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TRENDS IN THE USE OF NON-PROSECUTION, DEFERRED PROSECUTION, AND PLEA AGREEMENTS IN THE SETTLEMENT OF ALLEGED CORPORATE CRIMINAL WRONGDOING

APRIL 2015

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TRENDS IN THE USE OF NON-PROSECUTION, DEFERRED PROSECUTION, AND PLEA AGREEMENTS IN THE SETTLEMENT OF ALLEGED CORPORATE CRIMINAL WRONGDOING

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April 2015

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EXECUTIVE SUMMARY

Over the past decade, two novel approaches to corporate criminal prosecution have emerged, the Deferred Prosecution Agreement ("DPA") and Non-Prosecution Agreement ("NPA"). DPAs and NPAs have been used in virtually all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations, as well as foreign bribery cases.

Background

The objective of this Report is to shed new light on the dramatic transformation in corporate criminal law enforcement that occurred, pre- versus post-2003 by introducing some initial evidence on the related evolution of corporate criminal settlements over the period. While a few prior studies have documented the increased use of NPAs and DPAs and the provisions that are contained in them, there remains a dearth of empirical evidence on how NPAs and DPAs differ from traditional plea agreements and how the reach of United States corporate criminal enforcement has evolved in their presence. Little is known about the extent to which NPAs and DPAs are used as substitutes or complements for traditional plea agreements, and whether they have tended to supplant or supplement traditional criminal pleas. Little evidence exists about whether DPAs and NPAs systematically differ from plea agreements (or from one another) on important dimensions such as monetary sanctions, legal process-related provisions, and mandated governance reforms. To fill this gap, this Report examines evidence from a large-scale research project designed to study these settlement agreements. Since no comprehensive data had previously been collected, the study began with an exhaustive effort to identify and catalog all NPAs, DPAs, and plea agreements entered into by public corporations between 1997 and 2011, a period that frames the 2003 Thompson memorandum date and allows us to make comparisons over time, pre- versus post-2003. The data generated through this effort permit the first systematic characterization and comparison of all known criminal settlements between federal prosecutors and public companies over the period. Of the 486 agreements identified, 157 are NPAs and DPAs and 329 are plea agreements.

This Report focuses on the three initial questions of the study:

- Whether the increased use of NPAs and DPAs has been accompanied by a decline (or increase) in the use of plea agreements;
- What factors are associated with the choice to settle a criminal investigation with an NPA, DPA, or plea agreement; and
- What differences, if any, are observed in settlement outcomes when using NPAs, DPAs, or plea agreements.

Data

A comprehensive dataset of all known NPAs, DPAs, and plea agreements was constructed expressly for the study. To be included in the sample, an agreement must meet each of the following four criteria: (1) the agreement must involve conduct that violates a federal criminal statute; (2) the plaintiff must include either the US Department of Justice or an affiliated US Attorney's Office; (3) the defendant must be a public company or be affiliated with such a company (e.g., as a business unit or subsidiary) at the time of the and non-governmental sources were searched. Second, the public status of each defendant company was verified through a search of available databases of registered public companies and, in some instances, supplemental searches of the name histories of defendants and their affiliated public parents. Third, for each settlement event identified through the initial search for agreements involving public companies, a copy of the signed settlement agreement (or other documentation) of the terms of settlement was obtained.

Key Findings

Trends

- Agreements with public companies to resolve criminal allegations grew substantially over the 1997–2011 period. In 1997, only eleven criminal cases involving public companies were settled, but rapid growth began around 2005, leading to a four-fold increase in the number of settlements by 2011.

- When plea agreements are combined with NPAs and DPAs, the average annual number of settlements increases from 19.7 in the pre-DPA/NPA era (1997–2002) to 27.2 from 2003–2006, and 51.8 from 2007–2011.

- Prior to 2003, almost no cases were resolved through NPAs or DPAs. Beginning in 2003, however, the number of NPAs and DPAs begins to grow substantially, although the number fluctuates. From 2006–2011, 42 percent of cases were resolved with NPAs and DPAs, and in some years the combined number of NPAs and DPAs surpassed the number of pleas.

- Post-2003, multiple settlement agreements are sometimes entered into for a single instance of misconduct—agreements signed separately by a parent and its subsidiary for an offense. Thus, some of the observed increase in settlements can be explained by this use of multiple settlements that is not found prior to 2003.

- The introduction of NPAs and DPAs has not been accompanied by a decline in the use of plea agreements. To the contrary, increased use of plea agreements has accompanied the rise of NPAs and DPAs, and thus an overall increase in the reach of corporate criminal enforcement.

Offender Characteristics

- Parents and Subsidiaries. The majority of DPAs and NPAs (52% and 76%, respectively, in the full sample) involve a parent company. The evidence on pleas is the opposite: only 41 percent of plea agreements involve parent companies.

- Government. Thirty-two (32) percent of the settlements were found to involve offenses in which the government was an injured party. Of the settlements that involved government as an injured party, 43 percent were NPAs and DPAs. In comparison, 30 percent of settlements in which government was not an injured party were found to be NPAs or DPAs.

Offense Characteristics

- Offense Mix. By offense category, the largest numbers of total settlements for the entire sample comes from antitrust (119), followed by environmental and safety (91), foreign bribery/FCPA (86) and Healthcare/FDA (59).

- Offense Severity and Offender Culpability. Based on an analysis of U.S. Sentencing Guidelines for Organizations, the average offense scores for DPAs and NPAs are considerably larger than for pleas (30.9 and 29.5 vs. 20.9, respectively). The evidence is similar for the median offense scores, where both DPAs and NPAs have medians of 30 compared to only 18 for plea agreements. The base Guideline fine, another indicator of crime severity, is also higher for DPAs and NPAs than for pleas at the mean ($189 million and $219 million vs. $75.7 million); however, there is considerable variability across offense. This difference does not persist in the comparison of median base fines; while the median base fine for DPAs is higher than for plea agreements ($30.2 million versus $22.5 million), it is lower for NPAs ($17.5 million).

Penalties

- Monetary Sanctions. There is no persistent difference between the monetary sanctions imposed through DPAs and NPAs versus pleas, based on mean and median comparisons in different time periods. In particular, monetary sanctions tend to be higher at the mean and median for DPAs in the full sample and in each period studied, yet monetary sanctions are higher for pleas than for NPAs at the mean and median in the 2007–2011 period. Median DPA sanctions are more than three times ($29.8 million) those for pleas ($8.7 million), and median sanctions for pleas during 2007–2011 are 25 percent higher ($10.6 million) than those for NPAs ($8.5 million).

- Ratio of Monetary Sanction to Guideline Base Fine. When comparing the ratio of the Guideline fine to the actual monetary penalty, there is little difference among NPAs, DPAs, and pleas.

- Duration. Average durations of agreements tend to be shorter for between NPA and DPA provisions than for plea agreements. Plea agreements last an average of 40.7 months. By contrast, the length of agreements under NPAs and DPAs are 27.8 months and 28.3 months, respectively.

- Reform Mandates. NPAs and DPAs have tended to include more provisions that waive or alter the traditional legal entitlements of corporations and more conditions relating to the corporation's governance structure when compared with plea agreements. In each time period studied, NPAs and DPAs have consistently contained larger numbers of both legal process and governance reform provisions than plea agreements.

TRENDS IN THE USE OF NON-PROSECUTION, DEFERRED PROSECUTION, AND PLEA AGREEMENTS IN THE SETTLEMENT OF ALLEGED CORPORATE CRIMINAL WRONGDOING

1. Introduction

Over the past decade, two novel approaches to corporate criminal prosecution have emerged, the Deferred Prosecution Agreement ("DPA") and Non-Prosecution Agreement ("NPA"). DPAs and NPAs have been used in virtually all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations, as well as foreign corruption cases. These legal mechanisms bypass the traditional plea-bargaining process and instead involve a negotiated settlement whereby the organization may agree without pleading guilty (or *nolo contendere*) to a combination of restitution, forfeiture, monetary sanctions, and other legal and structural governance reforms. DPAs and NPAs did not arise from any change in the federal statutes but through an innovation in criminal enforcement practices and related coordination between criminal and civil enforcement authorities.

All US federal criminal cases are settled at the discretion of the US Department of Justice (DOJ), operating through prosecutors located in US attorneys' offices and divisions. Those prosecutors, along with representatives of the corporation, are the necessary signatories of each agreement. The government and corporation are thus its presumed beneficiaries.[1] The Criminal Division of the DOJ has been a signatory to the majority of NPAs and DPAs entered into by companies, although other divisions of the DOJ have entered many NPAs, DPAs, and plea agreements, as have its affiliated Offices of the US Attorneys. The Department of Justice has supported the exercise of prosecutorial discretion in these matters through the issuance of a series of memoranda, starting with the Holder Memorandum in 1999, with the most recent occurring in 2008.[2]

The standards and guidance that prosecutors face in deciding whether to seek a DPA, NPA or traditional plea agreement, and in negotiating sanctions under DPAs and NPAs have evolved over the past decade. The Thompson Memorandum in 2003 marked the start of a "DPA era" by encouraging prosecutors to substitute NPAs and DPAs for plea agreements in those instances where companies voluntarily disclosed and/or cooperated with the investigation of wrongdoing. Two other sources of guidance on charging practices and sanctions for corporations under federal criminal law remain relatively unchanged. The first are the Organizational Sentencing Guidelines. The second, the federal case law, contains only limited discussion of issues

[1] JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 1065 (West, 4th ed. 2009) (explaining how both parties to DPAs and NPAs secure important advantages); *see also* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998) (examining justifications for plea bargaining).

[2] *See* Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 Del. J. Corp. L. 921, 945, 952 (2009).

relating specifically to NPA or DPA settlements.[3]

Generally, criminal settlement agreements for corporations—NPAs, DPAs, and plea agreements—contain the following four elements: an admission of facts, an agreement of cooperation, a specified duration for the agreement, and an agreement to monetary and non-monetary sanctions. Common sanctions include restitution, fines, probation, appointment of monitors, and termination of responsible individuals.[4] While structurally similar, the legal and policy implications of NPAs, DPAs and plea agreements differ in significant respects.

While popular among federal prosecutors, the use of DPAs and NPAs has become controversial in both the legal and policy arenas. One noted legal scholar claimed that their use "erodes the most elementary protections of the criminal law, by turning the prosecutor into judge and jury, thus undermining our principles of separation of powers."[5] Another scholar remarked that DPA "agreements typically do not provide for judicial review of implementation or of any alleged breach, and they often require the organization's permanent future cooperation."[6]

In addition to the concerns raised by legal theorists, there is little agreement about the practical efficacy of DPAs and NPAs. Questions have emerged about the magnitude and potential collateral consequences of both monetary and non-monetary sanctions under NPAs and DPAs relative to traditional plea agreements, as well as the efficiency and ultimate deterrent effect of these alternative settlement vehicles. Some of these questions are similar to those encountered in the plea-bargaining debate.[7] Yet answers in this new context involve consideration of a wider array of settlement outcomes than tend to arise in the use of corporate plea agreements.

Some of the debate over NPAs and DPAs has focused on their effectiveness relative to a baseline of criminally charging and prosecuting corporations. On the one hand, the view is that, by avoiding a criminal plea, and resulting judgment, offending companies may avoid the costly collateral consequences, such as debarment from government contracts. Indeed, DPAs and NPAs are sometimes regarded as enabling some companies to avoid insolvency. This is reflected in the claim that DPAs and NPAs "rebuild shareholder and public confidence in corporations while allowing companies to avoid certain death by indictment."[8]

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[3] For an exception, *see* Judge Gleeson's opinion in the case of *HSBC Bank USA, N.A. and HSBC Holdings PLC*, 12-Cr.-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).
[4] Rachel Delaney, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 878 (2009).
[5] Richard A. Epstein, *The Deferred Prosecution Racket*, WALL. ST. J., Nov. 28, 2006, http://www.wsj.com/articles/SB116468395737834160.
[6] Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 857 (2007); *see also* Benjamin Greenblum, Note, *What Happens to a Prosecution Deferred?*, 105 COLUM. L. REV., 1863, 1863 (2005).
[7] For some of the most common arguments made regarding merits and demerits of plea bargaining, *see* Julie R. O'Sullivan, Federal White Collar Crime 1064 (4th ed. 2009).
[8] Elizabeth R. Sheyn, *Anything but a 'Racket': Why Professor Epstein's Attack on the Nature and Function of Deferred and Non-Prosecution Agreements Misses the Mark* 1 (Dec. 26, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=1514905.

On the other hand, relative to "criminal prosecution" by plea agreement, there is the concern that "deferred prosecution and non-prosecution agreements limit the punitive and deterrent value of the government's law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution."[9] As one commentator noted:

> The rise of these agreements has undermined the general deterrent and adverse publicity impact that results from corporate crime prosecutions and conviction. . . . It could very well be that the rise of these deferred and non-prosecution agreement deals represents a victory for the forces of big business who for decades have been seeking to weaken or eliminate corporate criminal liability.[10]

Still other views of NPAs and DPAs arise from comparisons against a baseline of no criminal action, such as may occur through administrative or civil settlement for the alleged misconduct. There is concern that widespread use of DPAs and NPAs may empower prosecutors to extract concessions beyond what some companies would face if prosecutors were instead left with no alternative to a plea agreement or trial other than non-action. By making it easier for corporations to reach a criminal settlement without a plea or trial, the introduction of DPAs and NPAs may well have increased the reach of the criminal law enforcement into areas that would otherwise be subject only to administrative compliance actions or private litigation.[11]

The objective of this Report is to shed new light on the dramatic transformation in corporate criminal law enforcement that has occurred, pre- versus post-2003 by introducing some initial evidence on the related evolution of corporate criminal settlements over the period. While a few prior studies have documented the increased use of NPAs and DPAs and the provisions that are contained in them,[12] there remains a dearth of empirical evidence on how NPAs and DPAs differ from traditional plea agreements and how the reach of United States corporate criminal enforcement has evolved in their presence.[13] Little is known about either the extent to which

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[9] David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1302 (2013).

[10] Russell Mokhiber, Editor, Corporate Crime Reporter, Speech Delivered at the National Press Club: Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements (Dec. 28, 2005), *available at* www.corporatecrimereporter.com/deferredreport.htm.

[11] On efficiency implications of settlement, see Kobayashi at note 27, *infra*.

[12] *See generally*, Garrett, *supra* note 6 (documenting the rise in DPAs and NPAs from 2001 to 2006). Further documenting the rise in DPAs and NPAs are annual reviews prepared by Gibson Dunn, such as Joseph F. Warin & Trent J. Benishek, *2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, Gibson Dunn (Jan. 4 2011), http://www.gibsondunn.com/publications/pages/2010year-endupdate-corporatedeferredprosecutionandnon-prosecutionagreements.aspx. More recently, James M. Anderson & Ivan Waggoner, *The Changing Role of Criminal Law in Controlling Corporate Behavior*, The RAND Corporation (2014), http://www.rand.org/pubs/research_reports/RR412.html, compared overall trends in the number of plea agreements to DPAs and NPAs and Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, BUS. LAW (Nov. 2014), examined the governance provisions of NPAs and DPAs. Unlike the Kaal and Lacine study, the Anderson and Waggoner study relied upon USSC data on plea agreements, which are known to understate the number of corporate criminal settlements.

[13] For an exception, *see* Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective, in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 11–37 (Anthony E. Barkow & Rachel S. Barkow, eds. 2011) (documenting the rise in the use of DPAs and NPAs relative to plea agreements between 2001 and 2007).

NPAs and DPAs are used as substitutes versus complements for each other; and whether NPAs and DPAs have tended to supplant or supplement the use of traditional criminal pleas. Little evidence exists about whether DPAs and NPAs systematically differ from plea agreements (or from one another) on important dimensions such as monetary sanctions, legal process-related provisions, and mandated governance reforms.

To fill this gap in the empirical literature, this Report examines evidence from a large-scale research project expressly designed to study these settlement agreements. Since no comprehensive data had previously been collected, the study began with an exhaustive effort to identify and catalog all NPAs, DPAs, and plea agreements entered into by public companies between 1997 and 2011, a period that frames the 2003 Thompson Memorandum date and allows us to make comparisons over time, pre- versus post-Thompson, and within eras. The data generated through this effort permit the first systematic characterization and comparison of all known agreements between federal prosecutors and public companies over the period. Of the 486 agreements identified, 157 are NPAs and DPAs and 329 are plea agreements.

This Report presents initial evidence from analysis of these new settlement data, focusing on three overarching questions. The first is whether the increased use of NPAs and DPAs has been accompanied by a decline (or increase) in the use of plea agreements. The second question focuses on what factors are associated with the choice to settle a criminal investigation with an NPA, DPA, or plea agreement. Finally, we examine some of the differences in the settlement outcomes that have been achieved using NPAs, DPAs, and plea agreements.

As to the first question, the data reveal an increase in the use of plea agreements starting in 2007, alongside a marked increase in the use of NPAs and DPAs since 2003. In addition, while foreign and domestic bribery cases make up the largest component of NPAs and DPAs, the post-2003 timing of the enforcement action may be more important than offense type in explaining the use of an NPA or DPA. In particular, the rise of DPAs and NPAs is not explained by the dramatic rise that has occurred in the bribery area, foreign or domestic. Bribery cases account for less than half of DPAs and NPAs since 2003.[14]

Second, we find that the use of a DPA or NPA rather than a plea agreement is associated with several factors that include: the corporation's culpability for the offense,[15] whether or not the offense involved business dealings with the government,[16] and whether a parent company or subsidiary was the defendant. Subsidiaries do not enter NPAs and DPAs as frequently as do

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[14] *See* Table 4, *infra*.

[15] Computation of a corporation's culpability score under the Guidelines depends on its degree of cooperation with the government investigation, the involvement of high-ranking officials of the corporation, whether there is a history of similar prior illegal conduct by the organization and other offender-specific factors. *See* US Sentencing Guidelines Manual § 8C2.5; *see also infra* notes 155 to 162 and accompanying text.

[16] Evidence that the government is often an injured party in federal crimes for which public companies pay sanctions dates back to the pre-Guideline era. *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J. L. & ECON., 489, 505 (1999). The current study is the first to our knowledge that links the *form of settlement* to the defendant's business dealings with the government.

their affiliated parent companies.

Finally, with respect to the differences in settlement outcomes that prosecutors and companies reach through NPAs and DPAs versus plea agreements, the most striking divergence between the new and traditional settlement practices lies not in the monetary sanctions they generate but in their use to extract *non*-monetary concessions from the defendant company. NPAs and DPAs are found on average to have contained more provisions relating to governance—such as required compliance programs and corporate monitors—than do plea agreements.[17] NPAs and DPAs also have included more provisions relating to legal process than have traditional plea agreements, such as the required waiver of privileges. That said, all of the forms of non-monetary sanction that we study are found in plea agreements, not just in NPAs and DPAs.

This Report proceeds as follows. Part 2 presents background on corporate criminal enforcement and the rise of NPAs and DPAs. Part 3 describes the data collection and sample construction. Part 4 presents our main findings on the use of NPAs and DPAs relative to plea agreements by federal prosecutors across a number of variables. Part 5 summarizes our findings and offers some conclusions.

