



Soft on Corporate Crime

DOJ Refuses to Prosecute Corporate
Lawbreakers, Fails to Deter Repeat Offenders

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Introduction: Corporate Deferred and Non-Prosecution Agreements Explained

Corporations keep committing crimes, and the U.S. Department of Justice (DOJ) keeps refusing to prosecute them.

Instead of holding big corporations accountable when they violate the law, federal law enforcement officials go out of their way to avoid indicting them. Instead of prioritizing protecting the victims of corporate crime, the Justice Department protects corporate profits and property. Instead of prosecuting corporations, prosecutors make deals with them.

The deals prosecutors make to protect corporations from prosecution are called deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Prosecutors and corporate defense attorneys negotiate these deals behind closed doors to keep corporations out of the criminal justice system.

Under these agreements, the corporations pay a fine, agree to reforms and promise not to commit any more crimes. Sometimes they are supervised by a DOJ-approved monitor. Usually after two or three years, as long as the corporation does not violate the agreement, the DOJ drops any charges it may have filed.

Corporations that enter DPAs and NPAs (also known as pre-trial diversions) technically have not been found guilty – but they're not innocent, either. They almost always admit and accept responsibility for their wrongdoing, but they are protected from the full consequences of criminal prosecution – consequences that, if criminal corporations faced them, would serve as powerful punitive deterrents.

The rationale for DPAs and NPAs is that they facilitate corporate compliance with the law and improve corporate culture better than prosecution would.

But the empirical evidence strongly contradicts this theory; in short, the DOJ's deals with large corporate offenders do not work. Most corporations that have faced multiple criminal enforcement actions, yet avoided prosecution, are large multinationals, and most of these have avoided prosecution more than once. Contrary to the DOJ's theory of corporate rehabilitation, DPAs and NPAs do not prevent corporate recidivism.

This history of large corporations repeatedly avoiding prosecution shows that a different approach is needed.

Key Findings

Deferred and non-prosecution agreements do not prevent corporations from breaking the law again. The DOJ has brought subsequent federal criminal enforcement actions against 38 corporations after the department entered deferred or non-prosecution agreements with the same companies. Most of these repeat offender corporations (63% – 24 out of 38) received at least one additional DPA or NPA after already having received a prior DPA or NPA, and most have pleaded guilty to subsequent crimes (66% – 25 out of 38). These corporations' 78 NPAs and DPAs make up 15% of the 535 agreements the DOJ entered since 1992.

Corporate prosecutions are plummeting, but DPAs and NPAs are on the rise. In the first half of 2019, the DOJ used these agreements 21 times instead of prosecuting a corporate wrongdoer, putting the department on track to match previous peak years for their use. Meanwhile, the number of corporate convictions in 2018 fell to 99, the lowest number recorded since the government started tracking them in 1996. Individuals hardly ever receive pre-trial diversions from federal prosecutors – less than 1% of the time in 2018.

The biggest corporations get the most lenience. Out of the 38 repeat offender corporations identified, 36 are major corporations that are on or have appeared on the Forbes Global 2000 list of the world's largest publicly traded corporations. Three of the corporations have held the top slot as the largest corporation in the world – JPMorgan Chase (2011 and 2010), General Electric (2009) and HSBC (2008). Most (25 out of 38) appear in the top 500 of the 2019 Fortune Global 500 list. Half of these repeat offender corporations (19 out of 38) are banks or financial corporations, and the majority of those (12) are headquartered internationally.

Prosecutors are not punishing corporations for violating agreements. Out of the 535 corporate NPAs (298) and DPAs (237) the Justice Department has entered with corporations, on only seven occasions – about 1% of the time – has the department held a corporation accountable for breaking its promise not to break the law in the future. In these instances, the DOJ extended the agreements with wrongdoing corporations on four occasions. In only three instances did it prosecute companies for their violation of the NPA or DPA.

Prosecutors are ignoring apparent violations. The reason the number of corporations being held accountable for breaching agreements is so low may be because the DOJ is not consistently enforcing against breaches. The agreements generally forbid corporations from committing further crimes, but about a third of repeat offender corporations (12 out of 38) were subject to subsequent federal criminal enforcement *before the expiration* of a previous NPA or DPA. Another fourth (9 out of 38) had some kind of criminal enforcement action brought against them within one and a half years of release from their previous NPA or DPA – including instances when alleged crimes occurred during the term of a previous NPA or DPA. In all 21 cases, the DOJ did not hold the corporation accountable for apparent breaches.

Section-by-Section Report Overview

This report is divided into six sections plus three appendices:

- The first section, **The Rise of Deferred and Non-Prosecution Agreements**, describes the U.S. Department of Justice's increased use of deferred and non-prosecution agreements instead of prosecutions against corporations.
- The second section, **DPAs and NPAs as Ineffective Instruments for Reform**, details congressional investigations into the use of these agreements between 2008 and 2010.
- Section three, **Systemic Risk and the Rise of Too Big to Jail**, documents the DOJ's preferred post-financial crisis argument for helping corporations avoid prosecution: that prosecuting a major financial corporation could destabilize the national or international financial system.
- Section four, **Repeat Offenders**, offers a detailed new analysis about the 38 corporations that received an NPA or DPA but nevertheless did offend again, sometimes repeatedly.
- Section five, **Egregious Examples of Corporate Repeat Offenders Receiving Multiple DPAs and/or NPAs**, provides short narrative overviews of criminal enforcement actions against HSBC, Bristol-Myers Squibb, JPMorgan Chase, Zimmer Biomet, Societe Generale and Las Vegas Sands.
- Section six, **Policy Solutions and Conclusion**, makes policy recommendations for ending corporate recidivism.
- **Appendix A: Detailed Profiles of Corporate Repeat Offenders Receiving DPAs and NPAs**, provides details for each of the 38 repeat offender corporations about the legal violations they have been accused of and the criminal enforcement actions the DOJ brought against them.
- **Appendices B and C** document corporations on the current Fortune 500 and Global Fortune 500 lists that have received at least one DPA or NPA.

I. The Rise of Deferred and Non-Prosecution Agreements

The Justice Department manual for business prosecutions¹ instructs prosecutors to consider using deferred and non-prosecution agreements in circumstances when they see potential for a corporation's conviction to result in "disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable."² When a corporation is prosecuted, it can be subject to monetary penalties, strict oversight and reputational damage and banned from conducting business with federal and state governments.³

Whether for corporations or for individuals, the Justice Department considers prosecution when it has enough evidence to prove "beyond a reasonable doubt" that the accused corporation or individual violated U.S. criminal law.⁴ Absent such evidence, the department can decline to prosecute. In practical terms, prosecution traditionally leads either to a trial conviction if the defendant is found guilty (or acquittal if not guilty) or, more often, a plea agreement, which must be approved by a judge. For felony and misdemeanor offenses, federal sentencing guidelines for organizations attempt to ensure consistent application of the law.⁵

Before 2003, the Justice Department reached fewer than five deferred or non-prosecution agreements with corporations per year. In the first decade following the turn of the millennium, these numbers rose to double digits by 2005 and to more than 40 in 2007 and 2010 (see Chart 1).

In 2015, the use of such agreements hit a peak of 101 due to non-prosecution agreements being the Justice Department's method for resolving allegations of tax-related criminal wrongdoing by Swiss banks, 75 of which entered NPAs with the DOJ in that year under the department's Swiss bank program.⁶ (Under the program, Swiss banks that met certain requirements, including advising the department that they had reason to believe that they had committed tax-related criminal offenses in

¹ "Principles of Federal Prosecution of Business Organizations," (9-28.300 – Factors to be Considered) Justice Manual, 2018, (accessed 15 Feb. 2019), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>

² *Ibid.*

³ "Frequently Asked Questions: Suspension & Debarment," U.S. General Services Administration (accessed 15 Feb. 2019), <https://www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment>

⁴ Civil enforcement, in which the evidentiary standards are lower and which hinge on the question of the accused's liability for wrongdoing, not on the question of the accused's guilt or innocence, is a related but separate issue not explored in this report.

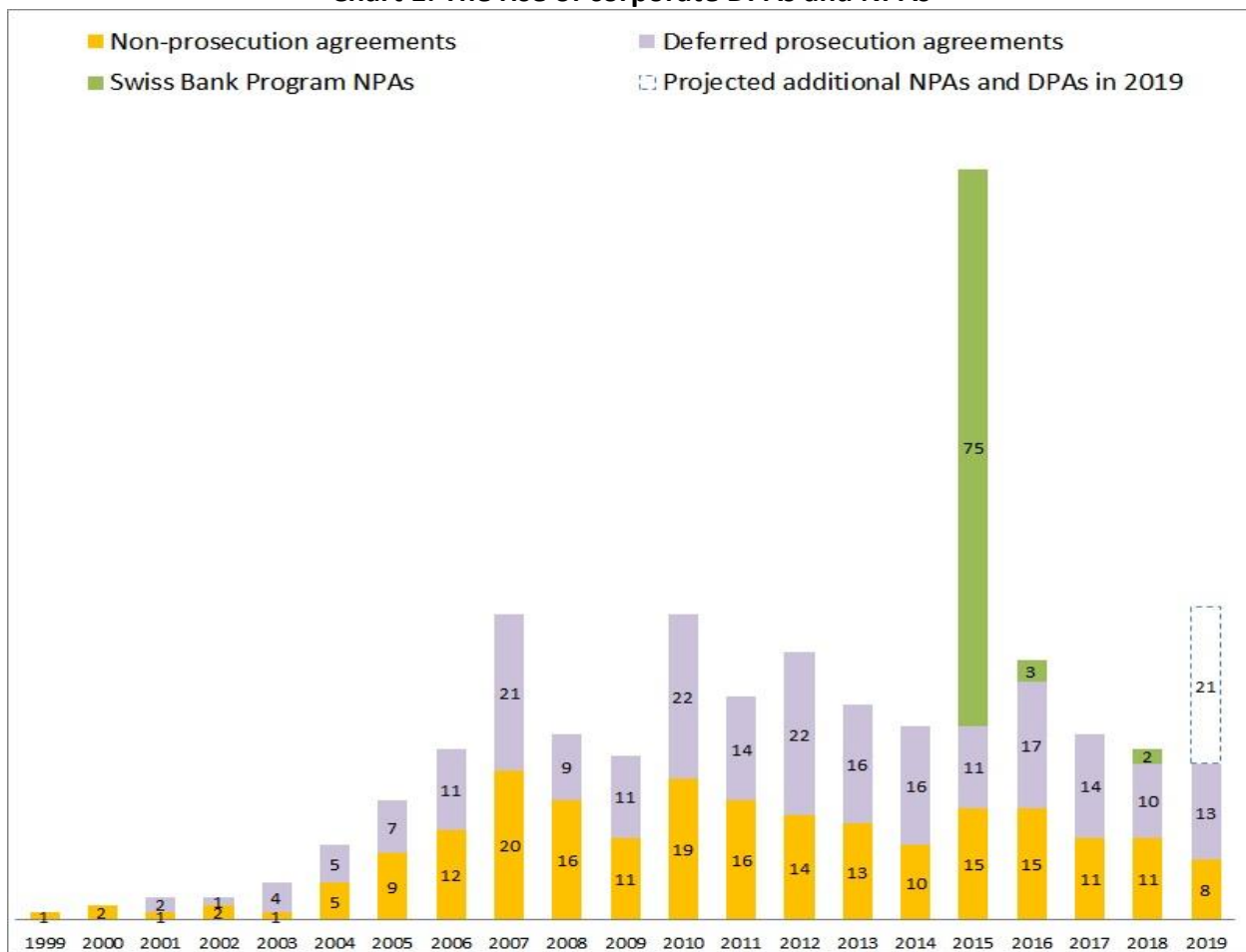
⁵ Guidelines Manual, (Chapter 8), U.S. Sentencing Commission, 2018, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/CHAPTER_8.pdf

⁶ "Swiss Bank Program," U.S. Department of Justice (updated 5 Sept. 2018), <https://www.justice.gov/tax/swiss-bank-program>

connection with undeclared U.S.-related accounts, were permitted to enter into non-prosecution agreements.)

As a result of the Swiss Bank Program, there was an extraordinary number of NPAs reported during President Barack Obama's seventh year in office. The DOJ entered into three more of these Swiss Bank Program NPAs in 2016 and another three in 2018 for a total of 81 NPAs with these Swiss banks. In exchange for avoiding prosecution, the Swiss banks were required to provide the DOJ and the IRS with detailed information, including information about accounts held by U.S. citizens, to bring their institutions into compliance with U.S. law and to pay penalties.

Chart 1: The rise of corporate DPAs and NPAs



Source: Duke University/University of Virginia Corporate Prosecution Registry⁷

⁷ Ashley, Jon and Brandon Garrett, Duke University/University of Virginia Corporate Prosecution Registry, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html>.

A concerning trend accompanying the upsurge in DPAs and NPAs is the simultaneous decline in federal corporate prosecutions. According to the U.S. Sentencing Commission's official annual reports on the federal criminal cases, the number of convicted corporations peaked in fiscal year 2000, when 296 corporations pleaded guilty or were convicted.⁸ The commission's most recent report, released in June 2019, shows that in fiscal year 2018, corporate prosecutions plummeted to 99 and notes this is "the lowest number of organizational defendants reported since the Commission began reporting this information in 1996"⁹ (see Chart 2).

During the first six months of 2019, the DOJ has already entered into 21 DPAs and NPAs with corporate offenders. This means the department is on track to match earlier peak years of 2007 and 2010, when the number of corporate pre-trial agreements exceeded 40 for the year overall.

A March 2019 article in the *American Criminal Law Review*¹⁰ by Duke University Professor Brandon Garrett describes the decline in corporate prosecutions, comparing the last 18 months of the Obama administration with the first 18 months of the Trump administration.¹¹ Garrett observes that while a fair number of small cases continue to be pursued, larger cases against public companies have fallen, as have the penalties in such cases when they are pursued. The DOJ increasingly is declining to bring charges against corporations – including cases in which the department alleges that an accused corporation did engage in criminal wrongdoing. These declinations are offered as an incentive for corporate defendants to fully cooperate with criminal investigations. The corporations may still be required to disgorge ill-gotten gains and pay other penalties, but the penalties are much less than what would result from prosecution. While the practice of offering declinations as an incentive to cooperate started as a pilot program under Obama and was specifically focused on Foreign Corrupt Practices Act cases, the Trump administration made the program permanent and has expanded it to other cases, notably Barclays.

⁸ U.S. Sentencing Commission Annual Report, (Table 51), 2000,

<https://web.archive.org/web/20041019051612/http://www.usc.gov/ANNRPT/2000/table51.pdf>

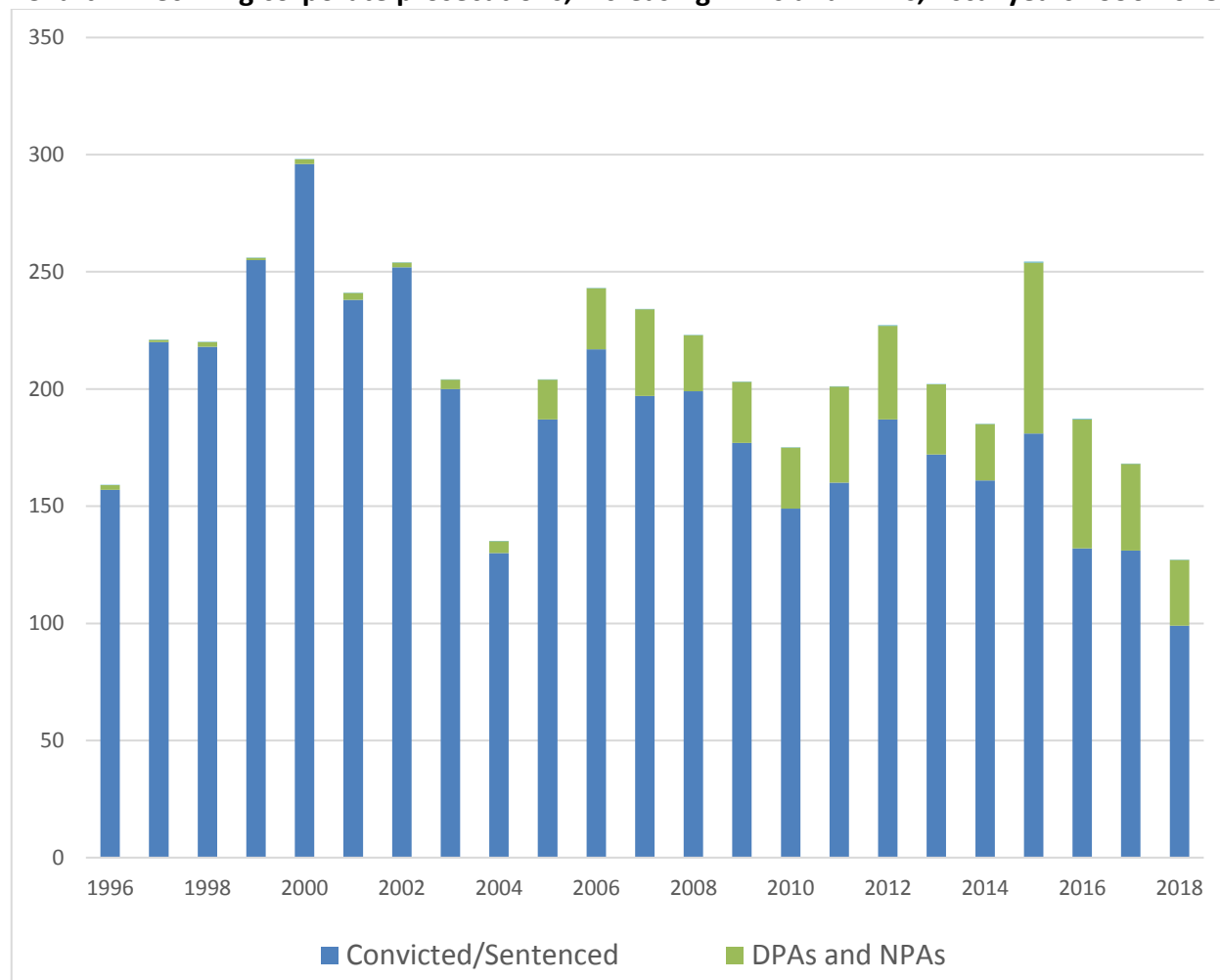
⁹ U.S. Sentencing Commission, Overview of Federal Criminal Cases: Fiscal Year 2018, (p. 21), June 2019,

https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf

¹⁰ Garrett, Brandon L., "Declining Corporate Prosecutions," *American Criminal Law Review*, Forthcoming; Duke Law School Public Law & Legal Theory Series (No. 2019-25), 26 March 2019,

<https://ssrn.com/abstract=3360456>

¹¹ For Public Citizen's 2018 analysis tracking the decline in corporate enforcement across federal agencies including the DOJ in Trump's first year, see <https://www.citizen.org/wp-content/uploads/migration/corporate-enforcement-public-citizen-report-july-2018.pdf>

Chart 2: Declining corporate prosecutions, increasing DPAs and NPAs, fiscal years 1996-2018

Source: Public Citizen analysis of U.S. Sentencing Commission data on organizational prosecutions and the Duke University/University of Virginia Corporate Prosecution Registry

In addition to the Foreign Corrupt Practices Act policy, Trump's DOJ has announced several policies that will reduce corporate penalties, such as the anti-"piling on" policy that limits how much a single corporate violation can trigger penalties from multiple agencies or jurisdictions.¹² The most recently announced of these policies comes from the DOJ's antitrust division,¹³ and is likely to increase the

¹² Shubber, Kadhim "Rod Rosenstein leaves lighter burden on companies at DoJ" Financial Times, 21 Jan. 2019, <https://www.ft.com/content/ff8e63f4-198d-11e9-b93e-f4351a53f1c3>

¹³ U.S. Department of Justice, Press Release: "Assistant Attorney General Makran Delrahim Delivers Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement,"

replacement of corporate prosecutions with deferred prosecution agreements. Under the new policy, corporations that violate antitrust laws, such as participating in criminal cartel or price-fixing conspiracies, will receive a DPA if they had a strong antitrust compliance program in place.¹⁴ This raises the obvious question of how strong the corporation's internal systems to prevent antitrust violations could have been if it was possible for a criminal violation to occur.

This wave of gentle corporate enforcement policies and the decline of federal corporate crime enforcement stands in stark contrast to the DOJ's approach to noncorporate defendants – i.e., actual humans. Federal prosecutors rarely enter deals like this with noncorporate humans. According to the latest official statistics, federal courts entered pre-trial diversion agreements in fewer than 1% of cases over the past year.¹⁵ Between 1996 and 2005, corporate pre-trial diversion was offered at a comparable amount, averaging about 2% of corporate resolutions per year. But between 2006 and 2018, the pre-trial diversion numbers increased so that nearly one in five (18%) corporations that were the subject of criminal enforcement actions by the DOJ received a deferred or non-prosecution agreement. Over the same time frame, the proportion of noncorporate pre-trial diversions decreased from nearly 3% in 2003 to 0.6% in 2018.¹⁶

Ironically, these agreements originated in the early 1900s as a way of reforming juvenile and nonviolent offenders without stigmatizing them by branding them criminals.¹⁷ The Trump administration DOJ's prosecution policy of pursuing the "most serious, readily provable" offense¹⁸ against individuals committing low-level offenses reversed the policy that the Obama administration embraced of lenience toward low-level offenders¹⁹ and marked a return to the "tough on crime"

<https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>

¹⁴ Broughton, Kristin and Dylan Tokar, "Antitrust Compliance Policy Revamps All-or-Nothing Approach to Corporate Leniency," The Wall Street Journal, 11 July 2019, <https://www.wsj.com/articles/antitrust-compliance-policy-revamps-all-or-nothing-approach-to-corporate-leniency-11562971766>

¹⁵ A rough estimate based on Tables D-4 and H-1 of the 2019 Federal Judicial Caseload Statistics, which report 455 pre-trial diversions out of 75,358 convictions and guilty pleas between April 2018 and March 2019. These statistics likely do not count NPAs, which are made directly between prosecutors and defendants and are not subject to court approval, <https://www.uscourts.gov/federal-judicial-caseload-statistics-2019-tables>

¹⁶ *Ibid.*

¹⁷ Reilly, Peter R. "Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions," Brigham Young University Law Review, 27 Sept. 2014, <https://ssrn.com/abstract=2501755>

¹⁸ U.S. Department of Justice, Memorandum for All Federal Prosecutors from Attorney General Jeff Sessions Re: Department Charging and Sentencing Policy, 10 May 2017, <https://www.justice.gov/opa/press-release/file/965896/download>

¹⁹ Horwitz, Sari and Matt Zapotosky, "Sessions issues sweeping new criminal charging policy," The Washington Post, 12 May 2017, <https://www.washingtonpost.com/world/national-security/sessions-issues->

policies of the Bush administration.²⁰ Today, the United States penal system has the largest incarcerated population²¹ and the highest incarceration rate in the world.²² Policies that encourage lenience toward corporations and severe punishments for individuals, especially immigrants accused of unlawful border crossings, have steadily been issued by the Trump administration. The result is a two-tiered justice system.

The stakes in preventing – or failing to prevent – corporate crime are high. The outcomes of future criminal enforcement actions against corporate violators will have tremendous consequences, not only for the corporations' executives, employees and shareholders, but for members of the public who are the victims of corporate crime. The Department of Justice reportedly recently has launched a number of criminal investigations of corporations. If the DOJ finds that any of the corporations it is investigating did in fact violate the law, the DOJ's choice of enforcement action – prosecution, deferred prosecution agreement or non-prosecution agreement – will show whether the department is serious about deterring corporate crime. Prioritizing victims of corporate crime means holding corporations accountable for their misdeeds, not protecting them from the legal consequences of their own unlawful misconduct.

Major corporations that reportedly are under criminal investigation by the DOJ include:

- Boeing, over the certification of the Boeing 737 Max, the model of plane that crashed in Indonesia and Ethiopia, killing 346.²³
- Deutsche Bank, over alleged anti-money laundering failures, including whistleblower allegations about suspicious transactions by White House adviser and President Donald Trump's son-in-law Jared Kushner.²⁴

[sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html](https://www.justice.gov/opa/pr/2017/05/17/170504-criminal-charge-004)

²⁰ U.S. Department of Justice, Memo Regarding Policy On Charging Of Criminal Defendants from Attorney General John Ashcroft Re: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, 22 Sept. 2003, https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm

²¹ Institute for Criminal Policy Research, "World Prison Brief," (accessed 30 July 2019), http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All

²² The Sentencing Project, Press Release: "New Prison and Jail Population Figures Released by U.S. Department of Justice," 25 April 2019, <https://www.sentencingproject.org/news/new-prison-jail-population-figures-released-u-s-department-justice/>

²³ Miletich, Steve, "FBI joining criminal investigation into certification of Boeing 737 MAX," 20 March 2019, <https://www.seattletimes.com/business/boeing-aerospace/fbi-joining-criminal-investigation-into-certification-of-boeing-737-max/>

²⁴ Enrich, David, Ben Protess and William K. Rashbaum, "Deutsche Bank Faces Criminal Investigation for Potential Money-Laundering Lapses," The New York Times, 19 June 2019, <https://www.nytimes.com/2019/06/19/business/deutsche-bank-money-laundering-trump.html>

- Facebook, over its arrangements to share user data with other major technology companies.²⁵
- Fiat Chrysler Automobiles, over alleged bribery payments and labor law violations.²⁶
- Ford Motor Company, over its emissions-certification process.²⁷
- Goldman Sachs, over its involvement with the international 1MDB Malaysian corruption scheme, and for which DOJ staff reportedly are seeking to prosecute the company.²⁸
- Huawei, for allegedly stealing T-Mobile trade secrets.²⁹
- Johnson & Johnson, for allegedly making misleading statements about asbestos in its talcum power products.³⁰
- Poultry processors including Tyson Foods, Perdue Farms, Koch Foods and Sanderson Farms over an alleged price fixing conspiracy.³¹
- Purdue Pharma, over allegations including the OxyContin maker's alleged failure to report doctors that overprescribed its opioids.³²

²⁵ LaForgia, Michael, Matthew Rosenberg and Gabriel J.X. Dance, "Facebook's Data Deals Are Under Criminal Investigation," The New York Times, 13 March 2019, <https://www.nytimes.com/2019/03/13/technology/facebook-data-deals-investigation.html>

²⁶ Snell, Robert, Ian Thibodeau and Daniel Howes, "Fiat Chrysler negotiates with feds to resolve corruption probe," The Detroit News, 19 June 2019, <https://www.detroitnews.com/story/business/autos/chrysler/2019/06/19/fiat-chrysler-negotiates-feds-resolve-corruption-probe/1489636001/>

²⁷ Shepardson, David and Ankit Ajmera, "U.S. opens criminal probe into Ford emissions certification," Reuters, 26 April 2019, <https://www.reuters.com/article/us-autos-ford-emissions/us-opens-criminal-probe-into-ford-emissions-certification-idUSKCN1S21BD>

²⁸ "U.S. Justice staff seek Goldman guilty plea in 1MDB settlement: FT," Reuters, 24 April 2019, <https://www.reuters.com/article/us-usa-1mdb/u-s-justice-staff-seek-goldman-guilty-plea-in-1mdb-settlement-ft-idUSKCN1S02AP>

²⁹ Strumpf, Dan, Nicole Hong and Aruna Viswanatha, "Huawei Targeted in U.S. Criminal Probe for Alleged Theft of Trade Secrets" The Wall Street Journal, 16 Jan. 2019, https://www.wsj.com/articles/federal-prosecutors-pursuing-criminal-case-against-huawei-for-alleged-theft-of-trade-secrets-11547670341?mod=hp_lead_pos1

³⁰ Feeley, Jef, "J&J Denials of Asbestos in Baby Powder Spur Criminal Probe" Bloomberg, 12 July 2019, <https://www.bloomberg.com/news/articles/2019-07-12/j-j-denials-of-asbestos-in-baby-powder-spur-u-s-criminal-probe>

³¹ Yaffe-Bellany, David, "Why Chicken Producers Are Under Investigation for Price Fixing," The New York Times, 25 June 2019, <https://www.nytimes.com/2019/06/25/business/chicken-price-fixing.html>

³² Randazzo, Sara, "Purdue Pharma in Talks With Justice Department to Resolve Criminal, Civil Probes," The Wall Street Journal, 6 Sept. 2019, <https://www.wsj.com/articles/purdue-pharma-in-talks-with-justice-department-to-resolve-criminal-civil-probes-11567792243>

- Uber, over an investigation into an alleged coverup of a 2016 data breach that exposed passengers' and drivers' personal information.³³

If the DOJ finds that any of these corporations committed crimes, it will be telling which, if any, of them are prosecuted and which the DOJ opts to protect with a DPA or NPA. Corporations that have already resolved criminal investigations with a DPA or NPA in 2019 include Walmart,³⁴ Merrill Lynch³⁵ and opioid manufacturers Insys Therapeutics³⁶ and Rochester Drug Cooperative.³⁷

The rapid growth in the number of deferred and non-prosecution agreements in the mid-2000s is the outgrowth of decisions made under the Clinton administration. Mary Jo White, in 1994 the U.S. Attorney for the Southern District of New York, credits herself with entering the first deferred prosecution agreement³⁸ with a major corporation, Prudential Securities,³⁹ a subsidiary of insurance giant Prudential Financial. White, who would later become the Obama administration's chair of the U.S. Securities and Exchange Commission (SEC), cited "crippling collateral consequences to thousands of innocent employees" as a main reason the corporation was offered a three-year DPA.⁴⁰ Reporters for *The Washington Post* characterized the Prudential agreement as "an uncommon

³³ "The Latest: Uber navigating criminal probes on road to IPO", The Associated Press, 25 June 2019, <https://www.apnews.com/105c50b80bbe4ea0b859c2d6ad208e32>

³⁴ U.S. Department of Justice, Press Release: "Walmart Inc. and Brazil-Based Subsidiary Agree to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Case," 20 June 2019, <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt>

³⁵ U.S. Department of Justice, Press Release: "Merrill Lynch Commodities Inc. Enters into Corporate Resolution and Agrees to Pay \$25 Million in Connection with Deceptive Trading Practices Executed on U.S. Commodities Markets," 25 June 2019, <https://www.justice.gov/opa/pr/merrill-lynch-commodities-inc-enters-corporate-resolution-and-agrees-pay-25-million>

³⁶ U.S. Department of Justice, Press Release: "Opioid Manufacturer Insys Therapeutics Agrees to Enter \$225 Million Global Resolution of Criminal and Civil Investigations," 5 June 2019, <https://www.justice.gov/opa/pr/opioid-manufacturer-insys-therapeutics-agrees-enter-225-million-global-resolution-criminal>

³⁷ U.S. Attorney's Office for the Southern District of New York, Press Release: "Manhattan U.S. Attorney And DEA Announce Charges Against Rochester Drug Co-Operative And Two Executives For Unlawfully Distributing Controlled Substances," 23 April 2019, <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-dea-announce-charges-against-rochester-drug-co-operative-and>

³⁸ Mokhiber, Russell, "Interview with Mary Jo White, Debevoise, New York, New York," Corporate Crime Reporter, 12 Dec. 2005, <https://www.corporatecrimereporter.com/news/200/interview-with-mary-jo-white-debevoise-new-york-new-york/>

³⁹ U.S. Attorney for the Southern District of New York, Deferred Prosecution Agreement with Prudential, 27 Oct. 1994, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/prudential.pdf>

⁴⁰ Eichenwald, Kurt "Brokerage Firm Admits Crimes In Energy Deals," The New York Times, 28 Oct. 1994, <https://www.nytimes.com/1994/10/28/us/brokerage-firm-admits-crimes-in-energy-deals.html>

deal.”⁴¹ White joined the white-collar defense firm Debevoise and Plimpton after her time as a U.S. Attorney, and she rejoined the firm after serving as SEC chair.⁴²

In 1999, then-deputy attorney general Eric Holder issued a memo outlining the U.S. government’s policies for criminal charges against corporations, which specifically indicated that DOJ attorneys should consider “collateral consequences”⁴³ when bringing charges.⁴⁴ The “Holder Doctrine,”⁴⁵ as it came to be known, directed federal prosecutors to consider potential adverse effects on a corporation’s shareholders and employees when deciding whether to bring charges against a corporation.⁴⁶

The administration of President George W. Bush further solidified the use of pre-trial diversion for corporations. In 2003, Deputy Attorney General Larry Thompson released what came to be known as the Thompson memo,⁴⁷ which instructs federal prosecutors to consider several factors when considering prosecuting a corporation. The factors included collateral consequences, the nature of the offense, harms to the public, pervasiveness of wrongdoing within the corporation, any history of similar conduct, timely and voluntary disclosures of wrongdoing by the corporation, the corporation’s compliance program, the adequacy of prosecuting individuals responsible for the

⁴¹ Walsh, Sharon and Jay Mathews, "Prudential Accused of Fraud, But Gets Chance to Avoid Trial," The Washington Post, 28 Oct. 1994, <https://www.washingtonpost.com/archive/politics/1994/10/28/prudential-accused-of-fraud-but-gets-chance-to-avoid-trial/6962be54-9425-4729-b08c-6b04bf4d139a/>

⁴² "Mary Jo White Biography," Debevoise & Plimpton, (accessed 18 April 2019), <https://www.debevoise.com/maryjowhite?tab=biography>

⁴³ For current guidance on DOJ views with regard to collateral consequences, see Principles of Federal Prosecution of Business Organizations (9-28.1100 - Collateral Consequences), Justice Manual, 2018 (accessed 15 Feb. 2019), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>

⁴⁴ U.S. Department of Justice, Memorandum to All Component Heads and United States Attorneys from the Deputy Attorney General, (Subject: Bringing Criminal Charges Against Corporations), U.S. Department of Justice, 16 June 1999, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>

⁴⁵ Conan, William D., "Sound and Fury in Bank Settlements, Still Signifying Nothing," The New York Times, 19 Aug. 2014, <https://dealbook.nytimes.com/2014/08/19/sound-and-fury-in-bank-settlements-still-signifying-nothing/>

⁴⁶ Conan, William D., "Justice Dept. Shift on White-Collar Crime Is Long Overdue," The New York Times, 11 Sept. 2015, <https://www.nytimes.com/2015/09/12/business/dealbook/justice-dept-shift-on-white-collar-crime-is-long-overdue.html>

⁴⁷ Thompson, L. D., Memorandum: Principles of Federal Prosecution of Business Organizations, Office of the Deputy Attorney General, 20 Jan. 2003, http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf

corporation's malfeasance and the adequacy of civil or regulatory enforcement actions.⁴⁸ The Thompson Memo mentions pre-trial diversion only once, but it is nonetheless seen as a decisive moment for the accelerated use of deferred and non-prosecution agreements.

Potential collateral consequences, it is worth noting, are not a factor the DOJ considers when considering whether to prosecute an individual.⁴⁹ All that is asked of prosecutors in the Justice Manual is that they "be alert to the possibility that a conviction [...] may, in some cases, result in collateral consequences for the defendant, such as disbarment"⁵⁰ – a consequence, it should be noted, that applies almost exclusively to white-collar criminals.

But collateral consequences for non-privileged offenders are not trivial. On the contrary, they can be devastating on both an individual and societal scale. The thousands of child separations⁵¹ and detentions that characterize the Trump administration's brutal "zero tolerance" immigration enforcement policies are, after all, a collateral consequence of the DOJ's immigration prosecutions.

Federal Judge Emmet Sullivan in a 2015 decision criticized corporate deferred prosecution agreements and lamented that federal prosecutors almost never enter similar agreements with individual defendants:

The Court respectfully requests the Department of Justice to consider expanding the use of deferred-prosecution agreements and other similar tools to use in appropriate circumstances when an individual who might not be a banker or business owner nonetheless shows all of the hallmarks of significant rehabilitation potential. The harm to society of refusing such individuals the chance to demonstrate their true character and avoid the catastrophic consequences of felony convictions is, in this Court's view, greater than the harm the government seeks to avoid by providing

⁴⁸ *Ibid.*

⁴⁹ Amulic, Andrea, "Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States," (116 Mich. L. Rev. 123), 2017, <http://repository.law.umich.edu/mlr/vol116/iss1/3>

⁵⁰ Principles of Federal Prosecution, (9-27.240 - Initiating and Declining Charges--Prosecution in Another Jurisdiction), Justice Manual, 2018, (accessed 5 June 2019), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>; See also Raman, Mythili, Acting Assistant Attorney General, Criminal Division, U.S. Department of Justice, "Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?" Testimony before the U.S. House of Representatives Committee on Financial Services, Subcommittee on Oversight and Investigations, 22 May 2013, <https://www.justice.gov/iso/opa/ola/witness/05-22-13-crm-raman-testimony-re-who-is-too-big-to-fail--are-large-financial-inst.201385141.pdf>

⁵¹ U.S. Department of Health & Human Services Office of Inspector General, "Issue Brief: Separated Children Placed in the Office of Refugee Resettlement Care," Jan. 2019, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>

corporations a path to avoid criminal convictions. If the Department of Justice is sincere in its expressed desire to reduce over-incarceration and bolster rehabilitation, it will increase the use of deferred-prosecution agreements for individuals as well as increase the use of other available resources as discussed in this Opinion.⁵²

The judge wrote his decision when the Obama administration had implemented criminal justice reform policies that succeeded in reducing the U.S. prison population by 5%.⁵³

Furthermore, more than 2 million incarcerated Americans are parents of children under the age of 18, and at least 32,000 (who have not been accused of abuse) have permanently lost custody of their children, thousands for no apparent reason aside from the fact of their incarceration.⁵⁴ Nevertheless, before the U.S. Justice Department, considerations for protecting the supposedly innocent shareholders and employees who may be harmed by a corporate prosecution outweigh considerations for protecting children who lose their parents to prosecution.

