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2013 MID-YEAR UPDATE ON CORPORATE DEFERRED PROSECUTION AGREEMENTS (DPAS) AND NON-PROSECUTION AGREEMENTS (NPAS)

To Our Clients and Friends:

Deferred Prosecution Agreements ("DPAs") and Non-Prosecution Agreements ("NPAs") (collectively, "agreements")[1] continue to be a consistent vehicle for prosecutors and companies alike in resolving allegations of corporate wrongdoing. In the two decades since their emergence as an alternative to the extremes of indictment and outright declination, DPAs and NPAs have risen in prominence, frequency, and scope. Such agreements are now a mainstay of the U.S. corporate enforcement regime, with the U.S. Department of Justice ("DOJ") leading the way, and the U.S. Securities and Exchange Commission ("SEC") recently expanding its use of this tool. These types of agreements have achieved official acceptance as a middle ground between exclusively civil enforcement (or even no enforcement action at all) and a criminal conviction and sentence. With the United Kingdom's recent enactment of its own DPA legislation, the trend toward use of these alternative means for resolving allegations of corporate wrongdoing is poised to continue.

Since 2000, DOJ has entered into a total of 257 publicly disclosed DPAs or NPAs. Based on our experience, there are likely to be others that went unpublicized. More recently, the SEC's Cooperation Initiative, started in 2010, has netted 6 more. Monetary recoveries related to DPAs and NPAs over that 13-year period have totaled more than $37 billion.[2] DPAs and NPAs allow companies and prosecutors to resolve high-stakes claims of corporate misconduct—often the subject of sizeable media attention—through agreements to obey the law, cooperate comprehensively with the government, adopt or enhance rigorous compliance measures, and often pay a hefty monetary penalty. As we have previously noted, the past decade was marked by a sharp increase in these agreements. DOJ has entered into at least 20 agreements in every year since 2006, with the exception of 2008, when the total was 19. DOJ has twice reached its high-water mark of 39 agreements—in 2007 and 2010—followed closely by 37 agreements in 2012.

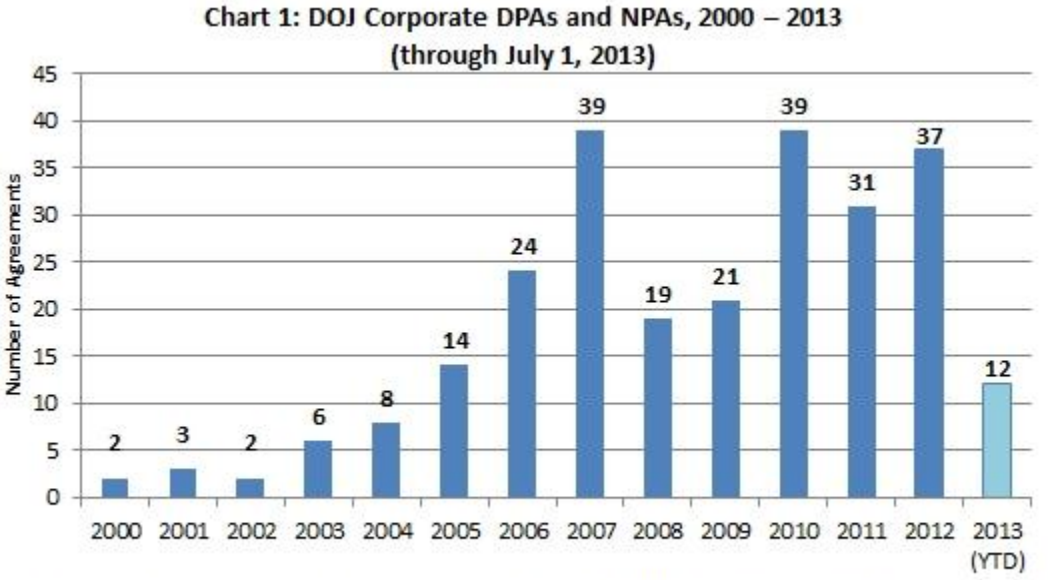
Continued use of DPAs and NPAs in various DOJ units, accompanied by the recent adoption of such tools at the SEC and their pending introduction in the United Kingdom, demonstrate their importance and staying power.

This client alert, the tenth in our series of semiannual updates on DPAs and NPAs (available here), (1) identifies the DPAs and NPAs announced to date in 2013 and the trends that those agreements reflect; (2) examines the prosecutorial calculus for DPAs and NPAs, in which punishment, deterrence, and remediation are weighed against potential collateral consequences in a form of measured justice; (3) analyzes the utility of the expanded use of DPAs and NPAs within the U.S. enforcement architecture; (4) discusses the role of the federal judiciary in approving DPAs; and (5) scrutinizes the United Kingdom's recently announced draft DPA code that will guide the implementation of U.K. DPA

legislation approved this year, and on which regulators are now seeking public comments. Similar to the previous updates in this series, the appendix lists all agreements announced to date in 2013, in addition to those agreements from 2012 that were either unannounced or not widely available before the start of this year.

DPAs and NPAs to Date in 2013

During the first six months of 2013, DOJ entered into a total of 12 agreements—6 DPAs and 6 NPAs—and the U.S. Securities and Exchange Commission ("SEC") negotiated 1 NPA. Coming off a year that marked a new high for monetary recoveries related to DPAs and NPAs (nearly $9 billion) and in which DOJ entered into 37 agreements, DOJ's 2013 trend line remains steady. While this year's figures lag a bit behind the near-record pace of 2012, when DOJ agreements passed the 20-agreement mark before July, DOJ remains on track to reach at least 20 agreements again this year. This continued use of DPAs and NPAs is a sure sign of their staying power. Chart 1 below reflects U.S. enforcers' continued use of DPAs and NPAs to resolve such cases. These charts are derived from a Gibson Dunn database that contains details of 263 DPAs and NPAs entered into by federal regulators between January 1, 2000 and July 8, 2013.

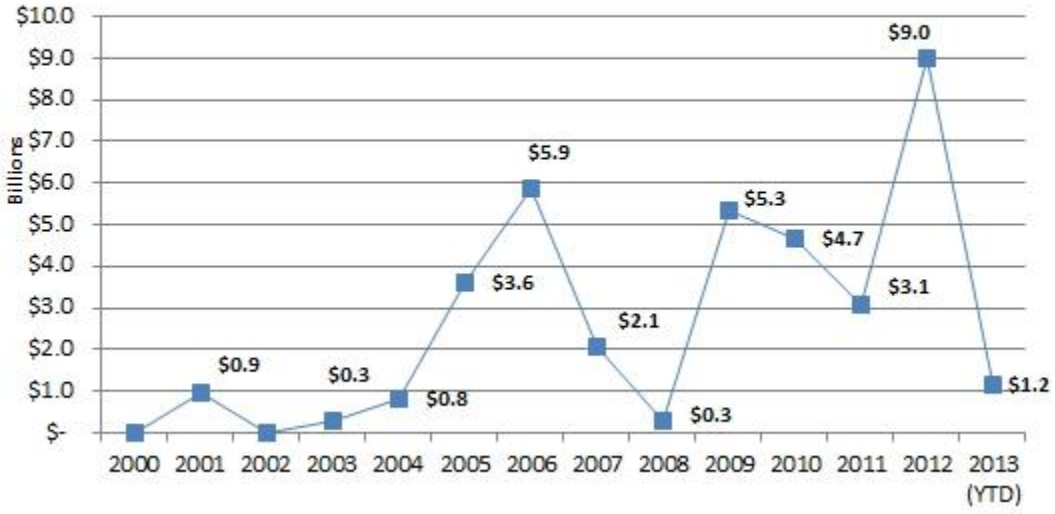


Note: The SEC has also entered into six agreements: 2010 (1), 2011 (3), 2012 (1), and 2013 (1 year to date).

