Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement

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Historically, the Department of Justice ("DOJ") had two choices when a business organization was the subject of Foreign Corrupt Practices Act ("FCPA") scrutiny: either charge the entity with an FCPA violation or not charge. However, in 2004 the DOJ brought to FCPA enforcement a third option: alternative resolution vehicles called non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs").

The use of alternative resolution vehicles to resolve FCPA scrutiny is not authorized by the FCPA nor any other specific Congressional legislation. Moreover, DOJ policy states that alternative resolution vehicles are to be used only "under appropriate circumstances."

However, this article demonstrates that alternative resolution vehicles have become the dominant way the DOJ resolves corporate FCPA scrutiny

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and serve as an obvious reason for the general increase in FCPA enforcement over the past decade. To the many cheerleaders of increased FCPA enforcement, NPAs and DPAs are thus worthy of applause.

Yet in a legal system based on the rule of law, quality of enforcement is more important than quantity of enforcement. Through empirical data and various case studies, this article measures the impact NPAs and DPAs have on the quality of FCPA enforcement and concludes that NPAs and DPAs — while resulting in higher quantity of FCPA enforcement — result in lower quality of FCPA enforcement. This disturbing finding matters not only in the specific context of the FCPA but more broadly as other nations with "FCPA-like" laws adopt U.S.-style alternative resolution vehicles.

TABLE OF CONTENTS

INTRODUCTION

Historically, the Department of Justice ("DOJ") had two choices when a business organization was the subject of legal scrutiny whether in the FCPA context or otherwise: either charge the entity with a legal violation or not charge. However, in 2004, the DOJ brought to FCPA enforcement a third option it had used sparingly in other contexts: non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs") (together alternative resolution vehicles). Part I of this article highlights the origins of NPAs and DPAs and how use of alternative resolution vehicles is not authorized by the FCPA or any other specific legislation.

Even though DOJ policy states that NPAs and DPAs are to be used only "under appropriate circumstances," Part II of this article demonstrates that alternative resolution vehicles have become the dominant way for the DOJ to resolve corporate FCPA scrutiny and serve as an obvious reason for the general increase in FCPA enforcement over the past decade. To the many cheerleaders of increased FCPA enforcement, NPAs and DPAs are thus worthy of applause.

Yet in a legal system based on the rule of law, quality of enforcement is more important than quantity of enforcement. Part III of this article thus attempts to measure the impact NPAs and DPAs have on the quality of FCPA enforcement. Although most aspects of corporate FCPA enforcement are opaque, this section identifies a viable way to measure the impact by comparing individual enforcement actions that result from enforcement actions against business organizations and demonstrates how this comparison materially flipped at the same time NPAs and DPAs were introduced to the FCPA context. Next, through the construction of a working hypothesis, this article highlights relevant empirical data points and case studies that demonstrate a disturbing impact NPAs and DPAs have on the quality of FCPA enforcement. The disturbing impact is that while NPAs and DPAs yield a higher quantity of FCPA enforcement, they also yield a lower quality of FCPA enforcement. In other words, NPAs and DPAs do not necessarily represent provable FCPA violations but contribute to a façade of FCPA enforcement.

Finally, Part IV of this article highlights why this disturbing impact matters not only in the specific context of the FCPA but more broadly as other nations with "FCPA-like" laws adopt U.S.-style alternative resolution vehicles.

I. THE ORIGINS OF NPAS AND DPAS

Historically, the DOJ had two choices when a business organization was the subject of legal scrutiny whether in the FCPA context or otherwise: either charge the entity with a legal violation or not charge. However, in 2004 the DOJ brought to FCPA enforcement a third option it had used sparingly in other contexts[1]: NPAs and DPAs (together alternative resolution vehicles). Part I of this article highlights the origins of NPAs and DPAs and how use of such alternative resolution is not authorized by the FCPA or any other specific legislation.

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Prior to NPAs and DPAs becoming the dominant way for the DOJ to resolve corporate FCPA scrutiny, the DOJ had two choices when a business organization was the subject of legal scrutiny. The two choices — which have served as the foundation of the U.S. criminal justice system for nearly a century when corporate criminal liability was first recognized — was either charge the entity with a legal violation or not charge.

This binary option is best highlighted in a 1999 official DOJ memorandum authored by then Deputy Attorney General Eric Holder.[2] What became widely-known as the "Holder Memo" bore the subject line "Bringing Criminal Charges Against Corporations" and attached a document titled "Federal Prosecution of Corporations."[3] The document provided guidance to all DOJ enforcement attorneys on factors "prosecutors should consider" in "conducting an investigation, determining whether to bring charges, and negotiating plea agreements" with business organizations.[4] In other words, the Holder Memo made

[1] The first DPA the DOJ used to resolve an enforcement action is believed to have occurred in 1994. *See* Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, *in* 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 818 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1517, 2005). For statistics on NPAs/DPAs between 2000 and 2014, see *2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN (Jan. 6, 2015), http://www.gibsondunn.com/publications/Documents/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf.

[2] Memorandum from Eric Holder, Deputy Att'y Gen., on Bringing Criminal Charges Against Corporations to All Component Heads and U.S. Attorneys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF.

[3] *Id.*

[4] *Id.*

no reference to anything other than the binary option when a business organization was the subject of criminal legal scrutiny.

However, in the early 2000s an isolated event occurred which caused the DOJ to reconsider its traditional approach to resolving alleged instances of corporate criminal liability. In 2002, in the aftermath of the financial collapse of Enron, the DOJ announced criminal charges against Enron's long-time auditor Arthur Andersen LLP.[5] As stated by the DOJ:

> [The criminal indictment charges] the Arthur Andersen partnership with obstruction of justice, for destroying literally tons of paper documents and other electronic information related to the Enron inquiries. The indictment catalogues allegations of widespread criminal conduct by the Arthur Andersen firm, charging that the firm sought to undermine our justice system by destroying evidence relevant to the investigations. It alleges that at the firm's direction, Andersen personnel engaged in the wholesale destruction of tons of paperwork and attempted to purge huge volumes of electronic data or information. The indictment further explains that at the time Andersen knew full well . . . that these documents were relevant to the inquiries and to Enron's collapse. The indictment alleges that Andersen partners and others personally directed these efforts to destroy evidence.[6]

Upon being criminally indicted, Arthur Andersen exercised its constitutional right to a jury trial and put the DOJ to its burden of proof and in 2002 the jury criminally convicted the business organization of obstruction of justice.[7] As a result of the criminal charges and criminal conviction, Arthur Andersen suffered numerous collateral consequences, including the loss of its certified public accounting license and the resulting inability to audit public companies.[8] In short order, Arthur Andersen laid off thousands of

[5] *See* Larry Thompson, Deputy Att'y Gen., Transcript, News Conference — Arthur Andersen Indictment (Mar. 14, 2002), *available at* http://www.justice.gov/archive/dag/speeches/2002/031402newsconferncearthurandersen.htm.

[6] *Id.*

[7] *See* Luisa Beltran, Brett Gering & Alice Martin, *Andersen Guilty: Once Grand Accounting Firm Now Faces Five Years Probation, $500,000 Fine and Possibly Its Own End*, CNN MONEY (June 16, 2002, 4:43 PM EDT), http://money.cnn.com/2002/06/13/news/andersen_verdict.

[8] *See id.* (stating that Arthur Andersen lost many of its public audit clients and that the Texas state accounting board filed a motion to revoke Arthur Andersen's license); *see also Arthur Andersen Goes out of Business*, ABC NEWS (Aug. 31, 2002),

employees and effectively went out of business in 2002.[9] Ultimately in 2005 the Supreme Court unanimously reversed Arthur Andersen's conviction; however, the near immediate negative consequences of the criminal charges and conviction had already occurred and could not be reversed.[10]

The perceived "Arthur Andersen effect" (i.e. that criminal charges alone, and certainly criminal convictions, could be the death sentence of a business organization) caused the DOJ to reconsider its historical binary option to resolving alleged instances of corporate criminal liability.[11]

In 2003, then Deputy Attorney General Larry Thompson issued an official DOJ memorandum regarding "Principles of Federal Prosecution of Business Organizations" that became widely-known as the "Thompson Memo."[12] It began as follows:

> As the [DOJ] Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud.[13]

Like the previously-issued Holder Memo, the Thompson Memo set forth guidance to all DOJ enforcement attorneys on factors prosecutors should consider when a business organization is the subject of criminal legal scrutiny. As relevant to this article, the Thompson Memo set forth a subtle, yet important, change to DOJ policy that reflected concerns about the perceived constraining aspects of its historical binary approach to criminal law enforcement. Under the heading "Charging a Corporation: Cooperation and Voluntary Disclosure," the Thompson Memo stated:

> In some circumstances . . . granting a corporation immunity or amnesty or ***pretrial diversion*** may be considered in the course of the government's investigation. In such circumstances,

http://abcnews.go.com/Business/Decade/arthur-andersen-business/story?id=9279255.

[9] *See Arthur Andersen Goes Out of Business*, *supra* note 8.

[10] *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005).

[11] *See supra* Part I.

[12] Memorandum from Larry D. Thompson, Deputy Att'y Gen., on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

[13] *Id.*

> prosecutors should refer to the principles governing non-prosecution agreements generally.[14]

Even though the Thompson Memo made "only the most fleeting of references" to alternative resolution vehicles[15] it "effectively open[ed] the door to the use of DPAs and NPAs."[16] As with any new law enforcement policy, there was a period of absorption before the new policy became an accepted practice.

In late 2004, the DOJ used alternative resolution vehicles for the first time in an FCPA enforcement action against InVision Technologies, Inc. and General Electric Company ("GE").[17] As stated in the InVision NPA, the DOJ "agreed not to prosecute InVision under the Foreign Corrupt Practices Act . . . for conduct that potentially violates the FCPA based on certain foreign transactions and attempted transactions conducted by InVision in [Thailand, China, and the Philippines]."[18] According to the DOJ's release:

> The investigations by the Department and the SEC revealed that InVision, through the conduct of certain employees, was aware of a high probability that its agents or distributors in . . . Thailand, . . . China and . . . the Philippines had paid or offered to pay money to foreign officials or political parties in connection with transactions or proposed transactions for the sale by InVision of its airport security screening machines. The investigations followed the voluntary disclosure to the Department and the SEC by InVision and GE of facts obtained

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[14] *Id.* (emphasis added). The Thompson Memo then proceeded to state: "*See* USAM § 9-27.600-650. These principles permit a non prosecution agreement in exchange for cooperation when a corporation's 'timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.'" *Id.* The irony is that USAM § 9-27.600-650 concerns non-prosecution agreements with individuals (i.e., natural persons) not legal persons such as business organizations.

[15] Joseph Warin & Peter E. Jaffe, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform*, 19 WHITE-COLLAR CRIME, Sept. 2005, at 2, *available at* http://www.gibsondunn.com/fstore/documents/pubs/WarinJaffeWCCDeferredPros0905.pdf.

[16] Scott A. Resnik & Keir N. Dougall, *The Rise of Deferred Prosecution Agreement*, N.Y. L.J., Dec. 18, 2006, *available at* http://www.kattenlaw.com/files/21834_The_Rise_of_Deferred_Prosecution_Agreements.pdf.

[17] *See* Press Release, U.S. Dep't of Justice, InVision Technologies, Inc. Enters into Agreement with the United States (Dec. 6, 2004) [hereinafter InVision Release], *available at* http://www.justice.gov/archive/opa/pr/2004/December/04_crm_780.htm.

[18] Letter from Dep't of Justice, to Brad D. Brian, Counsel to Gen. Elec. Co., on Gen. Elec. Co. Agreement (Dec. 3, 2004) [hereinafter GE Agreement Letter], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech/12-03-04invisiontech-agree-ge.pdf.

> in their internal investigation into the potential FCPA violations.[19]

In a related DOJ agreement with General Electric (GE had agreed to acquire InVision on the same day as the enforcement action), the company "agreed, among other things, to ensure compliance by InVision of InVision's obligations under its agreement and to effect FCPA compliance programs within its new InVision business."[20] Specifically relevant to this article, the InVision/General Electric enforcement action: (i) involved conduct that per the DOJ's own language "potentially violate[d] the FCPA,"; and (ii) did not result in any related individual prosecutions of company employees.[21]

At the time, the unique way in which the GE/InVision enforcement action was resolved did not generate much attention, although certain astute FCPA commentators noted perhaps a trend of the DOJ's "use of more creative methods in resolution of criminal cases" and further noted that the "DOJ appears to have adopted a new approach."[22]

After additional NPAs/DPAs were used in 2005 to resolve FCPA enforcement actions against business organizations,[23] a new way of resolving FCPA criminal actions was clearly developing, although it was still noted that alternative resolution vehicles were "not yet the norm in corporate investigations."[24] However, the new norm quickly emerged and alternative resolution vehicles became the dominant way for the DOJ to resolve corporate FCPA scrutiny. Indeed, as highlighted in Table 1 in the next section, there were twelve corporate criminal FCPA enforcement actions between 2006 and 2007, and 100% of the enforcement actions involved either an NPA or DPA.

Like the first FCPA NPA used in the InVision enforcement action and all subsequent NPAs used in the FCPA context, an NPA is a privately negotiated agreement between the DOJ and a business organization. These agreements, while often made public but not filed in court, take the form of a letter agreement from the DOJ to a business organization's lawyer and generally include a brief, often times bare-bones, statement of facts replete with legal conclusions that

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[19] InVision Release, *supra* note 17.

[20] *Id.*

[21] GE Agreement Letter, *supra* note 18.

[22] SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 1, 4 (2006), *available at* http://www.shearman.com/~/media/Files/NewsInsights/Publications/2006/03/Recent-Trends-and-Patterns-in-FCPA-Enforcement/Files/View-Full-Text/FileAttachment/LIT_032706.pdf.

[23] *See infra* Table 1.

[24] Resnik & Dougall, *supra* note 16.

the company acknowledges responsibility for, as well as a host of compliance undertakings that the company agrees to implement.[25] Because an NPA is not filed with a court, there is absolutely no judicial scrutiny of these agreements, including the statement of facts and legal conclusions that serve as the foundation of the agreement. Thus, there is no independent review to determine if evidence exists to support the essential elements of the "crime" not prosecuted or to determine whether valid and legitimate defenses are relevant to the alleged conduct. In other words, when utilizing an NPA, the DOJ occupies the role of prosecutor, judge, and jury all at the same time.

A DPA, on the other hand, is filed with a court and has the look and feel of a pleading, although the factual allegations are likewise often bare-bones and replete with legal conclusions.[26] Like NPAs, DPAs are also the result of privately negotiated agreements between the DOJ and a business organization's lawyer. In exchange for the DOJ agreeing to defer prosecution of the crime alleged (usually for an eighteen-month to three-year period), the company acknowledges responsibility for the alleged conduct and agrees to implement a host of compliance undertakings.

Because a DPA is filed with a court, these agreements, at least in theory, could be subject to meaningful judicial scrutiny. However, a 2009 report by the Government Accountability Office ("GAO") concluded that judicial scrutiny of DPAs was essentially nonexistent as well.[27] "To assess what role the courts have played in the DPA process," the GAO "obtained written responses to structured interview questions from . . . judges who had overseen DPAs in federal courts."[28] Based on these responses, the GAO found that "judges reported they were generally not involved in the DPA process."[29]

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[25] For recent examples of NPAs used to resolve corporate FCPA enforcement actions, see Letter from U.S. Dep't of Justice to Bio-Rad Labs., Inc. (Nov. 3, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bio-rad/Bio-Rad-NPA-110314.pdf; Letter from U.S. Dep't of Justice to Ralph Lauren Corp. (Apr. 22, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf.

