

SEARLE CIVIL JUSTICE INSTITUTE

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

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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.