January 6, 2015

2014 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS)

To Our Clients and Friends:

The U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") continue to deploy DPAs and NPAs aggressively. This past year left no doubt that such resolutions are a vital part of the federal corporate law enforcement arsenal, affording the U.S. government an avenue both to punish and reform corporations accused of wrongdoing. In early December, for example, U.S. Assistant Attorney General for DOJ's Criminal Division, Leslie Caldwell, highlighted the importance of negotiated resolutions that allowed DOJ to "impose reforms, impose compliance controls, and impose all sorts of behavioral change."[1] She concluded: "In the United States system at least [settlement] is a more powerful tool than actually going to trial." DOJ and the SEC have used negotiated resolutions, including DPAs and NPAs, to require companies to implement an effective compliance program. In 2014 we witnessed a number of notable developments in negotiated resolutions that demonstrate that the traditional hallmarks of DPAs and NPAs, including post-settlement compliance and reporting obligations, are here to stay.

This client alert, the thirteenth in our series of biannual updates on DPAs and NPAs (available here): (1) summarizes highlights from the DPAs and NPAs of 2014; (2) discusses several post-settlement considerations, including protections for independent monitor work product and post-settlement term revisions; (3) analyzes a potential trend in the judicial oversight of DPAs; and (4) addresses recent developments in the United Kingdom, where the Deferred Prosecution Agreements Code of Practice recently took effect. As in previous updates in this series, the appendix lists all agreements announced in 2014.

DPAs and NPAs in 2014

In 2014, DOJ entered into 19 DPAs and ten NPAs, including a "restitution and remediation agreement," a "criminal enforcement agreement," and a "side letter agreement."[2] Although three of the agreements classified as NPAs were issued under different names, the difference appears to be more one of form than function. DOJ's "restitution and remediation agreement" with SunTrust Mortgage, Inc., its "side letter agreement" with Stryker Corporation, and its "criminal enforcement agreement" with Pilot Travel Centers, LLC, d/b/a/ Pilot Flying J ("Pilot Flying J")--reminiscent of DOJ's agreement, discussed in our 2012 Year-End Update, with Gibson Guitar--all have the nuts and bolts of standard NPAs. The Pilot Flying J agreement, however, goes a small step further than typical NPAs by attaching an unfiled criminal information, in lieu of a statement of facts, that DOJ is "prepared to file" in the event of a breach of the agreement.[3] The varieties of NPAs and DPAs

underscore that the practices are subject to bespoke agreements created by the 94 U.S. Attorneys' Offices.

In addition to DOJ's 29 agreements, the SEC entered into one DPA in 2014, marking the third SEC DPA since SEC first began using the tool in 2011, and the seventh SEC NPA or DPA since SEC's first use of the NPA in 2010. At 30 NPAs and DPAs, 2014 was consistent with prior years, exceeding the number of NPAs and DPAs issued in 2013 by two. 2014's 30 NPAs and DPAs also involved a substantial collective increase in monetary recoveries over 2013's 28 NPAs and DPAs, reaching over $5.1 billion in comparison to 2013's approximately $2.9 billion. Thus, NPAs and DPAs continue to be an effective vehicle for resolving allegations of corporate misconduct. Indeed, the value to the government of DPAs and NPAs was highlighted this year as DOJ extended two NPAs--with Barclays Bank Plc. and UBS AG, respectively--and one DPA--with Standard Chartered Bank--for the purpose of concluding continuing investigations while the agreements were still in force.[4] These extensions are further discussed below in conjunction with other post-settlement considerations.

The decade-long trend favoring the use of these settlement tools is expected to explode in 2015, particularly as the DOJ Tax Division approaches resolution with approximately 100 Swiss banks that seek NPAs in connection with their participation in a DOJ tax disclosure and non-prosecution program.[5] This program, DOJ Tax Division's "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks" (the "Program"), rewards participating Swiss banks that "have reason to believe [they] may have committed [certain] tax-related offenses" in connection with "U.S. Related Accounts" (as defined by the Program) with NPAs for their cooperation and payment of penalties.[6] To date, no NPA has been issued under the Program, but as initial deadlines for resolution were set in mid-2014, settlements are likely forthcoming.[7] The Bank Leumi Group DPA, issued December 22, 2014, also foreshadows this group, with $157 million of its $270 million penalty attributed to Leumi Private Bank S.A.--Bank Leumi Le-Israel, B.M.'s Switzerland-based subsidiary--and calculated according to the formula set forth under the Program.[8]

Chart 1 below shows the continuing trend favoring the use of NPAs and DPAs since 2000, when DOJ issued only two. The below charts and figures are derived from Gibson Dunn's database containing details of 308 NPAs and DPAs entered into by federal prosecutors between January 1, 2000 and January 6, 2015.