[17] This may be seen as a means of customizing required governance reforms to the circumstances of the companies that are found to engage in misconduct and thereby avoiding higher costs of more pervasive governance reforms that are not so customized. On the potential cost of widespread governance reform, *see e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L. J. 1521, 1587–91 (2005).

2. Background

2.1 Corporate Criminal Liability

The Supreme Court established corporate criminal liability in 1909 under *New York Central & Hudson River Railroad Co. v. United States*.[18] In *New York Central*, the United States sued Central along with the individual employee responsible for fixing the prices of sugar shipments.[19] The act of suing a corporate entity was surprising to some in the legal community at the time, many of whom believed that corporations were fictional persons and therefore could not be charged criminally.[20]

Despite the court's finding in *New York Central*, applications of criminal liability to corporate organizations remained rare during most of the 20th century.[21] In the 1970s, however, an increase in corporate scandals prompted law enforcement officials to pursue more cases of corporate criminal liability, while Congress updated federal corporate criminal liability laws in fields such as antitrust, environmental law, and procurement fraud.[22]

Corporate criminal liability subjects a company to liability for the illegal acts of its employees if the acts are performed within the scope of employment and at least partly for the company's benefit.[23] In 2009, the Second Circuit Court of Appeals followed precedent by treating corporate criminal liability as an extension of the tort liability theory of *respondeat superior*.[24] Similarly, the Fourth Circuit Court of Appeals articulated a general federal law standard for corporate criminal liability, in which "[a] corporation may be responsible for the actions of its agents done or made within the scope of their authority."[25] In limited circumstances a company may also be liable for actions outside the employee's authority if their actions are related to assigned work or if the employee acted at least in part for the benefit of the company.[26]

2.2 Plea Agreements

Prosecutors historically avoid high costs of taking corporations to trial by either dropping charges or entering into a plea agreement at the end of a criminal investigation.[27] In deciding to

[18] 212 US 481, 493–94 (1909) (holding that corporations can be found vicariously liable for the crimes of their employees if they occur within the scope of employment and for the benefit of the employer).
[19] *Id.* at 489.
[20] Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1446 (2007).
[21] Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 14 (2014).
[22] *Id.* at 8.
[23] Richard Gruner, Corporate Criminal Liability and Prevention § 3.03 (2013); *see also* Cindy R. Alexander & Mark A. Cohen, *Why do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 32 (1999) (corporate crime is ultimately costly to the corporation).
[24] Gruner, *supra* note 23, § 3.03 (referring to *United States v. Ionia Mgmt.*, 555 F.3d 303 (2d Cir. 2009)).
[25] *Id.* (quoting *United States v. Singh*, 518 F.3d 236 (4th Cir. 2008)).
[26] *See, e.g., id.*; *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (upholding a corporate conviction even though the employee acted for his own benefit because the acts were also partly beneficial to the corporation).
[27] *See* Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, *in* DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 17, 17–31 (David A. Anderson ed., 1996) (noting the efficiency gains from settlement versus trial in the case of corporations).

enter into a plea, the corporation similarly avoids trial-related costs; it instead faces costs of settlement that include any collateral costs to the corporation of ending up with a criminal conviction as a result of having to plead guilty as part of the agreement, as is customary. The use of traditional plea agreements to impose sanctions is widely recognized as an efficient solution for prosecutors in cases where the cost of trial is relatively high and/or there is little uncertainty about the outcome.[28] The widespread use of traditional plea agreements, however, means that judges and juries tend not to hear criminal cases brought against public corporations.

All plea agreements are signed by a prosecutor at the DOJ, either in the Criminal Division, another division, or a US Attorney's Office. Investigations may be initiated by a private party or non-DOJ agency of the government and referred to DOJ for a determination as to whether prosecution is warranted and, if so, whether resolution should occur through settlement or trial. Many criminal cases that are brought against corporations in the United States under federal law indeed begin as investigations by agencies of the federal government other than the DOJ into the regulated conduct of corporations. The Sentencing Guidelines for Organizations apply to all settlements entered by DOJ, although the general fine provisions do not apply to all offenses; some offenses have their own specialized provisions of the guidelines for computing monetary sanctions (Antitrust) and there are no monetary fine provisions at all for other offenses (Environmental).[29]

2.3 DPAs and NPAs

After decades of criminal enforcement against corporations through the traditional process of plea-bargaining and trial, non-plea settlements arose in the 1990s to address some of the perceived limitations of traditional settlement. The earliest reported use of DPAs and NPAs in the federal corporate crime setting was to resolve charges against a financial institution.[30] NPAs and DPAs have similar properties insofar as they each permit the corporation to settle without a formal criminal sanction, unlike a plea agreement, and they facilitate the corporation's continuing cooperation with the prosecutor without a delay in settlement and through the agreement end date. Like the traditional plea agreement, NPAs and DPAs are pre-trial settlements through which the government and the corporation together avoid the costs of trial.[31] The difference is that, while corporations may agree to the same facts as appear in a traditional plea agreement, the corporations that enter into non-plea settlements are not required to enter formal *pleas* (of guilty or nolo contendere) and thus do not face the collateral

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[28] *Id.*

[29] US Sentencing Guidelines Manual § 8C2.1 (2014) (noting the applicability of fine guidelines to corporations but highlighting how offenses involving the environment comprise the largest category of offenses where the fine provisions do not apply); *see also Id.* § 2R1.1(d) (explaining the special instructions for fines concerning corporations, noting particularly how fines for antitrust offenses are based on a different provision of the Guidelines).

[30] In 1994 Prudential Securities was the first deferred prosecution agreement that involved a public corporation or other major company. *See Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York*, 19 CORP. CRIME REPORTER 48(11) (Dec. 12, 2005), *available at* http://www.corporatecrimereporter.com/news/200/interview-with-mary-jo-white-debevoise-new-york-new-york/.

[31] Throughout, "pre-trial settlement" refers to a settlement negotiated between the prosecutor and defendant in the absence of a trial verdict. Because criminal charges (such as through an indictment) must occur prior to trial, it is possible for a pre-trial settlement to occur after the filing of criminal charges.

costs of the criminal convictions that necessarily arise from such pleas. As in all pre-trial settlements, the government agrees in both instances not to proceed to trial if the corporation complies with the conditions of the agreement over its term.[32] Differences between NPA and DPA emerge upon closer inspection, however.[33]

A key difference between NPAs and DPAs is that DPAs involve the filing of charges in federal court, as would occur if the prosecutor were taking the case to trial.[34] With a DPA, the prosecutor and the corporation agree that although the prosecutor will charge the corporation in federal court, the prosecutor will defer the continued prosecution of the charges until the end of a certain period of time agreed upon by both parties.[35] If, at the end of the term of the agreement, the corporation has followed through on its obligations, the prosecutor will dismiss the charges.[36]

In an NPA, no charges are ever filed in federal court.[37] Unlike a DPA, there is indeed no direct role for the federal courts to play in the approval or enforcement of an NPA, although there is an open question as to whether a court could consider the breach of an NPA once the DOJ brings actual charges.[38] While specific claims of wrongdoing may be included, there appears to be no formal structure or requirement for the terms of an NPA. Under both DPAs and NPAs, a company is generally released from any obligations under the agreement after a specified period of time.[39] Typically, the government retains the right to press criminal charges against a company in the event of a breach of the agreement during the duration of its enforcement.[40]

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[32] Delaney, supra note 4.

[33] For the purposes of this Report, DPAs are distinguished from NPAs according to whether or not we found evidence that documents relating to the criminal investigation of the company and settlement were filed with the presiding federal court. By this definition, DPAs include all settlements in which the company does not enter a plea of guilty or no contest and that are filed in court. This distinction is similar to the Morford Memo, which observed that "the terms 'deferred prosecution agreement' and 'non-prosecution agreement' have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, which tends always to be an information, and the filing of the agreement with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding." Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., US Dep't of Justice, to Heads of Department Components, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations United States Attorneys (Mar. 7 2008) [hereinafter Morford Memo], *available at* http://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

[34] *See* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 56 n.62 (2006) ("On occasion, it is difficult to determine if an 'agreement' is a deferred prosecution or non-prosecution agreement. . . . [In] non-prosecution agreements, no charges were filed or pending against Prudential.").

[35] Delaney, *supra* note 4, at 878 ("Pretrial diversion agreements come in two variations: DPAs and non-prosecution agreements (NPAs).

[36] *Id.*

[37] *Id*.

[38] Greenblum, *supra* note 6, at 1869.

[39] *See, e.g*, *United States v. Biomet Orthopedics, Inc.*, No. 07-8133, 2007 WL 2964201, at *1 (D.N.J. Sept. 28, 2007) (noting Exhibit A, which defines a period of eighteen months for the DPA to remain in effect).

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

2.4 Agency Problems and Solutions: Guidelines, Review, and Guidance

Recent literature highlights the costs that corporations face in avoiding crime as an agency cost that is an artifact of the separation of ownership from control in the modern corporation.[41] These costs arise from the obstacles that principals, such as stockholders, face in controlling the actions of individuals within the corporation and bringing them into alignment with the principals' interests. Criminal enforcement actions may help address some of these costs. Yet agency costs can arise in law enforcement institutions, not just in business organizations.

A series of questions have emerged about the potential for agency costs to arise in using criminal law enforcement to control corporate misconduct. The reforms that have sought to address these questions affect the exercise of discretion in legal institutions, notably by prosecutors and judges. Solutions to perceived agency problems in the enforcement of the law have included the development of sentencing guidelines for federal judges, judicial review of settlements, and the promulgation of guidance for prosecutors. To place these solutions in context, we next consider some of briefly the conditions under which opportunities for the exercise of discretion may arise among corporate agents, prosecutors, and judges.

Corporate misconduct leads to criminal sanctions through a multi-stage process that begins with an investigation and proceeds with possible referral, prosecution, and settlement or trial. *Investigations* are done within the DOJ and by other agencies of the federal government. Some government agencies have indeed created special investigative units for this purpose; the DOJ alone is authorized to *prosecute* offenders under criminal law. The investigations that begin at other agencies must thus be *referred* to the DOJ if they are to proceed criminally. Otherwise or in parallel, the agency that does the initial investigation may obtain civil or administrative sanctions.

Discretion, and thus the potential for agency problems, arises at several stages. As the *prosecuto*r, the DOJ has discretion to pursue the case, and has issued guidelines for its attorneys and others to consider in determining whether to pursue a case, in which venue (e.g. civil versus criminal) and whether or not to impose a sanction. Corporations, through their officers and counsel, exercise discretion over the corporation's position in negotiating settlement. Finally, for cases that settle with a plea agreement or go to trial and do not end in acquittal, the discretion of the *judge* assigned to the case may become important to the determination of a sanction.

2.4.1 Guidelines for Judges

Concerns about the exercise of discretion by judges were met with the passage of the Sentencing Reform Act in 1984, and the publication of the first federal Sentencing Guidelines in 1986.[42] The United States Sentencing Commission ("Commission") formalized the first

[41] *See* Alexander & Cohen, *supra* note 23.
[42] *See* 18 U.S.C. § 3551 (1984) (establishing the United States Sentencing Commission and providing it with the authority to issue mandatory guidelines for sentencing federal criminals. The Commission first issued guidelines for individual offenders in 1986 and deferred action on organizational offenders).

organizational sentencing guidelines in 1991 ("Guidelines").[43] Until 2005, the Commission interpreted as its mandate the drafting of Guidelines that were binding on federal judges sentencing criminal defendants.[44] In 2005, the US Supreme Court in *United States v. Booker* held that the Guidelines were advisory in nature.[45] Despite being merely advisory, the Supreme Court later clarified, "[a] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . the Guidelines should be the starting point and initial benchmark."[46] However, "[t]he Guidelines are not the only consideration . . . [the Judge] must make an individualized assessment based on the facts presented."[47]

2.4.2 Judicial Review of Settlements

The role of judges in imposing and/or reviewing proposed sentences on corporations at trial and through plea agreements was arguably diminished by the issuance of sentencing guidelines, insofar as the Guidelines posed as a substitute for the discretion of judges in shaping the sanction. Nevertheless, judicial review remained critical in verifying that there was no undue exercise of discretion by prosecutors in negotiating settlement with corporations. Even under the Guidelines, Federal judges were called upon to provide guidance and review of sentences imposed on corporations through sentencing hearings after trial and as an outcome of the traditional plea bargaining process.

The role of the federal judiciary in the process of setting sanctions for companies under DPAs, NPAs, and plea agreements has evolved over the period of the study. For plea agreements, much of the debate has revolved around questions about whether and to what degree federal judges must adhere to the Guidelines. *Booker* resolved some of this debate in determining that the Guidelines are not binding on judges. More recent questions concern whether and how judges should be involved in reviewing DPAs or NPAs.[48]

Opportunities for judicial review arise in part when settlement documents are filed with the federal court. DPAs and Plea agreements are the subject of such filings; NPAs are not. DOJ files DPAs with the courts to comply with the Speedy Trial Act, which requires the court to approve any exception to the Act's requirement that trial begin within seventy days of bringing charges.[49] Critics of the use of non-plea settlements express concern that courts are too deferential to prosecutors—applying only a cursory review.[50] Alternatively, the district court in *United States v. HSBC Bank* observed that by entering into a DPA the parties had "[placed] a

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[43] 28 U.S.C. § 994 (1984). Until 1991, sanctions for corporate wrongdoing were completely at the discretion of the sentencing judge within the limits of any statutory maximum penalties.
[44] *See United States v. Booker*, 543 US 220, 233–4 (2005).
[45] *See id.* at 245.
[46] *Gall v. United States*, 552 US 38, 49 (2007).
[47] *Id*. at 49–50.
[48] *See* Sarah Merberg, Note, *Promises of Leniency: Whether Companies should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 VAND. J. TRANSNAT'L L. 557, 571 (2012); Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail Effect" and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293 (2014).
[49] 18 U.S.C. § 3161(h)(2) (2012) (allowing an exception to the 70-day requirement if "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").
[50] *See* Uhlmann, *supra* note 9, at 1328; US 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 25–28 (2009) [Hereinafter GAO Report], *available at* http://www.gao.gov/new.items/d10110.pdf.

criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority."[51] Consistent with the potential role of judicial review in addressing agency problems among the parties to the settlement, the court noted "[i]t is easy to imagine circumstances in which a deferred prosecution agreement… so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the court."[52] The court ultimately approved the DPA "subject to a continued monitoring of its execution and implementation."[53] To date, only this one district court ruling appears to address the extent to which judges might oversee DPAs. Thus, it remains to be seen whether other courts will adopt or amend this approach and how much monitoring of DPAs and NPAs by the courts we might see in the future.[54]

2.4.3 Guidance for Prosecutors

Beyond any guidance that they may receive through judicial review, prosecutors within the DOJ, including its USAOs, receive guidance on best practice from within the DOJ, as indicated through a series of memoranda released on corporate crime and settlement, starting with the Holder memo of 1999. A review of these memoranda relating to the criminal charging of corporations and the exercise of discretion in negotiating the contents of settlement reveals some of the key issues that have emerged over more than a decade of corporate settlements for alleged criminal misconduct. The emergence of NPAs and DPAs have in particular been associated with issues that include the decision whether to charge a corporation criminally, the rewarding of cooperation by the defendant, the required retention of a corporate monitor, and the required waiver of legal privileges, such as attorney-client privilege.

Criminal Charges Against Corporations

In 1999, then-Deputy Attorney General Eric Holder issued a memorandum titled *Bringing Criminal Charges Against Corporations*.[55] The Holder Memo served as guidance for prosecutors in deciding whether to criminally charge a corporation.[56] It set forth eight factors that a prosecutor should consider when deciding whether to prosecute a case.[57] Despite multiple revisions by subsequent Deputy Attorney Generals, the factors were substantially

[51] HSBC Bank USA, N.A. and HSBC Holdings PLC, 12-Cr.-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013).
[52] *Id.* at *6.
[53] *Id.* at *7. The court "recognize[d] that [the] exercise of supervisory power in this context is novel." *Id.* at *6.
[54] Although NPAs are not filed with by a court at the time of their issuance, court involvement might occur, for example, if a company subsequently were to challenge DOJ's attempt to enforce an NPA.
[55] Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., US Dep't of Justice, to All Component Heads & US Attorneys (June 16, 1999) [hereinafter Holder Memo], ***available at*** http:// www.justice.gov/criminal/fraud/fcpa/docs/response2-appx-k.pdf.
[56] *Id.*
[57] *Id.* (The eight factors to be considered are: (1) "nature and seriousness of the offense, including the risk of harm to the public"; (2) "pervasiveness of wrongdoing within the corporation"; (3) "corporation's history of similar conduct"; (4) "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate"; (5) "existence and adequacy of the corporation's compliance program"; (6) "corporation's remedial actions"; (7) "[c]ollateral consequences"; (8) "adequacy of non-criminal remedies").

incorporated into the Department of Justice's 2008 United States Attorney's Manual discussed below.[58]

Rewarding Cooperation

In 2003, then-Deputy Attorney General Larry D. Thompson released a memo entitled *Principles of Federal Prosecution of Business Organizations*.[59] The Thompson Memo was in many ways similar to the Holder Memo but included a greater emphasis on considering the authenticity of a corporation's cooperation with the government when considering leniency.[60] The memo emphasized the use of alternative resolutions to encourage greater cooperation.[61] Also, unlike the Holder Memo, which "did not instruct prosecutors to reason backward from every crime committed in the corporate context to consider whether charges may be brought against the corporation," the Thompson Memo indicated that its principles should be applied to all crimes committed in the corporate context.[62]

Some observers point to the 2003 Thompson Memo, which announced a DOJ policy shift away from prosecutions toward entering into settlement agreements with corporations based on cooperation and voluntary disclosure of wrongdoing, as an indicator of change in legal policy, facilitating widespread use of NPAs and DPAs.[63] The Thompson Memo went beyond the Holder Memo, in requiring prosecutors to consider whether every crime committed in a corporate context could lead to charges against the corporation itself, even those not considered serious, pervasive, or involving senior management.[64] The Thompson Memo also encouraged the use of NPAs and DPAs in lieu of prosecution, something the Holder Memo did not do.[65]

On August 28, 2008 then-Deputy Attorney General Mark Filip issued an additional memorandum.[66] The Filip Memo included a revision of the *Principles of Federal Prosecution of Business Organizations* and was incorporated for the first time in the United States Attorneys'

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[58] US Dep't of Justice, United States Attorney's Manual § 9-28.300.A. (2008) [hereinafter USAM], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300.

[59] Memorandum from Larry D. Thompson, Deputy Att'y Gen., US Dep't of Justice, to Heads of Dep't Components & United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

[60] *Id.*

[61] *See id.* at Part VI; *see also* Christopher A. Wray & Robert K. Hur*, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and* Practice, 43 Am. Crim. L. Rev. 1095,1103 (2006).

