GIBSON DUNN

January 4, 2011

2010 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

To Our Clients and Friends:

The United States Department of Justice ("DOJ") has long had discretion to defer or decline prosecution of a corporation, for a host of reasons. But over the past decade, the formalization of the declination process for corporations via deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") has evolved rapidly.[1] Indeed, these agreements are now one of two mainstays of the DOJ's efforts to combat corporate crime.[2] Although there was only one publicly reported corporate DPA in 2000, this year we identified thirty-two DPAs and NPAs entered by the DOJ. The increased usage of DPAs and NPAs likely stems from these agreements' perceived potential to remedy and reform corporate misconduct while avoiding some of the collateral consequences that often accompany traditional corporate prosecutions, such as suspension from participation in government contracting or healthcare programs and limitations on licensure requirements--consequences which can have a devastating impact on the fundamental operations of a business, impacting innocent employees and shareholders.

Although DPAs and NPAs have traditionally been the domain of federal criminal prosecutors, this year the Securities and Exchange Commission ("SEC") also entered the corporate DPA and NPA arena for the first time. On January 13, 2010, the SEC unveiled a new Cooperation Initiative, which includes the potential for a deferred or non-prosecution agreement for cooperating individuals or entities. In December, the SEC announced its first agreement with a corporation under that new Initiative--an NPA with Carter's, Inc. resolving allegations that the company's former Executive Vice President engaged in financial fraud and insider trading.

As DPAs and NPAs have increased in prominence as a government enforcement tool, the agreements have drawn increased scrutiny from Congress, academics, practitioners, and, this year, the judiciary. Among the most common criticisms are concerns that (a) the DPA/NPA regime inappropriately excuses corporate criminal behavior; (b) by continually entering DPAs and NPAs, the DOJ can shield its expansive interpretation of important statutes from judicial review; (c) the factors that determine whether the DOJ grants a DPA or NPA are not transparent; and (d) the use of corporate DPAs and NPAs leads to fewer prosecutions of culpable individuals within the corporation.

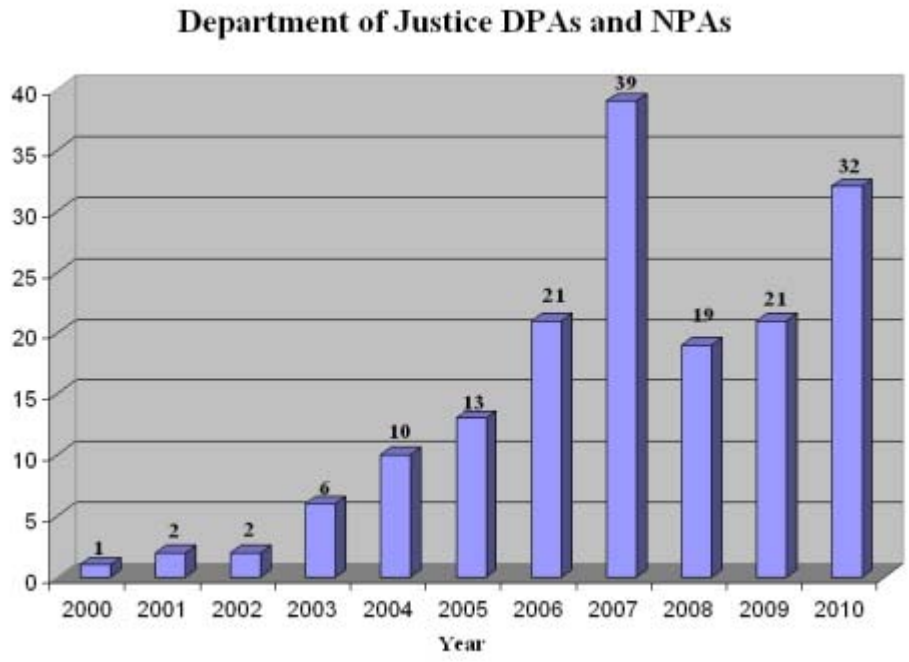
The DOJ has addressed many of these criticisms and, in our view, has appropriately authorized deployment of these agreements to conclude myriad investigations.

Gibson Dunn has been at the forefront in dealing with all aspects of DPAs and NPAs, representing corporations in some of the earliest agreements entered, as well as some of the most prominent agreements in recent years. Our attorneys also have written extensively on the use and policy implications of the agreements. This client update, part of our bi-annual

update on DPAs and NPAs, provides an overview of the DPAs and NPAs entered during 2010 and examines trends in the agreements and implications for the future.

Deferred and Non-Prosecution Agreements in 2010

According to our review, the DOJ entered thirty-two agreements during 2010.[3] This marks a significant increase from 2009, when the DOJ entered into twenty-one agreements, and from 2008, when we identified nineteen agreements.[4] As illustrated in the graph below, 2010 saw the second most agreements of any year in the past decade. The only year with more agreements was 2007, when the DOJ resolved numerous FCPA investigations related to the Iraq Oil-for-Food program as well as various healthcare fraud investigations in the orthopedic manufacturing industry.