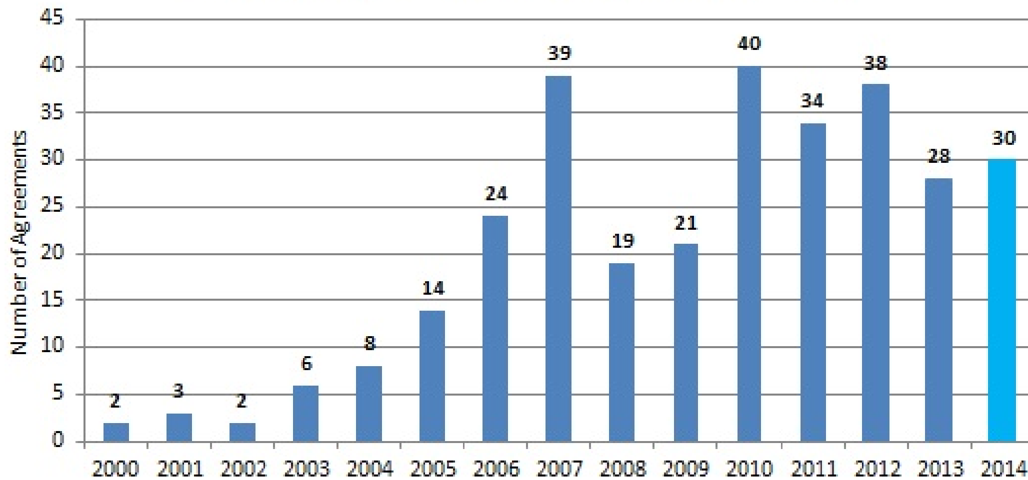
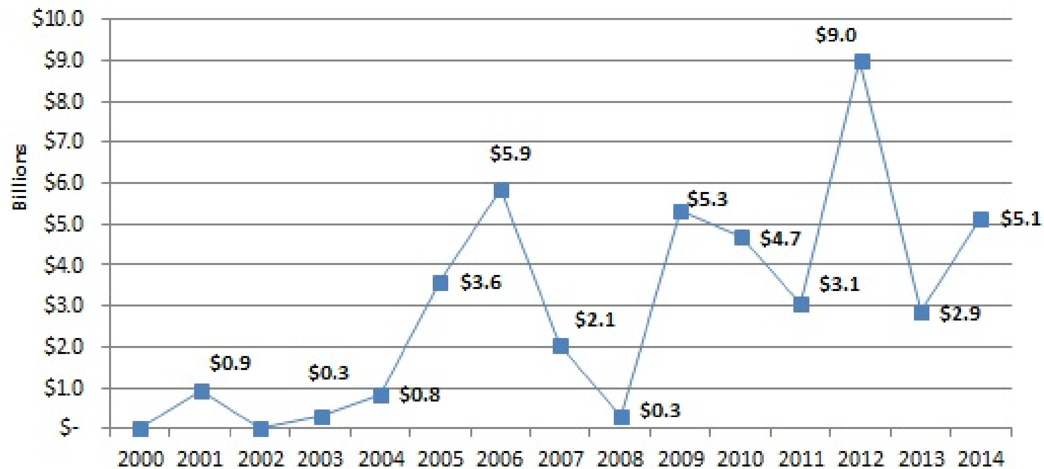


Chart 2 below demonstrates the trends in monetary recoveries over the course of the past 14 years. As noted above, the 30 NPAs and DPAs issued in 2014 resulted in a collective recovery of over $5.1 billion. This exceeds the recovery in 2013 by more than $2 billion, and also notably exceeds the recovery in 2011 of $3.1 billion, which represented 34 NPAs and DPAs. The 2014 recovery also significantly exceeds the recovery in 2008, when 19 NPAs and DPAs involved a recovery of approximately $300 million. We note that 2012 appears to have been an outlier and a banner year for NPA and DPA recoveries, when 38 individual agreements resulted in an overall recovery of almost $9 billion. As discussed in our 2012 Year-End Update, this is due in part to the settlement of three large cases, each of which involved a recovery of over $1.5 billion and up to $3 billion.

In 2014 settlements included several eye-catching figures, with eight of the 30 agreements involving settlements exceeding $100 million, of which two topped $1 billion. Two of these agreements related to Alstom, S.A.'s landmark FCPA settlement with DOJ valued at $772,290,000.[9] For more information regarding Alstom, see our 2014 Year-End FCPA Update.



Post-Settlement Considerations

In 2014, we have observed a number of interesting developments relevant to NPAs and DPAs in the post-settlement landscape. Notably, (1) a federal court took a significant step toward defining confidentiality afforded third-party independent monitors' work product; (2) DOJ illustrated continued post-settlement engagement with companies' compliance efforts through the alteration of settlement terms; and (3) as already noted, DOJ took the unusual measure of securing extensions of several NPAs and DPAs that were set to expire.

Siemens FOIA Litigation and Independent Monitor Work Product Confidentiality

Monitorship Background and Statistics

Internal corporate compliance assessments and reporting requirements regarding compliance programs are commonly imposed NPA and DPA conditions. These requirements take several different forms, including, most commonly, self-reporting by the company, the appointment of an independent third-party monitor, or required self-assessments through the use of third-party consultants and auditors. Since 2000, 155 of 308 NPAs and DPAs have involved some form of self-assessment and reporting or monitorship requirement, whether in-house or external. Of these, 86 have required the appointment of a third-party monitor, examiner, or similar independent party to test and report on the company's relevant policies, practices, and procedures.[10] As reported in our 2013 Year-End Update, the use of post-settlement reporting obligations as a tool for enforcing settlement conditions remains healthy in recent years. Indeed, of the 30 NPAs and DPAs issued this year, 19 required some form of monitoring, including self-reporting and, in three instances, traditional independent monitors.

In carrying out his or her duties, a monitor "will often need to understand the full scope of the corporation's misconduct covered by the agreement, but the monitor's responsibilities should be no

broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct."[11] In practice this means that independent monitors are given broad access to the facilities, personnel, and records of the companies they scrutinize. With this unfettered access to sensitive and confidential company information, companies understandably want to preserve the confidentiality of the monitor's reports and other communications to the government. A recent Freedom of Information Act ("FOIA") case--*100Reporters LLC v. DOJ*--however, has questioned the confidentiality protections available to monitor work product submitted to the government. The question stems, in part, from a context in which monitors are deliberately defined as "not the [monitored] corporation's attorney," and the attorney-client privilege is often expressly negated in monitorship agreements.[12] DOJ guidance counsels that the monitor "is an independent third-party, not an employee or agent of the corporation or of the Government."[13] Recent publications on the subject have acknowledged this guidance, but address the practical consequence of monitorships and argue that monitors serve as agents of both the corporations and the government.[14]

The Siemens Monitorship

On December 15, 2008, Siemens and several of its subsidiaries (collectively, "Siemens" or the "Company") entered into a plea agreement with DOJ and a settlement with the SEC (collectively, the "settlement agreements") to resolve criminal and civil charges alleging that the Company violated certain provisions of the U.S. Foreign Corrupt Practices Act ("FCPA"). Pursuant to those agreements, Siemens retained former German Minister of Finance Dr. Theo Waigel to serve as its independent corporate compliance monitor (the "Monitor") and F. Joseph Warin of Gibson Dunn to serve as independent U.S. Counsel to the Monitor for a period of up to four years. Under the terms of those agreements, the Monitor was tasked with evaluating the effectiveness of Siemens's "internal controls, record-keeping and financial reporting policies and procedures" as they related to ongoing compliance with anti-corruption laws.

