million for Illegal Transactions with Iranian, Sudanese, and Burmese Entities—Company Will Pay Additional \$10.5 Million in Parallel Civil Settlement (June 5, 2014), <https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/fokker-services-b.v.-agrees-to-forfeit-10.5-million-for-illegal-transactions-with-iranian-sudanese-and-burmese-entities>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

departments.<sup>83</sup> The DPA resolving the matter, which included a \$10.5 million forfeiture to settle claims by the U.S. Department of Justice and a \$10.5 million civil penalty to settle charges by the U.S. Commerce and U.S. Treasury Departments, appears to have been offered due to the company's "remedial actions to date and its willingness to acknowledge responsibility for its actions."<sup>84</sup> The federal district court, which rejected the DPA and said it was "grossly disproportionate to the gravity" of the offending behavior,<sup>85</sup> concluded: "[I]t would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time . . . ."<sup>86</sup> The appellate court ruled that the district court had overstepped its authority in reviewing the terms of the deal, vacated the lower court ruling, and remanded the matter back to the district court.<sup>87</sup> Immediately thereafter, the district court approved the DPA.

### 3. General Motors DPA

In a 2015 legal case in which at least 174 deaths were linked to an ignition-switch defect at General Motors (GM), the matter was resolved through a DPA.<sup>88</sup> The criminal charges included one count of concealing material facts from the National Highway Traffic Safety Administration (NHTSA) and one count of wire fraud.<sup>89</sup> Under the DPA, the company admitted to (1) failing to disclose, in a timely fashion, a safety defect to NHTSA, and (2) misleading consumers about the defect.<sup>90</sup> The problem started a decade earlier when, in 2004 and 2005, customers started experiencing "sudden stalls and engine shutoffs" caused by the defective switch.<sup>91</sup> The company failed to address the

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83. Press Release, U.S. Attorneys Office, D.C., *supra* note 78.

84. *Id.*

85. *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

86. *Id.*

87. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016).

88. Drew Harwell, *Why General Motors' \$900 Million Fine for a Deadly Defect Is Just a Slap on the Wrist*, WASH. POST (Sept. 17, 2015), [https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist/?noredirect=on&utm\\_term=.00682b5c54e1](https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist/?noredirect=on&utm_term=.00682b5c54e1).

89. Press Release, U.S. Attorneys Office, S. Dist. of N.Y., U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with \$900 Million Forfeiture (Sept. 17, 2015), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred>.

90. *Id.*

91. *Id.*

issue, “even reject[ing] a simple improvement to the head of the key that would have significantly reduced unexpected shutoffs at a price of less than a dollar a car.”<sup>92</sup> Instead of focusing on finding a fix, GM “gave assurance that the defect did not pose a safety concern.”<sup>93</sup> By the spring of 2012, the company was aware the problem could result in the non-deployment of airbags in some of its vehicles.<sup>94</sup> Yet the company waited until February 2014—twenty months later—to notify NHTSA of the concern, thereby “egregiously disregard[ing] NHTSA’s five-day regulatory reporting requirement for safety defects.”<sup>95</sup> The DPA resolving the matter, which included a \$900 million fine, appears to have been offered due to the company’s “exemplary actions” in accepting and acknowledging responsibility for its conduct.<sup>96</sup> Although the case was resolved *after* the issuance of a highly touted memorandum by then-Deputy Attorney General Sally Yates encouraging that individuals be identified and considered for prosecution in matters of corporate misconduct,<sup>97</sup> none of the GM employees have faced criminal charges<sup>98</sup>—a result that one federal judge calls “a

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Memorandum from Deputy Attorney Gen. Sally Quillian Yates to Assistant Attorneys Gen., Dirs. of the FBI and the Exec. Office for U.S. Trs., and U.S. Attorneys (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>. The guidance, designed to strengthen DOJ’s ability to hold individuals accountable for corporate misconduct, revises the DOJ’s Principles of Federal Prosecution of Business Organizations. *Id.* at 3; *see also* U.S. ATTORNEYS’ MANUAL, *supra* note 1, § 9.28.000. The Yates Memorandum sets forth the following six steps to achieve its goal:

(1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

Memorandum, Yates, *supra*, at 2–3.

98. Harwell, *supra* note 88.

shocking example of potentially culpable individuals not being criminally charged.”<sup>99</sup>

#### 4. TLI DPA

On March 12, 2018, transportation company Transport Logistics International (TLI)—which provides services for transporting nuclear materials to customers in the United States and abroad—reached a DPA agreement with DOJ.<sup>100</sup> The company was charged with conspiracy to violate the Foreign Corrupt Practices Act (FCPA).<sup>101</sup> Although DOJ said the company had provided “substantial cooperation” during its investigation into the matter, and that the company had “terminat[ed] the employment of all employees engaged in the misconduct,”<sup>102</sup> the district court reviewing the agreement pointed out that “there remain members of the Board of Directors who oversaw, or failed to oversee, the company during the time period of the fraud.”<sup>103</sup> The court further noted that (1) the company did not self-report the violations, (2) a large percentage of company business consisted of the same kind of uranium transportation work that had been secured through fraudulent activities, and (3) that the DPA required a penalty of less than ten percent of the amount recommended by the U.S. Sentencing Guidelines.<sup>104</sup> Thus, said the court, “there is a risk that a DPA under these circumstances will provide insufficient deterrence to companies which otherwise would permit fraud, or

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99. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 41 (D.D.C. 2015). Subsequent news reports suggest it is very difficult to prove outright fraud by employees within the automobile industry. According to former federal prosecutor Matthew L. Schwartz, “[U]nlike other regulated industries where health or human safety is involved, there is no criminal statute aimed at the [] carmakers that does not require specific criminal intent.” Danielle Ivory and Ben Protess, *Laws Hinder Prosecutors in Charging G.M. Employees in Ignition Defect*, N.Y. TIMES, July 19, 2015, at B1.

100. GIBSON, DUNN & CRUTCHER LLP, 2018 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAs) AND DEFERRED PROSECUTION AGREEMENTS (DPAs) 5 (2018) <https://www.gibsondunn.com/wp-content/uploads/2018/07/2018-mid-year-npa-dpa-update.pdf>.

101. Press Release, U.S. Dep’t of Justice, *Transp. Logistics Int’l Inc. Agrees to Pay \$2 Million Penalty to Resolve Foreign Bribery Case* (Mar. 13, 2018), <https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery>.

102. *Id.*

103. Order Approving Deferred Prosecution Agreement at 2, *United States v. Transp. Logistics Int’l, Inc.*, No. 8:18-cr-00011-TDC (D. Md. Apr. 2, 2018), [https://globalinvestigationsreview.com/digital\\_assets/30ddb5eb-54d5-406d-bb95-5df554d173ef/TLI-DPA.pdf](https://globalinvestigationsreview.com/digital_assets/30ddb5eb-54d5-406d-bb95-5df554d173ef/TLI-DPA.pdf).

104. *Id.*

fail to prevent fraud, by its senior officials in the future.”<sup>105</sup> It is interesting to read the back-and-forth conversation between the court and the government with respect to the issue of deterrence. In the following exchange that took place in a hearing regarding the DPA, it appears the court and the government have different notions about the fairness and effectiveness of U.S.-style DPAs:

THE COURT: Well, the issue isn't really that, is it? I mean, isn't the issue whether the company can be -- you filed this Information. So you believe there is probable cause to believe that the institution is criminally liable, correct?

[THE GOVERNMENT]: We believe -- yes, through the acts of the employees that have been charged.

THE COURT: So you have a case. You have probable cause to believe a crime was committed. You have a potential defendant, and yet you're deferring from prosecuting because there are certain people as part of the company who had nothing to do with it and because there is some collateral damage.

Every criminal case we have there is collateral damage. There are family members who suffer greatly, and the Department doesn't seem to worry about their fate when they charge a defendant. So why is this different?

[THE GOVERNMENT]: Well, in this case, you know, the company also, once the conduct was brought to their attention, did the right things. So the company fully cooperated. The company remediated. Their cooperation was extensive and assisted us in making these prosecutions, and the Department wants to incent companies to continue to do those things, and we think those things are extremely important.

So in addition to wanting the company -- we're not in the business of trying to put companies out of business. There is also the cooperation and the remediation and the compliance enhancements that we do want to incent going forward.

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105. *Id.* At an earlier hearing on the DPA, the court stated,

[T]he thing that always bothers me about deferred prosecution agreements is that it seems as if the discussion is always about what do we do to save the company when it's the company and its personnel who were engaged in crimes. I mean, why is the goal always to save the company as opposed to render justice when there has been significant criminal activity?

Transcript of Proceedings at 16–17, *United States v. Transp. Logistics Int'l, Inc.*, No. 8:18-cr-00011-TDC (D. Md. Mar. 12, 2018).

THE COURT: Uh-huh.

[THE GOVERNMENT]: And if this was simply an effort to try to seek a death penalty for the company, then that may not incent future companies to do those things, to cooperate, to remediate, to --

THE COURT: Or it would incentivize them to police their own shops better than this one did.

[THE GOVERNMENT]: Well, we're hopeful that through both, you know, the [DPA] with the company but also through the charges against the individuals and the pleas with the individuals, that that will be a sufficient deterrent to other companies and other individuals when viewing conduct like this.

THE COURT: How does a [DPA] provide any deterrence?

[THE GOVERNMENT]: It has obligations for the company that it needs to continue to cooperate, that the company needs to report to the Government on an annual basis, that the company needs to meet the standards of the compliance that's outlined in the Agreement, as well as that the company needs to pay the fine.

And so there are a number of obligations of the company, and if the company doesn't meet those things, doesn't move forward as a good corporate citizen, then the company will -- the Agreement will be breached, and the company will be charged. We think that is a significant deterrence.

THE COURT: What about general deterrence, though?

[THE GOVERNMENT]: General deterrence? You know, I expect companies are not looking to be -- enter into [DPAs]. Companies do not want to have -- you know, be broadcast that they have engaged in misconduct, do not want to pay criminal penalties, do not want to have the -- have to report to the Government about their compliance, and do all of these steps that are required in the agreement. So that, coupled with the individual prosecutions, which are closely aligned here, I think is a sufficient deterrent to other individuals -- companies act through their individuals -- and other companies from engaging in this conduct going forward.<sup>106</sup>

U.S. District Court Judge Jed S. Rakoff—who did not preside over this TLI matter—has also homed in on the possibility that DPAs are ineffective with respect to deterrence. Judge Rakoff has argued that the current process of negotiating DPAs to address corporate misconduct “is not the best way to

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106. Transcript of Proceedings, *supra* note 105, at 18–20.

proceed” and that “the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing.”<sup>107</sup> In the TLI matter, the trial court, despite strongly expressed apprehension to doing so, ultimately concludes that it must approve the DPA based on the standard set forth in *United States v. Fokker Services B.V.*<sup>108</sup> Specifically, said the court, it “may only fail to approve a DPA if it is not ‘geared to enabling the defendant to demonstrate compliance with the law’ and is instead ‘a pretext intended merely to evade the Speedy Trial Act’s time constraints.’”<sup>109</sup>

### *E. Tip of the Iceberg?*

In three of the four DPAs discussed above, the federal judge involved in the review process expresses strong misgivings about approving the agreement (indeed, in the *Fokker* matter, the trial court outright rejected the DPA until the appellate court vacated that ruling and remanded the case back to the trial court). In the fourth case (involving the General Motors DPA), a court not involved with its approval nevertheless felt compelled to express shock and dismay that no individuals were criminally charged in the matter. Given that the U.S. government appears to sometimes engage in DPAs and non-prosecution agreements<sup>110</sup> that are not made public,<sup>111</sup> it is difficult to know how many more agreements might exist where the reviewing judge expresses opposition to approval, but ultimately yields to existing precedent, ruling in favor of the motion to approve.

Two federal judges, writing in two separate judicial opinions, have asked Congress to bring clarity to this area of the law: Judge Emmet Sullivan calls for improved standards for courts (specifically writing that “congressional action to clarify the standards a court should apply when confronted with a

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107. Rakoff, *supra* note 32.

108. 818 F.3d 733, 744 (D.C. Cir. 2016).