The thirty-two agreements entered by the DOJ during 2010 resulted in an astounding total of over $2.314 billion in monetary penalties, resolving allegations regarding fourteen different types of violations with both public and private companies. In addition to the thirty-two agreements entered by the DOJ during 2010, the SEC entered into its first-ever corporate NPA this year, bringing the total for the DOJ and SEC combined to thirty-three agreements.

The chart below summarizes the agreements that the DOJ and SEC entered this year. The complete text of each agreement is hyperlinked in the chart, providing a more detailed explanation of the terms and conditions of each agreement.

2010 Deferred and Non Prosecution Agreements							
Company	**Violation**	**Type**	**DPA/ NPA Penalty**	**Total DOJ Penalty***	**Monitor**	**Self-Disclosure****	**Term**
ABB Ltd.	FCPA	DPA	$1.92 million	$58.3 million	No	Yes	3 years
ABN Amro Bank N.V.	International Emergency Economic Powers Act (Sanctions Violation)	DPA	$500 million	$500 million	No	No	1 year
Alliance One International Inc.	FCPA	NPA	None	$19.45 million	Yes	Yes	3 years
Barclays Bank	Trading with the Enemy Act and International Emergency Power Act	DPA	$149 million	$298 million	No	Yes	2 years
Carter's, Inc.***	Financial Fraud	NPA	None	None	No	Yes	N/A
Ceramic Protection Corp. of America	False Statements (Gov't Contracts)	DPA	$267,000	$267,000	No	No	14 months
CVS Pharmacy, Inc.	Combat Methamphetamine Epidemic Act	NPA	$77.6 million	$77.6 million	No	No	3 years
Daimler AG	FCPA	DPA	$93.6 million	$185 million	Yes	Yes	2 years and 7 days
Daimler Chrysler China Ltd.	FCPA	DPA	None	$185 million	Yes	Yes	2 years and 7 days
Deutsche Bank	Tax Shelters	NPA	$553.6 million	$553.6 million	Yes	No	2 years

2010 Deferred and Non Prosecution Agreements							
Exactech	Federal Anti-Kickback Statute (Healthcare Fraud)	DPA	None	$2.99 million	Yes	No	1 year
General Reinsurance Corp.	Fraud (Insurance)	NPA	$19.5 million	$80 million	No	Yes	3 years
Kos Pharmaceuticals	Federal Anti-Kickback Statute (Healthcare Fraud)	DPA	$3.36 million	$41.52 million	No	Yes	6 months
Louis Berger Group	Fraud	DPA	$18.7 million	$69.3 million	Yes	No	2 years
MetLife	False Statements (ERISA)	NPA	$13.5 million	$32.5 million	No	Yes	2 years
Noble Corp.	FCPA	NPA	$2.6 million	$8.18 million	No	Yes	3 years
Panalpina World Transport Ltd.	FCPA	DPA	$70.56 million	$81.92 million	No	No	3 years and 7 days
PPG	Export Control	NPA	$2 million	$2,032,319	No	Yes	2 years
Pride International	FCPA	DPA	$32.63 million	$56.16 million	No	Yes	3 years and 7 days
RAE Systems Inc.	FCPA	NPA	$1.7 million	$3 million	No	Yes	3 years
Schiavone Construction	Fraud	NPA	$20 million	$22.37 million	No	No	3 years
Shell Nigeria	FCPA	DPA	$30 million	$48.15 million	No	No	3 years and 7 days

2010 Deferred and Non Prosecution Agreements							
Shoppers Food Warehouse Corp.	Travel Act	DPA	$2.5 million	$2.5 million	No	No	2 years
Sirchie Acquisition Co., LLC	International Emergency Economic Powers Act (Export Violation)	DPA	$12.6 million	$12.6 million	Yes	No	3 years
Snamprogetti Netherlands B.V.	FCPA	DPA	$240 million	$365 million	No	No	2 years
Sportingbet PLC	Internet Gambling	NPA	$33 million	$33 million	No	No	3 years
Technip S.A.	FCPA	DPA	$240 million	$338 million	Yes	No	2 years
Tidewater Marine International	FCPA	DPA	$7.35 million	$15.67 million	No	Yes	3 years and 7 days
Transocean	FCPA	DPA	$13.44 million	$20.71 million	No	No	3 years and 7 days
Universal	FCPA	NPA	None	$4.4 million	Yes	No	3 years and 7 days
Wachovia	Money Laundering	DPA	$160 million	$160 million	No	No	1 year
Wright Medical Technology, Inc.	Federal Anti-Kickback Statute (Healthcare Fraud)	DPA	None	$7.9 million	Yes	No	1 year

2010 Deferred and Non Prosecution Agreements
* Includes monetary penalties from the agreement itself, plus other monetary penalties arising out of the same facts that gave rise to the agreement, such as guilty pleas of associated entities, and/or settlements with the SEC, HHS, or state prosecuting and regulatory entities. ** These agreements specifically emphasized the fact that the company self-disclosed violations as a supporting rationale for the DPA or NPA. *** This NPA was entered by the SEC, rather than the DOJ. To ensure consistency with previous Year-End and Mid-Year updates, this agreement is not included in the summary statistics and graphs provided in this update.