[62] Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 320–21 (2007) ("Only if the crime in question was serious, pervasive in the organization and senior management had at least some culpability, either active or by virtue of willful blindness, did federal prosecutors generally consider a corporate indictment under the Holder Memorandum.") (quoting Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong? In* 2 37th Annual Institute on Securities Regulation 815, 820 PLI Corp Law & Practice Course Handbook Series No. B-1517 (2005)); *see also* Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 245 (2009).

[63] *See, e.g.*, Khanna & Dickinson, *infra* note 84, at 1719.

[64] Thompson Memo, *supra* note 59, at Part IV.

[65] *Id*.

[66] Memorandum from Mark R. Filip, Deputy Att'y Gen., US Dep't of Justice, to Heads of Dep't Components & United States Attorneys (Aug. 28, 2008) [hereinafter Filip Memo] *available at* http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf.

Manual ("USAM").[67] The Filip Memo clarified how "cooperation" should be defined as a mitigating factor, and can be seen as an effort to alleviate prosecutorial pressure to cooperate.[68] The Holder Memo had instructed prosecutors—when assessing the extent of cooperation for the purpose of deciding on a sanction—to consider whether the corporation was willing to waive the attorney-client and work product privileges.[69] The Filip Memo changed this standard, instructing prosecutors to assess whether the "relevant facts" were disclosed, rather than whether a privilege was waived.[70] However, to obtain full credit for cooperating under the Filip Memo, companies were required to waive the work product and attorney-client privileges, at least in part, when appropriate to give prosecutors access to facts about the alleged misconduct.[71]

According to the USAM, prosecutors should apply the same considerations against corporate targets as are routinely used in individual charging decisions. These considerations include, "the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches."[72] Also the prosecutor, when handling a corporate target, is expected to consider the following nine factors:

- Nature and seriousness of the offense;
- Pervasiveness of the wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- The corporation's history of similar misconduct;
- Timely and voluntary disclosure;
- The existence and effectiveness of the corporation's pre-existing compliance program;
- Remedial actions;
- Collateral consequences;
- Adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- Adequacy of remedies such as civil or regulatory enforcement actions.[73]

The USAM also states that, "national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others."[74]

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[67] USAM, *supra* note 58.
[68] Filip Memo, *supra* note 66, at 7.
[69] Holder Memo, *supra* note 55, at Part VI.
[70] Filip Memo, *supra* note 66, at 9–13.
[71] Steven M. Witzel, *Privilege Waivers' Role in Deferred and Non-Prosecution Agreements*, 250 N.Y. L.J. no. 47, Sept. 5, 2013.
[72] USAM, *supra* note 58, § 9-28.300.
[73] *Id*.
[74] *Id*.

Waiver of Legal Privileges

In 2006, then-Deputy Attorney General Paul J. McNulty issued a memorandum that can be seen as introducing constraints on the strategies that prosecutors may use to obtain cooperation from corporations.[75] The McNulty Memo included a section on attorney-client and work product privileges,[76] and required that "prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request."[77] The memo further set forth principles for prosecutors to consider in determining whether to request such waivers and how the company's response to a waiver request should affect the severity or leniency of any settlement.[78]

The McNulty Memo advised prosecutors to limit the conditions under which privilege waivers were obtained to those cases in which the prosecutor could demonstrate "legitimate need" and the corporation's answer can only be considered when the information requested is strictly factual in nature.[79] The McNulty Memo also addressed whether the advancing of legal fees to employees can factor into the prosecutor's decision to charge the corporation, concluding that this should only be done in rare cases.[80] The memo constrained the practice of requiring waivers as a condition for leniency at settlement by eliminating uncertainty about best practice and by introducing a (potentially costly) procedure for prosecutors to follow within DOJ before requesting a waiver.

Corporate Monitors

The Morford Memo provides guidance to DOJ prosecutors, including the US Attorneys, for appointing monitors, and the scope of their duties.[81] The Morford Memo provides nine basic principles for federal prosecutors related to the use of corporate monitors, as well as guidance for drafting monitor-related provisions in DPAs.[82] In negotiating the terms of agreements, the Morford Memo states that prosecutors should consider both the benefits of appointing a

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[75] Memorandum from Paul J. McNulty, Deputy Att'y Gen., US Dep't of Justice, to Heads of Dep't Components & United States Attorneys (Dec. 12, 2006) [hereinafter McNulty Memo], *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

[76] *Id*. at 8–12. Some of the tactics discussed the McNulty Memo were the subject of litigation in *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008). In *Stein*, the court found that the government unconstitutionally interfered with the defendants' right to counsel by pressuring KPMG to cease paying its employees' legal fees. *Id*. at 135–36. As a condition to avoid indictment, prosecutors were said to have pressured KPMG to cease paying its employees' legal fees. The court held that the federal prosecutors violated the defendants' Sixth Amendment rights. *Id.*

[77] McNulty Memo, *supra* note 75, at 9.

[78] *Id.* at 8–11.

[79] *Id.* at 8–9; *see also* Ball & Bolia, *supra* note 62, at 255–56 (explaining the process of requesting a waiver of the work product privilege or attorney-client privilege).

[80] McNulty Memo*, supra* note 75, at 11 (according to *Stein*, 541 F.3d at 142–43, prosecutors gain bargaining power in settlement negotiations when employees are required to pay their own legal fees). *See also* "Remarks of Deputy Attorney General David W. Ogden at the Compliance Week Keynote Address," June 4, 2009 (available at: http://www.justice.gov/opa/speech/deputy-attorney-general-david-w-ogden-compliance-week-keynote-address) indicating DOJ had taken "significant steps" to address the attorney-client privilege, following concerns expressed by corporate counsel and Congressional members.

[81] Morford Memo, *supra* note 33.

[82] *Id*.

monitor, such as those accruing to the corporation and to the public, and the costs.[83] From the perspective of one scholar, "[e]specially in the case of independent monitors, who can wield vast amounts of power, there is little guidance other than the Morford Memo."[84] The memo sets out six guiding principles regarding the scope of a monitor's duties.[85] In particular, it notes that the corporation, not the monitor, has the responsibility of designing a corporate compliance program,[86] and that a monitor's responsibility should not be "broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct."[87]

The role of corporate monitors continued to be an issue after the release of the Morford Memo. Deputy Attorney General Gary Grindler thus issued a further memorandum on the subject.[88] The Grindler Memo specifically addresses how disputes between corporations and their monitors are to be resolved after the agreement is signed. It explains that any DPAs that require a corporate monitor should also include an explanation of the role of the DOJ in resolving post-settlement disputes between the monitor and the corporation.[89]

2.5 Policy Debate

There is a vibrant policy debate surrounding the efficacy of NPAs and DPAs relative to the traditional plea agreement in settling criminal investigations. NPAs and DPAs are viewed as important enforcement tools by federal prosecutors. The former head of the DOJ Criminal Division, Lanny Breuer, explained:

> When the only tool we had to use in cases of corporate misconduct was a criminal indictment, prosecutors sometimes had to use a sledgehammer to crack a nut. More often, they just walked away. In the world we live in now…prosecutors have much greater ability to hold companies accountable for misconduct than we used to….[90]

As this quote indicates, NPAs and DPAs have been regarded as powerful substitutes for

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[83] *Id.* at 2.
[84] Ellis W. Martin, *Deferred Prosecution Agreements: "Too Big to Jail" and the Potential of Judicial Oversight Combined with Congressional Legislation,* 18 N.C. BANKING INST. 457, 478 (2014). *See also* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1719–20 (2007) (discussing the appointment of monitors as part of a DPA or NPA).
[85] John F. Savarese et al., *The Morford Memo & Deferred Prosecution Agreements: Has DOJ Changed its Approach to Corporate Crime?* 5 No. 5 SEC. LITIG. REP. 9 (2008).
[86] Lauren Giudice, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 372 (2011).
[87] Morford Memo, *supra* note 33, at 5.
[88] Memorandum from Gary G. Grindler, Acting Deputy Att'y Gen., US Dep't of Justice, Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements (May 25, 2010), [hereinafter Grindler Memo]. *Available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00166.htm.
[89] *Id.*
[90] Lanny A. Breuer, Assistant Att'y Gen., US Dep't of Justice, Address at the New York City Bar Association (Sept. 13, 2002) [hereinafter Breuer Address], *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html); *see also Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?*: *Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Financial Services*, 113 Cong. 1 (2013) (statement of Mythili Raman) ("Oftentimes, our assessment . . . Is that one of the middle-ground resolutions is most appropriate, a deferred prosecution or a non prosecution agreement.").

indictment of offending corporations in resolving criminal investigations.[91] In this Report, we consider NPAs and DPAs as potential substitutes for two very different alternative settlement outcomes. The first outcome is a *traditional plea agreement*. If NPAs or DPAs enable prosecutors and corporations to settle at a lower cost than would be possible through a traditional plea agreement, the introduction of NPAs and DPAs could lead to a decline in the number of settlements reached through plea deals and a commensurate increase in the number reached through NPAs and DPAs, with no change in the overall number of settlements, other things equal.[92] This first possibility is consistent with an increase in the efficiency of criminal settlement through the use of DPAs and NPAs instead of pleas. The second alternative to an NPA or DPA is a *declination*, i.e., the choice to not to seek any criminal sanctions. In particular, by lowering the burden on the prosecutor and corporation of reaching a criminal settlement, the use of a NPA or DPA can lead to an increase in the number of cases resolved criminally rather than through administrative or civil sanctions alone, or no legal sanctions at all. This latter possibility is consistent with an increase in the reach of criminal law, facilitated by the emergence of NPAs and DPAs. Questions about the use of NPAs and DPAs, as opposed to pleas, have centered in part on whether they are indeed similar in the scope and magnitude of their *sanctions* – in particular, whether the monetary sanctions of one mechanism or another are more onerous and/or the required governance reforms more intrusive. Other questions about the use of these novel legal mechanisms concern their possible intended or unintended role in extending the reach of federal criminal law enforcement into the boardroom.[93]

2.5.1 Deterrence Debate

There is a heated policy debate about whether the existence of NPAs and DPAs has enhanced or detracted from the efficiency with which prosecutors deter future corporate wrongdoing. For example, some have argued that criminal indictment was largely responsible for the collapse of Arthur Andersen in 2002, and that it could have been avoided by settlement through an NPA.[94]

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[91] The tradeoffs that arise in choosing between an NPA or DPA and a traditional plea are similar to what arises in the choice of plea versus trial. As in the choice of plea over trial, NPA and DPA can be seen as a lower cost means of resolving criminal investigations than plea agreements. The enforcement authority can free up resources to confront future (prospective) offenders with higher *ex ante* probabilities of sanction, thereby increasing the level of general deterrence. On the deterrence consequences of plea versus trial, ***see*** A. Mitchell Polinsky & Daniel Rubinfeld, *The Deterrent Effects of Settlements and Trials*, INT. REV. L. & ECON. 109 (1988). For a somewhat recent treatment of the subject, ***see*** Nuno Garoupa & Frank Stephen, *Law and Economics of Plea-Bargaining* (July 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=917922. In addition, if the incentive to self-report is greater in the presence of NPA and DPA than just the plea agreement as an alternative to trial, the additional self-reporting that occurs under NPA and DPA could enable the enforcement authority to further lower the cost of detection by use of NPA and DPA, leading to a further increase in general deterrence. This is consistent with agency problems in the corporation as a cause of crime that can be exploited by prosecutors; it is not necessarily consistent with agency problems in the institutions of enforcement, however. On the role of agency problems in corporate crime, ***see*** Cindy R. Alexander, *Corporate Crime, Markets and Enforcement: A Review*, *in* NEW PERSPECTIVES ON ECONOMIC CRIME 20–41 (Hans Sjörgen and Göran Skogh eds., 2004) and Alexander & Cohen, *supra* note 13.

[92] Alternatively, changes in the enforcement environment – such as increased in corporate criminal activity and/or an increase in federal criminal enforcement budgets – might lead to an increase in the number of settlements might increase but the shares of settlements will still shift towards NPAs and DPAs and away from pleas.

[93] *See, e.g.*, PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, (Anthony E. Barkow & Rachel S. Barkow eds., 2011) (exploring the effects of DPAs and NPAs),

[94] *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109 (2006). *But see* Cunningham, *supra* note 21, at 21 ("On the contrary, empirical evidence accumulated since

Some commentators have thus identified as potential benefits from the increased use of NPAs the ability to pursue governance reforms that could diminish the threat of a recurrence of corporate crime while at the same time avoiding criminal charges that could have adverse business consequences for the company. This is consistent with the view that NPAs have been used in cases with defendants that otherwise would not have been criminally charged due to the risk of putting them out of business. Some have also noted that the use of NPAs and DPAs may, to a greater extent than traditional plea agreements, enable prosecutors to elicit cooperation and thereby lower the real costs of the investigation to the government and potentially to the company.[95]

On the other hand, some have been critical of NPAs and DPAs. While NPAs and DPAs may be used as net substitutes for plea agreements, they may not have the same deterrent effect as a traditional plea agreement, for example, especially if the NPA or DPA shelters the offending corporation from third party scrutiny and is accompanied by less adverse publicity.[96] Those who argue that DPAs undermine general deterrence reject the view that:

> A DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement.[97]

Others argue that NPAs and DPAs also can act as deterrents because they allow the prosecutor to pursue remedies beyond the scope of what could likely be achieved in a criminal prosecution.[98] Prosecutors indeed have significant leverage when negotiating a prosecution agreement with a corporation.[99] The threat of criminal prosecution can give the government a sizeable negotiating advantage against companies in many different industries.[100] By avoiding

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Andersen demonstrates that corporations and other businesses rarely collapse from indictments or face other serious collateral consequences. For example, recent research identified several dozen indictments of large public corporations in the past decade; only a handful of the companies failed and the indictment was not necessarily the cause.").

[95] *See* Courtney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 451–52 (2010).

[96] *See* Mokhiber, *supra* note 10.

[97] Breuer Address, *supra* note 90.

[98] *See generally* Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement between the US Attorney for the Distribute of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1043, 1059 (2006).

[99] *See* Preet Bharara*, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants,* 44 AM. CRIM. L. REV. 53, 73–74 (2007). United States Attorney Preet Baharara of the Southern District of New York has been actively involved in prosecuting corporate offenders, including recently against SAC Capital and many of its employees, explained that the source of bargaining power comes in part as a result of the inherent vulnerability of corporations, as well as the relative ease in obtaining a conviction. *Id.*; *see also* Paulsen, *supra* note 20, at 1467 (discussing the bargaining imbalance and noting, "the principal reason prosecution agreements can be abused is the expansive nature of vicarious liability law and corporate vulnerability to bad publicity—two factors that likely will not change").

[100] *See* Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. Pocket Part 312 (2007), *available at* http://www.yalelawjournal.org/forum/the-organizational-guidelines-rip ("the mere threat of criminal prosecution is enough to cause even the largest corporation to cower. Few companies are willing to risk an indictment, much less a criminal trial…[a]nd alternatives do exist: deferred and non-prosecution agreements offer corporations the chance to avoid indictment altogether").

criminal charges, offending companies may avoid risks of some costly consequences that can arise from criminal conviction, such as loss of critical business licenses or debarment from government contracts.[101] The government might use this power to demand concessions such as large monetary settlements, structural changes, and other forms of punishment.[102] Commentators have argued that this vastly unequal bargaining position has allowed the DOJ to extract concessions for conduct that has not been proven in a court to violate the law.[103]

2.5.2 Prosecutors in the Board Room

Some proponents have argued that the specific reforms required under DPA and NPA enhance the ability of corporate insiders to enforce compliance with the law inside the corporation.[104] On the other hand, critics of DPA and NPA have argued that prosecutors are poorly equipped to decide on corporate reforms after news of crime.[105] In targeting individual companies with the requirement that they undertake governance reforms as part of a criminal settlement, DPAs and NPAs (and Pleas) have the advantage of tailoring the governance solution to the individual corporation, as opposed to applying a one-size-fits-all solution across all firms in a market or industry, as can occur through alternative regulatory or statutory reforms.

2.5.3 Legal and Procedural Concerns

In addition to the debate over the extent to which NPAs and DPAs might affect deterrence of corporate wrongdoing, some commentators contend that the increasing prevalence of NPAs and DPAs has reduced the predictability and consistency in the law by reducing the frequency of judicial pronouncements on the law. Consistency in the application of the law is a DOJ objective, as former Attorney General Ashcroft said: "the Department of Justice has a unique obligation to ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner."[106] Some have argued that by reducing the probability of litigation, NPAs and DPAs contribute to ambiguities about the enforcement of laws and can make it difficult for corporations to project the legal risks.[107]

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[101] *See* Greenblum, *supra* note 6, at 1863.
[102] *See* John C. Coffee, Jr., *Deferred Prosecution: Has it Gone Too Far?*, 27 NAT. L.J. July, 2005, at 13; *see also* Ball & Bolia, *supra* note 62, at 251; 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, 807–08 (2013).
[103] *See generally* Bharara, *supra* note 99, at 73–75 (describing the vast bargaining power of prosecutors).
[104] *See* John C. Coffee, Jr., *Deferred Prosecution: Has it Gone Too Far?*, 27 NAT. L.J., July 2005, at 13; *see also* 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, 807-08 (2013)
[105] *See, e.g.*, Jennifer Arlen, *Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 63 (Anthony E. Barkow & Rachel S. Barkow eds, 2011).
[106] Memorandum from John Ashcroft, Att'y Gen., US Dep't of Justice, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.
[107] Allen R. Brooks, *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, 137–39 (2010); *see also* Paulsen, *supra* note 20, at 1459–

Similarly, some have focused on the discretion afforded to prosecutors through NPAs and DPAs, and how this authority is "turning the prosecutor into judge and jury, thus undermining principles of separation of powers."[108] Scholars contend that deference to, and the plenary power of, prosecutors creates separation of powers concerns.[109] As discussed above, although courts technically exercise judicial oversight of DPAs, and have discretion to reject proposed agreements, some scholars have said that "judicial review of DPAs is a pipedream and will remain limited during the negotiation and performance stages of these agreements."[110] Some commentators argue that this is the case because DPAs are "necessarily creatures of compromise, an area in which courts generally do not play with an active or heavy hand except when breach is claimed."[111] Although 18 U.S.C. § 3161(h)(2) references "the approval of the court,"[112] this provision arguably doesn't apply to NPAs, which are not court-filed. Commentators suggest that although companies are entitled to judicial review of DPAs at the post-indictment phase, no such review is available pre-indictment at the time when "prosecutorial discretion is at its zenith."[113] In this context, NPAs arguably offer less judicial oversight and more prosecutorial discretion than DPAs.