109. Order Approving Deferred Prosecution Agreement, *supra* note 103, at 3.

110. There is a difference between DPAs and NPAs: DPAs are filed in federal court, along with a charging document, and they are subject to court approval. See Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Dep’t of Justice, to Heads of Dep’t Components & U.S. Attorneys, U.S. Dep’t of Justice 1 n.2 (Mar. 7, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf> [hereinafter Morford Memorandum]. NPAs, however, are merely letter agreements between DOJ and the target company. See *id.* With NPAs, a charge is not filed and the agreement is not reviewed by a court. See *id.*

111. See Eric Williamson, *First Amendment Clinic Obtains 18 More of DOJ’s Secret Deals with Corporate Offenders*, UNIV. VA. SCH. LAW: NEWS & MEDIA (June 4, 2015), [https://www.law.virginia.edu/news/2015\\_sum/foia.htm](https://www.law.virginia.edu/news/2015_sum/foia.htm).

corporate deferred-prosecution agreement may be appropriate”),<sup>112</sup> and Judge Rosemary Pooler calls for increased judicial oversight (specifically writing, “I respectfully suggest it is time for Congress to consider implementing legislation providing for [meaningful court oversight of DPAs].”<sup>113</sup>). In both regards—delineating standards for courts, and providing judicial oversight—several countries outside the United States have crafted DPA programs that are superior to the U.S. program in terms of affording these and other rule-of-law and separation-of-power protections.

In criticizing DPAs, commentators have suggested that (1) in corporate cases, it appears that DOJ has been pursuing criminal actions against companies instead of the individuals who run those companies,<sup>114</sup> and (2) that DOJ seems to be using DPAs regularly in addressing allegations against entities, but only rarely for allegations against individuals.<sup>115</sup> As for the first criticism, Judge Jed S. Rakoff argues that the shift in recent decades to focusing on prosecuting companies rather than individuals has “often been rationalized as part of an attempt to transform ‘corporate cultures,’ so as to prevent future crimes”<sup>116</sup>—an approach the judge suggests has led to an increasing use of DPAs and “to some lax and dubious behavior on the part of prosecutors, with deleterious results.”<sup>117</sup> Other commentators agree, stating, “In a post-Enron world, DOJ officials appear to believe that the principal role of corporate criminal enforcement is to reform corrupt corporate cultures . . . rather than to indict, to prosecute, and to punish.”<sup>118</sup>

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112. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 30 n.9 (D.D.C. 2015).

113. *United States v. HSBC Bank USA*, 863 F.3d 125, 143 (2d Cir. 2017).

114. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 13 (2014) [hereinafter GARRETT, *TOO BIG TO JAIL*] (“In about two-thirds of the cases involving deferred prosecution or non-prosecution agreements and public corporations, the company was punished but no employees were prosecuted.”). Professor Garrett also points out that when employees *have* been charged, most have not been “higher-up officers of the companies, but rather middle managers of one kind or another and also some quite low-level individuals.” Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1802 (2015); *cf.* Rakoff, *supra* note 32 (suggesting that, among the various parties to a DPA, “the happiest of all are the executives, or former executives, who actually committed the underlying misconduct, for they are left untouched.”). *See generally* James B. Stewart, *In Corporate Crimes, Individual Accountability is Elusive*, N.Y. TIMES (Feb. 19, 2015), <https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html> (“The entire structure of a corporation is intended to protect and insulate high-ranking executives, who are often shielded from knowledge of wrongdoing, even if they have tacitly approved it.”).

115. *See* GARRETT, *TOO BIG TO JAIL*, *supra* note 114, at 263 (“Prosecutors rarely offer leniency to encourage individuals to rehabilitate.”).

116. Rakoff, *supra* note 32.

117. *Id.*

118. Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008).

As for the second criticism, it applies to both DPAs and to “C” plea bargain agreements<sup>119</sup>—sometimes referred to as “take it or leave it” pleas<sup>120</sup> because the court can only accept or reject the charge and sentence deal negotiated by the prosecutor and defendant (as opposed to a “B” plea, which permits the court to accept the plea and impose a sentence at its discretion).<sup>121</sup> In considering a “C” plea agreement in *United States v. Aegerion Pharmaceuticals, Inc.*, Judge William G. Young writes of the “shocking disparity between the treatment of corporations and individuals in our criminal justice system.”<sup>122</sup> Judge Young said he was “ashamed [he] had not recognized this glaring inequity until this case”—specifically that

a forbidden two-tier system pervades our courts. Corporations routinely get “C” pleas after closed door negotiations with the executive branch while individual offenders but rarely are afforded the advantages of a “C” plea. Instead, they plead guilty and face a truly independent judge. This is neither fair nor just; indeed, it mocks our protestations of ‘equal justice under law.’<sup>123</sup>

The court blamed the process itself, which it said “unduly hobbles this Court’s sworn constitutional duty to ‘do equal right to the poor and to the rich.’”<sup>124</sup> The court added further that using such pleas in the manner they are currently being used (1) “displaces the common law adversarial proceeding and thus directly affects the judicial role,”<sup>125</sup> and (2) might violate the Equal Protection clause of the 14th Amendment to the U.S. Constitution.<sup>126</sup> It could be argued that U.S.-style DPAs have corresponding shortcomings: they are offered routinely to corporations but rarely to individuals; the deals are made during closed-door negotiations between DOJ and defendant (which displace adversarial proceedings and thus directly affect the judicial role); and, finally, given that courts are not permitted to reject a DPA based on disagreement with its terms, the process lacks even the small amount of judicial oversight that is accorded courts reviewing “C” plea agreements.<sup>127</sup> In short, it could be

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119. FED. R. CRIM. P. 11(c)(1)(C).

120. Jeremy Sternberg and Christopher Iaquinto, *The Future of Corporate Criminal Pleas Under Rule 11(c)(1)(C)*, 28 CRIM. JUST. 12, 15 (2014).

121. FED. R. CRIM. P. 11(c)(1)(B).

122. *United States v. Aegerion Pharm., Inc.*, 280 F. Supp. 3d 217, 224 (2017).

123. *Id.* at 224–25.

124. *Id.* at 228 (quoting 28 U.S.C. § 453 (2018)).

125. *Id.* at 221.

126. *See id.* at 228.

127. *See In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 58 (D. Mass. 2005), in which Judge Young was reviewing a proposed settlement in a nationwide consumer class action. (“Judicial review must be exacting and thorough. The task is demanding because the

argued that U.S. corporate DPAs present an even *greater* danger of contributing to the creation of a two-tier justice system than do the “C” plea agreements about which Judge Young so vociferously complains.

Moreover, it should be noted that a two-tier justice system is created not only when *companies* are treated differently than *individuals*, as is suggested by Judge Young. Two-tier justice also occurs when (1) a large company is offered a DPA when a smaller company engaging in the same behavior is not; (2) when, in addressing the same kind of misconduct, employees of larger firms are treated differently than employees of smaller firms; or (3) when, in addressing the same kind of misconduct, wealthier criminals are treated differently than poorer criminals. Consider, for example, the case of G&A Check Cashing, a small company located in Los Angeles. The company and its officers were charged with laundering \$8 million. In the end, guilty pleas were obtained from the company (which paid a \$1 million fine) and from two senior officers (both of whom were incarcerated).<sup>128</sup> Compare that with the treatment of HSBC, a large company that had allegedly laundered *billions* of dollars: the company was given a DPA, and senior officers were not charged.<sup>129</sup> As one scholar puts it, “The dramatically different treatment of HSBC and G&A and their respective senior officers can hardly be squared with any meaningful concept of ‘equal justice under the law.’”<sup>130</sup>

To get rid of the two-tier justice system, defendants must be treated the same: big companies and small companies must be treated the same, and individuals must be treated the same whether they work in big companies, small companies, or no company at all.<sup>131</sup> Indeed, Judge Emmet Sullivan makes a strong case in *United States v. Saena Tech Corporation* that DOJ

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adversariness of litigation is often lost after the agreement to settle. The settling parties frequently make a joint presentation of the benefits of the settlement without significant information about any drawbacks. If objectors do not emerge, there may be no lawyers or litigants criticizing the settlement or seeking to expose flaws or abuses.”)

128. Press Release, U.S. Dep’t of Justice, Los Angeles Check Cashing Store, Head Manager and Compliance Officer Sentenced for Violating Anti-Money Laundering Laws (Jan. 14, 2013), <http://www.justice.gov/usao/cac/Pressroom/2013/008.html>.

129. Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 12, 2012, at A38.

130. See Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1375 (2013) (citation omitted).

131. How does one go about pursuing individuals at the top of large companies? Judge Jed Rakoff argues that prosecutors could pursue top officers of larger companies in the same manner they approach cases involving mobsters and drug kingpins: “You start at the bottom and, over many months or years, slowly work your way up. Specifically, you start by ‘flipping’ some lower- or mid-level participant . . . . With his help, and aided by the substantial prison penalties now available in white-collar cases you go up the ladder.” Rakoff, *supra* note 32. Judge Rakoff suggests that DOJ does not pursue individuals because it “would involve the kind of years-long investigations that [DOJ] no longer [has] the experience or the resources to pursue.” *Id.*

should consider using DPAs “in appropriate circumstances when an individual who might not be a banker or business owner nonetheless shows all of the hallmarks of significant rehabilitation potential.”<sup>132</sup> The judge argues that certain non-violent offenders deserve DPAs<sup>133</sup> and that “refusing such individuals the chance to demonstrate their true character and avoid the catastrophic consequences of felony convictions is, in this Court’s view, greater than the harm the government seeks to avoid by providing corporations a path to avoid criminal convictions.”<sup>134</sup>

#### F. *The Downside to Out-of-Court Resolutions*

In 1986, Judge Harry T. Edwards wrote that “[a]n oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values.”<sup>135</sup> Professor Owen Fiss expresses a similar sentiment when he states in his influential article, *Against Settlement*, that adjudication ensures a process that “explicate[s] and give[s] force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”<sup>136</sup> Using DPAs to address corporate crime replaces long-cherished values embodied in the Constitution with other values: low-cost, efficiency, and certainty. However, as Judge Edwards reminds us, “Inexpensive, expeditious, and informal adjudication is not always synonymous with *fair* and *just* adjudication.”<sup>137</sup>

Of course, proponents of DPAs see more strengths than weaknesses in using the tool. Consider former Assistant Attorney General Lanny Breuer’s statement that DPAs have “the same punitive, deterrent, and rehabilitative effect as a guilty plea.”<sup>138</sup> It is certainly a bold assertion—but is it accurate? One former federal prosecutor suggests it is not, saying, “Companies are *happy* to enter into these deferred prosecution agreements because it’s become so commonplace now. . . . They take a bath in the press for a finite

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132. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 46 (D.D.C. 2015).

133. *See id.* (finding that “[d]rug conspiracy defendants are no less deserving of a second-chance than bribery conspiracy defendants.”).

134. *Id.*

135. Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986).

136. Owen Fiss, Commentary, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

137. Edwards, *supra* note 135, at 679; *see* Marc Galanter, *The Hundred-Year Decline of Trial and the Thirty Years War*, 57 STAN. L. REV. 1255, 1272 (2005) (“The recent accelerated decline in the number of trials is . . . part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication.”).

138. Breuer, *supra* note 21.

period of time. The stock markets don't even seem to punish them.”<sup>139</sup> Moreover, the U.S. Government Accountability Office (GAO) studied these issues and concluded that “DOJ cannot evaluate and demonstrate the extent to which DPAs . . . contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness” and “therefore, it could be difficult for DOJ to justify its increasing use of these tools.”<sup>140</sup> If DOJ has ‘no measures to assess’ the effectiveness of DPAs, how can it be asserted with any confidence that DPAs have the same effect as guilty pleas with respect to punishment, deterrence, and rehabilitation? Given the prominent use of DPAs in the corporate law enforcement context, it would be useful to know more information about how effective (or ineffective) they are in achieving the general purposes of the criminal law—including deterring criminal behavior and punishing it when it occurs, protecting the public from criminal conduct, rehabilitating bad actors, and providing restitution for victims<sup>141</sup>—especially when compared with the more traditional tools of plea agreements and courtroom trials.<sup>142</sup>

There should be additional research conducted to determine if some of the reasons DPAs were first employed, and continue to be used, in the corporate context can be empirically validated. For example, prosecutors have indicated that a major driving force in choosing DPAs over traditional litigation is the belief that *indictment alone* can lead to a company's ruin.<sup>143</sup> Commentators are quick to point to the case of Arthur Andersen, LLP, as an “example of indictment sounding the death knell for a firm.”<sup>144</sup> In that case, the firm was indicted in March 2002, and was convicted of obstruction of

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139. Danielle Douglas, *Royal Bank of Scotland to Pay \$612 Million to Resolve Libor Case*, WASH. POST (Feb. 6, 2013) (emphasis added), [https://www.washingtonpost.com/business/economy/rbs-to-pay-612m-to-resolve-libor-case/2013/02/06/2c0cc42c-6fd3-11e2-aa58-243de81040ba\\_story.html?utm\\_term=.50579a6279a2](https://www.washingtonpost.com/business/economy/rbs-to-pay-612m-to-resolve-libor-case/2013/02/06/2c0cc42c-6fd3-11e2-aa58-243de81040ba_story.html?utm_term=.50579a6279a2).