The settlement agreements required that Siemens furnish the Monitor with comprehensive access to its confidential and commercially sensitive information, documents, and records. DOJ and the SEC further expressly authorized Siemens to share privileged information with the Monitor subject to a non-waiver agreement. Similarly, the settlement agreements obligated Siemens to ensure that the Monitor could inspect all relevant documents, conduct on-site observations of Siemens's internal controls and internal audit procedures, meet with and interview employees, officers, and directors, and analyze and test Siemens's compliance programs and controls.

In addition, the settlement agreements provided for periodic reporting obligations to the U.S. government, including an initial report, followed by up to three subsequent reviews and reports. The agreements required the Monitor to set forth in each report an assessment and recommendations "reasonably designed to improve the effectiveness of Siemens'[s] program for ensuring compliance with the anti-corruption laws." The negotiated resolution further required the Monitor to submit a work plan to DOJ and SEC for comment prior to each review, to provide them with written reports following each review, and to report any improper activities or violations of law discovered during the monitorship. After four years, DOJ and the SEC authorized termination of the monitorship,

concluding that Siemens had "satisfied its obligations under the [settlement agreements] with respect to the corporate compliance monitorship."[15]

100Reporters's FOIA Request

On July 23, 2013, 100Reporters LLC ("100Reporters"), a not-for-profit news media organization, submitted a FOIA request to DOJ seeking six categories of documents relating to the Siemens plea agreement and the monitorship, including all documents authored or submitted by the Monitor during the course of the monitorship pursuant to the settlement agreements. DOJ initially denied the request, on July 23, 2013, on the grounds that, pursuant to FOIA Exemption 7(A), the materials sought by 100Reporters were exempt from disclosure because they were law enforcement records whose disclosure could interfere with enforcement proceedings. On April 22, 2014, DOJ further affirmed that denial on administrative appeal.

Siemens Monitorship FOIA Litigation

Almost exactly one year after the original FOIA request, on July 24, 2014, 100Reporters brought a FOIA action in the District Court for the District of Columbia, seeking an order requiring DOJ to release the six categories of materials related to the Siemens plea agreement and the monitorship identified in its FOIA request.[16] In its answer, dated October 14, 2014, DOJ asserted the affirmative defense that the materials sought by 100Reporters are exempt from disclosure under six FOIA Exemptions:

- Exemption 4 (trade secrets and confidential commercial and financial information),
- Exemption 5 (deliberative process privilege and attorney work product doctrine),
- Exemptions 6 and 6(C) (personal privacy),
- Exemption 7(A) (law enforcement records whose disclosure could interfere with enforcement proceedings), and
- Exemption 7(D) (law enforcement records whose disclosure could reveal the identity of confidential sources).[17]

After becoming aware of the FOIA request in October 2014, Siemens and the Monitor--the latter of whom is represented by Gibson Dunn--each brought motions to intervene in the action arguing for intervention as of right or, alternatively, for permissive intervention.[18]

On December 3, 2014, in a 32 page opinion, Judge Rudolph Contreras categorically granted the motions to intervene of both Siemens and the Monitor over the opposition of 100Reporters, finding that both intervenors met all qualifications for intervention. 100Reporter's opposition to the Monitor's intervention focused chiefly on an argument that the Monitor lacked an interest in the underlying litigation--a crucial prerequisite for intervention as of right--and the Court devoted the greatest amount of space in its consolidated opinion to this subject.[19] As the Court noted, intervention as of right

requires that a prospective intervenor "demonstrate a legally protected interest in the action."[20] The Monitor argued that he possesses "a substantial and independent interest" in the mandate established by the settlement agreements and that "[c]onfidentiality between the Monitor and the DOJ--and the expectation that this confidentiality would be maintained--was vital to the Monitor's ability to carry out the Mandate."[21] The Monitor noted that "it is only by protecting these materials from disclosure that the Monitor could ensure that [he] would have unfettered access to Siemens's sensitive information and to communicate the Monitor's findings in detail to the DOJ and the SEC."[22]

100Reporters argued in its opposition that disclosure of the requested materials would not injure the Monitor's interest because the monitorship itself ended in 2012 and Dr. Waigel no longer serves as independent corporate compliance monitor to Siemens. In addition, 100Reporters contended "that the Monitor asserts a generalized and abstract injury because he claims only that disclosure would injure future compliance monitors at large by failing to protect the confidentiality of their official reports and communications with government agencies."[23] The Court disagreed.

The Court held that the Monitor "has a proper interest in the subject of this action,"[24] adopting the Monitor's argument that submitters of materials to government agencies have a cognizable interest in maintaining the confidentiality of that information, regardless of whether it originally belonged to the submitter or another party (i.e., Siemens). The Court also noted that the Monitor may possess an interest in the confidentiality of trade secrets and commercial or financial information through FOIA Exemption (b)(4) in "protect[ing] the confidentiality of the Monitor's own reports and communications with the DOJ, which were submitted by the Monitor to the agency as part of the Siemens monitorship and in which there was a mutual expectation that the DOJ would keep the Monitor's documents confidential."[25]

The Court also disagreed with 100Reporters's argument that neither Siemens nor the Monitor could intervene because their interests were adequately represented by DOJ. Adopting the analysis of the prospective intervenors, the Court reasoned that "by the very nature of FOIA litigation, the government entity and the private intervenor will possess fundamentally different interests."[26] The government is interested in fulfilling its obligations under FOIA, whereas a private intervenor is interested in preserving the confidentiality of its submitted information "such that the government entity is quite unlikely to provide 'adequate representation.'"[27] The Court recognized that agreement on litigation posture did not guarantee "adequate representation" because the agency "remains free to change its strategy during the course of litigation."[28]

In addition, the Court determined that Siemens and the Monitor were entitled to intervene in the action under the more lenient permissive intervention standard.[29] Under this standard, the Court reiterated its previous position that each party represents different interests and "the strength of the DOJ's position will be enhanced by the assistance of the Monitor (and Siemens) in asserting" the applicable FOIA Exemptions.[30] Finally, the Court held that, far from unduly delaying or complicating the proceedings, as argued by 100Reporters, the intervention of Siemens and the Monitor would "allow all interested parties to present their arguments in a single case at the same time."[31]

