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

To Our Clients and Friends:

Since their emergence in the early 1990s, and especially in the past decade, Non-Prosecution Agreements ("NPAs") and Deferred Prosecution Agreements ("DPAs") (collectively, "agreements")[1] have become embedded in the toolbox of U.S. federal prosecutors to address allegations of corporate misconduct. Prosecutors and companies alike have concluded that these agreements are an appropriate avenue for resolving even the most challenging allegations in targeted, efficient ways. NPAs and DPAs exact meaningful punishment, often through steep financial penalties and rigorous compliance reforms, while avoiding the serious collateral consequences of federal criminal convictions. Prosecutors view them as effective, tempered alternatives to criminal indictments and convictions, on the one hand, and prosecutorial declinations, on the other.

The use of NPAs and DPAs has increased markedly during the past decade. From 2000 through 2004, the U.S. Department of Justice ("DOJ") entered into an average of approximately four agreements per year, topping out at eight in 2004. Each subsequent year, however, DOJ figures have been in the double digits, averaging 28 agreements per year, with only two years that saw fewer than 20 agreements. Since 2000, DOJ has entered into 273 publicly disclosed NPAs and DPAs,[2] which have led to monetary penalties totaling more than $40 billion.[3] Of those 273 agreements, 252 have been executed since January 1, 2005. The U.S. Securities and Exchange Commission ("SEC") also has embraced these agreements as resolution tools, entering into six such agreements with companies since 2010. In 2013, the SEC entered into its first DPA with an individual.[4]

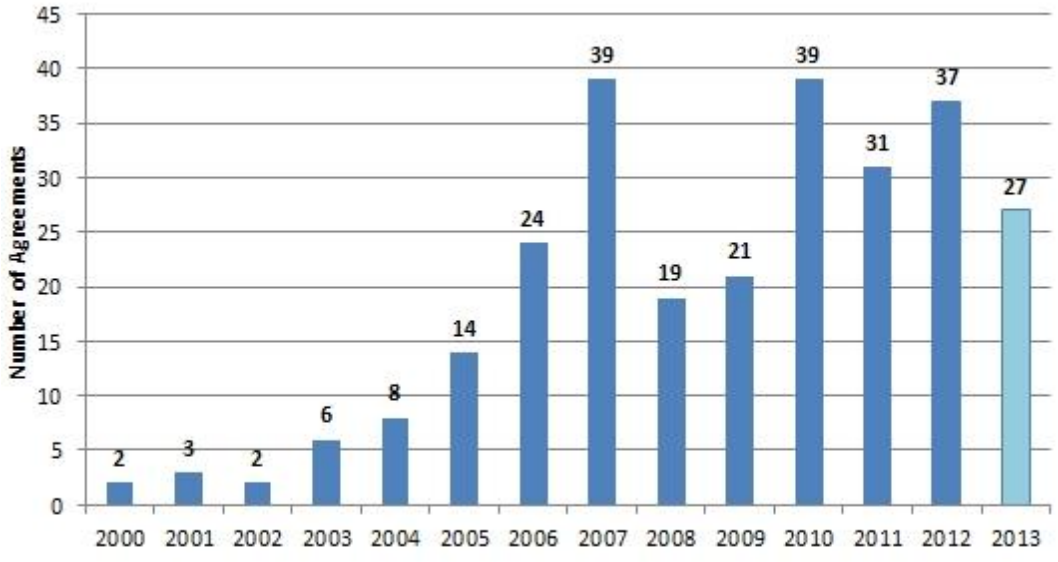
As we reported in our 2013 Mid-Year Update, the increased use of these types of agreements in recent years has prompted heightened judicial scrutiny of DPAs (which, unlike NPAs, are filed in court along with criminal charges that remain pending during the deferral period). Emblematic of this scrutiny, U.S. District Judge Jed Rakoff of the Southern District of New York has recently questioned the use of NPAs and DPAs without related prosecutions of any individuals whose conduct resulted in corporate liability.[5] "[T]he future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing," Judge Rakoff argued.[6] "Just going after the company is also both technically and morally suspect."[7] We routinely represent corporations and executives in criminal investigations. We respectfully disagree with Judge Rakoff's characterization of the current environment and believe that corporate compliance undertakings are often substantive, not cosmetic. Criticism and judicial scrutiny aside, these agreements are now a fixture in the federal corporate law enforcement regime, and all indications point to their use holding steady for the foreseeable future.

This client alert, the eleventh in our series of semiannual updates on NPAs and DPAs (available here), (1) identifies the NPAs and DPAs announced in 2013 and the trends they reflect; (2) surveys the role NPAs and DPAs may play in federal civil litigation collateral to the criminal resolutions of the agreements themselves; (3) analyzes the challenges that non-contradiction clauses in NPAs and DPAs can present for companies when they address the underlying conduct and facts outside the context of the criminal settlement; and (4) discusses debarment and suspension implications of NPAs and DPAs. Similar to the previous updates in this series, the appendix lists all agreements announced in 2013.

NPAs and DPAs in 2013

In 2013, DOJ entered into 27 agreements resolving a wide variety of alleged conduct spanning multiple DOJ units. Of these 27 agreements, 12 were NPAs and 15 were DPAs. In addition to DOJ's agreements, the SEC entered into one corporate NPA, its first involving the U.S. Foreign Corrupt Practices Act ("FCPA"). Although 2013's total number of agreements represents a decrease from 2012, the drop should not be taken as a sign that NPAs and DPAs are waning as prosecutorial tools. To the contrary, DOJ's 27 agreements made 2013 the fifth consecutive year in which at least 20 agreements have been executed. The trend in monetary penalties is similar. In eight of the last nine years, from 2005 through 2013, total monetary penalties associated with NPAs and DPAs have topped $1 billion. Chart 1 below shows that NPAs and DPAs remain a key tool to resolve allegations of corporate misconduct, with 2013 falling squarely within a range that has come to represent the norm. The below charts and figures are derived from Gibson Dunn's database containing details of 279 NPAs and DPAs entered into by federal regulators between January 1, 2000 and January 6, 2014.

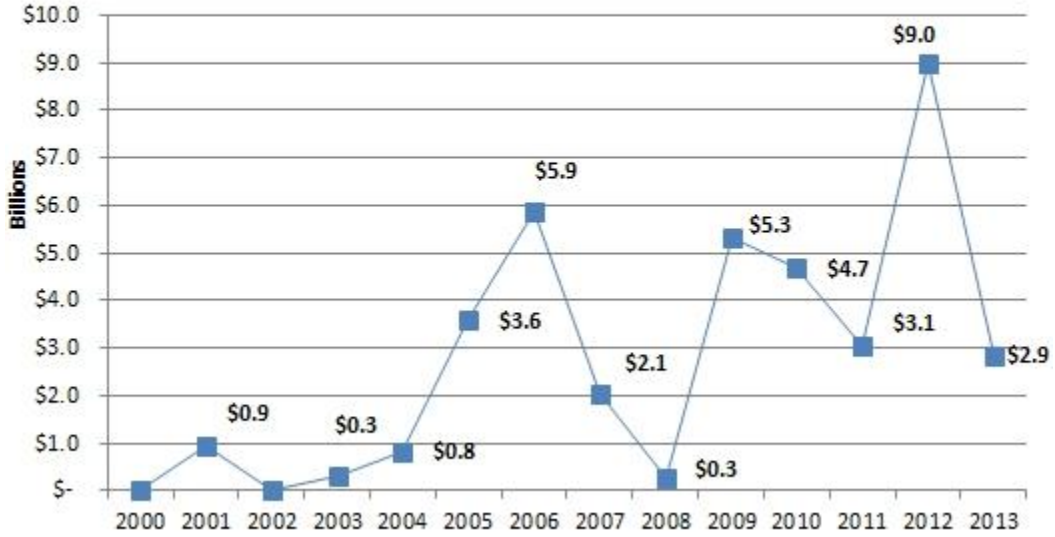
Chart 1: DOJ Corporate DPAs and NPAs, 2000 – 2013



Note: The SEC has also entered into six corporate DPAs and NPAs: 2010 (1), 2011 (3), 2012 (1), and 2013 (1).