As Chart 2 below demonstrates, the total in monetary recoveries so far this year is approaching $1.2 billion. That figure is well off the pace of 2012's record high, a number driven in large part by multiple high-dollar settlements. As we discussed in our 2012 Year-End Update, nine of the agreements in 2012 topped $100 million, including three for $1 billion or more apiece. By comparison, so far this year, total monetary recoveries for three agreements have surpassed $100 million, with the largest being $475 million. This year's more measured pace does not appear to signal a pullback in the importance of DPAs and NPAs as key tools for enforcement resolutions. To the contrary, the agreements announced to date have included several agreements in the Foreign Corrupt Practices Act

("FCPA") arena, and a DPA with the Royal Bank of Scotland plc ("RBS"), which included penalties and related monetary recoveries that rank it among the largest DPAs in connection with fraud and antitrust allegations, in terms of total monetary recoveries.

Chart 2: Total Monetary Recoveries Related to DPAs and NPAs (2000 – 2013)



The thirteen agreements announced so far in 2013 span the spectrum of corporate conduct and generally fall within the following six categories of statutes or violations: (1) the Controlled Substances Act; (2) the False Claims Act; (3) the Food, Drug & Cosmetic Act; (4) the FCPA; (5) various types of fraud; and (6) trade offenses. As detailed in Table 1 below, fraud and FCPA allegations have continued to lead the pack this year.

Table 1: 2013 DPAs/NPAs by Allegation (through July 8, 2013)

Primary Legal Allegation	Number
Controlled Substances Act	1
False Claims Act	1
Foreign Corrupt Practices Act	4
Fraud (various types)	4
Trade-related	1
Food, Drug, & Cosmetic Act	2

In a sign of increased coordination among DOJ and SEC attorneys, especially in the FCPA enforcement arena, the two agencies announced in April separate NPAs with Ralph Lauren Corporation for alleged FCPA violations. As discussed below, this marked the SEC's first NPA resolving FCPA allegations. That agreement is also the SEC's first NPA to include monetary penalties. (The previous three, where such penalties were not invoked, involved claims of securities or accounting fraud.) After introducing DPAs and NPAs in 2010 as part of its Cooperation Initiative, the SEC announced one agreement in 2010, three in 2011, and one in 2012, putting this year's single agreement through July 8 in line with the SEC's previous pace.

As shown in Table 2 below, 12 different DOJ units have participated in DPAs or NPAs so far in 2013. The Fraud Section was involved in five (or about 40%) of them. That is roughly in line with the Fraud Section's historical average, in which it has taken part in approximately 30% of DOJ's DPAs and NPAs since 2000.

**Table 2: 2013 DOJ DPAs/NPAs by DOJ Unit*
(through July 8, 2013)**

DOJ Unit	Number
DOJ Antitrust Division	1
DOJ Civil Division	1
DOJ Fraud Section	5
USAO for the Northern District of California	1
USAO for the Middle District of Florida	1
USAO for the Northern District of Georgia	1
USAO for the Northern District of Illinois	2
USAO for the Eastern District of New York	1
USAO for the Southern District of New York	1
USAO for the District of Puerto Rico	1
USAO for the Eastern District of Virginia	2
USAO for the Eastern District of Washington	1

*Some agreements involve more than one DOJ entity. The total number of DOJ agreements to date in 2013 is 12.

Corporate DPAs and NPAs Are Being Used to Minimize Collateral Consequences While Promoting Accountability, Deterrence, and Remediation

Prosecutors have long recognized the profound collateral consequences that criminal charges can have on the operation of a corporation, including loss of public confidence, reputational harm, and—in some sectors—revocation of essential licenses and other legal requirements for staying in operation. Criminal charges and their collateral consequences can threaten the very existence of some corporations, with harm extending beyond business operations to its employees' livelihoods, shareholders' investments, and the wider economy.

Prosecution of financial institutions, especially after the recent financial crisis and the increased scrutiny that has followed in its wake, can pose precisely these types of risks, making DPAs and NPAs all the more attractive in the minds of many. The potential risks to innocent bystanders—shareholders, employees, and the general public—have led prosecutors to consider collateral consequences and to act with great deliberation in their corporate charging decisions.[3] These considerations have long underpinned DOJ's processes, according to Mythili Raman, the Acting Assistant Attorney General for DOJ's Criminal Division. "The consideration of collateral consequences and other factors when determining whether to charge a corporation has been required by the U.S. Attorneys' Manual since 2008," she recently observed. "But the basic principles underlying those USAM provisions have a much longer history at the Department."[4] In addition to consideration of collateral consequences, prosecutors are guided in their decisions by such factors as the nature and seriousness of the offense, the reach of the misconduct within the company, the company's history of similar wrongdoing, voluntary disclosure to and cooperation with the government, the company's compliance program and its effectiveness, its remedial efforts, and the adequacy of individual prosecutions or civil or regulatory remedies.[5]

Like DOJ, the SEC has recognized the significance of collateral consequences in the context of corporate enforcement actions. The SEC's newly confirmed Chair, Mary Jo White, herself a former U.S. Attorney, stated during her April 2013 confirmation hearing that she endorsed DOJ's consideration of a criminal case's collateral consequences.[6] DPAs, in particular, can strike a critical balance between punishment and practicality, Ms. White explained, noting that DPAs are "designed to be tough in terms of monetary sanctions," but can enable companies to avoid criminal charges that themselves may cause what "the prosecutor may consider to be negative and very undesirable collateral consequences to the public interest."[7] Chair White has direct experience negotiating such agreements.

It is important to remember, however, that the risk of collateral consequences alone will not bar prosecution. "No individual or institution is immune from prosecution," Ms. Raman assured Congress, "and we intend to continue our aggressive pursuit of financial fraud with the same strong commitment with which we pursue other criminal matters of national and international significance."[8] Similarly, Ms. White noted in her confirmation hearing that while "certainly, prosecutors should consider" collateral consequences, those consequences will not necessarily preclude prosecution.[9]

The factors DOJ considers in evaluating charging decisions continue to serve as important guidance to corporations. Among these benchmarks is the benefit from disclosing potential violations not yet known to the government. As Denis McInerney, a Deputy Assistant Attorney General in DOJ's Criminal Division and former Chief of the Fraud Section, has noted, DPAs and NPAs are "a product of the reasoned judgment developed over time by prosecutors—to incentivize companies to do all the things that we want them to do, especially starting with disclosing the misconduct when it is uncovered, and then going through the cooperation they can provide in us getting to the people who engaged in the misconduct."[10]

February's DPA between Groeb Farms Inc. ("Groeb Farms" or "Groeb") and the U.S. Attorney's Office for the Northern District of Illinois is a recent example of the power that DPAs and NPAs offer when it comes to striking a balance among penalties, deterrence, minimizing collateral consequences, and promoting compliance. After uncovering red flags in its operations, Groeb Farms reportedly followed the steps DOJ hopes companies will follow, addressing each relevant DOJ guidepost as it conducted its internal investigation, and marshaling the proof to convince prosecutors that a DPA, rather than indictment, was the right course of action to address allegations that the company illegally imported honey from China. The company reportedly relied extensively on DOJ's Principles of Federal Prosecution of Business Organizations, set forth in the U.S. Attorney's Manual.[11] Groeb "went category by category to make sure that we were positioning ourselves in the best possible light in each of those categories," taking important remedial actions that included revamping the company's compliance and auditing programs, conducting employee training, terminating employees responsible for the conduct, and cooperating comprehensively with the government.[12]

In reaching a DPA, Groeb Farms and DOJ avoided the potentially devastating collateral consequences of a criminal conviction, including job losses in an economically depressed region.[13] During the negotiations, Groeb Farms presented financial statements to prosecutors and even offered an economic conditions analysis of the areas where the company's operations are located. The company emphasized to DOJ the grave risks of an indictment, arguing that it could force the company to shut down and declare bankruptcy, costing the jobs of 125 employees, some of whom had "worked for Groeb Farms their entire lives."[14] The company argued that indictment could have resulted in debarment from government contracts or the loss of customers who refuse to buy supplies from a company with a criminal record.[15]