Explaining the Increase in Deferred and Non-Prosecution Agreements

There is no denying the increase in the use of DPAs in recent years. For context, during the first five years of this decade, the average number of DPAs was just over four per year. In contrast, over the last five years, the average number of DPAs increased more than six-fold to an average of over twenty-six agreements per year. Although this year's increase in the number of agreements entered during 2010 can be attributed to many factors, the increase is partially attributable to (a) the DOJ's increased resources and more aggressive stance on corporate crime; (b) an increased emphasis on FCPA enforcement; (c) the frequency of voluntary disclosure of potential misconduct by corporations; and (d) the recent expansion of DPA and NPA use beyond the DOJ.

Focus on Corporate Crime

In the wake of the Bernard Madoff fraud case, the largest investor fraud in U.S. history, the White House and the DOJ have renewed their focus on fighting corporate fraud and white collar crime. In November 2009, President Obama issued an Executive Order establishing the interagency Financial Fraud Enforcement Task Force, to be lead by the DOJ. In addition, the federal budget for 2010 "represents the largest-ever, single-year enhancement to support and expand the Justice Department's financial fraud programs."[5] The 2011 budget will continue this expansion, as it requests a twenty-three percent increase over the already elevated 2010 budget for economic fraud enforcement. In 2010, the DOJ also ramped up its enforcement efforts by "adding a number of attorney's to the Fraud Section--lawyers who will be deployed immediately to prosecute crimes like securities fraud, health care fraud, and foreign bribery under the Foreign Corrupt Practices Act."[6]

Increased FCPA Enforcement

In November 2010, Assistant Attorney General Lanny Breuer announced a "new era of FCPA enforcement" at the 24th National Conference on the FCPA.[7] He explained that the DOJ's "FCPA enforcement is stronger than it's ever been--and getting stronger." As discussed in greater detail below, FCPA violations represented almost fifty percent of the agreements entered this year, and have consistently represented a large portion of the DPAs over the last several years. Therefore, it should come as no surprise that, as the DOJ has increased its enforcement efforts under the FCPA, there has been a corresponding increase in the number of DPAs to resolve potential FCPA prosecutions. Assistant Attorney General Breuer also noted that "in the past year, [the DOJ has] imposed the most criminal penalties in FCPA-related cases in any single 12-month period--ever." Indeed, eight out of ten of the largest fines imposed for FCPA violations occurred during 2010. Breuer stressed that this "new era" of FCPA enforcement is "here to stay." That means DPAs and NPAs to resolve FCPA allegations are probably here to stay as well.

Voluntary Disclosure

The DOJ has often indicated that it will "give corporations 'meaningful credit' for voluntarily disclosing their conduct and cooperating with [DOJ] investigations." In some instances, "meaningful credit" may result in a DPA or an NPA. Indeed, thirteen of the thirty-two agreements entered this year noted that the company's voluntarily self-disclosure of its conduct was part of the reason for the agreement. Self-disclosure also may play a role in whether a company receives a DPA versus an NPA. During 2010, approximately half of the NPAs entered involved self-disclosure, while only thirty-five percent of DPAs involved self-disclosure.

SEC's Groundbreaking Use of DPAs and NPAs

On January 13, 2010, the Securities and Exchange Commission announced a new Cooperation Initiative--"a series of measures to further strengthen its enforcement program by encouraging greater cooperation from individuals and companies in the agency's investigations and enforcement actions."[8] As part of this Initiative, the SEC instituted "new cooperation tools," including cooperation agreements, deferred prosecution agreements, and non-prosecution agreements. Although the DOJ has used DPAs and NPAs for many years, these agreements were "not previously available in SEC enforcement matters." Although the import of DPAs and NPAs into the civil enforcement context is an important development, it is not surprising given that Robert Khuzami, Director of Enforcement for the SEC, is a seasoned former federal prosecutor who is familiar with such agreements. In pubic statements, he repeatedly has emphasized his intention to bring the SEC's Enforcement Division more in line with the DOJ's prosecutorial model.

On December 17, 2010, the SEC entered its first corporate agreement, an NPA, with Carter's, Inc. The NPA identified the company's voluntary disclosure of the misconduct, "exemplary and extensive" cooperation with the SEC investigation, and the "relatively

isolated nature of the unlawful conduct" as factors that led the SEC to agree not to prosecute the company.

The DOJ's focus on corporate crime generally, and FCPA violations in particular, as well as the SEC's new ability to enter into DPAs and NPAs, certainly contributed to the large number of agreements this year, and likely will contribute to continued large numbers of agreements in the future.