Although the underlying FOIA litigation has not yet been resolved, the Court's opinion helps to define the scope of an independent monitor's confidentiality interests and underscores the importance of disclosure protections to ensure a monitor's broad access to the books, records, employees, and facilities of a monitored entity. While the Court did not reach the ultimate merits of the Monitor's position that the monitorship materials should not be disclosed, it recognized the importance of his interest in the preservation of confidentiality by granting him the opportunity to advocate for nondisclosure and articulate his position under the relevant FOIA exemptions in the pending action. In so doing the Court has taken a significant step toward ensuring that his work product and the contents therein remain protected from public disclosure. Without such protections a monitor is less likely to be an attractive or effective feature of DPAs or NPAs. This holding highlights the interests that independent monitors--and the companies they scrutinize--have in asserting the confidentiality of the monitor's reports and communications. This is an important step to preserving the confidentiality of monitor work product and independent third-party monitors as a feature of the DPA and NPA landscape; indeed, if such confidentiality is significantly undermined, monitorships as a facet of corporate enforcement action resolution will likely become less attractive to the government and corporations.[32]

Bazaarvoice, Inc. and the Imposition of Post-Settlement Conditions

In April 2014, Bazaarvoice, Inc. ("Bazaarvoice") settled charges of antitrust violations in connection with its purchase of a competing entity, PowerReviews.[33] As a condition of settlement, Bazaarvoice was required to appoint a trustee to oversee the ordered divestiture of PowerReviews and its compliance with related obligations, but no additional compliance mechanism was imposed.[34]

On December 1, 2014, however, DOJ filed a consent motion to enter a third amended proposed judgment, stating that by the end of July, "the United States became aware that there was a question whether Bazaarvoice was improperly continuing to use certain PowerReviews technology that the proposed Final Judgment required it to divest."[35] Although both Bazaarvoice and DOJ investigated the issue and Bazaarvoice ultimately stopped the questioned conduct, DOJ remained concerned that "the lack of timely communication between Bazaarvoice and the United States led to an investigation and dispute that could have been avoided by a greater focus from the company on its compliance obligations."[36] As a remedy, DOJ sought and secured a revised condition in the settlement agreement requiring the appointment of an "internal Compliance Officer . . . with responsibility for administering [Bazaarvoice's] antitrust compliance program and helping to ensure compliance with the Final Judgment."[37] Although the Compliance Officer may possibly, as an employee of the company, form an attorney-client relationship with Bazaarvoice, the Compliance Officer is also required to "furnish[] to the United States and the Trustee on a quarterly basis electronic copies of any non-privileged communications with any person containing allegations of Defendant's noncompliance with any provisions of this Final Judgment or the antitrust laws."[38] In addition, the Compliance Officer's appointment was subject to approval of the United States, his or her duties--overseeing compliance with the Final Judgment and implementation of a compliance program--followed those typically expected of independent monitors, and the term of the Officer's appointment was limited to four years from the date the assets were divested.[39] A Compliance Officer with similar

responsibilities and duties was appointed by Fisher Sand & Gravel Co. in 2009 as a condition of its DPA with DOJ.[40]

Companies currently subject to NPAs or DPAs without overt monitoring requirements would do well to take note of this post-settlement compliance undertaking. *Bazaarvoice* signals that even after settlement, additional conditions--like internal or third-party monitoring--may be added to an existing agreement if a company is perceived as falling short of its self-assessment and reporting requirements.

Extension of Non-Prosecution Agreements to Support Ongoing Investigations

Showing a willingness to undertake this very sort of retroactive alteration of an NPA or DPA, DOJ took the unusual step this year of extending several NPA/DPA settlement agreements that had terms set to expire in 2014. These included NPAs held by Barclays Bank Plc. ("Barclays") and UBS AG ("UBS"), both of which were extended by a term of one year, and a DPA held by Standard Chartered Bank ("Standard Chartered"), which was extended for three years. Standard Chartered also extended a similar DPA with the State of New York.[41]

Each of the three extended DOJ agreements contained standard language pledging broad cooperation with DOJ, including assisting with any investigation arising out of the conduct described in the agreements.[42] Each of the three agreements further acknowledged DOJ's right to prosecute upon finding that the company had committed a U.S. crime subsequent to the date of the agreement; that it had given false, incomplete, or misleading testimony or information at any time; or that it had otherwise violated the provisions of the agreement.[43] Consistent with this language, Barclays announced in its July 30, 2014 Form 6-K SEC filing that it had entered into a letter of agreement with DOJ giving DOJ until June 27, 2015, to "make a determination under the NPA solely as to whether any of Barclays trading activities in the foreign exchange market during the two year period [of the NPA's application] constituted a 'United States crime . . . .'"[44] UBS similarly agreed with DOJ to extend its NPA for a period of one year in connection with an ongoing investigation.[45]

Standard Chartered, which executed a DPA in 2012 to resolve charges of trade sanctions violations surrounding its facilitation of payments on behalf of sanctioned customers, announced a three-year extension of this DPA on December 9, 2014.[46] Notably, the length of this extension eclipses that of the original DPA, which itself lasted for a period of only 24 months.[47] Standard Chartered announced that the reason for this extension was its cooperation with "an ongoing U.S. sanctions-related investigation" for which additional time was needed to determine whether violations had occurred.[48]

These extensions, like the monitoring requirement imposed in *Bazaarvoice* (discussed above), serve as an important reminder that NPAs and DPAs, like any other agreement, may be subject to extension or revision at any time to suit the particular investigative or compliance needs of the parties.

Judicial Oversight of Deferred Prosecution Agreements

The increasing prominence of DPAs as a means of addressing corporate criminal conduct has not escaped the notice of the judiciary. As discussed in previous client alerts, DPAs, unlike NPAs, are

filed in court and thus are subject to judicial oversight. In the past, judges' participation in this process was largely limited to holding the case in abeyance for the term of the agreement and excluding time under the Speedy Trial Act. Once the defendant fulfilled its obligations under the agreement to the satisfaction of prosecutors, the judge dismissed the case with prejudice. In recent years, however, a growing number of judges have sought to expand their role in this process and have begun scrutinizing the terms of DPAs, a trend we first highlighted in our 2013 Mid-Year Update on NPAs and DPAs.