[26] For recent examples of DPAs used to resolve corporate FCPA enforcement actions, see Deferred Prosecution Agreement, United States v. Dallas Airmotive, Inc., (Dec. 10, 2014), http://www.justice.gov/criminal/fraud/fcpa/cases/dallas-air/dai-dpa-final.pdf; Deferred Prosecution Agreement, United States v. Diebold, Inc., (Oct. 22, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf.

[27] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 25 (2009) [hereinafter CORPORATE CRIME], *available at* http://www.gao.gov/assets/300/299781.pdf.

[28] *Id.* at 8.

[29] *Id.* at 25.

Thus, while DPAs could in theory be subjected to meaningful judicial scrutiny, the GAO report found, as relevant to this article, that judges routinely "rubber-stamp" DPAs without inquiring into whether factual evidence exists to support the essential elements of the crime alleged or to determine whether valid and legitimate defenses are relevant to the alleged conduct.[30]

[30] A notable exception to such judicial "rubber-stamping" of DPAs occurred in 2015, albeit outside of the FCPA context. In *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015) (a criminal action that alleged unlawful export of U.S. origin goods and services to Iran, Sudan, and Burma), the DOJ and Fokker agreed to an eighteen-month DPA in which the company agreed to forfeit $10.5 million and to pay an additional $10.5 million in a parallel civil settlement.

However, Judge Richard Leon (D.D.C.), unlike so many other trial court judges who had DPAs placed on their docket, rejected the DPA. The analysis section of Judge Leon's opinion stated, in pertinent part, as follows (internal citations omitted):

> Both of the parties argue, not surprisingly, that the Court's role is extremely limited in these circumstances. They essentially request the Court to serve as a rubber stamp . . . . Unfortunately for the parties, the Court's role is not quite so restricted.
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> . . . .
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> One of the purposes of the Court's supervisory powers, of course, is to protect the integrity of the judicial process.
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> The parties are, in essence, requesting the Court to lend its judicial imprimatur to their DPA. In effect, the Court itself would 'become [an] instrument[] of law enforcement.' The parties also seek to retain the possibility of using the full range of the Court's powers in the future should Fokker Services fail to comply with the agreed upon terms. To put it bluntly, the Court is thus being asked to serve as the leverage over the head of the company.
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> . . . .
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> . . . I am well aware, and agree completely, that our supervisory powers are to be exercised 'sparingly,' and I fully recognize that this is not a typical case for the use of such powers. The defendant has signed onto the DPA and is not seeking redress for any impropriety it has identified. But the Court must consider the public as well as the defendant. After all, the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct.
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> . . . [A]fter looking at the DPA in its totality, I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services' conduct . . . . In my judgment, it would undermine the public's

Completing the evolution of DOJ policy regarding alternative resolution vehicles, in 2008 NPAs and DPAs became further entrenched in DOJ policy with the release of an official DOJ memorandum by then Deputy Attorney General Mark Filip in what became widely known as the "Filip Memo."[31] Similar to the prior Holder and Thompson memos, the Filip Memo concerned "Principles of Federal Prosecution of Business Organizations" and began:

> [This memo] is a revision of the Principles of Federal Prosecution of Business Organizations . . . . The revised Principles will be set forth for the first time in the *United States Attorneys' Manual*, and will be binding on all federal prosecutors within the Department of Justice. The revised Principles will be effective immediately, on a prospective basis.[32]

Compared to the prior Holder and Thompson memos, which made only fleeting reference to NPAs and DPAs, the Filip memo specifically stated, in pertinent part:

> In certain instances, it may be appropriate . . . to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.[33]
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> . . . .
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> [W]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be

> confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies . . . . As such, the Court concludes that this agreement does not constitute an appropriate exercise of prosecutorial discretion and I cannot approve it in its current form.

Id. at 164-67. The DOJ and Fokker Services jointly appealed Judge Leon's order rejecting the DPA and a decision from the D.C. Circuit is pending. In the meantime, Judge Leon's order has started an important legal and policy conversation as to the judiciary's role in the alternate reality that the DOJ has created and championed through its use of alternative resolution vehicles.

[31] Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to the Heads of Dep't Components, U.S. Attorneys (Aug. 28, 2008), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[32] *Id.* at 1.

[33] *Id.* at 2.

> appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.[34]

Perhaps mindful that NPAs and DPAs represented a radical shift from the DOJ's traditional binary approach to resolving alleged instances of corporate crime, the DOJ was quick to craft policy rationales to justify its new approach. For instance, in a 2005 speech then DOJ Assistant Attorney General Christopher Wray stated:

> [W]e're encouraging prosecutors to develop flexible and innovative approaches as they work to ensure that companies accept responsibility and cooperate with us. In certain cases, an alternative resolution — like a deferred prosecution or even a nonprosecution agreement — can strike that balance.
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> One option we've used increasingly is the deferred prosecution agreement, which some people describe as pretrial diversion. We file charges, but agree to defer prosecution for a year, two years, or even longer. In return, the company agrees to cooperate fully and admits publicly the facts of its misconduct. It also typically makes a payment, which can be structured as a fine, restitution, forfeiture, or some other category. We can also require the company to take remedial actions to make

[34] *Id.* at 18.

> sure the conduct doesn't happen in the future. If the company complies with the agreement, the charges are dismissed at the end of the term. If not, we go to trial, now armed with the company's admission and all the evidence we obtained from its cooperation. In other words, if the company violates the agreement, its conviction is virtually a foregone conclusion.
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> The DP structure has many of the same benefits as a conviction. In terms of remedies, anything that the judge could impose under the organizational sentencing guidelines can be required under a DP agreement. The DP won't result in a criminal conviction if the defendant complies with the agreement, but filing charges publicly condemns the company's conduct.
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> . . . .
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> In other cases, we've used nonprosecution agreements with cooperating companies. These don't involve the filing of charges, but we still typically require the company to admit its conduct publicly. We also retain enormous leverage over the company, because we reserve the right to prosecute if it fails to comply with the agreement — again, armed with the company's admissions. And we can still include virtually any combination of payments and remedial measures.[35]

The DOJ's implicit policy assertion that NPAs and DPAs were needed to avert another "Arthur Andersen effect" was quickly embraced by the legal practitioners — perhaps because they stood to benefit from NPAs and DPAs because the agreements expanded the market for legal services — and the "Arthur Andersen effect" became accepted as a sort of gospel truth.

Legal practitioners stated:

> The reality is that few public or regulated companies can withstand the uncertainties and consequences that flow from an unresolved federal criminal indictment, much less conviction. The stigma of indictment alone is likely to cause the flight of clients, precipitous loss of business, plummeting

[35] Christopher Wray, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005), *in* Declaration of Lawrence D. Levit at Exhibit 1, *In re* Invision Techs., Inc. Sec. Litig., No. C-04-3181 (N.D. Cal. Aug. 31, 2006), *available at* http://securities.stanford.edu/filings-documents/1031/INVN04-01/2005628_r17d_04CV3181.pdf.

> stock prices, and onerous reporting obligations. Many entities would not survive as viable concerns long enough to defend themselves at trial. Accordingly, the pressure on corporate counsel to avoid indictment is dramatic.[36]

Likewise, others stated:

> Because of their almost limitless charging discretion, prosecutors are able to exercise powerful leverage over their corporate targets. To avoid indictment and not risk conviction either by a jury or plea agreement, companies seek and prefer pretrial diversion despite its heavy price. A criminal investigation and indictment alone could have enormous adverse consequences even if a company were ultimately acquitted at trial. For example, under federal procurement regulations, companies under investigation or indictment are suspended from applying for or receiving government contracts, subsidies, and assistance — effectively suspending any and all of their government-related business. Publicly traded corporations typically face a sharp drop in share value and debilitating class action lawsuits. A conviction could effectively result in a corporate death sentence, harming innocent employees, stockholders, and the economy. . . .
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> . . . .
> . . . [M]any corporations reluctantly prefer [NPAs and DPAs] rather than risk the adverse collateral consequences to the company, its innocent employees, and its shareholders from a prosecution and possible conviction.[37]

Even as the isolated 2002 Arthur Andersen demise faded into history, the DOJ has continued, over a decade later, to keep the perceived "Arthur Andersen effect" alive to justify its use of NPAs and DPAs. For instance, in 2012 then Assistant Attorney General Lanny Breuer stated:

> I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands

[36] Resnik & Dougall, *supra* note 16.

[37] WASHINGTON LEGAL FOUNDATION, CHAPTER 6: DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 6-2, -7, *available at* http://www.wlf.org/upload/chapter6DPAs.pdf.

> of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement.[38]

However, DOJ officials could have slept better at night because the "Arthur Andersen effect" that has served as the DOJ's primary policy justification for using NPAs and DPAs for over a decade is a fallacy and has been debunked. In an article titled "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century," Gabriel Markoff found, after studying actual DOJ enforcement data, that "much in opposition to the warnings of extreme collateral consequences that are continually repeated in both the popular and academic literature[,] no publicly traded company went out of business as the result of a federal criminal conviction in the years 2001 to 2010."[39] Indeed, in 2013 then DOJ Deputy Assistant Attorney General Denis McInerney acknowledged that there is a very small chance that a company would be put out of business as a result of actual DOJ criminal charges.[40]

In short, for the past two decades, it is clear that the DOJ has felt constrained by its traditional binary approach to corporate criminal law enforcement which, in the words of then Assistant Attorney General Breuer, presented prosecutors a "stark choice when they encountered a corporation that had engaged in misconduct — either indict, or walk away."[41]

However, there is absolutely nothing wrong with this choice. Bringing criminal charges against a business organization or individual should not be easy. It should be difficult. Our founding fathers recognized this as a necessary bulwark against an all-powerful government, and there is no legal or policy reason warranting a change from such a fundamental and long-lasting law enforcement principle.

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[38] Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Speech at the New York City Bar Ass'n (Sept. 13, 2012) [hereinafter Breuer Speech], *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

[39] Gabriel Markoff, *Arthur Anderson and the Myth of the Corporate Death Penalty*, FCPA PROFESSOR (Aug. 23, 2012), http://www.fcpaprofessor.com/arthur-anderson-and-the-myth-of-the-corporate-death-penalty.

[40] Mike Koehler, "*Our Stellar FCPA Unit Continues to Go Gangbusters, Bringing Case After Case*," FCPA PROFESSOR (May 6, 2013) [hereinafter *Our Stellar FCPA*], http://www.fcpaprofessor.com/our-stellar-fcpa-unit-continues-to-go-gangbusters-bringing-case-after-case.

[41] Breuer Speech, *supra* note 38.

Moreover, to the extent the DOJ feels constrained by its traditional binary approach to corporate criminal law enforcement, there are other policy options besides alternative resolution vehicles. For instance, the DOJ could embrace alternative concepts of corporate criminal liability — common in many peer nations — in which a business organization can only face criminal liability to the extent conduct was engaged in by "senior officers" or so-called "controlling minds" of the organization.[42] Moreover, and specific to the FCPA context, the DOJ could embrace — consistent with the FCPA-like laws of many peer nations — a compliance defense in which a business organization would not face legal liability to the extent it had pre-existing compliance policies and procedures designed to prevent FCPA violations yet a non-executive employee engaged in conduct in violation of the FCPA.[43]

However, rather than consider substantive solutions to corporate criminal liability that are common in many peer nations and responsive to the DOJ's policy concerns, the DOJ has created alternative resolution vehicles that represent a radical procedural and substantive shift from traditional criminal law enforcement principles.

Indeed, in recent years the DOJ has gone beyond justifying its extensive use of NPAs and DPAs to championing their use to resolve alleged instances of corporate crime. For instance, in 2012 then Assistant Attorney General Breuer maintained that such agreements "have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe."[44] Breuer further stated:

> The result has been, unequivocally, far greater accountability for corporate wrongdoing — and a sea change in corporate compliance efforts. . . . One of the reasons why deferred

[42] For instance, in the United Kingdom "the test for corporate criminal liability requires proof that the 'controlling mind' of the company (i.e., board level senior management) was complicit in the relevant criminality." *See Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference*, SERIOUS FRAUD OFFICE (Oct. 24, 2013), http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx. Likewise, in Canada a "senior official" must be involved in the improper conduct for there to be corporate criminal liability. *See, e.g.*, Paul Blyschak, *Corporate Liability for Foreign Corrupt Practices Under Canadian Law*, 59 MCGILL L.J. 655 (2014) (discussing problematic areas of corporate liability in cases of foreign corrupt practices under Canadian law).

[43] *See* Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 635-44 (highlighting compliance defenses in FCPA-like laws around the world).

[44] Breuer Speech, *supra* note 38.

> prosecution agreements are such a powerful tool is that, in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea . . . .[45]

Here again however, the DOJ's policy justification rings hollow as there is no data to suggest that resolving alleged instances of corporate criminal liability through NPAs or DPAs achieves any meaningful deterrence. For instance, the GAO study on NPAs and DPAs found:

> DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs — in addition to other tools, such as prosecution — contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met . . . .
>
> . . . .
>
> . . . [W]hile DOJ has stated that DPAs and NPAs are useful tools for combating and deterring corporate crime, without performance measures, it will be difficult for DOJ to demonstrate that these agreements are effective at helping the department achieve this goal.[46]

Likewise, the Organisation for Economic Co-operation and Development ("OECD") report on FCPA enforcement observed that the "actual deterrent effect [of NPAs and DPAs] has not been quantified," and it requested that the U.S. "[m]ake public any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials."[47] The DOJ's response to this request stated:

> Scholars have recognized that quantifying deterrence is extremely difficult. This is equally true for the deterrent effect of DPAs and NPAs. Thus . . . measuring 'the impact of NPAs and DPAs in deterring the bribery of foreign public officials' would be a difficult task, save providing certain anecdotal and

[45] Breuer Speech, *supra* note 38.

[46] CORPORATE CRIME, *supra* note 27, at 20, 28.

[47] ORG. FOR ECON. CO-OPERATION & DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 20, 63 (2010) [hereinafter OECD PHASE 3 U.S. REPORT], *available at* http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf.

> other circumstantial evidence. One of the best sources of anecdotal evidence demonstrating that DPAs and NPAs have a deterrent effect comes from the companies themselves. The companies against which DPAs and NPAs have been brought have often undergone dramatic changes.[48]

Despite the DOJ's statement that companies resolving FCPA enforcement actions through NPAs or DPAs have "undergone dramatic changes," several companies that resolved FCPA enforcement actions through alternative resolution vehicles have subsequently resolved additional FCPA enforcement actions.

For instance, in 2008 Aibel Group Ltd. pleaded guilty to violating the FCPA anti-bribery provisions and "admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct."[49] The DOJ release stated: "This is the third time since July 2004 that entities affiliated with Aibel Group have pleaded guilty to violating the FCPA."[50] Similarly, in 2012 Marubeni Corp. resolved a $54.6 million FCPA enforcement action through a DPA concerning alleged improper conduct in Nigeria.[51] In 2014, the company resolved another FCPA enforcement action — an $88 million dollar action concerning alleged improper conduct in Indonesia.[52] In addition to the above examples, several companies that resolved FCPA enforcement actions through alternative resolution vehicles have subsequently been the subject of additional FCPA scrutiny.[53]

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[48] ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 10 (2012), *available at* http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf.

[49] Press Release, U.S. Dep't of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008), *available at* http://www.justice.gov/archive/opa/pr/2008/November/08-crm-1041.html.

[50] *Id.*

[51] Press Release, U.S. Dep't of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), *available at* http://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546.

[52] Press Release, U.S. Dep't of Justice, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine (Mar. 19, 2014), *available at* http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine.