The 28 agreements from 2013 resulted in monetary penalties amounting to nearly $2.9 billion, as reflected in Chart 2 below. The 2013 total fell short of the 2012 record, which, as we noted in our 2012 Year-End Update, was driven in part by several particularly extraordinary fines. The 2013 penalties reflect DOJ's appetite for eye-popping fines. Beginning in 2005, the first year settlements topped $1 billion and the first year DOJ's number of agreements climbed out of the single digits (to 14, up from 8 the previous year), average annual penalties have totaled approximately $4 billion, with 5 years, including 2013, below that figure, and 4 above it. The total 2013 monetary penalties, therefore, are in the typical range for recent years. Seven agreements in 2013 included monetary penalties of $100 million or more, including one cross-border settlement topping $1 billion. These large settlements resolved various types of conduct in 2013, including FCPA violations, tax charges, and antitrust allegations. Such settlements reinforce the versatility of NPAs and DPAs in addressing complex and challenging corporate criminal matters.

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



The 28 agreements reported in 2013 cover a variety of conduct, ranging from allegations that have historically dominated the ranks of these agreements—fraud, FCPA, and Food, Drug, and Cosmetic Act allegations, for example—to statutes apparently making their first appearances in a corporate NPA or DPA, such as the Occupational Safety and Health Act. Table 1 below shows the 2013 agreements broken down by the primary legal allegations they resolved.

Table 1: 2013 DPAs/NPAs by Primary Allegation	
Primary Legal Allegation	**Number**
Bank Secrecy Act	1
Conflict of Interest	1
Controlled Substances Act	1
False Claims Act	1
False Statements	1
Food, Drug, and Cosmetic Act	2
Food Labeling	1
Foreign Corrupt Practices Act	8
Fraud (various types)	7
Occupational Safety and Health Act	1
Public Corruption (domestic)	1
Trade-related	3

As we noted in our 2013 Mid-Year Update, DOJ and the SEC have continued their coordination on FCPA matters, with the SEC entering into its first FCPA NPA. Another first for the SEC came in November 2013, when it entered into its first DPA with an individual.[8] In addition to the SEC's expanded use of NPAs and DPAs in 2013, many different DOJ units entered into NPAs or DPAs. The Fraud Section of DOJ's Criminal Division was involved in 11 agreements in 2013—more agreements than any other DOJ unit. Around the United States, 19 U.S. Attorneys' Offices were involved in a combined 22 agreements. That figure is a reflection of the expanding breadth of their use across the country, paralleling the trend for them to reach an ever increasing variety of conduct. A number of U.S. Attorneys' Offices entered into what are apparently their first publicly available agreements in 2013, including in the District of Arizona, the District of South Dakota, and the Eastern District of Washington. As we noted in our 2013 Mid-Year Update, the U.S. Attorney's Office for the District of Puerto Rico also executed its first DPA in February 2013.[9]

Several agreements executed in 2013 required the companies entering into them to engage an independent corporate monitor, as was typical in many agreements in earlier years. Of the 27 DOJ agreements, six included monitorship provisions. Four of those six agreements involved FCPA

allegations—a noteworthy increase compared with 2012, when there were only two FCPA agreements with such provisions, and 2011, with only one. Three of the 2013 monitorship provisions, however, established "hybrid" monitorships.[10] In those cases, the monitorship provisions facilitate the independent monitor serving for the first half of the agreement period (18 months in a three-year deferral period, for example), with the prospect of the company thereafter taking over for the monitor in a self-monitoring and reporting arrangement for the duration.[11]

Agreements in recent years also have required monitorships and monitorship-like arrangements outside the FCPA context. As we noted in our 2013 Mid-Year Update, the 2012 DPA with HSBC Bank USA, N.A. and HSBC Holdings plc, which Judge John Gleeson of the U.S. District Court for the Eastern District of New York approved in July 2013, required the engagement of an independent corporate compliance monitor in connection with the bank's anti-money laundering and trade sanctions controls. New York attorney Michael G. Cherkasky was selected as monitor and began his tenure on July 22, 2013, assisted by a monitor team of more than 60 people.[12]

Among 2013 agreements, DOJ's DPA with ConvergEx Group, LLC resolving wire and securities fraud allegations also required the company to engage an independent ethics and compliance consultant to examine its ethics and compliance program.[13] Distinct from agreements requiring traditional monitorships, the ConvergEx agreement places the onus on the company itself, rather than the consultant, to report to DOJ, at DOJ's request, about the company's "remediation and implementation of any compliance program and internal controls, policies, and procedures that relate to compliance with the securities laws and other criminal laws prohibiting fraud."[14]

In addition to the ConvergEx agreement, six agreements in 2013 required some measure of self-reporting, with two of those agreements (or related settlement documents) requiring the retention of a compliance consultant or auditor. As monitorship and monitorship-like requirements continue to appear in NPAs and DPAs covering a variety of allegations, the government demand for monitorships as a means of scrutinizing and enhancing compliance efforts is poised to grow in prominence, as it did during the earlier wave of FCPA compliance monitorships.

Collateral Use of NPAs and DPAs in Federal Civil Litigation

Following nearly a decade of DOJ's steady use of NPAs and DPAs to resolve corporate criminal matters, it is hardly surprising that plaintiffs are seeking to use these agreements in private, collateral litigation. As plaintiffs have seized on the agreements, some common themes have emerged. First, NPAs and DPAs are sometimes offered as swords by plaintiffs at the pleading stage and to oppose motions to dismiss. Second, federal courts sometimes consider NPAs and DPAs in evaluating the adequacy of pleadings and assessing a defendant's conduct. The extent to which courts analyze and rely on them, however, varies widely.

Use of NPAs and DPAs in the Early Stages of Litigation

In federal civil litigation, plaintiffs have relied on defendants' admissions in NPAs and DPAs to oppose motions to dismiss. These admissions can include statements and conduct set forth in the agreements' statements of facts, statements of responsibility, or criminal informations accompanying

the agreements. Similarly, plaintiffs have moved to amend their complaints when defendants enter into NPAs or DPAs related to plaintiffs' claims after a civil action is underway.