From these observations, on the relative effectiveness of settlements through DPA or NPA versus plea, emerge larger questions about the effect of NPA and DPA as an innovation in corporate criminal settlement generally. We propose three distinct possibilities. First, DPAs and NPAs may be interchangeable with plea agreements in settling criminal investigations. In that case, DPAs and NPAs may end up replacing plea agreements altogether without much change in the overall level of criminal enforcement activity. An alternative result could be that the transactions costs savings associated with the use of NPA and DPA relative to plea agreements could be large enough to lead prosecutors and corporations to enter into criminal settlements at the conclusion of investigations that would previously have been resolved with no action or settled civilly. A third possibility is that DPAs and NPAs may be complements to pleas in the sense that their availability could increase the use of plea agreements, and vice-versa. These possible results of the introduction of NPA and DPA are discussed further in the context of the evidence in Parts 4 and 5 below.

2.6 Empirical Questions Addressed

To summarize the policy debate, the introduction of NPAs and DPAs for settling criminal investigations of public companies has raised questions both about a possible role for new

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60 ("If a corporation has no clear sense of what employee crimes will be imputed to the entity or what punishment those crimes might produce, the corporation will have difficulty properly allocating its resources."); James K. Robinson *et al.*, *Deferred Prosecutions and the Independent Monitor*, 40 Int'l. Soc'y Barristers Q. 447, 448–49, 472 (2005) ("The fact that the government has not announced even informal policies that would provide guidance on what would make a company eligible for a deferred prosecution, what the limits [are] on the sanctions that can be imposed through a deferred prosecution, and what remains of the promise of non-prosecution offered by the [Thompson Memo], is disturbing.").

[108] Epstein, *supra* note 5.

[109] *See* Matt Senko, Note, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L.J. 163, 188 (2009).

[110] F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal For Reform*, 93 VA. L. REV. ONLINE 121, 122 (citing Garrett, *supra* note 6, at 924, 925).

[111] *Id.*; *see also* GAO Report, *supra* note 50, at 25–28 (discussing judicial involvement in the DPA process).

[112] 18 U.S.C. § 3161(h)(2) (2012).

[113] Warin & Boutros, *supra* note 110, at 132.

guidance for prosecutors and courts on the proper application of DPAs, NPAs, and plea agreements in administering the criminal law as it applies to corporations, and about the relative roles of the prosecutors and the courts in fashioning appropriate sanctions for corporations that enter into criminal settlements without a formal plea and thus without a conviction. Largely missing from this policy debate is empirical evidence. Although there have been several studies published about NPAs and DPAs, they have either focused on the incidence of these new forms of settlement or on characterizing the type of legal provisions typically found in them. To date, there is no systematic study of the types of companies or conduct that have been selected into NPAs and DPAs as opposed to plea agreements, or how the terms of NPAs and DPAs differ from pleas. Before one can fully address such questions about the relative costs and benefits of alternative settlement types, some basic data needs to be collected and analyzed. This Report is designed to fill this gap in the literature. It introduces the first evidence from a recent study of the use of NPAs, DPAs and Plea agreements by the DOJ and its offices of the US Attorneys, pre- versus post-2003, in obtaining pre-trial settlements of criminal investigations of public companies.[114]

Specifically, this report addresses three fundamental empirical questions:

1. Has the use of NPAs and DPAs led to fewer traditional Plea agreements?
   - Has the recent increase in NPAs and DPAs been accompanied by a concomitant decline in the use of plea agreements, or
   - Has the rise of NPAs and DPAs been accompanied by the same or greater use of the traditional plea agreement?
2. Do NPAs, DPAs and Plea agreements target similar kinds of offenses and companies?
   - Do they target similar types of misconduct?
   - Do they target offenses with similar levels of severity and/or culpability?
3. Do NPAs, DPAs and Plea agreements achieve similar settlement outcomes?
   - Are the monetary penalties associated with NPAs and DPAs fundamentally different from those obtained with plea agreements?
   - Do NPAs and DPAs require different kinds of governance reforms than plea agreements?
   - Are NPAs and DPAs more likely than plea agreements to include legal process-related provisions such as requiring defendants to waive privileges?

This Report begins to address these questions by introducing empirical evidence on the use of pleas versus NPAs and DPAs to settle criminal investigations of public companies from 1997 through 2011. This period brackets the collapse of Arthur Andersen and the issuance of the

[114] An advantage of studying public companies is that they are generally subject to sufficient market and regulatory scrutiny that news of their criminal settlements, particularly settlements involving monetary sanctions, will tend to be revealed publicly, even when the settlement agreement is not filed with the federal court, such as in the case of the NPA. This approach enables us to avoid some of the difficulties that otherwise arise in empirical research into corporate crime and settlement. *See* Cindy R. Alexander, Jennifer Arlen, & Mark A. Cohen, *Evaluating Trends in Corporate Sentencing: How Reliable are the US Sentencing Commission's Data?* 13 FED. SENT'G REP. 108 (2000) [hereinafter Alexander *et al.*, *Evaluating Trends*] (discussing some of the obstacles encountered historically in obtaining complete data on corporate criminal settlements involving United States corporations).

2003 Thompson Memo, thereby permitting comparisons to be made across forms of settlement and by legal policy era.

3. Sample Construction

A comprehensive dataset of all known NPAs, DPAs, and plea agreements was constructed for this study. To be included in the sample, an agreement must meet each of the following four criteria: (1) the agreement must involve conduct that violates a federal criminal statute; (2) the plaintiff must include either the US Department of Justice or an affiliated US Attorney's office; (3) the defendant must be a public company or be affiliated with such a company (e.g., as a business unit or subsidiary) at the time of the agreement; and (4) the agreement must be signed between 1997 and 2011.

Sample construction proceeded in stages. First, seventeen government and non-governmental sources were searched.[115] Specifically, a keyword search[116] using Lexis's Edgar database of public company filings was conducted, followed by searches of primary sources that included: Department of Justice[117] reports and press releases, Department of Defense Inspector General semi-annual reports, Environmental Protection Agency[118] reports of criminal investigations, Health and Human Services Inspector General reports and press releases, Food and Drug Administration[119] press releases, and others.[120] The following secondary sources also informed the construction of the sample: the Gibson Dunn law firm year end publications,[121] the Federal Contractors Misconduct Database,[122] Corporate Crime Reporter,[123] the University of Virginia

[115] This number of agencies parallels the numbers in federal fraud task forces. The Corporate Fraud Task Force, established in 2002, had four federal agencies and DOJ participants as members (Treasury, CFTC, SEC and FERC). *See* Exec. Order No. 13271, 3 C.F.R. § 13271 (2002). Its successor, the Financial Fraud Enforcement Task Force, had more than two dozen non-DOJ members. Exec. Order No. 13519, 3 C.F.R. 13519 (2009).

[116] For the DOJ, HHS, DOD, Gibson-Dunn, and Corporate Crime Reporter, keywords used included "prosecut", "plea", "guilt", "crimin", "DPA", and "NPA". For Lexis-Nexis, keywords used include (plead guilty or guilty or guilty plea or non prosecution or nonprosecution or non-prosecution or deferred prosecution or prosecution agreement or plea agreement) and (usao or doj or "US Attorney" or "united states attorney" or "department of justice" or "justice department") and FORM-TYPE(10-K! Or 10-Q! Or 8-K! Or 6-K! Or 20-F!).

[117] The DOJ and its US Attorneys Offices and Divisions has responsibility for prosecuting criminal cases. The DOJ develops cases both internally and based on *referrals* from outside sources. Other federal agencies have investigative but not criminal prosecution authority and may provide referrals and associated cooperation in support of the DOJ's decision whether to prosecute. For example, "[c]ooperating with criminal authorities is an important component of the SEC's enforcement mission. The SEC is an independent federal agency charged by Congress with upholding the federal securities laws. The SEC has authority to bring civil, but not criminal, actions to enforce those laws." Office of Chief Counsel, SEC Division of Enforcement, Enforcement Manual (2013), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[118] The EPA maintains a database, Summary of Criminal Prosecutions Database, which provides the capability to conduct searches for information on concluded criminal enforcement cases by fiscal year. The EPA maintains a staff of criminal investigators in its EPA-OECA Office of Criminal Enforcement, Forensics, and Training (OCEFT), which oversees implementation of the agency's federal environmental crimes investigation program. Prosecution of federal environmental crimes is undertaken by the US Attorneys Offices and ENRD's Environmental Crimes Section (ECS), which works closely with EPA's OCEFT investigators. *See* Robert Esworthy, Cong. Research Serv. RL34384, Federal Pollution Control Laws: How Are They Enforced? 24 (2014), *available at* http://www.fas.org/sgp/crs/misc/RL34384.pdf.

[119] The FDA Office of Criminal Investigations (OCI), established in 1991, has engaged in "conducting criminal investigations of illegal activities involving FDA-regulated products, arresting those responsible, and bringing them before the Department of Justice for prosecution." *See Criminal Investigations*, US Food & Drug Admin., http://www.fda.gov/ICECI/criminalinvestigations/ucm123041.htm (last updated Jan. 28, 2015).

[120] The search of sources beyond the DOJ criminal division revealed numerous non-criminal actions, consistent with the availability of administrative and civil remedies and the exercise discretion in making referrals.

[121] *See e.g.*, *2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* Gibson Dunn (Jan. 4, 2012), http://www.gibsondunn.com/publications/Pages/2011yearendupdate-corporatedeferredprosecution-nonprosecutionagreements.aspx..

[122] *Federal Contractor Misconduct Database*, POGO.Org, http://www.contractormisconduct.org/index.cfm/1,72,217.html (last visited Mar. 6, 2015).

[123] Corporate crime reporter, http://www.corporatecrimereporter.com (last visited Mar. 6, 2015).

website,[124] and a Factiva keyword search of news reports on the facts of each settlement from around the agreement date.

Second, the public status of each defendant company was verified through a search of available databases of registered public companies and, in some instances, supplemental searches of the name histories of defendants and their affiliated public parents. We restricted our sample to public companies in order to obtain a comprehensive sample and avoid some of the cross-company variation in availability of data on settlement events that could enter into a sample of settlements involving private companies. To be included in the sample, the defendant must have been itself a public company, or a majority owned subsidiary or other affiliate of a public company, on the date of the settlement.[125] Name history searches were thus sometimes required to verify that the company that was named as defendant in the settlement was either itself a public company or affiliated with such a company, for example, as a subsidiary, at the settlement. Initial verification of public status occurred through identification of a ticker symbol for the company in public news reports or online. Final verification required the identification of a GVKEY code[126] for the defendant company or its public affiliate through a search for the name and linking GVKEY in the Compustat database[127] around the date of settlement. The resulting sample consists of 486 agreements.[128]

Third, for each settlement event identified through the initial search for agreements involving public companies, a copy of the signed settlement agreement (or other documentation) of the terms of settlement was obtained. Copies of signed settlement agreements were located through a manual search of sources that included PACER, Bloomberg Law, Westlaw, agency websites, and a general Google search. As indicated in Table 1, we identified the agreement in 355 out of 486 cases. When the signed agreement was unavailable, the required information was collected from the docket and press releases from DOJ or the company.[129] A priority protocol was established so that information would first be coded from the agreement, next from other official documents such as a docket, and finally from press releases, and media reports if necessary.

The first finding of this study concerns the public availability of data for use by researchers on corporate criminal settlements. Previous studies have documented that the US Sentencing

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[124] *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.php (last visited Mar. 6, 2015); *Federal Organizational Plea Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/plea_agreements/home.php (last visited Mar. 6, 2015).

[125] We chose to use the time of the agreement, rather than the time of conduct, as the relevant date to determine public status for the sample analyzed in this Report in order to focus on the terms of the agreements themselves. We have also collected data on the starting and ending dates of the crime, which might be useful in future analyses of the data.

[126] A GVKEY, or "Global Company" key, is a unique six-digit number assigned to each company in the Compustat database.

[127] USSC data on organizations are available from Organizations Convicted in Federal Criminal Courts Series, ICPSR, http://www.icpsr.umich.edu/icpsrweb/DSDR/series/00085.

[128] In addition to describing our data collection method so that it might be replicated by future researchers using the same or different samples of DOJ (or other) corporate criminal settlements, we believe it has resulted in a comprehensive listing of all NPAs, DPA, and plea agreements signed by public companies during this time period.

[129] We attempted to collect all three types of sources for each case. Note that in some cases we were able to collect one type of document (e.g. A settlement agreement) for a parent company but not for its subsidiary who also entered into a settlement agreement, or vice versa.

Commission data on organizations convicted of federal offenses are incomplete and often exclude some of the largest companies and monetary sanctions.[130] Comparing the number of plea agreements by public companies we uncovered to those reported by the USSC data confirm that this problem remains unsolved. Between 1999 and 2011, the USSC data identify 112 plea agreements by public companies, compared to 302 in our dataset.[131] Similarly, during the most recent five-year period, 2007 to 2011, the USSC data identify 63 public company pleas compared to 144 in our dataset.[132] In addition to having less than a complete sample of cases, the Commission's decision to not attach company identifiers to the data that it makes available to the public on organizational sanctions makes it difficult for researchers to identify the names of corporate criminal defendants associated with published penalty data.[133] Given the Commission's policy regarding confidentiality of data in their public access files, we have not attempted to do so.[134] Due to the lack of completeness and inability to identify the name of the offending company, we have not utilized the Commission dataset as a primary source of data for this study.

Similarly, the DOJ does not maintain or publish any comprehensive listing of NPAs, DPAs, or plea agreements. We are unaware of any requirements for enforcement authorities to publicly reveal their federal criminal settlement agreements in a form that would make them reliably accessible to researchers, although we find that they do sometimes reveal them. By focusing on public companies, this study is designed to avoid some of the difficulties that might otherwise arise in identifying all agreements and obtaining copies of such agreements for all companies in the target sample. We ensure that our final dataset comprises a reasonably complete set of all federal criminal settlements entered between the DOJ (including Offices of the US Attorney) and public companies over the sample period.

The extensive data requirements of this study have brought a new research obstacle to light. That is, efforts to obtain copies of signed settlement agreements were not successful in every instance. The difficulties were greater for pleas than for NPAs and DPAs. As seen in Table 1, the actual agreement documents (including letter agreements) were available as a primary source for 73 percent of the sample (355 of the 486). When agreements were not available, dockets were the primary source of information for 107 cases. We relied on a press release or other media report as the primary source of documentation in just a handful of settlements (24 cases). In addition to the documents identified as primary sources in Table 1, we attempted to identify all three of the source types for each agreement. Copies of signed agreements were unavailable for one of the 91 NPAs and for 130 of the 329 pleas. Many of these pleas are presumably available directly through the federal courts, but they are not freely available online.

[130] *See* Alexander *et al.*, *supra* note 114, at 108–09.
[131] USSC data on organizations are available from Organizations Convicted in Federal Criminal Courts Series, ICPSR, http://www.icpsr.umich.edu/icpsrweb/DSDR/series/00085.
[132] Thus, the USSC data identified about 37 percent of public company pleas from 1999–2011 and 43 percent of those from 2007–2011—figures that are unchanged from the 38 percent identified in Alexander, Arlen and Cohen, *supra* note 114.
[133] *Id.* at 111.
[134] *See* US Sentencing Commission, Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 238 (Dec. 13, 1989,).

Table 1
Primary Source of Information*

Source	DPA	NPA	Plea	Total
Agreement	66	90	199	355
Docket	0	0	107	107
Press Release/Media	0	1	23	24
Total	66	91	329	486

*The full sample of 486 agreements comprises all corporate criminal settlements that were reportedly signed, 1997–2011, by the US Department of Justice and a public company or its affiliate, based on a survey of sources discussed in the text. The primary source reported in this table is the signed agreement or, if no agreement was found, the docket or, in the absence of an agreement or docket, the press release or news article documenting the settlement.

Once all available documents were collected, relevant information was retrieved from the documents and coded into an initial electronic database. The coding was then reviewed for accuracy and entered into the final database used for analysis. The defendant's primary offense was recorded as one of 31 specific offense categories (listed in Table 2), which fall under eight top-level offense categories: Fraud; Bribery and Kickbacks; Antitrust; Import/Export and Immigration; Money Laundering, Tax and Legal Procedure;[135] Environment and Safety;[136] Healthcare and FDA; and Other Violations.[137] The Bribery and Kickbacks category includes both domestic and foreign bribery settlements. The Healthcare & FDA category includes fraud offenses such as Medicaid fraud, misbranding offenses such as promoting off label use of prescription drugs, and illegal kickbacks and payments to physicians. To avoid double counting, the general categories of Fraud and Bribery and Kickbacks accordingly exclude these health care cases.

[135] Legal procedure violations include obstruction of justice and perjury.
[136] This category includes environmental and worker and mine safety violations as well as offenses involving endangered species and illegal logging.
[137] Five of the other offenses involved illegal gambling operations on the Internet. Examples of other violations in this category include bankruptcy fraud, falsifying labor records during a union strike, and regulatory offenses that are not otherwise classified.

Table 2
Offense Categories, 1997–2011

Offense Category	Number of Agreements
FRAUD:*	**56**
Against Government: - Over-charging for promised goods or services	5
- Under-delivery of promised goods/services (failure to deliver)	6
- Other	2
Against Business:	
Over-charging for promised goods or services	1
Under-delivery of promised goods or services (failure to deliver)	4
Other	4
Against Investor or Financial Markets:	
False Financial Reports	25
Trading Violations	6
Other	32
BRIBERY & KICKBACKS:*	**111**
Foreign Officials	86
Domestic Officials	7
Other	18
ANTITRUST:	**119**
Price-fixing or Bid-rigging	117
Other	2
IMPORT/EXPORT & IMMIGRATION:	**18**
Import Violation (not customs only which would be a tax violation)	2
Immigration	4
Export – National Security	10
Export – Other	2
MONEY LAUNDERING, TAX AND LEGAL PROCEDURE:	**23**
Tax violations – Failure to pay taxes	7
Money laundering/currency violations	15
Other Tax, legal procedure, and related violations	1
ENVIRONMENTAL & SAFETY:	**91**
Environmental – Dumping or Pollution	62
Environmental – Record Keeping	4
Wildlife violations	9
Firearms/Explosive/Public Safety	8
Worker Safety	7
Other health, environment, and safety violations	1
HEALTHCARE & FDA	**59**
Fraud/Mislabeling	49
Bribery and Kickbacks	10
OTHER OFFENSES:	**10**
TOTAL	486

* Note: Many Healthcare and FDA settlements involve fraud or bribery/kickbacks offenses. This table does not double count settlements. Thus, for example, the total number of fraud cases, including healthcare frauds is 104 (56+48).