The Groeb Farms DPA, like many others, attests to how these agreements achieve the twin goals of minimizing harmful collateral consequences while also incentivizing responsible corporate citizenship, compliance, and reform. The option of entering into a DPA or NPA to resolve serious allegations of criminal conduct can be a game-changing event for many companies. They encourage companies to address, proactively, potentially problematic conduct. In contrast, according to DOJ's Mr. McInerney, prosecutorial decisions that are exclusively either-or choices of indictment or declination tend to discourage such preemptive thinking. "If the company is going to just say after I uncover misconduct, if I disclose it, if I fully cooperate, if I remediate, I terminate the wrongdoers, I get our act together in a completely robust way, at the end of that whole process, what the Department will want is a guilty plea, why would I do it?" Mr. McInerney said.[16]

Expanded Use of DPAs and NPAs Confirms their Utility

As DPAs and NPAs have grown—both in number and size of monetary recoveries—so has the universe of prosecutorial entities employing them. And so too has the list of unlawful types of conduct that can lead to such an agreement. The first half of 2013 saw the SEC, for example, enter into its first NPA over FCPA allegations, with Ralph Lauren Corporation ("Ralph Lauren"). Similarly, the DOJ Antitrust Division, which had previously used only criminal indictments and convictions and the occasional NPA, reached a DPA with RBS in February. Measured by the size of monetary recovery, the RBS agreement, which also involved the DOJ Fraud Section, also ranks as the largest DPA so far this year.

In the first half of 2013, some DOJ units entered into DPAs and NPAs after seldom, if ever, having done so in the past. The U.S. Attorney's Office for the Northern District of Illinois announced its second and third DPAs—including the one with Groeb Farms, discussed above—following its first DPA in 2008; and the U.S. Attorney's Office for the Northern District of Georgia entered into its third NPA, following NPAs in 2005 and 2007. The U.S. Attorney's Office for the District of Puerto Rico is the newest member of the DPA-NPA club, having finalized its first publicly reported DPA in February 2013.

In addition to further use of DPAs and NPAs by various U.S. regulators, as we have discussed in previous updates in this series (2011 Year-End Update, 2012 Mid-Year Update, 2012 Year-End Update), the United Kingdom has for some time been considering legislation that would make DPAs available to prosecutors there. As discussed below, the United Kingdom is now poised to begin using DPAs as early as February 2014, continuing a trend in the expanded use of these tools.

DOJ Antitrust Division Enters Into Its First DPA

DOJ's Antitrust Division has historically avoided the use of DPAs. After entering into a number of NPAs, including four in 2011 in connection with the alleged manipulation of municipal bond prices, the division crossed a new enforcement threshold in February 2013 when the Antitrust Division, along with the DOJ Fraud Section, inked a DPA with RBS in connection with the bank's alleged role in the manipulation of benchmark interest rates. The Antitrust Division's prior avoidance of DPAs marked an effort to promote the leniency program's strongest possible incentive for companies to be the first to disclose antitrust violations. The Antitrust Division long pursued that goal by using the strategy of a binary choice for companies: either avoid prosecution altogether under the leniency program or face almost-certain criminal indictment.

With the RBS agreement, the Antitrust Division may be more willing to consider DPAs going forward. While the leniency program remains the Antitrust Division's primary tool for identifying and prosecuting antitrust violations, the division may now offer DPAs, in addition to NPAs, to non-leniency applicants in some cases, according to Peter Huston, Assistant Chief of the Antitrust Division's San Francisco field office.[17] Some commentators have ascribed this change to the unique sensitivity that financial institutions have to criminal charges.[18] The motivation for such an agreement, DOJ's Huston said, is to give a company the chance to remain in business and compete in its industry.[19]

The Antitrust Division, like DOJ's Criminal Division, is cognizant of the collateral consequences of corporate criminal prosecution. Antitrust prosecutors acknowledge that the division's twin aims of applying strong criminal sanctions to antitrust violators and advancing competition are in tension, because in some industries a criminal prosecution and conviction can amount to a death sentence for a company. "As antitrust enforcers, the last thing we want to do is punish someone out of business if that is going to mean a reduction in competition," Mr. Huston said.[20]

U.S. Securities and Exchange Commission Inks Its First FCPA-Related NPA

The SEC also marked an important milestone in April, when it entered into its first-ever NPA for FCPA allegations. As is typical in an NPA, Ralph Lauren agreed to cooperate with the SEC going forward. Unlike its previous NPAs—in 2010 with Carter's, Inc. for accounting fraud allegations, and in 2011 with the Federal Home Loan Mortgage Corporation, known as Freddie Mac, and the Federal National Mortgage Association, known as Fannie Mae—the SEC levied a disgorgement penalty ($734,846) to resolve its FCPA allegations against Ralph Lauren and included a detailed statement of facts describing the underlying conduct.

The SEC nevertheless praised Ralph Lauren's compliance program, citing it as a reason for the disposition that Ralph Lauren received. "This NPA shows the benefit of implementing an effective compliance program," said Kara Brockmeyer, the SEC's FCPA Unit Chief. "Ralph Lauren Corporation discovered this problem after it put in place an enhanced compliance program and began training its employees. That level of self-policing along with its self-reporting and cooperation led to this resolution."[21] George Canellos, who was appointed in April as Co-Director of the SEC's Division of Enforcement, agreed with this analysis, noting that Ralph Lauren's NPA "makes clear that we will confer substantial and tangible benefits on companies that respond appropriately to violations and cooperate fully with the SEC."[22]

The SEC's use of NPAs in the FCPA context follows the same approach by DOJ, in which the government credits effective FCPA compliance programs and remediation efforts. As reported in our 2012 Year-End Update, according to Robert Khuzami, who stepped down in January as director of the SEC's Enforcement Division, the SEC plans to pursue "more uniformity of use" of DPAs and NPAs by DOJ and the SEC.[23] Before the Ralph Lauren case, DOJ and the SEC had entered into an NPA or DPA with the same company over the same conduct only once: in a 2011 FCPA case against Tenaris, S.A., DOJ agreed to an NPA that included a $3.5 million penalty, and the SEC negotiated a DPA including more than $5 million in disgorgement and prejudgment interest.

Notwithstanding similarities in the DOJ and SEC agreements with Ralph Lauren—both are NPAs with similar fines, cooperation requirements, and the possibility of future enforcement action in the event of a breach—the two agreements are markedly different with respect to at least one key term. In particular, the SEC's NPA explicitly states that Ralph Lauren neither "admit[s] nor den[ies]" any of the facts contained in the agreement. By contrast, in DOJ's NPA Ralph Lauren specifically "admits, accepts, and acknowledges responsibility for the conduct." This also marks a shift from the silence on that issue in the SEC's 2010 Carter's, Inc. NPA.

Judicial Supervision of DPAs

With the uptick in DPAs during the past decade, it was perhaps only a matter of time before the role of the courts in the DPA process came to the foreground. DPAs make up slightly more than half of the agreements since 2000—139 DPAs out of 263 agreements, or approximately 53%. And, as discussed above, they are the agreements typically filed in court and subject to some manner of judicial oversight. But unlike the U.K.'s proposed paradigm for judicial review, discussed below, district courts do not have detailed protocols to consult in connection with the implementation and oversight of DPAs. Moreover, no statute sets forth with precision the judiciary's role or powers in connection with DPAs. There is no Bible for DPAs. Judges instead use a few approaches to oversee DPAs. To date, the role of the courts in the DPA process has frequently included approval of time exclusions under the Speedy Trial Act for the length of deferral periods and dismissal of charges following successful completion of those periods.