Case law on the use of NPAs and DPAs at the pleading stage varies dramatically. Many courts that have ruled on motions to dismiss merely mention a defendant's entry into an NPA or DPA, without further comment or analysis. Some courts, though, have directly addressed the significance of NPAs and DPAs at the motion to dismiss stage. In *Davis v. Beazer Homes, U.S.A. Inc.*, for example, the plaintiffs alleged that the defendant's mortgage financing practices were unfair and deceptive under state law.[15] To support their claims, the plaintiffs offered Beazer Homes' 2009 DPA, in which the company accepted responsibility for criminal acts related to the general allegations in the complaint. The magistrate judge found that although the DPA was not a "final adjudication" of the issues, it should be considered a "significant factor" in assessing the plausibility of a plaintiff's claims under the *Twombly* and *Iqbal* pleading standard.[16]

Beazer Homes contains what appears to be the most substantial judicial analysis to date of the effect that NPAs and DPAs have at the pleading stage in federal court, and it could serve as a guidepost for future cases. Notably, Beazer Homes negotiated language into its DPA permitting it "to contest liability, raise defenses, or assert affirmative claims in civil proceedings with specific private civil litigants . . . including by disputing [whether] the factual allegations [therein] apply to [the] private civil litigant or class of litigants."[17] Although the court did not address this clause specifically, such language could be helpful in limiting liability in anticipated or pending litigation, especially in light of the prevalence of settlement provisions that prohibit any statements contradictory to the settlement fact pattern. Such provisions may limit companies' statements as to the underlying conduct after the entry of an agreement. In addition, the magistrate judge addressed the existence of the defendant's recent DPA even though the plaintiffs' opposition brief did not cite it. Thus, defendants with NPAs or DPAs may find that the courts will analyze the agreements' terms regardless of whether the plaintiffs mention them.

Plaintiffs have exploited agreements to advance other arguments at the motion to dismiss stage as well. In recent derivative litigation involving SAIC,[18] plaintiffs cited the company's 2012 DPA resolving fraud allegations related to a New York City government contract to assert that a pre-suit demand on the company's board of directors would have been futile and should be excused. Plaintiffs argued there were "stunning admissions" in the DPA's statement of responsibility that they claimed proved the directors "knew or should have known" about improper billing practices related to the contract.[19] As the court observed, however, the statement of responsibility addressed *management's* responsibility, not the knowledge of any members of the board of directors. "Plaintiffs cannot seek to rely on parts of the SOR that describe managerial issues," the court reasoned, "and then, without any factual basis, ask the Court to infer a settlement-related cover-up that conceals Board knowledge of wrongdoing . . . ."[20] The court thus declined to infer directors' knowledge of corporate wrongdoing solely from the statements in the DPA, and granted the motions to dismiss due to plaintiffs' failure to comply with the demand requirement.[21]

Other plaintiffs have used NPAs and DPAs to seek tolling of a statute of limitations on their claims, arguing that they were unaware of defendants' activities or their injuries until the agreement's announcement.[22]

Defendants too have attempted to use NPAs and DPAs to their advantage. If plaintiffs allege that a defendant's NPA or DPA contains an admission of the alleged wrong asserted in a civil complaint , the defendant could argue that the statement in the agreement does not constitute an admission, or that even if it does, the statement does not admit the conduct that the plaintiffs allege. The defendant could also argue, if the facts support the position, that the plaintiffs themselves were engaged in conduct related to the allegations in the DPA.

Defendants also have used the agreements to argue for dismissal of plaintiffs' securities claims. For example, Tommy Hilfiger, U.S.A. argued—without success—that its 2005 NPA resolving a tax investigation warranted dismissal of a complaint for failure to plead loss causation.[23] The company argued that the market disclosure at issue in the case happened when the U.S. Attorney's Office announced the closure of the criminal investigation with no criminal charges and that the company was lowering a commission rate paid to subsidiaries that was at the heart of the dispute.[24] Furthermore, Tommy Hilfiger, U.S.A. contended that the NPA was evidence that "nothing fraudulent was afoot."[25] The court denied dismissal, rejecting the argument that plaintiffs failed to plead loss causation because the criminal investigation resulted in an NPA.[26]

Use of NPAs and DPAs at the Summary Judgment Stage

In other cases, plaintiffs have also used NPAs and DPAs at the summary judgment stage, despite the higher level of scrutiny and burden of proof at that stage. In one case in the Western District of Washington, plaintiffs sought to defeat a motion for summary judgment by reference to a tax-related DPA that Bayerische Hypo-und Vereinsbank AG ("HVB") entered into in February 2006.[27] Although HVB had been dismissed from the case for lack of personal jurisdiction and improper venue, and a separate action was dismissed as time barred in the Southern District of New York,[28] the plaintiffs claimed that other defendants breached a written contract by promising that a tax shelter transaction would include a loan, when in fact—and as stated in the DPA—the loan was a sham.[29] The plaintiffs asserted that the DPA's statement of facts qualified as circumstantial evidence showing that defendants did not in fact issue the loan, in breach of their promises and the contract.[30] Although the court took judicial notice of the DPA's terms, the court did not ultimately find the plaintiffs' argument persuasive.[31] The court stated there was direct evidence contrary to the plaintiffs' claim, and, alternatively, even if the DPA constituted circumstantial evidence, the plaintiffs should have been able to substantiate their claims with direct evidence.[32] As a result, the court granted summary judgment in favor of the defendants.[33]

Defendants have also used NPAs and DPAs tactically to defeat summary judgment motions. In *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, defendant HVB successfully petitioned the Ninth Circuit to reverse summary judgment in favor of the plaintiff, in part, by using its DPA with the government.[34] In the district court, the plaintiff argued that HVB's DPA admission that it had been involved in illegal tax shelter transactions and had defrauded the United States established that the

defendant had violated RICO and unfair competition laws.[35] The district court granted partial summary judgment in favor of the plaintiff on both claims, citing admissions within the defendant's DPA as evidence of the misconduct.[36] The Ninth Circuit reversed in part and remanded, stating that although the admissions in the DPA proved that the defendant had defrauded the *United States*, those admissions did not prove the defendant's fraudulent activities caused the *plaintiff's* injury.[37] "There is no dispute that HVB defrauded the United States through" the tax shelter scheme, the Ninth Circuit held, but "HVB's fraudulent activity towards the United States did not cause Rezner's injury."[38] Specifically, in analyzing the proximate causation element of the RICO claim, the court noted that "one consideration is whether a better suited plaintiff would have an incentive to sue."[39] Because the Ninth Circuit found that the United States, not the plaintiff, was the immediate, direct victim of defendant's fraud and was better situated to sue, the court held that the plaintiff could not show proximate causation.[40] The court therefore reversed in part the district's court grant of summary judgment.