[53] For instance Ingersoll-Rand, fresh off its exit of a DPA in 2011, soon disclosed other potential violations of the FCPA. *See* Joe Palazzolo, *Ingersoll-Rand Exits DPA Gracefully, Despite New FCPA Issues*, *Corruption Currents*, WALL ST. J. BLOGS (Feb. 23, 2011, 2:48 PM ET), http://blogs.wsj.com/corruption-currents/2011/02/23/ingersoll-rand-exits-dpa-gracefully-despite-new-fcpa-issues/. Further, the DPA that the DOJ used to

In short, alternative resolution vehicles represent a radical departure from traditional criminal law enforcement principles. However, evolving DOJ policy has championed alternative resolution vehicles even though the DOJ's policy justifications are either based on a fallacy or ring hollow. Indeed, Professor David Uhlmann (a former DOJ prosecutor) has stated that the DOJ's justifications for NPAs and DPAs are a "policy [in] search of a rationale."[54]

Nevertheless, as highlighted in the next section, since NPAs and DPAs become formally embedded in the U.S. Attorneys' Manual in 2008, the alternative resolution vehicles have become the dominant way for the DOJ to resolve alleged instances of FCPA criminal liability notwithstanding the fact that such resolution vehicles are not authorized by the FCPA nor any other specific legislation.[55]

II. THE DOMINANT USE OF NPAS AND DPAS IN FCPA ENFORCEMENT

Even though DOJ policy states that NPAs and DPAs are to be used only "under appropriate circumstances," Part II of this article demonstrates that alternative resolution vehicles have become the dominant way for the DOJ to resolve corporate FCPA scrutiny and serve as an obvious reason for the general increase in FCPA enforcement over the past decade. To the many cheerleaders of increased FCPA enforcement, NPAs and DPAs are thus worthy of applause.

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resolve Daimler's egregious conduct in violation of the FCPA was extended. Christopher Matthews, *Daimler Not Out of the Woods in Bribery Case*, *Corruption Currents*, WALL ST. J. BLOGS (Apr. 5, 2012, 1:10 PM ET), http://blogs.wsj.com/corruption-currents/2012/04/05/daimler-not-out-of-the-woods-in-bribery-case/. Although the reasons for the extension were not made public, the DPA provided that it could be extended if Daimler "knowingly violated any provision of the Agreement." *Id.*

[54] Koehler, *Our Stellar FCPA*, *supra* note 40.

[55] The DOJ has asserted that DPAs with business organizations are authorized by the Speedy Trial Act of 1974.

The Act generally states that "[i]n any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial." 18 U.S.C. § 3161(a) (2012). A separate section of the Act provides as follows: "[t]he following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: [a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." *Id.* § 3161(h), (h)(2).

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Table 1 below highlights all criminal DOJ FCPA enforcement actions[56] against business organizations from December 2004 (the first instance in which the DOJ resolved an FCPA enforcement action against a business organization with an alternative resolution vehicle) to 2014.[57]

Table 1

Year	**Legal Entity**	**Form of Resolution**
2004	Invision Technologies, Inc.	NPA
	General Electric Co.	NPA
2005	DPC (Tianjin) Co. Ltd.	Plea
2005	Monsanto	DPA
2005	Micrus Corp.	NPA
2005	Titan Corp.	Plea
2006	Schnitzer Steel Industries, Inc.	DPA
	SSI International Far East Ltd.	Plea
2007	Paradigm B.V.	NPA
2007	Vetco Gray Controls, Inc.	Plea
	Vetco Gray Controls Ltd.	Plea
	Vetco Gray UK Ltd.	Plea
	Aibel Group Ltd.	DPA

[56] The FCPA enforcement action involved either FCPA anti-bribery violations, books and records violations, internal controls violations, or all three. Note: one action listed on the DOJ's FCPA website did not involve actual FCPA charges and is thus excluded from Table 1. *See* Information at 1, United States v. BAE Systems plc, No. 1:10-cr-00035-JDB (D.D.C. 2010), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-01-10baesystems-info.pdf (charging BAE Systems with conspiracy to make false statements, to defraud the government, and to violate other laws, as opposed to an FCPA violation).

[57] Unless otherwise noted, enforcement action information is derived from the DOJ's FCPA website. *Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited Sept. 30, 2015).

2007	Lucent Technologies, Inc.	NPA
2007	Akzo Nobel N.V.	NPA
2007	Chevron Corp.[58]	NPA
2007	Ingersoll-Rand Co. Ltd. / Thermo King Ireland Ltd.	DPA
2007	York International Corp.	DPA
2007	Textron, Inc.	NPA
2007	Baker Hughes Services International, Inc. Baker Hughes, Inc.	Plea DPA
2007	El Paso Corp.[59]	NPA
2007	Omega Advisors, Inc.	NPA
2008	Fiat SpA / Iveco S.p.A./ CNH Italia S.p.A. / CNH France S.A.	DPA
2008	Siemens AG Siemens S.A. (Argentina) Siemens Bangladesh Ltd. Siemens S.A. (Venezuela)	Plea Plea Plea Plea
2008	Faro Technologies, Inc.	NPA
2008	AGA Medical Corp.	DPA
2008	Willbros Group, Inc. / Willbros International, Inc.	DPA
2008	AB Volvo / Renault Trucks SAS / Volvo Construction Equipment AB	DPA
2008	Flowserve Corp. / Flowserve Pompes SAS	DPA

[58] *See Chevron Corporation (UN Oil-for-Food)*, STOLEN ASSET RECOVERY INITIATIVE (Nov. 14, 2007), http://star.worldbank.org/corruption-cases/node/19892.

[59] *See U.S. v. El Paso Corporation*, SHEARMAN & STERLING LLP, http://fcpa.shearman.com/?s=matter&mode=form&id=171 (last visited Aug. 30, 2015).

2008	Westinghouse Air Brakes Technologies Corp.	NPA
2008	Nexus Technologies, Inc.	Plea
2009	UTStarcom, Inc.	NPA
2009	AGCO Ltd. / AGCO Corp.	DPA
2009	Helmerich & Payne, Inc.	NPA
2009	Control Components, Inc.	Plea
2009	Novo Nordisk A/S	DPA
2009	Latin Node, Inc.	Plea
2009	Kellogg Brown & Root, LLC	Plea
2010	Alcatel-Lucent S.A. Alcatel Centroamerica S.A. Alcatel-Lucent France S.A. Alcatel-Lucent Trade International, A.G.	DPA Plea Plea Plea
2010	RAE Systems, Inc.	NPA
2010	Panalpina, Inc. Panalpina World Transport (Holding) Ltd.	Plea DPA
2010	Noble Corp.	NPA
2010	Shell Nigeria Exploration and Production Company Ltd.	DPA
2010	Pride International, Inc. Pride Forasol S.A.S.	DPA Plea
2010	Tidewater Marine International, Inc.	DPA
2010	Transocean, Inc.	DPA
2010	ABB, Inc. ABB Ltd.	Plea DPA

2010	Alliance One International	NPA
	Alliance One Tobacco Osh, LLC	Plea
	Alliance One International AG	Plea
2010	Universal Corp.	NPA
	Universal Leaf Tabacos Ltda.	Plea
2010	Snamprogetti Netherlands B.V.	DPA
2010	Technip S.A.	DPA
2010	Daimler AG	DPA
	DaimlerChrysler Automotive Russia SAO	Plea
	Daimler Export and Trade Finance GmbH	Plea
	DaimlerChrysler China Ltd.	DPA
2010	Innospec, Inc.	Plea
2010	The Mercator Corp.	Plea
2010	Lindsey Manufacturing Co.	Criminal Indictment[60]
2011	Magyar Telekom Plc	DPA
	Deutsche Telekom AG	NPA
2011	Aon Corp.	NPA
2011	Bridgestone Corp.	Plea
2011	Armor Holdings, Inc.	NPA
2011	Tenaris S.A.	NPA
2011	Johnson and Johnson (Depuy)	DPA

[60] The criminal charges were ultimately dismissed after the court found numerous instances of prosecutorial misconduct. *See* Mike Koehler, *Milestone Erased: Judge Matz Dismisses Lindsey Convictions, Says that "Dr. Lindsey and Mr. Lee Were Put Through a Severe Ordeal" and that Lindsey Manufacturing, A "Small, Once Highly Respected Enterprise . . . Placed on Jeopardy*," FCPA PROFESSOR (Dec. 1, 2011) [hereinafter *Milestone Erased*], http://www.fcpaprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente.

2011	Comverse Technology, Inc.	NPA
2011	JGC Corp.	DPA
2011	Tyson Foods, Inc.	DPA
2011	Maxwell Technologies, Inc.	DPA
2011	Cinergy Telecommunications, Inc.	Criminal Indictment[61]
2012	Tyco International Ltd. Tyco Valves and Controls Middle East, Inc.	NPA Plea
2012	Pfizer H.C.P. Corporation	DPA
2012	The NORDAM Group, Inc.	NPA
2012	Orthofix International, N.V.	DPA
2012	Data Systems & Solutions, LLC	DPA
2012	Biomet, Inc.	DPA
2012	Bizjet International Sales and Support, Inc. Lufthansa Technik AG	DPA NPA
2012	Smith & Nephew, Inc.	DPA
2012	Marubeni Corp.	DPA
2013	Archer Daniels Midland Co. Alfred C. Toepfer International (Ukraine) Ltd.	NPA Plea
2013	Bilfinger SE	DPA
2013	Weatherford International Ltd. Weatherford Services Ltd.	DPA Plea
2013	Diebold, Inc.	DPA

[61] The criminal charges were ultimately dismissed after Cinergy became a non-operational entity. *See* Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Feb. 24, 2012) [hereinafter *Friday Roundup*], http://www.fcpaprofessor.com/friday-roundup-32.

2013	Total S.A.	DPA
2013	Ralph Lauren Corp.	NPA
2013	Parker Drilling Co.	DPA
2014	Alstom S.A. Alstom Network Schweiz AG Alstom Power, Inc. Alstom Grid, Inc.	Plea Plea DPA DPA
2014	Avon Products, Inc. Avon Products (China) Co. Ltd.	DPA Plea
2014	Dallas Airmotive, Inc.	DPA
2014	Bio-Rad Laboratories, Inc.	NPA
2014	Hewlett-Packard Polska, SP. Z O.O. ZAO Hewlett-Packard A.O. Hewlett-Packard Mexico, S. de R.L. de C.V.	DPA Plea NPA
2014	Marubeni Corp.	Plea
2014	Alcoa World Alumina, LLC	Plea

As demonstrated in Table 1, since the DOJ first used an alternative resolution vehicle in an FCPA enforcement action in December 2004, there have been 84 criminal FCPA enforcement actions against business organizations, and 70 of these enforcement actions (approximately 85%) involved an alternative resolution vehicle.

It is easy to see why the DOJ favors the use of NPAs and DPAs to resolve FCPA enforcement actions against business organizations. After all, the use of alternative resolution vehicles insulates the DOJ's FCPA enforcement theories from judicial scrutiny and places the DOJ in the role of prosecutor, judge, and jury all at the same time. In other words, think of the judicial process as a river where disputed legal issues are allowed to flow into the necessary channels. NPAs and DPAs represent logs and rubbish dumped into the river by the DOJ which block the flow of disputed legal issues into the necessary

channels, and instead of judicial decisions framing the law, prosecutorial common law flourishes.[62]

Moreover, the use of NPAs and DPAs also allows the DOJ to feed its lucrative FCPA enforcement program.[63] The notion that FCPA enforcement is lucrative for the DOJ is hard to dismiss given that some of the most forceful comments on this issue have come from former DOJ enforcement attorneys. For instance, a former DOJ prosecutor stated: "FCPA is a cash cow. Big companies, most of whom are quite vulnerable, will do anything to avoid a civil or criminal trial. FCPA becomes a cost of doing business. The money flows into the government."[64] Former DOJ Attorney General Alberto Gonzales commented that it is "easy, much easier quite frankly" for the DOJ to resolve FCPA inquiries with NPAs and DPAs and that alternative resolution vehicles have "less of a toll" on the DOJ's budget and "provide revenue" to the DOJ.[65] According to Gonzales, it is all "unfortunate."[66] Most prominently, the former Assistant Chief of the DOJ's FCPA unit stated: "The government sees a profitable program, and it's going to ride that horse until it can't ride it anymore."[67]

Indeed, use of NPAs and DPAs to resolve FCPA enforcement actions since late 2004 represents one of the more obvious reasons for the general upward trend in FCPA enforcement over the past decade. For instance, Mark Mendelsohn, the former chief of the DOJ's FCPA unit, stated that if the DOJ did not have the option of resolving FCPA enforcement actions with NPAs or DPAs, the DOJ "would certainly bring fewer cases."[68] Likewise, the OECD Report stated that "[i]t

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[62] *See, e.g.*, Michael Levy, *Prosecutorial Common Law*, FCPA PROFESSOR (Mar. 16, 2011), http://www.fcpaprofessor.com/prosecutorial-common-law.

[63] Since 2010, the DOJ has collected approximately $3 billion in corporate FCPA enforcement actions. *See* Mike Koehler, *Corporate FCPA Enforcement in 2014 Compared to Prior Years*, FCPA PROFESSOR (Jan. 13, 2015), http://www.fcpaprofessor.com/corporate-fcpa-enforcement-in-2014-compared-to-prior-years.

[64] Mike Koehler, "*Total"ly Milking the FCPA Cash Cow?*, FCPA PROFESSOR (June 3, 2013), http://www.fcpaprofessor.com/totally-milking-the-fcpa-cash-cow (highlighting numerous statements).

[65] Mike Koehler, *Former Attorney General Alberto Gonzales Criticizes Various Aspects of DOJ FCPA Enforcement*, FCPA PROFESSOR (Apr. 4, 2013), http://www.fcpaprofessor.com/former-attorney-general-alberto-gonzales-criticizes-various-aspects-of-doj-fcpa-enforcement.

[66] *Id.*

[67] Joseph Rosenbloom, *Here Come the Payoff Police*, 12 CORPORATE COUNSEL 6, 14 (June 1, 2010).

[68] *Mark Mendelsohn on the Rise of FCPA Enforcement*, 24 CORP. CRIME REP. 35, Sept. 10, 2010, *available at* http://www.corporatecrimereporter.com/mendelsohn091010.htm.

seems quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S."[69]

To the many cheerleaders of increased FCPA enforcement, NPAs and DPAs are thus worthy of applause. Indeed, some of the biggest cheerleaders of NPAs and DPAs are members of FCPA Inc.[70] The emergence and rapid rise of FCPA Inc. has been well documented and occurred during the same general time period in which NPAs and DPAs became the dominant way for the DOJ to resolve FCPA enforcement actions against business organizations.[71] Because FCPA Inc. benefits from more FCPA enforcement that results from NPAs and DPAs, as well as the post-enforcement action compliance obligations that are frequently required in NPAs and DPAs, many members of FCPA Inc. quickly embraced the DOJ rhetoric regarding alternative resolution vehicles.[72]

International monitoring groups have also cheered on increased FCPA enforcement regardless of resolution vehicles used. Indeed, the OECD's 2010 review of U.S. enforcement of the FCPA commended the United States for its "substantial enforcement, and stated commitment by the highest echelon of the Government" and noted that "[t]he United States has investigated and prosecuted the most foreign bribery cases among the Parties to the Anti-Bribery Convention."[73] In the immediate aftermath of the OECD report, the DOJ, SEC, State Department, and Commerce Department jointly issued a press release titled "OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery."[74]

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[69] OECD PHASE 3 U.S. REPORT, *supra* note 47, at 20.

[70] The author coined the term "FCPA Inc." in April 2010. *See Mike Koehler Takes on FCPA Inc*, 24 CORP. CRIME REP. 15 (April 12, 2010), http://www.corporatecrimereporter.com/fcpainc041210.htm. While perhaps viewed by some as a derogatory term, it is not intended to be. Rather, FCPA Inc. is a short-hand term used to describe a vibrant, niche industry consisting of numerous market participants such as law firms, accounting firms, compliance consulting firms and others.