Trends in the 2010 Deferred and Non-Prosecution Agreements

The Types of Conduct Resulting in DPAs

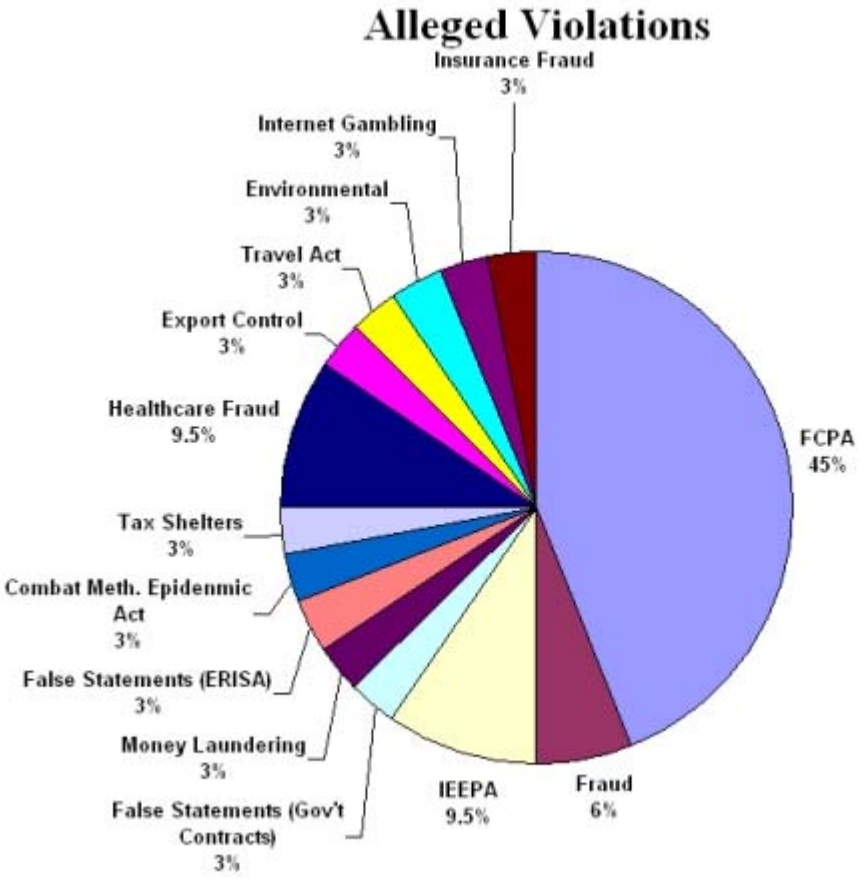
As discussed above, DPAs and NPAs are particularly prevalent in resolving alleged FCPA violations. In 2010, FCPA violations accounted for almost half of the total agreements--fourteen of the thirty-two agreements. By comparison, FCPA violations accounted for roughly twenty-four percent of the agreements in 2009, thirty-seven percent in 2008, twenty-six percent in 2007, and only nine percent in 2006.

Six of the agreements entered during 2010 relate to supply chain logistics. Panalpina World Transport Ltd., a global freight forwarding and logistics services company, admitted to a bribing foreign officials in numerous countries on behalf of several customers in the oil and gas industry.[9] Five of Panalpina's customers also entered into agreements with the DOJ.[10] Each of these corporations entered into a DPA, except Noble Corporation which received an NPA. A DOJ press release explained that the granting of the "non-prosecution agreement recognizes Noble's early voluntary disclosure, thorough self-investigation of the underlying conduct, full cooperation with the department and extensive remedial measures undertaken by the company." Interestingly, none of the six corporations were required to submit to an independent monitor. Instead, the DOJ required the companies to self-monitor, providing the DOJ with an initial report regarding compliance program implementation and annual follow-up reports for the duration of the agreement.

As in previous years, healthcare-related DPAs also were prominent this year. Agreements resolving allegations of Medicare fraud were the second most prevalent type of agreement in 2010, constituting eleven percent of the total agreements. Of course, curbing healthcare fraud is a top DOJ priority, and accordingly, resolutions by corporate DPAs and NPAs are a natural consequence.

The healthcare-related agreements entered during 2010 were similar to previous years. For example, Exactech and Wright Medical were both charged with conspiring to violate anti-kickback laws by entering into "consulting agreements" with orthopedic surgeons in order to induce the surgeons to use their hip and knee reconstruction and replacement products. This is reminiscent of 2007, when the DOJ resolved an industry-wide investigation into the practices of orthopedic manufacturers, which resulted in agreements with five companies.[11] And, as was the case with the five 2007 agreements, Exactech and Wright Medial's DPAs both contain an independent monitor requirement. These companies also entered into Corporate Integrity Agreements ("CIAs") with the Department of Health and Human Services ("HHS") which required a variety of compliance undertakings.

The remainder of the allegations that were resolved through corporate agreements during 2010 are quite diverse. As depicted in the graph below, the thirty-two agreements entered this year reflect fourteen different allegations. The variation of offenses increased this year as compared to 2009, when only seven types of allegations were represented.