Key Considerations Concerning the Use of NPAs and DPAs in Federal Civil Litigation

Given the appearance of NPAs and DPAs in civil litigation, it may be prudent for a company conducting negotiations over an NPA or DPA to assert, even before discussions with the government begin, that any statements it provides to the government in the course of the negotiations are made with the expectation that the parties are negotiating a plea agreement. If practicable, companies may wish to seek a similar statement from the prosecutors negotiating with company counsel. Doing so may help companies exclude those statements during subsequent litigation, using Federal Rule of Evidence 410(a)(4), which prohibits the admission in any civil case of statements "made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea."[41]

Similarly, companies in negotiations may want to seek to preserve confidentiality and privilege, if applicable, of any documents provided to the government in connection with investigations of alleged corporate misconduct. Doing so may help prevent disclosure of such documents to subsequent third-party litigants. Seeking confidential treatment under the Freedom of Information Act ("FOIA"), for commercial information provided in the course of a law enforcement investigation, may bolster the protection. FOIA Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential,"[42] and Exemption 7, which protects certain "records or information compiled for law enforcement purposes,"[43] can help companies keep their submissions private. Confidential treatment requests relying on FOIA Exemptions 4 and 7 routinely accompany companies' submissions to U.S. authorities in connection with corporate investigations, including those that result in NPAs and DPAs.

In the same vein, companies may try to protect the legal privilege connected with such materials by seeking during the early stages of investigations to enter into non-waiver or selective waiver agreements with prosecutors. Such agreements purport to protect the privilege attached to the materials despite their production to prosecutors. While courts have expressed skepticism over such agreements, and production may ultimately result in full waiver of the privilege, they may provide some defense against disclosure, especially when used in conjunction with FOIA confidential

treatment requests. Such mechanisms do not guarantee that investigative documents will remain unavailable to third parties, but they can provide some measure of protection by injecting additional procedural requirements into the disclosure process. They also demonstrate to DOJ and the SEC the gravity of a company's concerns about, and its diligent efforts to safeguard, its sensitive information.

Similarly, monitorship reports filed with DOJ and the SEC, and communications between independent compliance monitors and the companies they monitor, can also be avenues by which sensitive and confidential information—capable of fueling civil litigation—is disclosed. Non-waiver provisions in monitorship agreements could temper that risk. Moreover, monitorship reports may be protected from disclosure. The U.S. Court of Appeals for the D.C. Circuit in February 2013 denied a media outlet's request for access to monitorship reports. The court reversed a lower court's ruling, rejecting the conclusion that the media outlet had a common law right of access to the reports as judicial records, finding that they were neither judicial records nor public records, and concluding the First Amendment to the U.S. Constitution did not require their disclosure.[44]

Non-Contradiction Clauses Limit Companies' Post-Settlement Statements

Agreement terms limiting companies' statements about the conduct underlying settlements can also affect a company's options in both court filings and public statements. On March 21, 2013, Standard Chartered Bank PLC ("Standard Chartered" or "SCB") chairman Sir John Peace delivered a *mea culpa* that reverberated throughout the white collar defense bar. Peace, in a company-issued statement, apologetically withdrew as "both legally and factually incorrect" comments he had made just three weeks earlier concerning the company's 2012 DPA involving alleged violations of U.S. sanctions laws.[45] Peace's sudden about-face highlighted a sometimes overlooked component of most NPAs and DPAs—the non-contradiction clause.

Standard Chartered entered into a DPA on December 7, 2012 with DOJ and various other government entities relating to criminal violations of U.S. economic sanctions laws. Standard Chartered admitted in the DPA's accompanying statement of facts that it "knowingly and willfully engaged in this criminal conduct."[46] During a March 5, 2013 press conference, however, Chairman Peace assured the media that Standard Chartered had committed "no willful act to avoid sanctions [laws]; you know, mistakes are made—clerical errors—and we talked about last year a number of transactions which clearly were clerical errors or mistakes that were made . . . ."[47] According to media reports, within days DOJ officials threatened to revoke the company's DPA on grounds that Chairman Peace's statement violated the agreement's non-contradiction provision, which states:

> 12. **Public Statements:** SCB expressly agrees that it shall not cause to be made, through its attorneys, board of directors, agents, officers, employees . . . any public statement contradicting the acceptance of responsibility by SCB set forth above or the facts described in the Factual Statement. Any such public statement by SCB, its attorneys, board of directors, agents, officers, employees . . . shall, subject to the cure rights of SCB . . . , constitute a willful and material breach of this Agreement . . . , and SCB would thereafter be subject to prosecution pursuant to the terms of this Agreement . . . .[48]

The Standard Chartered DPA's non-contradiction clause follows a form DOJ has used numerous times during the past decade. FirstEnergy Nuclear Operating Company ("FirstEnergy") faced a comparable situation for allegedly running afoul of a similar non-contradiction clause.[49] In 2006, FirstEnergy entered into a DPA over false statements it allegedly made to the Nuclear Regulatory Commission, involving the safety of the Davis-Besse Nuclear Power Station on the shore of Lake Erie in northwest Ohio.[50] After signing the DPA, FirstEnergy filed consultant reports in related insurance-coverage arbitration.[51] These reports concluded that FirstEnergy did not intentionally cause damage to the Davis-Besse reactor. Upon learning of these reports, the Nuclear Regulatory Commission reportedly invoked the DPA's non-contradiction clause and threatened to refer FirstEnergy to DOJ for breach of the agreement.[52] Stuck between a rock and a hard place, FirstEnergy reportedly chose to forgo its multimillion-dollar insurance claim rather than risk DOJ revoking the DPA for breach.[53] The Standard Chartered and FirstEnergy examples demonstrate the "Sword of Damocles" effect that non-contradiction clauses may have on companies over the course of an NPA's or DPA's duration.

Companies are hard pressed to challenge non-contradiction clauses, and the government has the upper hand in evaluating potential breaches. Because the text of many agreements specifically reserves to DOJ "sole discretion" to determine whether a company has breached an NPA or DPA, companies must largely rely on the government's good faith to enforce these clauses only in appropriate circumstances. If DOJ does find a breach, companies may be unwilling to endure—or even unable to survive—the negative publicity and accompanying risks of indictment. As we noted in our 2013 Mid-Year Update, avoiding the potentially calamitous collateral consequences that indictment can bring is a key factor underpinning the surge in the use of NPAs and DPAs in the past decade.

The power of "sole discretion" to determine violations of non-contradiction clauses is not without its detractors. In adopting legislation authorizing the use of DPAs in the United Kingdom, the British Parliament expressly limited prosecutorial discretion in determining whether a breach of a U.K. DPA has occurred. Contrary to U.S. practice empowering prosecutors to make their own breach determinations, Schedule 17 of the adopted U.K. Crime and Courts Act 2013 vests the power in judges. Reflecting British skepticism of U.S.-style prosecutorial discretion, one prominent critic of non-contradiction clauses and prosecutorial discretion is the U.K.'s second-most senior criminal judge, Lord Justice Thomas. During the Innospec proceedings, discussed in our 2011 Year-End Update, Lord Justice Thomas explained that "[i]t would be inconceivable for a prosecutor to approve a press statement to be made by a person convicted of burglary or rape; companies who are guilty of corruption should be treated no differently to others who commit serious crimes."[54]

Non-contradiction clauses can necessitate carefully crafted corporate statements even on matters that barely skirt the substance of allegations resolved in NPAs and DPAs, and recent agreements highlight the non-contradiction provisions' durability, with the non-contradiction language remaining largely consistent across agreements.[55] The October 2013 Diebold, Inc. DPA, for example, contained non-contradiction language that is nearly identical to the language in the Standard Chartered agreement and previous DOJ agreements from the past decade.[56]

Non-contradiction clauses are likely to remain standard provisions in NPAs and DPAs in the United States, giving DOJ a mechanism to hold companies accountable for post-agreement statements that

could otherwise undermine the effect and value of an NPA or DPA, and allowing DOJ to send a message through what are often detailed statements of facts cataloging wrongdoing. Moreover, in an era of increasing judicial scrutiny of DPAs, as we discussed in our 2013 Mid-Year Update, a well-crafted statement of facts may likewise help assure a court that an adequate factual basis for an agreement exists—similar to the requirements for a court to accept a guilty plea under Federal Rule of Criminal Procedure 11(b)(3). As the role of the courts in scrutinizing and approving DPAs continues to evolve, it is conceivable that DPAs with both the shield of an adequate factual basis and the sword of a robust non-contradiction clause may stand a better chance of being accepted by the courts.