One of our findings, to be discussed further in the next section, is that related defendants have in many instances entered into simultaneous settlements for the same underlying criminal conduct. For example, a parent and one or more of its subsidiaries may be charged in the same scheme to bribe foreign officials under the FCPA, with each entity entering into a separate agreement. These agreements, moreover, may be different; the parent may enter into an NPA, whereas its subsidiary may settle charges with a plea or DPA. The sample includes 67 agreements (involving 28 separate criminal offenses) in which parents and subsidiaries separately enter into agreements to settle charges for a single underlying offense. Unless otherwise noted, the unit of analysis in this Report is an agreement with a specific defendant even if other affiliated defendants have entered into an agreement to settle charges stemming from the same underlying conduct. To avoid double counting, penalties are assigned to the organization that is initially responsible for the penalty under the agreements. For example, if a subsidiary's plea agreement includes a monetary penalty and a parent company's DPA indicates that it is ultimately responsible for that penalty if the subsidiary does not pay, we would assign the penalty to the subsidiary.[138]

[138] *See, e.g.*, Cooperation and Non-Prosecution Agreement with PPG Industries (Dec. 21, 2010), ***available at*** http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/ppg.pdf ("This Cooperation and Non-Prosecution Agreement is contingent on the United States District Court for the District of Columbia's acceptance of the USAO-DC's Plea Agreement ("PPG PAINTS TRADING Agreement") with PPG Paints Trading (Shanghai) Co., Ltd. ("PPG PAINTS TRADING"), a wholly-owned subsidiary of PPG INDUSTRIES, and on the Court's sentencing of PPG PAINTS TRADING to the recommended sentence in the PPG Paints Trading Plea Agreement.").

4. Evidence

4.1 Enforcement Trends

As seen in Figure 1, *agreements* with public companies to resolve criminal allegations have grown substantially over the period. In 1997, only eleven criminal cases involving public companies were settled, but rapid growth began around 2005, leading to a four-fold increase in the number of settlements by 2011. There is a large spike in cases in 2010, followed by a return to prior levels in 2011. Figure 1 also illustrates the growth in *offenses* settled by DPAs, NPAs, or plea agreements. Because some offenses result in multiple agreements—e.g., signed separately by a parent company and its subsidiary - we also report the number of cases this way to illustrate that both the number of settlements and the number of related offenses has increased.[139] As shown in Figure 1, whether measured by settlement or by related offense, there has been a significant increase in the total number of cases involving public companies over this time period. This increase in offenses and settlements may be due in part to increased corporate wrongdoing or increased enforcement effort over the period. In comparison with street crime, where victimization rates can be tracked over time through victim surveys and by crimes reported to police, there is relatively little documentation of the harm from corporate crime or its victims or frequency of occurrence. There is, however, evidence of both a perceived increase in corporate wrongdoing[140] and increased corporate crime enforcement activities beginning with the establishment of the Corporate Fraud Task Force in 2002,[141] and continuing throughout the time period of this study.[142] Since these increased enforcement activities were established in response to a perceived increase in crimes that the public regards as distinctly economic in nature, the increase in settlements over time may be attributable to increased crime, increased allocation of resources to enforcement, or both combined.

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[139] See notes 187 to 188 and accompanying text.

[140] *See, e.g.*, Press Release, President Announces Tough New Enforcement Initiatives for Reform (July 9, 2002), *available at* http://www.justice.gov/archive/mps/strategic2007-2012/strategic_plan20072012.pdf. ("The 1990s was a decade of tremendous economic growth…it was also a decade when the promise of rapid profits allowed the seeds of scandal to spring up. A lot of money was made, but too often standards were tossed aside.").

[141] *See* Christine Hurt, *The Undercivilization of Corporate Law*, 33 J CORP. L. 361, 379 (2008) (citing DOJ's budget for corporate fraud investigations increased by $24.5 million following the establishment of the Corporate Fraud Task Force in 2002).

[142] US Dep't of Justice, Strategic Plan, Fiscal Years 2007–2012, *available at* http://www.justice.gov/archive/mps/strategic2007-2012/strategic_plan20072012.pdf (Objective 2.5: "Combat public and corporate corruption, fraud, economic crime, and cybercrime"). *See also*, Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, Address at the Washington Metropolitan Area Corporate Counsel Association Annual Meeting (Jan. 26, 2011) *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html (citing increased enforcement of FCPA cases by the Criminal Division).

Figure 1
Agreements and Offenses involving Public Companies: 1997–2011

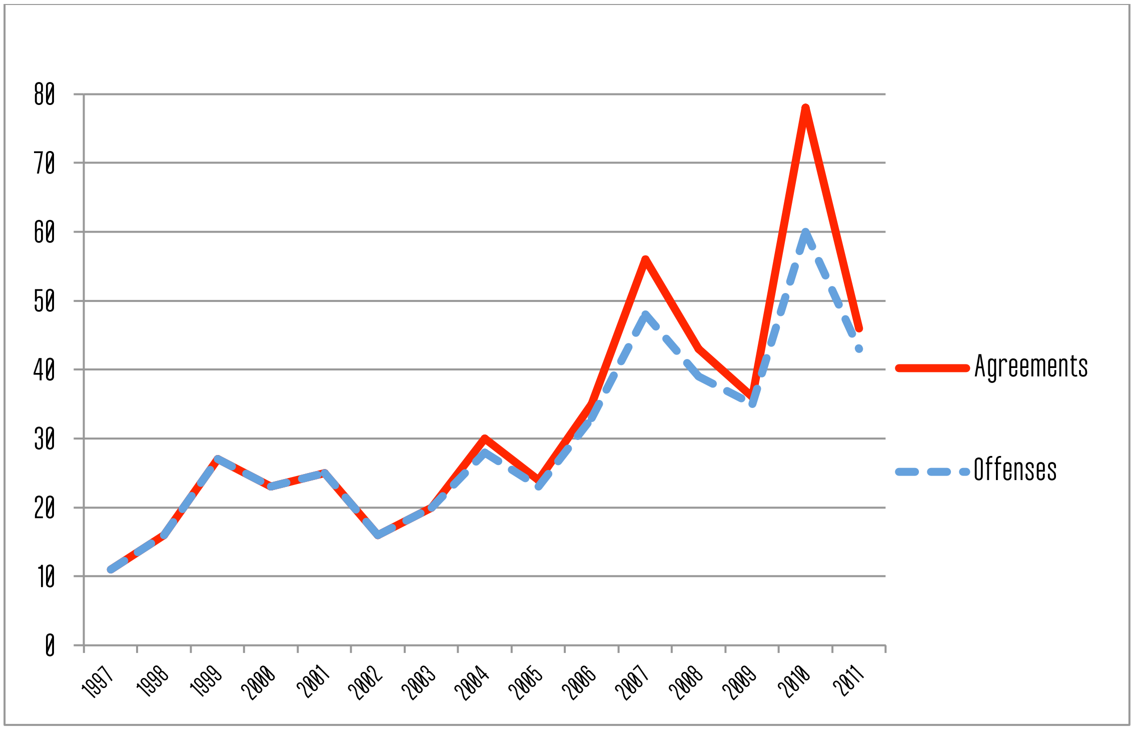

Figure 2 illustrates trends in the number of settlements by type of agreement. One result that is evident from these data is that the growth in corporate criminal enforcement shown in Figure 1 reflects both the emergence of NPAs and DPAs and the expanded use of plea agreements. Prior to 2003, almost no cases were resolved through NPAs or DPAs. Beginning in 2003, however, the number of NPAs and DPAs begins to grow substantially, although the number fluctuates. At the same time, the number of plea agreements remains above the number of NPAs or DPAs in each year over the period. Fluctuation in the use of plea agreements after 2007 is found to parallel the year-to-year fluctuation in the numbers of NPAs and DPAs shown in Figure 2. Overall, the emergence of NPAs and DPAs has not been accompanied by a reduction in the use of Plea agreements. There appear to be two possible explanations for this finding. First, factors that led to increased use of NPAs and DPAs to settle investigations (such as increased enforcement effort) may also have led to increased use of plea agreements to settle criminal investigations involving corporations. Second, the increased use of NPAs and DPAs might reflect a general expansion of the criminal law into offense categories that that might not otherwise have been prosecuted. While this question is largely beyond the scope of this Report, we do not see any evidence of new categories of offenses that are settled with NPAs or DPAs but not with plea agreements.

Figure 2
Trends in Agreements by Type: 1997–2011

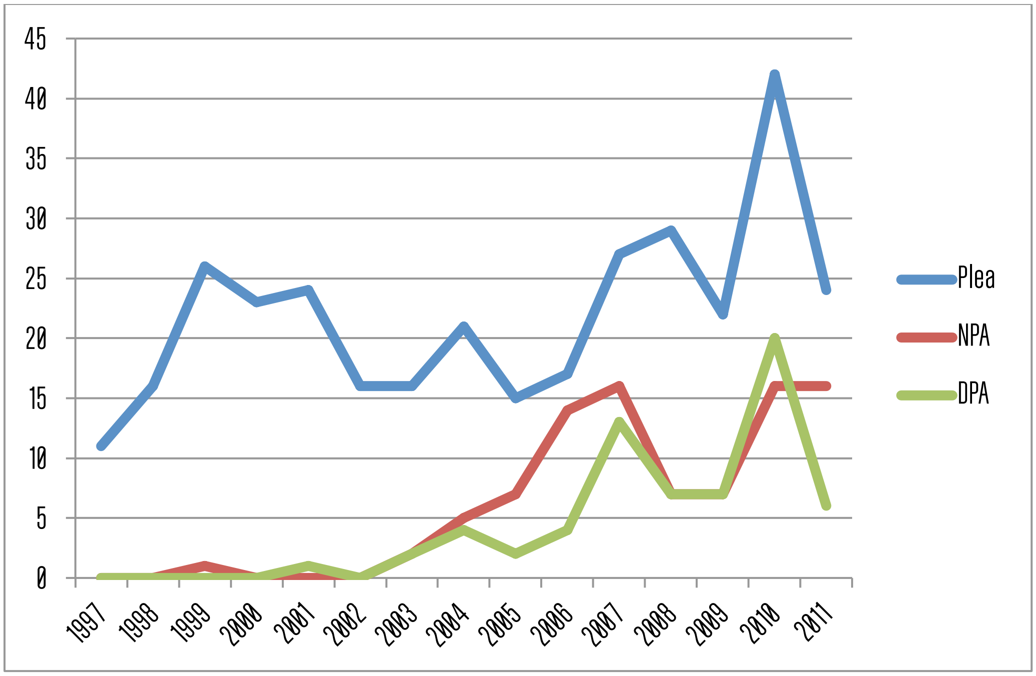

Figure 3 illustrates the annual composition of settlements by type of agreement. Plea agreements remain the predominant form of settlement over the entire period. DPAs and NPAs together comprise a substantial portion of all settlements in the years after 2007, and more than half of settlements negotiated during 2006 and 2007. The practical importance of DPA and NPA relative to Plea can be seen in the amount by which the numbers of DPAs and NPAs after 2003 exceed the maximum pre-2003 plea count that was set in 1999. In 2007 and again in 2010, the number of DPAs and NPAs breaks the 1999 record set by pleas of 27 in that year. The aggregate number of NPAs, DPAs and Pleas in 2010 can be seen in the figure as being almost three times the number of plea agreements entered in any year in the sample, pre-2003.

Figure 3
Composition of Agreements: 1997–2011

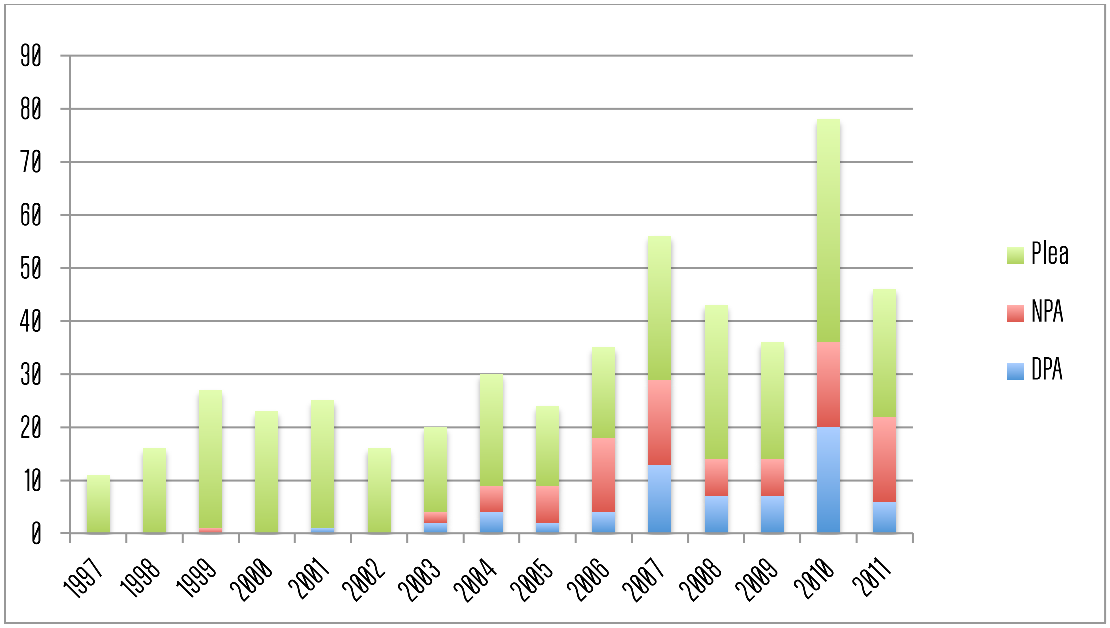

Table 3 reports on the composition of settlement types over three time periods. Over the entire time period from 1997 to 2011, 329 settlements, or 68 percent of the sample took the form of plea agreements. The remaining 157 cases were resolved through either an NPA or DPA—91 (19%) through NPA and 66 (14%) through DPA. As shown, the composition of agreements has changed markedly over time, with a steady downward trend in the proportion of pleas and an upward trend in the proportion of NPAs and DPAs. Prior to 2003, only two of the settlements took the form of an NPA or DPA. During 2003–2006, 40 cases (37%) agreements took this form, and during 2007-2011 nearly half of the cases in the sample (44%) were settled with an NPA or DPA.

Table 3
Agreements by Year and Type: Total and Percentage

Year	DPA	NPA	Plea	Total
1997 – 2002	1 1%	1 1%	116 98%	118 100%
2003 -2006	12 11%	28 26%	69 63%	109 100%
2007-2011	53 20%	62 24%	144 56%	259 100%
Full Sample	**66** **14%**	**91** **19%**	**329** **68%**	**486** **100%**

4.2 Offense and Offender Characteristics

This section examines offense and offender characteristics in relation to the type of settlement. We examine offense categories, severity of the offense, including its seriousness and the culpability of the offender, the parent or subsidiary status of the signatory to the agreement, and indicators of any business dealings between the offender and the government during the offense period.

4.2.1 Offense Category

Figure 4 presents evidence on the variety of alleged offenses that lead to criminal settlement agreements in our sample, as reflected in the variation we observe in settlement frequency for specific offenses over time. There are no clear trends or patterns of fluctuation, particularly when it comes to comparisons across offense categories. We observe considerable time-series variation in settlement frequencies for specific offenses. Unlike NPAs, DPAs, and pleas agreements generally, fluctuation in offense category settlement counts does not occur in parallel over time. To the contrary, settlement counts sometimes move in opposite directions, as would occur if resources were being shifted from one enforcement category to another.[143] The most prominent settlement categories from the 2007–2011 period—bribery/kickbacks and antitrust—do not fluctuate in parallel over the period. For example, increases in bribery/kickbacks settlement frequency coincide with declines in the level of antitrust settlement activity between 2006 and 2008.

Counts of settlement agreements are found here to overstate the numbers of instances of criminal misconduct that are the subject of enforcement action. For example, Figure 4 shows a spike in foreign bribery (FCPA) settlement activity in 2010. A closer look at the data, however, reveals that this spike does not reflect an expansion in the number of corporations independently prosecuted that year, but rather a tendency of groups of affiliated defendants to enter into more than one settlement agreement for a given underlying offense. This pattern is unique to the post-2003 period. In 2010, federal prosecutors entered into twenty settlements to resolve investigations of foreign bribery involving just seven public companies and their affiliates. Two of those companies were direct or indirect signatories to eight of the twenty settlements.[144] In terms of the number of offenses by public companies that directly or indirectly entered into settlement agreements for alleged FCPA offenses, the spike in activity is less pronounced than the spike in agreements shown in Figure 4.

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[143] *See* Stephen J. Choi et al., *Scandal Enforcement at the SEC: The Arc of the Option Backdating Investigations,* (Univ. Of Mich. Law & Econ, Empirical Legal Studies Ctr. Paper No. 11-009; NYU Law and Econ. Research Paper No. 11-20, 2013), *available at* http://dx.doi.org/10.2139/ssrn.1876725 (example of change over time).

[144] One company, Alcatel-Lucent, settled for a DPA along with three of its subsidiaries, each of whom settled with pleas. See http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal.html. Another company, Daimler AG also signed a DPA along with one other of its subsidiaries, while two of its other subsidiaries signed plea agreements. *See* http://www.justice.gov/criminal/fraud/fcpa/cases/daimler-ag.html. For details in FCPA enforcement trends, see SEARLE CIVIL JUSTICE INSTITUTE, THE FOREIGN CORRUPT PRACTICES ACT: AN EMPIRICAL EXAMINATION OF ENFORCEMENT TRENDS (2012), *at* http://www.masonlec.org/site/rte_uploads/files/FINAL%20FCPA%20REPORT%20PDF.pdf.

Figure 4
Enforcement Trends by Offense: All Agreements

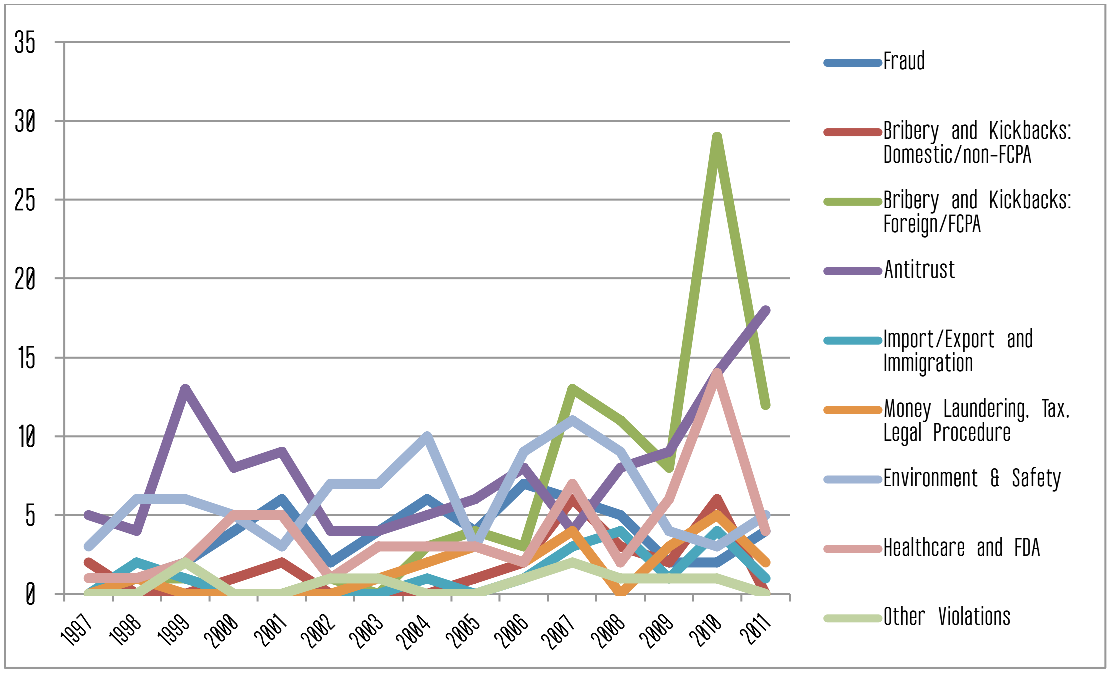

Table 4 presents the numbers of settlements agreements (by offense category) that occurred in each of the periods, 1997–2002, 2003–2006, and 2007–2011, by type of agreement. The largest number of total settlements for the entire sample comes from antitrust (119), followed by environmental and safety (91), and foreign bribery/FCPA (86). As shown in Table 4, antitrust, foreign bribery/FCPA, and healthcare/FDA offense categories each had more settlement activity in 2007–2011 than in any prior period. For example, for these three categories combined, there were an average of 31.5 settlements per year in 2007–2011 compared to 10.2 annually in 1997–2002 and 11 in 2003–2006. The foreign bribery area experienced even more dramatic change, rising from 0.5 settlements annually in 1997–2002 to 2.5 in 2003–2006, and finally 14.6 annually in 2007–2011.