[71] *See, e.g.*, Andrew Bast, *Going After Graft*, NEWSWEEK, Nov. 1, 2010, at 8; *The Anti-Bribery Business*, ECONOMIST, May 9, 2015, *available at* http://www.economist.com/news/business/21650557-enforcement-laws-against-corporate-bribery-increases-there-are-risks-it-may-go; Joe Palazzolo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), http://www.wsj.com/articles/SB10000872396390443862604578028462294611352; Steven Pearlstein, *Cashing in on Corruption*, WASH. POST (Apr. 25, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/24/AR2008042403461.html; Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010), http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html.

[72] Resnik & Dougall, *supra* note 16.

[73] OECD PHASE 3 U.S. REPORT, *supra* note 47, at 9-11.

[74] Press Release, U.S. Sec. & Exch. Comm'n, OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery (Oct. 20, 2010), *available at*

In the release, then DOJ Assistant Attorney General Breuer stated: "The United States has risen to the forefront of enhanced global efforts to combat foreign bribery, including through our vigorous enforcement of the FCPA."[75] Likewise, a Commerce Department official stated: "This report shows that the United States is serious about fighting corruption in international business transactions, and sets a high standard for global cooperation in this fight."[76]

As indicated by the above rhetoric and other DOJ enforcement attorney speeches, the DOJ seems to measure the success of its FCPA enforcement program on the number of enforcement actions brought and the amount of settlements secured. For instance in 2013, then Acting Assistant Attorney General Mythili Raman stated, "Our stellar FCPA Unit continues to go gangbusters, bringing case after case," and "we are not going away[,] . . . [and] our efforts to fight foreign bribery are more robust than ever."[77]

The quantity of FCPA enforcement actions and the amount of settlements secured also seems to be the metric by which DOJ FCPA prosecutors judge themselves. For instance, when Lanny Breuer departed from the DOJ as Assistant Attorney General, the FCPA talking point in the DOJ press release was:

> The Criminal Division has also substantially increased enforcement of the Foreign Corrupt Practices Act (FCPA), convicting three dozen individuals for FCPA-related offenses — a record number — and entering into more than 40 corporate resolutions involving eight of the top 10 largest FCPA penalties in history.[78]

Likewise, when DOJ FCPA Unit Chief Charles Duross departed, a point of emphasis was:

> Under his leadership, the FCPA Unit resolved more than 40 corporate cases, which include about two-thirds of the top 25

https://www.sec.gov/news/press/2010/2010-200.htm.

[75] *Id.*

[76] *Id.*

[77] Koehler, *Our Stellar FCPA*, *supra* note 40; Mike Koehler, *"We Are Not Going Away . . . Our Efforts to Fight Foreign Bribery Are More Robust than Ever,"* FCPA PROFESSOR (June 9, 2013), http://www.fcpaprofessor.com/we-are-not-going-away-our-efforts-to-fight-foreign-bribery-are-more-robust-than-ever.

[78] Press Release, U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Announces Departure from Department of Justice (Jan. 30, 2013), *available at* http://www.justice.gov/opa/pr/assistant-attorney-general-lanny-breuer-announces-departure-department-justice.

> biggest corporate resolutions ever. Those matters resulted in approximately $1.9 billion in monetary penalties and the conviction of more than two dozen business executives and money launderers.[79]

As Table 1 demonstrated however, approximately 85% of DOJ criminal FCPA enforcement actions against business organizations over the past decade were secured through alternative resolution vehicles not subjected to any meaningful judicial scrutiny. Rather than praising the fruits of this dynamic, this dynamic is something to lament.

Indeed, an irony of the OECD Report praising the United States for its "impressive FCPA enforcement record" was that the OECD quietly criticized and questioned many of the policies and enforcement theories which have yielded the "high level" of enforcement.[80] For instance, the OECD Report noted that the FCPA's language "does not specifically convey" that cases concerning "an operating license or permit to operate a business, or a reduction in tax or import duty" are in violation of the statute.[81] Yet, many FCPA enforcement actions resolved through NPAs or DPAs are based on this theory.[82] Moreover, the OECD Report noted, as previously discussed, that the increase in NPAs and DPAs "is one of the reasons for the impressive FCPA enforcement record in the U.S." yet also noted that these agreements are subject to little or no judicial scrutiny.[83]

Similarly, a joint World Bank Group/United Nations report praised the U.S. for "resolv[ing] more foreign bribery cases by way of settlement than any other nation."[84] Yet at the same time, the report noted that the United States has some "unique procedural features"

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[79] Press Release, Morrison & Foerster LLP, Top Government FCPA Prosecutor Charles Duross to Join Morrison & Foerster from DOJ; Will Lead Global Anti-Corruption Practice (Jan. 27, 2014), *available at* http://www.mofo.com/resources/news/2014/01/top-government-fcpa-prosecutor-charles-duross-to-join-morrison—foerster-from-doj-will-lead-global__.

[80] OECD PHASE 3 U.S. REPORT, *supra* note 47, at 20.

[81] *Id.* at 26; *see, e.g.*, Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 970, 972-75 (2010) [hereinafter *Façade*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517 (highlighting various FCPA enforcement actions concerning foreign licenses, permits, applications, certifications and customs and tax duties).

[82] *See* OECD PHASE 3 U.S. REPORT, *supra* note 47, at 26.

[83] *Id.* at 20, 33.

[84] ODUOR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY 32 (2013), *available at* http://star.worldbank.org/star/publication/left-out-bargain-settlements-foreign-bribery-cases-and-implications-asset-recovery.

and that NPAs and DPAs are "unique even among the common law jurisdictions."[85] Regarding the lack of judicial involvement in U.S. NPAs, the report stated: "In general, if a judge oversees the [settlement] process, the public will have more confidence in the outcome" and that "[w]ithout the stamp of judicial approval, settlements may have less legitimacy."[86]

In short, the cheerleaders of increased FCPA enforcement seem to be focused on the quantity of enforcement (regardless of enforcement theory, regardless of resolution vehicle used, and regardless of outcome) rather than the quality of enforcement. Indeed, a 2010 report from Transparency International (a global civil society organization) stated that certain bribery and corruption settlements in Western countries "should also make clear to laggard governments that investing in adequate enforcement can have substantial returns."[87]

Likewise, a former DOJ prosecutor noted the global trend of increased enforcement and stated:

> I think a lot of it is looking at the numbers . . . I think a lot of the global anti-bribery movement is driven by regulators around the world saying, Okay, a German company just paid $300 million to the U.S. That's sort of funny to us. Where are we in this? I think there is some international pressure. There is the pressure of raising the bar, but there's also a very cynical pressure of raising money. We're in an economic climate today where I don't think there's a single government in the world that isn't struggling to find resources. This area has emerged, again, as a money making center, which is kind of bizarre.[88]

That FCPA enforcement has become a money-making center in the minds of many is indeed bizarre because in a legal system based on the rule of law, quality of enforcement is more important than quantity of enforcement secured through NPAs and DPAs not subjected to any meaningful judicial scrutiny. However, this section has demonstrated

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[85] *Id.* at 32, 34.

[86] *Id.* at 41.

[87] FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT'L, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 9 (2010), *available at* http://www.transparency.org/whatwedo/publication/progress_report_2010_enforcement_of_the_oecd_anti_bribery_convention.

[88] MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT 264 (2014); Koehler, *Friday Roundup*, *supra* note 61; *see also Turning a New Page Against Corruption at the Corporate Level: Freshfield's Partner Explains Impact of UK Bribery Act*, ARGYLE JOURNAL (Aug. 9, 2012), http://www.argylejournal.com/general-counsel/session-transcript-adam-siegel-partner-freshfields-bruckhaus-deringer-llp/.

that alternative resolution vehicles have become the dominant way for the DOJ to resolve FCPA enforcement actions against business organizations to the cheers of many.

III. MEASURING THE IMPACT OF NPA AND DPAS ON FCPA ENFORCEMENT

Because the quality of FCPA enforcement is more important than the quantity of FCPA enforcement in a legal system based on the rule of law, Part III of this article attempts to measure the impact NPAs and DPAs have on the quality of FCPA enforcement. Although most aspects of corporate FCPA enforcement are opaque, this section identifies a viable way to measure the impact by comparing individual enforcement actions that result from related enforcement actions against business organizations and demonstrates how this comparison materially flipped at the same time NPAs and DPAs were introduced to the FCPA context. Next, through the construction of a working hypothesis, this section highlights relevant empirical data points and case studies that demonstrate a disturbing impact NPAs and DPAs have on FCPA enforcement. The disturbing impact is that while NPAs and DPAs yield a higher quantity of FCPA enforcement, they also yield a lower quality of FCPA enforcement. In other words, NPAs and DPAs do not necessarily represent provable FCPA violations but contribute to a façade of FCPA enforcement.

A. How to Measure the Impact

Transparency in law enforcement is a fundamental tenet of the rule of law. Indeed, the DOJ has stressed the importance of transparency[89] and Leslie Caldwell, Assistant Attorney General of the DOJ Criminal Division, recently stated that "greater transparency [in law enforcement] benefits everyone."[90]

While a true statement, the fact remains that much FCPA enforcement is opaque since NPAs and DPAs became the dominant

[89] *See, e.g.*, Press Release, U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.

[90] Press Release, U.S. Dep't of Justice, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

way for the DOJ to resolve FCPA enforcement actions against business organizations. For starters, these agreements are negotiated around conference room tables behind closed doors in Washington, D.C. Moreover, while NPAs and DPAs are often made public by the DOJ, the resolution vehicles often contain a bare-bones statement of facts, replete with legal conclusions. For instance, the Ralph Lauren NPA contained a three-page statement of facts (most of which identified the relevant parties);[91] the NORDAM Group NPA contained less than a three-page statement of facts (again most of which identified the relevant parties);[92] and the Lufthansa Technik NPA did not contain any statement of facts relevant to the entity.[93]

While much surrounding FCPA enforcement remains opaque, there is transparency regarding one aspect of FCPA enforcement — whether an enforcement action against a business organization resulted in a related enforcement action against company employees.

In other words, a viable way to measure the impact NPAs and DPAs have on the quality of FCPA enforcement is to compare individual enforcement actions that result from related enforcement actions against business organizations. After all, business organizations can only act through employees and agents, and if a business organization resolves an FCPA enforcement action, it would seem to suggest that provable facts exist that an actual person acted in violation of the FCPA.

Indeed, in the words of Deputy Assistant Attorney General Sung-Hee Suh, "corporations do not act criminally, but for the actions of individuals."[94] Likewise, Assistant Attorney General Caldwell stated: "Corporations do not act, but for the actions of individuals. In all but a few cases, an individual or group of individuals is responsible for the corporation's criminal conduct."[95] Stressing the importance of holding

[91] Letter from U.S. Dep't of Justice to Ralph Lauren Corp., U.S. Dep't of Justice (Apr. 22, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf.

[92] Letter from U.S. Dep't of Justice to The NORDAM Grp., Inc. (July 6, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group/2012-07-17-nordam-npa.pdf.

[93] Letter from U.S. Dep't of Justice to Lufthansa Technik AG (Dec. 21, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/lufthansa-technik/2011-12-21-lufthansa-npa.pdf.

[94] Press Release, U.S. Dep't of Justice, Deputy Assistant Attorney General Sung-Hee Suh Speaks at the PLI's 14th Annual Institute on Securities Regulation in Europe: Implications for U.S. Law on EU Practice (Jan. 20, 2015) [hereinafter Sung-Hee Suh Press Release], *available at* http://www.justice.gov/opa/pr/deputy-assistant-attorney-general-sung-hee-suh-speaks-pli-s-14th-annual-institute-securities.

[95] Press Release, U.S. Dep't of Justice, Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the 22nd Annual Ethics and Compliance

individuals accountable in connection with enforcement actions against business organization, then DOJ Attorney General Eric Holder stated in 2014:

> [T]he [DOJ] recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them. We believe that doing so is both important — and appropriate — for several reasons:
>
> First, it enhances accountability. Despite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to identify the decision makers at the company who ought to be held responsible.
>
> Second, it promotes fairness — because, when misconduct is the work of a known bad actor, or a handful of known bad actors, it's not right for punishment to be borne *exclusively* by the company, its employees, and its innocent shareholders.
>
> And finally, it has a powerful deterrent effect. All other things being equal, few things discourage criminal activity at a firm — or incentivize changes in corporate behavior — like the prospect of individual decision makers being held accountable. A corporation may enter a guilty plea and still see its stock price rise the next day. But an individual who is found guilty of a serious fraud crime is most likely going to prison.[96]

Based on the above truisms and policy reasons for holding individuals accountable, the DOJ has long recognized[97] that an FCPA

Conference (Oct. 1, 2014) [hereinafter Caldwell Remarks Press Release], *available at* http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics.

[96] Press Release, U.S. Dep't of Justice, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), *available at* http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law.

[97] For instance, in 1986 John Keeney (Deputy Assistant Attorney General, Criminal Division, DOJ) submitted written responses in the context of Senate hearings concerning a bill to amend the FCPA. He stated as follows:

> If the risk of conduct in violation of the statute becomes merely monetary, the fine will simply become a cost of doing business, payable only upon being caught and in many instances, it will be only a fraction of the profit

enforcement program based solely on corporate fines is not effective and does not adequately deter future FCPA violations. For instance, Patrick Stokes, current Chief of the DOJ's FCPA Unit, stated that the DOJ is "very focused" on prosecuting individuals as well as companies and that "going after one or the other is not sufficient for deterrence purposes."[98] Likewise, Assistant Attorney General Caldwell noted that the "prosecution of culpable individuals — including corporate executives — for their criminal wrongdoing continues to be a high priority for the department."[99]

Despite such rhetoric, there is a wide gap between FCPA enforcement against business organizations and enforcement against individuals employed by the entity resolving the corporate action. Table 2 below highlights all criminal DOJ FCPA enforcement actions against business organizations[100] from December 2004 (the first instance in which DOJ resolved an FCPA enforcement action against a business organization with an alternative resolution vehicle) to 2014 and indicates whether the enforcement action involved a related criminal prosecution of company employees.[101]

> acquired from the corrupt activity. Absent the threat of incarceration, there may no longer be any compelling need to resist the urge to acquire business in any way possible.

Business Accounting and Foreign Trade Simplification Act, Joint Hearing Before the Subcomm. on Int'l Fin. and Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., and Urban Affairs, 99th Cong. 149 (1986) (response to written questions of Senator D'Amato from John C. Keeney).

98 Mike Koehler, *DOJ Prosecution of Individuals — Are Other Factors at Play?*, FCPA PROFESSOR (Jan. 21, 2015) [hereinafter *Prosecution of Individuals*], http://www.fcpaprofessor.com/doj-prosecution-of-individuals-are-other-factors-at-play-4.

99 Caldwell Remarks Press Release, *supra* note 95.

100 The FCPA enforcement action involved either FCPA anti-bribery violations, books and records violations, internal controls violations or all three. Note: one action listed on the DOJ's FCPA website did not involve actual FCPA charges and is thus excluded from Table 2. *See* United States v. BAE Systems plc, No. 1:10-cr-00035-JDB (2010), *available at*, http://www.justice.gov/criminal/fraud/fcpa/cases/bae-systems.html.

101 Unless otherwise noted, enforcement action information is derived from the DOJ's FCPA website. *See generally Related Enforcement Actions*, *supra* note 57 (listing all DOJ criminal enforcement of FCPA against business organizations from 1977–2015).

Table 2

Year	Legal Entity	Form of Resolution	Related Criminal Prosecution[102] of Company Employees
2004	InVision Technologies, Inc.	NPA	No
	General Electric Co.	NPA	No
2005	DPC (Tianjin) Co. Ltd.	Plea	No
2005	Monsanto	DPA	No
2005	Micrus Corp.	NPA	No
2005	Titan Corp.	Plea	Yes (Steven Head)
2006	Schnitzer Steel Industries, Inc.	DPA	No
	SSI International Far East Ltd.	Plea	
2007	Paradigm B.V.	NPA	No
2007	Vetco Gray Controls, Inc.	Plea	No
	Vetco Gray Controls Ltd.	Plea	No
	Vetco Gray UK Ltd.	Plea	No
	Aibel Group Ltd.	DPA	No

[102] In certain instances, the DOJ criminal actions against company employees were not for FCPA offenses, but related criminal offenses (such as willfully failing to supply information regarding foreign bank accounts) in connection with the alleged improper payment scheme. *See, e.g.*, Grand Jury Indictment, United States v. Ali Hozhabri, No. 4:07-cr-00452 (Nov. 1, 2007), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-01-07hozhabri-indict.pdf (prosecuting a company employee for failing to file a report regarding foreign bank accounts).