With respect to two recent DPAs--Saena Tech Corporation's ("Saena Tech") agreement with the U.S. Attorney's Office for the District of Columbia resolving domestic bribery charges and Fokker Services B.V.'s ("Fokker Services") agreement with that same office in connection with export control violations--the judges overseeing the matters have each taken a more active role. Both have requested extensive briefing on the scope of their authority to approve the DPAs and required greater factual support justifying the agreements. The result in both cases has been a longer, more drawn-out process, in which it remains unclear whether the initial agreements will withstand the greater judicial scrutiny applied. It also remains to be seen whether these cases foreshadow more robust judicial supervision of DPAs that companies may expect in the future.

Saena Tech

In April 2014, the government filed its DPA with Saena Tech in U.S. District Court for the District of Columbia. In its DPA, Saena Tech, a South Korean corporation, admitted to giving cash and gifts to a U.S. Army Contracting Officer to obtain subcontracts on the prime contract that official was managing.[49] The company agreed to pay a $500,000 penalty and implement a compliance and ethics program.[50] In return for the defendant's full and truthful cooperation, and continued compliance with the agreement, the government not only agreed to conditionally release the defendant corporation from criminal liability, but also promised not to prosecute its Managing Director, Jin Seok Kim, who was directly implicated in the bribery scheme.[51] The government's primary basis for entering into the agreement was the fact that the company assisted the investigation by voluntarily producing documents and making Kim, a South Korean citizen, available for interview.[52] According to the government, during his interview, Mr. Kim "provided the investigation with considerable amounts of relevant and helpful evidence regarding illegal conduct involving a former public official . . . ."[53]

Pre-DPA Approval Judicial Review and Authority

Judge Emmet Sullivan of the U.S. District Court for the District of Columbia first voiced his concerns over the DPA at a July 17, 2014 hearing. Throughout the hearing, Judge Sullivan said that the agreement had the effect of formally immunizing Kim from prosecution and inquired as to whether this was fair in light of the fact that individuals at Saena Tech with far less involvement in the bribery scheme had been given lengthy prison sentences.[54] The government sought to allay Judge Sullivan's concerns and contended that Kim came to the United States of his own volition, volunteered critical information that the government would not have discovered otherwise, including several hundred thousand dollars' worth of previously unknown illicit payments, and promised to provide critical testimony in an upcoming criminal trial of other participants in the scheme in the Eastern District of

Virginia.[55] Nevertheless, Judge Sullivan characterized the agreement as a "sweetheart deal" for Kim.[56] Although Judge Sullivan did not comment on the fairness of the deal with respect to the corporation, he nevertheless sought guidance on his authority to reject the DPA on the grounds of "fundamental fairness," adding that his was not a "rubber stamp" court.[57] Unsatisfied with the government's response that the court's role was limited to procedural aspects, Judge Sullivan issued an order shortly after the hearing appointing Brandon Garrett, a professor at the University of Virginia School of Law, to "provid[e] the Court with advocacy on questions regarding the scope of the Court's authority, if any, to consider the fairness and reasonableness of a deferred prosecution agreement in deciding whether to accept or reject such an agreement."[58]

Prior to Professor Garrett's submission, the government filed a supplemental briefing arguing that the court's sole task in approving DPAs was to determine whether to exclude time under a subsection of the Speedy Trial Act, which provides:

> [a]ny period of delay during which prosecution is deferred by the attorney for the [g]overnment pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct [] shall be excluded [] in computing the time within which the trial of any such offense must commence.

18 U.S.C. § 3161(h)(2). The government admitted that while "case law is barren" with respect to the standard for court approval of the exclusion, the legislative history of the provision suggests that the court's role is limited to verifying that the real purpose of the agreement is not to stave off an impending trial date but to allow the defendant to demonstrate good conduct.[59] In addition, the government's brief also concluded the court could not invoke its supervisory powers, which were not unlimited.[60] The government emphasized that by passing judgment on the merits of the DPA, courts would become "superprosecutors," undermining the separation of powers.[61]

Professor Garrett disagreed with the government's position.[62] In his view, the relevant provision of the Speedy Trial Act, 3161(h)(2), "provides a court with clear and express authority to decide whether or not to approve such a deferred prosecution agreement, including with reference to the fairness and reasonableness of its terms."[63] Professor Garrett argued that the fact that such agreements can only proceed "upon 'the approval of the court' makes that discretion clear."[64] According to Professor Garrett, court oversight is especially necessary when the government agrees to defer prosecution of corporations.[65] The text of the provision itself says that time may be excluded, with court approval, "for the purpose of allowing the defendant to demonstrate good conduct."[66] Professor Garrett argued that, given the increased complexity of measuring a corporation's good conduct, active judicial supervision is necessary to ensure that the defendant demonstrates such good conduct through, for example, continued cooperation with the government or the adoption of governance reforms to improve compliance.[67]

Professor Garrett also recommended using the standard for plea agreement approval to inform a court's decision to approve or reject a deferred prosecution agreement.[68] As Professor Garrett noted, "judges may generally reject plea agreements 'when the district court believes that [the] bargain is too

lenient, or otherwise not in the public interest.'"[69] He also emphasized that in the context of corporations, because a plea agreement with an organization raises so many distinct issues with respect to enforcement priorities, third parties, regulators, and ongoing supervision, among other factors, many courts have conducted individualized assessments of the agreements beyond simply ascertaining whether the corporation is entering into the deal knowingly and voluntarily.[70] Professor Garrett provided the court with numerous examples of corporate plea agreements being heavily scrutinized, and in some cases rejected, because either they were not in the public interest, or the victims objected to the agreement--or, most saliently, the corporation was required to pay a fine but immunity was being offered to a culpable individual.[71] Professor Garrett recommended that in deciding whether to approve DPAs, courts should adopt the same case-by-case approach they use with plea agreements and assess whether the DPA is "reasonable, fair, comports with the goals of the Sentencing Guidelines [for Organizations], and is in the public interest."[72]