Table 4
Offense Category – by Agreement Type and Era: Number of Settlements, 1997–2011

Agreement Year	Fraud			Bribery and Kickbacks						Antitrust		
				Domestic/non-FCPA			Foreign/FCPA					
	DPA	NPA	Plea	DPA	NPA	Plea	DPA	NPA	Plea	DPA	NPA	Plea
1997 – 2002	1	0	14	0	0	5	0	0	3	0	0	43
2003 – 2006	5	15	1	0	1	2	2	4	4	0	2	21
2007 – 2011	3	10	6	9	4	4	28	22	23	0	4	49
Total	9	25	21	9	5	11	30	26	30	0	6	113

Agreement Year	Import/Export and Immigration			Money Laundering, Tax, Legal Procedure			Environment and Safety			Healthcare and FDA			Other Violations			Total		
	DPA	NPA	Plea	DPA	NPA	Plea	DPA	NPA	Plea	DPA	NPA	Plea	DPA	NPA	Plea	DPA	NPA	Plea
1997 – 2002	0	0	3	0	0	1	0	0	30	0	0	15	0	1	2	1	1	116
2003 – 2006	0	1	1	4	2	2	0	1	28	1	2	8	0	0	2	12	28	69
2007 - 2011	2	4	7	9	2	3	0	1	31	1	12	20	1	3	1	53	62	144
Total	2	5	11	13	4	6	0	2	89	2	14	43	1	4	5	66	91	329

Table 4 also introduces evidence of change in the use of NPAs, DPAs and plea agreements over time within offense categories. As shown, the vast majority of settlements that involve antitrust and environmental/safety violations were plea agreements. Although NPAs appear among antitrust settlements after 2003, only 8 percent of antitrust settlements have involved NPAs since 2003, and none are DPAs.[145] Similarly, only 3 percent of environment/safety settlement agreements after 2003 are NPA/DPAs.[146] In contrast, NPAs and DPAs emerged alongside plea agreements as primary settlement vehicles after 2003 in the areas of bribery and kickbacks, money laundering/tax violations and fraud. After 2007, more than a third of Import/Export and Healthcare/FDA settlement agreements are NPAs or DPAs.

The above evidence is consistent with NPAs and DPAs serving to expand the reach of criminal enforcement. For example, in bribery cases involving foreign officials, while there has been a large increase in the number of pleas in the 2007–2011 time frame, the number of NPAs and DPAs has grown at an even faster rate. Similarly, while the number of domestic bribery and kickbacks plea agreements has remained roughly constant, there was a dramatic increase in DPA settlements in the 2007–2011 time period. Overall, the offense categories with the most dramatic growth in enforcement also appear to be the categories with the most prevalent use of NPAs and DPAs. However, the increase in foreign and domestic bribery cases that occurred during this time period cannot fully explain the dramatic rise in NPAs and DPAs, as these offenses in combination account for less than half of NPAs and DPAs.[147] Although it is possible that this increase in the number of settlements would have occurred in the absence of NPAs and DPAs, given the unprecedented growth in the number of settlements,[148] statements by prosecutors on their earlier reluctance to force a plea in some cases (and thus decline prosecution altogether),[149] and the likelihood that NPAs and DPAs are less costly to negotiate, we suggest a more plausible interpretation is that NPAs and DPAs have allowed for an expansion of criminal enforcement.

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[145] This is consistent with claims that antitrust enforcement authorities have expressed their reluctance to use NPAs or DPAs due to a concern that they might undermine their corporate leniency program that offers no prosecution for firms or individuals who are first to voluntarily disclose an antitrust conspiracy to authorities. *See Antitrust Division Enters Into First Deferred Prosecution Agreement*, Cadwalader (Feb. 27, 2013), http://www.cadwalader.com/resources/clients-friends-memos/antitrust-division-enters-into-first-deferred-prosecution-agreement; Leah Nylen, *DOJ May Grant Non-Prosecution for Fraud, Bid-Rigging, but not for Antitrust Breaches*, Northwestern Univ. Sch. Of Law (June 7, 2012), http://www.law.northwestern.edu/research-faculty/searlecenter/events/international/documents/NPAs_chicago.pdf (citing Deputy Assistant Attorney General Scott Hammond explaining that NPAs were used in municipal bond financing cases partly due to concern about collateral consequences associated with financial institutions being criminally charged).

[146] All of the environmental settlements in the sample occur through plea agreements: the two reported NPAs in the category involve work and public safety offenses. In light of this finding, we examined the anecdotal evidence on EPA's policy regarding criminal referrals. A statement by the head of the EPA's environmental crimes section in 2008 indicates, "she does not believe in DPAs, and that if DOJ is not going to prosecute, then the matter should be referred for civil dispositions." *See Special Report: Federal Erosion of Business Civil Liberties*, Washington Legal Foundation 6-3 (Cory L. Andrews, ed. 2010), http://www.wlf.org/Upload/WLF_Spcl_Rprt_2010_Ed.pdf (last accessed January 1, 2015) (quoting Stacy Mitchell, Chief, Dep't of Justice Environmental Crimes Section, Remarks at the ABA Annual Institute on White Collar Crime) (Mar. 7, 2008).

[147] As shown in Table 4, out of the 157 DPAs and NPAs from 2003–2011, 56 (36%) are Foreign Bribery/FCPA and an additional 14 (19%) are domestic bribery cases.

[148] *See infra* Part 5.

[149] *See supra* note 101 and accompanying text.

4.2.2 Offense Severity

Next, we introduce evidence on the severity of the offenses that are resolved through NPAs, DPAs, and plea agreements. We follow the approach of the United States Sentencing Guidelines ("Guidelines") in considering three distinct severity metrics: (a) offense seriousness, which we regard as indicating the harmfulness of the offense; (b) offender culpability, which indicates the level of involvement of individuals within the corporation in either the offense or its detection, along with any prior history of misconduct; and (c) the fine range, which is our estimate of the Guidelines-prescribed sanction under the approach of the Guidelines and derives from the other metrics.

Our approach of relying on Guidelines-based indicators of severity in this study is a departure from the earlier literature on corporate crime. That literature used monetary loss or gain to measure offense severity.[150] An advantage of the current approach is that it permits comparisons to be made across offenses even where no monetary loss or gain is involved (or when monetary loss and gain are unknown), thereby expanding the size of the usable sample beyond what would arise if the study were limited to those offenses involving monetary transfers that are readily measurable. A limitation is that, as is customary in academic research and unlike judges and prosecutors, our available evidence comes entirely from public sources.

Although in some cases the agreements contained the Guideline calculations specifying both severity and culpability, in most cases these elements had to be estimated using the information provided by the source documents and applying the rules set forth in the Guidelines. Accordingly, our approach does not entirely eliminate the loss of observations that generally arise in estimating offense severity in the literature, as the tables in this section reveal.

Offense Seriousness

The most fundamental measure of offense seriousness under the Guidelines is the *offense score*. The offense score is used as an input to determine the fine range for the offense. For NPAs, DPAs, and plea agreements that do not include an offense score, we calculated one using the specific category corresponding to the charge being settled. Using Appendix A of the Guidelines in the year in which the agreement was reached, the offense category is determined by matching the US Code violation with the Guidelines category.[151] For each offense, the specific Guideline instructions (including any necessary enhancements) were

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[150] For example, Cohen was able to estimate monetary harm in 62 percent (178 out of 288) of organizations convicted of federal crimes between 1984 and 1987. *See* Mark A. Cohen, *Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984–1987*, 26 AM. CRIM. L. REV. 605, 617 (1988–89) [hereinafter Cohen, *Social Harm*]. Cohen was able to estimate monetary harm in 52 percent (262 out of 505) of cases between 1984 and 1988. *See* Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–1990*, 71 B.U. L. REV. 247, 257 (1991) [hereinafter Cohen, *Update*]. In the data set generated for this Report, we were able to assess monetary loss in only 13 percent (62 out of 486) of cases, and monetary harm in an additional 15 percent (71 out of 486) of cases. These numbers are lower than reported in Cohen (1989 and 1991). A potential explanation for the difference is that the loss and harm estimates for this Report were obtained from public documents, whereas the estimates in Cohen were obtained from proprietary presentence investigation reports. *See,* Cohen *Social Harm*, *supra*, at 608-10; Cohen, *Update*, *supra*, at 250.

[151] US Sentencing Guidelines Manual app. A (2014).

followed to arrive at an estimated offense score. The offense score in our data ranges from 6 to 47, with a higher score indicating a more serious offense. However, in applying the Guidelines to derive Guideline sanctions for the settlements in our data, we considered factors in addition to the offense score, as described next.

The *base fine* is an alternative measure of offense seriousness. It is available for fewer offense categories because the instructions for computing base fines apply only to certain types of offenses—those that the United States Sentencing Commission has found to generate harm or loss that is readily translated into monetary terms.[152] Under the Guidelines, it is determined as the greater of a default level from the Guidelines table or the monetary loss or gain from the offense when known.[153] Both offense scores and base fines are focused on the severity of the offense and generally do not take into consideration any offender-specific factors beyond those that affect the immediate harm from the offense.[154]

Offender Culpability

The culpability of the corporation is one of the factors, alongside offense seriousness, that determines the Guidelines fine range. While the Guidelines assign a culpability score only for offenses that also have a base fine, we were able to obtain sufficient information from public sources to generate offense scores for cases for which base fines could not be computed, e.g., due to lack of evidence on monetary loss or gain.[155]

The culpability score is based on "the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed."[156] For example, under the Guidelines, firms that voluntarily disclose a violation to the government before an official investigation are deemed less culpable and their culpability

[152] *See id.* § 8C2.4.
[153] *See id.* While offense scores can generally be calculated for every criminal offense (assuming there is adequate information about the offense), base fines are only defined for certain types of crimes under the Guidelines. In particular, environmental, food, drug, and agricultural offenses, export violations, and obstruction of justice offenses are not subject to the fine provisions of the Guidelines. See *id.* § 8C2.1 "Applicability of Fine Guidelines" for a list of statutory offenses that are included in the fine provisions of the Guidelines. The Commission excluded these offenses from the fine provisions of the Guidelines largely because "harm or loss caused or threatened often cannot easily be translated into monetary terms. Moreover, the dollar loss may not adequately reflect the societal harm caused by the offense." *See* US Sentencing Comm'n, Supplementary Report on Sentencing Guidelines for Organizations 7–8 (1991) [hereinafter Supplementary Report].
[154] As the Commission noted in its background document explaining the rationale behind the organizational sanctions guidelines, "[b]ecause an organization is vicariously liable for actions taken by its agents, the Commission determined that the base fine, which measures the seriousness of the offense, should not be the sole basis for determining an appropriate sentence." Supplementary Report, *id.* at 5. We suggest that harm can depend in some instances on the characteristics of the offender, even beyond what is revealed by evidence of wealth transfer at the time of the offense. For example, fraud by a widely trusted supplier would likely lead to greater harm than fraud by an organization widely known as a fly-by-night operation, other things being equal.
[155] *See* US Sentencing Guidelines Manual § 8C2.5. Culpability scores only apply to offenses subject to the organizational guidelines' fine provisions. However, we have estimated culpability scores for all offenses where adequate information was available to us to determine culpability. The reason we have done so for culpability and not for the base fine is that the former is based on individual characteristics, such as high level involvement and corporate cooperation that are irrespective of loss or gain, whereas the base fine is oftentimes dependent on monetary loss or gain—measures that are not necessarily as relevant in cases of environmental or national security offenses.
[156] *Id.* Ch. 8, introductory cmt. (1991) (amended 2004).

score is reduced considerably.[157] On the other hand, if a "high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense," the company is deemed to be more culpable.[158] Other factors that affect the culpability score include prior criminal or civil history of the offender,[159] whether the offense involves violation of an existing judicial order or violation of probation,[160] obstruction of justice,[161] and the existence of an effective compliance and ethics program.[162] Culpability is distinct from the seriousness of the offense, which depends primarily on its consequences for injured parties, such as harm or loss, and is instead based on the level of involvement of the offender—both during the commission of the offense and following its investigation by government authorities.

Fine Range

Under the Guidelines, when an offense is subject to the organizational fine provisions, the base fine and culpability scores are combined to determine a *fine range*. To determine the fine range for each defendant, first we collected fine ranges that were already provided for in the agreement. Most, but not all plea agreements in our sample provided a fine range. The Guidelines fine range was also provided in some NPAs and DPAs.

In addition to these indicators of offense seriousness and offender culpability and the fine ranges, other information was coded from primary sources when available, including: loss, gain, amount of bribe, and inability to pay. For cases with no fine range provided, we estimated the fine range based upon the Guideline instructions. However, offense scores and/or fine ranges could not be estimated in some cases due to lack of adequate information available in the source documents. In cases where the organizational fine provisions of the guidelines do not apply, the statutory fine range was used instead, if available. In addition, although culpability scores are not required in the case of offenses where the fine provisions do not apply, we estimated what they would be under the Guidelines if they were applicable.

Table 5 introduces the evidence on offense seriousness, offender culpability, and the Guidelines fine range by settlement type. As shown, the sample size varies by metric due to their varying requirements for background information on the offense and offending corporation, given our reliance on public data. Out of the 486 agreements in our sample, offense scores are estimated for 353, base fines for 231, culpability scores for 420, and fine ranges for 317.

As shown in Table 5, the average offense scores for DPAs and NPAs are considerably larger than for pleas (30.9 and 29.5 vs. 20.9 respectively). The evidence is similar for the median offense scores, where both DPAs and NPAs have medians of 30 compared to only 18 for plea

157 *Id.* § 8C2.5(g) (Self-Reporting, Cooperation, and Acceptance of Responsibility).
158 *Id.* § 8C2.5(b) (Involvement in or Tolerance of Criminal Activity). Consistent with the policy of the Guidelines to identify high level involvement without any consideration of whether any individual was charged, our assessments of high level involvement during the construction of the sample occurred independently of whether any individual was charged along with the company for the offense.
159 *Id.* § 8C2.5(c) (Prior History).
160 *Id.* § 8C2.5(d) (Violation of an Order).
161 *Id.* § 8C2.5(e) (Obstruction of Justice).
162 *Id.* § 8C2.5(f) (Effective Compliance and Ethics Program).

agreements.[163] The base fine, another indicator of crime severity, is also higher for DPAs and NPAs than for pleas at the mean ($189 million and $219 million vs. $75.7 million).[164] This difference does not persist in the comparison of median base fines, however; while the median base fine for DPAs is higher than for plea agreements ($30.2 million versus $22.5 million), it is lower for NPAs ($17.5 million).[165]

Table 5
Offense Severity by Agreement Type: Number of Settlements, 1997–2011

		DPA	NPA	Plea
Offense Score	**Mean**	30.9	29.5	20.9
	Median	30	30	18
	N*	(53)	(58)	(242)
Culpability Score	**Mean**	4.9	4.2	5.1
	Median	4	3	5
	N	(56)	(71)	(293)
High level Involvement	**% Positive**	59%	41%	54%
	N	(56)	(71)	(292)
Level of Cooperation	**% Positive** **Mean** **Median** **N**	2.5 2 (56)	2.6 2 (71)	2.0 2 (297)
Base Fine ($Millions)	**Mean**	$189	$219	$75.7
	Median	$30.2	$17.5	$22.5
	N	(41)	(52)	(138)
Mid-Point Guideline Fine Range ($Millions)	**Mean**	$255	$352	$103
	Median	$18.9	$16.0	$6.4
	N	(51)	(56)	(210)
Maximum Guideline Fine ($Millions)	**Mean**	$283	$400	$139
	Median	$25.2	$21.3	$9.1
	N	(51)	(56)	(210)

*Sample size varies with data availability across variables, as indicated in parentheses.

Turning to the culpability of the offender, we find that mean and median culpability scores are lower for NPAs and DPAs than for plea agreements when averaged across all offense categories. For example, while the median culpability score for plea agreements is 5, it is 4 for

[163] The difference between offense scores for pleas compared to either NPAs or DPAs is significant at p < .01 based on mean and median comparisons using Wilcoxon and rank sum test statistics. The difference between offense scores for pleas compared to DPAs persists at p < .01 in a subsample that excludes environmental and antitrust offenses, and is less pronounced for pleas versus NPAs in that restricted sample (with p > .10).
[164] The difference between the base fines of DPA and NPA versus plea settlements is significant at p > .20 at the mean and median, based on t-test and Wilcoxon test statistics. There are fewer observations with base fines than with offense levels in Table 5 because the base fine is not calculated for environmental crimes and certain other offenses where the fine provisions of the Guidelines do not apply.
[165] Further analysis of differences across offense types is warranted. For example, we note that plea agreements for bribery cases generally have larger offense scores and base fines than NPAs and DPAs.

DPAs and 3 for NPAs.[166] The finding of lower culpability scores in cases resolved through NPAs and DPAs is consistent with the Thompson Memo's call for NPAs and DPAs instead of traditional plea agreements in those instances where the firm was cooperative and/or voluntarily disclosed wrongdoing[167]—factors that lower our estimate of the culpability score under the Guidelines.

To further explore the differences in culpability scores, Table 5 reports two subcomponents of the culpability score.[168] First, we report on the percent of cases where high-level involvement was alleged by prosecutors.[169] As shown, while high level involvement was mentioned 54 percent of plea agreements and 59 percent of DPAs, it was mentioned in only 41 percent of NPAs. [170] Next, we report on the degree of cooperation, with a score ranging from zero to five, a higher score indicating more cooperation.[171] As shown, while the average cooperation score is 2.5 for DPAs and 2.7 for NPAs, it is only 1.7 for plea agreements. [172] The median score is 2.0 for all three settlement types combined.