2007	Lucent Technologies, Inc.	NPA	No
2007	Akzo Nobel N.V.	NPA	No
2007	Chevron Corp.[103]	NPA	No
2007	Ingersoll-Rand Co. Ltd. / Thermo King Ireland Ltd.	DPA	No
2007	York International Corp.	DPA	No
2007	Textron, Inc.	NPA	No
2007	Baker Hughes Services International, Inc. Baker Hughes, Inc.	Plea DPA	No No
2007	El Paso Corp.[104]	NPA	No
2007	Omega Advisors, Inc.	NPA	Yes (Clayton Lewis)
2008	Fiat SpA / Iveco S.p.A./ CNH Italia S.p.A. / CNH France S.A.	DPA	No
2008	Siemens AG Siemens S.A. (Argentina) Siemens Bangladesh Ltd. Siemens S.A. (Venezuela)	Plea Plea Plea Plea	Yes
2008	Faro Technologies, Inc.	NPA	No
2008	AGA Medical Corp.	DPA	No

[103] *See Chevron Corporation (UN Oil-for-Food)*, *supra* note 58.

[104] *See U.S. v. El Paso Corporation*, *supra* note 59.

2008	Willbros Group, Inc. / Willbros International, Inc.	DPA	Yes (James Tillery) (Jason Steph) (Jim Brown)
2008	AB Volvo / Renault Trucks SAS / Volvo Construction Equipment AB	DPA	No
2008	Flowserve Corp. / Flowserve Pompes SAS	DPA	No
2008	Westinghouse Air Brakes Technologies Corp.	NPA	No
2008	Nexus Technologies, Inc.	Plea	Yes (Nam Nguyen) (Kim Nguyen) (An Nguyen)
2009	UTStarcom, Inc.	NPA	No
2009	AGCO Ltd. / AGCO Corp.	DPA	No
2009	Helmerich & Payne, Inc.	NPA	No
2009	Control Components, Inc.	Plea	Yes (Richard Morlock) (Mario Covino) (Stuart Carson) (Hong Carson) (Paul Cosgrove) (David Edmonds) (Flavio Ricotti) (Han Yong Kim)
2009	Novo Nordisk A/S	DPA	No

2009	Latin Node, Inc.	Plea	Yes (Jorge Granados) (Manuel Caceres) (Manuel Salvoch) (Juan Vasquez)
2009	Kellogg Brown & Root, LLC	Plea	Yes (Albert Stanley)
2010	Alcatel-Lucent S.A. Alcatel Centroamerica S.A. Alcatel-Lucent France S.A. Alcatel-Lucent Trade International A.G.	DPA Plea Plea Plea	Yes (Christian Sapsizian) (Edgar Acosta)
2010	RAE Systems, Inc.	NPA	No
2010	Panalpina, Inc. Panalpina World Transport (Holding) Ltd.	Plea DPA	No
2010	Noble Corp.	NPA	No
2010	Shell Nigeria Exploration and Production Company Ltd.	DPA	No
2010	Pride International, Inc. Pride Forasol S.A.S.	DPA Plea	No
2010	Tidewater Marine International, Inc.	DPA	No
2010	Transocean, Inc.	DPA	No
2010	ABB, Inc. ABB Ltd.	Plea DPA	Yes (John O'Shea)

2010	Alliance One International Alliance One Tobacco Osh, LLC Alliance One International AG	NPA Plea Plea	Yes (Bobby Elkin)
2010	Universal Corp. Universal Leaf Tabacos Ltda.	NPA Plea	No
2010	Snamprogetti Netherlands B.V.	DPA	No
2010	Technip S.A.	DPA	No
2010	Daimler AG DaimlerChrysler Automotive Russia SAO Daimler Export and Trade Finance GmbH DaimlerChrysler China Ltd.	DPA Plea Plea DPA	No
2010	Innospec, Inc.	Plea	No
2010	The Mercator Corp.	Plea	Yes (James Giffen)
2010	Lindsey Manufacturing Co.	Criminal Indictment[105]	Yes (Keith Lindsey) (Steve Lee)
2011	Magyar Telekom Plc Deutsche Telekom AG	DPA NPA	No
2011	Aon Corp.	NPA	No
2011	Bridgestone Corp.	Plea	Yes (Misao Hioki)

[105] The criminal charges were ultimately dismissed after the court found numerous instances of prosecutorial misconduct. *See* Koehler, *Milestone Erased*, *supra* note 60.

2011	Armor Holdings, Inc.	NPA	Yes (Richard Bistrong)
2011	Tenaris S.A.	NPA	No
2011	Johnson and Johnson (Depuy)	DPA	No
2011	Comverse Technology, Inc.	NPA	No
2011	JGC Corp.	DPA	No
2011	Tyson Foods, Inc.	DPA	No
2011	Maxwell Technologies, Inc.	DPA	Yes (Alain Riedo)
2011	Cinergy Telecommunications, Inc.	Criminal Indictment[106]	Yes (Washington Cruz) (Amadeus Richers) (Cecilia Zurita)
2012	Tyco International Ltd. Tyco Valves and Controls Middle East, Inc.	NPA Plea	No
2012	Pfizer H.C.P. Corporation	DPA	No
2012	The NORDAM Group, Inc.	NPA	No
2012	Orthofix International N.V.	DPA	No
2012	Data Systems & Solutions, LLC	DPA	No
2012	Biomet, Inc.	DPA	No

[106] The criminal charges were ultimately dismissed after Cinergy became a non-operational entity. *See* Koehler, *Friday Roundup*, *supra* note 61.

2012	Bizjet International Sales and Support, Inc. Lufthansa Technik AG	DPA NPA	Yes (Bernd Kowalewski) (Jald Jensen) (Peter DuBois) (Neal Uhl)
2012	Smith & Nephew, Inc.	DPA	No
2012	Marubeni Corp.	DPA	No
2013	Archer Daniels Midland Co. Alfred C. Toepfer International (Ukraine) Ltd.	NPA Plea	No
2013	Bilfinger SE	DPA	No
2013	Weatherford International Ltd. Weatherford Services Ltd.	DPA Plea	No
2013	Diebold, Inc.	DPA	No
2013	Total S.A.	DPA	No
2013	Ralph Lauren Corp.	NPA	No
2013	Parker Drilling Co.	DPA	No
2014	Alstom S.A. Alstom Network Schweiz AG Alstom Power, Inc. Alstom Grid, Inc.	Plea Plea DPA DPA	Yes (Frederic Pierucci) (David Rothschild) (William Pomponi) (Lawrence Hoskins)
2014	Avon Products, Inc. Avon Products (China) Co. Ltd.	DPA Plea	No

2014	Dallas Airmotive, Inc.	DPA	No
2014	Bio-Rad Laboratories, Inc.	NPA	No
2014	Hewlett-Packard Polska, SP. Z O.O ZAO Hewlett-Packard A.O. Hewlett-Packard Mexico, S. de R.L. de C.V.	DPA Plea NPA	No
2014	Marubeni Corp.	Plea	No
2014	Alcoa World Alumina, LLC	Plea	No

As again highlighted in Table 2, since the DOJ first used an alternative resolution vehicle in December 2004 to resolve an FCPA enforcement action against a business organization, there have been 84 criminal FCPA enforcement actions against business organizations. Despite the fact that "corporations do not act criminally, but for the actions of individuals," 64 of these enforcement actions (76%) did not involve any related criminal prosecution of company employees.[107]

Before exploring reasons for this wide gap, it is important to understand that such a gap between criminal FCPA enforcement actions against business organizations and related individual enforcement actions did not exist prior to the DOJ introducing NPAs and DPAs to the FCPA context in late 2004.

Table 3 below highlights all criminal FCPA enforcement actions against business organizations from the FCPA's enactment in 1977 to December 2004 (the first instance in which DOJ resolved a criminal FCPA enforcement action against a business organization with an alternative resolution vehicle) and identifies whether the enforcement action against the business organization involved a related criminal prosecution of company employees.

[107] Sung-Hee Suh Press Release, *supra* note 94.

Table 3. Corporate Criminal DOJ FCPA Enforcement Actions[108] (1977–Dec. 2004)[109]

Year	**Legal Entity**	**Related Criminal Prosecution[110] of Company Employees**
1979	Kenny International Corp.	Yes (Finbar Kenny)
1982	International Harvester Corp.	Yes (George McLean) (Luis Uriarte)
1982	Crawford Enterprises, Inc.	Yes (Donald Crawford) (William Hall) (Gary Bateman)
1982	Ruston Gas Turbines, Inc.	Yes (Al Eyster) (James Smith)
1982	C.E. Miller Corp.	Yes (Charles Miller)
1983	Sam P. Wallace, Inc.	Yes (Alfonso Rodriguez)

[108] The FCPA enforcement action involved either FCPA anti-bribery violations, books and records violations, internal controls violations or all three. Note: one action listed on the DOJ's FCPA website did not involve actual FCPA charges and is thus excluded from Table 3. *See Litton Industries*, STOLEN ASSET RECOVERY INITIATIVE (June 30, 1999), http://star.worldbank.org/corruption-cases/node/20075; United States v. Litton Applied Technology Div., *Court Docket Number: 99-CR-673*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/litton-applied.html (last visited Aug. 30, 2015).

[109] Unless otherwise noted, enforcement action information is derived from the DOJ's FCPA website. *See generally Related Enforcement Actions*, *supra* note 57 (listing all DOJ criminal enforcement of FCPA against business organizations from 1977–2015).

[110] In certain instances, the DOJ criminal action against company employees were not for FCPA offenses, but related criminal offenses (such as violations of the Currency and Foreign Transactions Reporting Act, federal income tax violations, wire fraud, and money laundering) in connection with the alleged improper payment scheme.

1983	Applied Process Products Overseas, Inc.	Yes (Gary Bateman)[111]
1985	W.S. Kirkpatrick, Inc.	Yes (Harry Carpenter)
1985	Silicon Contractors, Inc.	No[112]
1989	Goodyear International Corp.	Yes (David Janasik)
1989	Young & Rubicam, Inc.	Yes (Arthur Klein) (Thomas Spangenberg)
1989	Napco International, Inc.	Yes (Richard Liebo)
1990	Harris Corp.	Yes (John Iacobucci) (Ronald Schultz)
1990	F.G. Mason Engineering, Inc.	Yes (Francis Mason)
1991	Eagle Bus Manufacturing, Inc.	Yes (John Blondek) (Vernon Tull)
1992	General Electric Co.	Yes (Herbert Steindler)
1994	Lockheed Corp.	Yes (Suleiman Nassar) (Allen Love)

[111] Bateman was an International Sales Manager for Crawford Enterprises, Inc. and also Chairman of the Board, President and sole shareholder of Applied Process Products Overseas, Inc. *See United States v. Gary D. Bateman Court Docket Number: 83-CR-004*, U.S. DEP'T OF JUSTICE (Jan. 5, 1983), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/22/1983-01-05-batemang-information.pdf.

[112] Even though there were no criminal charges against company employees, the DOJ did file a civil injunctive action against the following company employees: Herbert Hughes, Ronald Richardson, Richard Noble, and John Sherman. *See* Mike Koehler, *The First Enforcement Action to Involve CFE*, FCPA PROFESSOR (Dec. 29, 2011), http://www.fcpaprofessor.com/the-first-enforcement-action-to-involve-cfe.

1994	Vitusa Corp.	Yes (Denny Herzberg)
1998	Control Systems Specialist, Inc.	Yes (Darrold Crites)
1998	Saybolt, Inc.	Yes (David Mead) (Frerik Pluimers)
1999	International Materials Solutions Corp.	Yes (Thomas Qualey)
2000	UNC / Lear Services, Inc.	No
2002	Syncor Taiwan, Inc.	No
2004	ABB Vetco Gray, Inc.	No

As highlighted in Table 3, since the FCPA's enactment in 1977 to December 2004 (the first instance in which DOJ resolved a criminal FCPA enforcement action against a business organization with an alternative resolution vehicle), there were 24 FCPA enforcement actions against business organizations and 20 of these enforcement actions (83%) ***did*** involve related criminal prosecutions of company employees.

In other words, the comparison of individual FCPA enforcement actions related to enforcement actions of business organizations materially flipped when the DOJ introduced NPAs and DPAs to the FCPA context in late 2004. In short, since the FCPA's enactment in 1977 to December 2004, 83% of enforcement actions against business organization ***did*** involve related criminal prosecutions of company employees, whereas since December 2004, 77% of enforcement actions against business organizations ***did not*** involve any related criminal prosecutions of company employees.

Given the wide gap between criminal FCPA enforcement actions against business organizations and related individual FCPA prosecutions since NPAs and DPAs were introduced to the FCPA context, it is tempting to ask the "but why was nobody charged" question. Indeed, "bribery, but nobody was charged" was the title of a *New York Times* column which rightly noted, as to the 2011 Tyson FCPA enforcement action resolved through a DPA, "[c]orporations may have assets and liabilities, but they don't commit crimes — their officers, executives and employees do . . . . It would seem self-evident

that if Tyson engaged in a conspiracy and violated the Foreign Corrupt Practices Act, then someone at Tyson did so as well."[113]

The lack of individual FCPA enforcement actions resulting from criminal enforcement actions against business organizations was also the focus of a pointed question from then Senator Arlen Specter who chaired a 2010 Senate FCPA hearing to the DOJ representative who testified at the hearing. Senator Specter asked:

> [Y]ou talk about collecting more in criminal fines than anyone else, prosecuted more cases than other countries who are parties to the convention, and you say you do not hesitate to go after individuals. But whom have you sent to jail?[114]

Indeed, during the same hearing, written testimony by this author highlighted that the lack of individual prosecutions in most FCPA enforcement actions against business organizations "causes one to legitimately wonder whether the conduct was engaged in by ghosts."[115] However, the written testimony noted that there may be an equally plausible reason why so few enforcement actions against business organizations result in related FCPA charges against individuals employed by the company.[116] The reason may have more to do with the quality and legitimacy of the corporate enforcement action in the first place. In other words, perhaps the more appropriate question regarding the gap of individual FCPA charges in connection with most criminal FCPA enforcement actions against business organizations resolved through NPAs or DPAs is not "but why was nobody charged," but rather do NPAs and DPAs necessarily represent provable FCPA violations?[117]

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[113] James B. Stewart, *Bribery, but Nobody Was Charged*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/25/business/25stewart.html.

[114] *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 111th Cong. 5 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.

[115] *Id.* at 69.

[116] *See id.* at 68.

[117] While the focus of this article is DOJ NPAs and DPAs, the "but why was nobody charged" question is also tempting to ask in connection with SEC FCPA enforcement given that 83% of corporate FCPA enforcement actions since 2008 have not resulted in any SEC charges against company employees. *See* Mike Koehler, *A Focus on SEC FCPA Individual Actions*, FCPA PROFESSOR (Jan. 27, 2015) [hereinafter *SEC FCPA Individual Actions*], http://www.fcpaprofessor.com/a-focus-on-sec-fcpa-individual-actions-3. Yet, like with the DOJ figures, there may be an equally plausible reason why so few individuals have been charged in connection with corporate SEC FCPA enforcement actions. The reason may have to do with the quality and legitimacy of the

In flipping the salient question, it is important to recognize that unlike business organizations, individuals can be put in jail and have their liberty as well as personal assets and reputation at stake in an FCPA enforcement action. Thus, individuals are more likely to contest DOJ FCPA charges and put the DOJ to its high burden of proof at trial and potentially expose the DOJ's aggressive legal theories or its interpretation of facts giving rise to the related enforcement action against the business organization.