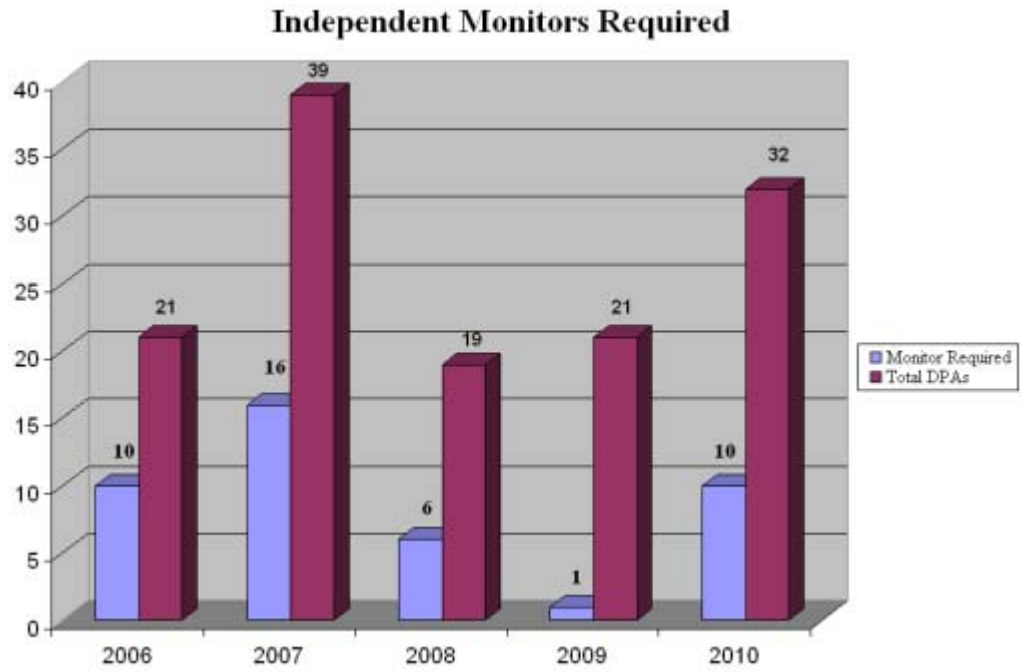
Critiques of the Agreements and the DOJ's Response

As the use of DPAs and NPAs has proliferated, the DOJ has faced several criticisms with regard to the use and administration of these agreements. This year, the DOJ took several steps demonstrating not only that it is listening to these criticisms, but also that it is willing to make changes in an attempt to address some of the most pressing concerns.

Criticisms Regarding the Use of Corporate Monitors

The DOJ's use of corporate monitors has faced heavy scrutiny over the past several years. This year was no exception. As we discussed in our 2010 Mid-Year Update, in March 2010, United States District Court Judge Ellen S. Huvelle refused to initially approve the DOJ's agreement with Innospec. Instead, she questioned who the monitor would be and explained that "[she had] an obligation to the public to find out" how the monitorship

would "work."[12] Judge Huvelle further stated that "it's an outrage, that people get $50 million to be a monitor."



But despite criticism and increased scrutiny, monitors still appear to play an important and prevalent role in the DOJ DPAs and in corporate compliance actions. As illustrated by the above graph, of the thirty-two agreements entered during 2010, ten--almost one-third of the agreements--contained a monitor requirement. This is a dramatic increase from 2009 when, following heavy criticism of the DOJ process for the selection of monitors, only one agreement out of twenty-one had a monitor requirement. This year, the clear trend was that monitors were more likely to be a part of the terms of an agreement when a DPA is entered, as opposed to an NPA. Of the ten agreements requiring a monitor in 2010, only three--the agreements with Alliance One, Deutsche Bank, and Universal--involved NPAs.[13]

Although the DOJ previously attempted to address concerns regarding its use of monitors, most notably issuing the Morford Memorandum in 2008, in 2010 the Department continued to add clarity about the use of monitors in DPA agreements. On May 25, 2010, Acting Deputy Attorney General Gary G. Grindler released a memorandum providing "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations." This guidance added to the Morford Memorandum a "tenth basic principle to guide prosecutors in drafting agreements." This additional principle directed that "[a]n agreement should explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case." This addition to the U.S. Attorney's Manual is one example of the DOJ responding to critiques.

Another example of the DOJ's efforts to respond to criticism regarding the use of monitors appears to be the use of a self-monitoring arrangement. On several occasions in 2010, federal prosecutors opted against an independent monitor, and instead implemented a "Corporate Compliance Reporting" requirement. Under this arrangement, the corporation is required to provide the DOJ with an initial report and annual written follow-up reports regarding their remediation and implementation of the revised corporate compliance program for the term of the agreement. All six of the agreements related to Panalpina involved a self-monitoring arrangement, rather than an independent monitor. Three of these companies--Noble Corporation, Pride International and Tidewater Marine International--self-disclosed the violations that resulted in the agreement. Overall, four of the eight companies (fifty percent) that received a self-monitoring arrangement voluntarily self-disclosed the misconduct to the DOJ. We expect that the DOJ may continue this trend to try to further entice companies to self-disclose alleged violations by providing the company with the "benefit" of a self-monitoring arrangement, as opposed to the more expensive and burdensome requirements of an independent monitor.

Criticisms Regarding Decisional Clarity

For many years the DOJ also has faced critiques regarding the lack of clarity surrounding the factors considered when deciding whether to enter a DPA or an NPA.[14] In October 2010, the OECD publicly validated those concerns when it released its Phase 3 review of the United States' anti-bribery enforcement. In its report, the OECD noted that "[g]uidance on when prosecutors may use PAs, DPAs and NPAs exists but is slightly uneven and indirect." The OECD also noted that "[p]ublishing more detailed reasons for entering into DPAs and NPAs would give more insight into the DOJ's choice of settlement agreements and, thus, enhance accountability and transparency of the process."