In connection with some recent DPAs, however, courts have asserted themselves more actively in evaluating whether particular agreements serve the public's interest, and in claiming the judicial authority to make such determinations. Court consideration of two 2012 DPAs—WakeMed's agreement with the U.S. Attorney's Office for the Eastern District of North Carolina in connection with alleged false statements in the health care context, and HSBC's DPA with the DOJ Asset Forfeiture and Money Laundering Section and the U.S. Attorney's Office for the Eastern District of New York—provides insights into the potential role of the courts in DPA approval and implementation. Each court paused before granting approval, requiring hearings and calling on the parties to establish their support for each agreement. These examples present an interesting, evolving framework for federal court consideration of DPAs, including through the lenses of the Federal Rules of Criminal Procedure, the U.S. Sentencing Guidelines, the Speedy Trial Act, and the plenary power of the federal courts to supervise matters on their dockets.

WakeMed

Federal Rule of Criminal Procedure 7 requires that felony charges be brought against a defendant by a grand jury indictment,[24] but DPAs typically proceed by waiver of indictment, confirmed in open court, and the filing of a criminal information.[25] That protocol typically necessitates some judicial involvement in the DPA process, at least in accepting the waiver of indictment. DOJ and WakeMed relied on Rule 7 to bring the DPA before the court. While DOJ initially requested that the court defer the waiver question, as a proxy for its request to have the court defer prosecution of the case,[26] U.S. District Judge Terrence W. Boyle required the parties to address waiver. He noted that for the process to move forward, WakeMed needed to waive indictment, and the government needed to file the criminal information.[27] WakeMed, however, wanted to reserve the right to proceed by way of indictment (rather than information) if the court did not approve the DPA, so the parties instead resolved the issue by presenting an un-signed waiver of indictment to be executed and filed upon court approval of the DPA.

Judge Boyle also challenged the parties on the decision to proceed with a DPA at all, citing concern for the victims of the alleged misconduct. Expressing frustration with the perception that the court's

approval of the agreement itself was unnecessary, Judge Boyle asked, "Why are you coming to court if you can do it all by yourself? If you are basically telling me you don't need me, I'm just window dressing, why are you even coming to court?"[28] The court also raised concerns about disparate treatment of companies and individuals, stating, "when a defendant comes in who is 'too big to fail' kind of thing, it's a different standard" than that for the individual who commits healthcare fraud.[29] He continued, "It's very hard for society and for The Court to differentiate between the everyday working Joe and Jane who goes to prison and the corporate giant . . . that gets a slap in the hand and doesn't miss a beat."[30] With these concerns on the table, the court called for DOJ and the company to explain, in writing, why the DPA was in the public's interest.

The government argued that WakeMed's cooperation and remediation efforts, along with the serious collateral consequences an indictment could bring, warranted the DPA.[31] Citing Gibson Dunn's 2012 Year-End Update, the government noted the necessity of balancing collateral consequences against the ability of NPAs and DPAs to effectively deter, punish, and reform corporate behavior. For WakeMed, the potential collateral consequences were significant: if convicted of a felony, it could no longer be a Medicare and Medicaid provider, which would have been a serious detriment to patients in those programs who rely on WakeMed's services. WakeMed agreed with DOJ that a DPA would most effectively protect customers while concurrently requiring WakeMed to repay taxpayers and publicly admit its transgressions and assume responsibility for wrongdoing.[32]

The collateral consequences argument resonated with Judge Boyle. He approved the DPA, stating that "the seriousness of the defendant's offense" balanced against "the potential harm to innocent parties that could result" from prosecution led the court to find a DPA to be "appropriate in this matter."[33] Specifically, the court balanced "the equities at issue," including the harm to the victims and the harm that "blameless" healthcare providers and employees of WakeMed would face by exclusion from Medicare and Medicaid. Had prosecution proceeded and forced WakeMed to shut down, the court found, "the provision of essential healthcare would be interrupted and the needs of the underprivileged in the surrounding area would be drastically and inhumanely curtailed."[34]

Judge Boyle's approval was subject to the parties providing the court with periodic status reports.[35]

HSBC

On July 1, U.S. District Court Judge John Gleeson of the Eastern District of New York approved HSBC's DPA in connection with money laundering charges and related conduct in a lengthy opinion weighing the agreement's costs and benefits and establishing what could become a new rubric for judicial authority to approve DPAs and oversee their operation. Judge Gleeson's opinion may also prompt further consideration of the judiciary's role in the DPA process.

The court, in approving the DPA, acknowledged that the Federal Rules of Criminal Procedure and the U.S. Sentencing Guidelines do not provide clear authority for the court to approve or reject DPAs.[36] During a December 2012 hearing on the DPA, Judge Gleeson asked the government what role it contemplated for the court going forward.[37] At that time, the court referenced Federal Rule of Criminal Procedure 11(c)(1)(A) and Section 6B1.2 of the Sentencing Guidelines, which govern plea

bargaining and require the court to make a finding on whether the charges adequately reflect the seriousness of the offense, as sources of its authority over the DPA. The court called on the parties to explain their understanding of the court's authority and why a DPA was appropriate to resolve the allegations. In their written submissions, the parties challenged that assertion of authority, contending that the provisions apply only to "cases where a defendant pleads guilty or *nolo contendere*" to charges.[38] HSBC maintained that the sole question before the court was the inquiry, under the Speedy Trial Act, of whether the interests of justice served by the exclusion of the five-year deferment period outweighed the best interests of the defendant and the public in a speedy trial.[39] The company argued the DPA would not trigger Rule 11(c)(1)(A).

The government argued that the DPA adequately reflects the seriousness of HSBC's behavior and yields a result that is consistent with the goals of the federal sentencing scheme including deterrence, remediation, and punishment.[40] The government further argued that the settlement, which included monetary recoveries of approximately $1.9 billion and a five-year compliance monitor, "ensures many of the same punitive effects of a guilty plea" while avoiding the potential collateral consequences.[41]

The court's opinion approving the DPA acknowledges that the text of the provisions that it considered applicable provides scant support for the court to assert authority. "The parties have a sound textual basis for their position."[42] The court found that the DPA was not a plea agreement within the meaning of Rule 11(c)(1)(A) because HSBC did not plead guilty, nor did it plead *nolo contendere*, instead entering not guilty pleas.[43] Reaching beyond the Speedy Trial Act exclusion-approval authority and the Federal Rules and U.S. Sentencing Guidelines provisions that the court found inapplicable, Judge Gleeson invoked the federal courts' traditional "supervisory authority" over matters on their dockets to decide whether to approve or reject the DPA, noting that courts use the supervisory power "to protect the integrity of judicial proceedings."[44]

Adopting that paradigm, the court rejected the contention that it lacked inherent authority over approval or implementation of the DPA, despite the parties' contention that the court's powers were limited to approving the Speedy Trial Act exclusion of time, and "in the distant future," considering the dismissal of the criminal charges.[45] "I conclude that the Court's authority in this setting is not nearly as cabined as the parties contend it is," the court wrote.[46] The court added its explanation to the long-understood distinction between NPAs as private agreements entered outside the court's purview, on the one hand, and DPAs as documents filed in court and subject to its oversight, on the other hand. "Even a formal, written agreement to that effect, which is often referred to as a 'non-prosecution agreement,' is not the business of the courts."[47] But once prosecutors and a corporate defendant put a *deferred* prosecution before the court, they have irreversibly injected the court's supervisory authority into the process, effectively conceding that the court may approve or reject the agreement, the opinion suggests.

Recognizing that such power is typically exercised when a defendant claims there has been an "impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety," the court nevertheless determined that its novel use of the supervisory power in consideration of a DPA is a necessary and appropriate use of that power.[48] Its exercise is necessary, the opinion reasoned, because it is unlikely that a corporate defendant seeking a DPA would risk "derailing" the agreement

by raising such an impropriety, "let alone seek[ing] the court's aid in redressing it."[49] According to Judge Gleeson, that diminished likelihood, combined with a litany of examples offered to demonstrate how "it is easy to imagine circumstances in which" a DPA or its implementation "so transgresses the bounds of lawfulness as to warrant judicial intervention to protect the integrity of the Court,"[50] more than warrants the use of the supervisory power.