140. U.S. GOV'T ACCOUNTABILITY OFFICE, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20 (2009), <http://www.gao.gov/assets/300/299781.pdf>.

141. See U.S. ATTORNEYS' MANUAL, *supra* note 1, § 9-28.200(B).

142. See generally RENA STEINZOR, WHY NOT JAIL?: INDUSTRIAL CATASTROPHES, CORPORATE MALFEASANCE, AND GOVERNMENT INACTION (2015).

143. See Alex B. Heller, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 763–64 (2015) (“In Andersen's case, the indictment alone was a corporate death sentence, even before adjudication. The Anderson case and the lessons learned in its aftermath have been regarded as a turning point in government decisions to charge corporate offenders, especially in the financial services industry.” (citations omitted)).

144. Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 165 (2009).

justice, a felony.<sup>145</sup> By the time the conviction was reversed by the U.S. Supreme Court in May 2005, the company had already lost its clients and laid off most of its workforce.<sup>146</sup> With that kind of devastating impact on a company and its workers, it is natural for prosecutors to draw lessons they will carry forward in their frameworks for prosecutorial decision-making; as one prosecutor stated in 2012, “[I]t’s my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation.”<sup>147</sup>

Yet, in 2013, Gabriel Markoff published an article entitled *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*,<sup>148</sup> which challenged the indictment-leads-to-company-ruin theory for targeted entities. Using empirical research methods and relying on large quantities of data, Markoff determined that from 2001 to 2010, no publicly traded company failed due to a conviction.<sup>149</sup> Markoff thus concludes that “the risk of driving companies out of business through prosecutions has been radically exaggerated.”<sup>150</sup> More research needs to be conducted; it is important to learn whether or not these pivotal prosecutorial decisions regarding the use of corporate DPAs are being influenced by incorrect assumptions.<sup>151</sup>

## II. DPA PROGRAMS IN OTHER COUNTRIES

Several countries worldwide have begun the process of implementing DPAs to address corporate misconduct. Before focusing on three of these programs in greater depth (those of Australia, Canada, and the United Kingdom), this Part will begin with a brief summary of each country’s approach. The common denominator among the programs is the requirement

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145. See Heller, *supra* note 143, at 769.

146. See Senko, *supra* note 144, at 763–64.

147. Breuer, *supra* note 21.

148. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013).

149. *Id.* at 797–98.

150. *Id.* at 802.

151. Note that in the excerpt of the hearing transcript from the TLI DPA proceedings printed in Part I.D.4, *supra*, the government attempts to justify offering a DPA in the case because “we’re not in the business of trying to put companies out of business.” Again, is it correct to assume that a company will be ‘put out of business’ if it is prosecuted instead of offered a DPA? More research needs to be conducted in order to conclusively answer that question. See Transcript of Proceedings, *supra* note 105, at 18–20.

for meaningful judicial review of the terms of each agreement—a key rule-of-law and separation-of-power feature that U.S. corporate DPAs so far lack.

### Australia

On December 6, 2017, the government introduced the Crimes Legislation Amendment Bill 2017 into Parliament, which includes a DPA program.<sup>152</sup> The process of producing the bill included obtaining input from the general public. The Attorney-General's Department, in consultation with various government agencies, produced a draft code of practice to provide guidance for the program. Integrated into that draft are stakeholder views received in the 2016 *Deferred Prosecution Agreements Public Consultation* as well as the 2017 *Proposed Model for a Deferred Prosecution Agreement Scheme in Australia Public Consultation*.<sup>153</sup> Thus, significant amounts of public feedback will inform the drafting of the final code of practice, due to be published when the DPA program actually begins.<sup>154</sup>

One commentator organization to the draft stated, “The benefit of having judicial oversight of the DPA process should not be underestimated. It would, in our view, improve the transparency of the process and assist to maintain public confidence in the use of DPAs.”<sup>155</sup> While the bill does not mandate judicial oversight, it mandates something similar: DPAs must be approved by an “approving officer” who is a former judicial officer of a federal, State, or Territory court. In other words, a person who has the knowledge and experience necessary to perform the same duties as would a court.<sup>156</sup> That officer will approve the DPA if he or she believes its terms are “in the interests of justice”<sup>157</sup> and “are fair, reasonable and proportionate.”<sup>158</sup>

### Canada

On March 27, 2018, following a public consultation process, Canada announced that it introduced amendments to its Integrity Regime that would create a new DPA program—which they call Remediation Agreements—to

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152. Austl. Gov't, *Deferred Prosecution Agreement Scheme Code of Practice*, ATTORNEY-GEN.'S DEP'T: CONSULTATIONS, REFORMS & REVS., <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreement-scheme-code-of-practice.aspx>.

153. *Id.*

154. *Id.*

155. Clifford Chance, Comment to Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia 5 (May 1, 2017) <https://www.ag.gov.au/Consultations/Documents/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia/Clifford-Chance-DPA-Submission.pdf>.

156. *Crimes Legislation Amendment Bill 2017* (Cth) sch 2 pt 3, § 17G cl 2 (Austl.).

157. *Id.* § 17D cl 4(a).

158. *Id.* § 17D cl 4(b).

“advance compliance measures, [and] hold eligible organizations accountable for misconduct, while protecting innocent parties such as employees and shareholders from the negative consequences of a criminal conviction of the organization.”<sup>159</sup> The bill was passed by both houses of Parliament and received Royal Assent on June 21, 2018.<sup>160</sup> The new law mandates court approval of the agreements, which will be granted if the court finds the agreement to be “in the public interest”<sup>161</sup> and terms to be “fair, reasonable, and proportionate to the gravity of the offence.”<sup>162</sup>

### **France**

On December 9, 2016, France enacted the Law on Transparency, Fight against Corruption and Modernization of Economic Life, referred to as “Sapin II” after Finance Minister Michel Sapin.<sup>163</sup> The law includes the public interest judicial agreement (*convention judiciaire d’intérêt public*), a tool that closely resembles DPAs.<sup>164</sup> Under Sapin II, the Public Prosecutor can offer a public interest judicial agreement to legal entities—but not to individuals—accused of corruption, influence peddling, or of laundering the proceeds of tax fraud.<sup>165</sup> The agreements must be presented at a public hearing, reviewed and approved (i.e., either validated or dismissed) by the Court of First Instance, and published on the French Anticorruption Agency’s website.<sup>166</sup> The public hearing to consider approval of the agreement may include presentations by both the victims of the misconduct, as well as representatives of the corporate entity accused of wrongdoing.<sup>167</sup>

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159. News Release, Pub. Servs. & Procurement Can., Canada to Enhance Its Toolkit to Address Corporate Wrongdoing (Mar. 27, 2018), <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>.

160. See Budget Implementation Act, 2018, No. 1, S.C. 2018, c 12 (Can.).

161. *Id.* § 715.37(6)(b).

162. *Id.* § 715.37(6)(c).

163. See Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9, 2016 relating to the Transparency, the Fight Against the Corruption and the Modernization of the Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016, <https://www.legifrance.gouv.fr/eli/loi/2016/12/9/2016-1691/jo/texte>.

164. *Id.* art. 22.

165. *Id.*

166. *Id.*

167. *Id.*

### Ireland

In Ireland, the Law Reform Commission was established by the *Law Reform Commission Act 1975* to continuously review the law and propose reform measures. In 2016, the Commission issued a report entitled “Regulatory Enforcement and Corporate Offences”<sup>168</sup> to address a series of corporate misconduct enforcement issues, including the possible introduction of DPAs. The report noted that “[t]he US model, in which DPAs are subject to little or no judicial oversight, would be difficult to reconcile with [Ireland’s constitutional requirements] . . . . The UK’s statutory system, in which judicial oversight is an integral part of the process . . . would appear a preferable model.”<sup>169</sup> One commentator came to a similar conclusion, arguing that judicial oversight of DPAs in Ireland should include “review of the terms of the DPA on grounds of fair procedures and for a declaration that the agreement is fair, just, and reasonable.”<sup>170</sup>

Another commentator suggests that the implementation of DPAs can “produce[] a bizarre set of incentives whereby the State is paid not to prosecute crimes orchestrated by managers who are incentivised to spend shareholder’s [sic] money to enter DPAs and avoid liability.”<sup>171</sup> The commentator argues that the limited amount of judicial review provided by U.S. courts “has compounded this problem,” and, accordingly, that requiring judicial oversight would “bring[] a welcome transparency” to any DPA program implemented in Ireland.<sup>172</sup>

Finally, the Law Society of Ireland—the “education, representative and regulatory body of the solicitors’ profession in Ireland”<sup>173</sup>—responds to the Law Reform Commission’s paper on corporate offences by stating, “The Society would be in favour of DPAs along the lines of the UK model rather than the US model. Judicial and executive oversight is crucial.”<sup>174</sup> The

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168. LAW REFORM COMM’N, ISSUES PAPER: REGULATORY ENFORCEMENT AND CORPORATE OFFENCES (2016) (Ir.).

169. *Id.* at 38.

170. Daniel McCarron, *Deferred Prosecution Agreements: A Practical Proposal*, 6 KING’S INNS STUDENT L. REV. 54, 61 (2016).

171. LAW REFORM COMM’N, ISSUES PAPER: REGULATORY ENFORCEMENT AND CORPORATE OFFENCES, RESPONSES OF UCD BUSINESS LAW AND REGULATION GROUP 27 (2016) (Ir.).

172. *Id.*

173. The Law Society engages in various statutory functions regarding the education, discipline, and regulation of the solicitors’ profession. L. SOC’Y IR., <https://www.lawsociety.ie> (last visited Dec. 28, 2018).

174. LAW SOCIETY SUBMISSION: RESPONSE TO LAW REFORM COMMISSION’S ISSUES PAPER ON: REGULATORY ENFORCEMENT AND CORPORATE OFFENCES 7 (2016) (Ir.), <https://www.lawsociety.ie/globalassets/documents/committees/business/subs/response-lrc-regulatoryenforcement-july2016.pdf>.

Society noted that while it is important to help preserve corporate entities and the employment they provide, “this priority must not operate to damage public confidence in our authorities.”<sup>175</sup>

### **Singapore**

On March 19, 2018, Singapore’s Parliament passed the Criminal Justice Reform Act, which includes DPAs.<sup>176</sup> The DPAs will be used only for corporate bodies (as opposed to individuals).<sup>177</sup> They will be approved only if a court finds the agreements to be “in the interests of justice” and the DPA terms to be “fair, reasonable and proportionate.”<sup>178</sup>

### **United Kingdom**

In 2013, following a public consultation process, the British Parliament passed the Crime and Courts Act, thereby creating a corporate DPA program within the U.K.<sup>179</sup> The agreements can be applied to organizations but not to individuals.<sup>180</sup> There is both a preliminary and final hearing process to approve a DPA, and in *both* processes the prosecutor must apply to the Crown Court for a declaration that the agreement “is likely to be in the interests of justice” and that the proposed terms of the agreement “are fair, reasonable and proportionate.”<sup>181</sup>

### **Details of Australia, Canada, and UK Programs**

The United Kingdom introduced its DPA program in 2014, one year after its enabling legislation was passed.<sup>182</sup> Australia and Canada have both made significant strides toward creating their own programs, but neither program has yet been completed. Since the three jurisdictions have been diligently creating and/or implementing new DPA programs, the sections that follow include a more in-depth look at legal and policy decisions being made in each jurisdiction, specifically around the following four questions: (1) what role will be played by the courts in the jurisdiction’s DPA program?, (2) what specific factors will be taken into consideration in determining whether a

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175. *Id.*

176. Criminal Justice Reform Act (Bill No. 14/2018) § 35 (Sing.) (amending Chapter 68 of the Criminal Procedure Code).

177. *Id.*

178. *Id.*

179. *See* Crime and Courts Act 2013, c. 22, sch. 17 (UK).