Against this backdrop, it is perhaps understandable why so few FCPA enforcement actions against business organizations result in related individual enforcement actions. Perhaps the enforcement agencies do not have sufficient evidence to establish provable FCPA violations against individuals even though the "carrots" and "sticks" relevant to resolving FCPA enforcement actions against business organizations yield a settlement through an NPA or DPA.[118] Perhaps the enforcement agencies are hesitant to expose certain aggressive enforcement theories to judicial scrutiny in an individual enforcement action and risk losing the theory to extract FCPA settlements against risk-averse business organizations.

corporate enforcement action in the first place. With the SEC, the issue is not so much NPAs or DPAs (the SEC has used such resolution vehicles only three times in the FCPA context), but rather the SEC's neither-admit-nor-deny settlement policy, in addition to the SEC's increased use of administrative actions. Regarding the former, in 2014 the Second Circuit concluded, in a non-FCPA case that challenged the SEC's neither-admit-nor-deny settlement policy, that SEC settlements are not necessarily about the truth, but pragmatism. *See* U.S. Sec. & Exch. Comm'n v. Citigroup Global Mkts., Inc., 752 F.3d 285, 295 (2d Cir. 2014) *available at* http://assets.law360news.com/0451000/451452/11-5227_opn.pdf. Moreover, individuals in an SEC FCPA enforcement action, even if only a civil action, and even if frequently allowed to settle on neither-admit-nor-deny terms or through an administrative process, have their personal reputation and finances at stake and are thus more likely than corporations to challenge the SEC and force it to satisfy its burden of proof as to all FCPA elements.

Regarding SEC administrative actions used to resolve alleged instances of FCPA scrutiny, from 2013–2014 the SEC used administrative actions to resolve nine corporate FCPA enforcement actions. In none of these actions has there been related SEC enforcement actions against company employees. *See* Koehler, *SEC FCPA Individual Actions*, *supra* note 117. In other words, like in the DOJ context, perhaps the more appropriate question is not "but why was nobody charged," in connection with most SEC corporate FCPA enforcement actions, but rather do SEC corporate FCPA enforcement actions necessarily represent provable FCPA violations?

[118] "Carrots" and "sticks" is a popular idiom that refers to a policy of offering a combination of rewards and punishment to induce behavior. To learn more about the "carrots" and "sticks" relevant to FCPA enforcement, see Koehler, *Façade*, *supra* note 81, at 924-29.

In assessing whether FCPA enforcement actions against business organizations resolved through NPAs or DPAs necessarily represent provable FCPA violations, the next section constructs a working hypothesis that seeks to answer this important question.

B. Construction of a Working Hypothesis

The following working hypothesis seeks to assess whether FCPA enforcement actions against business organizations resolved through an NPA or DPA necessarily represent provable FCPA violations.

- Instances in which the DOJ brings actual criminal charges against a business organization or otherwise insists in the resolution that the legal entity pleads guilty to FCPA violations represent a higher-quality FCPA enforcement action (in the eyes of the DOJ) and is thus more likely to result in related FCPA criminal charges against company employees.
- Instances in which the DOJ resolves an FCPA enforcement action against a business organization solely with an NPA or DPA represent a lower-quality FCPA enforcement action and is thus less likely to result in related FCPA criminal charges against company employees given that an individual is more likely to put the DOJ to its high burden of proof.

C. Relevant Data Points and Case Studies that Demonstrate a Disturbing Impact

This section tests the working hypothesis against information contained in Table 2 and highlights relevant empirical data points and case studies that demonstrate a disturbing impact that NPAs and DPAs have on the quality of FCPA enforcement. The disturbing impact is that while NPAs and DPAs yield a higher quantity of FCPA enforcement, they also yield a lower quality of FCPA enforcement. In other words, NPAs and DPAs do not necessarily represent provable FCPA violations but contribute to a façade of FCPA enforcement.

Since NPAs and DPAs were first introduced to the FCPA context in December 2004, there have been 84 criminal FCPA enforcement actions against business organizations and the below statistics provide compelling empirical data points regarding the quality and legitimacy

of many criminal FCPA enforcement actions against business organizations.[119]

- 14 of these enforcement actions resulted in a criminal indictment or guilty plea by the legal entity to FCPA violations. 10 of these enforcement actions (71%) resulted in related criminal charges of company employees.
- 54 of these enforcement actions were resolved solely with an NPA or DPA. In only 5 instances (9%) were there related criminal charges of company employees.
- A third type of FCPA enforcement action against a business organization is a hybrid action in which the resolution includes a guilty plea by some entity in the corporate family — usually a foreign subsidiary — and an NPA or DPA against the parent company. Since the introduction of NPAs and DPAs to the FCPA context, there have been 16 such enforcement actions. In 5 of these actions (31%), there were related criminal charges of company employees.

Although NPAs and DPAs were first introduced to the FCPA context in 2004, their use by the DOJ was sporadic at first, and alternative resolution vehicles did not become a fixture of FCPA enforcement until 2008 when they became firmly embedded in the U.S. Attorneys' Manual.[120] Thus, in testing the above hypothesis, 2008 is perhaps the best starting point.

Since 2008, there have been 67 criminal FCPA enforcement actions against business organizations.

- 12 of these enforcement actions were the result of a criminal indictment or resulted in a guilty plea by the legal entity to FCPA violations. 9 of these enforcement actions (75%) resulted in related criminal charges of company employees.
- 42 of these enforcement actions were resolved solely with an NPA or DPA. In only 4 instances (9%) were there related criminal charges of company employees.
- 13 enforcement actions were hybrid actions in which the resolution included a guilty plea by some entity in the corporate family — usually a foreign subsidiary — and an

[119] Koehler, *Prosecution of Individuals*, *supra* note 98.

[120] *See* Memorandum from Mark Filip, *supra* note 31.

> NPA or DPA against the parent company. In 4 of these actions (31%), there were related criminal charges of company employees.

To review, the working hypothesis posited that: (i) instances in which the DOJ brings actual criminal charges against a business organization or otherwise insists in the resolution that the legal entity pleads guilty to FCPA violations represent a higher quality FCPA enforcement action and is thus more likely to result in related criminal charges against company employees; and (ii) instances in which the DOJ resolves an FCPA enforcement action against a business organization solely with an NPA or DPA represent a lower-quality FCPA enforcement action and is thus less likely to result in related FCPA criminal charges against company employees given that an individual is more likely to put the DOJ to its high burden of proof.

The above analysis of enforcement actions provides compelling empirical data points, which seem to validate the hypothesis. In short, since 2008 when NPAs and DPAs became the dominant way for the DOJ to resolve FCPA enforcement actions, only 9% of enforcement actions against business organizations resolved solely with an NPA or DPA have resulted in related criminal charges of company employees.[121] In stark contrast, since 2008, 75% of enforcement actions against business organizations that were the result of a criminal indictment or resulted in a guilty plea by a legal entity have resulted in related criminal charges of company employees.

If the above statistics do not cause one to question the quality and legitimacy of many FCPA enforcement actions against business organizations, no empirical data ever will. Moreover, no other explanation has been offered to explain the wide gap between individual enforcement actions that have resulted from related enforcement actions against business organizations, or why this gap only started to appear after the DOJ began using alternative resolutions to resolve FCPA enforcement actions.[122]

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[121] The 9% figure specific to FCPA enforcement is particularly noteworthy given the finding that "[o]nly 34 percent of federal corporate deferred and non-prosecution agreements [in all substantive areas] from 2001–2014 were accompanied by charges against individuals." Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557465.

[122] In October 2014 the author publicly invited the DOJ (and SEC) to refute numbers evidencing the wide gap between individual enforcement actions that have resulted from related enforcement actions against business organizations. *See* Mike Koehler, *An Open Invitation to the DOJ and SEC to Refute These Numbers*, FCPA

Indeed, one commentator suggested that NPAs and DPAs used to resolve FCPA enforcement actions against business organizations must represent provable FCPA violations because he had not heard any complaints "from any practitioners, on or off the record, in public or in private" to the contrary.[123] Such an assertion ignores the fact that FCPA Inc. is one of the biggest cheerleaders of NPAs and DPAs because they yield more FCPA enforcement. More importantly the assertion ignores the fact that NPAs and DPAs contain so-called muzzle clauses preventing the company resolving the FCPA enforcement action from making any public statements, directly or indirectly through others (such as attorneys, etc.) contradicting the company's acceptance of responsibility for the conduct set forth in the resolution agreement.[124]

Commenting on the muzzling aspects of an NPA (outside the FCPA context), a *Wall Street Journal* opinion piece stated:

> In exchange for agreeing to read the government's script, [the company resolving its alleged legal scrutiny via an NPA] regained its ability to conduct business without a federal sword of Damocles dangling over its corporate head. This naked effort by federal prosecutors to control both news and

PROFESSOR (Oct. 14, 2014), http://www.fcpaprofessor.com/an-open-invitation-to-the-doj-and-sec-to-refute-these-numbers. The DOJ (and SEC) did not respond to the invitation.

123 Howard Sklar, *Maybe I Am Wrong: Rethinking Two FCPA Issues*, FORBES (Apr. 15, 2012), http://www.forbes.com/sites/howardsklar/2012/04/15/maybe-im-wrong-rethinking-two-fcpa-issues/.

124 *See* United States v. Bizjet Int'l Sales & Support, Inc., No. 12-CR-61-CVE (N.D. Okla. Mar. 14, 2012), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/22/2012-03-14-bizjet-deferred-prosecution-agreement.pdf. A typical "muzzle clause" in an FCPA DPA states:

> Public Statements by [Company]
>
> [Company] expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for [Company] make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by [Company] set forth above or the facts described in the attached Statement of Facts. Any such contradictory statement shall, subject to cure rights of [Company] described below, constitute a breach of this Agreement and [Company] thereafter shall be subject to prosecution as set forth in [this] Agreement. The decision whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be imputed to [Company] for the purpose of determining whether they have breached this Agreement shall be the sole discretion of the Department.

> outcomes, not to mention their own reputations, does not surprise those familiar with the modern federal criminal justice system . . . . Through these and myriad other techniques, federal investigators and prosecutors create an alternative reality that favors their own institutional interests, regardless of the truth or of justice. All citizens and companies become subject to the Justice Department's essentially unfettered power.[125]

As highlighted above, two theories were offered to explain why so few FCPA enforcement actions against business organizations result in related individual enforcement actions.

The first theory was that the DOJ does not have sufficient evidence to establish provable FCPA violations against individuals even though the "carrots" and "sticks" relevant to resolving FCPA enforcement actions against a business organization yielded a settlement through a DPA or NPA. In support of this theory, practitioners have noted:

> [NPAs and DPAs] provide fertile ground for the prosecution to advance expansive enforcement theories based on bare-boned and undeveloped factual assertions without having to meet the burden of proof beyond a reasonable doubt, given that the promise of avoiding the costly and risky endeavor of litigation through settlement provides every incentive to corporate defendants to accept the prosecution's position so long as the matter is resolved quickly and for the lowest fine possible.
>
> As a result, the agreements do not necessarily contain all of the relevant facts that went into determining the outcomes. They may contain broader enforcement theories than what would result from fully litigated cases, they do not have precedential value and thus do not bind the DOJ to act consistently, and they may not represent cases where criminal FCPA violations would have been found had the cases actually been litigated.[126]

In seeming recognition of the theory, Mark Mendelsohn (the former chief of the DOJ's FCPA Unit) noted the "danger" of NPAs and DPAs and how "it is tempting for the [DOJ] . . . to seek to resolve cases through DPAs or NPAs that don't actually constitute violations of the

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[125] Harvey Silverglate, *Gibson Is Off the Feds' Hook. Who's Next?*, WALL ST. J. (Aug. 19, 2012), http://www.wsj.com/articles/SB10000872396390443324404577594890622149010.

[126] Barry J. Pollack & Annie Wartanian Reisinger, *Lone Wolf or the Start of a New Pack: Should the FCPA Guidance Represent a New Paradigm in Evaluating Corporate Criminal Liability Risks?*, 51 AM. CRIM. L. REV. 121, 136 (2014).

law."[127] Moreover, in a 2012 policy speech devoted to NPAs and DPAs, then DOJ Assistant Attorney General Breuer stated: "[companies] know that they will be answerable even for conduct that in years past would have resulted in a declination."[128]

The second theory offered to explain why so few FCPA enforcement actions against business organizations result in related individual enforcement actions was that the DOJ is hesitant to expose aggressive enforcement theories to judicial scrutiny in an individual enforcement action and risk losing the theory to extract FCPA settlements against risk-averse business organizations. Relevant to the second theory, it is useful to analyze two FCPA enforcement theories that combined have yielded 17 DOJ enforcement actions against business organizations.

The first enforcement theory that has yielded 7 DOJ FCPA enforcement actions (Panalpina, Noble, Shell, Pride International, Tidewater Marine, Transocean, and Parker Drilling) was based on the core theory that the FCPA was violated in connection with alleged payments to notoriously corrupt Nigerian Customs Services ("NCS") employees in connection with securing or renewing temporary importation permits ("TIPS") so that oil rigs could remain in Nigerian waters, as well as other allegations that payments were made to NCS officials to expedite the delivery of goods and equipment into Nigeria.[129]

The enforcement theory was aggressive because the FCPA's anti-bribery provisions specifically exempt so-called facilitation payments. Specifically, the FCPA provides:

> The FCPA's anti-bribery provisions "shall not apply to any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official . . . ."[130]

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[127] *Corporation Admits to Serious Wrongdoing but Individuals Aren't Prosecuted. Why Not?*, CORP. CRIME REP. (Oct. 1, 2014), http://www.corporatecrimereporter.com/news/200/corporation-admits-serious-wrongdoing-individuals-arent-prosecuted/.

[128] Press Release, U.S. Dep't of Justice, Assistant Att'y Gen. Lanny A. Breuer Speaks at the N.Y.C. Bar Ass'n (Sept. 13, 2012), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

[129] *See* Mike Koehler, *All About Panalpina*, FCPA PROFESSOR (Dec. 30, 2010), http://www.fcpaprofessor.com/all-about-panalpina. For an extended discussion of these related FCPA enforcement actions dubbed "CustomsGate," see Mike Koehler, *Parker Drilling Resolves FCPA Enforcement Action Involving Conduct in Nigeria*, FCPA PROFESSOR (Apr. 17, 2013), http://www.fcpaprofessor.com/parker-drilling-resolves-fcpa-enforcement-action-involving-conduct-in-nigeria.

[130] 15 U.S.C. § 78dd-1(b) (2012). The FCPA defines "routine governmental action" as follows:

Perhaps in a sign of how obvious the facilitating payments exception was to the conduct at issue, the DOJ twice stated in resolution documents that the "payments [at issue] 'would not constitute facilitation payments for routine governmental actions within the meaning of the FCPA'."[131]

As indicated in Table 2 above, all of the so-called CustomsGate enforcement actions involved either an NPA or a DPA in which the DOJ extracted approximately $175 million in corporate settlements.[132] However, none of the CustomsGate enforcement actions involved any related criminal prosecution of individuals associated with the companies resolving the enforcement actions.[133]

What is perhaps most notable about the CustomsGate enforcement actions is that the SEC (which also brought 8 FCPA enforcement actions against business organizations based on the same core theory and extracted approximately $85 million in corporate settlements)[134] brought only one related prosecution of individuals associated with the companies resolving the enforcement action. However, Mark Jackson and James Ruehlen (both associated with Noble Corp.) put the SEC to its burden of proof whether the payments violated the

> The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in — (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.
>
> (B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.