The court staked its claim to the authority necessary to approve or reject the HSBC DPA and then approved the agreement "without hesitation,"[51] characterizing the decision to approve it as "easy, for it accomplishes a great deal."[52] The court found "no impropriety that implicates the integrity of the Court."[53] The court's approval was subject to quarterly reports on the DPA's implementation.[54]

In the context of the HSBC agreement, Judge Gleeson noted that "for whatever reason or reasons, the contracting parties have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with that, but a pending federal criminal case is not window dressing."[55] The court concluded that "[b]y placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority."[56] Consistent with increased judicial supervision of SEC settlements, courts now appear to be overseeing decisions to enter into DPAs.

The United Kingdom Enacts Legislation and Drafts Rules Permitting DPAs, Set for 2014 Implementation

On April 23, 2013, the U.K. Crime and Courts Act 2013 ("the 2013 Act") received Royal Assent, bringing DPAs into law in the U.K. for the first time.[57] DPAs are addressed in Schedule 17 of the 2013 Act.[58] This is a highly significant change to the enforcement of criminal law in the U.K., a jurisdiction in which legislators, courts, and prosecutors alike have long exhibited skepticism about consensual arrangements as means to resolve criminal investigations and prosecutions.

DPAs are not immediately available in the U.K., however. The 2013 Act requires the designated prosecutors—currently only the Director of the Serious Fraud Office ("SFO") and the Director of Public Prosecutions ("DPP")—first to produce guidance on the principles to be applied in considering whether to offer or enter into a DPA.

On June 27, 2013, the SFO and DPP addressed this requirement by publishing and commencing a public consultation on a draft Code of Practice ("the draft DPA Code"), which contains their proposed guidance to prosecutors (themselves) on conducting negotiations for, seeking court approval of, and overseeing compliance with DPAs.[59] Two other key authorities also announced public consultations on June 27, 2013 addressing criminal law issues:

- The U.K. Sentencing Council published a consultation[60] on proposed draft sentencing guidelines for fraud, bribery, and money laundering offenses, and for corporate liability generally which our 2013 Mid-Year FCPA Update addresses in detail. The Sentencing Council is an independent, non-departmental public body of the Ministry of Justice, whose primary role is to issue guidelines on sentencing. The courts in England and Wales must follow those guidelines unless it is in the interests of justice not to do so.

- The U.K.'s Criminal Procedure Rule Committee promulgated a consultation[61] on proposed procedural rules relating to the various hearings to be held before the Crown Courts (the senior first instance criminal courts in England and Wales) in connection with DPAs, as provided in the 2013 Act. The Criminal Procedure Rule Committee is a public authority responsible for modernizing court procedure and practice and making the Criminal Procedure Rules, in close coordination with the Ministry of Justice.

Each of these consultations is of profound importance to the operation of the new regime for DPAs.

The 12-week consultation period concludes on September 20, 2013. The consultation focuses on a number of specific questions related to the test for entering into a DPA and the factors to be taken into account in that decision, the terms of DPAs, the proposed approach to disclosure, the use of monitorships, and the compliance policies to be expected of defendant organizations entering into a DPA. The consultation also invites stakeholders to comment on any additional aspects of the regime. Consultations of this kind are not *pro forma*; instead, they offer a tangible opportunity for interested parties to influence governmental decision-making in the U.K. Gibson Dunn intends to participate in the process, and we are available to assist clients with any submissions. Others wishing to do so may use the consultation response form available here.

Availability of DPAs

Under the draft DPA Code, only designated prosecuting agencies have the option of inviting a corporate entity, a partnership, or an unincorporated association against whom proceedings are contemplated to enter into DPA negotiations. DPAs are not available in connection with the prosecutions of individuals.[62] The primary anticipated use of DPAs will be in connection with prosecutions of partnerships and corporations.

DPAs are also only available for certain offenses, which are chiefly economic in nature. The specified offenses include:[63]

- statutory offenses relating to theft, fraud, false accounting, or money laundering;
- various types of tax fraud and offenses under the Financial Services and Markets Act (including the now repealed section 397 offense relating to misleading statements or practices);
- corporate offenses of financial assistance, fraudulent trading, and the acquisition by the company of its own shares; and
- the four main offenses under the Bribery Act 2010 (the general offenses of bribery under section 1 and being bribed under section 2, bribery of a foreign public official under section 6, and the strict liability offense under section 7 for commercial organizations failing to prevent bribery by persons associated with them).

The controversial common law offense of conspiracy to defraud, under which the first criminal charges in the U.K. relating to LIBOR have been brought, is also specified. Ancillary offenses such as

offenses of complicity, attempt, and conspiracy in any of the specified offenses may also be dealt with by way of a DPA.

It is worth noting that the 2013 Act confirms the availability of DPAs with respect to conduct pre-dating the entry into force of the 2013 Act itself. As such, DPAs are available "retrospectively" for possible criminal charges which could be brought against relevant organizations for conduct, whenever committed, including prior to the time DPAs became available.

Process for Entry into a DPA

Only a prosecutor may initiate DPA negotiations, and doing so is within the prosecuting agency's discretion to be exercised personally by the Director of the SFO or the Director of Public Prosecutions, and not delegated—except where the Director is unavailable. A defendant organization has no right to be considered for disposition by way of a DPA.

The draft DPA Code sets forth the following mechanism for entering a DPA. Before inviting an organization to enter into negotiations for a possible DPA, the prosecutor must be satisfied that the alleged conduct is within the scope of the offenses for which DPAs are available. The case must also be one in which a DPA is likely to be appropriate. Although the DPA legislation does not establish the test for appropriateness, the draft DPA Code suggests a two-stage test, with an evidentiary stage and a public interest stage, discussed below. If so satisfied, the prosecutor may then invite the defendant organization to enter into negotiations for a possible DPA.

The prosecutor must apply to the Crown Court for a declaration confirming both that the DPA is in the interests of justice and that the terms proposed are fair, reasonable, and proportionate to the offense (a "paragraph 7 declaration").[64] The hearing of this application will take place in private, protecting the defendant's rights of defense in any ultimate prosecution or in related proceedings if the court is unable to give the paragraph 7 declaration. The court must give reasons—again, in private—for its decision granting or denying the paragraph 7 declaration. The decision itself to deny a declaration also must remain private. If a court refuses to grant such a declaration, the prosecutor may apply again.

If the court grants the paragraph 7 declaration on appropriateness, the prosecutor may then negotiate the terms of the DPA with the defendant organization. Once terms are reached, the prosecutor must apply again to the Crown Court, this time for approval, pursuant to paragraph 8, of the actual terms of the concluded DPA, not just proposed terms.[65]

As with the paragraph 7 process, the court may hold the hearing on the application for a paragraph 8 declaration in private, but a paragraph 8 declaration itself must be made in open court. The prosecutor generally must publish the DPA, the paragraph 8 declaration, the judge's reasoning in favor of it, the paragraph 7 declaration, the accompanying reasons in favor of it, and the judge's reasons for an initial refusal, if any, to grant the paragraph 7 declaration. Defendant organizations entering into DPAs will be very interested in the proposed language of these published documents.