During 2010, the DOJ has made improvements in this arena as well. Many of the 2010 agreements included a separate section titled "Relevant Considerations" that lists the "facts and circumstances" presented by each cases that federal prosecutors considered when entering into the agreement. This section does not provide a complete list of all factors considered, however, nor does it provide the weight given to any particular factor. This is particularly important with respect to voluntary disclosures. Although the more recently entered agreements often note when a corporation has voluntarily disclosed misconduct, they do not explicitly specify how much weight is given to this factor in deciding whether to enter an agreement or explain what effect, if any, voluntary disclosure had on the terms of the agreement or the choice between a DPA or an NPA. Further clarification will aid corporations in understanding the consequences of self-disclosure.

The judiciary also has been more active in voicing critiques regarding decisional clarity during 2010. In addition to Judge Huvelle's comments regarding corporate monitors, United States District Judge Emmet G. Sullivan voiced several concerns. During the hearing regarding approval of the DOJ's DPA with Barclays Bank, Judge Sullivan questioned whether the DPA was a sufficient penalty, and he criticized the DOJ for not bringing charges against the individuals who committed the acts. The DOJ defended the agreement, asserting that the $298 million forfeiture by Barclays was "well in excess" of

the amount of money the bank earned from its conduct. The DOJ also has indicated its intention to bring further actions against culpable individuals as well as against their corporate entities.

Criticisms Regarding the Use of DPAs and NPAs for FCPA Violations

Nowhere has the DOJ faced greater criticism regarding its use of DPAs and NPAs than in the FCPA context. Some of the major critiques were highlighted during a recent Senate Judiciary Subcommittee on Crimes and Drugs hearing titled "Examining Enforcement of the Foreign Corrupt Practice Act." The hearing highlighted the need for increased clarity about the meaning of the Act's terms. Senator Amy Klobuchar (D-MN), for example, suggested that additional guidelines from the DOJ on the FCPA's requirements may be necessary to give companies more clarity on what types of activities are covered by the law. She explained that this kind of clarity will incentivize corporations to adopt appropriate compliance procedures and voluntarily disclose the violations of rogue employees.

In response, Deputy Assistant Attorney General Greg Andres explained that the DOJ Fraud Section, the division of the DOJ charged with primary enforcement of the FCPA, makes all of its DPAs and NPAs publicly available to provide just such clarity to corporations. By way of example, the "Statement of Facts" provided in each agreement has become increasingly long and detailed, outlining the alleged misconduct with specificity. Arguably, this level of specificity provides corporations with additional information with which to determine which conduct could result in a violation of the FCPA. But because FCPA allegations against corporations rarely, if ever, go to trial, and DPAs and NPAs are subject only to minimal judicial scrutiny, the DOJ's sometime expansive interpretations of the FCPA is never truly tested.

Mandated corporate compliance procedures also have become increasingly standardized in FCPA-related agreements. These corporate compliance procedures may be used by corporations as guideposts in attempting to create appropriate anti-corruption programs. In that same vein, on February 18, 2010, the Organization for Economic Co-Operation and Development ("OECD") adopted its "Good Practice Guidance on Internal Controls, Ethics, and Compliance" guidelines. The OECD "Good Practice" guidelines are intended to serve as an example for companies "for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programs or measures for preventing and detecting" foreign bribery.

In developing its Good Practice guidelines, OECD appears to have deliberately mirrored many of the provisions previously set forth in FCPA-related DPAs. *Compare*, *e.g.*, Corporate Compliance Program in the Non-Prosecution Agreement between DOJ and Helmerich Payne, Inc, July 29, 2009 (requiring, for example, "a system of internal accounting controls designed to ensure that H&P makes and keeps fair and accurate books, records, and accounts," and "a compliance code with a clearly articulated corporate policy against violations of the anti-corruption laws") *with* OECD "Good Practice Guidance on Internal Controls, Ethics, and Compliance" (requiring "system of financial and accounting

procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery," and " a clearly articulated and visible corporate policy prohibiting foreign bribery").

After the adoption of the OECD guidelines, the DOJ also incorporated many of the OECD's recommendations into their required corporate compliance procedures. The main terms in the OECD guidance, and the parallel provisions found in the DOJ's corporate compliance programs, are detailed in Appendix A. The adoption of the OECD language may help provide standardization in requirements regarding compliance programs across OECD anti-bribery convention signatory nations, which could help alleviate concerns that American companies are placed at a competitive disadvantage world-wide due to the costs associated with FCPA enforcement and compliance.

Conclusion

Although this year's increase in agreements a from prior years is notable, the more important development is the fact that these agreements are being viewed as a viable alternative to traditional prosecutions by both the government and potential corporate defendants alike. It is also apparent that as the use of these agreements continues to expand and is subject to an increased level of scrutiny, the DOJ has adapted its practices and procedures to address some of the criticisms. With the expansion of DPAs and NPAs to SEC enforcement matters, it is likely that these agreements will continue to mature and that the size, scope, format, and basis for these agreements will continue to evolve.