The use of non-contradiction clauses amplifies the need for a sophisticated, multidisciplinary, and coordinated approach to NPA or DPA negotiations. The effect and longevity of NPAs and DPAs alone makes this so. Experienced counsel can help a company considering an NPA or DPA by advising on the drafting and negotiations of the statement of facts and implications of proposed non-contradiction language, among a number of considerations.

Collateral Consequences: Considering Government Contracting Debarment and Suspension Risks Related to NPAs and DPAs

A central reason that many companies agree to NPAs or DPAs in lieu of litigation is to avoid the potentially devastating collateral consequences of indictment or conviction. For companies that receive a substantial portion of their business from the federal government, debarment or suspension from federal contracting is among the most potentially damaging of these collateral consequences. The specter of suspension and debarment can make NPAs, without pending criminal charges on a court's docket, more attractive than DPAs. Due to the many overlapping considerations that can affect a decision to enter into an NPA or DPA, a company assessing criminal resolution options must address suspension and debarment issues concurrently with negotiations that may result in such an agreement.

The Authority for Suspension and Debarment

The Federal Acquisition Regulation ("FAR") prohibits federal "[c]ontractors debarred, suspended, or proposed for debarment" from receiving contracts, and it bars federal agencies from seeking offers from such contractors, awarding contracts to them, or agreeing to subcontracts with them, "unless the agency head determines that there is a compelling reason for such action."[57] Such debarments and suspensions generally apply across the entire federal government.[58]

Debarments are for fixed periods and generally may last for up to three years.[59] A suspension is, practically speaking, a temporary debarment that lasts for the duration of any investigation, litigation, or agency determination to settle the debarment determination.[60] For cases in which an investigation or litigation lasts longer than three years, a suspension may actually exceed the standard maximum term for a debarment.[61] Suspension is recognized as "a 'serious action' that should only be imposed on the basis of an indictment or 'adequate evidence' of the existence of grounds for debarment, and where 'immediate action' is necessary to protect the Government's and public's interests."[62] This

"adequate evidence" standard is a lower threshold than the "preponderance of the evidence" standard required for debarment.[63]

Suspension and debarment considerations can also be important for entities that do not rely on government contracts if they receive grant funding or participate in cooperative agreements with the U.S. government. The Nonprocurement Common Rule ("NCR") establishes the protocol for "governmentwide nonprocurement suspension and debarment" of entities engaged in transactions with the U.S. government involving grants or cooperative agreements.[64]

Despite the potentially harsh collateral consequences of suspension and debarment, these processes are not punitive and are not designed to punish contractors (e.g., no fines accompany them). Instead, they serve to help ensure that the government only contracts with "presently responsible" entities.[65] As a result, when proper grounds exist, suspension and debarment are permitted *but not required* under the FAR and NCR.[66] Federal agencies may exercise discretion in determining whether to suspend or debar a contractor, akin to DOJ prosecutors' discretion in determining whether to indict a company, decline prosecution, seek a plea agreement, or enter into an NPA or DPA. An agency should not debar or suspend a *presently* responsible contractor, even if grounds—based on past conduct—do exist.[67] "In determining whether a contractor is presently responsible, an agency looks to the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors counseling against exclusion."[68]

Grounds for debarment under the FAR include: "(1) a conviction or civil judgment for fraud or the commission of a criminal offense, (2) a serious violation of the terms of a Government contract, subcontract, or transaction (established by a preponderance of the evidence), or (3) any other cause so serious or compelling in nature that it affects an entity's 'present responsibility.'"[69]

Suspension and Debarment Consequences of DPAs Versus NPAs

A company that avoids a criminal judgment by entering into an NPA or DPA has by no means eliminated suspension and debarment concerns. Rather, such concerns should inform a company's handling of a criminal investigation in multiple ways. For example, a DPA may be less helpful for a company seeking to avoid suspension and debarment than an NPA, because DPAs generally require the company to consent to the filing of formal criminal charges—typically a criminal information, waiving indictment—which remains on the court's docket for the duration of the agreement and until the government seeks, and the court grants, dismissal of the charges following the successful conclusion of the deferral period.[70]

The pendency of criminal charges against a company is particularly relevant to "presently responsible" determinations because, under the FAR, contractors must certify whether they are "presently indicted for, or otherwise criminally [] charged by a governmental entity with" various allegations, including "commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract . . . or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, [or] tax evasion."[71] Therefore, a company entering into a DPA and that has formal criminal charges pending

against it on a court's docket for any of the classes of offenses enumerated in the FAR would be required to certify that it was presently indicted for purposes of responsibility determinations.

On the other hand, the FAR does *not* require a contractor to make a certification regarding *settlement* of *unfiled* criminal allegations. Therefore, companies that agree to an NPA may certify that they are not presently indicted or criminally charged with a crime within the meaning of the FAR. Similarly, companies that successfully complete deferral periods under their DPAs and have the criminal charges dismissed could thereafter certify they are not presently indicted or criminally charged, as defined by the FAR.

Directly Addressing Suspension and Debarment in the Negotiation of NPAs and DPAs

One tactic that can help companies mitigate unintended suspension and debarment consequences flowing from an NPA or DPA is to conduct parallel discussions with government debarment and suspension officers during the pendency of the NPA or DPA negotiations and, if feasible, to have the relevant officer review the agreement before its execution.[72] In some instances, it may even be possible to memorialize specific assurances against suspension and debarment in the NPA or DPA.[73]

For example, in 2007 Abt Associates ("Abt") entered into a DPA with the U.S. Attorney's Office for the District of Massachusetts to resolve allegations of False Claims Act violations for overbilling the U.S. Agency for International Development ("USAID").[74] In a "Compliance Agreement" between Abt and USAID, which was appended to the DPA, USAID, speaking for all "U.S. Government Contract Clients," agreed to not suspend, debar, or impose any other administrative sanction on Abt related to the DPA.