180. *See* *Deferred Prosecution Agreements*, SERIOUS FRAUD OFF., <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements> (last visited Dec. 28, 2018).

181. Crime and Courts Act 2013, c. 22, §§ 7(1), 8(1), sch. 17.

182. *See id.*

DPA will be offered in a particular matter?, (3) what terms of agreement will be offered to a defendant through a DPA?—i.e., will there be rules or guidelines put into place to ensure consistency-of-deal-terms among agreements?, and (4) to what extent will it be mandated that a given jurisdiction’s DPAs be made available to the public through publication?

*A. Judicial Oversight: Role Played by the Courts*

**Australia**

In Australia, a DPA is approved by an “approving officer” rather a court. The Minister can appoint a person as an approving officer so long as the candidate “is a former judicial officer of a federal court or a court of a State or Territory” and “the person has the knowledge or experience necessary” to perform the job.<sup>183</sup>

The Director of Public Prosecutions (Director) can enter a DPA agreement if he or she is satisfied that entering the DPA “is in the public interest.”<sup>184</sup> After the Director negotiates a DPA with the alleged wrongdoer,<sup>185</sup> the agreement is given to the reviewing officer who must approve the agreement if he or she believes its terms are “in the interests of justice”<sup>186</sup> and “are fair, reasonable and proportionate.”<sup>187</sup>

If the Director and the accused both agree that the DPA should be revised, the Director must submit the revised document to an approving officer,<sup>188</sup> who will approve only if he or she believes the terms of the new agreement are “in the interests of justice”<sup>189</sup> and “are fair, reasonable and proportionate.”<sup>190</sup>

The Director also determines whether or not there has been a material breach of the DPA. Although a finding of breach can lead immediately to the DPA ceasing to be in force,<sup>191</sup> a court can overturn that determination, thereby putting the DPA back into force.<sup>192</sup>

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183. *Crimes Legislation Amendment Bill 2017* (Cth) sch 2 pt 3, s 17G cl 2 (Austl.).

184. *Id.* s 17D cl. 2.

185. *Id.* s 17D cl. 1.

186. *Id.* s 17D cl. 4(a).

187. *Id.* s 17D cl. 4(b).

188. *Id.* s 17F cl. 1.

189. *Id.* s 17F cl. 3(a).

190. *Id.* s 17F cl. 3(b).

191. *Id.* s 17E cl. 1.

192. *Id.* s 17E cl. 2.

### Canada

In Canada, after the prosecutor and corporate entity have negotiated a DPA (called a “remediation agreement” in Canada), it will not come into force until it is approved by the court.<sup>193</sup> In deciding whether to approve the agreement, the court must consider the following: (1) the reparations or restitution the organization is being required to make to victims (or the reasonableness of the prosecutor’s statement explaining why such reparations are not appropriate);<sup>194</sup> (2) the explanation set forth by the prosecutor if he or she decided not to inform victims that remediation agreement negotiations had begun or that deal terms had been agreed upon;<sup>195</sup> and (3) all victim and community impact statements presented to the court.<sup>196</sup>

The court must approve the remediation agreement if it is satisfied the agreement is “in the public interest”<sup>197</sup> and that its terms are “fair, reasonable and proportionate to the gravity of the offence.”<sup>198</sup> Likewise, the court must approve a prosecutor’s request to *modify* an existing agreement so long as the court is satisfied the new agreement meets the same standard: it remains in the public interest and the terms are fair, reasonable and proportionate.<sup>199</sup> The court must approve a prosecutor’s request to *terminate* an existing agreement if the court is satisfied that the entity has breached a provision of the agreement.<sup>200</sup> If the agreement is terminated, the prosecutor can immediately move forward with prosecuting the alleged misconduct.<sup>201</sup>

Finally, again upon application by the prosecutor, the court must “declare that the terms of the agreement were met if it is satisfied that the organization has complied with the agreement.”<sup>202</sup> If that occurs, “the proceedings are deemed never to have been commenced and no other proceedings may be initiated against the organization for the same offence.”<sup>203</sup> In other words, the entity can move forward with confidence that the matter has been completely resolved.

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193. Budget Implementation Act, 2018, No. 1, § 715.37(2), S.C. 2018, c 12 (Can.).

194. *Id.* § 715.37(3)(a).

195. *Id.* § 715.37(3)(b).

196. *Id.* § 715.37(3)(c).

197. *Id.* § 715.37(6)(b).

198. *Id.* § 715.37(6)(c).

199. *Id.* § 715.38.

200. *Id.* § 715.39(1).

201. *Id.* § 715.39(2).

202. *Id.* § 715.4(1).

203. *Id.* § 715.4(2).

### **United Kingdom**

#### *Preliminary hearing for DPA approval*

In the U.K., after the DPA negotiations between the prosecutor and organization begin, but before its terms are agreed upon, the prosecutor must apply to the Crown Court for a declaration that the agreement “is likely to be in the interests of justice” and that the proposed terms of the agreement “are fair, reasonable and proportionate.”<sup>204</sup> The Court must provide reasons for deciding whether or not to make that declaration.<sup>205</sup> If the Court decides *against* making a declaration, the prosecutor is permitted to apply again to the Court after the agreement draft has been revised.<sup>206</sup> Importantly, the hearing at which the prosecutor applies for the declaration must be held in private, and the Court’s decision in the matter (including relaying the Court’s reasons) must all be conducted in private.<sup>207</sup>

#### *Final hearing for DPA approval*

If the draft of the DPA has obtained the necessary approval through the preliminary hearing process, the prosecutor and the accused organization can then agree upon a final draft of the DPA. At that time, the prosecutor must seek approval through a *final* hearing process. The process is similar to the preliminary hearing process in that the prosecutor must apply to the Crown Court for a declaration that the final agreement “is likely to be in the interests of justice” and that the proposed terms of the agreement “are fair, reasonable and proportionate.”<sup>208</sup> Again, the Court must provide reasons for deciding whether or not to make that declaration.<sup>209</sup> However, at this final hearing stage, the hearing can be held in private or in open court.<sup>210</sup> If the Court decides to make a declaration and thereby give final approval to the DPA and make the document come into force,<sup>211</sup> the Court must do so, including giving its reasons, in open court.<sup>212</sup>

#### *Oversight for DPA breach and revisions*

In the U.K., the court is also involved in an oversight capacity when there is a possible breach of the DPA, and when the DPA needs to be revised. As for *breach* of the agreement, if the prosecutor concludes the organization has failed to comply with the DPA, he or she can apply to the Crown Court for a

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204. Crime and Courts Act 2013, c. 22, § 7(1), sch. 17 (UK).

205. *Id.* § 7(2), sch. 17.

206. *Id.* § 7(3), sch. 17.

207. *Id.* § 7(4), sch. 17.

208. *Id.* § 8(1), sch. 17.

209. *Id.* § 8(4), sch. 17.

210. *See id.* § 8(5), sch. 17.

211. *Id.* § 8(3), sch. 17.

212. *Id.* § 8(6), sch. 17.

review of that determination.<sup>213</sup> If the court decides “on the balance of probabilities” that the organization has indeed failed to comply with the agreement, the court can either terminate the DPA or invite the two parties (the prosecutor and the entity) to remedy the failure.<sup>214</sup> All these decisions by the court—i.e., the decision of whether or not there has been a DPA breach; whether or not the agreement will be terminated due to said breach; and whether or not the court decides to invite the two parties to work on remedying the failure—will be published by the prosecutor, along with the reasons the court gives for arriving at each decision.<sup>215</sup>

As for *revisions* to the agreement, at any time while a DPA is in force, the two parties (the prosecutor and the entity) may agree to vary the DPA if revision is necessary to avoid a failure by the entity to comply with the agreement’s terms.<sup>216</sup> The prosecutor must then apply to the Crown Court for a declaration that the revision “is in the interests of justice” and that the new terms “are fair, reasonable and proportionate.”<sup>217</sup> Although the hearing for this application process can be held in private,<sup>218</sup> if the court decides to approve the request and make the declaration, it must do so in open court, including providing its reasoning for the decision.<sup>219</sup> The prosecutor must then publish both the text of the revised DPA, as well as the court’s approval decision and reasoning therefore.<sup>220</sup> If the court decides *not* to approve the revised DPA, the prosecutor must publish the court’s decision and the reasoning behind that as well.<sup>221</sup>

### B. Public Interest Part I: Will a DPA Be Offered?

#### **Australia**

In Australia, guidance on when a prosecutor is likely to offer a DPA is provided in the Prosecution Policy of the Commonwealth.<sup>222</sup> This will be

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213. *Id.* § 9(1)–(2), sch. 17.

214. *Id.* § 9(2)–(3), sch. 17.

215. *Id.* § 9(4)–(7), sch. 17.

216. *Id.* § 10(1), sch. 17.

217. *Id.* § 10(2), sch. 17.

218. *Id.* § 10(5), sch. 17.

219. *Id.* § 10(6), sch. 17.

220. *Id.* § 10(8), sch. 17.

221. *Id.* § 10(7), sch. 17.

222. COMMONWEALTH DIR. OF PUB. PROSECUTIONS, PROSECUTION POLICY OF THE COMMONWEALTH: GUIDELINES FOR THE MAKING OF DECISIONS IN THE PROSECUTION PROCESS (2016), [https://www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth\\_0.pdf](https://www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth_0.pdf).

supplemented with information from other public documents.<sup>223</sup> Factors that will be considered include: (1) the company's role in the wrongdoing; (2) whether the company self-reported the misconduct; (3) the extent to which the company has cooperated with any investigations (including providing information about both corporate and individual misconduct); and (4) the company's past conduct.<sup>224</sup>

### **Canada**

In Canada, the prosecutor may enter into negotiations for a remediation agreement if the following five conditions are met: (1) the prosecutor believes there is a "reasonable prospect of conviction" with respect to the alleged offense;<sup>225</sup> (2) the prosecutor believes the alleged offense was "not likely" to cause "serious bodily harm or death, or injury to national defence or national security";<sup>226</sup> (3) the prosecutor believes the alleged offense "was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group";<sup>227</sup> (4) the prosecutor believes the agreement is "in the public interest" and is "appropriate" for the situation;<sup>228</sup> and (5) the Attorney General has also consented to negotiating an agreement.<sup>229</sup>

In determining whether an agreement is appropriate and in the public interest, the prosecutor must consider the following nine factors: (1) the circumstance under which the alleged wrongdoing was brought to the attention of the government;<sup>230</sup> (2) the "nature and gravity" of the alleged offense and "its impact on any victim";<sup>231</sup> (3) the degree to which senior officers of the accused organization were involved in the alleged wrongdoing;<sup>232</sup> (4) "whether the organization has taken disciplinary action" against any employees involved in the alleged wrongdoing;<sup>233</sup> (5) whether the

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223. AUSTL. ATTORNEY-GEN.'S DEP'T, IMPROVING ENFORCEMENT OPTIONS FOR SERIOUS CORPORATE CRIME: A PROPOSED MODEL FOR A DEFERRED PROSECUTION AGREEMENT SCHEME IN AUSTRALIA 7 (2017), <https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreement-scheme/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf>.

224. *Id.*

225. Budget Implementation Act, 2018, No. 1, § 715.32(1)(a), S.C. 2018, c 12 (Can.).

226. *Id.* § 715.32(1)(b).

227. *Id.*

228. *Id.* § 715.32(1)(c).

229. *Id.* § 715.32(1)(d).

230. *Id.* § 715.32(2)(a).

231. *Id.* § 715.32(2)(b).

232. *Id.* § 715.32(2)(c).