Id. § 78dd-1(f)(3).

131 Mike Koehler, *"The Payments . . . Would Not Constitute Facilitation Payments for Routine Governmental Actions Within the Meaning of the FCPA,"* FCPA PROFESSOR (Nov. 10, 2010), http://www.fcpaprofessor.com/the-payments-would-not-constitute-facilitation-payments-for-routine-governmental-actions-within-the-meaning-of-the-fcpa.

132 *See* Mike Koehler, *Selective Prosecution?*, FCPA PROFESSOR (July 10, 2014), http://www.fcpaprofessor.com/selective-prosecution.

133 *Id.*

134 *Id.*

FCPA.[135] In an ironic twist, two years after the enforcement agencies collected approximately $260 million in the corporate CustomsGate enforcement actions, a federal district court judge ruled that the SEC has the burden of proof to negate the facilitating payments exception.[136] Despite the SEC merely having a civil burden of proof of preponderance of the evidence (as opposed to the DOJ's higher burden of proof in criminal actions of beyond a reasonable doubt), the SEC was unable to carry its burden and on the eve of trial the SEC offered to settle the Jackson and Ruehlen matter on terms very favorable to the defendants.[137]

The second enforcement theory that has yielded 10 DOJ FCPA enforcement actions (Syncor Taiwan, DPC (Tianjin Co), Micrus, AGA Medical, Johnson & Johnson, Pfizer, Orthofix International, Biomet, Smith & Nephew, and Bio-Rad) was based on the core theory that employees of foreign health care systems such as physicians, nurses, mid-wives and lab personnel are "foreign officials" under the FCPA.[138] This enforcement theory was first used by the DOJ in 2002 (before NPAs and DPAs became the dominant way for the DOJ to resolve FCPA enforcement actions against business organizations), and since 2005 has yielded 8 DOJ enforcement actions. This enforcement theory became so prominent that 50% of corporate enforcement actions in 2012 were against pharmaceutical or other health care companies based, in whole or in part, on this theory.[139]

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135 *See* SEC v. Jackson, 908 F. Supp. 2d 834, 855 (S.D. Tex. 2012).

136 *Id.* at 856.

137 *See* Mike Koehler, "*Friday" Roundup*, FCPA PROFESSOR (July 3, 2014), http://www.fcpaprofessor.com/friday-roundup-127; *see also 2014 Mid-Year FCPA Update*, GIBSON DUNN (July 7, 2014), http://www.gibsondunn.com/publications/Pages/2014-Mid-Year-FCPA-Update.aspx ("The Ruehlen and Jackson settlements, earned only after two years of hard-nosed litigation that brought the parties to the brink of trial, demonstrate that those who are willing to put the Government to its burden of proof can come out materially better for their efforts.").

138 *See* Mike Koehler, *The "Foreign Officials" of 2014*, FCPA PROFESSOR (Jan. 14, 2015), http://www.fcpaprofessor.com/the-foreign-officials-of-2014; Mike Koehler, *From Healthcare Providers to Customs Officials to SOE Employees — The "Foreign Officials" of 2013*, FCPA PROFESSOR (Jan. 13, 2014), http://www.fcpaprofessor.com/from-healthcare-providers-to-customs-officials-to-soe-employees-the-alleged-foreign-officials-of-2013; Mike Koehler, *The Origins and Prominence of a Theory*, FCPA PROFESSOR (Sept. 13, 2012), http://www.fcpaprofessor.com/the-origins-and-prominence-of-a-theory.

139 *See* Mike Koehler, *From SOE Employees to Health Care Providers — The "Foreign Officials" of 2012*, FCPA PROFESSOR (Jan. 10, 2013), http://www.fcpaprofessor.com/from-soe-employees-to-health-care-providers-the-foreign-officials-of-2012.

The enforcement theory is aggressive because the FCPA's legislative history is clear that the main reason motivating Congress to enact the FCPA was the foreign policy implications of discovered corporate payments to foreign government officials such as the Prime Minister of Japan, the President of Korea, the President of Gabon, and Italian political parties.[140] In other words, in passing the FCPA Congress was concerned with corporate payments to bona fide foreign government officials.

As indicated in Table 2 above, all of the "healthcare workers as foreign officials" enforcement actions since 2005 were resolved through an NPA or DPA in which the DOJ extracted approximately $90 million in corporate settlements. However, none of the enforcement actions involved any related criminal prosecution of individuals associated with the companies resolving the enforcement actions.

In short, two FCPA enforcement theories that combined have yielded 17 DOJ enforcement actions against business organizations in which the DOJ extracted approximately $350 million in corporate settlements have not resulted in any related criminal prosecution of individuals associated with the companies resolving the enforcement actions.

The empirical data points and case studies highlighted above have demonstrated a disturbing impact NPAs and DPAs have on the quality of FCPA enforcement. Given the opaque nature in which FCPA enforcement actions against business organizations are resolved, there is little beyond the above empirical data points and case studies to assess the working hypothesis. However, practitioner insights also lend support to the conclusion that NPAs and DPAs have a disturbing impact on the quality of criminal law enforcement in the FCPA context and otherwise.

Indeed, credible evidence suggests that NPAs or DPAs are offered to companies even before the elements of a crime have been proven beyond a reasonable doubt. Practitioners have reported:

> We have heard from colleagues in the defense bar of prosecutors who, in their haste to compel the company's cooperation in pursuit of individuals, have pressed the entity to enter into a diversion agreement before any particular individual's guilt could definitively be established. In such cases, the company is essentially forced to accept the filing of criminal charges (and all the related consequences, including

[140] *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 938-43 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185406.

> negative publicity); to waive a host of its defenses; to admit to certain facts; to undertake costly remedial measures; and perhaps even to pay serious 'criminal' penalties all, *before* the elements of the claim(s) against it can be proven beyond a reasonable doubt.[141]

Other practitioners have stated:

> [NPAs and DPAs] documents provide fertile ground for the prosecution to advance expansive enforcement theories based on bare-boned and undeveloped factual assertions without having to meet the burden of proof beyond a reasonable doubt, given that the promise of avoiding the costly and risky endeavor of litigation through settlement provides every incentive to corporate defendants to accept the prosecution's position so long as the matter is resolved quickly and for the lowest fine possible.[142]

Current SEC Chairman Mary Jo White, while in private practice, stated:

> [NPAs and DPAs are becoming] a semi-automatic response by the government in responding to corporate crime. . . . Prosecutors are thinking — before we close out this case that involves any kind of corporate crime, we should get something from the companies. . . . And prosecutors are like anybody else — when they devote a lot of time and effort to a case, they want something to show for it. And so I fear the deferred prosecution is becoming a vehicle to show results.[143]

Perhaps most forcefully are the insights of Matthew Fishbein (who previously served in the U.S. Attorney's Office for the Southern District of New York as Chief Assistant U.S. Attorney and Chief of the Criminal Division, among other DOJ positions). In an article titled "Why Individuals Aren't Prosecuted for Conduct Companies Admit,"[144] Fishbein touches upon the theories offered in this article

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[141] Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 188-89 (2008).

[142] Pollack & Reisinger, *supra* note 126, at 136.

[143] White, *supra* note 1, at 825; *Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York*, 19 CORP. CRIME REP. 48 (2005).

[144] Matthew E. Fishbein, *Why Individuals Aren't Prosecuted for Conduct Companies Admit*, N.Y. L.J. (Sept. 19, 2014), *available at* http://www.newyorklawjournal.com/home/id=1202670499295/Why-Individuals-Arent-Prosecuted-for-Conduct-Companies-Admit?mcode=1202615326010&curindex=2&slreturn=20150530082637.

regarding the wide gap between FCPA enforcement actions against business organizations and related enforcement actions against individuals employed by the legal entity resolving the enforcement action. Given Fishbein's prior DOJ positions, his insight is deserving of extended mention. He writes:

> The public has every right to wonder how it can be that the government brings no charges against individuals in the wake of [corporate criminal settlements]. Companies act only through the conduct of individuals — if the conduct is as egregious as portrayed in these settlements, and if the massive penalties are appropriate, how is it that so often the government charges no individuals?
>
> . . . .
>
> Prosecutors' increasing appreciation of the leverage they enjoy over corporate entities, coupled with companies' determinations that a 'bad' settlement is likely better than a 'good' litigation, has resulted in a greater number of corporate settlements in cases where the government would be unlikely to prevail if forced to prove its case in court. The result, increasingly common over the last 20 years, is that prosecutors can obtain what appears to be a monumental victory without needing to develop a theory, supported by evidence, that could survive a legal challenge or prevail before a jury.
>
> Prosecutors have far less leverage over individuals. People, unlike corporations, often face the prospect of incarceration and financial ruin in the event of a criminal conviction. As a result, individuals are more likely to test the government's legal theories and version of the facts. . . . [P]rosecutors know from their interactions with lawyers for individuals that, unlike with the corporation, they are likely to have a fight on their hands if they bring charges.
>
> . . . .
>
> As NPAs and DPAs have become increasingly common, the government's leverage over corporations in negotiating these settlements has become more apparent. In addition to the tremendous risks associated with an indictment, prosecutors have several other powerful sources of negotiating leverage. These include: government suspension and debarment; the loss of key licenses, such as banking licenses; the drain on the

> time and energy of corporate executives and other witnesses; legal costs; and costs associated with the uncertainty of a criminal investigation and potential indictment.
>
> Corporations are also reluctant to go to trial because they are risk averse. Regardless of the strength of the government's case, the facts in corporate criminal cases are often complex or esoteric, and there is always a chance that a jury may not understand why a few problematic documents do not add up to criminal liability.
>
> In light of these factors, companies often may view an admission of criminal conduct as preferable to a legal victory that clears the company's name but requires years of uncertainty.
>
> . . . .
>
> [A]s a result of the leverage discussed above, prosecutors can obtain settlements and massive payments in even marginal cases. Corporate prosecutions represent a low-risk, high-reward opportunity: The risk inherent in pursuing a marginal case is blunted by the high likelihood that a corporation will settle because of the prosecutor's superior leverage and the corporate defendant's rational risk aversion. And as settlements increase and monetary penalties skyrocket, the government accumulates and issues press releases reporting record amounts in fines and forfeitures.
>
> . . . .
>
> [F]ew prosecutions of individuals actually occur. The reason is simple: Prosecutors do not possess the same kind of leverage over individuals that they do over companies. Because an admission of wrongdoing by an individual has far greater consequences, individuals are more likely to test the prosecution's case. In cases where the evidence of criminal conduct is weak, prosecutors may well succeed in inducing the corporation to settle, but fail to convince individuals to do the same. Consequently, we see DPAs, often accompanied by inflammatory statements of fact (drafted by prosecutors) documenting outrageous criminal conduct by the company through its employees, without any follow-up prosecution of individuals.
>
> . . . .

> The leverage the government can exercise over companies has tipped the scales to a troubling degree. By using their considerable leverage to induce companies to enter into settlements in increasingly marginal cases and forcing them to admit to egregious conduct to settle charges that likely would not survive a legal challenge or be proved to a jury, prosecutors have created a situation where the public is deceived into thinking that the individuals involved in corporate criminal conduct are receiving a free pass.
>
> If these cases were exposed to the light of day by the adversarial system, the public would learn that they are often far murkier than they appear in the DPA's statement of facts. Instead, however, the public sees a fundamental disconnect between the prosecution of corporations and the prosecution of individuals — and is justifiably left to wonder why prosecutors do not pursue the individuals through whom all corporations must act.[145]

The empirical data points, cases studies, and commentary highlighted above provide explanations for why so few FCPA enforcement actions against business organizations result in related individual enforcement actions. In short, the FCPA enforcement process often plays out as follows: the DOJ recognizes, because of its enormous leverage over business organizations, that there is a small chance it will have to prove its theory of liability; because of the DOJ's enormous leverage, business organizations prefer to resolve alleged instances of FCPA scrutiny through NPAs and DPAs for reasons of ease and efficiency and not necessarily because the conduct at issue violated the FCPA; and because individuals are more likely to force the DOJ to prove its case in court, the DOJ elects not to pursue individuals in the vast majority of FCPA enforcement actions against business organizations.

This disturbing impact NPAs and DPAs have on the quality of FCPA enforcement contributes to a façade of FCPA enforcement[146] and the next section highlights why this disturbing impact matters.

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[145] *Id.*

[146] For an extended discussion of the façade of FCPA enforcement, see Koehler, *Façade*, *supra* note 81.

IV. WHY THE DISTURBING IMPACT MATTERS

This section highlights why the disturbing impact NPAs and DPAs have on the quality of FCPA enforcement matters not only in the specific context of the FCPA but more broadly as other nations with FCPA-like laws adopt U.S.-style alternative resolution vehicles.

A. Relevance to FCPA Enforcement

The dynamics highlighted above which contribute to the disturbing impact NPAs and DPAs have on the quality of FCPA enforcement would seem self-obvious with no further explanation needed. However, as previously discussed, there are many cheerleaders of the above dynamics because they yield a higher quantity of FCPA enforcement.

Accordingly this section begins with an explanation of why the above dynamics are disturbing. For starters, as a matter of general jurisprudence, it is disturbing when any area of law largely develops outside of the judicial process. The judicial process facilitates the thoughtful presentation of opposing views, mitigating facts and circumstances, and potential defenses in an adversarial proceeding culminating in an impartial decision-maker weighing the facts and applying the law in rendering a decision in a transparent manner. These fundamental hallmarks are largely missing in FCPA enforcement given the dominant use of NPAs and DPAs to resolve enforcement actions against business organizations.

Rather, the DOJ occupies the role of prosecutor, judge and jury all at the same time and induces settlements through the "carrots" and "sticks" they possess even though in many instances it is an open question whether a court would find the conduct at issue to be in violation of the FCPA. As former DOJ Attorney General Michael Mukasey stated during a House FCPA hearing in 2011:

> The primary statutory interpretive function therefore is performed almost exclusively by the DOJ . . . . By negotiating resolutions . . . before an indictment or enforcement action is filed, the agencies effectively control the disposition of FCPA cases they initiate . . . . We are left with a circumstance in which . . . 'the FCPA means what the enforcement agencies say it means.'[147]

[147] *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 22 (2011) (statement

The end result of this process is alternative resolution vehicles that do not facilitate the thoughtful presentation of opposing views, mitigating facts and circumstances, potential defenses, or testing of legal theories. Yet these alternative resolution vehicles are viewed by many as shaping the parameters of the FCPA, the most important U.S. law governing international commerce. When the parameters of any law develop through such a process, public confidence in that law, as well as the rule of law, suffers.

Indeed, the DOJ often speaks of the rule of law in connection with FCPA enforcement, but it is usually the United States as the preacher and the rest of the world as the congregation. For instance, in a speech titled "International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond," then Assistant Attorney General Breuer commented on how the increase in FCPA enforcement was consistent with the United States's global approach to promote the rule of law.[148] He began his speech by asking two rhetorical questions: is the rule of law "more than a catch phrase" and "does [the rule of law] have any real meaning," and concluded his speech by saying that there is nothing "more critical both to our country and to other nations [than] establishing the Rule of Law."[149]

While true statements, the same could be asked about various aspects of FCPA enforcement, including the extensive use of NPAs and DPAs by the DOJ to resolve FCPA enforcement actions against business organizations. For instance, a commonly accepted rule of law principle is limited government powers. The World Justice Project defines this factor as "systems of checks and balances . . . to limit the reach of excessive government power," and the distribution of authority "in a manner that ensures that no single organ of government has the practical ability to exercise unchecked power."[150]

Nevertheless, as stated in a report from the Manhattan Institute for Policy Research:

of Michael Mukasey, former U.S. Att'y Gen.), *available at* http://judiciary.house.gov/_files/hearings/printers/112th/112-47_66886.PDF.