The DPA becomes effective upon the Crown Court approval. Generally, the prosecutor will then, under paragraph 2(1) of Schedule 17, proceed using a bill of indictment covering the charges which are

the subject of the DPA. Under paragraph 2(2), those proceedings will be immediately suspended. The suspension can be lifted only through application by the prosecutor. While the DPA is in force, the prosecutor can bring no such application, and no other person may prosecute the defendant organization for the offenses covered by the DPA. Defendant organizations might be encouraged to request an exhaustive list of offenses to be covered by a DPA, to avoid the possibility of a prosecution based on the same underlying conduct, although courts would likely be sympathetic to a challenge that prosecutions under other statutes violate "legitimate expectations." Even if a private prosecution were brought, the U.K.'s Attorney General might exercise his or her prerogative under the circumstances to step in and bring such a prosecution to an end. But it bears noting that the conclusion of a DPA in the U.K. would offer no protection against prosecution by authorities in other jurisdictions exercising concurrent jurisdiction.

The Effect of a DPA

A DPA will automatically suspend criminal proceedings against the corporate defendant subject to the agreement.

A DPA will contain a statement of facts, prepared by the prosecutor and relating to the alleged offense, and it will set forth the date when the DPA expires. Similar to DPAs in the United States, if the defendant complies with the DPA's terms for the duration of the agreement, the criminal proceedings will be discontinued, and requirements imposed under the DPA will terminate through the prosecutor's notice to the Crown Court.[66]

The Act discusses the procedures regarding a breach of the DPA, the circumstances and process of modification of the DPA terms, and admissibility of the statement of facts in a terminated proceeding.

Insights into Likely Prosecutorial Practice in the Draft DPA Code

The draft DPA Code affords valuable insight into prosecutors' likely approach to DPAs.

<u>The test to be applied for determining whether a DPA is appropriate</u>

The draft DPA Code identifies the proposed starting point for assessing the appropriateness of a DPA as the application of a two-stage test, comprising an evidentiary stage and a public interest stage, on both of which prosecutors must be satisfied. The "public interest test" simply requires the prosecutor to be satisfied that the public interest would be properly served by a DPA in lieu of prosecution.

<u>Factors to be taken into account by the prosecutor in deciding whether to enter into a DPA</u>

The draft DPA Code proposes that, in exercising their discretion regarding DPAs, prosecutors will include within their consideration a range of factors to balance on a case-by-case basis. The draft proposes that prosecutors will consider existing relevant guidance and codes of practice, including the DPA Code as finalized, the U.K.'s Code for Crown Prosecutors,[67] the prosecutors' own Joint Prosecution Guidance on Corporate Prosecutions,[68] and Joint Prosecution Guidance on the Bribery Act.[69]

The draft further suggests that, in connection with the public interest test, prosecutors consider the seriousness of the offense; the value of any gain or loss; and the risk of harm to the public, to unidentified victims, shareholders, employees, and creditors, and to the stability and integrity of financial markets and international trade, including the impact beyond the U.K. The draft DPA Code suggests that a prosecution will usually take place unless public interest factors against prosecution clearly outweigh those that favor prosecution. In bribery cases, the prosecutors will seek to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[70] However, the draft DPA Code explicitly states that investigation and prosecution of bribery of a foreign public official should not be influenced by considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal persons involved.

The draft DPA Code also sets out lists of additional public interest factors that may either favor or cut against prosecution. The factors favoring prosecution include severe economic harm to victims, the impact on the country's economic reputation, the desirability of prosecution of repeated or flagrant violations or conduct which has become part of an organization's established business practice, the ineffectiveness of the compliance program in place at the time of the offense, or a company's failure to take action to prevent further breaches following prior warnings, sanctions, or criminal charges. Also included in factors favoring prosecution are the failure to report wrongdoing in a timely manner or the failure to report its true extent. Conversely, factors counseling for a DPA include self-reporting, remedial measures, and robustness of the organization's compliance program.

Compliance Monitors

The draft DPA Code provides that "[t]he use of monitors should . . . be approached with care."[71] Nonetheless, the approach to monitorships in the draft DPA Code suggests that the prosecutors see monitorships as an important device in driving the effectiveness of DPAs, and one to be deployed in a manner sensitive to the likely concerns of the defendant business organization.

The involvement of a monitor will, under the draft DPA Code, have significant ramifications for the DPA agreement itself. Before the Court approves a DPA containing a monitorship provision, the monitor must be selected and provisionally appointed. The parties must agree to the terms of the monitorship, and they must agree on a detailed work plan with the monitor for the first year and on an outline work plan for the remainder of the monitoring period. It is clear that prosecutors wish to ensure a high degree of transparency before the Crown Court where approval is sought for a DPA that includes a monitorship among its terms.

The draft DPA Code proposes that monitors' reports and associated correspondence shall be generally confidential with disclosure restricted to the prosecutor, the organization subject to the DPA, and the court. This approach, which will come as considerable comfort to companies considering a proposal that a monitorship be included as one of the terms of a DPA, contrasts with recent practice on monitors' reports that we have seen from the SFO. The SFO has insisted that its obligations of disclosure to individual defendants extend to extracts of such reports.

Financial Penalties

Paragraph 5(4) of Schedule 17 to the 2013 Act provides that "the amount of any financial penalty agreed between the prosecutor and [the defendant organization] must be broadly comparable to the fine that a court would have imposed on [the defendant organization] on conviction for the alleged offence following a guilty plea."

A guilty plea will generally result in a one-third reduction of sentence in England and Wales, although that reduction can be greater in cases where the defendant assists prosecutors in connection with related proceedings under the Serious Organised Crime and Police Act 2005, in which case the reduction can be up to 50%. The draft DPA Code anticipates the potential availability of such reductions being taken into account in connection with the calculation of the appropriate financial penalty to be provided for in a DPA.

Impact of DPAs

While the availability of DPAs under the 2013 Act extends beyond companies to partnerships and unincorporated associations, it is clear from the consultation surrounding the introduction of DPAs, from the debates in Parliament, and from the comments made by leading prosecutors in the U.K., that the desire to more readily extend the reach of the criminal law to *corporations* is the primary motivation for this initiative.

While criminal convictions of corporations have long been a feature of commercial life in the United States, prosecutions of companies in the U.K. courts have been hampered by the requirement under English law to prove *mens rea*, the element of intent or mental culpability in a criminal offense, such as dishonesty, recklessness, or malice. In all prosecutions for offenses requiring proof of *mens rea* for a company, prosecutors must prove intent attributable to one or more individuals representing the "controlling mind and will" of the company.

The U.K. courts have affirmed that stricture as recently as November 2011, with the judgment of the *Court of Criminal Appeals in R v. St Regis Paper*,[72] in which Lord Justice Moses, while overturning the lower court's judgment, apparently approved the notion that the controlling mind test required proof of *mens rea* on the part of the person in actual control of the relevant operations of the company, and someone at a lower level. The effect, in practice, of the "controlling mind and will" test has been that unless prosecutors can establish the requisite *mens rea* of a corporate officer at the board or near-board level, prosecution of the corporate entity is not possible. As a result, corporate prosecutions have tended to focus on strict liability offenses that do not require proof of *mens rea* in the first place.

It is also noteworthy, against this background, that in June 2013, SFO Director David Green QC suggested further moves to facilitate prosecutions against corporations for white collar crimes generally, in particular the removal of the "controlling mind and will" test and its replacement with strict liability offenses similar to the section 7 offense under the Bribery Act. Green noted that "such a change would assist in the application of DPAs: if a corporate can't be prosecuted, why should it agree to a DPA?"[73] Further in this regard, the Law Commission of England and Wales, the country's primary law reform authority, has proposed as a possible project of research and consultation, the

potential reform of the law surrounding corporate criminal liability. One option likely to be considered as part of such a project would be the abolition of the "controlling mind and will" test altogether. In any event, it would take several years before any such reform proposals might come before Parliament.

Comparison of U.S. and U.K. Regimes

Compared to the U.S. practice, the U.K. statutory regime and draft DPA Code sets forth a more formalized process with defined steps for beginning DPA negotiations, involving the judiciary in the process, and addressing breach. The U.S. processes tend, instead, to be relatively ad hoc and guided, for the most part, by the policies and practices of the government entities offering the agreements. The following are among the most notable differences:

- While U.S. prosecutors typically negotiate and file DPAs with little to no judicial oversight, U.K. prosecutors must seek out judicial approval to enter initial negotiations, file the agreement, or modify the agreement.