233. *Id.* § 715.32(2)(d).

organization has done anything (such as making reparations) to remedy the harm caused, and to prevent similar transgressions;<sup>234</sup> (6) “whether the organization has identified or expressed a willingness to identify any person in the wrongdoing”;<sup>235</sup> (7) whether the organization or its representatives have been convicted of (or sanctioned for) similar misconduct in Canada or elsewhere, or have entered any kind of agreement or settlement in Canada or elsewhere that pertains to similar misconduct;<sup>236</sup> (8) whether the organization is alleged to have committed any other offenses (including those not eligible for deferred prosecution);<sup>237</sup> and (9) “any other factor that the prosecutor considers relevant.”<sup>238</sup>

### **United Kingdom**

When deciding whether to enter a DPA, the prosecutor will be guided by existing codes of practice, including the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions (“the Corporate Prosecution Guidance”), the Bribery Act 2010: Joint Prosecution Guidance (“the Bribery Act Guidance”), and the DPA Code.<sup>239</sup> A key decision for the prosecutor is determining “whether or not a prosecution is in the public interest.”<sup>240</sup> The more serious the offense, the more likely public interest will require a prosecution.<sup>241</sup> Indicators of public interest include the value of the gain or loss, as well as “the risk of harm to the public, to unidentified victims, shareholders, employees and creditors and to the stability and integrity of financial markets and international trade.”<sup>242</sup> The impact of the misconduct upon both the U.K. and other countries will also be considered.<sup>243</sup> The decision requires a simple balancing test, and a prosecution “will usually take place unless there are public interest factors against prosecution which outweigh those tending in favour of prosecution.”<sup>244</sup> The individual prosecutor involved in the matter is given complete discretion in determining

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234. *Id.* § 715.32(2)(e).

235. *Id.* § 715.32(2)(f).

236. *Id.* § 715.32(2)(g).

237. *Id.* § 715.32(2)(h).

238. *Id.* § 715.32(2)(i).

239. Crime and Courts Act 2013, c. 22, sch. 17, Deferred Prosecution Agreements Code of Practice ¶ 2.3 (UK).

240. *Id.* ¶ 2.4.

241. *Id.*

242. *Id.* ¶ 2.4.

243. *Id.*

244. *Id.* ¶ 2.5.

which factors are relevant, and the amount of weight that will be given to each factor.<sup>245</sup>

Public interest factors weighing *in favor* of prosecution include the following: (1) the organization has a history of engaging in similar misconduct;<sup>246</sup> (2) the alleged wrongdoing is part of the established business practices of the accused organization;<sup>247</sup> (3) the organization had an ineffective corporate compliance program (or no program in place at all);<sup>248</sup> (4) the organization failed to adequately respond to previous warnings, sanctions, or criminal charges for misconduct;<sup>249</sup> (5) the organization failed to report “within reasonable time” wrongdoing that had been discovered internally;<sup>250</sup> (6) there was a “significant level of harm” to the victims resulting from the wrongdoing, or “a substantial adverse impact to the integrity or confidence of markets, local or national governments.”<sup>251</sup>

Public interest factors weighing *against* prosecution include the following: (1) the entity cooperates with the government, including reporting misconduct otherwise unknown to the government, compensating victims, identifying relevant witnesses and making them available to the government for interviews, and sharing internal investigation reports;<sup>252</sup> (2) the organization has no history of engaging in similar misconduct;<sup>253</sup> (3) there exists a “proactive” corporate compliance program within the organization;<sup>254</sup> (4) the misconduct “represents isolated actions by individuals, for example by a rogue director;”<sup>255</sup> (5) the misconduct “is not recent” and the

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245. *Id.* ¶ 2.6.

246. *Id.* ¶ 2.8.1(i).

247. *Id.* ¶ 2.8.1(ii).

248. *Id.* ¶ 2.8.1(iii).

249. *Id.* ¶ 2.8.1(iv).

250. *Id.* ¶ 2.8.1(v).

251. *Id.* ¶ 2.8.1(vii).

252. *Id.* ¶ 2.8.2. Note that the prosecutor will consider how *early* the entity self-reports, as well as the extent to which the organization “involves the prosecutor in the early stages of an investigation.” *Id.* ¶ 2.9.2. Furthermore,

the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded. Internal investigations which lead to such adverse consequences may militate against the use of DPAs.

*Id.* ¶ 2.9.3.

253. *Id.* ¶ 2.8.2(ii).

254. *Id.* ¶ 2.8.2(iii).

255. *Id.* ¶ 2.8.2(iv).

organization is now “effectively a different entity” from the one in which the wrongdoing took place—

for example [the entity] has been taken over by another organisation, it no longer operates in the relevant industry or market, [the entity’s] management team has completely changed, disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed . . . ;<sup>256</sup>

(6) “[a] conviction is likely to have disproportionate consequences” for the entity under domestic law or the laws of other jurisdictions;<sup>257</sup> (7) “[a] conviction is likely to have collateral effects on the public,” or upon the organization’s employees or shareholders;<sup>258</sup> and (8) the entity self-reports in the early stages of finding a problem, and perhaps even gets the prosecutor involved during those opening stages—something that can assist the prosecutor in starting his or her own criminal investigation, as well as ensure that important materials are not destroyed and that suspects are not afforded a delay that could increase the opportunity for fabrication.<sup>259</sup>

### C. Public Interest Part II: DPA Agreement Terms

#### Australia

In Australia, a DPA must contain the following: (1) a statement of facts regarding the offenses involved;<sup>260</sup> (2) the date on which the DPA will expire;<sup>261</sup> (3) the various terms of the agreement;<sup>262</sup> (4) the amount of the fine or penalty that will be paid by the defendant;<sup>263</sup> (5) the circumstances or

256. *Id.* ¶ 2.8.2(v).

257. *Id.* ¶ 2.8.2(vi).

258. *Id.* ¶ 2.8.2(vii).

259. *Id.* ¶¶ 2.9.2–9.3.

260. *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) sch 2 pt 3 item 17C(1)(a) (Austl.).

261. *Id.* item 17C(1)(b).

262. *Id.* item 17C(1)(c).

263. *Id.* item 17C(1)(d). The penalty “must be of a severity that the Director considers appropriate” after considering (1) the organization’s cooperation during DPA negotiations; (2) “the severity of the penalty that may be imposed by a court if the [entity] was convicted of [the offenses] specified in the DPA”; (3) whether the organization would also be putting money toward compensating victims, donating money to a charity or other third party; and (4) to what extent the organization forfeited various benefits derived from the wrongdoing. *See id.* item 17C(2)–(3). In the end, the Director can decide not to include a financial penalty “if the Director is satisfied that there are exceptional circumstances and it is not in the interests of justice to include such a penalty.” *Id.* item 17C(4).

actions that constitute a material breach of the DPA;<sup>264</sup> and (6) an indication that if “the Director is satisfied that there has been a material”<sup>265</sup> breach of the DPA provisions, the organization consents to having the Director move immediately forward with prosecution.<sup>266</sup>

Although DPAs in Australia must contain the six provisions listed above, the agreements *may* contain any of the following as well: (1) a provision requiring the organization to compensate victims;<sup>267</sup> (2) a provision requiring the organization to donate money to a charity or to a different third party;<sup>268</sup> (3) a provision requiring an organization to forfeit all benefits from the alleged misconduct;<sup>269</sup> (4) a provision requiring an organization to address shortcomings in policies, procedures, and training programs within the organization that may have allowed misconduct to occur in the first place;<sup>270</sup> (5) a provision requiring an organization “to cooperate in any investigation or prosecution relating to a matter specified in the DPA;”<sup>271</sup> (6) a provision requiring an organization “to pay reasonable costs incurred by a Commonwealth entity relating to negotiations for the DPA;”<sup>272</sup> (7) a provision stating the consequences that will occur if an organization fails to comply with the DPA;<sup>273</sup> and (8) any other provision “that the Director considers appropriate.”<sup>274</sup>

### **Canada**

In Canada, a remediation agreement must include the following: (1) a statement of facts related to the alleged wrongdoing, as well as an agreement by the accused not to make public statements contradicting those facts;<sup>275</sup> (2) an “admission of responsibility” by the accused;<sup>276</sup> (3) an indication that the accused organization will, after the agreement has been entered, make “reasonable efforts” toward identifying individuals involved in the wrongdoing;<sup>277</sup> (4) an indication that the accused organization will “cooperate

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264. *Id.* item 17C(1)(e).

265. *Id.* item 17A(3)(b).

266. *Id.* item 17C(1)(f).

267. *Id.* item 17C(2)(a)(i).

268. *Id.* item 17C(2)(a)(ii).

269. *Id.* item 17C(2)(a)(iii).

270. *Id.* item 17C(2)(a)(iv).

271. *Id.* item 17C(2)(a)(v).

272. *Id.* item 17C(2)(a)(vi).

273. *Id.* item 17C(2)(b).

274. *Id.* item 17C(2)(c).

275. Budget Implementation Act, 2018, No. 1, § 715.34(1)(a), S.C. 2018, c 12 (Can.).

276. *Id.* § 715.34(1)(b).

277. *Id.* § 715.34(1)(c).

in any investigation, prosecution or other proceeding” pertaining to the wrongdoing, “including by providing information or testimony;”<sup>278</sup> (5) an obligation for the organization to forfeit “any property, benefit or advantage” resulting from the alleged misconduct;<sup>279</sup> (6) an indication that the organization will pay a penalty for the wrongdoing, including the amount to be paid;<sup>280</sup> (7) an indication of the reparations and restitution required to be made to victims of the misconduct (or a statement by the prosecutor listing reasons why such reparations are inappropriate);<sup>281</sup> (8) an indication that the organization will pay a “victim surcharge” amounting to thirty percent of the penalty already determined pursuant to paragraph 715.34(1)(f) of the Bill, “or any other percentage that the prosecutor deems appropriate”;<sup>282</sup> (9) an indication that the organization will report to the prosecutor on the agreement’s implementation process, including details of how such reporting will occur;<sup>283</sup> (10) an indication of how “information obtained as a result of the agreement” can be utilized;<sup>284</sup> (11) a warning that a breach of the agreement “may lead to an application by the prosecutor for termination of the agreement and a recommencement of proceedings”;<sup>285</sup> (12) an indication that the organization cannot deduct for income tax purposes any costs associated with fulfilling the terms of the agreement, including reparations costs;<sup>286</sup> (13) an indication of the prosecutor’s right to revise or terminate the agreement, subject to court approval;<sup>287</sup> and (14) “an indication of the deadline by which the organization must meet the terms of the agreement.”<sup>288</sup>

While Canadian remediation agreements must contain the fourteen provisions discussed above, the agreements “*may* include, among other things,”<sup>289</sup> the following additional provisions: (1) an indication that the organization will “implement or enhance compliance measures” to address shortcomings in policies, procedures, and training programs within the organization that may have allowed misconduct to occur in the first place;<sup>290</sup> (2) an indication that the organization will “reimburse the prosecutor for any

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278. *Id.* § 715.34(1)(d).

279. *Id.* § 715.34(1)(e).

280. *Id.* § 715.34(1)(f).

281. *Id.* § 715.34(1)(g).

282. *Id.* § 715.37(5).

283. *Id.* § 715.34(1)(i).

284. *Id.* § 715.34(1)(l).

285. *Id.* § 715.34(1)(m).

286. *Id.* § 715.34(1)(n).

287. *Id.* § 715.34(1)(o).

288. *Id.* § 715.34(1)(p).

289. *Id.* § 715.34(3) (emphasis added).