---

[1] "[A] deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court." Craig S. Morford, Memorandum for Heads of Department Components and United States Attorneys, n.2 (March 7, 2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

[2] Throughout this update, the term "agreements" will be used to refer to DPAs and NPAs collectively. This update addresses only corporate DPAs and NPAs entered by the U.S. Department of Justice and Securities and Exchange Commission. State and local enforcement agencies frequently enter DPAs and NPAs as well, but those agreements are not discussed in this update.

[3] During 2010, the DOJ entered two additional DPAs which have not yet been approved by a court. In December, it was reported that Alcatel-Lucent entered a DPA with the DOJ Fraud Section to resolve FCPA allegations. That agreement is expected to be submitted to the court for approval in early 2011. Also in December, it was reported that BL Trading, LLC entered a DPA with the United States Attorney's Office for the District

of Massachusetts to resolve allegations of purchasing stolen property. That DPA has not yet been submitted to the court for approval.

[4] At the time of our 2009 Year-End Update and our 2010 Mid-Year Update, we had identified eighteen agreements entered by the DOJ during 2009. Since publication of our 2010 Mid-Year Update, we have identified three additional NPAs entered by the DOJ during 2009. Because NPAs are not filed with a court and often are not reported publicly, their numbers are difficult to determine with precision. We will continue to update our count of agreements from previous years as we become aware of new agreements.

[5] Attorney General Eric Holder at the Forum Club of the Palm Beaches West Palm Beach, Fla. (January 8, 2010), *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100108.html

[6] Lanny A. Breuer Assistant Attorney General, Criminal Division U.S. Department of Justice Prepared Remarks to *Compliance Week* 2010 -- 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers (May 26, 2010), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf

[7] Transcript available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[8] SEC Press Release, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, available at http://www.sec.gov/news/press/2010/2010-6.htm.

[9] See DOJ 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" (November 4, 2010), available at http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

[10] These companies included: Shell Nigeria Exploration and Production Company Ltd., Transocean Inc, Tidewater Marine International Inc, Pride International Inc., and Noble Corporation.

[11] See DOJ Press Release, "Exactech, Inc. Agrees to Corporate Compliance Reforms and Monitor Oversight to Address Alleged Violations of Federal Anti-Kickback Statute (December 7, 2010), available at http://www.justice.gov/usao/nj/press/press/files/pdffiles/Exactech%20DPA%20-%20Donofrio,%20Douglas%20Plea%20PR.pdf.

[12] Peter J. Henning, When Judges Refuse to Be Rubber Stamps, N.Y. Times (Mar. 22, 2010).

[13] The NPA entered by Deutsche Bank specifically makes reference to the appointment of an "Independent Expert," rather than a "monitor." However, the role of this "expert" appears to be the same as a traditional "monitor."

[14] See, e.g., F. Joseph Warin and Andrew S. Boutros, Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform, 93 Va. L. R. In Brief 121 (2007).

APPENDIX A

DOJ Compliance Program v. OECD Good Practice Guidance

	DOJ Corporate Compliance Program*	**OECD Good Practice Guidance**
Introduction	Where appropriate, [the company] agrees to adopt new or to modify existing internal controls, policies, and procedures in order to ensure that it maintains: (a) a system of internal accounting controls designed to ensure that Alliance makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws. At a minimum, this should include, but not be limited to, the following elements:	Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programs or measures for the purpose of preventing and detecting foreign bribery:
Support and commitment from management	- ensure that [corporate] senior management provide strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code.	1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery;
Visible corporate policy	- develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA	2. a clearly articulated and visible corporate policy prohibiting foreign bribery

	DOJ Corporate Compliance Program*	**OECD Good Practice Guidance**
Duty of all employees	- notify all employees that compliance with the standards and procedures is the duty of individuals at all levels of the company.	3. compliance with this prohibition and the related internal controls, ethics, and compliance programs or measures is the duty of individuals at all levels of the company;
Oversight compliance program	- assign responsibility to one or more senior corporate executives . . . for the implementation and oversight of [the] anti-corruption policies, standards, and procedures. Such corporate official(s) shall have direct reporting obligations to independent monitoring bodies, including internal audit, [the company's] Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.	4. oversight of ethics and compliance programs or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;

	DOJ Corporate Compliance Program*	OECD Good Practice Guidance
Subject matter compliance program	- develop and promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws . . . . These anti-corruption standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of [the corporation] in a foreign jurisdiction, including but not limited to, agents and intermediaries, consultants, representatives, distributors, learning partners, contractors and suppliers, consortia, and joint venture partners (collectively, "agents and business partners"), to the extent that agents and business partners may be employed under [the company's] corporate policy. - Such standards and procedures shall include policies governing: a. gifts; b. hospitality, entertainment, and expenses; c. customer travel; d. political contributions;	5. ethics and compliance programs or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas: i) gifts; ii) hospitality, entertainment and expenses; iii) customer travel; iv) political contributions; v) charitable donations and sponsorships; vi) facilitation payments; and vii) solicitation and extortion;

	DOJ Corporate Compliance Program*	**OECD Good Practice Guidance**
Interaction with agents and business partners	- institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including: a. Properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners; b. Informing agents and business partners of Alliance's commitment to abiding by laws on the prohibitions against foreign bribery, and of [the company's] ethics and compliance standards and procedures and other measures for preventing and detecting such bribery; and c. Seeking a reciprocal commitment from agents and business partners.	6. ethics and compliance programs or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements: i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners; ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance program or measures for preventing and detecting such bribery; and iii) seeking a reciprocal commitment from business partners.