- DOJ has substantial latitude in the types of crimes DPAs may resolve, whereas Schedule 17 limits U.K. DPAs to certain enumerated crimes (and their earlier analogues)—mostly economic offenses.

- DOJ may enter into DPAs with both individuals and corporations; by contrast, Schedule 17 applies only to companies, partnerships, and unincorporated associations.

- DOJ has discretion to determine whether breaches of a DPA have occurred; Schedule 17 assigns this role to the Crown Court, with such determinations to be established based on a balance of probabilities.

Conclusion

At the halfway mark of 2013, it is clear that DPAs and NPAs continue to be a critical weapon in the federal enforcement arsenal for resolving allegations of corporate criminal conduct, short of conviction, while nevertheless sending a strong message of deterrence and reinforcing the policy that the U.S. government does and will continue to pursue corporate wrongdoing. It remains to be seen whether 2013 will reach the heights of 2012 either in the number of agreements or the accompanying monetary recoveries, but there is no doubt that the agreements themselves have grown strong roots in the enforcement and compliance communities, and signs point to their continued expansion in new contexts in the United States and abroad.

Appendix

The chart below summarizes the agreements that DOJ and the SEC have reached to date in 2013 and additional agreements from 2012 that were unavailable at the time of our 2012 Year-End Update. The complete text of each agreement, if publicly available, is hyperlinked in the chart. Where more than one date is associated with an agreement, we use the earliest stated execution date.

The figures for "Monetary Recoveries" may include amounts not strictly limited to a DPA or an NPA, such as fines and penalties imposed by other regulators and enforcement agencies as well as amounts from related settlement agreements, all of which may be part of a global resolution in connection with the DPA or NPA. The term "Monitor" identifies traditional compliance monitors, self-reporting arrangements, and other monitorship arrangements found in settlement agreements.

APPENDIX
Deferred and Non-Prosecution Agreements to Date in 2013

Company	Agency	Alleged Violation	Type	Monetary Recoveries	Monitor	Term of DPA/NPA
CH2M Hill Companies Ltd. and CH2M Hill Hanford Group Inc.	U.S. Attorney, Eastern District of Washington	Fraud, False Claims Act	NPA	$19,000,000	Yes	36 months
C.R. Bard Inc.	U.S. Attorney, Northern District of Georgia; DOJ Civil Division	False Claims Act	NPA	$50,460,000	No	undisclosed[a]
Ernst & Young LLP	U.S. Attorney, Southern District of New York	Tax Fraud	NPA	$123,000,000	No	no set term[b]
Groeb Farms, Inc.	U.S. Attorney, Northern District of Illinois	Smuggling, False Statements (18 U.S.C. § 542)	DPA	$2,000,000	No	24 months
Honey Holding I, Ltd.	U.S. Attorney, Northern District of Illinois	Food, Drug, and Cosmetic Act	DPA	$1,000,000	No	24 months

Company	Agency	Alleged Violation	Type	Monetary Recoveries	Monitor	Term of DPA/NPA
Lender Processing Services, Inc.	DOJ Fraud Section; U.S. Attorney, Middle District of Florida	Mortgage Fraud, Accounting Fraud	NPA	$35,000,000	Yes[c]	24 months
LLC Wholesale Supply, LLC	U.S. Attorney, District of Puerto Rico	Food, Drug, and Cosmetic Act	DPA	$1,385,588	No	24 months
Parker Drilling Company	DOJ Fraud Section; U.S. Attorney, Eastern District of Virginia	FCPA	DPA	$15,850,818	Self-Reporting	36 months
Ralph Lauren Corp.	DOJ Fraud Section; U.S. Attorney, Eastern District of New York	FCPA	NPA	$882,000	Self-Reporting	24 months
Ralph Lauren Corp.	Securities & Exchange Commission	FCPA	NPA	$734,846	No	No set termb
The Royal Bank of Scotland plc	DOJ Antitrust Division; DOJ Fraud Section	Fraud, Antitrust	DPA	$475,000,000	Self-Reporting[d]	24 months
Total, S.A.	DOJ Fraud Section; U.S. Attorney, Eastern District of Virginia	FCPA	DPA	$398,200,000	Yes	36 months
United Parcel Service, Inc.	U.S. Attorney, Northern District of California	Controlled Substances Act	NPA	$40,000,000	Self-Reporting[e]	24 months

Company	Agency	Alleged Violation	Type	Monetary Recoveries	Monitor	Term of DPA/NPA
Additional Agreements from 2012*						
Dal-Tech (Florida)	U.S. Attorney, District of Delaware	Trade Sanctions	DPA	$10,000[f]	Yes[g]	12 months
WakeMed	U.S. Attorney, Eastern District of North Carolina	False Statements (18 U.S.C. § 1035)	DPA	$8,000,000	Yes[h]	24 months[i]

a) The duration of the NPA has not been disclosed.

b) The NPA does not specify a duration.

c) The NPA requires the retention of an independent consult to review and report on the company's lending practices and risks.

d) In addition to the self-reporting requirement in the DPA, the company's related agreement with the Commodity Futures Trading Commission requires the retention of a third-party auditor for four years to review its benchmark interest rate submissions.

e) The NPA requires the nomination of a Compliance Program Auditor approved by the government and the creation of a Compliance Confirmation Report to be provided to the government.

f) The DPA requires the company to pay this penalty to the Treasury Department's Office of Foreign Assets Control.

g) The DPA requires the company to retain or employ an outside consultant to be integrated into its organizational structure to ensure compliance with U.S. trade laws and regulations.

h) The company must abide by the terms of a Corporate Integrity Agreement between the company and the Office of the Inspector General of the Department of Health and Human Services, which has an independent review requirement.

i) In addition to the DPA term of 24 months, the company must abide by the terms of a Corporate Integrity Agreement between the company and the Office of the Inspector General of the Department of Health and Human Services, which has a term of five years.

***** Agreements listed herein represent additional agreements entered into in 2012, which were unavailable or not widely available at the time of our 2012 Year-End Update.

[1] The U.S. Department of Justice distinguishes between DPAs and NPAs based on the procedures by which they are adopted. DPAs are filed in federal court along with a charging document (e.g., a criminal information) and are subject to judicial approval, while NPAs are letter agreements between DOJ and the entity or entities subject to an NPA. *See* Craig S. Morford, Memorandum for Heads of Department Components and United States Attorneys, 1 n.2 (Mar. 7, 2008).

[2] Monetary recoveries, as detailed in the Appendix, may include amounts relating to global settlements negotiated in connection with a DPA or NPA, encompassing criminal and civil fines and penalties imposed by DOJ, the SEC, and/or other regulators and enforcement agencies, disgorgement payments, forfeiture amounts, and civil settlements related to DOJ and/or SEC resolutions.

[3] *See* USAM 9-28.300, 9-28.1000 (2008).

[4] *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 113th Cong. (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen. of the Department of Justice Criminal Division).

[5] *See* USAM 9-28.000.

[6] *See Confirmation Hearing on the Nominations of Richard Cordray to Be Consumer Financial Protection Bureau Director and Mary Jo White to Be Securities and Exchange Commission Chairwoman: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. 22 (2013).

[7] *Confirmation Hearing on the Nominations of Richard Cordray to Be Consumer Financial Protection Bureau Director and Mary Jo White to Be Securities and Exchange Commission Chairwoman: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. 22, at 27–28 (2013).

[8] *Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Servs.*, 113th Cong. (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen. of the Department of Justice Criminal Division).

[9] *Confirmation Hearing on the Nominations of Richard Cordray to be Consumer Financial Protection Bureau Director and Mary Jo White to be Securities and Exchange Commission Chairwoman: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 113th Cong. 22 (2013).