Disenfranchisement is another significant collateral consequence that convicted felons face. Felons lose their right to vote while incarcerated in 48 states, and in 12 of these states the felon's voting rights can be denied indefinitely.⁵⁵ Corporations cannot vote, but the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission* means corporations can spend as much as they want to influence elections. Among the top corporate political spenders are corporate wrongdoers that have been the subject of multiple criminal enforcement actions, including Las Vegas Sands, JPMorgan Chase, UBS, Chevron and Pfizer.

⁵² Memorandum Opinion of U.S. District Judge Emmet G. Sullivan in *U.S. v. Saena Tech Corporation*, (Case 1:14-cr-00066-EGS), U.S. District Court for the District of Columbia, 21 Oct. 2015, <http://rmokhiber.wpengine.com/wp-content/uploads/2015/10/saena.pdf>

⁵³ Gramlich, John "Federal prison population fell during Obama's term, reversing recent trend," Pew Research Center, 5 Jan. 2017, <https://www.pewresearch.org/fact-tank/2017/01/05/federal-prison-population-fell-during-obamas-term-reversing-recent-trend/>

⁵⁴ Hager, Eli and Anna Flagg, "How Incarcerated Parents Are Losing Their Children Forever," The Marshall Project, 2 Dec. 2018, <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever>

⁵⁵ National Conference of State Legislatures, "Felon Voting Rights," 21 Dec. 2018, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>

Table 1: Top corporate political spenders that have received a DPA or an NPA and been subject to subsequent criminal enforcement actions.

Corporation	Total Contributions	To Dems & Liberals	To Repubs & Conservs	% to Dems & Liberals	% to Repubs & Conservs
Las Vegas Sands	\$176,200,504	\$67,336	\$176,134,787	0.00%	100.00%
JPMorgan Chase	\$41,380,512	\$20,114,545	\$21,172,791	48.70%	51.30%
General Electric	\$39,497,868	\$17,946,169	\$21,479,773	45.50%	54.50%
UBS	\$30,929,248	\$13,118,921	\$17,565,687	42.80%	57.20%
Chevron	\$28,632,527	\$4,177,064	\$24,400,297	14.60%	85.40%
Pfizer	\$27,212,403	\$10,082,067	\$17,079,757	37.10%	62.90%
Total	\$343,853,062	\$65,506,102	\$277,833,092	19.05%	80.80%

Source: OpenSecrets.org

Among the Center for Responsive Politics' list of top organizational political spenders, which includes corporations, labor unions and nonprofit organizations, Las Vegas Sands, whose CEO is billionaire Republican donor Sheldon Adelson, is the third largest spender.⁵⁶

Importantly, the Thompson Memo was released seven months after the 2002 conviction of the multinational accounting firm Arthur Andersen. The DOJ indicted the firm on criminal obstruction of justice charges for destroying documents related to its audits of Enron,⁵⁷ the disgraced energy company whose bankruptcy and a subsequent FBI investigation revealed had cheated investors out of millions. The Enron investigation resulted in 22 convictions, including of CEO Jeff Skilling.⁵⁸ Throughout the legal proceeding against Arthur Andersen, the DOJ was accused of going too tough

⁵⁶ OpenSecrets.org, "Top Organization Contributors," (accessed 31 July 2019), <https://www.opensecrets.org/orgs/list.php?cycle=ALL>

⁵⁷ Wilke, John R. and Nicholas Kulish, "Indictment by Justice Department Puts Arthur Andersen's Fate on Line," The Wall Street Journal, 15 March 2002, <https://www.wsj.com/articles/SB1016135826861357280>

⁵⁸ Federal Bureau of Investigation, "Enron," (accessed 5 June 2019), <https://www.fbi.gov/history/famous-cases/enron>

on the firm,⁵⁹ which for the duration of the proceeding was suspended from doing business with the government.⁶⁰ Arthur Andersen's response was to claim that the indictment was tantamount to a "death sentence" for the company,⁶¹ though University of Maryland law professor Rena Steinzor says the firm was already mortally wounded by the reputational damage of its Enron collusion by the time the indictment became public.⁶² Indeed, the firm's corporate clients like the pharmaceutical giant Merck and Delta Air Lines started fleeing even before its indictment, and the firm's foreign affiliates were taking steps to sever ties with its toxic U.S. arm.⁶³ Three months later, Arthur Andersen was convicted,⁶⁴ and as an automatic collateral consequence was subsequently barred from auditing public companies.⁶⁵ Two years after its conviction, only 215 of its 28,000⁶⁶ US-based employees remained.⁶⁷ The idea that a large corporation will almost certainly collapse in the face of federal prosecution has come to be known as the "Andersen Effect."⁶⁸

During its trial, Arthur Andersen advanced the narrative that the DOJ's prosecution was an act of a reckless and zealous government overreach – "a gross abuse of government power," in the firm's lawyer's terms.⁶⁹ To influence public opinion, Andersen engaged in a sustained public relations campaign, including by organizing demonstrations in Washington, D.C., setting up a web page the firm's employees could use to contact their members of Congress to claim the indictment had left

⁵⁹ Garrett, Brandon L. "Structural Reform Prosecution," (Vol. 93, p. 880), Virginia Law Review, 17 March 2007, <http://www.virginialawreview.org/sites/virginialawreview.org/files/853.pdf>, citing Creswell, J. "U.S. Indictment for Big Law Firm in Class Actions," The New York Times, 19 March 2006, <http://www.nytimes.com/2006/05/19/business/19legal.html>

⁶⁰ General Services Administration, Press Release: "GSA Suspends Enron and Arthur Andersen and Former Officials," 15 March 2002, <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-suspends-enron-and-arthur-andersen-and-former-officials>

⁶¹ Wilke, John R. and Nicholas Kulish, "Indictment by Justice Department Puts Arthur Andersen's Fate on Line," The Wall Street Journal, 15 March 2002, <https://www.wsj.com/articles/SB1016135826861357280>

⁶² Steinzor, Rena, *Why Not Jail?* (p. 4-5), Cambridge University Press, 2014,

⁶³ Glater, Jonathan D., "Longtime Clients Abandon Auditor," The New York Times, 16 Mar. 2002, <https://www.nytimes.com/2002/03/16/business/longtime-clients-abandon-auditor.html>

⁶⁴ Weil, Jonathan and Alexei Barrionuevo, "Arthur Andersen Is Convicted On Obstruction-of-Justice Count," The Wall Street Journal, 16 June 2002, <https://www.wsj.com/articles/SB1023469305374958120>

⁶⁵ *Ibid.*

⁶⁶ Lane, C., "Justices Overturn Andersen Conviction." The Washington Post, 1 June 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053100491.html>

⁶⁷ Zaslow, Jeffery, "How the Former Staff Of Arthur Andersen Is Faring Two Years After Its Collapse," The Wall Street Journal, 8 April 2004, <https://www.wsj.com/articles/SB108137612021777213>

⁶⁸ Markoff, Gabriel, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century," (Vol. 15:3, p. 797), University of Pennsylvania Journal of Business Law, March 10, 2013, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1440&context=jbl>

⁶⁹ Brickey, Kathleen F. "Andersen's Fall From Grace," (Vo. 81:4, p. 917), Washington University Law Review, 2003, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1302&context=law_lawreview

them “emotionally and financially crippled,” releasing misleading information online about the government’s case, and running full-page newspaper ads claiming the firm’s lawyers were “absolutely convinced that no one in [Arthur Andersen] committed a crime.”⁷⁰

But the facts contradict Arthur Andersen’s version of the story. As ProPublica journalist Jesse Eisinger reports in *The Chickenshit Club*, his book about the decline in federal enforcement against white-collar crime, the firm’s actions were an attempt to avoid being implicated in the Enron scandal. Due to Andersen’s intransigence, the DOJ had practically no recourse besides prosecution.⁷¹

Facing an SEC investigation, an Arthur Andersen lawyer relayed instructions that would result in the destruction of more paper documents over three days than the firm typically destroyed in a year, plus 30,000 files and emails.⁷² The seriousness of the offense combined with the firm’s checkered past – a 1996 DPA and previous SEC enforcements – led Justice Department prosecutors to insist Arthur Andersen admit wrongdoing. On separate occasions during negotiations with the firm, prosecutor Michael Chertoff offered a DPA and an NPA, in both cases on the condition that Arthur Andersen admit wrongdoing. But the firm’s lawyers refused, opting instead for the trial that led ultimately to the firm’s dissolution.⁷³ Later, in 2005, the U.S. Supreme Court overturned Arthur Andersen’s conviction, citing faulty jury instructions.⁷⁴ While the ruling did not dispute the facts underlying Arthur Andersen’s conviction, it further fueled opponents of prosecuting corporations, has been used deceptively to mischaracterize Arthur Andersen as purely “innocent.”⁷⁵

Subsequently, the view that prosecuting corporations may threaten their collapse has come to prevail. Mary Jo White, the former SEC chair and former federal prosecutor who credits herself with completing the first DPA with a major company and now works for a white-collar defense firm, supports this view in a 2005 interview with the Corporate Crime Reporter:

The Justice Department came under a lot of criticism for indicting Arthur Andersen and putting it out of business.

That was justified criticism.

⁷⁰ *Ibid.*

⁷¹ Eisinger, Jesse, *The Chickenshit Club*, (p. 32-58), Simon & Schuster, 2017.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Lane, Charles, "Justices Overturn Andersen Conviction," The Washington Post, 1 June 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/31/AR2005053100491.html>

⁷⁵ Kilmeade, Brian, "I Dare Robert Mueller To Testify," Brian Kilmeade Show, Fox News Radio, 30 May 2019, <https://radio.foxnews.com/2019/05/30/rudy-giuliani-i-dare-robert-mueller-to-testify/>

What has happened is that since Arthur Andersen, the Justice Department, to its credit, has focused on the awesome collateral consequences of moving against an entire entity criminally. The stigma of that, the reputational hit of that is too severe for most companies to survive. And so, they have turned to what they consider to be a lesser sanction with lesser collateral consequences. And that is the deferred prosecution agreement, which can take many forms.⁷⁶

This view is contested, to say the least. Law scholar and defense lawyer Gabriel Markoff has demonstrated that convicted corporations do not necessarily collapse.⁷⁷ Of the 54 publicly traded corporations that were convicted between 2001 and 2010, Markoff found that the majority, 69 % (37 corporations), continued to remain active after conviction. Twelve merged with or were acquired by another business under favorable conditions. Only five failed, and three of the failures occurred more than three years after their convictions. In all five cases, the corporations' failures are readily explained by problems with the businesses. No company "could reasonably be said to have suffered a business failure because of their convictions," Markoff writes.⁷⁸ "There is no empirical evidence to support the existence of the Andersen Effect."⁷⁹

University of Michigan law professor and former federal prosecutor David Uhlman is another noteworthy critic of DPAs and NPAs who argues that the Justice Department should not hesitate to prosecute corporations that commit criminal acts.⁸⁰ Uhlman notes that the DOJ's use of pre-trial diversion is uneven, with DPAs and NPAs seldom being used for antitrust and environmental enforcement and some U.S. Attorney's offices using them more often than others for corporate enforcement. Uhlman takes particular exception to the DOJ entering an NPA in 2011 with Alpha Natural Resources over the Upper Big Branch mine disaster in which 29 workers were killed. Alpha acquired Massey Energy,⁸¹ the mining corporation responsible for Upper Big Branch, along with its concomitant liabilities about a year before the NPA was finalized. While Uhlman notes that managers at the mine were prosecuted and cites this as a "positive development," he argues, "The most effective

⁷⁶ Mokhiber, Russell, "Interview with Mary Jo White, Debevoise, New York, New York," Corporate Crime Reporter, 12 Dec. 2005, <https://www.corporatecrimereporter.com/news/200/interview-with-mary-jo-white-debevoise-new-york-new-york/>

⁷⁷ Markoff, Gabriel, "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century," (Vol. 15:3, p. 797), University of Pennsylvania Journal of Business Law, 10 March 2013, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1440&context=jbl>

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Uhlmann, David M. "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability", (Vol. 72, No. 4) Maryland Law Review, 2013; U of Michigan Public Law Research Paper (No. 352.), 1 Oct. 2013, <https://ssrn.com/abstract=2334230>

⁸¹ Gelsi, Steve "Massey Energy's shares rally on buyout pact," MarketWatch, 31 Jan. 2011, <https://www.marketwatch.com/story/massey-energy-shares-rally-on-buyout-deal-2011-01-31>

way to combat corporate crime [...] is to prosecute the individuals who committed the offenses *and* the companies involved” (emphasis in the original).⁸²

II. DPAs and NPAs as Ineffective Instruments for Reform

Another rationale the Department of Justice gives for entering into DPAs and NPAs with corporate criminals is that such agreements can bring about significant institutional change or “structural reform.” However, the repeat offender findings in this report cast doubt on these agreements’ effectiveness for reforming corporations.

In addition to fines, DPAs and NPAs typically require corporations to strengthen internal compliance programs and practices to prevent recidivism. Sometimes companies are required to appoint a federal monitor, who is paid by the corporation but reports to the DOJ, to oversee the corporation’s rehabilitation over the period of the agreement. In theory, prosecutors retain the power to prosecute or extend the deferment should the corporation violate the terms of the agreement, a determination that typically can be made unilaterally by DOJ prosecutors.⁸³ In a 2008 letter to the House Judiciary Committee, then-Principal Deputy Assistant Attorney General Brian A. Benczkowski (now Assistant Attorney General overseeing the DOJ’s criminal division under Trump⁸⁴) explained that “by requiring solid ethics and compliance programs, [DPAs and NPAs] encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates.”⁸⁵

Former U.S. Attorney General John Ashcroft, who served as a federal monitor for the medical device company Zimmer, which has since merged with a rival to form ZimmerBiomet, lauded the power of deferred prosecution agreements in correcting bad corporate behavior. According to Ashcroft, such agreements are a cost-effective way for the DOJ to fight corporate crime while strengthening American businesses. He explained in congressional testimony:

⁸² *Ibid.*

⁸³ The DOJ has resisted judicial intervention in deferred prosecution agreements. See Junck, Ryan D. Keith D. Krakaur, Elizabeth Robertson, and Khalil N. Maalouf, “Second Circuit Upholds Prosecutorial Discretion in Deferred Prosecution Agreements,” Skadden, Arps, Slate, Meagher & Flom LLP, 20 Sept. 2017, <https://www.skadden.com/insights/publications/2017/09/second-circuit-upholds-prosecutorial-discretion>

⁸⁴ U.S. Department of Justice, “Assistant Attorney General Brian A. Benczkowski,” 27 July 2018, <https://www.justice.gov/criminal/meet-aag>

⁸⁵ Letter from Benczkowski, B. A., Principal Deputy Assistant Attorney General to John Conyers, Chairman, Committee on the Judiciary, excerpted from Daly, E.M., “Congress Wary Of DOJ’s Corporate Monitoring Info,” Law 360, 23 May 2008, <http://www.law360.com/articles/57190/congress-wary-of-doj-s-corporate-monitoring-info>

[DPAs] provide defendant companies with legal and business guidance on how to conduct their businesses legally and ethically. They do this at the expense of the offending business and thereby free Department of Justice resources to prosecute other law-breaking companies. A deferred prosecution agreement allows a company to maintain operations while rectifying previous wrongdoing or unlawful behavior and allows the Department of Justice to resume prosecution in the event a company fails to comply with its deferred prosecution agreement responsibilities.⁸⁶

Ashcroft's appointment as Zimmer's monitor attracted congressional scrutiny of the rising use of DPAs and NPAs. Two hearings held in 2008 and 2009 focused on the use of such agreements. The first hearing was prompted by concerns that Ashcroft's appointment by then-U.S. Attorney for the District of New Jersey Chris Christie, a former Ashcroft subordinate, was an instance of cronyism. At the time, no DOJ guidelines were in place regarding how the department selected or approved such monitors, who are paid by the corporations. Ashcroft and his firm received a lucrative contract to monitor Zimmer, a medical device company that paid surgeons to induce them to use its products and allegedly conspired with other medical device companies to violate federal anti-kickback laws.⁸⁷ But the 2008 hearings went beyond monitor selection issues to look more broadly at the process by which prosecutors decide to use DPAs and NPAs and the implications of their use in corporate criminal cases.

Some witnesses at the hearing represented white-collar defense firms and suggested that DPAs and NPAs represent an excess of government power over corporations, in part because monitors were perceived as having significant authority to dictate practices to the corporations they were monitoring.⁸⁸

Others questioned the lack of guidelines concerning how and when to use such agreements. In his testimony, Duke University law professor Brandon Garrett (whose database was used for analysis in this report) pointed out that the DOJ gave no clear indication why some agreements required monitors and others did not, or why some required implementation of compliance programs and others did not. Moreover, the DOJ failed to explain why some agreements failed to include fines or restitution. The DOJ had not indicated when prosecutors should use NPAs, which were not evaluated by the court, instead of DPAs, which preserved some opportunity for judicial review. Finally, Garrett

⁸⁶ Testimony of John D. Ashcroft., *Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines*, (on file with authors), 11 March 2008.

⁸⁷ U.S. Department of Justice, U.S. Attorney, District of New Jersey. Press Release: "Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring," 27 September 2007. <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf>

⁸⁸ For example, see Testimony of George J. Terwilliger, *Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines*. (on file with author), 11 March 2008.

noted in his testimony that while federal guidelines call for assessments of compliance programs, DPAs did not have any such assessment practices in place. "As it stands, the public cannot tell whether agreements achieve the sought-after compliance. When an agreement ends, no information is typically released except the bare fact that prosecutors were satisfied that it was successful," Garrett said.⁸⁹

Another hearing in 2009 picked up the issues of lack of assessment and lack of transparency in the use of DPAs and NPAs. At that hearing, the Government Accountability Office (GAO) presented a report⁹⁰ based on a review of 57 out of the 140 DPAs and NPAs made from 1993 to 2009 and interviews conducted with 13 DOJ offices, representatives from the corporations that had signed DPAs or NPAs requiring compliance programs, and corporate monitors. The report suggested that while prosecutors were using DOJ guidelines to make decisions about the use of DPAs or NPAs, they differed in their willingness to use DPAs or NPAs. Since the 2008 hearings, the DOJ has issued guidance⁹¹ regarding selection of monitors, but the GAO report noted that the DOJ did not require documentation of the process and reasons for monitor selection and recommended that such documentation be required.⁹² Assistant Attorney General Benczkowski recently announced further modifications that place new limitations on corporate monitorships.⁹³

A GAO report filed later in 2009 also noted that the government had taken steps to improve tracking of DPAs and NPAs. Until 2009, no central mechanism for tracking these agreements existed. But the GAO still found the DOJ's tracking and evaluation of DPAs and NPAs to be inadequate. The report

⁸⁹ Testimony of Brandon Garrett, *Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines* (on file with author), 11 March 2008.

⁹⁰ "Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements" (GAO-09-636T), U.S. Government Accountability Office, 25 June 2009, <https://www.gao.gov/products/GAO-09-636T>

⁹¹ Acting Deputy Attorney Gary G. Grindler, "The Use of Corporate Monitors in any Deferred or Non-Prosecution Agreement," U.S. Department of Justice, 1 June 2010, <https://www.justice.gov/archives/opa/blog/use-corporate-monitors-any-deferred-or-non-prosecution-agreement>

⁹² U.S. Government Accountability Office, Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements, 2009, <http://www.gao.gov/new.items/d09636t.pdf>

⁹³ Press release: "Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance," U.S. Department of Justice, 12 Oct. 2018, <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program>

noted, “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.”⁹⁴

The GAO’s 2009 report suggested two possible models for measuring effectiveness of DPAs or NPAs: tracking recidivism or tracking a company’s compliance. Some of the companies the GAO interviewed said it would be difficult to come up with a measurement of recidivism: For example, a measurement would need to determine whether a company that entered into a DPA or NPA due to the violation of one criminal law would be considered a recidivist if a subsequent violation involved the breach of a different criminal law. Further, DOJ officials suggested that the department does not have the resources to monitor a company’s activities after the agreement has been completed, nor is it their mission to do so. So, according to the DOJ, recidivist acts occurring after the term of the agreement could not be tracked adequately, nor would it necessarily make sense to do so.

In response to the GAO’s recommendations, the DOJ agreed in 2010 to “complete revisions to its data systems to allow it to track progress and successful completion of DPAs and NPAs.”⁹⁵ The GAO stated that in December 2010, the executive office for U.S. Attorneys submitted its first report about the effectiveness of corporate DPAs and NPAs, but⁹⁶ the report has not been made publicly available.

⁹⁴ U.S. Government Accountability Office, DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness, 18 Dec. 2009.

<http://www.gao.gov/assets/300/299781.pdf>

⁹⁵ U.S. Government Accountability Office, Recommendation for Executive Action: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness, 18 Dec. 2009, <http://www.gao.gov/products/GAO-10-110>

⁹⁶ *Ibid.*

III. Systemic Risk and the Rise of Too Big to Jail

The controversy over corporate prosecutions grew in the wake of the 2008 financial crisis under President Obama, who named Eric Holder his first attorney general. Holder left his corporate defense practice at the law firm Covington & Burling⁹⁷ to take the job. In 2013 testimony before Congress, Holder admitted the size of major financial firms had made it tougher to prosecute these megabanks. In particular, Holder's DOJ was facing heavy criticism for its refusal to prosecute the global megabank HSBC, which instead received a deferred prosecution agreement in 2012 for charges filed against it for violating sanctions and facilitating money laundering for Mexican drug cartels.

Holder said:

It does become difficult for us to prosecute when we are hit with indications that if we do [...] bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. It has an inhibiting influence, impact on our ability to bring resolutions that I think would be more appropriate.⁹⁸

Holder also asserted that the DOJ has been "aggressive as we could have been":

These are not always easy cases to make. [...] When you look at these cases, you see that things were done 'wrong'; then the question is whether or not they were illegal. In some instances that has not been a satisfying answer to people, but we have been as aggressive as we could have been.⁹⁹

Two months later, after intense criticism from both the right and left, Holder backtracked on his remarks. "Let me be very, very, very clear," Holder said. "Banks are not too big to jail. If we find a bank or a financial institution that has done something wrong, if we can prove it beyond a reasonable doubt, those cases will be brought."¹⁰⁰ The impossibility of reconciling Holder's earlier statement with his later statement only added to the confusion. A 2014 analysis by Public Citizen highlighted that the DOJ had entered into multiple deferred and non-prosecution agreements with major multinational financial corporations. The report raised the concern that the DOJ may have adopted a

⁹⁷ Lattman, Peter "The Holder Memo and Its Progeny," The Wall Street Journal, 13 Dec. 2006, <https://blogs.wsj.com/law/2006/12/13/the-holder-memo/>

⁹⁸ Douglas, Danielle, "Holder concerned megabanks too big to jail," The Washington Post, 6 March 2013, https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html

⁹⁹ *Ibid.*

¹⁰⁰ Breslow, Jason M. "Eric Holder Backtracks Remarks on "Too Big To Jail," Frontline, 16 May 2013, <https://www.pbs.org/wgbh/frontline/article/eric-holder-backtracks-remarks-on-too-big-to-jail/>

de facto policy of refusing to indict certain institutions because of their relative size and systemic importance.¹⁰¹

Holder in 2015 returned to Covington, where he is a partner, but his treatment of large banks has continued to draw fire. For example, the Republican-controlled House Financial Services Committee in 2016 criticized top Justice Department officials including Holder for overruling prosecutors' recommendation to prosecute HSBC over concerns about the potential impact on the financial system. The report, based partly on a cache of documents Public Citizen acquired via a Freedom of Information Act,¹⁰² found that the "DOJ leadership declined to pursue [the] recommendation to prosecute HSBC because senior DOJ leaders were concerned that prosecuting the bank 'could result in a global financial disaster.'"¹⁰³ While the egregiousness of HSBC's offenses and the DOJ's lenience garnered an unusual amount of media attention, a 2014 report by Public Citizen on financial institutions receiving deferred and non-prosecution agreements judged the DOJ's treatment of the London-based megabank to be "the norm rather than the exception."¹⁰⁴

Earlier in the Obama administration, Lanny Breuer, head of the DOJ's criminal division at the time, made clear the DOJ's embrace of pre-trial diversion under presidents of both parties as the department's preferred mode of criminal enforcement for large corporations, stressing that "*the health of an industry or the markets are a real factor*" (emphasis added) in some cases.

We are frequently on the receiving end of presentations from defense counsel, CEOs, and economists who argue that the collateral consequences of an indictment would be devastating for their client. In my conference room, over the years, I have heard sober predictions that a company or bank might fail if we indict, that innocent employees could lose their jobs, that entire industries may be affected, and even that global markets will feel the effects. Sometimes – though, let me stress, not always – these presentations are compelling.

¹⁰¹ Public Citizen, "Justice Deferred: The Use of Deferred and Non-Prosecution Agreements in the Age of 'Too Big To Jail'," 8 July 2014, <https://www.citizen.org/wp-content/uploads/justice-deferred-too-big-to-jail-report.pdf>

¹⁰² Proress, Ben, "Documents Show Obama Officials in Tension Over British Banks," The New York Times, 29 May 2013, <https://dealbook.nytimes.com/2013/05/29/documents-show-obama-officials-in-tension-over-british-banks/>

¹⁰³ Report Prepared by the Republican Staff of the Committee on Financial Services, "Too Big To Jail: Inside the Obama Justice Department's Decision Not to Hold Wall Street Accountable," 11 July 2016, https://financialservices.house.gov/uploadedfiles/07072016_oi_tbtj_sr.pdf

¹⁰⁴ Public Citizen, "Justice Deferred: The Use of Deferred and Non-Prosecution Agreements in the Age of 'Too Big To Jail', 8 July 2014, <https://www.citizen.org/wp-content/uploads/justice-deferred-too-big-to-jail-report.pdf>

In reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the nature of the crimes committed and the pervasiveness of the misconduct. 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 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.¹⁰⁵

Under the Trump administration, nearly all types of corporate criminal enforcement have declined, with guilty pleas down to 50 in Trump's first and second years compared with 117 in Obama's last year. Deferred and non-prosecution agreements, on the other hand, are on the rise again. Despite the administration's "tough on crime" approach to immigrants and low-level offenders, the Trump DOJ has adopted several policies designed to decrease fines for corporations and help corporate offenders avoid prosecution. In this context, an increase in DPAs and NPAs is one more manifestation of the administration's softness on corporate crime.

¹⁰⁵ "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," U.S. Department of Justice 13 Sept. 2012, <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>

IV. Repeat Offenders

Contrary to claims that deferred and non-prosecution agreements foster compliance and prevent recidivism, corporations that enter into these agreements with the government are often repeat offenders that commit serious violations after their initial DPA or NPA. Public Citizen reviewed the Duke University/University of Virginia Corporate Prosecution Registry, the most comprehensive resource documenting criminal enforcement against corporations publicly available, and found that 38 corporations that entered into DPAs or NPAs with the government went on to face subsequent federal criminal enforcement actions, including DPAs, NPAs and plea agreements.

Most of the time, the Justice Department requires corporations that enter NPAs and DPAs to agree that the facts of the department's allegations are true and admit responsibility. Out of the department's 126 pre-trial diversion agreements, plea agreements and other enforcement actions with the 38 repeat offender corporations, in only seven instances (including Arthur Andersen's overturned trial conviction) does the action conclude with the accused corporation continuing to dispute the government's allegations (see Table 2). The five corporations that did not accept responsibility for the DOJ's allegations against them are Arthur Andersen, Halliburton, Hitachi, NEC and Stryker.

Table 2: The seven corporate enforcements involving an NPA or a DPA in which the accused alleged repeat offender corporation did not accept responsibility for the DOJ's allegations.

Corporation	Enforcement Type	Enforcement Date	Allegations	Details
Arthur Andersen	Trial Conviction	10/21/2002	Alleged obstruction of justice in 2001 related to the SEC's investigation into wrongdoing by Enron.	Arthur Andersen refused to accept an NPA or DPA and admit wrongdoing and was subsequently convicted in a jury trial. In 2005, the U.S. Supreme Court overturned the conviction, citing improper jury instructions.
Arthur Andersen	DPA	4/1/1996	Alleged participation in a real estate fraud scheme in 1989 and 1990.	Regarding allegations, the DPA states: "Andersen denies any such act or violation."
Halliburton	NPA	2/11/2009	Alleged foreign corruption violations between 1995 and 2004 to which Halliburton's then-subsidy KBR pleaded	No language admitting responsibility or accepting facts as described by DOJ is contained in Halliburton's NPA.

			guilty. Parent company Halliburton received an NPA for the same wrongdoing but did not admit wrongdoing.	
Hitachi	NPA	1/20/2006	Alleged antitrust violations with Elpida, a joint venture between Hitachi and NEC. Elpida pleaded guilty while Hitachi and NEC received NPAs.	No language admitting responsibility or accepting facts as described by DOJ is contained in Hitachi's NPA.
NEC	NPA	1/1/2006	Alleged antitrust violations with Elpida, a joint venture between Hitachi and NEC. Elpida pleaded guilty while Hitachi and NEC received NPAs.	No language admitting responsibility or accepting facts as described by DOJ is contained in NEC's NPA.
Stryker (Stryker Corp.)	NPA	8/28/2014	Alleged health care fraud violations to which Otismed, a Stryker subsidiary that was not owned by Stryker at the time of wrongdoing, pleaded guilty. Stryker entered an NPA in a side letter with DOJ.	No language admitting responsibility or accepting facts as described by DOJ is contained in the Stryker side letter detailing its NPA with DOJ.
Stryker (Stryker Orthopedics)	NPA	10/1/2005	Alleged antitrust violations with four other medical device companies (Biomet, Depuy Orthopaedics, Smith & Nephew and Zimmer). Being the first corporation to come forward about the conspiracy, Stryker was rewarded with an NPA while the others received DPAs.	No language admitting responsibility or accepting facts as described by DOJ is contained in Stryker's NPA.

Source: Duke University/University of Virginia Corporate Prosecution Registry

The U.S. Sentencing Commission, an agency within the judiciary branch with the purpose of reducing sentencing disparities and promoting transparency and proportionality in sentencing,¹⁰⁶ produces nonbinding guidelines for judges to consider before sentencing criminals. The guidelines instruct judges to hand down harsher penalties to repeat offenders, including corporate offenders, and for the purpose of considering whether a corporation is recidivist, they do not distinguish a parent corporation from its separate subsidiaries.¹⁰⁷ The guidelines do, however, provide judges a great deal of discretion in considering the autonomy of distinct “lines of business.” In his book *Too Big To Jail*, Brandon Garrett questions whether prosecutors, when negotiating NPAs and DPAs, take these guidelines seriously.¹⁰⁸ This report’s finding that 63% of the 38 repeat offender corporations (24 out of 38) have received at least one additional DPA or NPA after already having received a prior DPA or NPA suggests prosecutors are in many instances ignoring this guidance.

If a corporation violates its DPA or NPA, it is up to federal prosecutors to hold the accused corporation accountable. Despite occasional instances of high-profile media speculation that a corporation may have breached its deal with prosecutors, little information is available about corporations facing consequences for violating such an agreement.

Allegations of “extortion and blackmail” by Amazon CEO Jeff Bezos¹⁰⁹ against AMI, the parent company of the National Enquirer, recently reignited interest in the issue of breached pre-trial diversion agreements. AMI entered a non-prosecution agreement¹¹⁰ in September 2018 over allegations that the company facilitated a 2016 hush-money payment¹¹¹ to Karen McDougal, a former Playboy model who allegedly had an affair with Donald Trump.¹¹² According to the NPA, if AMI violates the agreement, AMI could face prosecution for both offenses: the hush money payments and

¹⁰⁶ U.S. Sentencing Commission website, (accessed 5 June 2019), <https://www.ussc.gov/>

¹⁰⁷ U.S. Sentencing Guidelines: Chapter 8 - Sentencing of Organizations, §8C2.5.(c): Culpability Score, 2018, <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN>

¹⁰⁸ Garrett, Brandon, *Too Big To Jail*, (p. 165-168), Belknap Press of Harvard University Press, 2014.

¹⁰⁹ Bezos, Jeff, "No thank you, Mr. Pecker," Medium, 7 Feb. 2019, <https://medium.com/@jeffreypbezos/no-thank-you-mr-pecker-146e3922310f>

¹¹⁰ U.S. Department of Justice, Non-prosecution agreement with AMU, U.S. Department, 20 Sept. 2018, <https://www.justice.gov/usao-sdny/press-release/file/1119501/download>

¹¹¹ Press Release: “Michael Cohen Sentenced To 3 Years In Prison,” U.S. Attorney’s Office for the Southern District of New York, 12 Dec. 2018, <https://www.justice.gov/usao-sdny/pr/michael-cohen-sentenced-3-years-prison>

¹¹² Managan, Dan, "Federal prosecutors give National Enquirer publisher immunity over hush-money payment to purported Trump lover," CNBC, 12 Dec. 2018, <https://www.cnbc.com/2018/12/12/federal-prosecutors-give-national-enquirer-publisher-immunity.html>

the blackmail Bezos alleges. Federal prosecutors reportedly investigated, fueling speculation that AMI could be prosecuted.¹¹³

But the DOJ seldom holds corporations accountable for breaching NPAs and DPAs, and it almost never prosecutes them. Public Citizen identified only seven instances when a corporation was punished for violating an NPA or DPA. In four of these cases, the pre-trial diversion agreement was extended, and in three, the company was prosecuted.

In 2015, UBS, the largest Swiss bank, was reportedly under investigation for allegedly breaching the non-prosecution agreement it entered with the DOJ.¹¹⁴ The non-prosecution agreement was related to allegations that the bank had manipulated interest rates. One month later, the Department of Justice announced UBS would be prosecuted for its breach. "The department has declared UBS in breach of the agreement and UBS has agreed to plead guilty to a one-count felony charge of wire fraud in connection with a scheme to manipulate LIBOR and other benchmark interest rates," stated the press release.¹¹⁵ Interestingly, the guilty plea and breach were announced five months after the term of UBS' NPA had expired.

Similarly, in 2016, when HSBC was bound by the five-year deferred prosecution agreement it had entered with the DOJ in 2012, Bloomberg News reported prosecutors were considering criminal charges against the London-based megabank over allegations of illegal foreign exchange trading.¹¹⁶ Bloomberg reporters Greg Farrell and Keri Geiger wrote,

If the Justice Department determines that the bank broke U.S. law after it entered into the agreement, it could invoke a section of the deal that says HSBC could be held responsible for the conduct it admitted to in 2012. Such a cascade of events could lead to a conviction in the [2012] laundering and sanctions case, threatening the bank's ability to move beyond its legal troubles.¹¹⁷

However, unlike UBS, the criminal charges against HSBC never appeared – until five weeks after the term of the 2012 agreement expired. Then the DOJ announced HSBC would enter its second

¹¹³ Dienst, Jonathan and Tom Winter, "Feds weighing if National Enquirer publisher violated non-prosecution agreement," NBC News, 8 Feb. 2019, <https://www.nbcnews.com/politics/justice-department/feds-weighing-if-national-enquirer-publisher-violated-non-prosecution-agreement-n969431>

¹¹⁴ Christie Smythe and David Voreacos, "UBS Said to Be Probed for Deferred-Prosecution Breach," Bloomberg News, 12 Feb. 2015, <https://www.bloomberg.com/news/articles/2015-02-12/ubs-bond-probe-said-to-look-at-whether-bank-breached-tax-deal>

¹¹⁵ U.S. Department of Justice, Press Release: "Five Major Banks Agree to Parent-Level Guilty Pleas," 20 May 2015, <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>

¹¹⁶ Farrell, Greg and Keri Geiger, "U.S. Considers HSBC Charge That Could Upend 2012 Settlement," Bloomberg News, 7 Sept. 2016, <https://www.bloomberg.com/news/articles/2016-09-07/u-s-said-to-weigh-hsbc-charge-that-could-upend-2012-settlement>

¹¹⁷ *Ibid.*

consecutive DPA, with a term of three years, to resolve charges of foreign exchange rate manipulation.¹¹⁸

In another instance of an apparently consequence-free breach of an agreement, pharmaceutical corporation Bristol Myers Squibb (BMS) closed a two-year DPA even as the company entered a plea agreement for a subsequent crime in 2007. A report by the corporate monitor the DOJ appointed to oversee BMS' internal reforms noted that then-U.S. Attorney for the District of New Jersey Chris Christie "determined that BMS' plea agreement and the conduct to which it relates constituted a violation of the Deferred Prosecution Agreement."¹¹⁹ Nevertheless, according to the monitor, Christie asserted that BMS had "cured that breach" by firing executives who were allegedly implicated in the wrongdoing¹²⁰ and undergoing internal reforms.¹²¹ Four days before the pharmaceutical giant was released from the DPA it entered in 2005 over securities fraud charges,¹²² BMS pleaded guilty to making false statements to the government relating to a secret deal to keep a generic drug (Plavix) off the market.¹²³ The corporate defense attorney sitting opposite Christie and negotiating both BMS' DPA and plea agreement was none other than former U.S. Attorney for the Southern District of New York and future SEC Chair Mary Jo White.