The government dismissed Professor Garrett's analysis as a reflection of his personal aspiration and criticized his interpretation of the statutory landscape and legislative history.[73] The government argued that there was no statutory authority for judicial consideration of DPAs, noting that the standard for plea agreement--based on Federal Rule of Criminal Procedure 11--was a stand-alone rule that did not apply to DPAs.[74] Instead, § 3161(h)(2), which applied to DPAs, was intended to "strengthen[] the supervision over persons released pending trial," and established only time periods to be excluded in calculating when the case must be brought to trial.[75] The government asked "how strengthening supervision over persons released pending trial relates to empowering judges to reject corporate deferred prosecution agreements based on notions of fairness and reasonableness, particularly since corporations cannot be detained pending trial."[76] The government argued that the legislative intent was never to tie the court approval requirement to the fairness and reasonableness of the agreement.[77] Citing the Second Circuit's recent decision in *SEC v. Citigroup Global Markets*, 752 F.3d 285, 297 (2d Cir. 2014), the government stressed that even in cases where the Court has statutory authority to review settlements for fairness and reasonableness, its inquiry is limited to determining whether the settlement is procedurally proper.[78]

Post-DPA Approval Judicial Review and Authority

Perhaps looking for other ways to correct what he saw as the deficiencies in the Saena Tech DPA, in a September 5, 2014 minute order, Judge Sullivan asked the government and Professor Garrett to address two additional questions:

> (1) whether, after a Court approves an exclusion of time under Section 3161(h)(2) of the Speedy Trial Act, it has any authority to hold a defendant in contempt for failing to comply with the agreement's provisions; and (2) whether it may order a party to comply with the provisions of that agreement in connection with a colloquy regarding that party's understanding of the agreement and relinquishment of its constitutional and statutory right to a speedy trial.[79]

Under the statute for criminal contempt, 18 U.S.C. § 401, if Saena Tech or Kim were to violate a court order to comply with the agreement, the Court would have the power to punish the parties by fine or

imprisonment.[80] Furthermore, under Federal Rule of Criminal Procedure 42, the Court would be able to request that the United States Attorney prosecute the alleged contempt, and, if he refused, to appoint a special prosecutor.[81] Through the power of holding a party in criminal contempt, Judge Sullivan could then ensure that, despite the supposed "sweetheart" nature of the deal, Kim would be exposed to severe penalties if he were to violate the DPA.

The government responded by arguing that the provisions relating to criminal contempt sanctions are inapplicable in the context of a DPA.[82] A necessary requirement for a contempt order is a court order that is "clear and reasonably specific."[83] In the government's view, such an order cannot be issued in the DPA context because the court's lawful order would be confined to approving or disapproving the parties' agreement to exclude time from computation under the Speedy Trial Act, rather than addressing the merits of the DPA.[84] For similar reasons, the government also claimed that the court does not have the authority "to impose conditions designed to assure" the defendant's compliance with the DPA.[85] A criminal DPA, by its terms, gives prosecutors the authority to assess compliance, which is a necessary part of prosecutorial discretion.[86] Furthermore, the government claimed that the Court does not have a basis in its supervisory authority to condition the exclusion of time on a defendant's compliance with the terms of the agreement; conditioning the exclusion of time on a party's compliance with the DPA "is not essential to the Court's function, particularly when the defendant is not raising an impropriety or otherwise requesting the Court's exercise of its supervisory authority."[87]

In his own filing, Professor Garrett noted that there was an alternative means by which a Court could ensure that a DPA was faithfully implemented: if the terms of an agreement state that in the event of a breach the case may return to the docket for prosecution, and the judge requires status reports on implementation of the DPA, then the court would be in a position to know of any potential breach, return it to its calendar, and cease tolling under the Speedy Trial Act.[88]

Judge Sullivan has not decided whether he has the authority to reject the DPA outright for its perceived lack of fairness. *Saena Tech* is instructive as it demonstrates the murkiness of the courts' authority to reject DPAs on account of a perceived lack of fairness.

Moreover, Judge Sullivan's probing is part of a growing trend of oversight of DPAs by district courts. For example, Judge John Gleeson of the Eastern District of New York issued a lengthy opinion in 2013 in *United States v. HSBC* discussing a court's power to oversee these agreements on the basis of its inherent authority to review matters on its docket.[89] Judge Gleeson held that "the inherent supervisory power serves to ensure that courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."[90] Judge Gleeson also did not find that subsection 3161(h)(2) of the Speedy Trial Act provided the standard for his review.[91] Indeed, as the parties demonstrated in *Saena Tech*, subsection 3161(h)(2) was not designed with diversion programs for corporations in mind and the case law interpreting it is sparse.[92] However, with the increasing demand from the public and other stakeholders for the individuals responsible for corporate misconduct to be held personally accountable, courts will continue to find ways to exercise authority over these agreements. Consequently, DPAs that resolve charges against the corporation and

effectively immunize officers suspected of wrongdoing in so doing are likely to attract heightened judicial scrutiny.

Fokker Services

Judicial consideration of a DPA between Fokker Services B.V. ("FSBV"), a Dutch aerospace services provider, and the U.S. Attorney's Office for the District of Columbia also sheds light on potential pitfalls a corporate defendant can encounter even after prolonged settlement negotiations. Despite conducting an extensive internal investigation with the assistance of outside counsel and disclosing the results of that investigation to the relevant agencies, FSBV faces significant uncertainty as to whether its DPA will be approved. Judge Richard Leon of the U.S. District Court for the District of Columbia has expressed substantial discomfort over approving the agreement given the government's failure to prosecute individuals at the company, the size of the penalty, and, most significantly, ambiguity surrounding whether the defendant's disclosure was truly voluntary. Just as he did with respect to the SEC's 2011 consent judgment with IBM concerning the company's alleged FCPA violations, which has been covered in several of our FCPA updates, Judge Leon has encouraged the parties into re-negotiating a new agreement that would surely be less favorable to FSBV. Judge Leon, a former federal prosecutor and white collar criminal defense attorney, is quite experienced in complex corporate criminal prosecution, including handling the proceedings against Siemens and Daimler.