290. *Id.* § 715.34(3)(a).

costs” incurred by the prosecutor relating to “administration” of the remediation agreement;<sup>291</sup> (3) an indication that an independent monitor has been selected, with the prosecutor’s approval, to report to the prosecutor on whether the organization has adequately addressed organizational compliance shortcomings, and has met other obligations in the agreement as identified by the prosecutor;<sup>292</sup> and (4) “an indication of the organization’s obligations with respect to” any monitor that is appointed, “including the obligations to cooperate with the monitor and pay the monitor’s costs.”<sup>293</sup>

The proposed legislation is also careful in its attempt to ensure that monitors are independent and without conflicts of interest, stating that candidates “must notify the prosecutor in writing of any previous or ongoing relationship, in particular with the organization or any of its representatives, that may have a real or perceived impact on the candidate’s ability to provide” an independent assessment of the situation.<sup>294</sup>

### **United Kingdom**

In the United Kingdom, a DPA must contain a statement of facts regarding the alleged offense<sup>295</sup> and an indication of the DPA’s expiration date.<sup>296</sup> In addition, the DPA *may* include (but is not limited to including) provisions requiring the alleged offender:<sup>297</sup> (1) to pay a financial penalty<sup>298</sup> that is “broadly comparable to the fine that a court would have imposed on [the offender] on conviction for the alleged offence following a guilty plea”;<sup>299</sup> (2) “to compensate victims of the alleged offense;”<sup>300</sup> (3) “to donate money to a charity or other third party;”<sup>301</sup> (4) to “disgorge any profits” resulting from the alleged wrongdoing;<sup>302</sup> (5) to implement or enhance compliance and training programs within the organization;<sup>303</sup> (6) to cooperate in investigations surrounding the case;<sup>304</sup> (7) to pay “any reasonable costs of the

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291. *Id.* § 715.34(3)(b).

292. *Id.* § 715.34(3)(c).

293. *Id.*

294. *Id.* § 715.35.

295. *See* Crime and Courts Act 2013, c. 22, § 5(1), sch. 17 (UK).

296. *See id.* § 5(2), sch. 17.

297. *See id.* § 5(3), sch. 17.

298. *See id.* § 5(3)(a), sch. 17.

299. *Id.* § 5(4), sch. 17.

300. *Id.* § 5(3)(b), sch. 17.

301. *Id.* § 5(3)(c), sch. 17.

302. *Id.* § 5(3)(d), sch. 17.

303. *See id.* § 5(3)(e), sch. 17.

304. *See id.* § 5(3)(f), sch. 17.

prosecutor” relating to the misconduct or the DPA;<sup>305</sup> and (8) to fulfill the various requirements imposed on the organization within a specified period of time.<sup>306</sup> The DPA may also include a provision stating the consequences that will occur if an organization fails to comply with its terms.<sup>307</sup>

#### D. Transparency: Publishing DPAs

##### **Australia**

In Australia, if a DPA is approved, the Director must, within ten days, publish the DPA on the Office’s website.<sup>308</sup> However, if the Director believes it to be “in the interests of justice,”<sup>309</sup> he or she can decide to (1) not publish the DPA at all,<sup>310</sup> or (2) to publish the DPA without disclosing the name of the allegedly offending entity “or any other material the Director considers should not be disclosed.”<sup>311</sup> In deciding not to publish a DPA (or to publish a less-than-complete version), the Director must believe that publishing the full agreement could be a threat to public safety, could prejudice an ongoing investigation, could prejudice the fair trial of an organization, or could go against a court order.<sup>312</sup> Moreover, the Director has the authority to publish the DPA (or a less-than-full version of the DPA) at a later time if he or she believes doing so would be in the interests of justice.<sup>313</sup>

##### **Canada**

In Canada, the court must publish “as soon as practicable”<sup>314</sup> the following: (1) the text of any remediation agreement approved by the court;<sup>315</sup> (2) any court order to approve an agreement, to modify an agreement, to terminate an agreement due to breach, or to declare that all the terms of an agreement have been fulfilled—along with the reasons for making the order or for deciding against making the order.<sup>316</sup> However, the court has the discretion *not* to publish, in whole or in part, any agreements, orders, or

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305. *Id.* § 5(3)(g), sch. 17.

306. *See id.* § 5(3), sch. 17.

307. *See id.* § 5(5), sch. 17.

308. *See Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (Cth) sch 2 pt 2 item 17D(7) (Austl.).

309. *Id.* item 17D(8).

310. *See id.* item 17D(8)(b).

311. *Id.* item 17D(8)(a).

312. *See id.* item 17D(9)(a)–(d).

313. *See id.* item 17D(10).

314. Budget Implementation Act, 2018, No. 1, § 715.42(1), S.C. 2018, c 12 (Can.).

315. *See id.* § 715.42 (1)(a).

316. *See id.* § 715.42(1)(b).

reasons so long as the court “is satisfied that the non-publication is necessary for the proper administration of justice.”<sup>317</sup> In making that determination, the court must consider (1) society’s interest in encouraging people to report crimes;<sup>318</sup> (2) society’s interest in encouraging crime victims to participate in the criminal justice process;<sup>319</sup> (3) “whether it is necessary to protect the identity” of the victims or the people involved in bringing the misconduct to the government’s attention;<sup>320</sup> (4) “the prevention of any adverse effect to any ongoing investigation or prosecution;”<sup>321</sup> (5) whether there are effective alternatives available to deciding not to publish;<sup>322</sup> (6) the positive and negative effects of deciding not to publish;<sup>323</sup> and (7) “any other factor that the court considers relevant.”<sup>324</sup>

### **United Kingdom**

In the U.K., when a DPA is approved by the court, the prosecutor must publish the text of the DPA, as well as the results of both the preliminary and final hearings on the road to court approval. In other words, the prosecutor must publish the court’s declaration from the *preliminary* hearing and the court’s reasons for making it (or the reasons for denying it), as well as the court’s declaration from the *final* hearing, as well as the reasons for making it.<sup>325</sup>

In addition, transparency of the process is achieved by requiring publication of events that might occur *after* a DPA is approved—including (1) breach of the DPA, (2) revision of the agreement, and (3) successful completion of all its terms.<sup>326</sup>

With respect to a possible breach of the agreement, the various decisions that must be made by the Crown Court in such a scenario—including the decision of whether or not there has indeed been a breach, whether or not the DPA will be terminated due to said breach, and whether or not the court will decide to invite the two parties to work on remedying the breach—must be

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317. *Id.* § 715.42(2).

318. *See id.* § 715.42(3)(a).

319. *See id.* § 715.42(3)(a).

320. *Id.* § 715.42(3)(b).

321. *Id.* § 715.42(3)(c).

322. *See id.* § 715.42(3)(d).

323. *See id.* § 715.42(3)(e).

324. *Id.* § 715.42(3)(f).

325. *See* Crime and Courts Act 2013, c. 22, § 8(7), sch. 17 (UK).

326. *Id.* §§ 9–11.

published by the prosecutor, along with the *reasons* the court gives for arriving at each decision.<sup>327</sup>

With respect to revision of the agreement, the prosecutor must publish the Crown Court's decision, including its reasoning, of whether or not to grant approval of a revised DPA, as well as the text of the revised agreement if approval is granted.<sup>328</sup>

With respect to the successful completion of all the terms of the DPA, the prosecutor must publish the details of the accused entity's full compliance with the DPA, as well as the facts that the proceedings have been discontinued and the matter is considered closed.<sup>329</sup>

Importantly, in all the above instances in which the statute mandates the prosecutor to publish information, the court has ultimate oversight power because it can order the postponement of any publication for whatever period of time the court deems appropriate if doing so "is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings."<sup>330</sup>

#### *E. Summary Observations*

While the details of the DPA programs vary among the three countries, there are core ideas that are common to all of them, including: (1) a court or officer must review the terms of the agreements to make sure they are reasonable and fair; (2) with minor exceptions, the agreements must be published and made available to the public for review; and (3) the DPA program has been formally implemented through some sort of public deliberative process, whether it be a formal legislative process or a public consultation process. None of these critical components and protections have played a role within the creation or functioning of the U.S. corporate DPA program.

Moreover, the DPA program in the United Kingdom is fairly new, having been introduced in 2014. Despite being such a new program, there are already indications that the numbers of DPAs used in the U.S. will dwarf the numbers used in the U.K. Consider, for example, that between 2010 and 2016, the U.S. resolved matters with DPAs (and non-prosecution agreements)<sup>331</sup> between 29

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327. *See id.* § 9(4)–(7).

328. *See id.* § 9(4), (7), (8).

329. *See id.* § 11(8).

330. *Id.* § 12.

331. Although non-prosecution agreements, or NPAs, are similar in form and function to DPAs, there is still a difference between them: DPAs are filed in federal court, along with a

and 40 times *per year* (except in 2015, when the number rose to 102),<sup>332</sup> while the U.K. has used DPAs just four times *total* in the several years since the agreements were introduced in 2014.<sup>333</sup> This suggests the U.K. is choosing to prosecute cases that, if they had occurred in the U.S., might instead be resolved with a DPA.

One reason for this stark difference might be that DOJ seems to have fairly low qualifying standards in offering DPAs—i.e., the government is turning to DPAs in instances when it could very well prosecute. In 2015, the Berlin-based international non-governmental organization Transparency International (TI), whose mission is combatting global corruption, published a list of factors to consider in determining when out-of-court settlements could provide a reasonable alternative to traditional prosecution.<sup>334</sup> TI suggested that corporate misconduct should be prosecuted (rather than addressed through a settlement) if *even one* of the following conditions is present: (1) if the misconduct “is serious, pervasive, long-lasting and has global consequences;” (2) if top management is complicit in the misconduct; (3) if the company fails to cooperate with investigations into the misconduct; or (4) if the government has strong evidence of wrongdoing and could successfully prosecute the case through a trial.<sup>335</sup> If the United States were to adhere to TI’s recommendations, it is likely that far fewer DPAs would be used in addressing allegations of corporate wrongdoing—in fact, the U.S. DPA numbers might begin to look more like those in the United Kingdom. David Green, the former director of U.K.’s Serious Fraud Office who was known for having a “strong bias in favor of prosecution,”<sup>336</sup> made it clear throughout his tenure as director that DPAs would not be “a mechanism for

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charging document, and they are subject to court approval. NPAs are merely letter agreements between DOJ and the target company. When using NPAs, a charge is not filed and the agreement is not reviewed by a court. *See* Morford Memorandum, *supra* note 110, at 1 n.2.

332. GIBSON, DUNN & CRUTCHER LLP, *supra* note 100, at 2.

333. GIBSON, DUNN & CRUTCHER LLP, 2017 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAs) AND DEFERRED PROSECUTION AGREEMENTS (DPAs) 8 (2018) <https://www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-NPA-DPA-update.pdf> (noting that the U.K. had used DPAs only four times since 2014); *see also* GIBSON, DUNN & CRUTCHER LLP, *supra* note 100, at 15 (noting that the U.K. had not used any new DPAs since last report).

334. *See* TRANSPARENCY INT’L, CAN JUSTICE BE ACHIEVED THROUGH SETTLEMENTS? 2 (Angela McClellan & Craig Fagan eds., 2015), [http://files.transparency.org/content/download/1917/12678/file/2015\\_PolicyBrief1\\_Settlements\\_EN.pdf](http://files.transparency.org/content/download/1917/12678/file/2015_PolicyBrief1_Settlements_EN.pdf).

335. *Id.* at 2. In addition, said TI, the settlement should respect the principles of transparency, due process, accountability, and victim reparation. *Id.* at 3–4.

336. Robert Amaee, *A Close Look at Deferred Prosecution Agreements: US vs. UK*, LAW360, (Oct. 6, 2017), <https://www.law360.com/articles/972193/a-close-look-at-deferred-prosecution-agreements-us-vs-uk>.

a corporate offender to buy itself out of trouble”<sup>337</sup>—something commentators have suggested corporate offenders in the U.S. are accomplishing through “get-out-of-jail-free cards.”<sup>338</sup>

### III. TIME FOR CONGRESS TO ACT

#### *A. Accountability in Deferred Prosecution Act*

It is now time for the U.S. Congress to pass legislation providing much-needed reform to the country’s corporate DPA program. Starting in 2009, Congress has proposed, several times, legislation to do just that. Entitled the Accountability in Deferred Prosecution Act (ADPA), the legislation has never been enacted into law.<sup>339</sup> The legislation calls for the issuance of “public written guidelines” by the Attorney General within ninety days after the Act is enacted.<sup>340</sup> The guidelines would address a number of important areas, including: “[t]he circumstances in which an independent monitor is warranted for the agreement”;<sup>341</sup> “[w]hat terms and conditions are appropriate in the agreement”;<sup>342</sup> “[t]he process by which the [DOJ] decides that the organization has successfully satisfied the terms of the agreement”;<sup>343</sup> “[t]he manner and method for determining a breach of the agreement”;<sup>344</sup> “[t]he extent of joint involvement of regulatory agencies in connection with the agreement”;<sup>345</sup> “[t]he period during which the agreement should remain in

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337. Press Release, Serious Fraud Office, Deferred Prosecution Agreements: New Guidance for Prosecutors (Feb. 14, 2014), <https://www.sfo.gov.uk/2014/02/14/deferred-prosecution-agreements-new-guidance-prosecutors/>.