Table 5 also reports both the midpoint and the maximum of the Guideline or statutory fine range—metrics that incorporate both severity and culpability. Both the midpoint of the Guideline fine range and the maximum fine are larger for NPAs and DPAs than for plea agreements. For example, the average midpoint of the fine range is $255 million for DPAs, $352 million for NPAs, and $103 million for pleas; while the medians are $18.9, $16.0 and $6.4 million respectively.[173] The same pattern is shown for the maximum of the fine range. Thus, it appears that while the culpability score tends to be higher for pleas, the higher offense scores of NPA and DPA offenses outweigh the culpability score when determining the ultimate Guideline fines range, on average.

Overall, our evidence is that lower culpability scores are associated with the use of NPAs and DPAs instead of plea agreements to impose criminal sanctions. The evidence on the other indicator of crime severity, the seriousness of the offense, is mixed. Neither the base fine nor

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[166] The significant levels for the differences in mean and median culpability scores between samples of DPA and Plea settlements are .61 and .53, respectively, based on t-test and Wilcoxon test statistics. The difference in culpability scores between NPA and Plea settlement subsamples is significant at p < .01 at both the mean and median

[167] *See* Thompson Memo, *supra* note 59.

[168] In addition to these categories, the culpability score is also based on prior offending behavior, obstruction of justice, and the existence of effective compliance and ethics programs. *See* US Sentencing Guidelines Manual § 8C2.5.

[169] The extent to which high-level involvement affects the culpability score depends upon the size of the business unit and/or organization. Here, we are only interested in whether or not high-level involvement is more or less likely to be associated with settlement type. *See id.* § 8C2.5(b) (Involvement in or Tolerance of Criminal Activity).

[170] The significance levels for the differences in percentage of DPA and Plea agreements exceeds .10 based on a t-test, while the difference between NPA and Plea settlement subsamples is significant at p = .05. Note that these differences are not robust to a specification of the actual culpability score for high-level involvement which is a combination of high-level involvement and size of the firm or business unit involved in the offense. In particular, the mean culpability score adjustment for high level involvement is 2.0 for pleas, 1.8 for NPAs and 2.2 for DPAs. The significance levels for the differences between Pleas and NPAs and between Pleas and DPAs exceed .10…

[171] *See id.* § 8C2.5(g) (Self-Reporting, Cooperation, and Acceptance of Responsibility). A score of five is reserved for firms that voluntarily disclose and are fully cooperative in the investigation.

[172] The significance levels for the differences in mean and median mid-points of the fine range between samples of DPA and Plea settlements are .32 and .06, respectively, based on t-test and Wilcoxon test statistics. The differences in mean and median mid-points of the fine range between NPA and Plea settlement subsamples exceed .10 in each instance..

[173] The significance levels for the differences in mean and median mid-points of the fine range between samples of DPA and Plea settlements are .32 and .06, respectively, based on t-test and Wilcoxon test statistics. The differences in mean and median mid-points of the fine range between NPA and Plea settlement subsamples are .22 and .25.

the offense score alone appears to be a good predictor of whether a settlement negotiation is resolved as a NPA, DPA, or plea.

4.2.3 Offender Characteristics

This section presents evidence on how the characteristics of the offending company may affect the choice whether to settle using a NPA, DPA, or a traditional plea agreement. We focus on two such characteristics: whether the company that signs the agreement is itself a public company ("parent") or, as sometimes occurs, a subsidiary or majority owned business unit of such a company ("subsidiary") and, second, its business relationship with the federal government.

Parents versus Subsidiaries

Table 6 compares parents versus subsidiaries by type of settlement. Defendants were coded as a subsidiary if they were wholly or jointly owned by another company. One hypothesis is that parent companies should be found to enter into NPAs or DPAs, as opposed to plea agreements, more frequently than the subsidiaries. This would occur if the collateral consequences of a plea agreements were relatively more costly for parents than for subsidiaries, other things equal. Such collateral consequences might include debarment from federal business, which could be particularly costly for parents that have numerous business units engaged in government contracts. If so, we might expect to see plea agreements more often with subsidiaries than with parents.

Table 6
Type of Defendant (Parent or Subsidiary) by Agreement Type and Era, 1997–2011: Number and Share of Settlements in Full Sample

Time Period	DPA		NPA		Plea		Total	
	Parent	Sub	Parent	Sub	Parent	Sub	Parent	Sub
1997–2002*	--	--	--	--	52	64	52	66
					45%	55%	44%	56%
2003–2006	7	5	18	10	26	43	51	58
	58%	42%	64%	36%	38%	62%	47%	53%
2007–2011	27	26	51	11	56	88	134	125
	51%	49%	82%	18%	39%	61%	52%	48%
Full Sample	34	32	69	22	134	195	237	249
	52%	48%	76%	24%	41%	59%	49%	51%

*Share of settlements is not separately reported for DPA and NPA in 1997–2002 due to small sample size.

As shown, the majority of DPAs and NPAs (52% and 76%, respectively, in the full sample) involve a parent company. The evidence on pleas is the opposite: only 41 percent of plea agreements involve parent companies.[174]

Table 7 focuses on a subsample of 63 settlement agreements involving investigations of the same underlying conduct that were settled by a parent and subsidiary simultaneously, albeit through separately signed agreements. This allows us to focus on instances in which a parent and subsidiary may jointly agree through negotiations with prosecutors through a two-part settlement that limits the collateral effects of settlement. In the hypothesized two-part settlement,[175] the subsidiary enters into a plea agreement and the parent enters into a NPA or DPA. The effect is to limit the scope of any debarment or other collateral effects of plea to the subsidiary, while holding the parent accountable for other monetary and non-monetary sanctions, as needed to achieve the overall enforcement objective.[176] The evidence is consistent with this hypothesis. The proportions of NPA/DPAs involving parents, and pleas involving subsidiaries, are both higher when focusing only on instances where parents and subsidiaries settle for the same conduct. The vast majority of NPAs involve parent companies (86%), about half of DPAs involve parents, whereas only 13 percent of the pleas in this subsample involve parent companies. Further, 89 percent of parent companies in the sample enter into an NPA/DPA, whereas 77 percent of subsidiaries enter into plea agreements.

[174] The anecdotal evidence is that prosecutors sometimes expressly link the decision not to charge the parent company to the decision by the subsidiary to enter into a plea agreement. *See, eg.*, Letter from Carmen M. Ortiz, US Att'y, Dist. Of Mass., to Theodore V. Wells, Jr. & R.J. Cinquegrana, counsel, regarding settlement with Merck & Co (Nov. 7, 2011), *available at* http://www.justice.gov/archive/usao/ma/news/2011/November/20111114024231128.pdf. ("This letter ('Side Letter Agreement') will confirm that, *in exchange for full performance of the Plea Agreement entered into by* and among the United States of America, acting through the United States Attorney for the District of Massachusetts ('US Attorney') and the Department of Justice (collectively referred to as 'the United States') and your client, *Merck Sharp & Dohme Corp.*, a copy of which Plea Agreement is attached hereto as Exhibit One, and in exchange for certain other promises made herein between and among the United States and your client, Merck & Co., Inc., its direct and indirect subsidiaries (other than Merck, Sharp & Dohme Corp.) And its successors, *the United States and Merck & Co., Inc. Hereby agree as follows: 1. No Criminal Prosecution of Merck & Co., Inc.* . . . .") (emphasis added).

[175] The statements of at least one corporate insider and anecdotal evidence are also consistent our two-part settlement hypothesis. In particular, Schering-Plough and its subsidiary, Schering Sales, in 2006 entered into simultaneous settlements. The parent, Schering-Plough, signed a DPA and agreed to pay over $250 million in civil settlements. The subsidiary, Schering Sales, entered into a plea agreement with a $180 million criminal fine. According to a media quote of an insider to the arraignment "the guilty plea from Schering Sales means it can no longer sell drugs to the government, but its marketing functions have been taken over by other parts of the company, which are permitted to continue doing business with Medicaid and Medicare. Schering Sales 'is an entity whose sole purpose is to plead guilty in these matters, said Mr. Saunders' (a spokesperson for the company)." Sylvia Pagan Westphal et al., *Schering-Plough Settles Charges for $435 Million*, WALL ST. J., Aug. 8, 2006, http://www.wsj.com/articles/SB115686228166948388.

[176] While not tabulated, we find that plea agreements with subsidiary companies often, if not always, contain a provision to put the burden of the monetary sanction onto the parent if the subsidiary is unable to pay. This addresses the concern that a subsidiary might be judgment-proof as compared to its parent.

Table 7
Type of Defendant (Parents or Subsidiary) by Agreement Type and Era:
Number and Share of Settlements in Joint-Settlement Subsample

Time Period	DPA		NPA		Plea		Total	
	Parent	Subsidiary	Parent	Subsidiary	Parent	Subsidiary	Parent	Subsidiary
1997–2002*	--	--	--	--	--	--	0	0
							0%	0%
2003–2006	0	1	4	2	1	2	5	5
	0%	100%	67%	33%	33%	67%	50%	50%
2007–2011	6	5	14	1	3	26	23	32
	55%	45%	93%	7%	10%	90%	42%	58%
Total	6	6	18	3	4	28	28	37
	50%	50%	86%	14%	13%	87%	43%	57%

*No settlement agreements in the Joint-Settlement subsample were signed prior to 2003.

Business Dealings with Government

Table 8 examines whether the signing party's offense involved a business relationship with any government agency. A business relationship was assumed to exist if the agreement or press accounts surrounding the settlement agreement indicated the offending behavior involved any government entity as a victim. Thirty-two percent of the settlements were found to involve business dealings with the government. Forty-three percent of companies that had business relationships with the government entered into an NPA or DPA, while only 30 percent of companies with no such relationship entered into an NPA or DPA. This finding also is consistent with the view that a criminal plea increases the chance of debarment and that a motivation for the use of NPA and DPA may again be to limit the debarment risk facing companies that do business with the government.

Table 8
Presence of Government-Business Relationship during Offense Period
by Agreement Type: Number and Share of Settlements with Available Data

Government Involvement	DPA	NPA	Plea	All
Yes	30	35	85	150
	20%	23%	57%	100%
No	36	56	222	314
	12%	18%	71%	100%
All*	66	91	307	464
	14%	20%	66%	100%

*Sample consists of the 464 agreements with available data.

4.3 Penalties

As noted in Section 3, corporate criminal behavior can involve a variety of penalties. In this section, we compare the penalties that are imposed on companies through NPAs, DPAs, and plea agreements. We first examine monetary penalties, then turn to non-monetary sanctions such as legal liability conditions and required governance reforms.

4.3.1 Monetary Penalties

To compare monetary penalties, we considered all penalties that are either explicitly required by the agreement or were mentioned as being part of an overall settlement by the DOJ at the time of the agreement. Thus, the monetary penalties we have estimated can be thought of as a "global settlement" of the monetary penalties. We include civil settlements with other government agencies or state governments, for example, if they are noted in the agreement or in the DOJ Press Release.[177] This definition is necessitated by the differences in approaches between NPAs, DPAs, and pleas, as well as the availability and the language of source documents. An alternative approach might have attempted to measure only monetary penalties "required" by the agreement. However, that approach is neither feasible nor is it consistent with the varying legal instruments we are analyzing. For example, some pleas explicitly indicate that a civil penalty is being paid to a government agency as part of the agreement—sometimes even indicating that the criminal penalty is predicated on the payment of the civil penalty and would be increased otherwise. In this example, it is clear that the court was made aware of the civil penalty and this was part of an overall settlement agreement for the criminal plea. In other cases, the DOJ press release announcing the plea agreement includes a statement that the company agreed to a civil settlement with a government agency at the same time. This information might not be incorporated into any formal plea agreement. In some cases, a plea agreement and a civil settlement appear to be filed with the court at the same time even if they are not necessarily cross referenced in the legal documents. In those cases, we might not have had a copy of the actual plea agreement, so it would be difficult to know whether the monetary sanctions required by the civil settlement are expressly required under the plea agreement. In another example, an NPA might indicate that the firm has agreed to pay the government agency a civil settlement. In that example, it would not be clear whether this was implicitly required as part of DOJ's agreement to settle for an NPA. Thus, we have carefully examined each announcement by the DOJ (or in some cases the firm press release or press reports quoting government officials) on the day of the agreement and determined which, if any, additional monetary settlements appear to be part of a global settlement.

In addition, it is not possible to isolate and directly compare the criminal part of the monetary sanctions that are imposed through NPAs, DPAs, and pleas, since the monetary settlements in NPAs and DPAs do not always explicitly identify whether a fine is in lieu of a criminal penalty. Thus, our measure of monetary penalty is the most directly comparable monetary sanction available across these three legal instruments. Throughout this Report, we use the term "global settlement" and "total monetary penalty" interchangeably.

Figure 5 shows the average total monetary penalty by agreement type over the sample period. Penalties associated with NPAs and DPAs are smaller on average than those associated with plea agreements in some years and larger in others. Overall, no clear difference emerges between the monetary sanctions imposed through different types of settlement agreements, on average.

[177] In a few cases where we do not have a DOJ Press Release, we include civil settlements or other payments that are clearly indicated by other sources (such as another government agency or a media report quoting the US Attorney or judge) as being part of a global settlement at the same time as the DPA, NPA or Plea.

Figure 5
Average Total Monetary Penalties by Agreement Type ($Thousands)

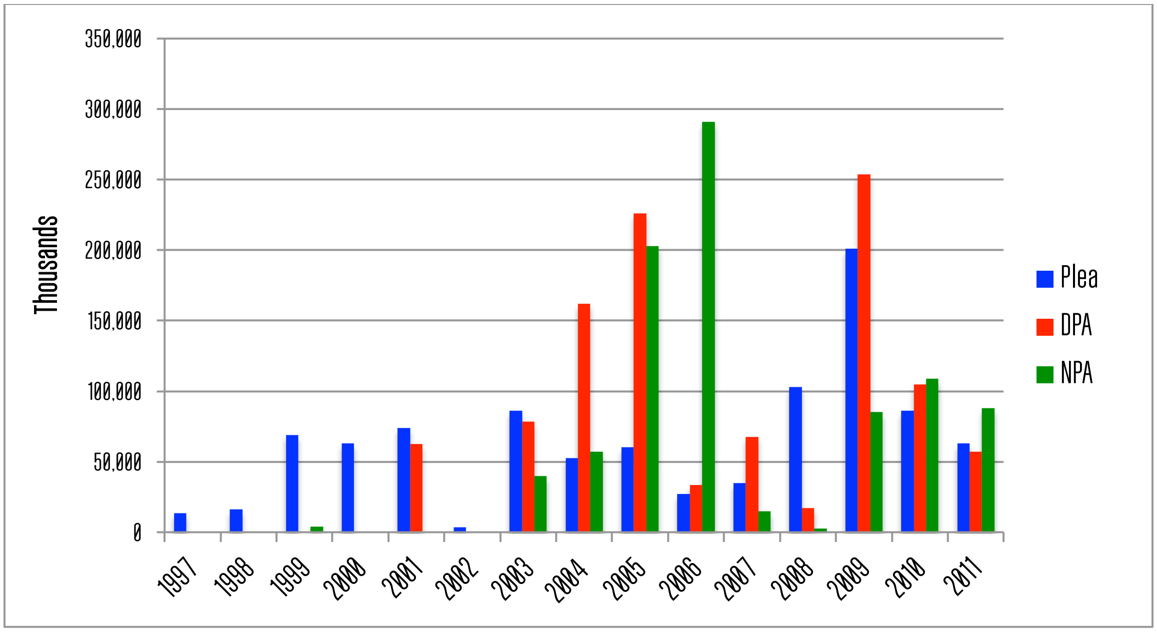

Table 9 reports average and median monetary penalties for NPAs, DPAs, and pleas for the 1997–2002, 2003–2006, and 2007–2011 eras. For the full sample, average penalties associated with DPAs are approximately 50 percent larger than those associated with plea agreements, and average penalties for NPAs are nearly double those of plea agreements. However, it is important to note that the large difference between mean and median penalties for both types of agreements suggests that a few large settlements are driving averages. Median DPA penalties are more than three times larger ($29.8 million) than those for pleas ($8.7 million), but median penalties for pleas are only slightly smaller than those for NPAs ($13.5 million). Looking over the time span of the sample, average and median penalties associated with pleas have remained relatively constant, whereas they have been more variable for NPAs and DPAs. Mean and median penalties associated with DPAs are larger than pleas in all periods, whereas penalties associated with pleas are lower than those associated with NPAs from 2003–2006, but comparable to NPAs during the 2007–2011 period.

Table 9
Total Monetary Sanction by Agreement Year and Type:
Mean and Median ($Millions)*

		DPA	NPA	Plea	All
1997–2002	**Mean**	--	--	$47.3	$47.1
	Median			$7.4	$7.4
	N			116	118
2003–2006	**Mean**	$116	$209	$55.7	$102
	Median	$45.8	$36.3	$8.0	$15.1
	N	12	28	69	109
2007–2011	**Mean**	$98.7	$64.7	$93.7	$87.8
	Median	$28.9	$8.5	$10.6	$13.2
	N	53	62	144	259
Full Sample	**Mean**	$101	$109	$69.4	$81.1
	Median	$29.8	$13.5	$8.7	$10.7
	N	66	91	329	486

*Means and medians for DPA and NPA in 1997–2002 are not separately reported due to small sample size.

Table 10 reports the mean and median ratio of the total monetary sanction to the maximum fine under the Guidelines analysis for NPAs, DPAs, and plea agreements. Companies that were reportedly unable to pay the minimum of the Guideline fine range were excluded from this analysis.[178] This statistic has been used in previous literature to capture the relationship between actual penalties paid relative to the severity of the crime and culpability of the firm, as calculated under the Guidelines. If penalties required under NPAs and DPAs are relatively more severe in relation to the severity of the crime and culpability of the firm than those required under plea agreements, the ratios that are associated with NPAs and DPAs ratios should be relatively higher, other things equal. The evidence in Table 10, however, does not suggest that the penalty-to-severity/culpability ratio is systematically different for NPAs and DPAs versus pleas. Although the average ratio for DPAs is larger for the post-2003 period, this is driven by extreme values. Further, for the full sample, the median ratios for NPAs, DPAs, and pleas are statistically equivalent. Overall, there does not seem to be any systematic difference between required penalties relative to severity and culpability. This finding suggests that the larger average and median penalties for DPAs versus pleas shown in Table 5 is mostly explained by the fact that DPAs generally involve more severe crimes. In other words, we do not see any evidence that the total monetary sanctions under NPAs and DPAs differ relative to

[178] Out of the 486 settlement agreements, twenty-one (sixteen plea agreements, two NPAs and three DPAs), contained language suggesting that the fine was constrained to be below the minimum of the Guideline fine based on the firm's ability to pay. Table 10 excludes these twenty-one observations from the sample. Under the Guidelines, the Court must reduce the fine if it would otherwise jeopardize payment of victim restitution, and may reduce it if it would jeopardize the "continued viability of the organizations." *See* US Sentencing Guidelines Manual § 8C3.3 (2014) (Reduction of Fine Based on Inability to Pay). The basic findings of Table 10 are unchanged if we exclude additional observations from the sample where other public sources suggest ability to pay may have been a factor in determining the monetary sanction (e.g. Information in press reports or DOJ press releases mentioning prior bankruptcy or cessation of operations of the company).

the fine that would be assessed under the Guidelines if the offender had instead settled for a plea agreement.