In fact, UBS is one of only seven corporations that have faced consequences for breaching their deferred or non-prosecution agreements, according to publicly available records. The other corporations that have faced consequences for violating these agreements are Moneygram, Wright Medical Group, Biomet, Standard Chartered Bank, UBS, Barclays and Aibel Group (see Table 3). The Justice Department's methods for holding corporations accountable for these breaches appear to be

¹¹⁸ U.S. Department of Justice, Press Release: "HSBC Holdings Plc Agrees to Pay More Than \$100 Million to Resolve Fraud Charges," 18 Jan. 2018, <https://www.justice.gov/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges>

¹¹⁹ Lacey, Frederick B., "Executive Summary" (of the corporate monitor's report on Bristol-Myers Squibb), U.S. Department of Justice, June 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/ExecutiveSummaryofFinalReportofMonitor.pdf>

¹²⁰ Masters, Brooke A. "Bristol-Myers Ousts Its Chief at Monitor's Urging; Dolan Had Led Firm Since 2001," The Washington Post, 13 Sept. 2006, <https://www.washingtonpost.com/archive/business/2006/09/13/bristol-myers-ousts-its-chief-at-monitors-urging-span-classbankhead-dolan-had-led-firm-since-2001span/ee3945a9-1939-45d1-8110-94cc46d68a86/>

¹²¹ Lacey, Frederick B. "Executive Summary" (of the corporate monitor's report on Bristol-Myers Squibb), U.S. Department of Justice, June 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/ExecutiveSummaryofFinalReportofMonitor.pdf>

¹²² Press release: "Statement from U.S. Attorney Christopher J. Christie on Expiration of Deferred Prosecution Agreement with Bristol-Myers Squibb," U.S. Department of Justice 14 June 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/dpaexpires0614rel.pdf>

¹²³ Plea agreement, U.S. v. Bristol-Myers Squibb Co., 11 June 2007, <https://www.justice.gov/atr/case-document/plea-agreement-43>

inconsistent. When Biomet breached its 2012 DPA, the DOJ imposed a new three-year DPA on the corporation.¹²⁴ For Standard Chartered, the DOJ has extended the DPA it entered in 2012 for sanctions violations¹²⁵ no less than five times, then negotiated a new DPA in 2019 to resolve further violations not addressed in the earlier agreement.¹²⁶ In two cases (Moneygram and Wright Medical Group), the DOJ extended the DPA's terms. In only three cases (UBS, Barclays and Aibel Group) did breaches lead to prosecutions.

Among the many downsides to deferred and non-prosecution agreements is the lack of transparency regarding breaches. A corporation that pleads guilty to a crime and is put on probation must, if accused of violating its probation, argue its case publicly before a judge, who can impose severe penalties for the violation.¹²⁷ In contrast, if there are instances of corporations persuading prosecutors against imposing consequences for breaching a deferred or non-prosecution agreement, there is no way for the public to know.

Table 3: The seven corporations that faced consequences for breaching a DPA or an NPA.

Corporation (Subsidiary)	NPA or DPA	Date Breach Noted / Agreement Extended	Original Agreement Date	Consequences
Moneygram (MoneyGram International Inc.)	DPA	11/8/2018	11/9/2012	DPA extended 30 months, \$125 million penalty, further strengthened compliance required.
Wright Medical Group (Wright Medical Technology)	DPA	9/15/2011	10/1/2010	DPA extended 12 months.

¹²⁴ Press Release: "Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges," U.S. Department of Justice, 12 Jan. 2017, <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>

¹²⁵ "StanChart's U.S. sanctions scrutiny extended," Reuters, 27 July 2018, <https://www.reuters.com/article/us-stanchart-deferred-prosecution-agreem/standard-chartered-agrees-extension-of-u-s-deferred-prosecution-agreements-idUSKBN1KH24B>

¹²⁶ U.S. Department of Justice, Press release: "Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than \$1 Billion," 9 April 2019, <https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions>

¹²⁷ An example of this recently played out with Carnival Cruise Lines, which paid a \$40 million penalty and was placed on probation after a 2017 conviction on felony pollution charges. The court later found the corporation, which continuing its polluting practices, guilty of six probation violations. In June of 2019 Carnival pleaded guilty to the probation violations and agreed to pay an additional \$20 million criminal penalty and to be subject to increased court supervision. See <https://www.justice.gov/opa/pr/princess-cruise-lines-and-its-parent-company-plead-guilty-environmental-probation-violations>

Zimmer Biomet Holdings (Biomet)	DPA	3/13/2015, 1/12/2017	3/26/2012	DPA extended 12 months, then subsequently enters new three-year DPA with corporate monitor and pays \$17.4 million penalty.
Standard Chartered Bank (SCB New York)	DPA	Dec. 2014, Nov. 2017, July 2018, Dec. 2018, April 1, 2019, April 9, 2019	12/10/2012	2014 DPA extension was for three years and required appointment of corporate monitor; the 2017 extension was for nine months; the July 2018 extension was for five months; and the December 2018 extension was for three months. The monitor's term also was extended until the 10-day extension in April 2019, which no longer required a monitor. After the 10-day extension, DOJ announced the bank had agreed to enter a new two-year DPA.
UBS	NPA	5/20/2015	12/19/2012	PROSECUTION: UBS agreed to plead guilty to a one-count felony charge of wire fraud in connection with a scheme to manipulate LIBOR and other benchmark interest rates. UBS also agreed to pay a criminal penalty of \$203 million and entered a three-year corporate probation.
Barclays	NPA	5/20/2015	6/26/2012	PROSECUTION: Barclays agreed to plead guilty to a one-count felony charge of conspiring to fix prices and rig bids for U.S. dollars and euros exchanged in the FX spot market in the United States and elsewhere. Barclays agreed to pay a fine of \$650 million plus an additional \$60 million criminal penalty based on its violation of the NPA and entered a three-year corporate probation.
Aibel Group	DPA	11/21/2008	2/6/2007	PROSECUTION: Aibel pleaded guilty to FCPA violations and agreed to pay a \$4.2 million criminal fine. Its 2007 DPA was dismissed, and the company was placed on probation for two years.

Source: Duke University/University of Virginia Corporate Prosecution Registry

As commonly understood, the penalty of violating a DPA is supposed to be prosecution for the charges filed; the penalty for violating an NPA is supposed to be for the charges to be filed. Both can lead to prosecution. This is a view the Justice Department advances in its own press releases, when describing the consequences of breaching a pre-trial diversion agreement. For example, in the 2015 DOJ press release announcing that five banks were entering guilty pleas for interest rate manipulation, two of which were found to be in breach of such agreements, then-Assistant Attorney General Leslie Caldwell said:

[W]e will enforce the agreements that we enter into with corporations. If appropriate and proportional to the misconduct and the company's track record, we will tear up an NPA or a DPA and prosecute the offending company.¹²⁸

In this light, the DOJ's practice of entering into a new pre-trial diversion agreement or plea agreement with some corporations while the corporation is still bound by a previous DPA or NPA raises an important question: Why did the DOJ not enforce the terms of the original agreement?

In a dozen cases – about a third of the repeat offender corporations (12 out of 38) – the DOJ brought subsequent federal criminal enforcement action against a repeat offender before the term of a previous NPA or DPA had ended (see Table 4). Particularly worrisome from a corporate accountability perspective are examples of corporations that were permitted to enter multiple successive DPAs and/or NPAs, the most egregious of which may be HSBC. However, even in instances when an NPA or DPA is followed by tougher enforcement such as a guilty plea, the DOJ's refusal to hold corporations to their earlier agreements represents a remarkable degree of lenience.

Table 4: The 12 corporations that the DOJ brought a subsequent enforcement against before the term of a prior DPA or NPA expired.

Corporation	Enforcement Types	Enforcement Dates	Time Remaining Under Previous DPA or NPA	Details
Standard Chartered Bank (Switzerland) SA	DPA then NPA	2/6/2012 (amended and extended through 2021), 11/12/2015	4 years	Less than one year after the first time DOJ extended the DPA that Standard Chartered entered in 2012 over sanctions charges, a Swiss Standard Chartered subsidiary entered a four-year NPA in 2015 to resolve tax violation allegations as part of DOJ's Swiss Bank Program. Standard Chartered's 2012 DPA was amended in April 2019 and extended to 2021.
Credit Agricole	DPA then NPA	10/20/2015, 12/8/2015	2 years and 10 months	In 2015, just two months after French bank Credit Agricole entered into two three-year DPAs, one with DOJ and one with the Manhattan District Attorney's Office, to resolve sanctions violation charges, the

¹²⁸ Press Release: "Five Major Banks Agree to Parent-Level Guilty Pleas," U.S. Department of Justice, 20 May 2015, <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>

Corporation	Enforcement Types	Enforcement Dates	Time Remaining Under Previous DPA or NPA	Details
				bank's Swiss subsidiary received a four-year NPA as part of DOJ's Swiss Bank Program.
Societe Generale	Two NPAs, then a DPA, then a DPA	5/28/2015, 6/9/2015, 6/4/2018, 11/19/2018	1 year; 2 years and 6 months	Two separate Societe Generale subsidiaries entered four-year NPAs within months of each other in 2013 to resolve alleged tax violations as part of DOJ's Swiss Bank Program. With about a year left on both NPAs, the parent bank entered into a three-year DPA in 2018 and a separate subsidiary pleaded guilty to foreign bribery charges. About six months later, Societe Generale was permitted to enter into another three-year DPA over charges of violating sanctions. At the time, the bank still had about half a year left in its earlier NPAs and two-and-a-half years left on the DPA it entered earlier in 2018.
Deutsche Bank	DPA then NPA	4/23/2015, 11/24/2015	2 years and 3 months	In 2015, just seven months after Deutsche Bank entered a three-year DPA with DOJ to resolve antitrust, wire fraud and price-fixing charges, the bank's Swiss subsidiary entered a four-year NPA with DOJ as part of its Swiss Bank Program.
BNP Paribas	NPA then guilty plea	11/19/2015, 1/26/2018	1 year and 10 months	One year and 10 months before the end of the four-year NPA entered in 2015 to resolve alleged tax violations as part of DOJ's Swiss Bank Program, BNP Paribas pleaded guilty to price fixing violations in 2018.
AIG	A DPA and an NPA, then another NPA	11/30/2004, 2/7/2006	10 months	With 10 months to go on a two-year DPA and a two-year NPA over securities fraud charges, AIG in 2006

Corporation	Enforcement Types	Enforcement Dates	Time Remaining Under Previous DPA or NPA	Details
				was given another NPA to resolve additional securities fraud charges.
Transocean	DPA then guilty plea	11/4/2010, 2/14/2013	9 months	With about nine months left on a three-year DPA that a Transocean subsidiary entered in 2010 to resolve criminal foreign bribery charges, Transocean pleaded guilty to a charge of violating the Clean Water Act in 2013.
JPMorgan Chase	DPA then guilty plea	1/7/2014, 5/19/2015	7 months	With about seven months left on a two-year DPA, JPMorgan Chase entered in 2014 to resolve charges of Bank Secrecy Act violations related to the Bernie Madoff fraud scheme, JPMorgan Chase pleaded guilty in 2015 to a felony violation of the Sherman Antitrust Act.
Pfizer (and Pharmacia & Upjohn, a Pfizer subsidiary)	DPA and NPA, then guilty plea	4/2/2007, 10/16/2009	5 months	With about five months left on a three-year DPA for Pfizer subsidiary Pharmacia & Upjohn and a three-year NPA for parent company Pfizer, which both entered in 2007 over kickback-paying charges, Pharmacia & Upjohn pleaded guilty to misbranding a pharmaceutical (Bextra) in 2009.
UBS (UBS Securities Japan Co. Ltd.)	NPA then NPA and guilty plea	5/4/2011, 12/19/2012	5 months	With about five months left on a two-year NPA that UBS entered in 2011 for allegedly rigging bids in municipal bond investments, parent company UBS in 2012 agreed to enter another two-year NPA and a subsidiary pleaded guilty for engaging in an interest rate manipulation conspiracy.
Barclays Bank	DPA then NPA	8/18/2010, 6/26/2012	6 weeks	With about six weeks before the end of the term of its 2010 DPA over charges of making illegal transactions

Corporation	Enforcement Types	Enforcement Dates	Time Remaining Under Previous DPA or NPA	Details
				on behalf of sanctioned nations, Barclays entered an NPA in 2012 to resolve fraud allegations (manipulating LIBOR interest rates).
Bristol-Myers Squibb	DPA then guilty plea	6/15/2005, 6/11/2007	4 days	Four days before the two-year anniversary of the pharmaceutical giant entering a two-year DPA in 2005 over securities fraud charges, BMS pleaded guilty in 2007 to making false statements to the government relating to a secret deal to keep a generic drug (Plavix) off the market.

Source: Duke University/University of Virginia Corporate Prosecution Registry

A quarter of the repeat offender corporations (9 out of 38)¹²⁹ had some kind of criminal enforcement against them within one year and six months of release from their previous NPA or DPA (see Table 5).

Because DOJ criminal investigations into corporate wrongdoing can take years, it seems implausible that the department was unaware of the wrongdoing underlying the enforcement actions in all the cases that were completed within two years of the corporations' release from their NPAs or DPAs. Particularly worrisome are instances when the subsequent DOJ enforcement followed the conclusion of an NPA or a DPA's term by weeks (HSBC) or months (Marubeni, RBS, JPMorgan Chase, UBS and Wachovia). Prosecutors have a great deal of discretion determining when charges are filed and enforcement actions are announced. Given the DOJ's long-term reluctance to prosecute corporations, it is not difficult to imagine that the timing of making the criminal enforcement action public is subject to negotiation. Furthermore, if the timing is negotiable, then corporate counsel will try to negotiate the best possible deal for their client, including timing the announcement of the enforcement so that it does not violate the terms of the NPA or DPA by which their client is currently bound. In this way, it may be possible for prosecutors and corporate counsel to game the timing of announcements to avoid triggering the consequences of a breached NPA or DPA – consequences that can include prosecution, which the department has made clear it is prepared to go to great lengths to avoid.

¹²⁹ For separate charges, JPMorgan Chase and UBS are included in both categories.

Table 5: The nine corporations that the DOJ brought a subsequent enforcement against within one and a half years of being released from a prior DPA or NPA.

Corporation	Enforcement Type	Enforcement Dates	Time Passed Since Expiration of Previous DPA or NPA	Details
HSBC	DPA then DPA	12/11/2012, 1/18/2018	5 weeks	Five weeks after HSBC was released from the five-year DPA it entered in 2012 over charges of extensive anti-money laundering and sanctions violations, HSBC entered a six-month DPA in 2018 to resolve charges of exchange rate manipulation.
Marubeni	DPA then guilty plea	1/17/2012, 5/15/2014	2 months	Two months after Marubeni was released from a two-year DPA it entered in 2012 over charges of engaging in foreign bribery in Nigeria, Marubeni pleaded guilty in 2014 to engaging in foreign bribery in Indonesia.
Royal Bank of Scotland (RBS)	DPA then guilty plea then NPA	2/6/2013, 5/20/2015, 1/10/2017	3 months and 2 weeks, 1 year and 8 months	About three and a half months after the end of a two-year DPA that RBS entered in 2013 to resolve charges of fraud (manipulating LIBOR interest rates), RBS pleaded guilty in 2015 to a criminal violation of the Sherman Antitrust Act. One year and eight months later, an RBS subsidiary received an NPA in 2017 over alleged financial fraud.
JPMorgan Chase	NPA then DPA then NPA	7/7/2011, 1/7/2014, 11/17/2016	6 months, 10 months	Six months after being released from a two-year NPA that JPMorgan Chase entered in 2011 over allegations of rigging bids and manipulating the bidding process for municipal bond investments, JPMorgan Chase entered a two-year DPA in 2014 to resolve Bank Secrecy Act charges related to the Bernie Madoff fraud scheme. About 10 months after being released from

Corporation	Enforcement Type	Enforcement Dates	Time Passed Since Expiration of Previous DPA or NPA	Details
				that DPA, JPMorgan Chase's Hong Kong-based subsidiary entered a three-year NPA to resolve allegations of corruptly awarding jobs to friends and relatives of Chinese government officials.
UBS	DPA then NPA	2/18/2009, 5/4/2011	8 months	About eight months after the end of the term of a one and a half-year DPA that UBS entered in 2009 over tax fraud charges, UBS entered a two-year NPA in 2011 over allegations of rigging bids in municipal investments.
Wachovia	DPA then NPA	3/17/2010, 12/8/2011	9 months	About nine months after the end of the term of a one-year DPA that Wachovia entered in 2010 over charges of anti-money laundering failures, Wachovia Bank entered a one-year NPA in 2011 over alleged bid rigging in municipal investments.
Alcatel-Lucent	NPA then DPA	11/14/2007, 12/27/2010	1 year and 1 month	About one year after the end of a two-year NPA that an Alcatel-Lucent subsidiary entered in 2007 over alleged foreign corruption, parent company Alcatel-Lucent entered a three-year DPA to resolve foreign corruption charges.
Las Vegas Sands	NPA then NPA	8/27/2013, 1/17/2017	1 year and 5 months	About one year and five months after the end of a two-year NPA that Las Vegas Sands entered in 2013 to resolve alleged Bank Secrecy Act compliance failures, Las Vegas Sands in 2017 entered a new NPA with a three-year term to resolve foreign corruption allegations.
Noble	NPA then guilty plea	11/4/2010, 12/8/2014	1 year and 6 months	About one and a half years after the end of a three-year NPA that Noble entered in 2010 to resolve alleged

Corporation	Enforcement Type	Enforcement Dates	Time Passed Since Expiration of Previous DPA or NPA	Details
				foreign corruption violations, Noble pleaded guilty in 2014 to environmental and maritime crimes that it committed in 2012 (while still bound by the 2010 NPA).

Source: Duke University/University of Virginia Corporate Prosecution Registry

If a goal of prosecution agreements is to change the culture of corporations that engage in criminal activities, this goal is decidedly not met when the culture of the company still permits lawbreaking. Moreover, although most agreements state that companies that violate the law during the term of their agreements may be prosecuted, the DOJ has moved forward with such a prosecution only three times (Aibel Group, Barclays and UBS in Table 3), according to publicly available records.

When companies face new federal investigations and reach new settlements with federal officials within just a few years after the terms of their prosecution agreements have expired, it is worth questioning whether pre-trial diversion effectively deters crime.

As the examples below indicate, pre-trial diversion agreements appear to offer few incentives for corporations to avoid recidivism. Instead, large corporations routinely reoffend, and are rewarded with either further deferred or non-prosecution agreements. As Wayne State University law professor Peter Henning wrote in 2015, in examining several cases involving global financial firms:

Yet even as penalty after penalty is paid by big banks in various cases, it seems as though the same cast of corporate characters keeps reappearing. It makes you wonder whether the global banks are acting like teenagers who find it easier to beg forgiveness than actually change their behavior.”¹³⁰

Most repeat offender corporations – 63%, or 24 out of 38 – have received at least one additional DPA or NPA after already having received a prior DPA or NPA (see Table 6). All are or were large corporations – 36 of the 38 repeat offender corporations are on (or have appeared on) the Forbes Global 2000 list of the world’s largest publicly traded corporations. (The two exceptions are Arthur Andersen and Louis Berger Group, both sizable entities but neither of which have been publicly

¹³⁰ Henning, Peter J. "Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St.," The New York Times, 20 May 2015, <https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html>

traded.) Most of the repeat offender corporations (24 out of 38) appear in the top 500 of the 2019 list.¹³¹ Out of the 2019 Fortune 500, 40 corporations have received at least one NPA or DPA; nine among the repeat offenders.¹³² Out of the 2019 Global Fortune 500, 44 have received at least one NPA or DPA; 26 are among repeat offenders.¹³³

Table 6: The 38 corporations that received NPAs or DPAs from the DOJ and were subject to subsequent federal criminal enforcement actions.

Parent Corporation	NPAs	DPAs	Pleas	Other	Total	DPAs & NPAs only	Forbes Global Ranking (2019 unless otherwise specified)
AIG	2	1	0	0	3	3	462
ALCATEL-LUCENT	1	1	3	0	5	2	904*
ARTHUR ANDERSEN	0	1	0	1 (overturned trial conviction)	2	1	n/a (an LLP, not public)
BARCLAYS	1	1	1	1 (declination)	4	2	187
BDO	0	2	0	0	2	2	1072*
BRISTOL-MYERS SQUIBB	0	1	1	0	2	1	266
BNP PARIBAS	1	0	1	0	2	1	34
BP	0	1	3	0	4	1	24
CHEVRON	1	0	1	0	2	1	19
CONAGRA	0	1	2	0	3	1	880
CREDIT AGRICOLE (and CREDIT LYONNAIS)	2	2	1	0	5	4	104
CREDIT SUISSE	1	2	1	0	4	3	191
DEUTSCHE BANK	2	1	1	0	4	3	547
GENERAL ELECTRIC	3	0	0	0	3	3	389
GLAXOSMITHKLINE	1	0	1	0	2	1	147
HALLIBURTON	1	0	1	0	2	1	442
HELMERICH & PAYNE	1	0	1	0	2	1	1644*
HITACHI	1	0	6	0	7	1	230
HSBC	0	2	0	0	2	2	21
JPMORGAN CHASE	2	1	1	0	4	3	2

¹³¹ Touryalai, Halah and Kristin Stoller with data by Andrea Murphy, "Global 2000: The World's Largest Public Companies," Forbes, 6 June 2018, <https://www.forbes.com/global2000/list/>

¹³² See Appendix B.

¹³³ See Appendix C.

Parent Corporation	NPAs	DPAs	Pleas	Other	Total	DPAs & NPAs only	Forbes Global Ranking (2019 unless otherwise specified)
LAS VEGAS SANDS	2	0	0	0	2	2	491
LLOYDS	0	3	0	0	3	3	90
LOUIS BERGER GROUP	0	2	0	0	2	2	n/a (privately held)
MARUBENI	0	1	1	0	2	1	350
MERRILL LYNCH	2	0	0	0	2	2	32*
NEC	1	0	1	0	2	1	1023
NOBLE	1	0	1	0	2	1	1541
PFIZER	0	2	3	0	5	2	54
PRUDENTIAL	0	2	0	0	2	2	98
ROYAL BANK OF SCOTLAND	1	1	2	0	4	2	185
SMITH & NEPHEW	0	2	0	0	2	2	1377
SOCIETE GENERALE	2	2	1	0	5	4	157
STANDARD CHARTERED	1	4	0	5 (DPA extensions)	10	5	357
STRYKER	2	0	2	0	4	2	366
TRANSOCEAN	0	1	1	0	2	1	1290*
UBS	2	1	2	0	5	3	95
WACHOVIA	1	1	0	0	2	2	131*
ZIMMERBIOMET	0	4	1	1 (DPA extension)	6	4	1027

Source: Duke University/University of Virginia Corporate Prosecution Registry and Forbes Global Fortune 2000 list.¹³⁴

*Alcatel-Lucent and Helmerich & Payne rankings from 2015. BDO ranking from 2018. Merrill Lynch ranking from 2007, prior to its acquisition by Bank of America, which now ranks 5. Transocean ranking from 2017. Wachovia ranking from 2007, prior to its acquisition by Wells Fargo, which now ranks 10.

¹³⁴ Touryalai, Halah and Kristin Stoller with data by Andrea Murphy, "Global 2000: The World's Largest Public Companies," Forbes, 6 June 2018, <https://www.forbes.com/global2000/list/>

V. Egregious Examples of Corporate Repeat Offenders Receiving Multiple DPAs and/or NPAs

HSBC



HSBC

In 2012, the DOJ declined to prosecute HSBC – a London-based global megabank that violated anti-money laundering laws and U.S. sanctions – and instead entered a five-year DPA with the bank. Then-Attorney

General Eric Holder admitted the bank's size was a factor in the DOJ's decision not to prosecute. The bank was, essentially, "too big to jail."

The sanctions violations HSBC was charged with making were serious. Starting in the 1990s, HSBC allowed about \$660 million in illegal transactions with nations that were subject to U.S. sanctions, including Iran, Cuba, Sudan, Libya and Burma. Through various means, the transactions were concealed from the corporation's U.S. subsidiary and other U.S. financial institutions. Despite repeated protests by the bank's compliance officer starting in 2001, HSBC continued to allow the concealed transactions.

HSBC's anti-money laundering violations were equally serious. Between 2006 and 2010, HSBC's U.S. subsidiary understaffed its anti-money laundering compliance efforts and did not implement a compliance program capable of preventing money laundering through HSBC Mexico. HSBC Mexico's own, separate weak anti-money laundering efforts had made the bank the preferred institution for drug cartels and money launderers. Ultimately, HSBC's U.S. subsidiary failed to adequately monitor over \$200 trillion in wire transfers, including \$670 billion in wire transfers and more than \$9.4 billion in purchases of U.S. cash from HSBC Mexico.

HSBC Holdings, the HSBC parent company, admitted that it violated the Trading With the Enemy Act and the International Emergency Economic Powers Act and the bank's U.S. subsidiary admitted to violating the Bank Secrecy Act.

The DOJ's 2012 DPA stated that if during the term of the agreement the corporation was found to have "committed any crime under U.S. federal law," the corporation "shall be subject to prosecution for any criminal violation of which the Department has knowledge" – that is, both the charges filed in the 2012 DPA plus any new charges.

But that's not what happened. The DOJ reportedly was investigating alleged illegal foreign exchange trading at HSBC in 2016, but the results of that investigation were not announced until January 2018 – conveniently just five weeks after the term of HSBC's earlier DPA had expired and the DOJ's 2012

charges against the bank were dismissed. The investigation's result: the DOJ made a new three-year DPA with HSBC and filed charges of criminal foreign exchange rate manipulation against the bank.

Deutsche Bank



In 2010, the DOJ entered an NPA with Deutsche Bank over the Frankfurt-based multinational engaging in tax shelter fraud. Between 1996 and 2002, Deutsche Bank helped more than 2,100 wealthy American clients fraudulently claim an estimated \$29.3 billion in tax benefits, allowing them to evade an estimated \$5.9 billion in taxes. The German bank admitted it had engaged in criminal wrongdoing. The NPA had a term of one to two years, depending on the DOJ-appointed monitor's assessment of the bank's compliance improvements.

In April 2015, the DOJ entered a three-year DPA with Deutsche Bank over wire fraud and antitrust charges. The bank's London subsidiary pleaded guilty to wire fraud. The violations occurred between 2003 and 2011 – meaning they occurred while Deutsche Bank was bound by its promise in the 2010 NPA to “commit no crimes whatsoever.”

According to DOJ charging documents, Deutsche Bank's derivatives traders secretly manipulated the values of currencies, including the U.S. Dollar, Yen, Swiss Franc and Pound Sterling, on the London InterBank Offered Rate (LIBOR) and Euro Interbank Offered Rate (EURIBOR), resulting in fraudulent transactions.

In November 2015 – only seven months after entering its DPA – the Deutsche Bank's Swiss subsidiary entered a four-year NPA with DOJ as part of its Swiss Bank Program.

At least between 2008 and 2013 – a time frame which also overlaps with the bank's earlier NPA over tax shelter fraud – the subsidiary maintained over 1,000 U.S.-related accounts with a collective value of \$7.65 billion. The bank helped U.S. taxpayers evade U.S. tax liabilities and helped these U.S. taxpayers access and spend their undeclared funds, which were held in offshore tax shelter countries including Liechtenstein, Liberia, Panama and the British Virgin Islands.

The term of this latest NPA, in which the subsidiary promises to “commit no U.S. federal offenses” is set to expire in November 2019. In June 2019 the New York Times reported Deutsche Bank is under criminal investigation by the DOJ over alleged anti-money laundering failures, including whistleblower allegations about suspicious transactions by White House adviser and President Donald Trump's son-in-law Jared Kushner.

Bristol-Myers Squibb



In 2005, multinational pharmaceutical corporation Bristol-Myers Squibb entered a two-year DPA with the DOJ to resolve charges of deceiving investors. According to the DPA, the corporation had engaged in “channel stuffing,” meaning that it used financial incentives to spur wholesalers to buy its products in excess of prescription demands so that the company could report higher sales and earnings. To incentivize wholesalers, BMS used pre-price increase buy-ins, which allowed wholesalers to make purchases prior to imminent price increases by BMS; extended datings of invoices, which extend the due date for wholesaler payment beyond the standard 30 days; early payment discounts; and future file purchases, which allowed wholesalers to buy at earlier, lower prices after the effective date of a price increase. As a result, wholesalers accumulated excess inventory of BMS products, which adversely effected subsequent sales.

In June 2007 – just four days before the two-year anniversary of the company entering its two-year DPA – BMS pleaded guilty to deceiving the government about a secret deal it made with another company to keep a generic drug (Plavix) off the market. The DPA was officially terminated at the end of the month.

A report by the corporate monitor the DOJ appointed to oversee the corporation’s internal reforms noted that then-U.S. Attorney for the District of New Jersey Chris Christie had determined the government deception was a violation of its DPA. Nevertheless, according to the monitor, Christie asserted that BMS had “cured that breach” by firing executives who were allegedly implicated in the wrongdoing and by undergoing internal reforms.

The corporate defense attorney sitting opposite Christie and negotiating both BMS’ DPA and plea agreement was former U.S. Attorney for the Southern District of New York and future SEC Chair Mary Jo White, who has since returned to private defense practice at the white-collar defense firm Debevoise and Plimpton.

JPMorgan Chase



The largest bank in the United States is another serial recipient of DOJ lenience. In 2011, the bank entered a two-year NPA with

the DOJ for illegally manipulating the bidding process for contracts associated with municipal investments.

Three years later, the DOJ allowed the bank to enter a two-year DPA in 2014 to resolve two felony charges related to the infamous Bernie Madoff fraud scheme. Under the terms of the agreement, if JPMorgan Chase was found to have “committed any crime under the federal laws of the United States subsequent to the execution of this Agreement,” the bank “shall, in the Office’s sole discretion, thereafter be subject to prosecution for any federal criminal violation” – like HSBC, both the charges filed in the DPA plus any new charges.

Again, that’s not what happened. One year later, with about seven months left on its DPA, JPMorgan Chase in 2015 pleaded guilty to a one-count felony charge of conspiring with other global megabanks to manipulate exchange rates, a violation of the Sherman Antitrust Act. The bank was placed on probation for three years. Despite the parent-level felony guilty plea, no public information shows the bank facing consequences for this apparent violation of its 2014 DPA. The plea agreement contained a provision forbidding JPMorgan Chase from committing any further federal crimes and threatens to terminate the agreement and prosecute the bank if the agreement is breached.

Then, about 10 months after the bank was released from the 2014 DPA and while it was still on probation, JPMorgan Chase's Hong Kong-based subsidiary entered a three-year NPA in 2016 to resolve allegations of corruptly awarding jobs to friends and relatives of Chinese government officials. That NPA, the third pre-trial diversion agreement the bank received in less than 10 years, is set to expire in November 2019.

Zimmer Biomet



Zimmer and Biomet (itself a spinoff from Bristol-Myers Squibb) merged in 2015. But in 2007, Zimmer and Biomet were separate medical device corporations and the DOJ

charged both, along with three other medical device corporations, with using improper payments to induce surgeons to use the corporations’ hip and knee joint replacements. Both corporations entered 18-month DPAs with the DOJ.

In 2012, the DOJ allowed Biomet to resolve another charge relating to improper payments with a DPA, this time with a term of three years. According to the DOJ, the corporation made more than \$1.5 million in payments to employees of state health care providers in Argentina, Brazil and China to secure business with hospitals. The DPA states that Biomet shall be subject to prosecution if the corporation is found to have “committed any felony under federal law” subsequent to signing the agreement or if the corporation at any time provided the DOJ with “deliberately false, incomplete or misleading information.”

In 2015, three months before announcing the completion of its merger with Zimmer, Biomet announced in a filing with the Securities and Exchange Commission that, following the revelation of “certain alleged improprieties regarding its operations in Brazil and Mexico,” the DOJ had extended its DPA by one year.

In 2017, the DOJ announced that Biomet had violated its 2012 DPA by continuing to engage in foreign bribery in Brazil and Mexico and by failing to adopt appropriate internal anticorruption policies. The DOJ prosecuted an indirect subsidiary of the corporation and, as part of a new three-year DPA, filed charges against Zimmer Biomet for violating the Foreign Corrupt Practices Act. The DPA is set to expire in January 2020.

Societe Generale



Two separate Societe Generale subsidiaries entered four-year NPAs within months of each other in 2015 to resolve alleged tax violations as part of the DOJ's Swiss Bank Program. This program offers lenience to Swiss banks that make required disclosures about individual tax avoiders and bring their institutions into compliance with U.S. tax law. Both NPAs note that the subsidiaries “shall thereafter be subject to prosecution” if the entities are found to have committed any U.S. federal crimes during the terms of their agreements.

In 2018, with about a year left on both NPAs, the parent bank entered a three-year DPA to resolve charges of fraud and foreign bribery while a subsidiary pleaded guilty to foreign bribery charges. The bribery charges stemmed from corrupt payments the bank made to Libyan officials under Muamar Al Gaddafi, while the fraud charge stemmed from schemes to manipulate currency interest rates.

About six months later, Societe Generale was permitted to enter yet another three-year DPA, this time over charges of violating U.S. sanctions against Cuba and Cuban businesses. The bank's actions resulted in the processing of nearly \$13 billion in transactions that should have been blocked. At the

time, the bank still had about six months left on its two earlier NPAs and two years and six months left on its earlier 2018 DPA. The bank's 2018 DPAs are set to expire in 2021.

Las Vegas Sands



gambler was allegedly using the casino to launder money earned from illegal drug trafficking activities.

In 2013, international casino and resort development corporation Las Vegas Sands entered a two-year NPA after allegedly failing to comply with the Bank Secrecy Act. The casino allegedly helped its largest "all-cash, up-front" gambler transfer money in ways that would avoid government scrutiny. The

About one year and five months after the term of that NPA, Las Vegas Sands in 2017 entered a second NPA with a three-year term to resolve foreign corruption allegations. The corporation "knowingly and willfully failed" to ensure payments to a consultant totaling \$5.8 million ostensibly to promote the business in China and Macao were being made for legitimate business purposes.

According to the NPA, "certain senior Sands executives knew that over \$700,000" paid to the consultant "had simply disappeared." Among the tasks Las Vegas Sands sought to have the consultant complete was the purchase of a professional basketball team in China. Under the Chinese league's rules, as a gaming company, Las Vegas Sands was forbidden from directly owning a team. The consultant was to use the corporation's money to purchase the team and act as the team owner while the corporation would appear only as the team's "sponsor." An employee who raised concerns about potential legal violations was fired.

The second NPA is set to expire in January 2020.

VI. Policy Solutions and Conclusion

As an approach to reforming corporations that violate the law, deferred and non-prosecution agreements have failed. These agreements were intended to reform corporate criminals into responsible corporate citizens, but instead, they have had the opposite effect and enabled further wrongdoing. Faced with a timid Department of Justice that makes plain its reluctance to prosecute major corporations when they violate the law, corporate counsel are taking full advantage of the opportunity the department provides to help their clients avoid prosecution.

The American public, meanwhile, is suffering. Corporations pollute our air and water, make and push harmful and addictive opioid drugs, engage in financial rip-offs and sell and share reams of our personal information. The DOJ's unwillingness, even under a supposedly "law and order" administration, to prosecute large corporations that violate the law has sent the unmistakable message to the most powerful multinationals that lawbreaking, when profitable, may well be worth the risk.

Legal commentator Andrea Amulic's observed that the DOJ's policies humanize corporations while dehumanizing individuals.¹³⁵ This is not to say that there are not important distinctions to be made between how individuals and corporations are prosecuted. But current DOJ policies and procedures have the approach exactly backwards. Pre-trial diversion agreements are actually more appropriate for individuals than they are for corporations. People can commit crimes for all sorts of reasons – they commit acts that can be impulsive, irrational or self-destructive. They can be addicted to illegal substances or turn to crime as a way to survive when employment options are limited.

Corporations, on the other hand, are fundamentally rational, mechanical creations whose actions typically are the product of deliberate decisions. Prosecution and serious penalties have even more power to discipline corporations than they do people, because unlike individuals, a corporation has only one motive and one purpose: to turn a profit.

Punishment that poses a serious threat to a corporate profits by restricting a company's activities can deter corporate crime more effectively than negotiated agreements that are premised on protecting a corporate violator's profitability, as DPAs and NPAs do. When corporate criminals actually face the credible threat of corporate prosecution, the public interest is advanced through the deterrence of corporate crime. No executive order or legislation is required. All that is needed is the

¹³⁵ Amulic, Andrea, "Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States," (116 Mich. L. Rev. 123), 2017, <http://repository.law.umich.edu/mlr/vol116/iss1/3>

Department of Justice's will to make it so. The DOJ has all the authority it needs to end its use of DPAs and NPAs. It is time that it does.

Some of the potential reluctance to make this change stems from claims by corporations that stronger enforcement will trigger catastrophic collateral consequences. These consequences fall into two distinct categories: consequences for those within the corporation (employees and shareholders) and for those outside of the corporation (customers, other businesses and countries). Consequences for those outside of the corporation can in theory vary widely depending on the corporation's size and systemic significance. For the first group, the risk is far less than many have argued. Gabriel Markoff's legal research has persuasively debunked the myth of the "Andersen effect," the belief that to indict a corporation is to put it out of business regardless of its guilt or innocence, by demonstrating that corporate prosecutions almost never lead to business failures.¹³⁶

Current DOJ policy is not only unfair to individuals – it's also unfair to smaller businesses that do face a credible threat of prosecution. Since 1996, there have been more than 4,300 corporate prosecutions – more than five times the number of NPAs and DPAs combined.¹³⁷ The key difference between corporations that are convicted and corporations that negotiate pre-trial diversion agreements is that these agreements are overwhelmingly concentrated among the largest firms. This is an outcome of how the DOJ has applied the Holder Doctrine and Thompson Memo's directive to consider potential adverse effects on a corporation's shareholders and employees when deciding whether to bring charges against a corporation. By this logic, the larger the business, the greater the consequences. No wonder the corporate repeat offenders that received DPAs or NPAs are almost exclusively large corporations listed among the Fortune 500 or Global Fortune 500 lists. If the principle of equal justice before the law has meaning, there is no principled or legal reason why bigger corporations should get a better deal than smaller businesses.

Nevertheless, there may be rare instances when prosecuting a corporation puts it out of business. Employees may lose their jobs, shareholders may lose money, and the reputational damage to a prosecuted corporation may offer an opportunity for a competitor to exploit an opening in the accused corporation's market. Those who are affected by these consequences may call them unfair.