[148] Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond, Remarks at the Council on Foreign Relations (May 4, 2010), *available at* http://www.justice.gov/sites/default/files/criminal-icitap/legacy/2015/04/23/05-04-10AAG-breuer-remarks.pdf.

[149] *Id.*

[150] *Constraints on Government Powers*, WORLD JUSTICE PROJECT, http://worldjusticeproject.org/factors/constraints-government-powers (last visited Aug. 28, 2015).

> [P]rosecutors' virtually unchecked powers under DPAs and NPAs threaten our constitutional framework. To be sure, prosecutors are acting upon duly enacted laws, but federal criminal provisions are often vague or ambiguous, and the fact that prosecutors and large corporations alike feel obliged to reach agreement, rather than follow an orderly regulatory process and litigate disagreements in court, denies the judiciary an opportunity to clarify the boundaries of such laws. Instead, the laws come to mean what the *prosecutors* say they mean — and companies do what the prosecutors say they must. Federal prosecutors are thus assuming the role of judge (interpreting the law) and of legislature (setting broad policy choices about industry conduct), substantially eroding the separation of powers.[151]

Likewise, the current Chairman of the SEC, stated while in private practice:

> [B]efore making their decisions about charging companies, some prosecutors are exerting considerable — some say, extreme — pressure on corporate behavior under the not so subtle threat that if the company doesn't do as the government wishes, the company risks, at the end of the day, being indicted. . . . To ensure that a company does not become that 'rare' case resulting in a corporate indictment with all of its attendant negative consequences, a company must not poke the government in the eye by declining any of its requests or suggestion of how a cooperative, good corporate citizen is to behave in the government's criminal investigation. This template, in my view, can give prosecutors too much power.[152]

Because of the above dynamics of NPAs and DPAs, the resolution vehicles have long been criticized. For instance, in 2007 (the infancy of DOJ's use of NPAs and DPAs) former Attorney General Dick Thornburgh stated:

> [Deferred and non-prosecution] agreements can border on the extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can

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[151] JAMES R. COPLAND, MANHATTAN INST. FOR POLICY RESEARCH, THE SHADOW REGULATORY STATE: THE RISE OF DEFERRED PROSECUTION AGREEMENTS 12 (No. 14, May 2012).

[152] White, *supra* note 1, at 820-21.

> lead to abuse, and not just in the extravagant amounts of money the corporations are forced to pay.[153]

As discussed in the next section, the disturbing impact NPAs and DPAs have on the quality of FCPA enforcement matters not only in the specific context of the FCPA, but more broadly as other nations with FCPA-like laws adopt U.S.-style alternative resolution vehicles.

B. Broader Ramifications

For years, the cheerleaders of more enforcement of anti-bribery laws have publicly shamed other countries for lax enforcement compared to U.S. enforcement of the FCPA.[154] Even though comparative enforcement statistics are of little value because they are an "apples to oranges" comparison,[155] political actors in peer nations have responded to this public shaming by adopting U.S. alternative resolution vehicles in an ill-advised effort to increase the quantity of enforcement.

Case in point is the United Kingdom, a country that has long been subject to criticism for lax enforcement of its anti-bribery laws. After replacing its hodgepodge collection of antiquated bribery statutes with the Bribery Act in 2010,[156] the U.K. Serious Fraud Office ("SFO" — a law enforcement agency similar to the U.S. DOJ) quickly stated its intention to model enforcement of the Bribery Act on the DOJ's enforcement of the FCPA including through use of alternative resolution vehicles.[157]

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153 WASH. LEGAL FOUND., SPECIAL REPORT: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES 6-1 (2008), *available at* http://www.wlf.org/upload/WLF%20timeline.pdf.

154 *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CANADA (2011), *available at* http://www.oecd.org/canada/Canadaphase3reportEN.pdf (describing concerns about Canada's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions).

155 *See* Mike Koehler, *Ten Seldom Discussed Foreign Corrupt Practices Act Facts That You Need to Know*, WHITE COLLAR CRIME REP. (Bloomberg BNA, Arlington, Va.), May 1, 2015, at 1, 10, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601840.

156 *See* Bribery Act, 2010, c. 23 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2010/23/contents.

157 *See* Cassell Bryan-Low, *U.K. Agency Steps up Fight Against Foreign Corruption*, WALL ST. J., Jan. 20, 2010, at A13, (highlighting statements from the SFO Director showing a desire "to borrow from the U.S. justice system, by encouraging companies to voluntarily report corruption problems and strike plea deals to resolve them rather than face drawn-out criminal prosecutions" and wanting the SFO "to move more quickly on cases and sought to settle deals as an alternative to prosecutions").

However, unlike the United States where adoption of alternative resolution vehicles was the result of internal DOJ policy only, adoption of alternative resolution vehicles in the U.K. was the result of a deliberative legislative process.[158] Prior to discussing this process, it is important to recognize that the U.K. rejected U.S.-style NPAs, agreements that as highlighted in Table 1 have been used to resolve numerous FCPA enforcement actions against business organizations. As stated by the U.K. Ministry of Justice:

> [T]he lack of judicial oversight is likely to make [NPAs] unsuitable for the constitutional arrangements and legal traditions in England and Wales. We have concluded that [NPAs] are not suitable for this jurisdiction due to their markedly lesser degree of transparency, including the absence of judicial oversight.[159]

Nevertheless, in February 2014 DPAs formally became available for use by U.K. prosecutors,[160] and U.K. authorities were remarkably candid in explaining why they desired DPAs. In its DPA "Code of Practice," the SFO and U.K. Crown Prosecution Service essentially acknowledged that doing things the old-fashioned way (that is proving a criminal violation in the context of an adversarial system) was too difficult and took too long.[161] Indeed, the Director of the SFO used particularly blunt language as he stated that "[o]ne of the principal purposes of DPAs is to bring resolution to cases of corporate criminality more quickly."[162]

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158 *See* David Green, Dir., U.K. Serious Fraud Office, Ethical Business Conduct: An Enforcement Perspective (Mar. 6, 2014), *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2014/ethical-business-conduct-an-enforcement-perspective.aspx ("The US model for DPAs has no statutory foundation; it has developed through practice. . . . The British model for DPAs is adapted to the British context. It is a creature of statute, explained by a published Code of Conduct.").

159 MINISTRY OF JUSTICE, CONSULTATION ON A NEW ENFORCEMENT TOOL TO DEAL WITH ECONOMIC CRIME COMMITTED BY COMMERCIAL ORGANISATIONS: DEFERRED PROSECUTION AGREEMENTS, 2012, Cm. 8348, at 19 (U.K.), *available at* https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf.

160 *See* Mike Koehler, *The U.K. Enters the Facade Era*, FCPA PROFESSOR (Feb. 24, 2014), http://www.fcpaprofessor.com/the-u-k-enters-the-facade-era (with links to original source documents).

161 *See* SERIOUS FRAUD OFFICE, DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE: CRIME AND COURTS ACT 2013, 2013, at 3 (U.K.), *available at* http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf.

162 SERIOUS FRAUD OFFICE, DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE: THE DIRECTORS' RESPONSE TO THE PUBLIC CONSULTATION, 2013, at 3 (U.K.), *available at*

The most troubling feature of the Code of Practice governing U.K. DPAs concerns the evidence sufficient for U.K. prosecutors to resolve an action through a DPA. In defending adoption of a "lower evidential test" in the Code of Practice and addressing concerns that this standard "was so easily satisfied as to have very little substance," the SFO's response, in pertinent part, stated:

> One of the principal purposes of DPAs is to bring a resolution to cases of corporate criminality more quickly . . . If a prosecutor had to be satisfied that the evidence against an organisation was sufficient to meet the Full Code Test ["Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge"] without the alternative of the 'lower' evidential test before considering whether a DPA was in the public interest, a key purpose of DPAs, as was the express intention of parliament, would become redundant. In order to achieve one of parliament's key intentions in legislating for the introduction of DPAs a 'lower' evidential test is necessary.
>
> Satisfaction of the Full Code Test, particularly in view of the well documented difficulties in proving corporate liability, would in most circumstances require a complete and full scale investigation, sometimes spanning many jurisdictions, which inevitably is time consuming and expensive. It is not intended for there to have been such an investigation before a DPA is entered into.[163]

Consistent with the above rationale for DPAs, a top-SFO official recently stated:

> The Deferred Prosecution Agreement regime provides a structure for those wanting to resolve their criminal liability to do so quickly and with a degree of control and certainty largely absent from traditional prosecution.[164]

The above statements by U.K. authorities regarding DPAs are troubling because ease, efficiency and certainty are not concepts normally associated with the rule of law and rightly so. Yet when the

http://www.sfo.gov.uk/media/264627/dpa%20code%20of%20practice%20response.pdf.

[163] *Id.* at 3-4.

[164] Ben Morgan, Joint Head of Bribery & Corruption, U.K. Serious Fraud Office, Compliance and Cooperation (May 20, 2015), *available at* http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/ben-morgan-compliance-and-cooperation.aspx.

cheerleaders of increased enforcement of anti-bribery laws (regardless of resolution vehicles used) have sway over politicians, the end result is what happened in the U.K. In short, the U.K. adoption of DPAs was a political response intended to increase the quantity of Bribery Act prosecutions, and because the new enforcement regime will likely expand the market for legal services, few U.K. practitioners oppose the new regime.[165]

Even though the U.K. adopted DPAs to resolve Bribery Act and other offenses, the U.K. DPA regime is expected to be materially different compared to U.S.-style DPAs.[166] For instance, the U.K. regime envisions judicial involvement in the DPA process from an early stage in which the proposed DPA is considered by the judiciary at a preliminary hearing before the DPA returns to the court for final judicial approval. As stated by the U.K. Solicitor General:

> We decided to build on the US model by formulating proposals which ensure a greater level of judicial involvement, from an earlier stage, as well as greater levels of transparency in order to command the confidence of the public.[167]

The U.K. is not the only country that has grown envious of U.S.-style alternative resolution vehicles. At present, Canada, Australia and Ireland are also in the early stages of considering alternative resolution vehicles to resolve violations of their FCPA-like laws.[168] However,

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[165] *See, e.g.*, Barry Vitou & Richard Kovalevsky, *With the Greatest Respect. We Disagree with Mike.*, THEBRIBERYACT.COM (Aug. 1, 2012, 3:17 PM), http://thebriberyact.com/2012/08/01/with-the-greatest-respect-we-disagree-with-mike/ (arguing that a DPA regime in the UK would be useful since the UK's enforcement agencies "do not have equality of arms").

[166] Because there has not yet been any Bribery Act prosecutions for FCPA-like offenses, let alone any resolved through DPAs, assessing the quality of Bribery Act prosecutions through empirical data points and case studies is not yet possible.

[167] Oliver Heald, Solicitor Gen., Att'y Gen.'s Office, Keynote Speech to the World Bribery and Corruption Compliance Forum (Oct. 23, 2012), *available at* https://www.gov.uk/government/speeches/keynote-speech-to-the-world-bribery-and-corruption-compliance-forum.

[168] As to Canada, see Ken Jull & Christopher Burkett, *Deferred Prosecution: Why Canada Should Adopt the U.K. Judicial Model*, GLOBALCOMPLIANCENEWS (June 14, 2015), http://globalcompliancenews.com/deferred-prosecution-why-canada-should-adopt-the-u-k-judicial-model-20150615/; John Manley, *Canada Needs New Tools to Fight Corporate Wrongdoing*, THE GLOBE & MAIL (May 29, 2015), http://www.theglobeandmail.com/report-on-business/rob-commentary/canada-needs-new-tools-to-fight-corporate-wrongdoing/article24675411/ ("Canada's failure to provide prosecutors with alternative enforcement tools therefore serves as an obstacle to law-enforcement authorities in other countries, to the benefit of corporate offenders."). As to Ireland, see Simon Carswell, *Prosecution Deals Urged to Uncover White Collar Crime*, THE IRISH TIMES (Oct. 22, 2012),

advocates of such an approach in peer countries are justifying their positions through the same flawed and hollow rhetoric the U.S. has used to justify alternative resolution vehicles — namely that alternative resolution vehicles are necessary to avoid the perceived "Arthur Andersen effect" and achieve deterrence.[169]

Should other countries join the alternative resolution vehicle movement, they might score points with the cheerleaders of increased enforcement because the resolution vehicles will likely yield a higher quantity of enforcement compared to historical averages. However, similar to the United States, the quality of such enforcement will be open to question and a façade of enforcement is likely to ensure. Indeed, an interesting case study concerns the ongoing scrutiny of SNC-Lavalin, a Canadian company criminally charged for violating the FCPA-like law of Canada. Upon being criminally charged in March 2015 for alleged business dealings in Libya,[170] the company made the following public statement:

> It is important to note that companies in other jurisdictions, such as the United States and United Kingdom, benefit from a different approach that has been effectively used in the public interest to resolve similar matters while balancing accountability and securing the employment, economic and other benefits of businesses.[171]

However, SNC-Lavalin should be grateful, and not pout, that Canadian authorities have not abandoned (as U.S. authorities have) traditional legal principles in the name of ease and efficiency. In other words, SNC-Lavalin should be grateful that Canadian authorities will actually have to prove the facts and legal theories alleged in the enforcement action in order for it to be criminally liable.

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http://www.irishtimes.com/business/2.790/prosecution-deals-urged-to-uncover-white-collar-crime-1.555839. As to Australia, see Justin McDonnell, Natalie Caton, Jane Menzies & Jordan English, *Foreign Bribery Senate Inquiry Given the Green Light*, KING & WOOD MALLESONS (June 25, 2015), http://www.kwm.com/en/au/knowledge/insights/foreign-bribery-senate-inquiry-australia-corruption-20150625 (highlighting proposals before an Australian Senate committee to address foreign corrupt practices including the adoption of deferred prosecution agreements).

169 *See, e.g.*, Jull & Burkett, *supra* note 168; Manley, *supra* note 168.

170 *See* Press Release, Royal Canadian Mounted Police, RCMP Charges SNL-Lavalin (Feb. 19, 2015), *available at* http://www.rcmp-grc.gc.ca/ottawa/ne-no/pr-cp/2015/0219-lavalin-eng.htm.

171 Press Release, SNC-Lavalin, SNC-Lavalin Contests the Federal Charges by the Public Prosecution Service of Canada, and Will Enter a Non-guilty Plea (Feb. 19, 2015), *available at* http://www.snclavalin.com/en/snc-lavalin-contests-the-federal-charges-february-19-2015.

Relevant to the façade of enforcement that is likely to ensue in peer countries that adopt U.S.-style alternative resolution vehicles, it is worth noting that SNC-Lavalin stated that the criminal charges against it were "without merit."[172] The inference from SNC-Lavalin's public statements is that the company viewed the criminal charges against it to be "without merit" yet would gladly pay millions of dollars to make Canadian law enforcement authorities go away. Thus, SNC-Lavalin, like so many other business organizations that have become the subject of FCPA scrutiny in the United States, was willing to become a participant in the façade of enforcement.

However, as highlighted in this section, the quality of enforcement is more important than the quantity of enforcement in legal systems based on the rule of law. Yet, responsive to the cheerleaders of increased enforcement (regardless of resolution vehicle used) there appears to be a new "global arms race" when it comes to resolving bribery offenses.

CONCLUSION

The question thus becomes: does anyone care? Does anyone care that alternative resolution vehicles have become the dominant way for the DOJ to resolve corporate FCPA scrutiny? Does anyone care that empirical data points and case studies demonstrate a disturbing impact that NPAs and DPAs have on the quality of FCPA enforcement?

The cheerleaders of increased FCPA (and related) enforcement appear not to care. FCPA Inc. and other industry participants who benefit from more enforcement of anti-bribery laws resulting from alternative resolution vehicles appear not to care. However, it is incumbent upon those who value the rule of law to care and it is hoped that the issues discussed in this article facilitate a closer examination of the alternative resolution vehicles used to resolve FCPA enforcement actions against business organizations.

[172] *Id.*