In June 2010, FSBV disclosed to the government that it had violated export control laws by supplying certain manufacturing parts and technologies to U.S.-sanctioned countries, namely Burma, Iran, and Sudan, since 2005. Since its formation in 1996, FSBV historically had worked with 11 Iranian civil and military customers, four Sudanese airlines, and four Burmese clients.[93] According to the criminal information filed with the DPA, although the company had specific knowledge of the relevant export control laws, and had been warned about the ramifications of violating those laws by in-house counsel, it chose to continue servicing customers in embargoed countries.[94] For example, a manager in the company's Logistics Group published a "work instruction" detailing steps employees could take to evade U.S. sanctions and avoid detection by U.S. authorities when a customer from an embargoed country asked FSBV to obtain a replacement of or service for a U.S.-manufactured part.[95] Furthermore, FSBV employees constructed and continuously updated a chart, known as the "black list," that tracked which U.S. companies were most vigilant about export control laws and directed business to repair shops that were less diligent.[96] By engaging in the prohibited transactions, FSBV realized $21 million in gross revenue and $5.9 in gross, pre-tax profits.[97] In June 2014, after extensive negotiation between the defendant and several government agencies, including the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the U.S. Department of Commerce's Bureau of Industry and Security ("BIS"), FSBV and the government reached a global settlement resolving the criminal and administrative investigations.[98] FSBV agreed to pay $10.5 million to the U.S. Attorney's Office and $10.5 million to the U.S. Treasury pursuant to the agreements with OFAC and BIS.[99]

After four years of extensive investigation and protracted negotiations with the government, the matter was not finished. In a June 25, 2014 status conference, Judge Leon requested that the government submit a pleading "setting forth why the DPA reached in this case adequately reflects the seriousness

of the company's conduct and why this resolution serves the interests of justice." [100] In a July 7, 2014 memorandum, the government attempted to allay some of Judge Leon's concerns by detailing its application of principles of corporate liability from the U.S. Attorney's Office Manual to this particular case.[101] It explained that although the nature and extent of the wrongdoing at issue was undoubtedly significant, there were mitigating factors that made the terms of the DPA appropriate.[102] First, the government noted that FSBV voluntarily disclosed its violations to the relevant government regulators and later turned over the results of an extensive internal investigation to the government.[103] Second, prosecutors acknowledged that since launching its internal investigation, FSBV adopted "new and more effective internal controls and procedures, including robust enhancements to its current compliance program to prevent the recurrence of the criminal conduct at issue."[104] Third, the government praised the comprehensiveness of the company's internal investigation, which included the review of more than 500,000 documents, interviews of 51 witnesses, and data collection on more than 20,000 transactions and 200,000 shipments.[105] Finally, the government emphasized the collateral consequences of imposing a harsher fine on the company given its dire financial condition.[106]

Judge Leon was unmoved. At a July 9, 2014 hearing, he expressed concerns over what he believed was the modest size of the penalty as well as the failure to prosecute individuals. Moreover, he questioned the government's representation that this was truly a voluntarily disclosure, noting a *Bloomberg News* article that said that the government was aware of FSBV's wrongdoing back in 2008 as a result of an investigation into another Dutch aerospace company, Aviation Services International B.V, for export control violations.[107] In light of these concerns, he ordered the parties to submit additional briefing on whether the disclosure was truly voluntary and the standard of review for a court reviewing a DPA.[108]

The parties addressed the thorny question of standard of review. They both acknowledged that the sole source of authority of the Court to oversee a DPA is the Speedy Trial Act, and that its only task was to determine whether to exclude time, not to review the substance of the agreement to determine whether the DPA "serves the interests of justice."[109] Both parties also concluded that the primary purpose of enabling courts to exercise broad supervisory powers is "to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."[110] Yet both stressed that this power was not unlimited. The government emphasized that the supervisory powers were not implicated here because the question of whether the disclosures were voluntary is "outside the Court's authority under any rubric of judicial authority."[111] FSBV said that the court's supervisory powers could not be invoked because there was no risk that by approving the agreement, the Court would be lending its imprimatur to some sort of impropriety.[112] Here, the agreement was the product of arm's-length, good-faith negotiation between the parties.[113]

Before Judge Leon evaluated the merits of the parties' standard of review arguments, the government notified the court that it had received an affidavit of a BIS Special Agent which called into question whether FSBV's disclosure was voluntary.[114] At an August 21, 2014 status conference, Judge Leon, describing FSBV's allegedly voluntary disclosure the "linchpin or critical element, keystone to the deal," stated his reservations about the DPA, and said that he did not want to move forward in his

"evaluation" of the deal with a crucial question such as this "still laying fertile out there."[115] Though Judge Leon has yet to specifically address the standard of review, his comments clearly reflect an understanding that judicial review of DPAs includes an assessment of a DPA's merits.[116]

FSBV's DPA remains in limbo. In a September 30, 2014 filing, the government stated that it had interviewed 18 individuals and reviewed voluminous internal government communications surrounding a prior investigation giving rise to the suggestion that FSBV's disclosure was not voluntary, all in an effort to assuage Judge Leon's reservations.[117] This level of post-agreement investigation is unprecedented. The government again stressed that no case or investigation of FSBV was opened until after the June 2010 disclosure, all of the substantive investigative steps focused on FSBV were pursued after its disclosure, and no one has found any evidence that FSBV believed it was under investigation.[118] The government concluded by saying that the notion that FBSV was under investigation prior to June 2010 "is based on the tautology that, because the United States government obtained some information through [another] investigation that indicated Fokker Services may have been involved in conduct in violation of U.S. export control laws, Fokker services was thereby 'under investigation.'"[119] At an October 29, 2014 status conference, however, Judge Leon remained unimpressed. He told the parties that they may have made "too good a deal" and that he would decide within a matter of weeks whether to reject it.[120] Furthermore, he told the parties that "[y]ou probably would be wise to use your time in the next few weeks to have some discussion," over "an alternative resolution that might be acceptable to the court[.]"[121] To date, Judge Leon has not made a decision about the DPA.

At this time, it is unclear whether the parties have heeded Judge Leon's suggestions and undertaken efforts to adopt an alternative resolution. However, Judge Leon's consideration of this DPA underscores how critical a corporation's self-disclosure of misconduct is to both the government and, now, the courts. The case also illustrates the efforts courts may take to review all factors underlying the basis for the agreement.