In 2013, Skedco, Inc. ("Skedco") entered into a DPA with the U.S. Attorney's Office for the Eastern District of North Carolina over alleged bribery of a public official.[75] An "Administrative Agreement" between Skedco and the U.S. Army,[76] set forth an extensive "Contractor Responsibility Program" for Skedco.[77] The agreement states "[t]he Army has determined that the terms and conditions of this Agreement provide adequate assurances that the interests of the Government will be sufficiently protected to preclude the necessity of debarment or suspension of Skedco . . . ."[78]

Companies that contract with the federal government or receive grant money or other financing from federal sources should tread carefully in evaluating potential resolutions to allegations of corporate wrongdoing. Not only must such companies consider the standard array of collateral consequences that any company resolving federal criminal allegations faces, they must also weigh and address contemporaneously the potential debarment and suspension risks with their federal contracting clients.

Conclusion

As we ring in a new year, NPAs and DPAs remain at the forefront of corporate criminal enforcement in the United States. U.S. prosecutors and regulators turned to this approach more than two dozen times in 2013, continuing their steady use during the past decade. Following on the heels of 2013's continued use of NPAs and DPAs, 2014 has begun with JPMorgan Chase's entry into a DPA on January 6, with the U.S. Attorney's Office for the Southern District of New York, in which the

company agreed to a forfeiture of $1.7 billion to resolve Bank Secrecy Act violations in connection with the Bernard L. Madoff Ponzi scheme. The regularity and stability of DOJ's use of NPAs and DPAs, along with the SEC's adoption of the agreements in its Cooperation Initiative, and the versatility of their application to a broad spectrum of corporate criminal allegations have helped the agreements become go-to tactics in the federal enforcement strategy. Their tempered approach to addressing serious criminal allegations has helped enforcement officials and responsible companies alike bolster corporate compliance culture and root out malfeasance while avoiding devastating collateral consequences that could visit harm on innocent shareholders, employees, and the economy as a whole. These agreements have led to average monetary penalties of more than $4 billion per year. As 2014 begins, the direct and indirect uses of NPAs and DPAs remain among the top corporate prosecution issues to watch, as they reach new conduct in the United States and continue to facilitate cross-border cooperation among law enforcement agencies.

APPENDIX
2013 Non-Prosecution and Deferred Prosecution Agreements

The chart below summarizes the agreements that DOJ and the SEC executed in 2013. 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 Penalties" may include amounts not strictly limited to an NPA or a DPA, such as fines, penalties, forfeitures, and restitution requirements 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 NPA or DPA, paid by the named entity and/or subsidiaries. The term "Monitor" identifies traditional compliance monitors, self-reporting arrangements, and other monitorship arrangements found in settlement agreements.

APPENDIX **2013 Non-Prosecution and Deferred Prosection Agreements**						
Company	**Agency**	**Alleged Violation**	**Type**	**Monetary Penalties**	**Monitor**	**Term of DPA/NPA**
ADA-ES, Inc. & ADA Environmental Solutions, LLC	U.S. Attorney, Eastern District of Texas	Trade Secrets	NPA	$0	No	24 months
Adams Thermal Systems, Inc.	U.S. Attorney, District of South Dakota	Occupational Safety and Health Act	DPA	$1,335,000	No	36 months

APPENDIX 2013 Non-Prosecution and Deferred Prosection Agreements						
Company	**Agency**	**Alleged Violation**	**Type**	**Monetary Penalties**	**Monitor**	**Term of DPA/NPA**
Archer Daniels Midland	DOJ Fraud Section; U.S. Attorney, Central District of Illinois	FCPA	NPA	$54,267,366	Self-Reporting	36 months
Bashas' Inc.	U.S. Attorney, District of Arizona	Food Mislabeling	NPA	$1,472,487	No	24 months
Bilfinger SE	DOJ Fraud Section	FCPA	DPA	$32,000,000	Yes	36 months
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
ConvergEx Group, LLC	DOJ Fraud Section	Fraud	DPA	$151,014,402	Yes[a]	24 months
C.R. Bard Inc.	U.S. Attorney, Northern District of Georgia; DOJ Civil Division	False Claims Act	NPA	$50,460,000	No	undisclosed[b]
Diebold, Inc.	U.S. Attorney, Northern District of Ohio; DOJ Fraud Section	FCPA	DPA	$48,170,000	Yes	36 months
Ernst & Young LLP	U.S. Attorney, Southern District of New York	Tax Fraud	NPA	$123,000,000	No	no set term[c]
The Gallup Organization	U.S. Attorney, District of Columbia	Conflict of Interest	NPA	$10,550,000	No	33 months
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

APPENDIX 2013 Non-Prosecution and Deferred Prosection Agreements						
Company	**Agency**	**Alleged Violation**	**Type**	**Monetary Penalties**	**Monitor**	**Term of DPA/NPA**
Honey Holding I, Ltd.	U.S. Attorney, Northern District of Illinois	Food, Drug, and Cosmetic Act	DPA	$1,000,000	No	24 months
Las Vegas Sands Corp.	U.S. Attorney, Central District of California	Bank Secrecy Act	NPA	47,400,300	Self-Reporting	24 months
Lender Processing Services, Inc.	DOJ Fraud Section; U.S. Attorney, Middle District of Florida	Mortgage Fraud, Accoun ting Fraud	NPA	$35,000,000	Yes[d]	24 months
Liechtensteinisc he Landesbank AG	U.S. Attorney, Southern District of New York; DOJ Tax Division	Tax Fraud	NPA	$23,841,542	No	36 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
Rabobank (Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.)	DOJ Fraud Section; DOJ Antitrust Division	Fraud	DPA	$1,066,500,000	No	24 months
Ralph Lauren Corp.	DOJ Fraud Section; U.S. Attorney, Eastern District of New York	FCPA	NPA	$882,000	Self-Reporting	24 months

APPENDIX

2013 Non-Prosecution and Deferred Prosection Agreements

Company	Agency	Alleged Violation	Type	Monetary Penalties	Monitor	Term of DPA/NPA
Ralph Lauren Corp.	Securities & Exchange Commission	FCPA	NPA	$734,846	No	no set term[c]
The Royal Bank of Scotland plc	DOJ Antitrust Division; DOJ Fraud Section	Fraud, Antitrust	DPA	$475,000,000	Self-Reporting[e]	24 months
Skedco, Inc.	U.S. Attorney, Eastern District of North Carolina	Public Corruption	DPA	$300,000	No	24 months
Total S.A.	DOJ Fraud Section; U.S. Attorney, Eastern District of Virginia	FCPA	DPA	$398,200,000	Yes	36 months
Unico, Inc.	U.S. Attorney, Southern District of California	False Statements (18 U.S.C. § 1001)	DPA	$51,000[f]	Yes	36 months
United Parcel Service, Inc.	U.S. Attorney, Northern District of California	Controlled Substances Act	NPA	$40,000,000	Self-Reporting[g]	24 months
Weatherford International Limited	DOJ Fraud Section	FCPA	DPA	$152,790,616	Yes	36 months
Weatherford International Limited	U.S. Attorney, Southern District of Texas	Trade Sanctions	DPA	$100,000,000	Yes[h]	36 months

a) The DPA requires the retention of an independent ethics and compliance consultant to review the company's ethics and compliance program.

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

c) The NPA does not specify a duration.