338. Senator Elizabeth Warren, Address at the Levy Institute’s 24th Annual Hyman P. Minsky Conference: The Unfinished Business of Financial Reform 4 (Apr. 15, 2015), [https://www.warren.senate.gov/files/documents/Unfinished\\_Business\\_20150415.pdf](https://www.warren.senate.gov/files/documents/Unfinished_Business_20150415.pdf) (arguing that DPAs “were originally created to deal with low-level, non-violent individual offenders, but they have now been transformed beyond recognition to create get-out-of-jail-free cards for the biggest corporations in the world.”).

339. The most recent version was the Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/house-bill/4540/all-info>, introduced by Representative Bill Pascrell, Jr. (D., NJ) and co-sponsored by Representatives Frank Pallone, Jr. (D., NJ), Steve Cohen (D., TN), and John Conyers, Jr. (D., MI).

340. *Id.* § 4(a).

341. *Id.* § 4(b)(1).

342. *Id.* § 4(b)(2).

343. *Id.* § 4(b)(4).

344. *Id.* § 4(b)(5). The Act would enable a court—an objective trier-of-fact—to assure that any such termination “is consistent with the interests of justice.” *Id.* at § 7(c).

345. *Id.* § 4(b)(6).

effect”;<sup>346</sup> “[w]hat constitutes the cooperation, if any, required by the agreement from the organization and its employees”;<sup>347</sup> and “[w]hen and why it would be appropriate for Federal prosecutors to enter into a nonprosecution agreement rather than a deferred prosecution agreement.”<sup>348</sup>

Although all of these are important areas to flesh out, thereby giving much-needed guidance and direction to federal prosecutors, the legislation fails to mandate that the new guidelines provide direction for the following critically important question: What are the *specific criteria* to be applied in determining whether a DPA should be offered? Currently there are no rules or clear guidelines governing that determination.<sup>349</sup> We know that “[g]overnment is at its most arbitrary when it treats similarly situated people differently,”<sup>350</sup> and publishing the criteria prosecutors will use in their decision-making process would provide an important check on such arbitrariness. Of course, one might argue that publishing this information would somehow interfere with prosecutorial discretion; the *Fokker* appellate court makes it clear that “[t]he Executive’s charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought.”<sup>351</sup> However, for Congress to mandate the publishing of factors that will be *considered* in a prosecutor’s decision making process would not undercut or interfere with prosecutorial authority in actually *making* a decision; rather, it merely ensures decisions will have a measure of consistency and will not be made for personal or arbitrary reasons. In the United Kingdom, for example, when a prosecutor makes the important determination of whether or not a particular prosecution is in the public interest,<sup>352</sup> he or she is provided with guiding factors, but is then given complete discretion in determining which factors are relevant in a given case, and the amount of weight accorded each.<sup>353</sup> In other words, the prosecutors still have complete discretion, and putting forth guidance for them in making their determination does not diminish that discretion. The same could be done in the United States.

In addition, although the bill mandates court review of a DPA to ensure it is consistent with the Attorney General’s guidelines “*and* is in the interests

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346. *Id.* § 4(b)(7).

347. *Id.* § 4(b)(8).

348. *Id.* § 4(b)(9).

349. Arlen, *supra* note 25, at 227–28.

350. Etelson v. Office of Pers. Mgmt., 684 F.2d 918, 926 (D.C. Cir. 1982).

351. United States v. Fokker Servs. B.V., 818 F.3d 733, 737 (D.C. Cir. 2016).

352. Crime and Courts Act 2013, c. 22, sch. 17, Deferred Prosecution Agreements Code of Practice ¶ 2.4 (UK).

353. *Id.* ¶ 2.6.

of justice,”<sup>354</sup> there are no standards or guidelines set forth for determining what would lead a court to deem the DPA to be ‘in the interests of justice.’ This same problem exists when the bill states that a court can be asked by a party (or by the monitor) to “review the implementation or termination of the agreement, and take any appropriate action, to assure that the implementation or termination is consistent with the interests of justice.”<sup>355</sup> Again, there are no standards or guidelines set forth to assist in determining whether a given implementation or termination process is ‘consistent with the interests of justice.’ Thus, the bill has three fundamental shortcomings: (1) it fails to mandate that the guidelines provide *specific criteria* to be applied by prosecutors in deciding when a DPA will be offered; (2) it fails to provide standards or guidelines to help courts determine whether a particular DPA is in fact ‘in the interests of justice’—which it must be if it is to be approved by the court; and (3) in similar fashion, the bill fails to provide standards or guidelines to help courts determine whether particular DPA implementation or termination processes are in fact ‘consistent with the interests of justice’—which they must be if they are going to be allowed by the court. In sum, even if the bill were to become law, it would contain serious shortfalls in providing helpful guidance for prosecutors and courts involved in the corporate DPA process.

### B. *Ending Too Big to Jail Act*

On March 14, 2018, United States Senator Elizabeth Warren introduced legislation to accomplish three goals: create a permanent law enforcement agency to investigate crimes at financial institutions; require banks with assets of \$10 billion or more to conduct periodic due diligence measures to prevent financial misconduct; and mandate judicial oversight of DPAs.<sup>356</sup> The section addressing DPAs mandates that a court would not approve a DPA “unless [it] determines that the agreement is in the public interest.”<sup>357</sup> In making that determination, the court must consider whether reforms listed in the DPA are “likely to prevent similar unlawful behavior in the future” and whether penalties imposed by the DPA “are sufficient to compensate victims and deter future unlawful actions.”<sup>358</sup> The bill states that “if the defendant has

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354. Accountability in Deferred Prosecution Act of 2014, H.R. 4540, 113th Cong. § 7(a) (2014) (emphasis added).

355. *Id.* § 7(c).

356. Ending Too Big to Jail Act, S. 2544, 115th Cong. (2018).

357. *Id.* § 4(2).

358. *Id.*

previously been convicted or entered into a [DPA] with the Government in connection with related activity, the court may not, without good cause, approve such an agreement.”<sup>359</sup> The court is also permitted to “review the implementation or termination of the [DPA], and take any appropriate action, to assure that the implementation or termination is in the public interest.”<sup>360</sup> Finally, the U.S. Attorney General is directed to publish through DOJ’s public website the text of all DPAs between the government and any corporate entity, as well as the text of all agreements between the government and any independent monitor (unless the court finds “good cause” not to make the information available to the public).<sup>361</sup>

In summary, the bill mandates that courts not approve DPAs unless they are in the public interest, and mandates that courts be given judicial review powers to ensure that both the ‘implementation’ and ‘termination’ of DPAs are in the public interest as well. While mandating such oversight and review would certainly be a step forward in many respects, this broad and general language suffers some of the same drawbacks as the language used in the Accountability in Deferred Prosecution Act discussed above: There are no standards or guidelines set forth for determining what would lead a court to deem a DPA (or its implementation or termination) to be in the public interest.<sup>362</sup> Thus, Congress might do well to look to the U.K.’s DPA program, which sets forth numerous and detailed public interest-related factors to be considered by U.K. prosecutors when choosing between a DPA and traditional prosecution.<sup>363</sup> In similar fashion, the U.S. Congress could set forth a list of issues to be considered by courts when they determine how DPA approval, implementation, or termination relates to and impacts the public interest.<sup>364</sup> Such guidance would assist judges in making decisions tending toward objectivity and consistency throughout different cases and jurisdictions.

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359. *Id.*

360. *Id.*

361. *Id.*

362. It could be argued that federal judges are used to such a situation given that their duties currently entail conducting reviews of plea agreements without guidance in deciding whether to accept or reject those deals. FED. R. CRIM. P. 11(c)(3).

363. *See supra* Part II.B.

364. Some of these would touch on considerations similar to those set forth in the Principles of Federal Prosecution of Business Organizations, U.S. ATTORNEYS’ MANUAL, *supra* note 1, § 9-28.300.

C. *Learning from Other Countries*

It would be difficult, if not impossible, for one country to import a carbon-copy of another country's DPA program due to, among other factors, important differences of culture and history, as well as the dictates of each country's current policies and laws, legal precedents, and legislative and policy-making processes. However, below are several categories of concern that the U.S. Congress should be mindful of should it move forward with reforming the nation's DPA program.

First, regarding transparency of process surrounding DPA formation—i.e., to what extent is the public able to participate in watching these deals be made? In the United States, these deals are negotiated behind closed doors and therefore lack transparency.<sup>365</sup> The U.K. has cleverly addressed this problem by dividing the process into two separate stages, with the first stage purposefully lacking transparency so the entity can be protected from publicity should it decide not to move forward with the DPA.<sup>366</sup> If, on the other hand, it becomes clear to all parties, and to the judge, that an appropriate and fair DPA deal can be achieved, *then* the process is opened up fully to the public for scrutiny.<sup>367</sup> In the U.K.'s *Standard Bank PLC* case, the judge makes it clear in the text of the agreement that such an arrangement also prevents failed DPA negotiations from interfering with a later prosecution:

... following the commencement of negotiations, the scheme mandates that a hearing must be held in private for the purposes of ascertaining whether the court will declare that the proposed DPA is 'likely' to be in the interests of justice and its proposed terms are fair, reasonable and proportionate . . . . Reasons must be given and, if a declaration is declined, a further application is permitted . . . . In that way, the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.<sup>368</sup>

Second, regarding transparency of the DPA agreements themselves—i.e., to what extent will the agreements be made accessible to the general public? It should be required that all DPAs be made available to the public through publishing—ideally on the government's website. Currently, not all DPA

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365. MIKE KOEHLER, *THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA* 64 (2014).

366. Crime and Courts Act 2013, c. 22, sch. 17, Deferred Prosecution Agreements Code of Practice ¶ 1.2 (UK).

367. *Id.*

368. Serious Fraud Office v. Standard Bank PLC [2015] EWHC (QB) No. U20150854 [2] (Eng.).

agreements employed by the U.S. government are made publicly available, sometimes prompting lawsuits to gain access.<sup>369</sup> Although the agreements do not provide formal judicial precedent as would a court opinion, they nevertheless provide important guidance to business entities, helping them clarify what is (and what is not) acceptable conduct under a given statute.<sup>370</sup> In addition to publishing the DPA agreements themselves, the government websites could publish periodic updates on their implementation—right up until the time when either a breach in the agreement is declared, or when it is determined that all agreement terms have been met and charges are therefore being dismissed. Since there are potential privacy concerns involved, more research should be conducted to determine if some kinds of information would need to be redacted or otherwise kept from public view.<sup>371</sup>

Third, regarding standardization of agreements: There has been longstanding criticism that U.S. prosecutors are given too little guidance in formulating DPA agreement terms,<sup>372</sup> with one commentator saying current policy gives prosecutors a “roving commission to do good.”<sup>373</sup> There must be a balance to the large amount of discretion prosecutors have in deciding DPA agreement terms. In short, there needs to be an increased standardization of DPA agreements. This could be achieved through the Congressionally mandated use of written guidance answering questions central to all cases potentially resolved with a DPA, e.g., what criteria and standards will be used in calculating the fine?; what types of compliance program changes might be required of the entity?; what considerations will be used in determining how many months or years the DPA agreement will run?; what factors will be evaluated in deciding whether the agreement has been breached, or has been

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369. Williamson, *supra* note 111.

370. Carrie Menkel-Meadow, Essay, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500 (1985) (“When an authoritative ruling is necessary, . . . the courts must adjudicate and provide clear guidance for all . . . .”); see Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 127 (2014) (noting that because DPAs do not provide formal judicial precedent as would a court opinion, “the DOJ is under no obligation to treat the same conduct by different corporations with any consistency, increasing the challenges of corporate compliance and risk reduction.”). One commentator makes the somewhat cynical, but possibly truthful, suggestion that DOJ uses DPAs because it “strategically keep[s] the law underdeveloped in order to place more pressure on corporations.” Brooks, *supra* note 36, at 139 n.22.