The truth is, over the course of the normal churn of business activity, employees lose jobs and shareholders lose money all the time. Bad business decisions harm businesses, and it should not be a surprise that the committing crimes, either through willful wrongdoing or negligence, constitute

¹³⁶ Markoff, Gabriel "Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century," (Vol. 15:3, p. 797), University of Pennsylvania Journal of Business Law, March 10, 2013, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1440&context=jbl>

¹³⁷ Ashley, Jon and Brandon Garrett, Duke University/University of Virginia Corporate Prosecution Registry, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

bad business decisions that, despite potential short-term gains, can ultimately be harmful to the business enterprise. To the degree that employees are victims and not perpetrators of corporate crime, they may deserve compensation. But shareholders who profit from ill-gotten-gains rightfully lose when a corporation they invested in violated the law, just the way the values of stocks rise and fall for any number of reasons over which shareholders have little or no control. (And shareholders, it is worth noting, do in fact have the power to strengthen corporate governance and hold executives accountable to help deter wrongdoing. The prospect of disgorgement and penalties hurting stock prices is an incentive for shareholders to insist on compliance.)

As for the second group of collateral consequences – those posed by a corporation’s size and structural significance – structural remedies should play a major role. Explaining the reasoning behind not prosecuting some corporate violators, former DOJ criminal division head Lanny Breuer has asserted protecting the health of an industry and markets is a significant factor to be considered.¹³⁸ But this reasoning begs the question, are industries and markets truly well-served when the federal government protects certain large corporations from the consequences of violating the law while other businesses are refused these protections? On the contrary, if a firm’s size protects it from prosecution, then it has a significant and unfair advantage over similar but smaller firms that would face tougher consequences for similar violations.

Instead of protecting such corporations from prosecution, the DOJ should take steps to remove the size advantage of any corporation that has grown so large as to be effectively too big to jail. A corporation’s plea agreement or separate civil settlement can effectively initiate the breakup of a supposedly too-big-to-jail corporation by requiring it to spin off lines of business through forced divestitures. The forced breakup of a criminal corporation would have to ensure culpable segments of the enterprise are not permitted to escape prosecution the way the DOJ today sometimes allows a corporation to sacrifice a hollowed-out subsidiary that pleads guilty while protecting the core enterprise from the enforcement. In some cases, such as in pharmaceuticals, the government may have to prevent disruptions in the corporation’s supply chain even as the corporation itself is prosecuted, for example by requiring patent holders to provide licenses to generic competitors in exchange for reasonable royalty payments

A tougher, fairer approach to corporate crime will require more resources. A more aggressive, adversarial and hands-on approach to corporate crime enforcement would require a substantial increase in law enforcement resources dedicated to complex investigations and prosecutions of sprawling multinationals.

¹³⁸ U.S. Department of Justice, "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association," 13 Sept. 2012, <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>

Short of the DOJ ceasing corporate DPAs and NPAs and reorienting itself toward aggressive investigations of corporate crime, there are incremental policy solutions that can begin to turn the tide:

- The DOJ should stop entering DPAs and NPAs with repeat offenders.
- Congress could pass laws requiring greater transparency around prosecutors' decisions to enter DPAs and NPAs so that the public could know what specific collateral consequences were considered when weighing the decision not to prosecute.
- If the potential of a prosecution to threaten the financial or economic stability of the U.S. or another country was a factor a prosecutor considered, then the public should know – and regulators should move to break up the entity which has been too big to be subject to proper law enforcement.
- Transparency should also be increased around how the DOJ evaluates the compliance measures prosecutors often require of corporations that enter DPAs and NPAs. Reports by monitors appointed to oversee strengthened compliance should be made public, as should any other Justice Department reports tracking the performance of DPAs and NPAs.
- Additionally, these agreements could be treated more like guilty pleas alongside additional enforcement reforms, including making executives criminally liable and subject to jail time when corporations violate the law.¹³⁹

The ultimate fix, nevertheless, is the simplest: ending the DOJ's practice of entering deferred and non-prosecution agreements with corporations once and for all.

¹³⁹ This last policy was introduced recently by Sen. Elizabeth Warren as the Corporate Executive Accountability Act (S. 1010). See <https://www.congress.gov/bill/116th-congress/senate-bill/1010>

Appendix A: Detailed Profiles of Corporate Repeat Offenders Receiving DPAs and NPAs

Banks and Financial Corporations (Domestic)

Corporate wrongdoer: American Insurance Group (AIG), a multinational financial and insurance corporation based in New York City.



Offense resulting in NPA and DPA: Securities fraud between 2000 and 2002.

The DOJ charged AIG-FP PAGIC Equity Holding Corporation, an AIG subsidiary, with aiding and abetting PNC Financial Services Group in connection with fraudulent transactions involving a special purpose entity known as a PAGIC entity.

The DOJ's press release states that AIG-FP "developed the structured financial products used by PNC to transfer \$750 million in mostly troubled loans and venture capital investments from subsidiaries of PNC to PAGIC entities. AIG placed the PAGIC entities on its balance sheet. The ability of PNC to account for the PAGIC entities as off-balance sheet SPEs – as if PNC no longer owned the assets transferred to those entities – depended upon whether the transactions complied with the requirements for non-consolidation under generally accepted accounting principles (GAAP). The PAGIC transactions violated GAAP requirements for non-consolidation because AIG-FP did not make or maintain a substantive capital investment of at least 3% in the PAGIC entities."¹⁴⁰

Criminal enforcement action (Nov. 30, 2004): DPA with AIG subsidiary AIG-FP PAGIC Equity Holding Corp. with a term of two years¹⁴¹ and a two-year NPA with AIG subsidiary AIG-Financial Products Corp.¹⁴²

¹⁴⁰ U.S. Department of Justice, Press Release: "American International Group, Inc. Enters into Agreement with the United States," 30 Nov. 2004,

https://www.justice.gov/archive/opa/pr/2004/November/04_crm_764.htm

¹⁴¹ U.S. Department of Justice, Deferred Prosecution Agreement with AIG-FP PAGIC Equity Holding Corp., 2004, <https://www.justice.gov/criminal-fraud/file/835556/download>

¹⁴² U.S. Department of Justice, Non-Prosecution Agreement with AIG-FP, 2004, <https://www.justice.gov/criminal-fraud/file/835581/download>

The agreements required AIG-FP to pay \$80 million in penalties to the United States, disgorgement of \$39.8 million in fees received from the PAGIC transactions, and payment of \$6.5 million in prejudgment interest.

AIG accepted responsibility for the conduct of its employees and pledged its complete cooperation with a continuing investigation into the PAGIC transactions and other transactions. It was also required to hire a monitor.

The DPA stated that it “shall become null and void and AIG-FP shall, in the Department’s sole reasonable discretion, thereafter be subject to prosecution for any federal criminal violation” if AIG-FP has deliberately given false information or has committed any federal crimes subsequent to the date of the agreement.¹⁴³

Second offense, resulting in NPA: Alleged securities fraud between 2000 and 2004.¹⁴⁴

The allegations were related to two transactions. The first transaction involved a fraudulent scheme between AIG and General Re Corporation (Gen Re). The scheme was meant to create the appearance that AIG had increased its loss reserves, a key financial indicator for insurance companies. With the help of Gen Re, AIG booked approximately \$250 million in loss reserves in the fourth quarter of 2000 and another \$250 million in the first quarter of 2001. It reported these additional loss reserves in public reports filed with the SEC. AIG’s documentation included a false “paper trail” offer letter and misleading contracts, which led to AIG improperly reporting positive loss reserve growth in those periods. Three former Gen Re executives and one former AIG executive were charged with conspiracy, securities fraud, mail and wire fraud, and making false statements to the SEC in conjunction with these actions.¹⁴⁵

The second transaction involved AIG hiding approximately \$200 million in underwriting losses in 2000 in its general insurance business by improperly converting them into capital losses that were less important to the investment community. This misled investors and analysts. AIG structured a series of bogus transactions to convert underwriting losses to investment losses by transferring them to Capco Reinsurance Company, an offshore entity.¹⁴⁶

Criminal enforcement action (Feb. 7, 2006): Just over a year after the previous DOJ enforcement, AIG entered a three-year NPA with the DOJ and paid \$25 million in penalties.

¹⁴³ U.S. Department of Justice, Deferred Prosecution Agreement with AIG-FP PAGIC Equity Holding Corp., 2004, <https://www.justice.gov/criminal-fraud/file/835556/download>

¹⁴⁴ U.S. Department of Justice, Press Release: “American International Group, Inc. Enters into Agreement with the United States.” 9 February 2006.

https://www.justice.gov/archive/opa/pr/2006/February/06_crm_070.html

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

As a result of a related enforcement proceeding, the company paid \$800 million in penalties to the SEC. The agreement lasted for three years, during which time AIG was to fully cooperate with the investigation into its practices.

For both the 2004 and 2006 agreements, the DOJ and AIG agreed to select James Cole as the federal monitor, overseeing the company's progress in meeting the terms of the agreement. Cole, a lawyer, and his firm were paid about \$20 million to oversee AIG's business practices and submit periodic reports to the government. The reports were not made public.¹⁴⁷

Corporate wrongdoer: Arthur Andersen, once one of the largest accounting firms in the world, was founded in 1913 and based in Chicago.



Offense resulting in DPA: Alleged participation in a real estate fraud scheme in 1989 and 1990.¹⁴⁸

Arthur Andersen partnered¹⁴⁹ with the Connecticut real estate firm Colonial Realty Company, which, following its bankruptcy in 1990, resulted in losses of as much as \$350 million for investors.¹⁵⁰ Arthur Andersen allegedly aided Colonial through its endorsement of a misleading financial prospectus.¹⁵¹

¹⁴⁷ U.S. Department of Justice, Prosecution Agreement with American International Group, Inc., 7 February 2006, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/aig.pdf>; Lattman, P. (27 March 2009). "The U.S.'s Fly on the Wall at AIG." *The Wall Street Journal*, <http://online.wsj.com/article/SB123812186477454361.html>

¹⁴⁸ Mokhiber, Russell, "Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements," *Corporate Crime Reporter* (28 Dec. 2005), <https://www.corporatecrimereporter.com/news/200/crime-without-conviction-the-rise-of-deferred-and-non-prosecution-agreements-2/>

¹⁴⁹ George Judson, "Accountants to Pay \$10 Million To Victims of Real Estate Fraud," *The New York Times*, 24 April 1996, <https://www.nytimes.com/1996/04/24/nyregion/accountants-to-pay-10-million-to-victims-of-real-estate-fraud.html>

¹⁵⁰ Denise Lavoie, "Colonial Executive Gets Nine-year Prison Sentence," *The New York Times*, 7 July 1995, <https://www.apnews.com/588fb59339c537ea705e5fb271b51231>

¹⁵¹ Mokhiber, Russell, "Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements," *Corporate Crime Reporter* (28 Dec. 2005), <https://www.corporatecrimereporter.com/news/200/crime-without-conviction-the-rise-of-deferred-and-non-prosecution-agreements-2/>

Criminal enforcement action (April 15, 1996): Arthur Andersen entered a 90-day DPA¹⁵² with the DOJ and agreed to pay \$10.3 million into a fund for defrauded investors. The corporation did not admit wrongdoing. Separately, the two Colonial executives behind the fraudulent scheme pleaded guilty and were sentenced to eight and nine years in prison.¹⁵³

Second offense, resulting in trial conviction (subsequently overturned): Alleged obstruction of justice in October of 2001.¹⁵⁴

In advance of an SEC investigation¹⁵⁵ into Enron, Arthur Andersen destroyed documents related to its Enron account.¹⁵⁶

Criminal enforcement action (Oct. 16, 2002): Arthur Andersen was convicted following a federal jury trial and received the maximum sentence, five years of probation and a \$500,000 fine.¹⁵⁷ Separately, Arthur Andersen, following its indictment, was debarred from conducting business with the federal government.¹⁵⁸ The corporation did not admit wrongdoing. Following Arthur Andersen's indictment, debarment and conviction, the firm collapsed.¹⁵⁹

In 2005, the U.S. Supreme Court overturned the conviction, ruling that the lower court had failed to prove the corporation destroyed the documents in order to deliberately conceal evidence from the SEC.¹⁶⁰

¹⁵² U.S. Department of Justice, Deferred Prosecution Agreement with American International Group, Inc., 15 April 2006, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/arthuranderson.pdf>

¹⁵³ Lavoie, Denise, "Colonial Executive Gets Nine-year Prison Sentence," The New York Times, 7 July 1995, <https://www.apnews.com/588fb59339c537ea705e5fb271b51231>

¹⁵⁴ Weil, Jonathan and Alexei Barrionuevo, "Arthur Andersen Is Convicted On Obstruction-of-Justice Count," The Wall Street Journal, 16 June 2002, <https://www.wsj.com/articles/SB1023469305374958120>

¹⁵⁵ Berenson, Alex, "S.E.C. Opens Investigation Into Enron," The Wall Street Journal, 1 Nov. 2001, <https://www.nytimes.com/2001/11/01/business/sec-opens-investigation-into-enron.html>

¹⁵⁶ Weil, Jonathan, John Emshwiller and Scot J. Paltrow, "Arthur Andersen Admits It Destroyed Documents Related to Enron Account," The Wall Street Journal, 11 Jan. 2002, <https://www.wsj.com/articles/SB1010695966620300040>

¹⁵⁷ Fowler, Tom and Mary Flood, "Andersen gets the maximum sentence," Houston Chronicle, 16 Oct. 2002, <https://www.chron.com/business/enron/article/Andersen-gets-the-maximum-sentence-2115792.php>

¹⁵⁸ Press release: "GSA Suspends Enron and Arthur Andersen and Former Officials," General Services Administration, 15 March 2002, <https://www.gsa.gov/node/77451>

¹⁵⁹ Greenhouse, Linda, "Justices Unanimously Overturn Conviction of Arthur Andersen," The New York Times 31 May 2005, <https://www.nytimes.com/2005/05/31/business/justices-unanimously-overturn-conviction-of-arthur-andersen.html>

¹⁶⁰ *Ibid.*

Corporate wrongdoer: JPMorgan Chase, the largest bank in the U.S., is based in New York City.



Offense resulting in NPA: Antitrust violations between 2001 and 2006.¹⁶¹

JPMorgan Chase municipal investment employees rigged bids and manipulated the bidding process for contracts associated with municipal bonds and other public funds. The bank admitted and accepted responsibility for the illegal scheme.

Criminal enforcement action (July 7, 2011): JPMorgan Chase entered a two-year NPA¹⁶² and paid \$228 million in restitution, penalties and disgorgement to federal and state agencies and accepted responsibility for illegal, anticompetitive conduct by former employees.¹⁶³

Second offense, resulting in DPA: Bank Secrecy Act violations between 2006 and 2008.¹⁶⁴

The DOJ filed two felony charges of Bank Secrecy Act violations against JPMorgan Chase for anti-money laundering failures. For more than twenty years, JPMorgan was the bank that Bernard Madoff primarily used for accounts connected with his infamous fraud scheme. In 2006, JPMorgan bankers in London flagged suspicious activity connected with Madoff, and the bank took measures to reduce its financial liabilities relating to Madoff activities. In 2008, due diligence officers in London reported Madoff to regulators in the United Kingdom. Meanwhile, U.S.-based JPMorgan anti-money laundering staff were not alerted to the U.K. desk's concerns. In the weeks leading up to Madoff's arrest, most of the more than \$2 billion

¹⁶¹ U.S. Department of Justice, Press Release: "JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$228 Million to Federal and State Agencies," 7 July 2011, <https://www.justice.gov/opa/pr/jpmorgan-chase-admits-anticompetitive-conduct-former-employees-municipal-bond-investments>

¹⁶² U.S. Department of Justice, Non-Prosecution Agreement with JPMorgan Chase, 6 July 2011. <https://www.justice.gov/sites/default/files/atr/legacy/2011/07/07/272815a.pdf>

¹⁶³ Dash, E., "JPMorgan Settles Bond Bid-Rigging Case for \$211 Million," *The New York Times*, 7 July 2011, <https://www.justice.gov/opa/pr/jpmorgan-chase-admits-anticompetitive-conduct-former-employees-municipal-bond-investments>

¹⁶⁴ U.S. Department of Justice, Press Release: "Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Filing of Criminal Charters Against and Deferred Prosecution Agreement with JPMorgan Chase Bank, N.A., in Connection with Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme," 7 January 2014, <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal>

that was drained from Madoff's accounts went into JPMorgan funds that had taken a position against Madoff.¹⁶⁵

Criminal enforcement action (Jan. 7, 2014): A two-year DPA with JPMorgan requiring the bank to acknowledge its responsibility and pay a non-tax deductible penalty of \$1.7 billion, at the time the largest financial penalty imposed by the Department of Justice, to be distributed to Madoff fraud victims.

JPMorgan also was required to cooperate with ongoing Madoff fraud investigations and to reform its Bank Secrecy Act/Anti-Money Laundering compliance programs and procedures. If JPMorgan complies for two years with the terms of the DPA, the government will dismiss the charges.¹⁶⁶

Third offense, resulting in a plea agreement: Sherman Antitrust Act violations between July 2010 and January 2013.¹⁶⁷

Traders from JPMorgan Chase, Citicorp, Barclays and RBS conspired to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange market.¹⁶⁸

The conspirator banks described themselves as "The Cartel" and used a private online chat room and coded language to manipulate benchmark exchange rates. This market manipulation protected members of the so-called Cartel while suppressing competition.

Criminal enforcement action (May 19, 2015): JPMorgan Chase agreed to plead guilty¹⁶⁹ to a one-count felony charge of conspiring to fix prices and rig bids and paid a criminal fine of \$550 million. The judgement was not finalized until January 10, 2017.¹⁷⁰

¹⁶⁵ *Ibid.*

¹⁶⁶ U.S. Department of Justice, Deferred Prosecution Agreement with JPMorgan Chase Bank, 6 January 2014, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/JPMorgan-Chase.pdf>

¹⁶⁷ U.S. Department of Justice, Plea Agreement with JPMorgan Chase, 19 May 2015, <https://www.justice.gov/file/440491/download>

¹⁶⁸ U.S. Department of Justice, Press Release: "Five Major Banks Agree to Parent-Level Guilty Pleas," 20 May 2015, "<https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>"

¹⁶⁹ U.S. District Court: District of Connecticut, Plea Agreement with JPMorgan Chase, 19 May 2015, <https://www.justice.gov/file/440491/download>

¹⁷⁰ USA v. JP Morgan Chase & Co, Criminal Docket for Case #: 3:15-cr-00079-SRU, U.S. District Court for the District of Connecticut (New Haven), 10 Jan. 2017, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/dockets/jpmorgan-chase-2017.html>

Fourth offense, resulting in NPA: Alleged foreign Corrupt Practices Act violations between 2006 and 2012.¹⁷¹

Employees of JPMorgan Securities (Asia Pacific) Limited, a Hong Kong-based JPMorgan Chase subsidiary, sought to win banking deals by corruptly awarding jobs to friends and relatives of Chinese government officials.¹⁷²

Criminal enforcement action (Nov. 17, 2016): The JPMorgan Chase subsidiary entered a three-year NPA with the DOJ and paid a criminal penalty of \$72 million.

JPMorgan Chase also was required to pay penalties to the SEC and the Federal Reserve System's Board of Governors, bringing up the total amount of penalties paid by the parent corporation and its subsidiary for the scheme to \$264.4 million.¹⁷³

Corporate wrongdoer: Merrill Lynch, a major Wall Street investment and wealth management firm until its acquisition by Bank of America during the 2008 financial crisis.¹⁷⁴ Now a Bank of America subsidiary, it was formally rebranded "Merrill" in 2019.¹⁷⁵



Offense resulting in NPA: Engaging in an allegedly fraudulent scheme with disgraced energy firm Enron in 1999.¹⁷⁶

¹⁷¹ U.S. Department of Justice, Non-Prosecution Agreement with JPMorgan Securities (Asia Pacific) Limited, 17 November 2016, <https://www.justice.gov/opa/press-release/file/911206/download>

¹⁷² U.S. Department of Justice. Press Release: "JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China," 17 November 2016, <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>

¹⁷³ *Ibid.*

¹⁷⁴ Gasparino, Charlie "Bank of America to Buy Merrill Lynch for \$50 Billion," CNBC, 14 Sept. 2008, <https://www.cnbc.com/id/26708319>

¹⁷⁵ Frank, Robert and Liz Moyer, "Bank of America to drop U.S. Trust and Merrill Lynch names, rebrand wealth unit as just 'Merrill'," CNBC, 25 Feb. 2019, <https://www.cnbc.com/2019/02/25/bank-of-america-to-drop-merrill-lynch-name-and-rebrand-wealth-unit-as-just-merrill-wsj-says.html>

¹⁷⁶ U.S. Department of Justice, Press Release: "Three Top Former Merrill Lynch Executives Charged with Conspiracy, Obstruction of Justice, Perjury in Enron Investigation," 17 Sept. 2003, https://www.justice.gov/archive/opa/pr/2003/September/03_crm_510.htm

The DOJ alleged that Merrill Lynch executives conspired with Enron in a \$12 million deal to purchase the energy company's investment in power-generating barges off the coast of Nigeria. By purchasing the Nigerian barge investment from Enron when Enron failed to find a legitimate buyer, even as Enron continued to seek a buyer and promised Merrill a significant rate of return, the DOJ alleged Merrill facilitated Enron's fraud against investors.¹⁷⁷

Criminal enforcement action (Sept. 7, 2003): Merrill Lynch entered an 18-month NPA with the DOJ.¹⁷⁸ The firm accepted responsibility for any criminal violations its employees may have committed and agreed to be overseen by a corporate monitor and to undergo internal reforms intended to prevent the firm from engaging in any future fraudulent activity.¹⁷⁹

No criminal financial penalties were imposed. In a civil settlement Merrill entered with the Securities and Exchange Commission six months earlier, Merrill Lynch neither admitted nor denied the allegations and agreed to pay \$80 million in disgorgement, penalties and interest.¹⁸⁰

Additionally, the DOJ prosecuted three of the firm's executives, who were convicted in a jury trial. The convictions, however, were mostly overturned.¹⁸¹ One of the executives was permitted to enter a one-year DPA with the DOJ.¹⁸² Another sought unsuccessfully to have his obstruction of justice and perjury charges overturned by the U.S. Supreme Court.¹⁸³

Second offense, resulting in NPA: Fraud between 2008 and 2014.

¹⁷⁷ *Ibid.*

¹⁷⁸ U.S. Department of Justice, Non-prosecution agreement with Merrill Lynch, 17 Sept. 2003, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/merrilllynch.pdf>

¹⁷⁹ U.S. Department of Justice, Press Release: "Three Top Former Merrill Lynch Executives Charged with Conspiracy, Obstruction of Justice, Perjury in Enron Investigation," 17 Sept. 2003, https://www.justice.gov/archive/opa/pr/2003/September/03_crm_510.htm

¹⁸⁰ U.S. Securities and Exchange Commission, Press Release: "SEC Charges Merrill Lynch, Four Merrill Lynch Executives with Aiding and Abetting Enron Accounting Fraud," 17 March 2003, <https://www.sec.gov/news/press/2003-32.htm>

¹⁸¹ Roper, John C. "4 ex-Merrill Lynch execs' convictions overturned," Houston Chronicle, 2 Aug. 2006, <https://www.chron.com/business/enron/article/4-ex-Merrill-Lynch-execs-convictions-overturned-1484942.php>

¹⁸² U.S. Department of Justice: Closed Criminal Division Cases, United States v. Robert Furst, Court Docket Number: 03-CR-00363-003, updated 20 Dec. 2016, <https://www.justice.gov/criminal-vns/case/furstr>

¹⁸³ Kendall, Brent, "Justices Deny Ex-Merrill Executive's Appeal in Enron Case," The Wall Street Journal, 23 April 2012, <https://www.wsj.com/articles/SB10001424052702303592404577361802633915754>

Precious metals traders who were employees of Merrill Lynch Commodities Inc., a Merrill Lynch subsidiary acquired by Bank of America, fraudulently sought to profit by manipulating global markets for precious metals including gold, silver and platinum.¹⁸⁴ The fraudulent activity, called “spoofing,” induced other market participants to buy and sell contracts, altering the commodities’ prices and facilitating profitmaking by the Merrill traders.¹⁸⁵ The DOJ did not disclose how much the traders profited from their illicit activities.

Criminal enforcement action (June 25, 2019): Merrill Lynch Commodities Inc. entered a three-year NPA¹⁸⁶ with the DOJ and agreed to pay \$25 million in combined criminal fines, restitution and forfeiture. The subsidiary accepted responsibility for its wrongdoing, and both it and its parent, Bank of America, agreed to cooperate with ongoing investigations and undergo compliance reforms.

Despite the allegations associated with the 2003 enforcement, the NPA with Merrill asserts the subsidiary has no prior criminal history.¹⁸⁷

The Commodity Futures Trading Commission also announced it would penalize Merrill, though in its enforcement order the agency says its penalties will be “offset” by the DOJ penalties.¹⁸⁸

¹⁸⁴ U.S. Department of Justice, Non-prosecution agreement with Merrill Lynch Commodities, Inc., 25 June 2019, <https://www.justice.gov/opa/press-release/file/1177296/download>

¹⁸⁵ U.S. Department of Justice, Press Release: “Merrill Lynch Commodities Inc. Enters into Corporate Resolution and Agrees to Pay \$25 Million in Connection with Deceptive Trading Practices Executed on U.S. Commodities Markets,” 25 June 2019, <https://www.justice.gov/opa/pr/merrill-lynch-commodities-inc-enters-corporate-resolution-and-agrees-pay-25-million>

¹⁸⁶ ¹⁸⁶ U.S. Department of Justice, Non-prosecution agreement with Merrill Lynch Commodities, Inc., 25 June 2019, <https://www.justice.gov/opa/press-release/file/1177296/download>

¹⁸⁷ *Ibid.*

¹⁸⁸ U.S. Commodity Futures Trading Commission, Press Release: “CFTC Orders Merrill Lynch Commodities, Inc. to Pay Approximately \$25 Million for Spoofing, Manipulation, and Attempted Manipulation in Precious Metals Futures,” 25 June 2019, <https://www.cftc.gov/PressRoom/PressReleases/7946-19>

¹⁸⁸ U.S. Attorney, Southern District of New York. Deferred Prosecution Agreement with Prudential Securities Incorporated, 27 October 1994, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/prudential.pdf>

Corporate wrongdoer: Prudential Financial, a multinational insurance company based in Newark, New Jersey.

Offense resulting in DPA: Fraud between 1983 and 1990.¹⁸⁹

Prudential Securities, a Prudential subsidiary, reportedly offered the energy funds to investors as “safe, low risk, and suitable for all investors.” However, the funds had substantial investment risk and no significant tax benefits for investors. Prudential reportedly admitted to misleading potential investors through a variety of marketing materials. More than 600,000 investors nationwide put money into these limited partnerships, which collectively lost more than \$2 billion.¹⁹⁰



Criminal enforcement action (Oct. 27, 1994): The DOJ entered into a three-year DPA with the Prudential subsidiary. According to Mary Jo White, then the U.S. Attorney for the Southern District of New York and prosecutor for the case, this was the first DPA involving a major corporation.¹⁹¹

Prudential paid a \$330 million settlement into a fund for investors’ benefit and agreed to cooperate with investigators. Prudential also agreed to pay all additional claims to investors exceeding \$330 million. The company accepted responsibility for the wrongdoing.¹⁹²

Second offense, resulting in DPA: Fraud between 1999 and 2003.¹⁹³

According to the DOJ, brokers employed by Prudential Securities Inc. (Prudential Equity Group’s predecessor entity and a Prudential Financial subsidiary) placed thousands of market timing trades on behalf of their clients. Because the brokers manipulated trade information sent over the automated mutual fund trading system the company used, these prohibited trades generated commissions for the brokers and profits for their clients.

¹⁸⁹ U.S. Attorney, Southern District of New York. Deferred Prosecution Agreement with Prudential Securities Incorporated, 27 October 1994, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/prudential.pdf>

¹⁹⁰ Paltrow, Scott J., "Prudential Firm Agrees to Strict Fraud Settlement," Los Angeles Times, 28 Oct. 1994, <https://www.latimes.com/archives/la-xpm-1994-10-28-mn-55889-story.html>

¹⁹¹ Mokhiber, Russell "Interview with Mary Jo White, Debevoise, New York, New York," Corporate Crime Reporter, 12 Dec. 2005, <https://www.corporatecrimereporter.com/news/200/interview-with-mary-jo-white-debevoise-new-york-new-york/>

¹⁹² *Ibid.*

¹⁹³ U.S. Department of Justice, Press Release: “Prudential Financial Subsidiary Agrees to Pay \$600 Million to Settle Securities Fraud Allegations,” 28 August 2006. https://www.justice.gov/archive/opa/pr/2006/August/06_odag_574.html

Prudential Securities Inc. management was aware of the deceptive trading practices, yet, instead of intervening, they facilitated continued wrongdoing.¹⁹⁴

DOJ enforcement action (Aug. 28, 2006): The Prudential subsidiary entered a five-year DPA with the DOJ and paid a \$300 million criminal penalty. With additional civil penalties, the company paid a total of \$600 million.

Corporate wrongdoer: Wachovia was a financial corporation based in Charlotte, North Carolina. Wells Fargo, a San Francisco-based megabank, acquired Wachovia in 2008¹⁹⁵ after it suffered multibillion-dollar losses during the financial crisis.



Offense resulting in DPA: Anti-money laundering failures between 2003 and 2008.¹⁹⁶

WACHOVIA

According to the DOJ, Wachovia allowed Mexican currency exchange houses (known as “casas de cambios” or “CDCs”) to wire funds through Wachovia accounts to recipients throughout the world. The bank offered CDCs a service through which large sums of dollars could be physically transported to the U.S. for deposit. Wachovia did not have an effective procedure to monitor these transactions to detect money laundering activity. Between 2004 and 2007, at least \$373 billion in wire transfers were made from CDCs to Wachovia accounts. Wachovia was aware as early as 1996 that CDCs were being used to launder drug money. More than \$4 billion in bulk cash was transported from CDCs in Mexico to Wachovia accounts. A sum of \$47 billion was deposited in Wachovia accounts through a “remote deposit capture” (RDC) service. Millions of these dollars were used to purchase airplane for narcotics trafficking operations. More than 20,000 kilograms of cocaine were seized from the planes.

Criminal enforcement action (March 17, 2010): Wachovia Bank entered into a one-year DPA¹⁹⁷

¹⁹⁴ *Ibid.*

¹⁹⁵ Wells Fargo, “Wachovia Is Now Wells Fargo,” 2008, <https://www.wellsfargo.com/about/corporate/wachovia/>

¹⁹⁶ U.S. Attorney’s Office, Southern District of Florida, Press Release: “Wachovia Enters into Deferred Prosecution Agreement,” 17 March 2010, <https://www.justice.gov/archive/usao/fls/PressReleases/2010/100317-02.html>

¹⁹⁷ U.S. District Court, Southern District of Florida. Deferred Prosecution Agreement with Wachovia Bank, N.A., 16 March 2010, <https://www.justice.gov/archive/usao/fls/PressReleases/Attachments/100317-02.Agreement.pdf>

with the DOJ and agreed to forfeit \$110 million to the U.S. – the proceeds of illegal narcotic sales that were laundered through the bank – and pay a \$50 million fine to the U.S. Treasury Department. Wachovia also was required to implement remedial measure to comply with the Bank Secrecy Act, abide by any orders and regulations of the OCC, and the U.S. Department of Treasury, Financial Crimes Enforcement Network. It was required to provide all relevant documents to the government, cooperate with investigations, and comply with the law.¹⁹⁸

Offense¹⁹⁹ resulting in NPA: Antitrust violations from 1998 through 2004.²⁰⁰

According to the DOJ, Wachovia employees at its municipal derivatives desk entered into contracts to unlawfully manipulate the bidding process and rig bids on municipal investments. The contracts were used to invest proceeds from bond issuances by municipalities and other public entities or to manage the risks associated with those bond issuances. Wachovia corrupted the bidding practices for investment contracts, depriving municipalities of the benefits of competitive processes.

Criminal enforcement action (Dec. 8, 2011): The Department of Justice entered into a one-year NPA²⁰¹ with Wachovia Bank, during which the company was required to break no federal criminal laws, notify the DOJ of any criminal violations by employees, cooperate with investigations, and alert the department to proceedings of any civil actions.

Wachovia was required to pay a total of \$148 million in restitution to federal and state agencies. While any investigations of former employees of the company are being conducted (regardless of timing), Wachovia was also required to provide relevant information to the government. Violations of the agreement may lead to prosecution.

¹⁹⁸ *Ibid.*

¹⁹⁹ Note the crossed chronology of Wachovia's offenses and resulting criminal enforcement actions. While the enforcement action resulting in the DPA occurred before the enforcement action resulting in the NPA, the wrongdoing the DOJ describes in the 2011 NPA precedes the wrongdoing the DOJ describes in the 2010 DPA.

²⁰⁰ U.S. Department of Justice, Press Release: "Wachovia Bank N.A. Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$148 Million to Federal and State Agencies," 8 Dec. 2011, <https://www.justice.gov/opa/pr/wachovia-bank-na-admits-anticompetitive-conduct-former-employees-municipal-bond-investments>

²⁰¹ U.S. Department of Justice, Non-Prosecution Agreement with Wachovia Bank, N.A., 8 Dec. 2011, <https://www.justice.gov/sites/default/files/atr/legacy/2011/12/08/278076a.pdf>

Banks and Financial Corporations (International)

Corporate wrongdoer: Barclays, a London-based multinational financial corporation.

Offense resulting in DPA: International Emergency Economic Powers Act (IEEPA) and Trading with the Enemy Act (TWEA) violations between the mid-1990s and 2006.²⁰²



The DOJ charged Barclays with conducting illegal transactions on behalf of customers from Cuba, Iran, Sudan, Libya, and Burma, and other parties or jurisdictions sanctioned in programs administered by the U.S. Treasury's Office of Foreign Assets Control (OFAC).²⁰³

According to the DOJ, on numerous occasions, Barclays stripped information from payment messages to avoid alerting U.S. financial institutions about the origins of the funds. Barclays routed U.S. dollar payments through an internal account to hide the connection to sanctioned states and entities. The company also used "cover payments," a method of payment messages meant to obscure the identities of the sanctioned countries.

Criminal enforcement action (Aug. 18, 2010): Barclays entered into a two-year DPA with the DOJ and forfeited \$298 million to the U.S. government and the Manhattan District Attorney's Office.²⁰⁴

Barclays also was required to provide comprehensive training on U.N., U.S. and E.U. sanctions for all relevant employees. The bank was ordered to implement a written policy requiring the use of a specific type of bank-to-bank payment measures. Barclays was required to provide information to investigators as requested, and to make employees available to provide such information. The agreement also required Barclays to implement compliance procedures and training related to the crimes committed.

Second offense, resulting in NPA: Fraudulent submissions by the bank for the London InterBank

²⁰² U.S. Department of Justice, Press Release: "Barclays Bank PLC Agrees to Forfeit \$298 Million in Connection with Violations of the International Emergency Economic Powers Act and the Trading with the Enemy Act," 18 August 2010, <https://www.justice.gov/opa/pr/barclays-bank-plc-agrees-forfeit-298-million-connection-violations-international-emergency>

²⁰³ *Ibid.*

²⁰⁴ U.S. Department of Justice. Deferred Prosecution Agreement with Barclays Bank PLC, 16 August 2010, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/barclays.pdf>

Offered Rate (LIBOR) and the Euro Interbank Offered Rate (EURIBOR) between 2005 and 2009.²⁰⁵

Barclays swaps traders requested that the company's LIBOR and EURIBOR submitters submit inaccurate LIBOR and EURIBOR contributions that would benefit their trading positions. The submitters accommodated the swaps traders' requests on numerous occasions. Additionally, in response to press speculation that Barclays' high U.S. dollar LIBOR submissions could reflect liquidity problems, Barclays management directed that its dollar LIBOR submissions be lowered. These directions often resulted in submission of false rates.²⁰⁶

Criminal enforcement action (June 27, 2012): Barclays Bank PLC entered into a two-year NPA²⁰⁷ with the DOJ and paid \$160 million to the U.S. Treasury.²⁰⁸

During the NPA's term, Barclays was required to commit no crimes in the United States and to disclose all relevant information regarding the company's activities to the Fraud Section of the DOJ. It was required to notify the Fraud Section of any criminal conduct of the company or its employees. If the DOJ determined that Barclays breached the agreement, it could prosecute. The agreement stated that Barclays has strengthened its compliance and internal controls standards and procedures and will further strengthen them as required by the U.S. Commodity Futures Trading Commission.

Third offense, resulting in plea agreement: Between 2007 and 2012, conspired with Citicorp, JPMorgan Chase, Royal Bank of Scotland and UBS AG to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange market.²⁰⁹

²⁰⁵ U.S. Department of Justice, Press Release: "Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty," 27 June 2012, <https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and>

²⁰⁶ *Ibid.*

²⁰⁷ U.S. Department of Justice, Non-Prosecution Agreement with Barclays Bank PLC, 26 June 2012. <https://www.justice.gov/iso/opa/resources/337201271017335469822.pdf>

²⁰⁸ U.S. Department of Justice, Press Release: "Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty, 27 June 2012." <https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and>

²⁰⁹ U.S. Department of Justice, Press Release: "Five Major Banks Agree to Parent-Level Guilty Pleas," 20 May 2015, <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>

The conspirator banks described themselves as “The Cartel” and used a private online chat room and coded language to manipulate benchmark exchange rates. This market manipulation protected members of the so-called Cartel while suppressing competition.