	DOJ Corporate Compliance Program*	**OECD Good Practice Guidance**
Financial and accounting procedures	- ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery.	7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;
Communication with employees	- implement mechanisms designed to ensure that its anti-corruption policies, standards, and procedures are effectively communicated to all directors, officers, employees, and, where appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all directors, officers, and employees, and, where necessary and appropriate, agents and business partners; and (b) annual certifications by all such directors, officers, and employees, and, where necessary and appropriate, agents, and business partners, certifying compliance with the training requirements.	8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance program or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;

	DOJ Corporate Compliance Program*	**OECD Good Practice Guidance**
Encourage observance with company policies	- will take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery by personnel at all levels of the company.	9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programs or measures against foreign bribery, at all levels of the company;
Disciplinary procedures	- institute appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws and [the company's] anti-corruption compliance code, policies, and procedures by [the company's] directors, officers, and employees	10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance program or measures regarding foreign bribery;

	DOJ Corporate Compliance Program*	OECD Good Practice Guidance
Effective system for guidance, advice, and confidential reporting	- establish an effective system for: a. Providing guidance and advice to directors, officers, employees, and, where appropriate, agents and business partners, on complying with [company's] anti-corruption compliance policies, standards, and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction in which the company operates; b. Internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents and business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employee, and, where appropriate, agents and business partners, willing to report breaches of the law or professional standards or ethics concerning anti-corruption occurring within the company, suspected criminal conduct, and/or violations of the compliance policies, standards, and procedures regarding the anti-corruption	11. effective measures for: i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance program or measures, including when they need urgent advice on difficult situations in foreign jurisdictions; ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and iii) undertaking appropriate action in response to such reports

	DOJ Corporate Compliance Program*	OECD Good Practice Guidance
Review of compliance program	conduct periodic review and testing of its anti-corruption compliance code, standards, and procedures designed to evaluate and improve their effectiveness in preventing and detecting violations of anti-corruption laws and [company's] anti-corruption code, standards and procedures, taking into account relevant developments in the field and evolving international and industry standards.	12. periodic reviews of the ethics and compliance programs or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.
* Quotes from sample Corporate Compliance Program provided in the NPA between DOJ and Alliance One.		

The White Collar Defense and Investigations Practice Group of Gibson, Dunn & Crutcher LLP successfully defends corporations, senior corporate executives, and public officials in a wide range of federal and state investigations and prosecutions, and conducts sensitive internal investigations for leading companies in almost every business sector. The Group has members in every domestic office of the Firm and draws on more than 75 attorneys with deep government experience, including numerous former federal and state prosecutors and officials, many of whom served at high levels within the Department of Justice and the Securities and Exchange Commission. Joe Warin, a former federal prosecutor, currently serves as the U.S. counsel for the compliance monitor for Siemens, and recently completed his role as the monitor for Statoil pursuant to a DOJ and SEC enforcement action. Debra Wong Yang is the former United States Attorney for the Central District of California, and recently completed her role as a monitor pursuant to a DOJ enforcement action.

Washington, D.C.
F. Joseph Warin (202-887-3609, fwarin@gibsondunn.com)
John H. Sturc (202-955-8243, jsturc@gibsondunn.com)
David P. Burns (202-887-3786, dburns@gibsondunn.com)
David Debold (202-955-8551, ddebold@gibsondunn.com)
Brian C. Baldrate (202-887-3717, bbaldrate@gibsondunn.com)

New York
Joel M. Cohen (212-351-2664, jcohen@gibsondunn.com)
Lee G. Dunst (212-351-3824, ldunst@gibsondunn.com)
Barry R. Goldsmith (212-351-2440, bgoldsmith@gibsondunn.com)
Christopher M. Joralemon (212-351-2668, cjoralemon@gibsondunn.com)
Mark A. Kirsch (212-351-2662, mkirsch@gibsondunn.com)
Randy M. Mastro (213-351-3825, rmastro@gibsondunn.com)
Marc K. Schonfeld (212-351-2433, mschonfeld@gibsondunn.com)
Orin Snyder (212-351-2400, osnyder@gibsondunn.com)
Alexander H. Southwell (212-351-3981, asouthwell@gibsondunn.com)
Jim Walden (212-351-2300, jwalden@gibsondunn.com)
Lawrence J. Zweifach (212-351-2625, lzweifach@gibsondunn.com)

Denver
Robert C. Blume (303-298-5758, rblume@gibsondunn.com)

Orange County
Nicola T. Hanna (949-451-4270, nhanna@gibsondunn.com)

Los Angeles
Debra Wong Yang (213-229-7472, dwongyang@gibsondunn.com)
Marcellus McRae (213-229-7675, mmcrae@gibsondunn.com)
Michael M. Farhang (213-229-7005, mfarhang@gibsondunn.com)
Douglas Fuchs (213-229-7605, dfuchs@gibsondunn.com)