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

APPENDIX 2013 Non-Prosecution and Deferred Prosection Agreements						
Company	**Agency**	**Alleged Violation**	**Type**	**Monetary Penalties**	**Monitor**	**Term of DPA/NPA**
e) 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. f) The DPA provides that the U.S. Attorney's Office will defer the company's obligation to pay for 18 months from the date of the agreement. g) 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. h) The attendant agreement with the Department of Commerce's Bureau of Industry and Security requires the engagement of an independent auditor regarding the company's compliance with export control and sanctions laws for three years (2012, 2013, and 2014 calendar years).						

[1] The U.S. Department of Justice distinguishes between NPAs and DPAs 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). Over the years, the terminology has been refined, and the current bright line distinction between NPAs and DPAs was much more opaque earlier in time.

[2] Based on our experience, it is likely that there are other NPAs and DPAs that have not been publicly disclosed. Gibson Dunn has executed non-prosecution agreements that have not been made public. In some instances, DOJ declines to disclose publicly the agreements. In November 2013, a University of Virginia School of Law researcher filed a lawsuit under the Freedom of Information Act against DOJ seeking access to a 2012 NPA between ABC Professional Tree Services, Inc. and the U.S. Attorney's Office for the Southern District of Texas. The complaint, which seeks an order requiring the immediate disclosure of the agreement, argues that the researcher is "statutorily entitled to the disclosure" of the agreement and that DOJ "has improperly withheld the requested records in violation of the law and in opposition to the strong public interest in understanding the judicial system and why admitted wrongdoers are not criminally prosecuted." Complaint at 1, *Ashley v. U.S. Dep't of Justice*, No. 13-cv-01873-KBJ (D.D.C. Nov. 26, 2013).

[3] Monetary penalties, as detailed in the Appendix, may include amounts beyond an NPA or DPA itself. Global settlements negotiated in connection with an NPA or DPA will sometimes include criminal and civil fines and penalties imposed by DOJ, the SEC, and/or other regulators and enforcement agencies; disgorgement payments; forfeiture amounts; restitution requirements; and civil settlements related to DOJ and/or SEC resolutions.

[4] While we do not report statistics on NPAs and DPAs entered into by individuals, the SEC's entry into its first individual DPA in 2013 marks a noteworthy expansion of their use in the SEC's Cooperation Initiative.

[5] Hon. Jed S. Rakoff, U.S. Dist. Judge for the S.D.N.Y., Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?, Address Before the New York City Bar Association 17 (Nov. 12, 2013).

[6] Hon. Jed S. Rakoff, U.S. Dist. Judge for the S.D.N.Y., Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?, Address Before the New York City Bar Association 17 (Nov. 12, 2013).

[7] Hon. Jed S. Rakoff, U.S. Dist. Judge for the S.D.N.Y., Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?, Address Before the New York City Bar Association 17 (Nov. 12, 2013).

[8] Press Release, U.S. Sec. and Exch. Comm'n, SEC Announces First Deferred Prosecution Agreement With Individual (Nov. 12, 2013).

[9] That office was also involved in and is referenced in a 2003 DPA with Banco Popular de Puerto Rico, but attorneys in DOJ's Asset Forfeiture and Money Laundering Section executed the agreement without any signatories from the U.S. Attorneys' office. *See* Banco Popular de Puerto Rico DPA (Jan. 13, 2003).

[10] Jeffrey Benzing, *Self-Monitoring and Hybrids More Common As U.S. Credits FCPA Compliance*, Main Justice Just Anti-Corruption (May 10, 2013, 1:58 PM).

[11] Jeffrey Benzing, *Self-Monitoring and Hybrids More Common As U.S. Credits FCPA Compliance*, Main Justice Just Anti-Corruption (May 10, 2013, 1:58 PM).

[12] Letter from Loretta E. Lynch, U.S. Attorney for the Eastern District of New York, to U.S. District Judge John Gleeson, United States v. HSBC Bank USA, N.A., No. 12-CR-763 (E.D.N.Y. Sep. 30, 2013).

[13] ConvergEx Group LLC DPA ¶ 13 (Dec. 12, 2013).

[14] ConvergEx Group LLC DPA ¶ 13 (Dec. 12, 2013).

[15] No. 1:08CV247, 2009 WL 3855935, at *1 (M.D.N.C. Nov. 17, 2009).

[16] *Davis v. Beazer Homes, U.S.A. Inc.*, No. 1:08CV247, 2009 WL 3855935, at *7 (M.D.N.C. Nov. 17, 2009).

[17] Beazer Homes USA, Inc. DPA ¶ 4 (Jul. 1, 2009).

[18] *In re SAIC Inc. Derivative Litigation*, No. 12 Civ. 2437, 2013 WL 2466796 (S.D.N.Y. June 10, 2013), *appeal docketed*, No. 13-2648 (2d Cir. July 9, 2013).

[19] *In re SAIC Inc. Derivative Litigation*, No. 12 Civ. 2437, 2013 WL 2466796, at *14 (S.D.N.Y. June 10, 2013), *appeal docketed*, No. 13-2648 (2d Cir. July 9, 2013).

[20] *In re SAIC Inc. Derivative Litigation*, No. 12 Civ. 2437, 2013 WL 2466796, at *14 (S.D.N.Y. June 10, 2013), *appeal docketed*, No. 13-2648 (2d Cir. July 9, 2013).

[21] *In re SAIC Inc. Derivative Litigation*, No. 12 Civ. 2437, 2013 WL 2466796, at *22 (S.D.N.Y. June 10, 2013), *appeal docketed*, No. 13-2648 (2d Cir. July 9, 2013).

[22] Such efforts are not necessarily successful. *See, e.g.*, *Curtis Inv. Co., LLC v. Bayerische Hypo- und Vereinsbank*, AG, 341 F. App'x 487, 496–97 (11th Cir. 2009) (affirming dismissal because, in part, the defendant's DPA stated that all parties involved, including the plaintiff, knew of the fraudulent nature of the transaction at the time it was made).

[23] *See In re Tommy Hilfiger Sec. Litig.*, No. 04-CIV-7678, 2007 WL 5581705, at *3 n.2 (S.D.N.Y. July 20, 2007).

[24] *In re Tommy Hilfiger Sec. Litig.*, No. 04-CIV-7678, 2007 WL 5581705, at *3 (S.D.N.Y. July 20, 2007).

[25] *In re Tommy Hilfiger Sec. Litig.*, No. 04-CIV-7678, 2007 WL 5581705, at *3 n.2 (S.D.N.Y. July 20, 2007).

[26] *In re Tommy Hilfiger Sec. Litig.*, No. 04-CIV-7678, 2007 WL 5581705, at *3 n.2 (S.D.N.Y. July 20, 2007).

[27] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *8 (W.D. Wash. Aug. 30, 2010).

[28] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *8 n.4 (W.D. Wash. Aug. 30, 2010).

[29] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *8–9 (W.D. Wash. Aug. 30, 2010).

[30] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *9–10 (W.D. Wash. Aug. 30, 2010).

[31] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *9–10 (W.D. Wash. Aug. 30, 2010).

[32] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *9–10 (W.D. Wash. Aug. 30, 2010).