Criminal enforcement action (May 20, 2015): Barclays pleaded guilty²¹⁰ to a one-count felony charge of conspiring to fix prices and rig bids and paid a criminal fine of \$650 million. Additionally, Barclays agreed the market manipulation violations were a breach of its 2012 non-prosecution agreement, and will pay an additional \$60 million criminal penalty.

Barclays also agreed to a three-year corporate probation and settled claims related to the violation with the New York State Department of Financial Services, the Commodity Futures Trading Commission, and the United Kingdom’s Financial Conduct Authority an additional collective penalty of \$1.3 billion.²¹¹

Fourth offense, resulting in declination: Alleged Misappropriation of confidential information provided by Hewlett Packard and engaging in trading to manipulate prices in ways that increased profits for individual traders.²¹²

Criminal enforcement action (Feb. 28, 2018): The DOJ declined to prosecute.²¹³ Barclays agreed to pay \$12,896,011 in restitution and disgorgement to the U.S. Treasury, which will be offset by the amount Barclays pays in restitution to Hewlett Packard.

²¹⁰ U.S. District Court: District of Connecticut, Plea Agreement with Barclays Bank PLC, 19 May 2015.

<https://www.justice.gov/file/440481/download>

²¹¹ U.S. Department of Justice, Press Release: “Five Major Banks Agree to Parent-Level Guilty Pleas,” 20 May 2015. <https://www.justice.gov/sites/default/files/atr/legacy/2015/05/20/314165.pdf>

²¹² U.S. Department of Justice, Declination to prosecute Barclays PLC, 28 Feb. 2018, <https://www.justice.gov/criminal-fraud/file/1039791/download>

²¹³ *Ibid.*

Corporate wrongdoer: BDO (formerly BDO Seidman, the corporation rebranded²¹⁴ itself as BDO in 2010), a multinational accounting firm based in Belgium.



Offense resulting in DPA: From 1995 to 1998,²¹⁵ partners in the accounting firm's St. Louis office helped a wealthy client illegally convert the annuity funds BDO held in trust for personal injury clients in order to help the client acquire part of a grocery chain. When the grocery business failed, the annuitants, many of whom were paraplegics, widows and orphans, experienced catastrophic loss²¹⁶ in excess of \$60 million.²¹⁷

Criminal enforcement action (April 12, 2002): An 18-month DPA, approved by the United State District Court for the Southern District of Illinois,²¹⁸ and a \$16 million fine, which was put into a fund established for victim restitution. Victims who claimed money from this fund were required to renounce any claims they were pursuing and/or any future claims against the company. As a part of the agreement, BDO must not violate any law, must disclose documents that would otherwise be covered under attorney-client privilege, must cooperate, and must encourage the cooperation of its employees.²¹⁹

Second offense, resulting in DPA: Tax fraud conspiracy between 1997 and 2003.²²⁰

The DOJ charged BDO with participating in a tax shelter fraud scheme, generating at least \$6.5 billion in phony tax losses for wealthy clients. The fraudulent activity resulted in the evasion and attempted evasion of approximately \$1.3 billion in taxes. BDO used two tax shelters,

²¹⁴ "BDO Seidman Rebrands as 'BDO'," Accounting Today, 4 January 2011, <https://www.accountingtoday.com/news/bdo-seidman-rebrands-as-bdo>

²¹⁵ U.S. District Court for the Southern District of Illinois, Deferred Prosecution Agreement with BDO Seidman LLP, April 12, 2002, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/bdoseidman.pdf>

²¹⁶ Rosen, E. "Audit Firm Survives Criminal Charge, \$16 Million Later," The New York Times, 22 June 2002, <http://www.nytimes.com/2002/06/22/business/audit-firm-survives-criminal-charge-16-million-later.html>

²¹⁷ Miquelon, Miriam. "Dispositions in Criminal Prosecutions of Business Organizations," (pg. 33), May 2003 <https://www.justice.gov/sites/default/files/usao/legacy/2006/02/14/usab5103.pdf>

²¹⁸ U.S. District Court for the Southern District of Illinois, Deferred Prosecution Agreement with BDO Seidman LLP, April 12, 2002, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/bdoseidman.pdf>

²¹⁹ Mokhiber, R., Without Conviction: The Rise of Deferred and Non Prosecution Agreements, 12 April 2002, <http://corporatecrimereporter.com/deferredreport.htm>

²²⁰ U.S. Attorney's Office, Southern District of New York, Press Release: "Manhattan U.S. Attorney Announces Agreement with BDO USA LLP to Pay \$50 Million to Resolve Federal Tax Fraud Investigations," 13 June 2012, <https://www.justice.gov/archive/usao/nys/pressreleases/June12/bdo/bdodpamaterials.pdf>

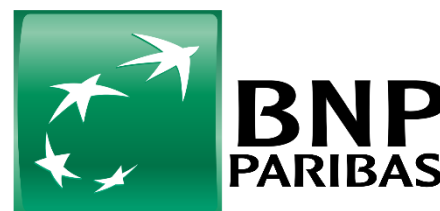
labeled “short sale” and “SOS” and concealed them from the IRS by characterizing them as investments. According to charging documents, BDO used fraudulent correspondence and agreements to mask the products and associated fees, even going so far as to file false tax returns on behalf of clients and provide false information and documents to the IRS.²²¹

Criminal enforcement action (June 6, 2012): A six-month DPA with the DOJ and the United States Attorney’s Office for the Southern District of New York.²²²

BDO agreed to pay \$50 million in forfeitures and penalties. BDO was also required to agree to permanent restrictions on its income tax practice. Should the DOJ determine that BDO had given false information, committed any crime, or violated any provision of the agreement, it may prosecute for any criminal violation, including the ones at issue in this agreement. The agreement also stated that if BDO violates any provision of the DPA, the agreement may be extended for one-year periods, but the total term may not exceed five years. The company was required to implement an effective compliance and ethics program, including maintaining a permanent compliance office and educational and training program for employees.

Corporate wrongdoer: BNP Paribas, a multinational banking group based in Paris.

Offense resulting in NPA: Allegedly facilitating tax avoidance between at least August 2008 and August 2013.²²³



BNP Paribas (Suisse), a Swiss subsidiary of BNP Paribas, maintained U.S.-related accounts – a total of 760 with a collective value of \$1.2 billion – that helped U.S. taxpayers evade U.S. tax liabilities and helped these U.S. taxpayers access and spend their undeclared funds. The accounts were held in offshore tax shelter countries including the British Virgin Islands, Panama, Liechtenstein and Liberia.²²⁴

²²¹ *Ibid.*

²²² U.S. Department of Justice, Deferred Prosecution Agreement with BDO Seidman, LLP, 12 April 2012.

<https://www.justice.gov/archive/usao/nys/pressreleases/June12/bdo/bdodpamaterials.pdf>

²²³ U.S. Department of Justice, Press Release: “Justice Department Announces Three Banks Reach Resolutions Under Swiss Bank Program,” 19 Nov. 2015, <https://www.justice.gov/opa/pr/justice-department-announces-three-banks-reach-resolutions-under-swiss-bank-program-0>

²²⁴ *Ibid.*

Criminal enforcement action (Nov. 19, 2015): The subsidiary entered a four-year NPA²²⁵ with the DOJ and agreed to pay a penalty of more than \$59 million.

The NPA was entered into as part of the DOJ's Swiss Bank Program, which applies lenience to financial institutions that come forward with adequate disclosures regarding accounts held by U.S. taxpayers seeking to avoid U.S. tax liabilities and to close those accounts that fail to meet U.S. tax obligations, and to meet other conditions.²²⁶

Second offense, resulting in plea agreement: Antitrust violations between 2011 and 2013.²²⁷

BNP Paribas USA, the U.S. subsidiary of BNP Paribas, violated the Sherman Antitrust Act by conspiring to suppress and eliminate competition through a scheme to fix prices in Central and Eastern European, Middle Eastern and African currencies.²²⁸ The conspiracy was undertaken through the bank's electronic trading activity in the foreign currency exchange market.

Criminal enforcement action (Jan. 26, 2018): BNP Paribas USA pleaded guilty to a one-count information and agreed to pay a criminal fine of \$90 million.²²⁹ The DOJ agreed not to require BNP to serve probation.

²²⁵ U.S. Department of Justice, Non-prosecution Agreement with BNP Paribas, 10 Nov. 2015

<https://www.justice.gov/opa/file/794551/download>

²²⁶ U.S. Department of Justice, Press Release: "Justice Department Announces Deutsche Bank (Suisse) SA Reaches Resolution under Swiss Bank Program," 24 November 2015,

<https://www.justice.gov/opa/pr/justice-department-announces-deutsche-bank-suisse-sa-reaches-resolution-under-swiss-bank>

²²⁷ U.S. Department of Justice, Press Release: "BNP Paribas USA Inc. Pleads Guilty to Antitrust Conspiracy," 26 Jan. 2018, <https://www.justice.gov/opa/pr/bnp-paribas-usa-inc-pleads-guilty-antitrust-conspiracy>

²²⁸ *Ibid.*

²²⁹ *Ibid.*

Corporate wrongdoer: Crédit Lyonnais and Crédit Agricole (the latter of which was acquired by the former in 2003²³⁰), a multinational French bank.



Offense resulting in NPA: According to the NPA between Crédit Lyonnais and the U.S. Attorney's Office for the Central District of California, the U.S. investigated and allegedly possessed "substantial evidence" of deliberate wrongdoing by bank employees between 1987 and 1994.²³¹

The agreement says the wrongdoing by a Crédit Lyonnais officer involved the owners of a movie studio, MGM, the 1990 acquisition of which Crédit Lyonnais financed, and which "may have violated United States laws."



The MGM owners, Giancarlo Parretti and Florio Fiorini, faced a long list of charges, including international money laundering and tax evasion for Parretti and securities fraud and conspiracy.²³²

Criminal enforcement action (June 7, 1999): Crédit Lyonnais entered an 18-month NPA²³³ with the U.S. Attorney's Office for the Central District of California. Part of the reason the French bank was granted lenience was its efforts to bail out MGM, for which it spent about \$2 billion.

Second offense, resulting in plea agreement: Fraud between 1991 and 1998.²³⁴

Crédit Lyonnais illegally obtained insurance assets that had belonged to Executive Life, a life insurance company that had been declared insolvent and which the state of California bailed

²³⁰ Braud, Maurice, "Crédit Agricole takeover of Crédit Lyonnais approved," European Foundation for the Improvement of Living and Working Conditions, 9 April 2003, <https://www.eurofound.europa.eu/publications/article/2003/credit-agricole-takeover-of-credit-lyonnais-approved>

²³¹ U.S. Attorney's Office for the Central District of California, Non-prosecution Agreement with Credit Lyonnais, 6 May 2003, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/creditlyonnais.pdf>

²³² Pollack, Andrew, "Bank Has Paid \$4 Million To Settle Case Over MGM," The New York Times, 13 Oct. 1999, <https://www.nytimes.com/1999/10/13/business/bank-has-paid-4-million-to-settle-case-over-mgm.html>

²³³ U.S. Attorney's Office for the Central District of California, Non-prosecution Agreement with Credit Lyonnais, 6 May 2003, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/creditlyonnais.pdf>

²³⁴ U.S. Federal Bureau of Investigation, Press Release: "Credit Lyonnais and Others to Plead Guilty and Pay \$771 Million in Executive Life Affair," 18 Dec. 2003, <https://archives.fbi.gov/archives/news/pressrel/press-releases/credit-lyonnais-and-others-to-plead-guilty>

out in 1991.²³⁵ To conceal its illegal financial relationship with the insurance assets, the French bank made false statements, including to the U.S. Federal Reserve, the California Insurance Commissioner and the court overseeing the Executive Life affair.

Criminal enforcement action (Dec. 18, 2003): Crédit Lyonnais, now a Credit Agricole subsidiary, pleaded guilty to three felony counts of making false statements to the Federal Reserve and agreed to pay a \$100 million criminal fine.²³⁶

Third offense, resulting in two DPAs: Sanctions violations between 2003 and 2008.

Crédit Agricole Corporate and Investment Bank, a Crédit Agricole subsidiary, employed deceptive practices to move about \$312 million through the U.S. financial system on behalf of sanctioned entities, primarily Sudan and including Burma, Iran and Cuba.²³⁷

Criminal enforcement action (Oct. 20, 2015): The Crédit Agricole subsidiary entered into a three-year DPA with the DOJ²³⁸ as well as a separate DPA with the New York County District Attorney's Office, and agreed to forfeit \$312 million. The subsidiary was required to take on an independent compliance monitor for one year

Fourth offense, resulting in NPA: Alleged tax violations between 2001 and 2009.

The Switzerland-based subsidiary of Crédit Agricole, Crédit Agricole (Suisse), opened accounts and held funds on behalf of U.S. citizens and US-based corporate entities whom the bank knew or should have known were using the Swiss accounts to avoid U.S. tax obligations. In 2001, the subsidiary made an information-sharing agreement with the IRS, but withheld information based on its interpretation of limits placed on the agreement.²³⁹

²³⁵ Lieber, Ron, "What Happens When Your Insurer Goes Under?" The New York Times, 14 Nov. 2008, <https://www.nytimes.com/2008/11/15/business/yourmoney/15money.html>

²³⁶ U.S. Federal Bureau of Investigation, Press Release: "Credit Lyonnais and Others to Plead Guilty and Pay \$771 Million in Executive Life Affair," 18 Dec. 2003, <https://archives.fbi.gov/archives/news/pressrel/press-releases/credit-lyonnais-and-others-to-plead-guilty>

²³⁷ U.S. Department of Justice, Press Release: "Crédit Agricole Corporate and Investment Bank Admits to Sanctions Violations, Agrees to Forfeit \$312 Million," 20 Oct. 2015, <https://www.justice.gov/opa/pr/cr-dit-agricole-corporate-and-investment-bank-admits-sanctions-violations-agrees-forfeit-312>

²³⁸ U.S. District Court for the District of Columbia, Deferred Prosecution Agreement with Credit Agricole Corporate & Investment Bank, 20 Oct. 2015, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/Credit-Agricole.pdf>

²³⁹ U.S. Department of Justice, Press Release: "Justice Department Announces Three Banks Reach Resolutions Under Swiss Bank Program," 15 Dec. 2003, <https://www.justice.gov/opa/pr/justice-department-announces-three-banks-reach-resolutions-under-swiss-bank-program-1>

Since August 2008, the Crédit Agricole subsidiary held 954 US-related accounts (including both declared and undeclared) worth, in aggregate, more than \$1.8 billion.²⁴⁰

Criminal enforcement action (Dec. 15, 2015): As part of the Obama DOJ's Swiss Bank Program,²⁴¹ Crédit Agricole (Suisse) entered a four-year NPA²⁴² with the DOJ and agreed to pay a penalty of \$99.211 million. In exchange for avoiding prosecution, the subsidiary agreed to provide detailed disclosures and close all accounts related to U.S. tax avoidance activities.

Corporate wrongdoer: Credit Suisse, a Swiss multinational bank and financial corporation based in Zurich.



Offense resulting in two DPAs: Sanctions violations between as early as 1995 through 2006.

Credit Suisse, operating in Switzerland and in the United Kingdom, was charged with violating the International Emergency Economic Powers Act (IEEPA) by deliberately modifying financial transactions with U.S. sanctioned countries and individuals in order to conceal the financial activity from U.S. authorities. The sanctioned nations involved in the transactions included Iran, Sudan, Burma, Cuba and Libya.²⁴³

²⁴⁰ *Ibid.*

²⁴¹ U.S. Department of Justice "Swiss Bank Program," 5 Sept. 2018, <https://www.justice.gov/tax/swiss-bank-program>

²⁴² U.S. Department of Justice, Non-prosecution Agreement with Credit Agricole (Suisse) SA, 8 Dec. 2015, <https://www.justice.gov/opa/file/799456/download>

²⁴³ U.S. Department of Justice, Press Release: "Credit Suisse Agrees to Forfeit \$536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law," 16 Dec. 2009, <https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency>

Criminal enforcement action (Dec. 16, 2009): Credit Suisse entered a two-year DPA²⁴⁴

with the DOJ and agreed to forfeit \$536 million – at the time the largest forfeiture ever for IEEPA violations – to the U.S. and the Manhattan District Attorney’s Office.²⁴⁵ Credit Suisse also entered a separate DPA with the Manhattan District Attorney’s Office.²⁴⁶

Second offense, resulting in plea agreement: Tax violations “for decades” through 2009.

Credit Suisse helped U.S. citizens evade taxes, including by helping its U.S. clients set up “sham entities” to hide accounts, maintaining the hidden accounts by evading transaction reporting requirements, and facilitating the use of the hidden accounts via offshore credit and debit cards.

Criminal enforcement action (May 19, 2014): Credit Suisse pleaded guilty to one count of helping U.S. taxpayers file fraudulent income tax returns and other documents with the IRS and was required to pay a criminal fine of more than \$1.1 billion.²⁴⁷ With civil penalties and disgorgement, Credit Suisse was required to pay a total of \$2.6 billion.²⁴⁸

Third offense, resulting in NPA: Alleged FCPA violations between 2007 and 2013.

Bankers at Credit Suisse (Hong Kong) Limited, Credit Suisse’s Hong Kong subsidiary, allegedly engaged in a corrupt scheme of hiring friends and family of Chinese government officials in exchange for business opportunities that netted the subsidiary at least \$46 million.²⁴⁹

²⁴⁴ U.S. Department of Justice, Deferred Prosecution Agreement with Credit Suisse AG, 16 Dec. 2009, <https://www.justice.gov/opa/press-release/file/978871/download>

²⁴⁵ U.S. Department of Justice, Press Release: “Credit Suisse Agrees to Forfeit \$536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law,” 16 Dec. 2009, <https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency>

²⁴⁶ Manhattan District Attorney’s Office, Press Release: “District Attorney Morgenthau Announces Deferred Prosecution Agreement with Credit Suisse,” 16 Dec. 2009, <https://www.manhattanda.org/district-attorney-morgenthau-announces-deferred-prosecution-agreement-credit-suisse/>

²⁴⁷ U.S. Department of Justice, Plea Agreement with Credit Suisse AG, (pg. 5), 19 May 2014, <https://www.justice.gov/iso/opa/resources/6862014519191516948022.pdf>

²⁴⁸ U.S. Department of Justice, Press Release: “Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns,” 19 May 2014, <https://www.justice.gov/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns>

²⁴⁹ U.S. Department of Justice, Press Release: “Credit Suisse’s Investment Bank in Hong Kong Agrees to Pay \$47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA,” 5 July 2018, <https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt>

Criminal enforcement action (July 5, 2018): The Credit Suisse subsidiary entered a three-year NPA²⁵⁰ and was required to pay a \$47 million criminal penalty.²⁵¹

Corporate wrongdoer: Deutsche Bank, a German multinational financial corporation based in Frankfurt.

Offense resulting in NPA: Tax shelter fraud between 1996 and 2002.²⁵²



Deutsche Bank participated in tax shelter schemes for financial institutions that created the appearance of losses and other sham investment activity. The transactions included at least 1,300 deals involving more than 2,100 clients and 2,300 transactions that were used fraudulently to claim an estimated \$29.3 billion in tax benefits.²⁵³ Deutsche Bank admitted to its criminal wrongdoing.

Criminal enforcement action (Dec. 21, 2010): Deutsche Bank entered into an NPA with the U.S. Attorney for the Southern District of New York with a term of one to two years, depending on the DOJ-appointed monitor's assessment of compliance measures the bank was required to implement..

Deutsche Bank admitted to facilitating financial transactions for fraudulent tax shelters and agreed to pay \$553,633,153 – a sum representing the fees the bank collected for the tax shelter activity plus taxes and interest the IRS was thwarted from collecting plus a civil penalty exceeding \$149 million. The NPA also forbids Deutsche Bank from offering tax products similar to those involved in the criminal scheme.²⁵⁴

²⁵⁰ U.S. Department of Justice, Non-prosecution Agreement with Credit Suisse (Hong Kong) Limited, (page 3), 24 May 2018, <https://www.justice.gov/opa/press-release/file/1077881/download>

²⁵¹ U.S. Department of Justice, Press Release: "Credit Suisse's Investment Bank in Hong Kong Agrees to Pay \$47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA," 5 July 2018, <https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt>

²⁵² U.S. Department of Justice, Non-Prosecution Agreement with Deutsche Bank AG, 21 December 2010, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/deutschebank.pdf>

²⁵³ *Ibid.*

²⁵⁴ U.S. District Court, Southern District of New York, Press Release: "Deutsche Bank to Pay More Than \$550 Million to Resolve Federal Tax Shelter Fraud Investigation," 21 December 2010, <https://www.justice.gov/sites/default/files/tax/legacy/2011/01/03/deutschebankpr.pdf>

Second offense, resulting in a plea agreement and a DPA: Wire fraud, antitrust and price-fixing violations between 2003 and 2011.²⁵⁵

According to DOJ charging documents, Deutsche Bank's derivatives traders secretly manipulated the values of currencies, including the U.S. Dollar, Yen, Swiss Franc and Pound Sterling, on the London InterBank Offered Rate (LIBOR) and Euro Interbank Offered Rate (EURIBOR), resulting in fraudulent transactions.²⁵⁶

Criminal enforcement action (April 23, 2015): Deutsche Bank subsidiary DB Group Services (UK) Limited pleaded guilty²⁵⁷ to wire fraud and the parent company, Deutsche Bank AG, entered into a three-year DPA²⁵⁸ with the DOJ.

During the term of the agreement, the bank was required to retain a corporate monitor. The bank and its subsidiary agreed to pay \$775 million in criminal penalties. Additional regulatory penalties and disgorgement brought the total Deutsche Bank must pay to more than \$2.5 billion.²⁵⁹

Third offense, resulting in NPA: Facilitating tax avoidance between at least August 2008 and August 2013.²⁶⁰

Deutsche Bank Suisse, a Swiss subsidiary, maintained at U.S.-related accounts – a total of 1,072 with a collective value of \$7.65 billion – that helped U.S. taxpayers evade U.S. tax

²⁵⁵ U.S. Department of Justice, Press Release: "Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR," 23 April 2015, <https://www.justice.gov/opa/pr/deutsche-banks-london-subsubsidiary-agrees-plead-guilty-connection-long-running-manipulation>

²⁵⁶ *Ibid.*

²⁵⁷ U.S. Department of Justice, Plea Agreement with DB Group Services (UK) Limited, 23 April 2015. https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/dbgs_plea_agreement.pdf

²⁵⁸ U.S. Department of Justice, Deferred Prosecution Agreement with Deutsche Bank AG, 23 April 2015. https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf

²⁵⁹ U.S. Department of Justice, Press Release: "Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR," 23 April 2015, <https://www.justice.gov/opa/pr/deutsche-banks-london-subsubsidiary-agrees-plead-guilty-connection-long-running-manipulation>

²⁶⁰ U.S. Department of Justice, Press Release: "Justice Department Announces Deutsche Bank (Suisse) SA Reaches Resolution under Swiss Bank Program," 24 November 2015., <https://www.justice.gov/opa/pr/justice-department-announces-deutsche-bank-suisse-sa-reaches-resolution-under-swiss-bank>

liabilities and helped these U.S. taxpayers access and spend their undeclared funds. The accounts were held in offshore tax shelter countries including Liechtenstein, Liberia, Panama and the British Virgin Islands.²⁶¹

Criminal enforcement action (Nov. 24, 2015): The subsidiary entered a four-year NPA²⁶² with the DOJ and paid a penalty of more than \$31 million.

The NPA was entered into as part of DOJ's Swiss Bank Program, which applies a degree of lenience to financial institutions that come forward with adequate disclosures regarding accounts held by U.S. taxpayers seeking to avoid U.S. tax liabilities and to close those accounts that fail to meet U.S. tax obligations, and to meet other conditions.²⁶³

Corporate wrongdoer: HSBC Holdings plc (HSBC), a London-based multinational bank.



Offense resulting in DPA: Anti-money laundering and sanctions violations from the mid-1990s through 2006.

Sanctions violations: Starting in the 1990s, HSBC allowed about \$660 million in transactions prohibited by U.S. sanctions against nations including Iran, Cuba, Sudan, Libya and Burma. Through various means, the transactions were concealed from HSBC Bank USA, the corporation's U.S. subsidiary, as well as other U.S. financial institutions. Despite repeated protests by the bank's compliance officer starting in 2001, HSBC continued to allow the concealed transactions.²⁶⁴

Anti-money laundering violations: Between 2006 and 2010, HSBC Bank USA, HSBC's U.S. subsidiary, understaffed its anti-money laundering compliance efforts and did not implement

²⁶¹ U.S. Department of Justice, Non-Prosecution Agreement with Deutsche Bank Suisse, 24 November 2015, <https://www.justice.gov/opa/file/795876/download>

²⁶² *Ibid.*

²⁶³ U.S. Department of Justice, Press Release: "Justice Department Announces Deutsche Bank (Suisse) SA Reaches Resolution under Swiss Bank Program," 24 November 2015, <https://www.justice.gov/opa/pr/justice-department-announces-deutsche-bank-suisse-sa-reaches-resolution-under-swiss-bank>

²⁶⁴ U.S. Department of Justice, Press Release: "HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement," 11 Dec. 2012, <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>

a compliance program capable of preventing money laundering through HSBC Mexico. HSBC Mexico's own, separate weak anti-money laundering efforts had made the bank the preferred institution for drug cartels and money launderers.²⁶⁵ Ultimately, HSBC's U.S. subsidiary failed to adequately monitor over \$200 trillion in wire transfers, including \$670 billion in wire transfers and more than \$9.4 billion in purchases of U.S. cash from HSBC Mexico.²⁶⁶

HSBC's widespread and severe violations are documented in the criminal information the DOJ filed with HSBC's DPA. HSBC Holdings, the HSBC parent company, admitted that it violated the Trading With the Enemy Act and the International Emergency Economic Powers Act and the bank's U.S. subsidiary admitted to violating the Bank Secrecy Act.²⁶⁷

Criminal enforcement action (Dec. 11, 2012): The DOJ filed a four-count felony information²⁶⁸ against HSBC, which accepted a five-year DPA.²⁶⁹ HSBC accepted responsibility for the actions documented in the criminal information. In accepting the DPA, HSBC agreed to forfeit \$1.256 billion and pay additional civil penalties.²⁷⁰ HSBC agreed to take on an independent corporate compliance monitor²⁷¹ for the duration of the agreement.

On Dec. 11, 2017, the term of the five-year DPA ended, and the DOJ dismissed its charges against HSBC.²⁷²

²⁶⁵ *Ibid.*

²⁶⁶ U.S. Department of Justice, Attachment A (Statement of Facts) accompanying Deferred Prosecution Agreement with HSBC, 11 Dec. 2012, <https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-a.pdf>

²⁶⁷ *Ibid.*

²⁶⁸ U.S. Department of Justice, Deferred Prosecution Agreement with HSBC, 11 Dec. 2012, <https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf>

²⁶⁹ U.S. Department of Justice, Attachment A (Statement of Facts) accompanying Deferred Prosecution Agreement with HSBC, 11 Dec. 2012, <https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-a.pdf>

²⁷⁰ U.S. Department of Justice, Press Release: "HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement," 11 Dec. 2012, <https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations>

²⁷¹ U.S. Department of Justice, Attachment B (Corporate Compliance Monitor) accompanying Deferred Prosecution Agreement with HSBC, 11 Dec. 2012, <https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-b.pdf>

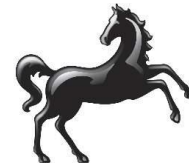
²⁷² HSBC, Press Release: "HSBC Holdings plc Expiration of 2012 Deferred Prosecution Agreement," 11 Dec. 2017, <https://www.hsbc.com/news-and-insight/media-resources/media-releases/2017/hsbc-holdings-plc-expiration-of-2012-deferred-prosecution-agreement>

Second offense, resulting in DPA: Fraud in 2010 and 2011.

Traders on HSBC's foreign exchange desk abused confidential information provided for HSBC to implement a multi-billion dollar transaction involving the British Pound Sterling. The traders manipulated the price of the currency in a way that benefited HSBC and harmed its clients, and misled the client in the 2001 transaction, Cairn Energy, to conceal the trader's manipulations. HSBC made \$46.4 million in ill-gotten-gains from the traders' fraudulent market manipulations.²⁷³ HSBC admitted its responsibility for the wrongdoing.

Criminal enforcement action (Jan. 18, 2018): Five weeks after the DOJ filed to dismiss HSBC's previous DPA, the DOJ entered a three-year DPA with HSBC²⁷⁴ with DOJ over the fraudulent market activity and was required to pay a \$63.1 million criminal penalty and \$38.4 million in disgorgement and restitution.²⁷⁵

Corporate wrongdoer: Lloyds Banking Group, a London-based bank whose principle subsidiary was previously known as Lloyds TSB Bank until it changed its name to Lloyds Bank in 2013.²⁷⁶



LLOYDS BANK

Offense resulting in two DPAs: Sanctions violations between 1995 and 2007.

The DOJ charged Lloyds TSB Bank with violating the International Emergency Economic Powers Act. According to the DOJ, the bank falsified U.S. wire transfers, concealing identities

²⁷³ U.S. Department of Justice, Press Release: "HSBC Holdings Plc Agrees to Pay More Than \$100 Million to Resolve Fraud Charges," 18 Jan. 2018, <https://www.justice.gov/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges>

²⁷⁴ U.S. Department of Justice, Deferred Prosecution Agreement with HSBC, 18 Jan. 2018, <https://www.justice.gov/opa/press-release/file/1027316/download>

²⁷⁵ U.S. Department of Justice, Press Release: "HSBC Holdings Plc Agrees to Pay More Than \$100 Million to Resolve Fraud Charges," 18 Jan. 2018, <https://www.justice.gov/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges>

²⁷⁶ Lloyds Banking Group, "Press Release: Change of Name - Lloyds TSB Bank PLC to Lloyds Bank PLC," 23 Sept. 2013, https://www.lloydsbankinggroup.com/globalassets/documents/investors/2013/2013sept23_lbg_lloyds_bank_name_change.pdf

involving sanctioned entities, including Iran and Sudan, and allowing \$350 million in transactions that should have been blocked.²⁷⁷

Criminal enforcement action (Jan. 9, 2009): Lloyds entered a two-year DPA²⁷⁸ with the DOJ and agreed to pay \$350 million, to be split evenly between the federal government and the state of New York.²⁷⁹ Lloyds also entered a separate DPA with the Manhattan District Attorney's Office.²⁸⁰

Second offense, resulting in DPA: Wire fraud between 2006 and 2009.

According to the DOJ, Lloyds Banking Group traders submitted fraudulent LIBOR (London InterBank Offered Rate) rates to manipulate currency trades, affecting a number of currencies including the U.S. dollar, British pound sterling, and Japanese yen, to benefit Lloyds traders' positions.²⁸¹

Criminal enforcement action (July 28, 2014): Lloyds Banking Group entered into a two-year DPA with the DOJ and agreed to pay a criminal penalty of \$86 million.²⁸²

Corporate wrongdoer: Royal Bank of Scotland (RBS), a multinational financial corporation headquartered in Edinburgh, U.K.

²⁷⁷ U.S. Department of Justice, Press Release: "Lloyds TSB Bank Plc Agrees to Forfeit \$350 Million in Connection with Violations of the International Emergency Economic Powers Act," 9 Jan. 2009, <https://www.justice.gov/opa/pr/lloyds-tsb-bank-plc-agrees-forfeit-350-million-connection-violations-international-emergency>

²⁷⁸ U.S. Department of Justice, Deferred Prosecution Agreement with Lloyds TSB Bank PLC, 9 Jan. 2009, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/lloyds.pdf>

²⁷⁹ *Ibid.* (Page 2)

²⁸⁰ Manhattan District Attorney's Office, Press Release: "District Attorney Morgenthau Announces Deferred Prosecution Agreement with British Bank Related to Violations of Federal Financial Sanctions," 9 Jan. 2009, <https://www.manhattanda.org/district-attorney-morgenthau-announces-deferred-prosecution-agreement-british-bank-rel/>

²⁸¹ U.S. Department of Justice, Press Release: "Lloyds Banking Group Admits Wrongdoing in LIBOR Investigation, Agrees to Pay \$86 Million Criminal Penalty," 28 July 2014, <https://www.justice.gov/opa/pr/lloyds-banking-group-admits-wrongdoing-libor-investigation-agrees-pay-86-million-criminal>

²⁸² U.S. Department of Justice, Deferred Prosecution Agreement with Lloyds Banking Group PLC, 28 July 2014, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/lloyds-banking.pdf>

Offense resulting in DPA and plea agreement: Wire fraud between 2006 through 2010 and antitrust violations.²⁸³

RBS Securities Japan Limited, an RBS subsidiary, engaged in a LIBOR manipulation conspiracy to provide false and misleading interest rates for Japanese Yen and Swiss Francs.



Criminal enforcement action (Feb. 6, 2013): RBS' Japanese subsidiary pleaded guilty to a one-count criminal information charging the corporation with wire fraud, and was required to pay a \$50 million fine.²⁸⁴

Separately, the parent company RBS entered a two-year DPA with the DOJ and agreed to pay \$100 million on top of the Japanese subsidiary's penalties.²⁸⁵

Second offense, resulting in a plea agreement: Antitrust violations between 2007 and 2010.

RBS conspired with Barclays, Citicorp, JPMorgan Chase, and UBS AG to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange market.²⁸⁶

The conspirator banks described themselves as "The Cartel" and used a private online chat room and coded language to manipulate benchmark exchange rates. This market manipulation protected members of the so-called Cartel while suppressing competition.

Criminal enforcement action (May 20, 2015): RBS pleaded guilty to one count of violating the Sherman Antitrust Act and agreed to pay a criminal fine of \$395 million.²⁸⁷

²⁸³ U.S. Department of Justice, Press Release: "RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates," 6 Feb. 2013, <https://www.justice.gov/opa/pr/rbs-securities-japan-limited-agrees-plead-guilty-connection-long-running-manipulation-libor>

²⁸⁴ U.S. District Court for the District of Connecticut, Plea Agreement with RBS Securities Japan Limited, 6 Feb. 2013, <https://www.justice.gov/iso/opa/resources/217201326133540747939.pdf>

²⁸⁵ U.S. District Court for the District of Connecticut, Deferred Prosecution Agreement with The Royal Bank of Scotland PLC, 6 Feb. 2013, <https://www.justice.gov/iso/opa/resources/28201326133127414481.pdf>

²⁸⁶ U.S. Department of Justice, Press Release: "Five Major Banks Agree to Parent-Level Guilty Pleas," 20 May 2015, <https://www.justice.gov/sites/default/files/atr/legacy/2015/05/20/314165.pdf>

²⁸⁷ U.S. District Court for the District of Connecticut, Plea Agreement with The Royal Bank of Scotland PLC, 20 May 2015, <https://www.justice.gov/file/440496/download>

Third offense, resulting in NPA: Alleged fraud between 2008 and 2013.²⁸⁸

According to the DOJ, RBS Securities Inc., an RBS subsidiary, engaged in fraudulent and deceptive trading practices in the sale of mortgage-backed securities and collateralized loan obligations. RBS allegedly concealed the deceptive from some employees while acting with the knowledge and assistance of supervisors and compliance staff.²⁸⁹

Criminal enforcement action (Oct. 26, 2017): The DOJ entered a one-year NPA with the RBS subsidiary and imposed a \$35 million penalty.²⁹⁰

Corporate wrongdoer: Société Générale, a French multinational finance corporation based in Paris.



Offense resulting in NPA: Facilitating tax avoidance between at least August 2008 and August 2013.

Société Générale Private Banking (Lugano-Svizzera) SA, a Switzerland-based subsidiary of Société Générale, opened accounts and held funds on behalf of U.S. citizens and assisted its account holders in creating sham entities intended to conceal their beneficiaries from the U.S. government.²⁹¹ In 2001, the subsidiary made an information-sharing agreement with the IRS, but withheld information based on its interpretation of limits placed on the agreement.²⁹²

Since August 2008, the subsidiary held 109 US-related accounts worth, in aggregate, about \$139.6 million.²⁹³

²⁸⁸ U.S. Attorney's Office, District of Connecticut, Press Release: "RBS Securities Inc. Agrees to Pay \$35 Million Penalty Related to Securities Fraud Scheme," 26 Oct. 2017, <https://www.justice.gov/usao-ct/pr/rbs-securities-inc-agrees-pay-35-million-penalty-related-securities-fraud-scheme>

²⁸⁹ *Ibid.*

²⁹⁰ U.S. District Court for the District of Connecticut, Non-prosecution Agreement with RBS Securities Inc., 25 Oct. 2017, <https://www.justice.gov/file/1006796/download>

²⁹¹ U.S. Department of Justice, Press Release: "Four Banks Reach Resolutions Under Department of Justice Swiss Bank Program," 28 May 2015, <https://www.justice.gov/opa/pr/four-banks-reach-resolutions-under-department-justice-swiss-bank-program>

²⁹² U.S. Department of Justice, Non-prosecution Agreement with Societe Generale Private Banking (Suisse) SA, 2 June 2015, <https://www.justice.gov/opa/file/476986/download>

²⁹³ U.S. Department of Justice, Press Release: "Four Banks Reach Resolutions Under Department of Justice Swiss Bank Program," 28 May 2015, <https://www.justice.gov/opa/pr/four-banks-reach-resolutions-under-department-justice-swiss-bank-program>

Criminal enforcement action (May 28, 2015): As part of the Obama DOJ's Swiss Bank Program,²⁹⁴ the Société Générale subsidiary entered a four-year NPA²⁹⁵ with the DOJ and agreed to pay a penalty of \$1.363 million. In exchange for avoiding prosecution, the subsidiary agreed to provide detailed disclosures and close all accounts related to U.S. tax avoidance activities.²⁹⁶

Second offense, resulting in NPA: Facilitating tax avoidance between at least August 2008 and August 2013.