[10] *McInerney Defends Deferred and Non Prosecution Agreements*, Corp. Crime Rep., (May 7, 2013, 4:49 PM).

[11] *See* USAM 9-28.000.

[12] *See Foley & Lardner's Lisa Noller on Securing Deferred Prosecution Agreements*, Corp. Crime Rep., (Mar. 11, 2013, 11:02 AM).

[13] *See Foley & Lardner's Lisa Noller on Securing Deferred Prosecution Agreements*, Corp. Crime Rep., (Mar. 11, 2013, 11:02 AM).

[14] *See Foley & Lardner's Lisa Noller on Securing Deferred Prosecution Agreements*, Corp. Crime Rep., (Mar. 11, 2013, 11:02 AM).

[15] *See Foley & Lardner's Lisa Noller on Securing Deferred Prosecution Agreements*, Corp. Crime Rep., (Mar. 11, 2013, 11:02 AM).

[16] *McInerney Defends Deferred and Non Prosecution Agreements*, Corp. Crime Rep., (May 7, 2013, 4:49 PM).

[17] Ron Knox, *DOJ Official: In Some Industries, NPAs Needed to Protect Competition*, Global Competition Rev. (Feb. 25, 2013).

[18] Kellie Lerner & Elizabeth Friedman, *When You Lose the Race to Corporate Leniency*, Law360 (Mar. 15, 2013, 12:51 PM).

[19] Ron Knox, *DOJ Official: In Some Industries, NPAs Needed to Protect Competition*, Global Competition Review (Feb. 25, 2013).

[20] Ron Knox, *DOJ Official: In Some Industries, NPAs Needed to Protect Competition*, Global Competition Review (Feb. 25, 2013).

[21] Press Release, U.S. Sec. and Exch. Comm'n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corp. Involving FCPA Misconduct (Apr. 22, 2013).

[22] Press Release, U.S. Sec. and Exch. Comm'n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corp. Involving FCPA Misconduct (Apr. 22, 2013).

[23] *Khuzami Says Use of NPAs, DPAs Will Become More Uniform Over Time*, BNA White Collar Crime Rep., Nov. 16, 2012.

[24] *See* Fed. R. Crim. P. 7(a)(1) ("An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year.").

[25] *See* Fed. R. Crim. P. 7(b) ("An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.").

[26] Transcript of Docket Call at 4, 22, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Jan. 17, 2013).

[27] Transcript of Docket Call at 22, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Jan. 17, 2013).

[28] Transcript of Docket Call at 3, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Jan. 17, 2013).

[29] Transcript of Docket Call at 15, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Jan. 17, 2013).

[30] Transcript of Docket Call at 15, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Jan. 17, 2013).

[31] *See* Transcript of Disposition Hearing and Arraignment at 15, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Feb. 5, 2013).

[32] Memorandum in Support of Deferred Prosecution Agreement at 8, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Jan. 31, 2013).

[33] Order at 3, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Feb. 8, 2013).

[34] Order at 3, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Feb. 8, 2013).

[35] Order at 4, United States v. WakeMed, No. 5:12-CR-398-BO-1 (E.D.N.C. Feb. 8, 2013).

[36] *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 slip op. at 2–3 (E.D.N.Y. July 1, 2013) (hereinafter "HSBC slip op.").

[37] Transcript of Criminal Cause for Status Conference at 5, United States v. HSBC Bank USA, N.A., No. 12-CR-763 (E.D.N.Y. Dec. 20, 2012).

[38] HSBC slip op. at 2–3.

[39] Letter Re United States v. HSBC Bank USA, N.A. and HSBC Holdings plc, 12 Cr. 763 (JG) at 2, United States v. HSBC Bank USA, N.A., No. 12-CR-763 (E.D.N.Y. Jan. 30, 2013).

[40] Government's Memorandum in Support of the Deferred Prosecution Agreement at 2, United States v. HSBC Bank USA, N.A., No. 12-CR-763 (E.D.N.Y. Jan. 30, 2013).

[41] Government's Memorandum in Support of the Deferred Prosecution Agreement at 11, United States v. HSBC Bank USA, N.A., No. 12-CR-763 (E.D.N.Y. Jan. 30, 2013).

[42] HSBC slip op. at 3.

[43] HSBC slip op. at 3.

[44] HSBC slip op. at 6–7 (quoting *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (stating that the power "permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar.")).

[45] HSBC slip op. at 8–9.

[46] HSBC slip op. at 9.

[47] HSBC slip op. at 9

[48] HSBC slip op. at 10–11.

[49] HSBC slip op. at 11.

[50] Among those, the court noted, are instances related to earlier DPAs in which prosecutors pushed companies inappropriately beyond the bounds of required cooperation to sacrifice attorney-client privilege and the protections of the work product doctrine, or the constitutional rights of employees, or an inappropriate measure to cure a breach, such as "an endowed chair at the United States Attorney's *alma mater*." Slip op. at 11–12.

[51] HSBC slip op. at 20.

[52] HSBC slip op. at 15.

[53] HSBC slip op. at 13.

[54] HSBC slip op. at 20.

[55] HSBC slip op. at 10.

[56] HSBC slip op. at 10.

[57] Crime and Courts Act, 2013, c. 44 (U.K.).

[58] Crime and Courts Act, 2013, c. 44, § 45, sch. 17 (U.K.).

[59] U.K. Serious Fraud Office, Crime and Courts Act 2013: Deferred Prosecution Agreement Code of Practice (Draft, 27 June 2013).

[60] U.K. Sentencing Council, Fraud, Bribery and Money Laundering Offences Guideline Consultation (June 2013).

[61] U.K. Ministry of Justice, Criminal Procedure Rule Committee, Deferred Prosecution Agreements, Invitation to Comment on Proposed New Rules (June 2013).

[62] The inclusion of unincorporated associations is noteworthy because the nature of an unincorporated association in the U.K. is such that all of its individual members are jointly and severally liable for actions done with their authority. The Court of Appeal confirmed in 2008 the permissibility of prosecution of an unincorporated association (in that case, a golf club, all of whose members would have been equally liable of the offense). R v RL and JF [2008] EWCA Crim 1970; [2008] WLR (D) 299. But such prosecutions are few and far between, and indeed the unincorporated association is itself increasingly rare as a unit of business organization.

[63] *See* Crime and Courts Act, 2013, c. 22, § 45, sch. 17 ¶¶ 15–30 (U.K.).

[64] *See* Crime and Courts Act, 2013, c. 22, § 45, sch. 17 ¶ 7 (U.K.).

[65] *See* Crime and Courts Act, 2013, c. 22, § 45, sch. 17 ¶ 8 (U.K.).

[66] *See* Crime and Courts Act, 2013, c. 22, § 45, sch. 17 ¶ 11 (U.K.).

[67] U.K. Crown Prosecution Service, The Code for Crown Prosecutors (January 2013).

[68] U.K. Serious Fraud Office *et al.*, Guidance on Corporate Prosecutions (July 2009).

[69] Bribery Act 2010, Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (March 2011).

[70] Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997 (entered into force Feb. 15, 1999) (amended Dec. 9, 2009).

[71] U.K. Serious Fraud Office, Crime and Courts Act 2013: Deferred Prosecution Agreement Code of Practice ¶ 43 (Draft, 27 June 2013).

[72] R v. St Regis Paper Co. [2012] Cr.App.R. 14 [2011] EWCA 2527.

[73] Caroline Binham, *Call to Make Companies Liable for Failure to Prevent Fraud*, Fin. Times, June 5, 2013.

The White Collar Defense and Investigations Practice Group of Gibson, Dunn & Crutcher LLP successfully defends corporations and senior corporate executives in a wide range of federal and state investigations and prosecutions, and conducts sensitive internal investigations for leading companies and their boards of directors in almost every business sector. The Group has members in every domestic office of the Firm and draws on more than 125 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

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