371. Some of these questions have been addressed in *United States v. HSBC Bank*, 863 F.3d 125 (2d Cir. 2017), which held that DPAs are not judicial documents and are therefore not subject to a presumptive right of public access.

372. See Arlen, *supra* note 25, at 221 (noting that “[i]ndividual U.S. Attorneys’ Offices are free to make their own decisions about when to impose a mandate and what form it should take”).

373. Coffee, *supra* note 47.

successfully completed?; what criteria will be used in appointing a monitor?<sup>374</sup> Of course, there are resources and standards currently employed in other contexts that can provide at least preliminary guidance—for example, the U.S. Sentencing Guidelines can help in calculating fine ranges and creating effective compliance programs.<sup>375</sup>

Fourth, regarding flexibility versus certainty: There will always be an inherent tension between flexibility and certainty surrounding the corporate DPA. On one side is the government, wanting flexibility to draft DPA agreement terms that it deems appropriate. On the other side is the corporate entity, wanting a sense of the parameters within which the final deal will be set, thereby providing some sense of predictability and outcome-certainty.<sup>376</sup> One change the Congress might consider is to provide more protection to a defendant whose DPA ends up being rejected by the district court. Currently, DPAs almost always include an admission of wrongdoing by the defendant.<sup>377</sup> Even if the DPA is rejected by the court, that admission can still be used by the government if it decides to pursue prosecution. One possible solution to this problem is for the enactment, in the DPA context, of a provision similar to Federal Rule of Criminal Procedure 11(c)(5).<sup>378</sup> That provision, in the context of a plea bargain, allows a defendant to *withdraw* a

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374. Note that some guidance has already been set forth in two separate internal DOJ memoranda. See Morford Memorandum, *supra* note 110; modified by Memorandum from Gary G. Grindler, Acting Deputy Attorney Gen., on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010).

375. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL (2008), <https://www.uscourts.gov/sites/default/files/pdf/guidelines-manual/2008/manual/GL2008.pdf>. The Sentencing Guidelines were used in calculating fines in Deferred Prosecution Agreement at 7, *United States v. Och-Ziff Capital Mgmt. Grp. LLC*, No. 16-516 (E.D.N.Y. 2016), and in Deferred Prosecution Agreement at 6–7, *United States v. Latam Airlines Grp.*, No. 16-60195 (S.D. Fla. 2016).

376. See Amaee, *supra* note 336 (discussing how the U.S. DPA model “places considerable discretion and authority in the hands of the U.S. prosecutor,” which can “give a company a higher degree of certainty as to the negotiated outcome”).

377. Court E. Golombic & 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, 1310 n.116 (2014) (“An admission of wrongdoing is standard fare in the modern DPA.”); see Sarah Kelly-Kilgore & Emily M. Smith, *Corporate Criminal Liability*, 48 AM. CRIM. L. REV. 421, 453 n.227 (2011) (discussing how an admission of wrongdoing in a DPA “will be admissible in subsequent civil litigation and disclosures will likely be discoverable.”).

378. Such a change to the Federal Rules of Criminal Procedure would likely have to be made not by Congress, but by the Supreme Court of the United States. Authority to establish rules of criminal procedure was given to the Supreme Court in 1940 through the Sumners Courts Act. Sumners Courts Act of 1940, 76 Pub. L. No. 76-675, 54 Stat. 688 (1940) (codified at 18 U.S.C. § 3771 (2015)).

guilty plea if the plea agreement is rejected by the court under Federal Rules of Criminal Procedure 11(c)(3)(A). Allowing a defendant to withdraw an admission of wrongdoing in the context of a DPA seems only fair given that the DPA rejection by the court would deprive the defendant of all other benefits from the agreement. Such a change would be especially important if the Congress, in reforming this area of law, empowers district courts to approve or reject DPAs based on a substantive review of the deal terms—an action that would likely lead to increased numbers of DPA rejections by the courts.

Fifth, regarding oversight for the life of the agreement: Current policy dictates that the government, and only the government, determines if a DPA has been breached by the defendant during the deferral period—a decision that is not reviewable by the court.<sup>379</sup> However, the court *should* be called upon to review that determination of breach, thereby serving as a check and balance on the government’s power. Furthermore, although the law remains unclear regarding a court’s power to continue its involvement with a DPA (or with the assigned monitor) after the agreement has initially been approved,<sup>380</sup> there needs to be an independent entity, such as a court, that is responsible for overseeing and monitoring the DPA process from start to finish. Moreover, to the extent practicable, the public should be informed of the degree to which a company is (or is *not*) successfully working toward meeting the terms of the DPA. One can easily see how the government—the party that drafted the DPA agreement with a company—might not have a strong incentive to accurately report to the public that the deal is not unfolding well. For these same reasons, why should the prosecutor alone, without review or oversight, get to make the determination regarding if and when all the DPA agreement terms have been met and it is therefore time to end the deferral period and withdraw all charges? These issues quickly venture into territory that is beyond the scope of this Article. And yet, the topic goes to the Article’s core criticism of the U.S. DPA program: there is too much government discretion involved, without enough judicial oversight and review. There needs to be additional investigation conducted, by both academics and policy makers, regarding oversight for the life of the DPA agreement.

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379. See Xian, *supra* note 6, at 644–45 (“These agreements often include provisions in which the government is listed as the sole decider as to whether a breach has occurred. As a result, the question of whether a company actually breached the agreement is not subject to an objective trier-of-fact’s judgment, but posed to the government, which might have an ancillary interest in protecting the status of ‘successful’ [DPAs].” (footnote omitted)).

380. See Mike Scarcella, *Court Urged to Reject ‘Blanket Sealing’ of Monitor’s Report in HSBC Case; The Second Circuit Case Tests the Secrecy of Compliance Reports*, NAT’L L.J., (Oct. 21, 2016), <https://advance.lexis.com/api/permalink/3c498595-e783-4add-82d9-ae6cdfb095c1/?context=1000516>.

Sixth, regarding cost: Proponents of DPAs argue the agreements can lead to significant cost-savings when compared to traditional litigation because they do not require various expenditures associated with trials (e.g., organizing juries, providing court personnel such as bailiffs, court reporters and transcribers, etc.). The agreements will oftentimes mandate that the defendant company carry out internal investigations that are to be shared with the government as part of the process. Although these company-funded investigations save taxpayers from spending limited resources, should these private investigations be trusted as being comprehensive, appropriately aggressive, and competently performed? As Professor Katrice Bridges Copeland argues, “The notion that the corporation should perform the prosecutor’s function of investigating, identifying, and providing evidence against the wrongdoer within the corporation is ludicrous.”<sup>381</sup> Given the obvious incentives at play for a company to shield itself and its employees from criminal liability, it would seem likely that the government would yield far more reliable results by conducting its own investigations.<sup>382</sup>

#### CONCLUSION

Historically, when the U.S. judicial system has turned to alternative dispute resolution tools such as plea bargaining, settlement agreements, and consent decrees, those mechanisms have included ample oversight from courts to protect the parties, to protect the public interest, and to act as a check on prosecutorial power. Because the government has tremendous power when using DPAs in the corporate context—including the ability to act as accuser, judge, jury, and probation officer—there must be meaningful judicial review of those agreements. Unfortunately, precedent from two federal circuit court rulings not only prevents meaningful judicial review, but can also, as described in this Article, make district courts feel compelled to approve a DPA even when the court believes the agreement is overly lenient toward the defendant. (Of course, it would be equally problematic if the district court believed the DPA was overly *harsh* toward a defendant. In either case, the harm stems from circuit court rulings compelling district courts to approve DPAs that those courts would otherwise likely reject).

Rule-of-law and separation-of-power principles call for the U.S. Congress to now step in and reform the nation’s corporate DPA program. First, Congress should mandate that courts provide meaningful review of the terms

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381. Katrice Bridges Copeland, *The Yates Memo: Looking for ‘Individual Accountability’ in All the Wrong Places*, 102 IOWA L. REV. 1897, 1924 (2017).

382. *See id.*

of all DPA agreements to ensure reasonableness and fairness for the parties and public. Second, Congress should give more guidance to the government regarding when—i.e., under what kinds of circumstances—DPAs are permitted to be offered, to ensure that DPAs are not contributing to the creation of a dual system of justice. Currently, there are no rules or clear guidelines governing when DPAs will or will not be offered to a defendant. Although that kind of unfettered prosecutorial power is acceptable when there are checks and balances in place to constrain prosecutors' actions and decisions (e.g., judges, juries, and proceedings that can be viewed by the public and reported on by the press), no such checks and balances exist for DPAs. With that much discretion being accorded the government, the following situations can occur: a large company can be offered a DPA when a smaller company engaging in the same misconduct is not; employees of large firms can be offered DPAs when employees of small firms are not—even when *all* the wrongdoers are engaging in the same misconduct; or wealthy criminals can be offered DPAs when poor criminals are not—even when *everyone* is committing the same crime. Congress must ensure that DPAs are not permitted to play a role in creating this kind of unconstitutional dual system of justice.

Third, there needs to be more research and investigation into the degree to which DPAs are effective (or not) as tools of law enforcement. The U.S. Government Accountability Office has concluded the government currently has no measures to assess DPA effectiveness,<sup>383</sup> and this needs to change; resources need to be committed to finding a way to determine whether the agreements are as effective as other tools and processes (such as plea agreements or traditional courtroom trials) in achieving the general purposes of the criminal law—i.e., deterring criminal behavior and punishing it when it occurs, protecting the public from criminal conduct, rehabilitating bad actors, and providing restitution for victims. Information presented in this paper suggests DPAs might be less effective compared to other tools, especially regarding deterrence, but more investigative work needs to be completed before a true comparison among the various tools can be made. In the end, if it is found that DPAs are in fact less effective than other crime-fighting tools, it might nevertheless be decided that economic and other efficiencies stemming from their use are worth the tradeoff in decreased law enforcement. Unfortunately, these kinds of calculations and weighing of options cannot be made due to lack of information.

Finally, it must be determined if the reasoning the government relies upon to justify using DPAs in the corporate context can be empirically validated.

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383. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 29, at 20.

For example, prosecutors have indicated that a major driving force in choosing DPAs over traditional litigation is the belief that indictment alone, in the context of a traditional prosecution, can lead to a company's ruin—with negative impacts on innocent parties like employees, customers, and shareholders. But is this belief in fact correct, or is it an overblown myth? Evidence presented in this Article suggests the latter but, again, complete and accurate information is necessary. Unfortunately, it appears that prosecutorial decision-making with respect to corporate DPAs might currently be overly influenced by anecdote, speculation, and myth. This needs to change.

It is telling that nearly every country outside the United States that is now in the process of drafting or implementing its own DPA program has decided that (1) a court or similar officer must be allowed to review the terms of the agreements to ensure they are reasonable and fair, (2) that all agreements must, with minor exceptions, be made available to the general public through publication, and (3) that the DPA program will be formally created and enacted through some sort of deliberative process, whether it be a formal legislative process or a public consultation process. The United States has failed in all three regards: there is no meaningful judicial review of DPA agreement terms; there are no legal or policy mandates ensuring that all DPAs are published and made publicly available; and the program within the United States, rather than being subjected to the rigors of the legislative process and ultimately signed into law, has evolved internally within DOJ, with guidance given mostly through the U.S. Attorneys' Manual.<sup>384</sup> This means the only guidance given to U.S. prosecutors in deciding whether to offer a DPA, and in deciding the terms of that agreement, are the general standards and considerations set forth within the Principles of Federal Prosecution of Business Organizations.<sup>385</sup> It is little wonder why so many foreign countries are rejecting U.S.-style corporate DPAs as they work to fashion their own programs. Congress must now act. Failing to address U.S. DPA rule-of-law and separation-of-power shortcomings will continue to undermine respect for U.S. law, both domestically and abroad.

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384. The only role Congress played in creating the U.S. DPA program was to include certain exclusions as part of the Speedy Trial Act (18 U.S.C. §§ 3161–3174 (2008)). In other words, while the Act mandates that a defendant's trial begin within seventy days after the government files an indictment, it also allows for certain exclusions from that seventy day limit, such as “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.” This exemption, under 18 U.S.C. § 3161(h)(2), enables the government to resolve matters using DPAs.

385. U.S. ATTORNEYS' MANUAL, *supra* note 1, § 9-28.300.