Société Générale Private Banking (Suisse) SA, another Switzerland-based subsidiary of Société Générale, opened accounts and held funds on behalf of U.S. citizens and assisted its account holders in creating sham entities based in Panama, the British Virgin Islands and Liechtenstein intended to conceal their beneficiaries from the U.S. government.²⁹⁷ In 2001, the subsidiary made an information-sharing agreement with the IRS, but withheld information based on its interpretation of limits placed on the agreement.²⁹⁸

Since August 2008, the subsidiary held 375 US-related accounts worth, in aggregate, about \$660 million.²⁹⁹

Criminal enforcement action (June 9, 2015): As part of the Obama DOJ's Swiss Bank Program,³⁰⁰ the Société Générale subsidiary entered a four-year NPA³⁰¹ with the DOJ and agreed to pay a penalty of more than \$17 million. In exchange for avoiding prosecution, the subsidiary agreed

²⁹⁴ U.S. Department of Justice "Swiss Bank Program," 5 Sept. 2018, <https://www.justice.gov/tax/swiss-bank-program>

²⁹⁵ U.S. Department of Justice, Non-prosecution Agreement with Societe Generale Private Banking (Lugano-Svizzera) SA, 18 May 2015, <https://www.justice.gov/opa/file/450621/download>

²⁹⁶ U.S. Department of Justice, Press Release: "Four Banks Reach Resolutions Under Department of Justice Swiss Bank Program," 28 May 2015, <https://www.justice.gov/opa/pr/four-banks-reach-resolutions-under-department-justice-swiss-bank-program>

²⁹⁷ U.S. Department of Justice, Press Release: "Two More Banks Reach Resolutions under Justice Department's Swiss Bank Program," 9 June 2015, <https://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program-0>

²⁹⁸ U.S. Department of Justice, Non-prosecution Agreement with Societe Generale Private Banking (Suisse) SA, 2 June 2015, <https://www.justice.gov/opa/file/476986/download>

²⁹⁹ U.S. Department of Justice, Press Release: "Two More Banks Reach Resolutions under Justice Department's Swiss Bank Program," 9 June 2015, <https://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program-0>

³⁰⁰ U.S. Department of Justice "Swiss Bank Program," 5 Sept. 2018, <https://www.justice.gov/tax/swiss-bank-program>

³⁰¹ U.S. Department of Justice, Non-prosecution Agreement with Societe Generale Private Banking (Suisse) SA, 2 June 2015, <https://www.justice.gov/opa/file/476986/download>

to provide detailed disclosures and close all accounts related to U.S. tax avoidance activities.³⁰²

Third offenses, resulting in DPA and plea agreement: FCPA violations between 2004 and 2009 and fraud in 2006 and between 2010 and 2011.

According to the DOJ, the FCPA violations involved Société Générale paying bribes to Gaddafi-era officials in Libya through a corrupt scheme in which the corporation paid \$90 million, some of which was directed toward government officials. In exchange, the bank received investments and ultimately profited by about \$523 million from the corrupt scheme.³⁰³ SGA Société Générale Acceptance N.V., a Société Générale subsidiary based in Curaçao, also was involved in the scheme.

The fraud charges stem from two schemes. The first, initiated by Société Générale senior executives, involved manipulating currency values with fraudulent U.S. dollar submissions on the London InterBank Offered Rate (LIBOR). The second involves Société Générale employees in London and Tokyo conspiring to manipulate the bank's Japan Yen LIBOR submissions.

Criminal enforcement action (June 4, 2018): In a joint enforcement action carried out by the DOJ and French authorities, Société Générale entered a three-year DPA³⁰⁴ with the DOJ and SGA Société Générale Acceptance N.V. pleaded guilty³⁰⁵ to a one-count criminal information charging the corporation with violating the FCPA. The bank agreed to pay a criminal penalty of \$585 million in the FCPA case and a fine of \$275 million to resolve the LIBOR case. The bank agreed to strengthen its compliance program.

Fourth offense, resulting in DPA: Sanctions violations from 2004 through 2010.

³⁰² U.S. Department of Justice, Press Release: "Two More Banks Reach Resolutions under Justice Department's Swiss Bank Program," 9 June 2015, <https://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program-0>

³⁰³ U.S. Department of Justice, Press Release: "Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate," 4 June 2018, <https://www.justice.gov/opa/pr/soci-t-g-n-r-ale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan>

³⁰⁴ U.S. Department of Justice, Deferred Prosecution Agreement with Société Générale S.A., 20 May 2018, <https://www.justice.gov/opa/press-release/file/1068521/download>

³⁰⁵ U.S. Department of Justice, Plea Agreement with SGA Société Générale Acceptance N.V., 5 June 2018, <https://www.justice.gov/opa/press-release/file/1068526/download>

According to the DOJ, Société Générale operated 21 credit facilities that engaged in more than 2,500 transactions in violation of U.S. sanctions against Cuba and Cuban businesses. The bank's actions resulted in the processing of nearly \$13 billion in transactions should have been blocked. Most of the transactions involved a Dutch commodities trading firm and Cuba's state-run oil refining corporation.³⁰⁶ The bank's senior management and compliance department were aware of the non-compliant transactions as early as 2004, yet allowed them to continue for nearly six years.

Criminal enforcement action (Nov. 19, 2018): Société Générale entered a three-year DPA³⁰⁷ with the DOJ and agreed to forfeit more than \$717 million plus civil penalties that brought the bank's total penalties up to \$1.3 billion, at the time the largest penalty ever imposed by the U.S. for sanctions violations.³⁰⁸

³⁰⁶ U.S. Attorney's Office for the Southern District of New York, Press Release: "Manhattan U.S. Attorney Announces Criminal Charges Against Société Générale S.A. For Violations Of The Trading With The Enemy Act," 19 Nov. 2018, <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-soci-t-g-n-rale-sa-violations>

³⁰⁷ U.S. Department of Justice, Deferred Prosecution Agreement with Société Générale S.A., 19 Nov. 2018, <https://www.justice.gov/usao-sdny/press-release/file/1112461/download>

³⁰⁸ U.S. Attorney's Office for the Southern District of New York, Press Release: "Manhattan U.S. Attorney Announces Criminal Charges Against Société Générale S.A. For Violations Of The Trading With The Enemy Act," 19 Nov. 2018, <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-soci-t-g-n-rale-sa-violations>

Corporate wrongdoer: Standard Chartered, a London-based multinational financial corporation, and American Express Bank, a subsidiary of New York City-based American Express that Standard Chartered acquired in 2008.³⁰⁹



Offense resulting two DPAs: Sanctions violations between 2001 and 2007.³¹⁰

According to the DOJ, Standard Chartered processed over \$200 million in transactions on behalf of sanctioned entities in Iran, Sudan, Libya and Burma. The criminal acts were carried out primarily by the bank's London and Dubai branches. The transactions were able to be processed through Standard Chartered's U.S. branch because of measures the bank took to conceal the identities of the entities on whose behalf it was acting.



Criminal enforcement action (Feb. 6, 2012): The DOJ entered a two-year DPA³¹¹ with Standard Chartered and agreed to forfeit \$227 million in lieu of a criminal penalty. The DOJ penalty also was credited against the Treasury's Office of Foreign Assets Control's \$132 million penalty.³¹²

³⁰⁹ Standard Chartered, Press Release: "Standard Chartered completes acquisition of American Express Bank for \$823 million," 4 March 2008, <https://www.sc.com/global/av/ae-news-media-080304.pdf>

³¹⁰ U.S. Department of Justice, Press Release: "Standard Chartered Bank Agrees to Forfeit \$227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma," 10 Dec. 2012, <https://www.justice.gov/opa/pr/standard-chartered-bank-agrees-forfeit-227-million-illegal-transactions-iran-sudan-libya-and>

³¹¹ U.S. District Court for the District of Columbia, Deferred Prosecution Agreement with Standard Chartered Bank, 10 Dec. 2012, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/Standard-Chartered.pdf>

³¹² U.S. Department of Justice, Press Release: "Standard Chartered Bank Agrees to Forfeit \$227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma," 10 Dec. 2012, <https://www.justice.gov/opa/pr/standard-chartered-bank-agrees-forfeit-227-million-illegal-transactions-iran-sudan-libya-and>

Separately, Standard Chartered also entered a DPA with the Manhattan District Attorney's Office.³¹³

In 2014, the DOJ extended Standard Chartered's DPA by three years and required the bank to appoint an independent monitor.³¹⁴ The bank's DPA was extended a total of five times and ultimately expired in April of 2019³¹⁵ as it entered an amended DPA³¹⁶ to resolve sanctions violations not covered by the 2012 DPA.

Offense resulting in DPA: Anti-money laundering violations between 1999 and 2004.³¹⁷

According to the DOJ, American Express Bank International (AEBI), an American Express subsidiary, willfully failed to establish an adequate anti-money laundering program.³¹⁸ According to the statement of facts the DOJ released with the charging documents, "The violations at AEBI were serious and systemic and allowed millions of dollars of financial transactions involving proceeds from the sale of illegal narcotics to be conducted."³¹⁹

Criminal enforcement action (Aug. 6, 2007): The American Express subsidiary entered a one-year DPA with the DOJ and agreed to forfeit \$55 million.³²⁰

³¹³ Manhattan District Attorney's Office, Press Release: "Standard Chartered Bank Reaches \$327 Million Settlement for Illegal Transactions," 10 Dec. 2012, <https://www.manhattanda.org/standard-chartered-bank-reaches-327-million-settlement-illegal-transactions/>

³¹⁴ Standard Chartered, Press Release: "Extension of the U.S. Deferred Prosecution Agreements," 27 July 2018, <https://www.sc.com/en/media/press-release/extension-of-the-u-s-deferred-prosecution-agreements/>

³¹⁵ Standard Chartered, Press Release: "Standard Chartered Resolves Legacy Conduct & Control Issues for \$1.1bn; Monitorships Terminated," 9 April 2019, <https://www.sc.com/en/media/press-release/standard-chartered-resolves-legacy-conduct-and-control-issues-for-1-1bn-monitorships-terminated/>

³¹⁶ U.S. Department of Justice, Press Release: "Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than \$1 Billion," 9 April 2019, <https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions>

³¹⁷ U.S. District Court for the Southern District of Florida, Deferred Prosecution Agreement with American Express Bank International, 6 Aug. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/americanexpress.pdf>

³¹⁸ *Ibid.*

³¹⁹ U.S. Department of Justice, Press Release: "American Express Bank International Enters Into Deferred Prosecution Agreement And Forfeits \$55 Million To Resolve Bank Secrecy Act Violations," 6 Aug. 2007, https://www.justice.gov/archive/opa/pr/2007/August/07_crm_584.html

³²⁰ *Ibid.*

Standard Chartered announced its intention to acquire American Express Bank about five weeks after the DOJ's enforcement action.³²¹ In 2008, American Express Bank International was renamed Standard Chartered Bank International (Americas) Limited.³²²

Third offense, resulting in NPA: Tax violations between 2008 and 2014.

Standard Chartered's acquisition of American Express Bank included the bank's Swiss subsidiary, which maintained at U.S.-related accounts – a total of 22 with a collective value of \$33.1 million – that helped U.S. taxpayers evade U.S. tax liabilities.³²³

Criminal enforcement action (Nov. 13, 2015): As part of the Obama DOJ's Swiss Bank Program,³²⁴ Standard Chartered (Switzerland) entered a four-year NPA³²⁵ with the DOJ and agreed to pay a penalty of \$6.337 million in exchange for avoiding prosecution.³²⁶

Fourth offense, resulting in an amended DPA: Sanctions violations between 2007 and 2011.

Employees of Standard Chartered's Dubai branch conspired with an Iranian national to process about 9,500 transactions worth about \$240 million through the U.S. financial system, in violation of U.S. sanctions against Iran.³²⁷ A Standard Chartered employee pleaded guilty in connection with the violation and charges were filed against the Iranian national.

³²¹ Clark, Andrew, "Standard Chartered buys American Express Bank," The Guardian, 18 Sept. 2007, <https://www.theguardian.com/business/2007/sep/18/9> ; Standard Chartered "Press Release: Standard Chartered completes acquisition of American Express Bank for \$823 million," 4 March 2008, <https://www.sc.com/global/av/ae-news-media-080304.pdf>

³²² Standard Chartered Bank International (Americas) Limited, RSSD ID: 169877, Federal Financial Institutions Examination Council, National Information Center, (accessed 6 June 2019), <https://www.ffiec.gov/npw/Institution/Profile/169877?dt=20171220>

³²³ U.S. Department of Justice, Non-prosecution Agreement with Standard Chartered Bank (Switzerland) SA, (p. 12,) 12 Nov. 2015, <https://www.justice.gov/opa/file/793151/download>

³²⁴ U.S. Department of Justice "Swiss Bank Program," 5 Sept. 2018, <https://www.justice.gov/tax/swiss-bank-program>

³²⁵ U.S. Department of Justice, Non-prosecution Agreement with Standard Chartered Bank (Switzerland) SA, 12 Nov. 2015, <https://www.justice.gov/opa/file/793151/download>

³²⁶ U.S. Department of Justice, Press Release: "Justice Department Announces Standard Chartered Bank (Switzerland) SA Reaches Resolution Under Swiss Bank Program," 13 Nov. 2015, <https://www.justice.gov/opa/pr/justice-department-announces-standard-chartered-bank-switzerland-sa-reaches-resolution-under>

³²⁷ U.S. Department of Justice, Press Release: "Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than \$1 Billion," 9 April 2019, <https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions>

Criminal enforcement action (April 9, 2019): Following the fifth extension of the DPA Standard Chartered entered with the DOJ in 2012, the DOJ allowed that DPA to expire and entered a new amended DPA³²⁸ with the corporation. The DOJ filed a two-count felony criminal information against the bank with the understanding that, as long as the bank meets the terms of the DPA, the charges against it will be waived after two years. Standard Chartered agreed to forfeit \$240 million, the value of the illegal transactions, and to pay a \$480 million fine.³²⁹

Corporate wrongdoer: UBS, a multinational financial corporation and Switzerland's largest bank.

Offense resulting in DPA: Tax fraud conspiracy from 2000 to 2007.³³⁰



The DOJ charged UBS with conspiring to defraud the U.S. government by impeding the IRS.

After purchasing brokerage firm Paine Webber in 2000, UBS entered into an agreement with the IRS that required it to report income and other identifying information for its U.S. clients who held U.S. securities in a UBS account. According to the DOJ, in order to evade these reporting requirements, UBS helped U.S. taxpayers open new UBS accounts in the names of nominees or sham entities. The account holders then transferred their assets to the newly created accounts, which were not required to include the U.S. taxpayers as beneficiaries. Swiss bankers also travelled to the U.S. repeatedly to market their bank secrecy to U.S. clients. UBS employees used counter-surveillance techniques to prevent detection of these marketing efforts and conceal the identities of U.S. clients.³³¹

³²⁸ U.S. District Court for the District of Columbia, Amended Deferred Prosecution Agreement with Standard Chartered Bank, 9 April 2019, <https://www.justice.gov/opa/press-release/file/1152806/download>

³²⁹ U.S. Department of Justice, Press Release: "Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than \$1 Billion," 9 April 2019, <https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions>

³³⁰ U.S. District Court, Southern District of Florida. Deferred Prosecution Agreement with UBS AG, 18 February 2009, https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf

³³¹ U.S. Department of Justice, Press Release: "UBS Enters into Deferred Prosecution Agreement," 18 February 2009. <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement>

Criminal enforcement action (Feb. 18, 2009): UBS AG entered into an 18-month DPA with the DOJ and paid \$780 million in fines, penalties, interest and restitution.

Prior to the agreement, UBS also agreed to exit the U.S. cross-border business and only provide banking or securities services to U.S. resident private clients through subsidiaries or affiliates registered to do business with the SEC. U.S. clients would be required to supply fully executed IRS forms that include their full identification. The company also agreed to implement and maintain an internal controls and compliance program, which requires it to appoint personnel, develop written policies, and provide training to personnel.³³²

UBS was also required to provide account information of U.S. clients to the U.S. government and continue to cooperate with the investigation. The agreement states that if UBS gives false information, violates the agreement, or violates any U.S. federal criminal law, the U.S. government may revoke the agreement and prosecute any known crimes.³³³

Second offense, resulting in NPA: Antitrust violations from 2001 through 2006.

Former UBS employees at the company's municipal reinvestment and derivatives desk entered into unlawful agreements to manipulate the bidding process and rig bids on municipal bond contracts.³³⁴

Criminal enforcement action (May 4, 2011): UBS entered a two-year NPA³³⁵ with the DOJ and paid \$160 million in restitution, penalties, and disgorgement to federal and state agencies.

As a part of the agreement, UBS agreed to commit no violation of the U.S. federal criminal law, disclose any criminal violations that come to the attention of the company's legal department, and cooperate fully with the investigation.³³⁶

³³² U.S. District Court, Southern District of Florida. Deferred Prosecution Agreement with UBS AG, 18 February 2009,

https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf

³³³ *Ibid.*

³³⁴ U.S. Department of Justice, Press Release: "UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$160 Million to Federal and State Agencies," 4 May 2011, <https://www.justice.gov/opa/pr/ubs-ag-admits-anticompetitive-conduct-former-employees-municipal-bond-investments-market-and>

³³⁵ U.S. Department of Justice, Non-Prosecution Agreement with UBS AG, 4 May 2011.

<https://www.justice.gov/atr/letter-assistant-attorney-general-christine-varney-setting-forth-terms-and-conditions-agreement>

³³⁶ *Ibid.*

Third offense, resulting in NPA and plea agreement: Wire fraud from November 2006 through September 2009.³³⁷

UBS Securities Japan Co. Ltd., a UBS subsidiary, engaged in a LIBOR manipulation conspiracy to provide false and misleading interest rates for the Japanese Yen.

Criminal enforcement action (Dec. 19, 2012): The UBS subsidiary pleaded guilty to a felony count and agreed to pay a \$100 million fine.³³⁸ UBS AG, the parent company, entered a two-year NPA³³⁹ with the DOJ and agreed to pay an additional \$400 million.

Additionally, two former UBS traders were charged. With regulatory penalties and disgorgement to U.S. and international authorities, the total UBS was required to pay in penalties exceeded \$1.5 billion.³⁴⁰

In 2015, UBS pleaded guilty to the LIBOR manipulation scheme after the DOJ found the corporation to be in breach of its NPA.³⁴¹

Fourth offense, resulting in a plea agreement for past offenses and “conditional immunity” for antitrust violations: Antitrust violations between October 2011 and January 2013.³⁴²

UBS AG engaged in deceptive foreign-exchange market practices wherein UBS employees colluded to mislead customers. The illegal acts were considered a breach of UBS’ 2012 NPA.³⁴³

³³⁷ U.S. Department of Justice, Press Release: “UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates,” 19 December 2012, <https://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor>

³³⁸ *Ibid.*

³³⁹ U.S. Department of Justice, Non-Prosecution Agreement with UBS AG, 18 December 2012, <https://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf>

³⁴⁰ *Ibid.*

³⁴¹ U.S. Department of Justice, Press Release: “Five Major Banks Agree to Parent-Level Guilty Pleas,” 20 May 2015, <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>

³⁴² U.S. Department of Justice, Plea Agreement with UBS AG, 20 May 2015, <https://www.justice.gov/file/440521/download>

³⁴³ U.S. Department of Justice, Press Release: “Five Major Banks Agree to Parent-Level Guilty Pleas,” 20 May 2015, <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>

The DOJ press release notes “UBS’s post-LIBOR compliance and remediation efforts failed to detect the illegal conduct until an article was published pointing to potential misconduct in the FX markets.”³⁴⁴

Criminal enforcement action (May 20, 2015): UBS AG, now considered to be in breach of its 2012 NPA, pleaded guilty to the LIBOR manipulation charge described in the 2012 NPA and agreed to pay a \$203 million criminal penalty and accepted a three-year probation term.³⁴⁵

However, the DOJ granted UBS “conditional immunity” from prosecution for its antitrust violations.³⁴⁶ UBS was required to pay the Federal Reserve \$342 million. No criminal charges were filed.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ UBS, Press Release: “UBS participates in resolutions of industry-wide FX matter,” 20 May 2015, https://www.ubs.com/global/en/about_ubs/investor_relations/releases/news-display-investor-releases.html/en/2015/05/20/fx.html

Drug and Medical Device Corporations

Corporate wrongdoer: Bristol-Myers Squibb (BMS), a pharmaceutical corporation based in New York City.

Offense resulting in DPA: Securities fraud in 2000 and 2001.³⁴⁷



According to BMS' DPA, the corporation engaged in "channel stuffing," meaning that it used financial incentives to spur wholesalers to buy products in excess of prescription demands so that the company could report higher sales and earnings. To incentivize wholesalers, BMS used pre-price increase buy-ins, which allowed wholesalers to make purchases prior to imminent price increases by BMS; extended datings of invoices, which extend the due date for wholesaler payment beyond the standard 30 days; early payment discounts; and future file purchases, which allowed wholesalers to buy at earlier, lower prices after the effective date of a price increase. As a result, wholesalers accumulated excess inventory of BMS products, which adversely effected subsequent sales.

BMS had publicly announced its plans to double the company's sales, earnings, and earnings per share in a seven-year period. It also announced a plan to double year-end 2000 sales and earnings by 2005. Channel stuffing enabled BMS to achieve and report results consistent with its publicly announced goals. Without channel stuffing, it would have failed.

BMS improperly established reserves and used funds from its reserves for improper purposes, including boosting BMS revenue as necessary to hit consensus estimates. In doing so, it violated the Generally Accepted Accounting Principles (GAAP). BMS also violated GAAP in its accounting policies related to expected rebates. BMS failed to disclose its channel stuffing in its 10Ks and 10Qs or quarterly press releases and analyst conference calls.

Criminal enforcement action (June 15, 2005): BMS entered into a two-year DPA with the U.S. Attorney's Office for the District of New Jersey.

It appointed a member of its board of directors to ensure that BMS emphasizes openness, accountability and integrity in corporate governance. BMS paid \$300 million in additional restitution to shareholders (bringing the total paid up to \$839 million).

³⁴⁷ U.S. District Court for the District of New Jersey, Deferred Prosecution Agreement with Bristol-Myers Squibb, June 15, 2005, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/bristol-meyers.pdf>

BMS was required to adopt internal controls and other remedial measures to prevent and deter potential violations of the federal securities laws. The company hired former U.S. Attorney and federal judge Frederick B. Lacey as a federal monitor. The company also was required to endow a chair in business ethics and corporate governance at Seton Hall University Law School,³⁴⁸ the alma mater of the prosecutor overseeing the case – then-U.S. Attorney for the District of New Jersey Chris Christie.³⁴⁹ Former U.S. Attorney for the Southern District of New York and future SEC Chair Mary Jo White led the BMS defense team.³⁵⁰

Second offense, resulting in plea agreement: Lying to the federal government and concealing its false statements in 2006.³⁵¹

BMS allegedly reached a secret agreement with Canadian company Apotex to keep a generic version of Plavix, an anti-clotting drug, off the market. BMS was co-marketer of the drug with Sanofi-Aventis. The drug was BMS' largest product. The Plavix patent was challenged by Apotex, which threatened to sell a generic copy of the drug. BMS tried to settle a lawsuit with Apotex to prevent this. The terms of the deal between BMS and Apotex should have been cleared by the Federal Trade Commission, as the company was operating under a consent decree requiring FTC review of its patent settlements. However, BMS did not disclose major parts of the deal to the FTC, instead making much of the deal in secret.³⁵²

DOJ enforcement action (June 11, 2007): BMS pleaded guilty³⁵³ to two counts of providing false statements to the federal government³⁵⁴ and paid a criminal fine of \$1 million.

³⁴⁸ *Ibid.*

³⁴⁹ Kocieniewski, David. "In Testy Exchange in Congress, Christie Defends His Record as a Prosecutor," The New York Times, 26 June 2009, <https://www.nytimes.com/2009/06/26/nyregion/26christie.html>

³⁵⁰ U.S. Attorney's Office for the District of New Jersey, Deferred Prosecution Agreement with Bristol-Myers Squibb, 5 June 2006, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/bristol-meyers.pdf>

³⁵¹ U.S. Department of Justice, Press Release: "Bristol-Myers Squibb Pleads Guilty to Lying to the Federal Government About Deal Involving Blood-Thinning Drug," 30 May 2007. https://www.justice.gov/archive/atr/public/press_releases/2007/223634.htm

³⁵² Saul, S. "Drug Maker to Plead Guilty to Making False Statements." The New York Times, 11 May 2007, <http://www.nytimes.com/2007/05/11/business/11bristol.html>

³⁵³ U.S. Department of Justice, Plea Agreement with Bristol-Myers Squibb, 11 Jun. 2007, <https://www.justice.gov/atr/case-document/plea-agreement-43>

³⁵⁴ U.S. Department of Justice, Criminal Information in the United States of America v. Bristol-Myers Squibb Company, 30 May 2007, <https://www.justice.gov/atr/case-document/information-83>

BMS entered its guilty plea just four days before it was released from its 2005 DPA. Then-U.S. Attorney for the District of New Jersey Chris Christie found that BMS' conduct and guilty plea violated the DPA, but determined that BMS had "cured that breach" by firing executives who were allegedly implicated in the wrongdoing and undergoing internal reforms.³⁵⁵ Again, the corporate defense attorney sitting opposite Christie and negotiating BMS agreement with the DOJ was Mary Jo White.

Corporate wrongdoer: GlaxoSmithKline (GSK), a London-based multinational pharmaceutical corporation.



Offense resulting in NPA and plea agreement: Food, Drug and Cosmetic Act (FDCA) violations between 2001 and 2005.

SB Pharmco, a GSK subsidiary, manufactured and distributed adulterated drugs (Kytril, Bactroban, Paxil CR, and Avadamet) made at a Puerto Rican facility. The facility produced drugs that had critical defects, did not have the therapeutic effect intended, lacked a controlled release mechanism, lacked the FDA-approved active ingredient mix, and packaged drugs of one strength or type in the same bottle with drugs of other types and strengths.³⁵⁶

GSK was alleged to have committed the crime described above via SB Pharmco. Additionally, it was alleged to have knowingly caused false and/or fraudulent claims to be submitted to Medicare and other federal healthcare programs. GSK does not admit to these facts – it "expressly denies the contentions and allegations."³⁵⁷

Criminal enforcement action (Oct. 21, 2010): GSK entered an NPA with the DOJ and the subsidiary pleaded guilty to the FDCA violations. The corporation paid a criminal fine and forfeiture of \$150 million and a civil settlement under the False Claims Act of \$600 million.³⁵⁸

³⁵⁵ *Ibid.*

³⁵⁶ U.S. Department of Justice, Press Release: "GlaxoSmithKline to Plead Guilty & Pay \$750 Million to Resolve Criminal and Civil Liability Regarding Manufacturing Deficiencies at Puerto Rico Plant," 26 Oct. 2010, <http://www.justice.gov/opa/pr/2010/October/10-civ-1205.html>

³⁵⁷ U.S. Department of Justice, Non-Prosecution Agreement with GlaxoSmithKline LLC. (page 4, 21 Oct. 2010, <https://www.justice.gov/archive/usao/ma/news/2010/October/FINAL%20side%20letter.pdf>)

³⁵⁸ U.S. Department of Justice, Press Release: "GlaxoSmithKline to Plead Guilty & Pay \$750 Million to Resolve Criminal and Civil Liability Regarding Manufacturing Deficiencies at Puerto Rico Plant," 26 Oct. 2010, <http://www.justice.gov/opa/pr/2010/October/10-civ-1205.html>

Second offense, resulting in plea agreement: Health care fraud between 1994 and 2007.³⁵⁹

The company engaged in “off-label marketing” of the drugs Paxil and Wellbutrin. The company marketed the antidepressant Paxil as effective for use in children and adolescents. It marketed Wellbutrin, also an antidepressant, for weight loss, the treatment of sexual dysfunction, substance addictions, attention deficit hyperactivity disorder, and other off-label uses. GSK spent millions, paying doctors to speak about the Wellbutrin’s off-label uses at meetings held at lavish resorts.

Finally, GSK failed to include safety data about Avandia, a diabetes drug, in its reports to the FDA, thereby restricting the FDA’s ability to assess the drug’s safety.³⁶⁰

Criminal enforcement action (July 2, 2012): GSK pleaded guilty to three criminal charges: two counts of introducing misbranded drugs into interstate commerce and one count of failing to report safety data about a drug to the FDA.³⁶¹

GSK paid \$3 billion to resolve both its criminal and civil liability for the offenses. The criminal fine and forfeiture under the plea agreement amount to \$1 billion.³⁶²

³⁵⁹ U.S. Department of Justice, Press Release: “GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data,” 2 July 2012, <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report>

³⁶⁰ *Ibid.*

³⁶¹ U.S. Department of Justice, Press Release: “GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data,” 2 July 2012, <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report>

³⁶² U.S. Department of Justice, Plea Agreement with GlaxoSmithKline LLC, 27 June 2012, http://lib.law.virginia.edu/Garrett/plea_agreements/pdf/Glaxosmithkline.pdf; U.S. Department of Justice Press Release: “GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data,” 2 July 2012, <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report>

Corporate wrongdoer: Pfizer, a New York City-based multinational pharmaceutical corporation and Pfizer subsidiaries Pharmacia & Upjohn, which Pfizer acquired in 2002,³⁶³ and Wyeth, which Pfizer acquired in 2009.³⁶⁴



Offense resulting in DPA, NPA and plea agreement: Offering kickbacks between January 2000 and March 2003.³⁶⁵

Pharmacia Upjohn, Inc., offered kickbacks to a pharmacy benefit manager in order to improve sales of one of its products, the human growth hormone Genotropin. When Pfizer acquired Pharmacia, it initiated self-disclosure of the aforementioned conduct.



Criminal enforcement action (April 2, 2007): Pfizer subsidiary Pharmacia & Upjohn, Inc., pleaded guilty³⁶⁶ and was fined \$19.7 million, and as a result became disqualified from participation in government healthcare programs. According to the Pfizer press release, the subsidiary "has no operational role in Pfizer today."³⁶⁷

The United States Attorney's Office for the District of Massachusetts entered a three-year DPA³⁶⁸ with a separate Pharmacia & Upjohn subsidiary of Pfizer, Pharmacia & Upjohn LLC,

³⁶³ Sorkin, Andrew Ross, "Pfizer Said to Buy Large Drug Rival in \$60 Billion Deal," The New York Times, 15 July 2002, <http://www.nytimes.com/2002/07/15/business/pfizer-said-to-buy-large-drug-rival-in-60-billion-deal.html>

³⁶⁴ Pfizer, Press Release: "PFIZER AND WYETH BECOME ONE: WORKING TOGETHER FOR A HEALTHIER WORLD™," 15 Oct. 2009, <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-wyeth-become-one-working-together-for-a-healthier-world>

³⁶⁵ Pfizer, Press Release: "Pharmacia Subsidiaries Reach \$34.7 Million Settlement with DOJ; Resolve Allegations of Improper Activities Prior to Acquisition by Pfizer," 2 Apr. 2007, <http://press.pfizer.com/press-release/pharmacia-subsiidiaries-reach-347-million-settlement-doj-resolve-allegations-improper-a>

³⁶⁶ U. S. Department of Justice, Plea Agreement with Pharmacia & Upjohn, 27 Mar. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/PharmaciaUpjohn2.pdf>

³⁶⁷ Pfizer, Press Release: "Pharmacia Subsidiaries Reach \$34.7 Million Settlement with DOJ; Resolve Allegations of Improper Activities Prior to Acquisition by Pfizer," 2 April 2007, <http://press.pfizer.com/press-release/pharmacia-subsiidiaries-reach-347-million-settlement-doj-resolve-allegations-improper-a>

³⁶⁸ U.S. Department of Justice, Deferred Prosecution Agreement with Pfizer, 27 Mar. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/pfizer.pdf>

and a three-year NPA with parent company Pfizer.³⁶⁹ The agreement included a \$15 million fine.

Second offense, resulting in plea agreement: FDCA violation between 2002 and 2005.³⁷⁰

Pharmacia & Upjohn misbranded the drug Bextra between 2002 and 2005. Bextra was approved for use in cases of osteoarthritis, adult rheumatoid arthritis and primary dysmenorrhea. However, the company promoted the drug for general acute pain and surgical pain – uses the FDA specifically rejected.

Criminal enforcement action (Sept. 15, 2009): Pharmacia & Upjohn pleaded guilty and agreed to pay a criminal fine of \$1.195 billion, at the time the largest criminal fine ever imposed by the U.S. government.³⁷¹

The Pfizer subsidiary agreed³⁷² to forfeit an additional \$105 million, bringing the total criminal resolution up to \$1.3 billion.

Pfizer also agreed to pay an additional \$1 billion plus interest in civil penalties for fraudulent promotion of and kickback schemes involving Bextra, Geodon, Zyvox and Lyrica, bringing to total cost of the corporation's settlements for this fraud scheme up to \$2.3 billion.³⁷³

Third offense, resulting in DPA: FCPA violations between 1997 and 2006.³⁷⁴

³⁶⁹ *Ibid.*

³⁷⁰ U.S. Department of Justice, Non-Prosecution Agreement with Pfizer Inc., 27 Mar. 2007, <https://www.justice.gov/sites/default/files/usao-ma/legacy/2012/10/09/Pfizer%20Settlement%20Agreement.pdf>

³⁷¹ The Federal Bureau of Investigation: Boston Division, Press Release: "Pharmacia & Upjohn Company, Inc. Pleads Guilty to Fraudulent Marketing of Bextra," 15 Sept. 2009, <https://archives.fbi.gov/archives/boston/press-releases/2009/bs091509b.htm>

³⁷² U.S. Department of Justice, Settlement Agreement with Pfizer, 31 Aug. 2009, <https://www.justice.gov/sites/default/files/usao-ma/legacy/2012/10/09/Pfizer%20Settlement%20Agreement.pdf>

³⁷³ U.S. Department of Justice, Press Release: "Justice Department Announces Largest Health Care Fraud Settlement in Its History," 2 Sept 2009, <https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history>

³⁷⁴ U.S. Department of Justice, Press Release: "Pfizer H.C.P. Corp. Agrees to Pay \$15 Million Penalty to Resolve Foreign Bribery Investigation," 7 Aug. 2012, <https://www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation>

Pfizer H.C.P. Corporation, a Pfizer subsidiary, made improper payments to government officials in Bulgaria, Croatia, Kazakhstan and Russia, seeking to influence government decisions in these countries regarding approval and registration of Pfizer products, the award of pharmaceutical tenders, and the level of sales of Pfizer products. Pfizer admitted to paying more than \$2 million in bribes to officials in the Eurasian countries, and to making more than \$7 million in profits as a result of the bribes.³⁷⁵

Criminal enforcement action (Aug. 7, 2012): Pfizer entered a two-year DPA³⁷⁶ and paid a \$15 million penalty.

Additionally, Pfizer settled with the SEC by paying \$26.3 million in disgorgement of profits and Wyeth, a corporation acquired by Pfizer in 2009,³⁷⁷ separately paid \$18.8 million in disgorgement of profits.³⁷⁸

The company was not required to retain a corporate monitor. It must periodically report to the DOJ on its implementation of compliance efforts. The agreement stated that if the company commits any criminal violation of U.S. law after signing the agreement, provides deliberately false, incomplete or misleading information, or otherwise breaches the agreement, it can be subject to prosecution for the FCPA violations at issue in the agreement or any other crimes.³⁷⁹

Fourth offense, resulting in plea agreement: FDCA violation between 1998 and 2009.³⁸⁰

³⁷⁵ U.S. Department of Justice, Pfizer H.C.P. Corporation Criminal Information, 7 Aug. 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/15/2012-08-07-pfizer-info.pdf>

³⁷⁶ U.S. Department of Justice, Deferred Prosecution Agreement with Pfizer H.C.P. Corporation, 7 Aug 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/15/2012-08-07-pfizer-dpa.pdf>

³⁷⁷ Pfizer, Press Release: "PFIZER AND WYETH BECOME ONE: WORKING TOGETHER FOR A HEALTHIER WORLD™," 15 Oct 2009, <https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-wyeth-become-one-working-together-for-a-healthier-world>

³⁷⁸ U.S. Department of Justice, Press Release: "Pfizer H.C.P. Corp. Agrees to Pay \$15 Million Penalty to Resolve Foreign Bribery Investigation," 7 Aug. 2012, <https://www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation>

³⁷⁹ U.S. Department of Justice, Deferred Prosecution Agreement with Pfizer H.C.P. Corporation, 7 Aug. 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/15/2012-08-07-pfizer-dpa.pdf>

³⁸⁰ U.S. Department of Justice, Press Release: "Wyeth Pharmaceuticals Agrees to Pay \$490.9 Million for Marketing the Prescription Drug Rapamune for Unapproved Uses," 30 July 2013, <https://www.justice.gov/opa/pr/wyeth-pharmaceuticals-agrees-pay-4909-million-marketing-prescription-drug-rapamune-unapproved>

Wyeth Pharmaceuticals Inc., a Pfizer subsidiary, unlawfully marketed the prescription drug Rapamune, which helps prevent the bodies of organ donation recipients from rejecting a donated organ, for uses not approved by the FDA.³⁸¹

Criminal enforcement action (July 30, 2013): Wyeth pleaded guilty³⁸² to the FDCA violation and agreed to pay a criminal fine of \$157.58 million and to forfeit \$76 million.

With civil claims, Wyeth was required to pay a total of \$490 million.

Corporate wrongdoer: Smith & Nephew, a multinational medical device corporation based in London.



Offense resulting in DPA: Kickbacks between 2002 and 2006.³⁸³

According to the DOJ's charges, Smith & Nephew, with five other companies (Biomet, Zimmer, Depuy Orthopaedics and Stryker Orthopedics), conspired to violate the federal anti-kickback statute.