[33] *Malone v. Nuber*, No. C07-2046RSL, 2010 WL 3430418, at *10 (W.D. Wash. Aug. 30, 2010).

[34] *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873–74 (9th Cir. 2010).

[35] *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 870 (9th Cir. 2010).

[36] *See Rezner v. Bayerische Hypo-Und Vereinsbank AG*, No. C 06-02064 JW, 2009 WL 8652919 at *2–3 (N.D. Cal. May 1, 2009).

[37] *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873–74 (9th Cir. 2010).

[38] *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873 (9th Cir. 2010).

[39] *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873 (9th Cir. 2010) (citing *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010)).

[40] *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 874 (9th Cir. 2010).

[41] *See, e.g.*, *Escue v. Sequent, Inc.*, No. 2:09-CV-765, 2012 WL 220204, at *1, *12 (S.D. Ohio Jan. 25, 2012) (denying defendants' motion in limine that sought to exclude from trial certain materials in the possession of plaintiff, including defendants' written and oral statements made in the course of plea discussions with the U.S. government that led to a DPA, finding that Rule 410(a)(4) did not apply because "defendants provide no specific information concerning what statements were made to the prosecuting attorney that they believed [were] protected by Rule 410" and that "defendants' assertion alone is simply not sufficient to demonstrate that any and all statements . . . were made with the expectation that they were negotiating a plea agreement and that that belief was reasonable.").

[42] 5 U.S.C. § 552(b)(4).

[43] 5 U.S.C. § 552(b)(7).

[44] *S.E.C. v. Am. Int'l Group*, 712 F.3d 1, 2–3 (D.C. Cir. 2013). *But see In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liab. Litig.*, MDL 3:11-MD-2244-K, 2013 WL 2091715 at *1–3 (N.D. Tex. May 15, 2013).

[45] Statement of Sir John Peace, Chairman, Standard Chartered PLC (Mar. 21, 2013).

[46] Standard Chartered Bank DPA, Exh. A ¶ 2 (Dec. 7, 2012).

[47] Louise Armistead, *Standard Chartered Forced to Apologise for Calling US Sanctions Breaches a 'Clerical Error'*, Telegraph (London), Mar. 21, 2013.

[48] Standard Chartered Bank DPA ¶ 12 (Dec. 10, 2012).

[49] Joseph G. Block & David L. Feinberg, *Look Before You Leap: DPAs, NPAs, And The Environmental Criminal Case*, ALI-ABA Business Law Course Materials Journal, at 9–10 (Feb. 2010).

[50] Press Release, U.S. Dep't of Justice, FirstEnergy Nuclear Operating Company to Pay $28 Million Relating to Operation of Davis-Besse Nuclear Power Station (Jan. 20, 2006).

[51] Tom Henry, *Regulators Skeptical of Davis-Besse Report*, Toledo Blade, May 19, 2007.

[52] Tom Henry, *NRC 'Disappointed' in Davis-Besse Insurance Claim*, Toledo Blade, June 15, 2007.

[53] Tom Henry, *FirstEnergy Drops Insurance Claim*, Toledo Blade, Dec. 8, 2007.

[54] *R. v. Innospec Ltd.*, [2010] Crim L.R. 665, Sentencing Remarks of Lord Justice Thomas, ¶ 50 (Mar. 26, 2010).

[55] *See, e.g.*, Parker Drilling DPA ¶ 19 (Apr. 16, 2013); Bashas', Inc. NPA ¶ 11 (Aug. 30, 2013); Diebold, Inc. DPA ¶ 21 (Oct. 22, 2013).

[56] *See, e.g.*, AmSouth Bankcorp. DPA ¶ 3 (Oct. 12, 2004); AEP Energy Services DPA ¶ 3 (Jan. 25, 2005); Vulcan Sports Media, Inc. NPA ¶ 4 (Jan. 19, 2006); Blue Cross & Blue Shield of Rhode Island NPA ¶ 37 (Dec. 13, 2007); The Country Club of Jackson, Mississippi DPA ¶ 6 (Feb. 6, 2008); Tacos de Mexico DPA ¶ 3 (May 13, 2009); Spectranetics Corp. NPA ¶ 6 (Dec. 17, 2009); CSK Auto Corp. NPA, at 3 (Aug. 30, 2011).

[57] 48 C.F.R. § 9.405(a) (2013).

[58] 48 C.F.R. § 9.406-1(c) ("A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless the agency head or designee . . . states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.").

[59] 48 C.F.R. § 9.406-4(a)(1) (debarments "[g]enerally . . . should not exceed 3 years").

[60] Joseph D. West et al., *Suspension & Debarment*, Briefing Papers: Second Series, Aug. 2006 at 5 (hereinafter "*Suspension & Debarment*"); 48 C.F.R. § 9.407-4(a) (suspensions last "for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in [48 C.F.R. § 9.407-4]").

[61] *Suspension & Debarment*, at 5.

[62] *Suspension & Debarment*, at 5 (citing and quoting 48 C.F.R. § 9.407-1(b) and 2 C.F.R. § 180.700).

[63] *Suspension & Debarment*, at 5.

[64] 53 Fed. Reg. 19160 (May 26, 1988).

[65] *Suspension & Debarment*, at 3–4.

[66] *Suspension & Debarment*, at 4.

[67] *Suspension & Debarment*, at 4.

[68] *Suspension & Debarment*, at 4.

[69] *Suspension & Debarment*, at 4 (citing 48 C.F.R. §§ 9.406-1(a), 9.407-1(b)).

[70] *See, e.g.*, Craig S. Morford, Memorandum for Heads of Department Components and United States Attorneys, 1 n.2 (Mar. 7, 2008) (explaining that a DPA is "predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court"); Letter from Michael J. Garcia, U.S. Attorney for the Southern District of New York, to Amy M. Burgert, Counsel to ESI Entm't Sys., Re: ESI – Deferred Prosecution Agreement (June 3, 2008) ("ESI consents to the filing of a one-count Information . . . in the United States District Court for the Southern District of New York . . . .").

[71] 48 C.F.R. § 52.209-5(a)(1)(i)(C), (B) (2013).

[72] Joseph G. Block & David L. Feinberg, *Look Before You Leap: DPAs, NPAs, and the Environmental Criminal Case*, ALI-ABA Business Law Course Materials Journal, at 22 (Feb. 2010).

[73] *Look Before You Leap*, at 22–23.

[74] Abt Associates DPA, "Compliance Agreement" att., at 5 (Dec. 28, 2006).

[75] Skedco DPA (Oct. 8, 2013).

[76] Skedco DPA, att. C.

[77] Skedco DPA, att. C, at 6.

[78] Skedco DPA, att. C, at 4.

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 former federal prosecutor, served as the U.S. counsel for the compliance monitor for Siemens and as the FCPA compliance monitor for Alliance One International. He previously served as the monitor for Statoil pursuant to a DOJ and SEC enforcement action. He co-authored the seminal law review article on NPAs and DPAs in 2007. Debra Wong Yang is the former United States Attorney for the Central District of California, and has served as independent monitor to a leading orthopedic implant manufacturer to oversee its compliance with a DPA.

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