Table 10
Ratio of Total Monetary Sanction by Guideline Fine Maximum by Agreement Year and Type*

		DPA	NPA	Plea	All*
1997–2002	**Mean**	--	--	3.3	3.2
	Median			0.9	0.9
	N			56	58
2003–2006	**Mean**	24.0	9.8	2.6	6.9
	Median	0.7	0.6	0.9	0.7
	N	9	18	48	75
2007–2011	**Mean**	54.4	7.9	3.2	15.7
	Median	0.7	0.9	0.6	0.7
	N	38	37	94	169
Total	**Mean**	47.6	8.2	8.4	11.1
	Median	0.7	0.8	0.7	0.7
	N	48	56	198	302

*Sample Consists of the 302 agreements with available data on the monetary sanction and the Guideline fine maximum and excludes agreements that mention inability to pay as a consideration in determining the sanction. Mean and median for DPA and NPA in 1997–2002 are not separately reported due to small sample size.

4.3.2 Non-Monetary Sanctions – Legal Process and Governance

This section compares non-monetary sanctions by type of agreement. First, we consider the duration of the settlement agreement. Next, we compare legal process-related conditions such as whether or not the settlement requires waiver of privileges. Finally, we compare governance reforms required in each type of settlement agreement.

Duration of the Agreement

Table 11 provides descriptive statistics for length of the agreement.[179] Average durations of agreements tend to be shorter for between NPA and DPA provisions than for plea agreements. Plea agreements last an average of 40.7 months. By contrast, the length of agreements under NPAs and DPAs are 27.8 months and 28.3 months, respectively. This difference persists for medians as well, and appears to be relatively stable over the entire sample period. This is consistent with the evidence that pleas tend to be used in settlements that have higher culpability scores, calling for longer terms of probation.

[179] The duration for plea agreements is defined here as the length of probation.

Table 11
Duration of Agreement by Agreement Year and Type (Months)

		DPA	NPA	Plea	All
1997–2002	**Mean**	--	--	42.3*	41.4
	Median			36	36
	N			44	46
2003–2006	**Mean**	21.0	25.9	42.3	33.0
	Median	21	24	36	36
	N	12	27	36	75
2007–2011	**Mean**	30.1	28.7	38.1	32.2
	Median	36	24	36	36
	N	53	57	52	162
Full Sample	**Mean**	28.3	27.8	40.7	33.9
	Median	24	24	36	36
	N	66	85	132	283

*Sample consists of the 283 agreements with available data on duration. Mean and median for DPA and NPA in 1997–2002 are not separately reported due to small sample size.

Legal Process-Related Conditions in the Agreement

Table 12 reports the percentages of NPAs, DPAs, and plea agreements that include settlement provisions requiring the defendant to waive certain rights or admit certain facts that could make it easier for the government to prosecute the defendant in event of breach of the agreement, or to prosecute other entities or individuals for related conduct. Generally, such provisions appear *more frequently in NPAs and DPAs than in plea agreements*. For example, around a quarter of NPAs and DPAs have involved a waiver of attorney-client and work product privilege (26 percent, and 24 percent, respectively), compared to just 9 percent of plea agreements.[180] Further, over 91 percent of DPAs and 79 percent of NPAs are found to require an agreement to the admissibility of a statement of facts and prior testimony or statements, compared to 38 percent of all plea agreements. Moreover, NPA and DPAs more frequently contain provisions related to termination of the agreement in the event of breach, including the possibility of breach for contradictory public statements. While public statements contradicting the statement of facts in the agreement are considered a breach in 91 percent of the DPAs and 81 percent of the NPAs, such provisions are included in only 16 percent of the plea agreements. Overall, NPAs and DPAs on average require more of these conditions than do pleas (4.8 and 5.2, respectively, vs. 2.7 conditions per agreement).

[180] However, we note that there have been fewer such provisions following the Ogden speech in June 2009 (*supra* note 80). Waiver of attorney-client privilege is found in 39 percent (36 out of 93) of NPAs and DPAs signed prior to June 2009, and only 5 percent (3 out of 64) signed since that time.

Table 12
Presence of Legal Process Conditions by Condition and Agreement Type: Number and Share

	DPA (66)	NPA (90)	Plea (199)	All (355)*
Waive Right to Speedy Trial and/or Statute of Limitations	100% (66)	92% (83)	78% (156)	86% (305)
Waive Attorney-Client Privilege	24% (16)	26% (23)	9% (17)	16% (56)
Waive Attorney Work-Product	21% (14)	24% (22)	8% (15)	14% (51)
Waive Other Privileges	0% (0)	2% (2)	9% (17)	5% (19)
Admissibility of Statement of Facts	91% (60)	79% (71)	38% (76)	58% (207)
Admissibility of Prior Testimony/Statements to Government	88% (58)	86% (77)	45% (89)	63% (224)
Termination of Agreement for Breach	100% (66)	97% (87)	81% (161)	88% (314)
Public Statements Contradicting Considered Breach	91% (60)	81% (73)	16% (31)	46% (164)
Average Number of Provisions	**5.2**	**4.9**	**2.8**	**3.8**

*Sample consists of the 355 agreements with available signed settlement documents, 1997–2011.

Governance Provisions of the Agreement

As noted in Part 2, some commentators regard DPAs and NPAs as being more likely to require far reaching governance reforms, including external monitors and compliance programs, than those typically achieved through a plea agreement.[181] However, lack of comprehensive data has thus far made such a comparison only anecdotal.

Table 13 reports on governance-related requirements found in NPAs and DPAs and plea agreements, 1997–2011. Once again, these provisions *occur more frequently in NPAs and DPAs than in plea agreements*. For example, DPAs and NPAs more frequently than plea agreements require training (76 percent and 58 percent versus 30 percent), changes in accounting or auditing reforms (77 and 58 percent versus 23 percent), and compliance related reforms (64 and 54 percent versus 13 percent). DPAs more frequently require the appointment of a monitor than either NPAs or pleas (48 percent for DPAs versus 30 percent and 26 percent for NPAs and pleas respectively). Appointment of an external monitor is sometimes viewed as one of the more costly and intrusive forms of governance provisions. Overall, as with the legal process-related conditions reported in Table 12, NPAs and DPAs on average contain more governance terms (2.6 and 3.2 versus 1.2 provisions per agreement).

Table 13
Presence of Governance Conditions by Condition and Agreement Type: Number and Share

	DPA (66)	**NPA (90)**	**Plea (199)**	**All (355)***
Monitor Appointed	48% (32)	30% (27)	26% (52)	31% (111)
Hotline or Ombudsman	48% (32)	43% (39)	12% (24)	27% (95)
Training	76% (50)	58% (52)	27% (53)	44% (155)
Business Unit shut down or divested	14% (9)	10% (9)	1% (2)	6% (20)
Other business changes	26% (17)	29% (26)	8% (16)	17% (59)
Debarred or suspended	-- (0)	-- (0)	6% (11)	3% (11)
Audit Procedure Revisions	77% (51)	58% (52)	23% (46)	42% (149)
Compliance Program Revisions	64% (42)	54% (49)	13% (26)	33% (117)
Average Number of Provisions	**3.5**	**2.8**	**1.2**	**2.0**

*Sample consists of the 355 agreements with available signed settlement documents, 1997–2011.

Not included in Table 13 are "community service" payments that are expressly required as part of the settlement agreement. These payments are already included in the total monetary

[181] *E.g.*, Uhlmann, *supra* note 9, at 1301.

sanctions reported in Table 9. Unlike victim restitution, community service agreements often require the defendant to donate money or provide goods or services to third parties.[182] For example, a common form of community service in a plea agreement is for the defendant to donate money to a nonprofit organization—oftentimes an organization that has the express objective of assisting consumers, improving the environment, or mitigating the harm to victims of the offense. The community service requirement is of special interest to our study because it has been a focus of debate over the extent to which NPAs and DPAs uniquely facilitate over-reaching by prosecutors. However, we find very similar community service requirement rates in NPAs (11%), DPAs (14%) and plea agreements (17%) in this study. This is not what one would expect to find if all non-monetary sanctions were more intrusive in NPAs and DPAs than in plea agreements. *In requiring community service, our evidence is that the NPAs and DPAs tend to be no more intrusive than are the plea agreements, on average.*

To be sure, in addition to the evidence in Table 13, we have collected anecdotal evidence on the form of community service requirements and how they vary across the different types of settlement agreements. The evidence is that the form of community service that has been the focus of criticism of DPAs—the requirement that the company endow a chair at a university as a condition of settlement—is not unique to DPAs. [183] The anecdotal evidence is that this type of service requirement has been the subject of plea agreements, not just DPAs.[184]

Table 14 summarizes the average numbers of legal and governance provisions that we have found in settlement agreements, by type of agreement and by time period. While NPAs and DPAs consistently have more legal and governance-related provisions than pleas, we find no clear patterns of growth in the number of these provisions over time.[185]

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[182] *See* US Sentencing Guidelines Manual § 8B1.3 (Community Service - Organizations (Policy Statement)).

[183] For example, Bristol Myers Squibb signed a DPA in 2007 that included a provision stating, "BMS shall endow a chair at Seton Hall University School of Law dedicated to the teaching of business ethics and corporate governance, which position shall include conducting one or more seminars per year on business ethics and corporate governance at Seton Hall University School of Law that members of BMS's executive and management staff, along with representatives of the executive and management staffs of other companies in the New Jersey area may attend." Deferred Prosecution Agreement with Bristol-Myers Squibb Co. ¶ 20, *available at* http://edgar.sec.gov/Archives/edgar/data/14272/000119312505125970/dex992.htm (Exhibit 99.2 to Bristol Myers Squibb Company Form 8-K, June 16, 2005). This provision had been criticized by Richard Epstein, *supra* note 5. *But see* Sheyn, *supra* note 8, at 17, agreeing with Epstein on community service requirements such as the BMS agreement while disagreeing with Epstein's overall criticism of NPAs and DPAs.

[184] For example, in a plea agreement in 1999, Northeast Nuclear Energy Company agreed to pay $1 million towards establishing a chair in business ethics at the University of Connecticut. In re Ne. Util. Serv. Co. & Ne. Nuclear Energy Co., EPA Case. No. 99-0120-00 (1999) (Compliance Agreement).

[185] Note that this approach to aggregation implicitly gives equal weights to each type of provision independently of its cost to the company or effect on general deterrence. As we noted above, certain provisions, such as the appointment of corporate monitors, might be more heavily weighted by corporate insiders, prosecutors, or both. Identification of more meaningful weights is a suitable topic for further research. Additional future research such as a survey of government and defense attorneys might provide evidence on more appropriate weights. On the disparate views of corporate insiders regarding the effects of governance reform see Cindy R. Alexander, et al., *Economic Effects of SOX Section 404 Compliance: A Corporate Insider Perspective*, 56 J. ACCT. & ECON. 267, 275 (2013).

Table 14
Presence of Legal Process and Governance Provisions
by Year and Agreement Type: Average Number Per Agreement

	DPA		NPA		Plea	
	Legal	**Governance**	**Legal**	**Governance**	**Legal**	**Governance**
1997–2002	-	-	-	-	2.2	1.3
2003–2006	5.8	2.8	5.8	2.4	2.8	1.1
2007–2011	5.0	3.4	4.5	2.7	2.9	1.3

*Sample consists of the 355 agreements with available signed settlement documents, 1997-2011. Mean and median for DPA and NPA in 1997-2002 are not separately reported due to small sample size.

Overall, the evidence on non-monetary sanctions is that the NPAs and DPAs have tended to include more provisions that waive or alter the traditional legal entitlements of corporations and more conditions relating to the corporation's governance structure when compared with the plea agreements. In each time period studied, NPAs and DPAs have consistently contained larger numbers of both legal process and governance reform provisions than plea agreements.

5. Discussion and Conclusion

This Report is based on a unique comprehensive dataset of 486 settlements between public companies and the US Department of Justice through NPAs, DPAs, and plea agreements between 1997 and 2011, a period that frames the Thompson Memo of 2003. It is the first study that allows for a direct comparison to be made among these three different approaches to settling federal charges of organizational wrongdoing and their disparate implications for the affected companies, initially focusing on their provisions relating to legal process and governance. Our main finding is that the growth in NPAs and DPAs has not been accompanied by a decrease in the use of plea agreements. We also provide initial evidence on two subsidiary questions: (1) what are the differences among the types of offenses and offenders that tend to settle with NPAs, DPAs, or plea agreements and (2) what are the differences in the sanctions imposed on corporations through these different settlement mechanisms.

Growth in NPAs and DPAs Relative to Plea Agreements

Over the fifteen-year period, there has been a steady increase in the numbers of settlements entered into by public companies annually for alleged federal criminal conduct. We have divided our analysis into three time periods: the six year period 1997–2002 prior to the Thompson Memo and the widespread adoption of NPAs and DPAs; the four year period 2003–2006 after these mechanisms became relatively common; and the subsequent five year period from 2007–2011. During the pre-DPA/NPA era, the average number of plea agreements was 19.3 annually. The number of pleas decreased to 17.2 annually during 2003–2006 and increased to 28.8 in the 2007–2011 period. Thus, in the most recent five-year period, the average number of pleas increased above the prior level.[186] However, when combined with NPAs and DPAs, the increase in average annual number of settlements is more dramatic—increasing from 19.7 in the pre-DPA/NPA era to 27.2 from 2003–2006, and 51.8 in 2007–2011. Therefore, we find that the introduction of NPAs and DPAs has not been accompanied by a decline in the use of plea agreements. To the contrary, increased use of plea agreements has accompanied the rise of NPAs and DPAs and thus an overall increase in the reach of corporate criminal enforcement.

Although it is possible that in the absence of NPAs and DPAs, the number of pleas would have increased to this level, this appears to us unlikely. Never before have we seen fifty public companies convicted of federal crimes in one year, let alone an average this high over a five-year stretch. For example, using a similar sample selection method, Alexander, Arlen and Cohen found 243 pleas, an average of twenty-seven annually during the nine-year period from

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[186] This finding differs from a recent study that claims the number of plea agreements settled against organizations has been declining over this time period. According to Anderson and Waggoner, there has been a steady decline in the number of plea agreements settled by organizations—including those that are not publicly traded. *See* Anderson & Waggoner, *supra* note 12, at 69–70. Since the present study focuses solely on public companies, we cannot make a direct comparison to the Anderson and Waggoner findings. However, we note that the source of their data is the USSC, which we have noted is incomplete and unreliable as a source of data trends. *See* Alexander, Arlen and Cohen, *Evaluating Trends*, *supra* note 114.

1988 to 1996.[187] They found no trend upward or downward, with annual pleas ranging from 19 to 32.[188] Other studies have found even lower numbers of pleas annually, pre-Guidelines.[189]

Differences in Offenses and Offenders

The evidence from analysis of Guidelines offense scores is that NPAs and DPAs are associated with offenses that are relatively more serious than are plea agreements. The offense score is the seriousness measure that is available in the largest number of cases. Offense scores are higher for both NPAs and DPAs than they are for plea agreements at both the mean and median. At the same time, the evidence is that culpability scores tend to be higher under plea agreements than under NPAs and DPAs.

In addition, we find NPAs and DPAs infrequently among the antitrust and environmental settlements.[190] Of the 119 antitrust settlements for which data were collected for this study, only six were identified as occurring through an NPA and none with a DPA.[191]

One of the claims made by both proponents and opponents of NPAs and DPAs is that these vehicles might help shield companies from debarment. The evidence is consistent with such a finding. While the majority of NPAs and DPAs are settled by parent companies, less than half of plea agreements are settled by parent companies. In cases where public parent companies and their units or subsidiaries simultaneously enter into both a plea and an NPA or DPA, we find that the signer of the plea tends to be the subsidiary while the signer of the NPA or DPA tends to be the public parent company. Finally, while the majority of companies whose offenses involves a business transaction with the government settle with either a DPA or NPA, we find just the opposite for companies whose offenses appear not to involve a direct government relationship. With less clear implications, we also find that NPAs are more likely than DPAs to involve parent companies relative to subsidiaries.

Differences in Outcomes

Overall, settlement outcomes are different in the presence of DPAs and NPAs than with plea agreements. The most striking differences arise in comparisons of the numbers of non-monetary sanctions—legal requirements and structural governance reforms—across the types

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[187] Alexander et al., *Regulating Sanctions*, *supra* note 114, at 403.
[188] *Id.* at 407 (Table 3).
[189] *See* Alexander, *supra* note 16, at 497; Alexander & Cohen, *supra* note 23, at 11.
[190] In addition to the lesser presence of NPA and DPA among antitrust and environmental cases, prior literature documents a lesser stock price impact of news of an enforcement action involving such offenses. *See* Alexander *supra* note 16, at 521–22 (documenting the absence of change in stock prices and limited evidence of governance reform around news of criminal sanctions for environmental and other regulatory (third-party) corporate offenses alongside evidence of significant stock price and reform announcements around news of fraud and other offenses that involve harm to parties on which the company relies for its future business); for further evidence relating to environmental offenses, see Kari Jones & Paul H. Rubin, *Effects of Harmful Environmental Events on Reputations of Firms*, 6 Advances in Fin. Econ. 161, 179 (2001) (finding an overall insignificant stock market response to environmental incidents); Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 666 (2005) (discussing the limited stock price impact of news of an environmental offenses as a possible indicator of the absence of any reputational effect of environmental crime).
[191] Three of those six antitrust cases involved financial institutions (JP Morgan Chase, UBS, and Wachovia) that settled in a joint conspiracy to fix municipal bond prices. Similarly, of the ninety-one environmental and safety offenses, only one settled with a DPA (First Energy Nuclear Operating Company) and one with an NPA (Alpha Natural Resources, Inc.).

of settlements. DPAs and NPAs typically require more non-monetary sanctions than do plea agreements—both in governance-related conditions (such as external monitors or mandatory compliance programs) and legal process-related conditions (such as waiver of statute of limitations or attorney-client privileges.

Future Research

Our initial findings have identified certain patterns that answer fundamental questions about the frequency and type of offenses and offenders by settlement type. They also begin to answer some of the many policy questions raised about NPAs and DPAs. However, our findings do not necessarily imply causation. For example, while we found differences in the level of sanctions and the extent to which governance and legal provisions appear by settlement type, it is possible that some of these differences can be explained by changes in the policy regime over time–not solely by the differences in settlement vehicles. As we have discussed in this Report, there has been an evolution of DOJ policy memos on corporate prosecutions during this time period. Thus, further analysis of the data should help uncover the extent to which these differences are "caused" by the introduction of the new settlement types that are the focus of this report versus other differences, such as the timing of settlement or other characteristics of the settlement, the offender or the offense.[192]

[192] For example, Alexander, Arlen and Cohen conducted a similar analysis to examine the extent to which changes in observed sanctions could be explained solely by the newly adopted Guidelines or partly through systematic changes in policy preferences over time. *See* Alexander *et. al*, *Regulating Sanctions*, *supra* note 114.

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