The companies used consulting agreements with orthopedic surgeons to induce the surgeons to use particular companies' products. These surgeons received tens to hundreds of thousands of dollars for yearly "consulting contracts," often receiving lavish trips and other benefits. The surgeons failed to disclose their relationships to Smith & Nephew and the other companies to their patients or to the hospitals where the surgeries were performed.

Criminal enforcement action (Sept. 27, 2007): Smith & Nephew entered into an 18-month DPA³⁸⁴ with the DOJ and paid \$28.9 million in fines.

³⁸¹ *Ibid.*

³⁸² U.S. District Court for the Western District of Oklahoma, Plea Agreement with Wyeth Pharmaceuticals, 30 July 2013, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/wyeth_pharmaceuticals.pdf

³⁸³ U.S. Department of Justice, U.S. Attorney, District of New Jersey, Press Release: "Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring," 27 Sept. 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf>

³⁸⁴ U.S. Attorney, District of New Jersey, Deferred Prosecution Agreement with Smith & Nephew, 27 Sept. 2007, <https://www.justice.gov/archive/usao/nj/Press/files/pdf/Deferred%20pros%20agreementSNfinal.pdf>

The company was required to hire a federal monitor (David Samson, a former Attorney General of the State of New Jersey). Smith & Nephew was also required to maintain a compliance program and cooperate with ongoing investigations. Any subsequent consulting agreements that Smith & Nephew entered into required that physicians disclose their financial ties to the company.³⁸⁵

Second offense, resulting in DPA: FCPA violations between 1998 and 2008.³⁸⁶

The company sold products at full price to a Greek distributor, then paid the distributor an amount that would bring the product price down to the discount price, but made the discount price payments to shell companies created by the distributor. The Greek distributor then used the funds to bribe Greek-government funded health care providers into purchasing Smith & Nephew products. According to the DOJ, \$9.4 million were paid into the shell companies, some of which was used to bribe physicians.³⁸⁷

Criminal enforcement action (Feb. 6, 2012): Smith & Nephew entered another 18-month DPA³⁸⁸ with the DOJ and paid a \$16.8 million penalty.

Additionally, Smith & Nephew in a related matter paid a \$5.4 million disgorgement of profits to the SEC.³⁸⁹

³⁸⁵ *Ibid.*

³⁸⁶ U.S. Department of Justice, Press Release: "Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation," 6 Feb. 2012, <https://www.justice.gov/opa/pr/medical-device-company-smith-nephew-resolves-foreign-corrupt-practices-act-investigation>

³⁸⁷ *Ibid.*

³⁸⁸ U.S. Department of Justice, Deferred Prosecution Agreement with Smith & Nephew, 1 Feb. 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/02/15/2012-02-01-s-n-dpa.pdf>

³⁸⁹ U.S. Department of Justice, Press Release: "Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation," 6 Feb. 2012, <https://www.justice.gov/opa/pr/medical-device-company-smith-nephew-resolves-foreign-corrupt-practices-act-investigation>

Corporate wrongdoer: Stryker Corporation, a medical device company based in Kalamazoo, Mich., and OtisMed Corporation, which Stryker acquired in November 2009.³⁹⁰



Offense resulting in NPA: Antitrust violations between 2002 and 2006.

Stryker Orthopedics, a Stryker subsidiary, conspired with four other medical device makers (Biomet, Depuy Orthopaedics, Smith & Nephew and Zimmer) in violation of federal anti-kickback law.³⁹¹



The five companies accounted for nearly 95% of the hip and knee surgical implant market. The companies used consulting agreements with orthopedic surgeons to induce the surgeons to use particular companies' products. These surgeons received tens to hundreds of thousands of dollars for yearly "consulting contracts," often receiving lavish trips and other benefits. The surgeons failed to disclose their relationships to Stryker and the other companies to their patients or to the hospitals where the surgeries were performed.³⁹²

Criminal enforcement action (Oct. 1, 2005): Stryker, being the first corporation to come forward and cooperate with the DOJ, entered into an 18-month NPA.³⁹³ (The other four corporations entered DPAs with the DOJ.) Unlike its co-conspirators, Stryker was not required to pay a fine, though it was required to retain a corporate monitor for the duration of the NPA.³⁹⁴

Second offense, resulting in plea agreement: Misbranding from 2006 to 2008.

³⁹⁰ Stryker, Press Release: "Stryker Announces Agreements To Acquire Assets," 10 Nov. 2009, <https://investors.stryker.com/press-releases/news-details/2009/Stryker-Announces-Agreements-To-Acquire-Assets/default.aspx>

³⁹¹ U.S. Department of Justice, U.S. Attorney, District of New Jersey. Press Release: "Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring," 27 Sept. 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf>

³⁹² *Ibid.*

³⁹³ U.S. Attorney's Office for the District of New Jersey, Non-prosecution Agreement with Stryker, 1 Oct. 2005, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/strykerorthopedics.pdf>

³⁹⁴ U.S. Department of Justice, U.S. Attorney, District of New Jersey. Press Release: "Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring," 27 Sept. 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf>

According to the FBI's indictment, Stryker Biotech, a subsidiary of Stryker Corporation, allegedly promoted its bone repair products for uses not approved by the FDA, resulting in "serious medical problems" arising in some patients.³⁹⁵

Criminal enforcement action (Jan. 17, 2012): The Stryker subsidiary pleaded guilty to one misdemeanor count of medical device misbranding and agreed to pay a \$15 million fine.³⁹⁶ The government dropped its charges against the company's executives, and the felony charges against Stryker were dismissed.³⁹⁷

Third offense, resulting in NPA and plea agreement: Marketing an unapproved medical device between May 2006 and September 2009.³⁹⁸

OtisMed Corporation, a private corporation until it was purchased in November 2009 by Stryker,³⁹⁹ sold a medical device it manufactured, the OtisKnee, despite the device not being approved by the FDA. The sales of the device allegedly included co-promotion activities with Stryker. OtisMed belatedly sought FDA approval for the device in 2008 and was denied. Even after the denial, OtisMed shipped orders of the device to be used in scheduled surgeries. OtisMed sold more than 18,000 of the unapproved devices, resulting in income of about \$27.1 million.⁴⁰⁰

Criminal enforcement action (Dec. 8, 2014): OtisMed pleaded guilty and agreed to pay a

³⁹⁵ Federal Bureau of Investigation, Press Release: "Stryker Biotech and Its Top Management Indicted for Illegal Promotion of Medical Devices Used in Invasive Surgeries," 28 Oct. 2009, <https://archives.fbi.gov/archives/boston/press-releases/2009/bs102809.htm>

³⁹⁶ U.S. Attorney's Office for the District of Massachusetts, Plea Agreement with Stryker, 17 January 2012, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/StrykerBiotech.pdf>

³⁹⁷ Thomas Sullivan, Policy & Medicine, "Stryker Biotech: Case Dismissed Charges Dropped," 6 May 2018, <https://www.policymed.com/2012/03/stryker-biotech-case-dismissed-charges-dropped.html>

³⁹⁸ U.S. Attorney's Office for the District of New Jersey, Press Release: "Otismed Corporation And Former CEO Plead Guilty To Distributing FDA-Rejected Cutting Guides For Knee Replacement Surgeries," 8 Dec. 2014, <https://www.justice.gov/usao-nj/pr/otismed-corporation-and-former-ceo-plead-guilty-distributing-fda-rejected-cutting-guides>

³⁹⁹ Stryker, Press Release: "Stryker Announces Agreements To Acquire Assets," 10 Nov. 2009, <https://investors.stryker.com/press-releases/news-details/2009/Stryker-Announces-Agreements-To-Acquire-Assets/default.aspx>

⁴⁰⁰ U.S. Attorney's Office for the District of New Jersey, Press Release: "Otismed Corporation And Former CEO Plead Guilty To Distributing FDA-Rejected Cutting Guides For Knee Replacement Surgeries," 8 Dec. 2014, <https://www.justice.gov/usao-nj/pr/otismed-corporation-and-former-ceo-plead-guilty-distributing-fda-rejected-cutting-guides>

criminal fine of \$34.4 million and forfeited \$5.16 million.⁴⁰¹

Stryker entered a three-year NPA with the DOJ.⁴⁰²

Separately, OtisMed's CEO Charlie Chi pleaded guilty to introducing adulterated medical devices into interstate commerce.⁴⁰³

Corporate wrongdoer: Zimmer Biomet, a multinational medical device corporation based in Warsaw, Ind. Zimmer and Biomet, formerly separate



corporations, merged in 2015.⁴⁰⁴ Zimmer was formed from the orthopedics division of Bristol-Myers Squibb, which spun off from its parent corporation in 2001.⁴⁰⁵

Offenses resulting in DPAs: Zimmer and Biomet, then separate companies, conspired with three other companies (Depuy Orthopaedics, Stryker Orthopedics and Smith & Nephew) in violation of federal anti-kickback law from at least 2002 to 2006.⁴⁰⁶

The five companies accounted for nearly 95% of the hip and knee surgical implant market. The companies used consulting agreements with orthopedic surgeons to induce the surgeons to use particular companies' products. These surgeons received tens to hundreds of

⁴⁰¹ U.S. Attorney's Office for the District of New Jersey, Plea Agreement with OtisMed Corporation, 29 Aug. 2014, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2014/12/08/OtisMed%20Plea%20Agreement%20with%20attachments%20FINAL%2012.04.14.pdf>

⁴⁰² U.S. Attorney's Office for the District of New Jersey, Non-prosecution Agreement with Stryker, 29 Aug. 2014 <https://www.justice.gov/sites/default/files/usao-nj/legacy/2014/12/08/Stryker%20Side%20Letter%20FINAL%2012.04.14.pdf>

⁴⁰³ Mokhiber, Russell "Stryker Gets Non Prosecution Agreement in FDA Criminal Case," Corporate Crime Reporter, 8 Dec. 2014, <https://www.corporatecrimereporter.com/news/200/stryker-gets-non-prosecution-agreement-fda-criminal-case/>

⁴⁰⁴ Zimmer Holdings Inc., Press Release: "Zimmer Completes Combination with Biomet," 24 Jun. 2015, <https://www.prnewswire.com/news-releases/zimmer-completes-combination-with-biomet-300104244.html>

⁴⁰⁵ Zimmer Biomet, Press Release: "Zimmer Holdings, Inc. Announces Initial Directors of Company's Board," 6 Aug. 2001, <http://investor.zimmerbiomet.com/news-and-events/news/archive/06-08-2001-192604878>

⁴⁰⁶ U.S. Department of Justice, U.S. Attorney, District of New Jersey. Press Release: "Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring," 27 Sept. 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf>

thousands of dollars for yearly “consulting contracts,” often receiving lavish trips and other benefits. The surgeons failed to disclose their relationships to Biomet and the other companies to their patients or to the hospitals where the surgeries were performed. More than 700,000 hip and knee replacement surgeries are performed in the U.S. each year. Two-thirds of these are performed on patients covered by Medicare.⁴⁰⁷

Criminal enforcement action (Sept. 27, 2007): Both Zimmer⁴⁰⁸ and Biomet⁴⁰⁹ entered into 18-month DPAs with the DOJ.

In fines, Zimmer paid \$169.5 million and Biomet Orthopedics, a Biomet subsidiary, paid \$26.9 million.⁴¹⁰

Both were required to retain a corporate monitor.

Second offense, resulting in DPA: FCPA violations between 2000 and 2008.⁴¹¹

Biomet and its subsidiaries made improper payments to publicly employed health care providers in Argentina, Brazil and China to secure business with hospitals. More than \$1.5 million in corrupt payments were made. The company falsely recorded the payments as “commissions,” “royalties,” “consulting fees” and “scientific incentives.”⁴¹²

Criminal enforcement action (March 26, 2012): Biomet entered a three-year DPA with the DOJ and was required to pay \$17.28 million in criminal penalties.

The DPA also required that the company implement rigorous internal controls to cooperate with investigations and hire a federal monitor for 18 months. Following the monitorship, for

⁴⁰⁷ *Ibid.*

⁴⁰⁸ U.S. Department of Justice, Deferred Prosecution Agreement with Zimmer, Inc., 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/Zimmer.pdf>

⁴⁰⁹ U.S. Department of Justice, Deferred Prosecution Agreement with Biomet, Inc., 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/biomet.pdf>

⁴¹⁰ U.S. Department of Justice, U.S. Attorney, District of New Jersey, Press Release: “Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring,” . 27 Sept. 2007, <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf>

⁴¹¹ U.S. Department of Justice, Deferred Prosecution Agreement with Biomet, Inc., 26 Mar. 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/30/2012-03-26-biomet-dpa.pdf>

⁴¹² U.S. Department of Justice, Press Release: “Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation,” 26 Mar. 2012, <https://www.justice.gov/opa/pr/third-medical-device-company-resolves-foreign-corrupt-practices-act-investigation>

the remainder of the agreement, Biomet was required to report to the DOJ on its corporate compliance activities at least every six months. As a result of Biomet's ongoing remedial efforts, cooperation and compliance improvements, the company received a reduction in its penalty. Biomet also reached a settlement with the SEC for \$5.4 million in disgorgement of profits.⁴¹³

In 2015, Biomet announced in a filing with the Securities and Exchange Commission that, following the revelation of "certain alleged improprieties regarding its operations in Brazil and Mexico," the DOJ had extended its DPA by one year.⁴¹⁴

Third offense, resulting in DPA: Ongoing FCPA violations, between 2009 and 2013.⁴¹⁵

In breach of Biomet's 2012 DPA, the corporation continued to engage in foreign bribery in Brazil and Mexico and failed to adopt appropriate internal anticorruption policies.⁴¹⁶

Criminal enforcement action (Jan. 12, 2017): Zimmer Biomet, the new entity formed by Zimmer's acquisition of Biomet in 2015, entered a new three-year DPA with the DOJ and agreed to pay a \$17.4 million criminal penalty.⁴¹⁷

JERDS Luxembourg Holding S.à.r.l., an indirect Zimmer Biomet subsidiary, pleaded guilty.

Additionally, Zimmer Biomet agreed to pay the SEC \$13 million in disgorgement and civil penalties.

⁴¹³ *Ibid.*

⁴¹⁴ Biomet Inc Form 8-K filed with the U.S. Securities and Exchange Commission, 13 Mar. 2015, https://www.sec.gov/Archives/edgar/data/351346/000090342315000219/biomet-8k_0317.htm

⁴¹⁵ U.S. District Court for the District of Columbia, Zimmer Biomet Superseding Information, 12 Jan. 2017, <https://www.justice.gov/opa/press-release/file/925186/download>

⁴¹⁶ U.S. Department of Justice, Press Release: "Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges," 12 Jan. 2017,, <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>

⁴¹⁷ *Ibid.*

Engineering and International Development Corporations

Corporate wrongdoer: Louis Berger Group, a global engineering and development company based in New Jersey. The business was privately held until it was acquired in late 2018⁴¹⁸ by WSP, a Montreal-based multinational engineering firm.



Louis Berger

Offense resulting in DPA: Fraud between 1999 and 2007.⁴¹⁹

The DOJ filed charges against Louis Berger Group for, at the direction of its former executives and employees, overbilling the United States Agency for International Development (USAID) and the U.S. Department of Defense by more than \$10 million. The billing was for contracts for “rehabilitative and reconstructive work” in Iraq and Afghanistan.⁴²⁰

Criminal enforcement action (Nov. 5, 2010): Louis Berger Group entered a two-year DPA⁴²¹ with the DOJ and agreed to pay \$18.7 million. The corporation was required to improve its ethics and compliance programs and to hire an independent monitor for the duration of the agreement. The corporation also was required to pay more than \$50 million to settle civil claims. Two senior employees pleaded guilty for their role in the fraudulent scheme.

Second offense, resulting in DPA: FCPA violations between 1998 and 2010.⁴²²

⁴¹⁸ WSP, Press Release: “Louis Berger Is Now Part of WSP,” 18 Dec. 2018, <https://www.wsp.com/en-US/news/2018/louis-berger-is-now-part-of-wsp>

⁴¹⁹ U.S. Attorney's Office for the District of New Jersey, Press Release: “Scheme to Defraud Government on Reconstruction Contracts Leads to Criminal Charges and Civil Penalties for Louis Berger Group, Inc.” (5 Nov. 2010), <https://www.justice.gov/sites/default/files/usao-nj/legacy/2014/09/02/LBG%20Settlement%20PR.pdf>

⁴²⁰ U.S. Attorney's Office for the District of New Jersey Deferred Prosecution Agreement with Louis Berger Group, 5 Nov. 2010, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/louisberger.pdf>

⁴²¹ *Ibid.*

⁴²² U.S. Department of Justice, Press Release: “Louis Berger International Resolves Foreign Bribery Charges,” 17 July 2015, <https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges>

Louis Berger International, a division of Louis Berger Group, paid \$3.9 million in bribes to officials in India, Indonesia, Vietnam and Kuwait in order to secure contracts with the countries' respective governments.⁴²³

Criminal enforcement action (July 17, 2015): Louis Berger International entered a three-year DPA⁴²⁴ with the DOJ and agreed to pay a \$17.1 million criminal penalty. The DPA requires the corporation to improve its anticorruption compliance program and to take on an independent monitor for the duration of the agreement.

Corporate wrongdoer: Marubeni Corporation, an international trading company based in Tokyo.

The Marubeni logo is displayed in a bold, red, sans-serif font.

Offense resulting in DPA: Alleged FCPA violations between 1994 and 2004.⁴²⁵

Marubeni allegedly paid bribes to officials in Nigeria on behalf of a joint corporate venture that was involved in developing liquified natural gas facilities.⁴²⁶ The joint venture paid Marubeni \$51 million, which in part were used to pay bribes.

Criminal enforcement action (Jan. 17, 2012): Marubeni entered a two-year DPA⁴²⁷ with the DOJ and

agreed to pay a \$54.6 million criminal penalty.⁴²⁸ Marubeni was required to strengthen its anticorruption compliance program and hire a corporate compliance consultant. The DPA states that if Marubeni is found to have committed any felony or breached the agreement in

⁴²³ *Ibid.*

⁴²⁴ U.S. District Court for the Southern District of Texas, Houston Division, Criminal Information Filed Against Marubeni Corporation, 17 Jan. 2012, <https://www.justice.gov/opa/file/631346/download>

⁴²⁵ U.S. District Court for the Southern District of Texas, Houston Division, Criminal Information Filed Against Marubeni Corporation, 17 Jan. 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2012-01-17-marubeni-information.pdf>

⁴²⁶ U.S. Department of Justice, Press Release: "Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty," 17 Jan. 2012, <https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546>

⁴²⁷ U.S. District Court for the Southern District of Texas, Houston Division, Deferred Prosecution Agreement with Marubeni Corporation, 17 Jan. 2012, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2012-01-17-marubeni-dpa.pdf>

⁴²⁸ U.S. Department of Justice, Press Release: "Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty," 17 Jan. 2012, <https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546>

any other way during the term of the agreement, the corporation shall be subject to criminal prosecution for the violation.

Second offense, resulting in plea agreement: FCPA violations between 2002 and 2009.⁴²⁹

According to the DOJ, Marubeni engaged in a scheme to bribe officials in Indonesia, including a high-ranking member of Indonesia's parliament and officials in Indonesia's state-run power company, in exchange for help obtaining a \$118 million contract for itself and a co-conspirator corporation.⁴³⁰

Criminal enforcement action (March 19, 2014): Marubeni pleaded guilty to an eight-count criminal information and agreed to pay a criminal fine of \$88 million.⁴³¹ Marubeni agreed to improve its anti-corruption compliance program and cooperate further with DOJ investigations.

⁴²⁹ U.S. District Court for the District of Connecticut, Plea Agreement with Marubeni Corporation, (pg. 39), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/03/24/marubeni-corp-plea-agreement.pdf>

⁴³⁰ U.S. Department of Justice, Press Release: "Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine," 19 Mar. 2014, <https://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine>

⁴³¹ U.S. Department of Justice, Press Release: "Marubeni Corporation Sentenced for Foreign Bribery Violations," 15 May 2014, <https://www.justice.gov/opa/pr/marubeni-corporation-sentenced-foreign-bribery-violations>

Oil and Gas Corporations

Corporate wrongdoer: BP, a London-based multinational oil and gas corporation.

Offenses resulting in DPA and two guilty pleas: The October 2007

DOJ press release describes criminal charges for three separate BP violations: fraud in 2004 and environmental violations in Texas between 1999 and 2005 and in Alaska in 2006.⁴³²

According to the DOJ, in February and March of 2004, subsidiaries of BP America conspired to inflate the price of propane in the pipeline system owned by the Texas Eastern Products Pipeline Company (TEPPCO), which transports propane from Texas to the Midwest and Northeast states.⁴³³ BP executives and BP's compliance manager were informed of the scheme, which was in violation of BP's written policy, but no trader involved in the scheme was disciplined until the corporation was under investigation by the U.S. Commodity Futures Trading Commission.⁴³⁴ The inflated cost of propane was estimated to have cost consumers more than \$53 million.⁴³⁵

Separately, on March 23, 2005, an explosion at a Texas oil refinery owned by BP Products North America killed 15 workers and injured 170 others.⁴³⁶ The explosion occurred after procedures to maintain a unit used for increasing the octane level of unleaded gasoline, and required by the Clean Air Act, were not performed for about six years preceding the explosion.⁴³⁷



⁴³² U.S. Department of Justice, Press Release: "British Petroleum to Pay More Than \$370 Million in Environmental Crimes, Fraud Cases," 25 Oct. 2007,

https://www.justice.gov/archive/opa/pr/2007/October/07_ag_850.html

⁴³³ U.S. District Court for the Northern District of Illinois, Eastern Division, Deferred Prosecution Agreement with BP America Inc., (pg. 30), 25 Oct. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/bp.pdf>

⁴³⁴ *Ibid.*, p. 49

⁴³⁵ U.S. Department of Justice, Press Release: "British Petroleum to Pay More Than \$370 Million in Environmental Crimes, Fraud Cases," 25 Oct. 2007,

https://www.justice.gov/archive/opa/pr/2007/October/07_ag_850.html

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

Also separately, British Petroleum Exploration (Alaska), suffered two pipeline leaks, in violation of the Clean Water Act. The first leak, discovered in March 2006, spilled over 200,000 gallons of crude oil, and was the largest oil spill ever in the North Slope region of Alaska. The second leak, which occurred in August the same year, spilled 1,000 gallons.⁴³⁸

Criminal enforcement action (Oct. 25, 2007): Enforcement actions against three BP subsidiaries for the three violations were announced in a single DOJ press release.⁴³⁹

To resolve the DOJ's fraud charge, BP America paid a criminal penalty of \$100 million and entered a three-year DPA requiring the corporation to take on an independent monitor.⁴⁴⁰ BP also was required to pay a civil penalty of \$125 million, a \$25 million penalty to the U.S. Postal Inspection Consumer Fraud Fund, and restitution of about \$53 million.

The DPA includes language significantly narrowing the scope of types of subsequent violations that could be considered a breach:

"[S]hould the Department in its sole discretion determine that BP America has committed any federal crime *involving Manipulative Conduct other than a misdemeanor violation*, knowingly given false, incomplete or misleading information *relating to the current investigation of propane*, or of such other Manipulative Conduct about which the Department shall inquire of [...] BP Entities, [...] BP America shall [...] thereafter be subject to prosecution[.]"⁴⁴¹ [Emphasis added]

For the conduct leading up to the Texas oil refinery explosion, BP Products North America Inc. pleaded guilty to a felony violation of the Clean Air Act and agreed to pay a \$50 million criminal fine. (At the time, it was the largest fine for a Clean Air Act violation). The subsidiary was ordered to serve three years of probation.⁴⁴²

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ U.S. District Court for the Northern District of Illinois, Eastern Division, Deferred Prosecution Agreement with BP America Inc., 25 Oct. 2007, <https://www.justice.gov/sites/default/files/criminal-vns/legacy/2014/11/07/10-25-07bpameriac-dpa.pdf>

⁴⁴¹ *Ibid.*

⁴⁴² U.S. Department of Justice, Press Release: "British Petroleum to Pay More Than \$370 Million in Environmental Crimes, Fraud Cases," 25 Oct. 2007, https://www.justice.gov/archive/opa/pr/2007/October/07_ag_850.html

For the Alaska oil spills, British Petroleum Exploration (Alaska) pleaded guilty and agreed to pay a \$12 million criminal fine and \$8 million in community service payments to the National Fish and Wildlife Federation and in restitution to the state of Alaska. The subsidiary was ordered to serve three years of probation.⁴⁴³

Second offense, resulting in plea agreement: Manslaughter and environmental violations in 2010.

On April 20, 2010, the two highest-ranking BP supervisors on the Deepwater Horizon offshore oil-drilling rig in the Gulf of Mexico, in failing to take measures to prevent a blowout despite clear indications the well was not secure, negligently caused the deaths of 11 workers and the catastrophic oil spill that followed when the well exploded.⁴⁴⁴ Over 87 days, 4 million barrels of oil poured into the ocean from the damaged well until it was capped.⁴⁴⁵

Additionally, a BP senior executive obstructed a congressional inquiry into how much oil was coming out of the damaged well. The executive provided false information and misled Congress and the public while pushing BP's official narrative that 5,000 barrels of oil were pouring out of the well per day. BP's internal estimates were much higher, and an independent investigation later concluded that more than 60,000 barrels per day were spilling into the ocean from BP's well.

Criminal enforcement action (Jan. 29, 2013): BP Exploration and Production, a BP subsidiary, pleaded guilty to 14 criminal counts: 11 counts of felony manslaughter, one count of felony obstruction of Congress, and Clean Water Act and Migratory Bird Treaty Act violations.⁴⁴⁶

The corporation was sentenced to pay \$4 billion in criminal fines and penalties, which the DOJ press release remarked was the largest criminal resolution in history, and put on five

⁴⁴³ *Ibid.*

⁴⁴⁴ U.S. Department of Justice, Press Release: "BP Exploration and Production Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident," 29 Jan. 2013, <https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-pleads-guilty-sentenced-to-pay-record-4-billion-crimes>

⁴⁴⁵ U.S. Environmental Protection Agency, Deepwater Horizon – BP Gulf of Mexico Oil Spill, (accessed 10 June 2019), <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill>

⁴⁴⁶ U.S. Department of Justice, Press Release: "BP Exploration and Production Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident," 29 Jan. 2013, <https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-pleads-guilty-sentenced-to-pay-record-4-billion-crimes>

years probation, the maximum allowed. Additionally, BP was required to take on two monitors, a safety and risk management monitor and an ethics monitor.⁴⁴⁷

Corporate wrongdoer: Chevron, a multinational oil and gas corporation based in San Ramon, Calif.



Offense resulting in NPA: The DOJ alleges Chevron illegally purchased oil from intermediaries with the Iraqi government under Saddam Hussein, the proceeds of which secretly funded Hussein's government, between 2001 to 2002.⁴⁴⁸

These actions were in violation of the U.S wire fraud statutes and administrative regulations prohibiting transactions with the former government of Iraq.⁴⁴⁹

Criminal enforcement action (Nov. 14, 2007): Chevron entered into a two-year NPA⁴⁵⁰ with the U.S. Attorney for the Southern District of New York.

As a part of the agreement, Chevron paid \$20 million to the U.S. Attorney's office for the Southern District of New York (SDNY), which transferred that money to the Development Fund of Iraq and paid as restitution for the benefit of the people of Iraq. Additionally, Chevron paid \$5 million to the New York County District Attorney's (DANY) office and \$2 million in civil penalties to the U.S. Treasury's Office of Foreign Assets Control for civil penalties. The company also paid \$3 million to the SEC. The fees paid to SDNY and DANY satisfy the disgorgement of \$25 million that Chevron was ordered to pay.⁴⁵¹

In a press release, SDNY explained its reason for not prosecuting Chevron, pointing to the "Principles of Federal Prosecution of Business Organizations." Among the reasons it

⁴⁴⁷ *Ibid.*

⁴⁴⁸ U.S. Department of Justice, Non-Prosecution Agreement with Chevron Corporation, 8 Nov. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/chevron.pdf>

⁴⁴⁹ U.S. Attorney, Southern District of New York, Press Release: "Chevron Corporation Agrees to Pay \$30 Million In Oil-for-Food Settlement," 14 Nov. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/press-release/Chevron.pdf>

⁴⁵⁰ U.S. Department of Justice, Non-Prosecution Agreement with Chevron Corporation, 8 Nov. 2007, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/chevron.pdf>

⁴⁵¹ U.S. Attorney, Southern District of New York. Press Release: "Chevron Corporation Agrees to Pay \$30 Million In Oil-for-Food Settlement," 14 Nov. 2007, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/press_release/Chevron.pdf

highlighted were: Chevron's cooperation with government investigations, its commitment to continued cooperation, its implementation of enhanced compliance procedures designed to prevent future violations of law by employees, removal of culpable employees, settlement of the SEC's civil enforcement action prior to entering the NPA, and agreement to forfeit at least \$20 million for transfer to the Iraqi people. SDNY also cited collateral consequences of criminal indictment that could result for "innocent employees and shareholders."⁴⁵²

The agreement states that if Chevron commits any crimes after the agreement is signed or is found to have given false, incomplete or misleading testimony, it may be subject to prosecution for this or other crimes.⁴⁵³

Second offense, resulting in plea agreement: Tax evasion between 2002 and 2010.

Chevron conspired "to impede, impair, obstruct and defeat the functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of federal excise taxes" (tax evasion).⁴⁵⁴

Criminal enforcement action (July 26, 2010): Chevron Commercial, a subsidiary, pleaded guilty to engaging in the conspiracy. While the maximum penalty for the violation was a five-year probation and a fine of \$500,000, the plea agreement notes that the government is not recommending a fine because it would "impair the ability of the defendant to pay federal excise taxes due to the [IRS]." The court noted the defendant would be required to pay a "Special Assessment" of \$400.⁴⁵⁵

Corporate wrongdoer: Halliburton and Kellogg Brown & Root (KBR), a Halliburton subsidiary until 2006.⁴⁵⁶

HALLIBURTON

⁴⁵² *Ibid.*

⁴⁵³ U.S. Department of Justice, Non-Prosecution Agreement with Chevron Corporation, 8 Nov. 2007, http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/chevron.pdf

⁴⁵⁴ U.S. District Court for the Southern District of Illinois, Plea Agreement with Chevron Commercial, Inc., 26 July 2010, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/ChevronCommercial.pdf>

⁴⁵⁵ *Ibid.*

⁴⁵⁶ U.S. Securities and Exchange Commission, Master Separation Agreement Between Halliburton Company and KBR, Inc, 20 Nov. 2006, <https://www.sec.gov/Archives/edgar/data/1357615/000119312506242116/dex101.htm>

Offense resulting in NPA: FCPA violations between 1995 and 2004.

Then-Halliburton subsidiary KBR, through senior management including CEO Albert “Jack” Stanley, engaged in a scheme of bribing Nigerian government officials, including to executive branch officials, in order to obtain contracts with Nigeria’s government-owned oil company, the Nigerian National Petroleum Corporation, to build liquefied natural gas facilities.⁴⁵⁷ The contracts were valued at more than \$6 billion. At the time, KBR was a Halliburton subsidiary.

Criminal enforcement action (Feb. 11, 2009): KBR, now a separate public corporation and no longer a Halliburton subsidiary, pleaded guilty to a five-count criminal information and agreed to pay a \$402 million criminal fine.

Former parent company Halliburton entered a two-year NPA ⁴⁵⁸ with the DOJ and contributed \$382 million toward paying KBR’s criminal fine. Halliburton did not admit wrongdoing.

In a related proceeding, former KBR CEO Stanley pleaded guilty for his role in the bribery scheme and in 2012 was sentenced to serve 30 months in prison.⁴⁵⁹

Second offense, resulting in plea agreement: Destroying evidence in May and June 2010.

In the aftermath of the BP’s fatal oil spill disaster, Halliburton Energy Services, a Halliburton subsidiary, conducted an investigation into the oil well design.⁴⁶⁰ The safety mechanism that failed to seal the well in during the emergency had been provided by Halliburton.⁴⁶¹ In May and June of 2010, Halliburton ran simulations of the incident to determine whether changes to certain technical aspects of the well design could have prevented or lessened the disaster.

⁴⁵⁷ U.S. Department of Justice, Press Release: “Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine,” 11 Feb. 2009, <https://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million>

⁴⁵⁸ U.S. Department of Justice, Non-prosecution Agreement with Halliburton Company, 6 Feb. 2009, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/halliburton.pdf>

⁴⁵⁹ Baltimore, Chris, “Ex-KBR CEO gets 30 months for Nigeria scheme,” Reuters, 23 Feb. 2012, <https://www.reuters.com/article/us-kbr-bribery/ex-kbr-ceo-gets-30-months-for-nigeria-scheme-idUSTRE81M1NX20120223>

⁴⁶⁰ U.S. Department of Justice, Press Release: “Halliburton Agrees to Plead Guilty to Destruction of Evidence in Connection with Deepwater Horizon Tragedy,” 25 July 2013, <https://www.justice.gov/opa/pr/halliburton-agrees-plead-guilty-destruction-evidence-connection-deepwater-horizon-tragedy>

⁴⁶¹ Rushe, Dominic, “Halliburton reaches \$1.1bn settlement over Deepwater Horizon oil spill,” The Guardian, 2 Sept. 2014, <https://www.theguardian.com/environment/2014/sep/02/halliburton-11bn-settlement-deepwater-horizon-spill>

After finding that the technical changes would not have prevented or lessened the disaster, Halliburton destroyed the simulation results.⁴⁶²

Criminal enforcement action (Sept. 19, 2013): Halliburton pleaded guilty to a charge of destroying evidence and agreed to pay the statutory maximum fine,⁴⁶³ reportedly \$200,000,⁴⁶⁴ and serve three years of probation.

Corporate wrongdoer: Helmerich & Payne, a global oil and gas drilling corporation based in Tulsa, Okla.

Offense resulting in NPA: FCPA violations from 2003 through 2008.⁴⁶⁵



Helmerich & Payne International Drilling Co. is an offshore subsidiary of Helmerich & Payne, and which itself serves as a parent company for Helmerich & Payne's Argentinian and Venezuelan subsidiaries.

The Helmerich & Payne subsidiaries made about \$185,673 in improper payments to Argentinian and Venezuelan customs officials that saved the corporation about \$320,604.⁴⁶⁶ Helmerich & Payne's internal recordkeeping procedures failed to account for the improper payments.

Criminal enforcement action (July 30, 2009): Helmerich & Payne entered a two-year

⁴⁶² U.S. Department of Justice, Press Release: "Halliburton Agrees to Plead Guilty to Destruction of Evidence in Connection with Deepwater Horizon Tragedy," 25 July 2013, <https://www.justice.gov/opa/pr/halliburton-agrees-plead-guilty-destruction-evidence-connection-deepwater-horizon-tragedy>

⁴⁶³ U.S. Department of Justice, "Halliburton Pleads Guilty to Destruction of Evidence in Connection with Deepwater Horizon Disaster and Is Sentenced to Statutory Maximum Fine," 19 Sept. 2013, <https://www.justice.gov/opa/pr/halliburton-pleads-guilty-destruction-evidence-connection-deepwater-horizon-disaster-and>

⁴⁶⁴ Krauss, Clifford, "Halliburton Pleads Guilty to Destroying Evidence After Gulf Spill," The New York Times, 2 Sept. 2014, <https://www.nytimes.com/2013/07/26/business/halliburton-pleads-guilty-to-destroying-evidence-after-gulf-spill.html>

⁴⁶⁵ U.S. Department of Justice Non-prosecution Agreement with Helmerich & Payne, 29 July 2009, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/helmerich.pdf>

⁴⁶⁶ *Ibid.*

NPA⁴⁶⁷ with the DOJ and agreed to pay a \$1 million penalty.⁴⁶⁸

Second offense, resulting in plea agreement: Falsifying documents and failing to perform required equipment tests to prevent oil spills on six occasions in 2010.⁴⁶⁹

A crew working on an oil rig in the Gulf of Mexico managed by Helmerich & Payne International Drilling Co., a subsidiary of Helmerich & Payne, did not perform equipment tests on a blowout preventer because the employees knew the equipment would fail. Instead, the employees created false test charts, which they used to deceive federal inspectors. According to the DOJ press release, the crew “falsified the testing records for the benefit of the defendant, [the Helmerich & Payne subsidiary], to minimize downtime and costs associated with repairs.”⁴⁷⁰

Criminal enforcement action (Nov. 8, 2013): The Helmerich & Payne subsidiary pleaded guilty to a misdemeanor count of knowingly making and delivering false writings and agreed to pay a criminal monetary penalty of \$6.4 million.⁴⁷¹ The company was placed on probation for three years. In a related enforcement matter, the drilling rig manager responsible for overseeing the crew involved in falsifying the data pleaded guilty to lying to a federal agent and was sentenced to two years of probation.⁴⁷²

Corporate wrongdoer: Noble Corporation, a global offshore oil drilling corporation based in London.



Offense resulting in NPA: FCPA violations between January 2003 and July 2007.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ U.S. Department of Justice, Press Release: “Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America,” 30 July 2009, <https://www.justice.gov/opa/pr/helmerich-payne-agrees-pay-1-million-penalty-resolve-allegations-foreign-bribery-south>

⁴⁶⁹ U.S. Attorney's Office for the Eastern District of Louisiana, Press Release: “Helmerich & Payne International Drilling Company Sentenced To \$6.4 Million Criminal Penalty For False Writings Related To Well Control Testing,” 8 Nov. 2013, <https://www.justice.gov/usao-edla/pr/helmerich-payne-international-drilling-company-sentenced-64-million-criminal-penalty>

⁴⁷⁰ *Ibid.*

⁴⁷¹ U.S. Attorney's Office for the Eastern District of Louisiana, Plea Agreement with Helmerich & Payne, 8 Nov. 2013, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/Helmerich-Payne-International-Drilling.pdf>

⁴⁷² Monies, Paul, “Former drilling rig manager sentenced in false safety data case,” *The Oklahoman*, 9 Aug. 2012, <https://newsok.com/article/3699354/former-drilling-rig-manager-sentenced-in-false-safety-data-case>

Noble made about \$74,000 in payments to a freight forwarding agent, and some Noble employees knew that some amount of the payments would be used to bribe Nigerian customs officials. The corporation made false records to conceal the bribes.⁴⁷³

Criminal enforcement action (Nov. 4, 2010): Noble entered a three-year NPA⁴⁷⁴ with the DOJ and agreed to pay a \$2.59 million criminal penalty.⁴⁷⁵ In a related enforcement action, two Noble executives, who denied wrongdoing, entered a settlement with the SEC which required them to pay no penalties.⁴⁷⁶

Second offense, resulting in plea agreement: Environmental and maritime crimes in 2012.⁴⁷⁷

Violations by Noble Drilling (US), Noble's U.S. subsidiary, involve the operation of a mobile drill ship and a rig known as the Kulluk, both of which Shell contracted for arctic drilling.⁴⁷⁸ Noble falsified records regarding the operation of pollution prevention devices the ship and rig were legally required to use. The device was nonfunctional. Noble separately devised another makeshift pollution prevention device for managing engine room wastewater and attempted to conceal the system from the Coast Guard. Additionally, Noble repeatedly violated the legal requirement to report hazards caused by its vessels to the Coast Guard.⁴⁷⁹

Criminal enforcement action (Dec. 8, 2014): The Noble Drilling subsidiary pleaded guilty to eight

⁴⁷³ U.S. Department of Justice, Press Release: "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties," 4 Nov. 2010, <https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>

⁴⁷⁴ U.S. Department of Justice, Non-prosecution Agreement with Noble Corporation, 4 Nov. 2010, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/noble.pdf>

⁴⁷⁵ U.S. Department of Justice, Press Release: "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties," 4 Nov. 2010, <https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>

⁴⁷⁶ Raymond, Nate, "Noble Corp executives to pay nothing in U.S. SEC bribery settlement," Reuters, 3 July 2014, <https://www.reuters.com/article/us-noble-corp-sec-settlement/noble-corp-executives-to-pay-nothing-in-u-s-sec-bribery-settlement-idUSKBN0F82M720140703>

⁴⁷⁷ U.S. Department of Justice, Press Release: "Drilling Company Charged with Environmental and Maritime Crimes in Alaska," 8 Dec. 2014, <https://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-alaska>

⁴⁷⁸ Funk, McKenzie, "The Wreck of the Kulluk," The New York Times, 3 July 2014, <https://www.nytimes.com/2015/01/04/magazine/the-wreck-of-the-kulluk.html>

⁴⁷⁹ U.S. Department of Justice, Press Release: "Drilling Company Charged with Environmental and Maritime Crimes in Alaska," 8 Dec. 2014, <https://www.justice.gov/opa/pr/drilling-company-charged-environmental-and-maritime-crimes-alaska>

felony offenses and agreed to pay a criminal fine of \$8.2 million and a community service payment of \$4 million.⁴⁸⁰

Corporate wrongdoer: Transocean, a multinational offshore oil drilling corporation based in Switzerland.⁴⁸¹



Offense resulting in DPA: FCPA violations between 2002 and 2007.⁴⁸²

Agents employed by Transocean Inc., the Caymans Island subsidiary of Transocean, paid about \$90,000 in bribes to Nigerian customs officials in order to get around Nigerian regulations regarding the importation of deep-water oil rigs.⁴⁸³

Criminal enforcement action (Nov. 4, 2010): Transocean entered a three-year DPA⁴⁸⁴ with the DOJ, agreed to accept responsibility for its actions and pay a criminal penalty of \$13.44 million.

Second offense, resulting in plea agreement: Environmental violations in 2010 leading up to the BP oil spill disaster in the Gulf of Mexico.⁴⁸⁵

Specifically, members of Transocean Deepwater's crew on board the Deepwater Horizon acted negligently in failing to investigate indications the deepwater oil well was insecure, a violation of the Clean Water Act.

⁴⁸⁰ U.S. District Court for the District of Alaska, Plea Agreement with Noble Drilling, 8 Dec. 2014, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/NobleDrilling.pdf>

⁴⁸¹ U.S. Department of Justice, Press Release: "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties," 4 Nov. 2010, <https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery>

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ U.S. District Court for the Southern District of Texas, Houston Division, Deferred Prosecution Agreement with Transocean Inc., 4 Nov. 2010, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10transocean-dpa.pdf>

⁴⁸⁵ U.S. Department of Justice, Press Release: "Transocean Pleads Guilty, Is Sentenced to Pay \$400 Million in Criminal Penalties for Criminal Conduct Leading to Deepwater Horizon Disaster," 14 Feb. 2013, <https://www.justice.gov/opa/pr/transocean-pleads-guilty-sentenced-pay-400-million-in-criminal-penalties-criminal>

Criminal enforcement action (Feb. 14, 2013): Transocean pleaded guilty to a one-count charge of violating the Clean Water Act, was sentenced to five years of probation and agreed to pay \$400 million in criminal penalties.⁴⁸⁶ Separately, a \$1 billion civil penalty was imposed on the corporation for its environmental violation.⁴⁸⁷

Technology Corporations

Corporate wrongdoer: Lucent and Alcatel-Lucent. The latter

formed when the former, an American corporation, merged with Alcatel, a French corporation, in 2006. In 2016, the corporation was acquired by, and became a subsidiary of, Nokia, which is headquartered in Finland.



Offense resulting in NPA: FCPA violations between 2000 and 2003.

Lucent provided Chinese government officials with 315 trips that were primarily for the purpose of leisure. These trips were set up with the help of U.S.-based Lucent employees by Lucent China officials. The company improperly recorded expenses for these trips in its books and records and failed adequately to monitor the provision of travel and other items of value to Chinese government officials. Examples of trips provided and their benefits to the company include: a trip for Chinese officials to various cities in the U.S. that cost more than \$73,000 and had the potential to yield \$80 million in new business for Lucent and two-week trips for two delegations from a large national, state-owned telecom enterprise in China that cost over \$130,000 and had the potential to yield more than \$4 million in business for Lucent.⁴⁸⁸

Criminal enforcement action (Nov. 14, 2007): Lucent entered a two-year NPA with the DOJ and agreed to pay a \$1 million fine.

⁴⁸⁶ U.S. District Court for the Eastern District of Louisiana, Plea Agreement with Transocean Deepwater Inc., 3 Jan. 2013, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/Transocean-Deepwater.pdf>

⁴⁸⁷ U.S. Department of Justice, Press Release: "Transocean Pleads Guilty, Is Sentenced to Pay \$400 Million in Criminal Penalties for Criminal Conduct Leading to Deepwater Horizon Disaster," 14 Feb. 2013, <https://www.justice.gov/opa/pr/transocean-pleads-guilty-sentenced-pay-400-million-in-criminal-penalties-criminal>

⁴⁸⁸ U.S. Department of Justice, Non-Prosecution Agreement with Lucent Technologies Inc., 14 Nov. 2007, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-14-07lucent-agree.pdf>; U.S. Department of Justice, Press Release: "Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations," 21 December, 2007, https://www.justice.gov/archive/opa/pr/2007/December/07_crm_1028.html

During the agreement's term, Lucent was required to commit no crimes, disclose all information related to the activities of the company to investigators and notify the DOJ of criminal conduct by the company or its employees or any civil action brought by governmental authorities alleging fraud by or against Lucent. Lucent was to adopt new internal controls or modify existing controls, policies and procedures to ensure that it kept fair and accurate books, records and accounts, and adhered to an anti-corruption compliance code. If Lucent complied with the terms of the agreement, the DOJ would not prosecute.

Second offense, resulting in DPA and three plea agreements: FCPA violations from the 1990s through 2006.

Alcatel had been pursuing business opportunities around the world through third-party agents and consultants. These consultants repeatedly were used to bribe foreign officials and executives in order to obtain business in various countries. The decentralized structure of the company meant that Alcatel employees did not perform adequate due diligence on third-party consultants. In particular, one executive (referred to only as "Executive 1" in the agreement) failed to make efforts to verify information provided by consultants.⁴⁸⁹

According to the DOJ's charging documents, senior executives at Alcatel's subsidiaries knew or should have known that the consultants were paying bribes to foreign officials. To conceal their illegal business practices, employees of some subsidiaries sometimes used aliases in their emails when referring to foreign officials who received bribes or provided non-public information to Alcatel.⁴⁹⁰

The three subsidiaries paid millions of dollars in bribes to foreign officials and admitted to earning \$48.1 million in profits as a result of the improper payments. These profits came from contracts in Costa Rica worth \$300 million; contracts in Honduras worth \$47 million; and contracts in Taiwan worth \$19.2 million.⁴⁹¹

Criminal enforcement action (Dec. 27, 2010): Parent company Alcatel-Lucent S.A. entered into a three-year DPA with the DOJ. The three subsidiaries, Alcatel-Lucent France, Alcatel-Lucent Trade International and Alcatel Centroamerica pleaded guilty to violating anti-bribery, books and records, and internal controls provisions of the FCPA. The DPA required the company to

⁴⁸⁹ U.S. District Court for the Southern District of Florida, Deferred Prosecution Agreement with Alcatel-Lucent, S.A., 27 Dec. 2010, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-20-10alcatel-lucent-dpa.pdf>

⁴⁹⁰ *Ibid.*

⁴⁹¹ U.S. Department of Justice, Press Release: "Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation," 27 Dec. 2010, <https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt>

hire a corporate monitor. Collectively, the parent and subsidiaries paid penalties totaling \$92 million.

Corporate wrongdoer: General Electric (GE), a multinational industrial corporate conglomerate based in Boston.

Offense resulting in two NPAs: Alleged FCPA violations between 2001 and 2004.⁴⁹²



When GE acquired the airport security technology company InVision Technologies in 2004, it also acquired its new subsidiary's criminal liabilities. Investigations by the DOJ and the SEC revealed "a high probability" that InVision had offered bribes to foreign officials in Thailand, China and the Philippines in order to secure sales of its airport security screening equipment.

Criminal enforcement action (Dec. 6, 2004): The DOJ entered into a one-year NPA with GE⁴⁹³ and a two year-NPA with InVision,⁴⁹⁴ which also was required to pay \$800,000 in penalties. Under the NPA, GE agreed to integrate InVision into an FCPA compliance program, retain an independent consultant to oversee the process and ensure its subsidiary's ongoing cooperation and compliance.⁴⁹⁵

Offense⁴⁹⁶ resulting in NPA: Antitrust violations between 1999 and 2006.⁴⁹⁷

⁴⁹² U.S. Department of Justice, Press Release: "InVision Technologies, Inc. Enters Into Agreement with the United States," 6 Dec. 2004, https://www.justice.gov/archive/opa/pr/2004/December/04_crm_780.htm

⁴⁹³ U.S. Department of Justice, Non-prosecution Agreement with General Electric Company, 3 Dec. 2004, <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-03-04invisiontech-agree-ge.pdf>

⁴⁹⁴ *Ibid.*

⁴⁹⁵ U.S. Department of Justice, Press Release: "InVision Technologies, Inc. Enters Into Agreement with the United States," 6 Dec. 2004, https://www.justice.gov/archive/opa/pr/2004/December/04_crm_780.htm

⁴⁹⁶ Note the crossed chronology of GE's offenses and resulting criminal enforcement actions. While the enforcement action resulting in the first NPA (2004) occurred before the enforcement action resulting in the second NPA (2011), the wrongdoing the DOJ described in the later NPA precedes the wrongdoing the DOJ describes in the earlier NPA.

⁴⁹⁷ U.S. Department of Justice, Press Release: "GE Funding Capital Market Services Inc. Admits to Anticompetitive Conduct by Former Traders in the Municipal Bond Investments Market and Agrees to Pay \$70 Million to Federal and State Agencies," 23 Dec. 2011, <https://www.justice.gov/opa/pr/ge-funding-capital-market-services-inc-admits-anticompetitive-conduct-former-traders>

Traders working for GE Funding Capital Markets, a GE subsidiary, sought to manipulate the bidding process on municipal bonds through unlawful means.

Criminal enforcement action (Dec. 23, 2011): The GE subsidiary entered into a one-year NPA⁴⁹⁸ with the DOJ and agreed to pay \$70 million in restitution, penalties and disgorgement to federal and state agencies and to cooperate fully with further investigations.⁴⁹⁹

Corporate wrongdoer: Hitachi, a Tokyo-based multinational technology corporation.

HITACHI

Offense resulting in NPA: Alleged price fixing / antitrust violations between 1999 and 2002.⁵⁰⁰

Elpida, a corporation formed in 2000⁵⁰¹ as a joint venture between Hitachi and NEC Corporation, conspired to fix prices with other dynamic random access memory (DRAM) manufacturers. Elpida also conspired to rig a bid for its product.

Criminal enforcement action (Jan.30, 2006): Both Hitachi⁵⁰² and NEC Corporation entered NPAs with the DOJ. Elpida pleaded guilty to the price fixing and bid rigging violations and paid an \$84 million fine.⁵⁰³ Three other corporations involved in DRAM price-fixing schemes also pleaded guilty and paid fines. Neither Hitachi nor NEC admitted to wrongdoing.

⁴⁹⁸ U.S. Department of Justice, Non-prosecution Agreement with GE Funding Capital Market Services, Inc., 23 Dec. 2011, <https://www.justice.gov/sites/default/files/atr/legacy/2011/12/27/278581a.pdf>

⁴⁹⁹ U.S. Department of Justice, Press Release: "GE Funding Capital Market Services Inc. Admits to Anticompetitive Conduct by Former Traders in the Municipal Bond Investments Market and Agrees to Pay \$70 Million to Federal and State Agencies," 6 Dec. 2004, (retrieved 25 May 2016), http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/press_release/GEFundingCapitalMarketServices.pdf

⁵⁰⁰ U.S. Department of Justice, Press Release: "Japanese Company Agrees to Plead Guilty to Participating in DRAM Price-Fixing Conspiracy," 30 Jan. 2006, https://www.justice.gov/archive/atr/public/press_releases/2006/214352.pdf

⁵⁰¹ EE Times, "NEC-Hitachi venture announces 'Elpida' name, 0.13-micron DRAM," 28 September 2000, https://www.eetimes.com/document.asp?doc_id=1185954

⁵⁰² U.S. Department of Justice, Cooperation and Non-Prosecution Agreement with Hitachi, Ltd, 20 Jan. 2006, <https://www.justice.gov/atr/hitachi-ltd-cooperation-and-non-prosecution-agreement>

⁵⁰³ U.S. Department of Justice, Press Release: "Japanese Company Agrees to Plead Guilty to Participating in DRAM Price-Fixing Conspiracy," 30 Jan. 2006, https://www.justice.gov/archive/atr/public/press_releases/2006/214352.pdf

Elpida ceased its direct affiliation with Hitachi in 2005, after Hitachi reduced its shareholding stake.⁵⁰⁴

Second offense, resulting in plea agreement: Price fixing violations between April 2001 and March 2004.⁵⁰⁵

Hitachi Displays Ltd., a Hitachi subsidiary participated in a conspiracy with other major thin-film transistor liquid crystal display panel (TFT-LCD) producers to fix the prices of TFT-LCD sold to Dell for use in their notebook computers.⁵⁰⁶

Criminal enforcement action (March 10, 2009): The Hitachi subsidiary pleaded guilty and paid a \$31 million fine.⁵⁰⁷

Three other multinational companies were involved in the price fixing scheme and also paid fines.⁵⁰⁸

Third offense, resulting in plea agreement: Wire fraud, Sherman Antitrust Act violations, price fixing and bid rigging between 2004 and 2009.⁵⁰⁹

Hitachi-LG Data Storage, a joint venture of Hitachi Ltd. And LG Electronics Inc., conspired with other corporations to rig bids on optical disk drives sold to Dell, Hewlett-Packard and Microsoft. Hitachi-LG Data Storage also was charged with scheming to defraud Hewlett-Packard.

⁵⁰⁴ Nystedt, D. "Hitachi sells portion of Elpida Memory," ComputerWorld, 13 Sept. 2015, <https://www.computerworld.com/article/2559519/computer-hardware/hitachi-sells-portion-of-elpida-memory.html>

⁵⁰⁵ U.S. Department of Justice, Press Release: "Hitachi Displays Agrees to Plead Guilty and Pay \$31 Million Fine for Participating in LCD Price-Fixing Conspiracy," 10 Mar, 2009, <https://www.justice.gov/opa/pr/hitachi-displays-agrees-plead-guilty-and-pay-31-million-fine-participating-lcd-price-fixing>

⁵⁰⁶ *Ibid.*

⁵⁰⁷ U.S. District Court, Northern District of California., Plea Agreement with Hitachi Displays Ltd., 22 May 2009, <https://www.justice.gov/atr/case-document/plea-agreement-163>

⁵⁰⁸ *Ibid.*

⁵⁰⁹ U.S. Department of Justice, Press Release: "Hitachi-LG Data Storage Inc. Agrees to Plead Guilty to Participating in Bid-Rigging and Price-Fixing Conspiracies Involving Optical Disk Drives," 30 Sept. 2011, <https://www.justice.gov/opa/pr/hitachi-lg-data-storage-inc-agrees-plead-guilty-participating-bid-rigging-and-price-fixing>

Criminal enforcement action (Sept. 30, 2011): The Hitachi subsidiary pleaded guilty to a 15-count felony charge and paid a \$21.1 million criminal fine.⁵¹⁰

Fourth offense, resulting in plea agreement: Price fixing and bid rigging from at least as early as January 2000 until at least February 2010.⁵¹¹

Hitachi Automotive Systems Ltd., a Hitachi subsidiary that manufactures and sells auto parts, conspired to fix the price of starter motors, alternators, air flow meters, valve timing control devices, fuel injection systems, electronic throttle bodies, ignition coils, inverters and motor generators, when selling the parts to auto manufacturers including Ford, General Motors, Honda, Nissan and Toyota.⁵¹²

Criminal enforcement action (Sept. 26, 2013): The Hitachi subsidiary pleaded guilty to a one-count felony charge and paid a \$195 million criminal fine.⁵¹³

Fifth offense, resulting in plea agreement: Price fixing and big rigging in violation of the Sherman Antitrust Act between November 2005 and September 2009.⁵¹⁴

Hitachi Metals Ltd., a Hitachi subsidiary, conspired to fix prices and rig bids for automotive brake hoses.

Criminal enforcement action (Oct. 31, 2014): Hitachi Metals pleaded guilty and paid a \$1.25 million criminal fine.⁵¹⁵

Sixth offense, resulting in a plea agreement: Price fixing between 2002 and 2010.

⁵¹⁰ *Ibid.*

⁵¹¹ U.S. Department of Justice, Press Release: "Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars," 26 Sept. 2013, <https://www.justice.gov/opa/pr/nine-automobile-parts-manufacturers-and-two-executives-agree-plead-guilty-fixing-prices>

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ U.S. Department of Justice, Press Release: "Hitachi Metals Ltd. Agrees to Plead Guilty for Fixing Prices and Rigging Bids on Automobile Parts Installed in U.S. Cars," 31 Oct. 2014, <https://www.justice.gov/opa/pr/hitachi-metals-ltd-agrees-plead-guilty-fixing-prices-and-rigging-bids-automobile-parts>

⁵¹⁵ *Ibid.*

Hitachi Chemical Co. Ltd., a Hitachi subsidiary, conspired with its competitors to fix prices for electrolytic capacitors.⁵¹⁶

DOJ enforcement action (April 27, 2016): Hitachi Chemical Co. pleaded guilty to a one-count felony charge⁵¹⁷ and was sentenced to pay a criminal fine of \$3.8 million.⁵¹⁸

Seventh offense, resulting in a plea agreement: Price fixing and bid rigging from the mid-1990s until summer 2011.⁵¹⁹

Hitachi Automotive Systems Ltd., conspired to fix the price of shock absorbers and coordinated prices with other suppliers in order to inflate prices when selling the parts to Toyota Motor Corporation and its subsidiaries.⁵²⁰

Criminal enforcement action (Aug. 9, 2016): Again, the Hitachi automotive subsidiary pleaded guilty. The company paid a \$55.48 million criminal fine and the DOJ recommended the corporation be placed on probation for three years.⁵²¹

Corporate wrongdoer: NEC, a Tokyo-based multinational technology corporation.



Offense resulting in NPA: Alleged price fixing / antitrust violations between 1999 and 2002.⁵²² (This offense is the same as Hitachi's first offense, listed above.)

⁵¹⁶ U.S. Department of Justice, Press Release: "Hitachi Chemical Co. Ltd. to Plead Guilty for Fixing Price of Electrolytic Capacitors," 27 April 2016, <https://www.justice.gov/opa/pr/hitachi-chemical-co-ltd-plead-guilty-fixing-price-electrolytic-capacitors>

⁵¹⁷ *Ibid.*

⁵¹⁸ U.S. Department of Justice, Press Release: "Three Companies Agree to Plead Guilty for Fixing Prices of Electrolytic Capacitors," 22 Aug. 2016, <https://www.justice.gov/opa/pr/three-companies-agree-plead-guilty-fixing-prices-electrolytic-capacitors>

⁵¹⁹ U.S. Department of Justice, Press Release: "Hitachi Automotive Systems Agrees to Plead Guilty to Involvement in Anti-Competitive Auto Parts Conspiracy," 9 Aug. 2016, <https://www.justice.gov/opa/pr/hitachi-automotive-systems-agrees-plead-guilty-involvement-anti-competitive-auto-parts>

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² U.S. Department of Justice, Press Release: "Japanese Company Agrees to Plead Guilty to Participating in DRAM Price-Fixing Conspiracy," 30 Jan. 2006, https://www.justice.gov/archive/atr/public/press_releases/2006/214352.pdf

Elpida, a corporation formed in 2000⁵²³ as a joint venture between Hitachi and NEC Corporation, conspired to fix prices with other dynamic random access memory (DRAM) manufacturers. Elpida also conspired to rig a bid for its product. (NEC significantly reduced its Elpida shareholding stake in 2005.⁵²⁴)

Criminal enforcement action (Jan. 30, 2006): Both Hitachi and NEC⁵²⁵ entered NPAs with the DOJ. Elpida pleaded guilty to the price fixing and bid rigging violations and paid an \$84 million fine.⁵²⁶ Three other corporations involved in DRAM price-fixing schemes also pleaded guilty and paid fines. Neither Hitachi nor NEC admitted to wrongdoing.

Second offense, resulting in plea agreement: Antitrust violations between 2002 and 2013.⁵²⁷

NEC Tokin Corporation was a subsidiary of NEC until 2017, when it was acquired by KEMET Corporation and renamed TOKIN.⁵²⁸ The former NEC subsidiary conspired with its competitors to fix prices for electrolytic capacitors, a common component in consumer electronic products.⁵²⁹

Criminal enforcement action (Sept. 2, 2015): NEC pleaded guilty to a one-count felony charge and agreed to pay a \$13.8 million criminal fine.

⁵²³ EE Times, "NEC-Hitachi venture announces 'Elpida' name, 0.13-micron DRAM," 28 Sept. 2000, https://www.eetimes.com/document.asp?doc_id=1185954

⁵²⁴ Williams, Martyn, "NEC to cut stake in Elpida Memory," InfoWorld, 30 Aug. 2005, <https://www.infoworld.com/article/2669562/computer-hardware/nec-to-cut-stake-in-elpida-memory.html>

⁵²⁵ U.S. Department of Justice, Cooperation and Non-prosecution Agreement with NEC Corporation, 20 Jan. 2006, <https://www.justice.gov/atr/nec-corporation-cooperation-and-non-prosecution-agreement>

⁵²⁶ U.S. Department of Justice, Press Release: "Japanese Company Agrees to Plead Guilty to Participating in DRAM Price-Fixing Conspiracy," 30 Jan. 2006, https://www.justice.gov/archive/atr/public/press_releases/2006/214352.pdf

⁵²⁷ U.S. Department of Justice, Press Release: "NEC Tokin Corporation to Plead Guilty and Pay \$13.8 Million for Fixing Price of Electrolytic Capacitors," 2 Sept. 2015, <https://www.justice.gov/opa/pr/nec-tokin-corporation-plead-guilty-and-pay-138-million-fixing-price-electrolytic-capacitors>

⁵²⁸ KEMET, Press Release: "KEMET Completes Acquisition of NEC TOKIN," 19 April 2017, <http://newsroom.kemet.com/news-releases/news-release-details/kemet-completes-acquisition-nec-tokin>

⁵²⁹ U.S. Department of Justice, Press Release: "NEC Tokin Corporation to Plead Guilty and Pay \$13.8 Million for Fixing Price of Electrolytic Capacitors," 2 Sept. 2015, <https://www.justice.gov/opa/pr/nec-tokin-corporation-plead-guilty-and-pay-138-million-fixing-price-electrolytic-capacitors>

Other Corporations

Corporate wrongdoer: ConAgra Foods, which is based in Chicago and changed its name to ConAgra Brands in 2016.⁵³⁰

Offense resulting in DPA: Alleged immigration violations in 1995.

Managers at a ConAgra poultry plant in Kentucky knowingly employed four undocumented immigrants.⁵³¹



Criminal enforcement action (April 16, 1998): ConAgra Poultry Company, a ConAgra subsidiary, acknowledged its responsibility for the wrongdoing and agreed to pay \$100,000. The subsidiary entered a three-year DPA and agreed to commit no further violations.⁵³² So long as the corporation complied with the terms of the agreement, the U.S. Attorney's Office for the Western District of Kentucky agreed not to prosecute.⁵³³

Second offense, resulting in plea agreement: Environmental violations between 1998 and 2003.

ConAgra Foods failed to report and maintain proper documentation with regards to the temperature of water being discharged from a food processing facility. Temperatures higher than were allowed were documented in a logbook at the facility but not relayed as required to the Minnesota Pollution Control Agency.⁵³⁴

Criminal enforcement action (Jan. 18, 2006): ConAgra pleaded guilty to one count of

⁵³⁰ Conagra Brands, Inc. Profile, Yahoo! Finance, (accessed 11 June 2019), <https://finance.yahoo.com/quote/CAG/profile/>

⁵³¹ Vorman, Julie "ConAgra pays \$223,000 in probe of illegal workers," Reuters, 16 Apr. 1998, accessed via Thompson Reuters Westlaw search.

⁵³² U.S. District Court for the Western District of Kentucky, Deferred Prosecution Agreement with Conagra Poultry Company, 16 Apr. 1998, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/conagra.pdf>

⁵³³ *Ibid.*

⁵³⁴ U.S. Environmental Protection Agency, Press Release: "ConAgra Signs Clean Water Act Permit Plea Agreement for Violations at Minnesota Facility," 17 Aug. 2005, https://archive.epa.gov/epapages/newsroom_archive/newsreleases/af4f040e07fb0f9f85257060006bc0b5.html

violating the Clean Water Act and was sentenced to pay a criminal fine of \$138,513 and \$55,000 each to the National Park Foundation and the Friends of the Mississippi River, plus \$1,487 in restitution to the Minnesota Pollution Control Agency.⁵³⁵

Third offense, resulting in plea agreement: Food safety violations between 2006 and 2007.⁵³⁶

ConAgra Grocery Products Company, a ConAgra Foods subsidiary, shipped tainted Peter Pan brand peanut butter, which was prepared under conditions that could allow it to be contaminated by salmonella.⁵³⁷

Criminal enforcement action (May 20, 2015): The ConAgra subsidiary pleaded guilty, paid a criminal fine of \$8 million, and forfeited assets of \$3.2 million. At the time, the criminal fine was the largest ever in a food safety case.⁵³⁸

Corporate wrongdoer: Las Vegas Sands, a hotel and casino developer and operator based in Las Vegas.



Offense resulting in NPA: Alleged Bank Secrecy Act compliance failures between October of 2006 and April of 2007.⁵³⁹

Officials at Las Vegas Sands' Venetian-Palazzo hotel complex failed to file suspicious activity reports with regards to wire transfers of more than \$45 million and cashiers checks deposits of \$13 million from Zhenli Ye Gon, at the time the casino's largest ever "all-cash, up-front

⁵³⁵ U.S. Department of Justice, Press Release: "Conagra Foods Sentenced for Violating the Clean Water Act," 18 Jan. 2006, https://www.justice.gov/archive/opa/pr/2006/January/06_enrd_024.html

⁵³⁶ U.S. Department of Justice, Press Release: "ConAgra Subsidiary Agrees to Enter Guilty Plea in Connection with 2006 through 2007 Outbreak of Salmonella Poisoning Related to Peanut Butter," 20 May 2015, <https://www.justice.gov/opa/pr/conagra-subsidiary-agrees-enter-guilty-plea-connection-2006-through-2007-outbreak-salmonella>

⁵³⁷ U.S. District Court for the Middle District of Georgia, Albany Division, Plea Agreement with Conagra Grocery Products Company, LLC, 20 May 2015, <https://www.justice.gov/file/440651/download>

⁵³⁸ U.S. Department of Justice, Press Release: "ConAgra Subsidiary Agrees to Enter Guilty Plea in Connection with 2006 through 2007 Outbreak of Salmonella Poisoning Related to Peanut Butter," 20 May 2015, <https://www.justice.gov/opa/pr/conagra-subsidiary-agrees-enter-guilty-plea-connection-2006-through-2007-outbreak-salmonella>

⁵³⁹ U.S. District Court for the Central District of California, Deferred Prosecution Agreement with Las Vegas Sands, 26 Aug. 2013, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/las-vegas-sands.pdf>

gambler.” Federal officials allege Las Vegas Sands helped Ye Gon transfer funds in ways that would avoid government scrutiny, and that the scheme was conducted to launder money earned from illegal drug trafficking activities.⁵⁴⁰

Criminal enforcement action (Aug. 27, 2013): Las Vegas Sands entered a two-year NPA⁵⁴¹ with the DOJ and agreed to pay \$47,400,300 to the U.S. Treasury. The NPA required Las Vegas Sands to reconfigure and improve its Bank Secrecy Act and suspicious activity report compliance efforts.

Second offense, resulting in NPA: Alleged FCPA violations from 2006 through 2009.⁵⁴²

According to the DOJ, members of Las Vegas Sands’ executive team knowingly and willfully failed to put in place internal compliance systems to ensure the legitimacy of payments the corporation was making to a consultant, who was paid \$5.8 million, ostensibly to promote the business in China and Macao. Las Vegas Sands continued to make payments to the consultant after staff and an outside auditor raised concerns about the payments. One employee in the finance department who tried to raise concerns about the suspicious payments was fired.⁵⁴³

Criminal enforcement action (Jan. 19, 2017): Las Vegas Sands entered another NPA with the DOJ, this one with a term of three years,⁵⁴⁴ and agreed to pay a criminal penalty of \$6.96 million.⁵⁴⁵ According to the press release, the individuals responsible for the conduct are no longer employed at the corporation, which underwent extensive remedial measures

⁵⁴⁰ U.S. District Court for the Central District of California, Press Release: “Operator Of Venetian Resort In Las Vegas Agrees To Return Over \$47 Million After Receiving Money Under Suspicious Circumstances,” 27 Aug. 2013, <https://www.justice.gov/usao-cdca/pr/operator-venetian-resort-las-vegas-agrees-return-over-47-million-after-receiving-money>

⁵⁴¹ U.S. District Court for the Central District of California, Deferred Prosecution Agreement with Las Vegas Sands, 26 Aug. 2013, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/las-vegas-sands.pdf>

⁵⁴² U.S. Department of Justice, Press Release: “Las Vegas Sands Corporation Agrees to Pay Nearly \$7 Million Penalty to Resolve FCPA Charges Related to China and Macao,” 19 Jan. 2017, <https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related>

⁵⁴³ *Ibid.*

⁵⁴⁴ U.S. Department of Justice, Deferred Prosecution Agreement with Las Vegas Sands Corp., 17 Jan. 2017, <https://www.justice.gov/opa/press-release/file/929836/download>

⁵⁴⁵ U.S. Department of Justice, Press Release: “Las Vegas Sands Corporation Agrees to Pay Nearly \$7 Million Penalty to Resolve FCPA Charges Related to China and Macao,” 19 Jan. 2017, <https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related>

Appendix B

Table: The 39 Fortune 500 companies that have received a DPA or NPA, 16 of which received a subsequent U.S. criminal enforcement action.

Corporation	Fortune 500 Rank	Revenue	Received DPA or NPA	Subsequent Enforcement
Berkshire Hathaway	4	\$ 247 billion	yes (General Reinsurance)	no
CVS Health	8	\$194 billion	yes	no
Chevron	11	\$166 billion	yes	yes
General Motors	13	\$147 billion	yes	no
Alphabet	15	\$137 billion	yes (Google)	no
JPMorgan Chase	18	\$131 billion	yes	yes
Archer Daniels Midland	19	\$64 billion	yes	yes
General Electric	21	\$120 billion	yes	yes
Bank of America	25	\$110 billion	yes (Merrill Lynch)	yes
Johnson & Johnson	37	\$82 billion	yes	no
United Parcel Service	41	\$72 billion	yes	no
United Technologies	46	\$67 billion	yes	no
Prudential Financial	50	\$63 billion	yes	yes
HP	55	\$58 billion	yes	no
Pfizer	61	\$54 billion	yes	yes
AIG	66	\$47 billion	yes	yes
Merck	76	\$42 billion	yes	yes
United Continental Holdings	78	\$41 billion	yes	no
Tyson Foods	80	\$40 billion	yes	yes
Halliburton	127	\$24 billion	yes	yes
Bristol-Myers Squibb	138	\$23 billion	yes	yes
WellCare Health Plans	155	\$20 billion	yes	no
PNC Financial Services	159	\$20 billion	yes	no
Bank of New York Mellon	163	\$19 billion	yes (both pre-merged entities Bank of New York and Mellon Financial)	no
Tenet Healthcare	172	\$18 billion	yes	no

Corporation	Fortune 500 Rank	Revenue	Received DPA or NPA	Subsequent Enforcement
PPG Industries	205	\$15 billion	yes	no
Las Vegas Sands	230	\$14 billion	yes	yes
Stryker	233	\$14 billion	yes	yes
State Street Corp.	247	\$13 billion	yes	no
FirstEnergy	263	\$12 billion	yes	no
Corning	279	\$11 billion	yes	no
Baxter International	286	\$11 billion	yes	no
SunTrust Banks	304	\$10 billion	yes	no
Williams	348	\$9 billion	yes	no
Jones Financial (Edward Jones)	356	\$9 billion	yes	no
Conagra Brands	386	\$8 billion	yes	yes
Zimmer Biomet Holdings	387	\$8 billion	yes	yes
Ralph Lauren	473	\$6 billion	yes	no
Western Union	498	\$6 billion	yes	no

Source: Fortune 500 list⁵⁴⁶ cross-referenced with Duke University/University of Virginia Corporate Prosecution Registry

⁵⁴⁶ <https://fortune.com/fortune500/2019/>

Appendix C

Table: The 43 Global Fortune 500 Companies that have received a DPA or NPA, 25 of which received subsequent U.S. criminal enforcement actions.

Corporation	Global 500 Rank (2019)	Revenue	Received DPA or NPA	Subsequent Offense
Walmart	1	\$514 billion	yes	no
Royal Dutch Shell	3	\$397 billion	yes	no
BP	7	\$304 billion	yes	yes
Toyota Motor	10	\$273 billion	yes	no
Berkshire Hathaway	12	\$248 billion	yes (General Reinsurance)	no
Daimler	18	\$198 billion	yes	yes
CVS Health	19	\$195 billion	yes	no
Total	20	\$184 billion	yes	no
Chevron	28	\$166 billion	yes	yes
General Motors	32	\$147 billion	yes	no
Alphabet	37	\$137 billion	yes (Google)	no
JPMorgan Chase & Co.	41	\$131 billion	yes	yes
General Electric	48	\$120 billion	yes	yes
Deutsche Telekom	90	\$89 billion	yes	no
Credit Agricole	91	\$88 billion	yes	yes
HSBC Holdings	99	\$86 billion	yes	yes
Hitachi	102	\$86 billion	yes	yes
BNP Paribas	104	\$84 billion	yes	yes
Johnson & Johnson	109	\$82 billion	yes	no
AIG	119	\$76 billion	yes	yes
UPS	132	\$72 billion	yes	no
Marubeni	147	\$67 billion	yes	yes
United Technologies	148	\$67 billion	yes	no
Archer Daniels Midland	155	\$64 billion	yes	yes
Prudential Financial	156	\$63 billion	yes	yes
HP	173	\$58 billion	yes	no
Societe Generale	174	\$58 billion	yes	yes
Pfizer	198	\$54 billion	yes	yes
Deutsche Bank	239	\$47 billion	yes	yes
Bayer	240	\$47 billion	yes (Monsanto)	no

Corporation	Global 500 Rank (2019)	Revenue	Received DPA or NPA	Subsequent Offense
Volvo	253	\$45 billion	yes	no
UBS Group	274	\$43 billion	yes	yes
Lufthansa Group	284	\$42 billion	yes (Lufthansa Technik)	no
Merck	285	\$42 billion	yes	yes
United Airlines Holdings	293	\$41 billion	yes	no
GlaxoSmithKline	296	\$41 billion	yes	yes
Tyson Foods	306	\$40 billion	yes	yes
Barclays	320	\$38 billion	yes	yes
ABB	328	\$37 billion	yes	yes
Lloyds Banking Group	353	\$35 billion	yes	yes
Credit Suisse Group	360	\$34 billion	yes	yes
DZ Bank	392	\$32 billion	yes	no
NEC	470	\$26 billion	yes	yes

Source: Fortune Global 500 list⁵⁴⁷ cross-referenced with Duke University/University of Virginia Corporate Prosecution Registry

⁵⁴⁷ <https://fortune.com/global500/>