DPA Updates from the United Kingdom

As discussed in our 2013 Mid-Year Update and 2014 Mid-Year Update, the United Kingdom adopted DPA legislation that took effect on February 24, 2014, and allows for the first time the use of DPAs by U.K. enforcement agencies. At the same time, the Serious Fraud Office ("SFO") and the Crown Prosecution Service issued a Deferred Prosecution Agreement Code of Practice to guide enforcement officials in deploying this new tool. The key technical differences between the U.K. DPA regime and the approach taken in the United States, including the more limited, count-specific protection afforded to U.K. DPA signatories as compared to the broad deferral of prosecution in U.S. DPAs, are also discussed in our 2014 Mid-Year Update.

In the ten months since DPAs became available to U.K. prosecutors, there have been no public examples. This is not, however, unexpected, as the U.K. DPA regime requires that the early stages of DPA negotiations be conducted in private. After negotiations have started but before the DPA terms are agreed to, the prosecutor must apply to the Crown Court for an initial determination that entry into a DPA will be in the interest of justice and the proposed terms are "fair, reasonable, and

proportionate."[122] This first application is also conducted in private. Indeed, the SFO has charged a number of companies with criminal offenses since February, but there has been no public indication that DPAs were considered as potential alternatives to corporate criminal charges. Nonetheless, it is clear that DPAs are very much at the forefront of the minds of prosecutors and other public authorities. For example, specific mention is made of DPAs as "a new mechanism for dealing with corporate economic crime, including bribery and corruption" in the government's U.K. Anti-Corruption Plan, published in December 2014.

The U.K. Anti-Corruption Plan also states the government's intention to: (1) consider the case for creating an entirely new corporate offense for failure by a company to prevent economic crime, which was inspired by the 2010 Bribery Act offense of "corporate failure to prevent bribery;" and (2) reconsider the rules on establishing corporate criminal liability.[123] This drive to revise the existing rules on corporate liability has been linked by the current Director of the SFO, David Green QC, to the successful implementation of the U.K.'s DPA regime, as noted in our 2013 Mid-Year Update .[124] Mr. Green has argued that companies will more readily consider entering into DPAs if faced with the credible threat of successful prosecution. He has further noted that the most significant existing obstacle facing prosecutors in assigning criminal liability to a corporation is the "controlling mind and will" test for offenses requiring proof of a mental element, which will be subject to reconsideration following issuance of the U.K. Anti-Corruption Plan.[125]

Although no DPAs or DPA negotiations have yet been made public, public speeches on the issue made by senior officials at the SFO lend insight into the approach that prosecutors will likely take toward DPAs in the coming months and years.[126] These pronouncements suggest that the bar for companies to be considered for potential DPAs will be set at a high level. Specifically, they suggest that the SFO may expect corporate self-reporting that goes beyond reporting the wrongdoing of employees and other persons associated with the company, and that extends to reporting acts adverse to the company itself, potentially even requiring admissions of company-level offenses. As Director Green colorfully underscored, consideration of a company for a potential DPA will depend on three things: "cooperation, cooperation and cooperation."[127]

The public comments of senior SFO officials also suggest that, in considering the appropriateness of a DPA, the SFO will look unfavorably on early investigative steps taken by a company that might prejudice the SFO's later investigation, and that the SFO may expect companies to waive privilege over records of internal witness interviews. Indeed, one SFO official has suggested that companies conducting internal investigations should consider having non-lawyers conduct initial witness interviews to avoid subsequent concerns regarding collateral waiver of privilege in connection with those interviews' later disclosure.

Conclusion

2014 saw the continued steady use of NPAs and DPAs as a key vehicle for resolving allegations of corporate misconduct. NPAs and DPAs have remained a consistent and favored tool, with every year since 2008 involving more than 20 individual agreements. Many of 2014's NPA and DPA recoveries were also notable for their size, with one resolution (involving two DPAs) representing the largest ever

FCPA recovery, two DPAs exceeding $1 billion, and eight DPAs exceeding $100,000,000 in associated recovery values. With figures like these, recent statements by DOJ leadership in support of negotiated resolutions, and the looming resolution of DOJ Tax Program participation for dozens of Swiss banks, it is highly likely that we can expect the trend in favor of NPA and DPA use to continue in coming years.

APPENDIX: 2014 Non-Prosecution and Deferred Prosecution Agreements

The chart below summarizes the agreements that DOJ entered in 2014. The complete text of each publicly available agreement is hyperlinked in the chart.

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" includes traditional compliance monitors, self-reporting arrangements, and other monitorship arrangements found in settlement agreements.

APPENDIX
Deferred and Non-Prosecution Agreements in 2014

Company	Agency	Alleged Violation	Type	Monetary Penalties	Monitor	Term of DPA/NPA
Alstom Grid, Inc.	DOJ Fraud Section	FCPA	DPA	$772,290,000[a]	Self-Reporting	36 months
Alstom Power, Inc.	DOJ Fraud Section	FCPA	DPA	$772,290,000[a]	Self-Reporting	36 months
ArthroCare Corp.	DOJ Fraud Section	Fraud	DPA	$30,000,000	Self-Reporting	24 months
Avon Products, Inc.	DOJ Fraud Section; U.S. Attorney, Southern District of New York	FCPA	DPA	$135,013,013	Yes	36 months and seven days

APPENDIX
Deferred and Non-Prosecution Agreements in 2014

Bank Leumi Group	DOJ Tax Division	Tax Evasion	DPA	$270,000,000	Self-Reporting	24 months[b]
Bio-Rad Laboratories, Inc.	DOJ Fraud Section; SEC	FCPA	NPA	$55,050,000	Self-Reporting	24 months
Dallas Airmotive, Inc.	DOJ Fraud Section; Federal Bureau of Investigation	FCPA	DPA	$14,000,000	Self-Reporting	36 months
Endo Pharmaceuticals, Inc.	U.S. Attorney, Northern District of New York	FDA	DPA	$192,739,086[c]	Self-Reporting	30 months
Fokker Services B.V.	U.S. Attorney, District of Columbia	Trade Sanctions	DPA	$21,000,000	No	18 months
Forrester Construction Company	U.S. Attorney, District of Columbia	Fraud	NPA	$2,150,000	Yes	24 months
Grand Junction Regional Airport Authority	U.S. Attorney, District of Colorado	Fraud	NPA	$0	Self-Reporting	Unspecified
Hewlett-Packard Mexico, S. de R.L. de C.V.	DOJ Fraud Section	FCPA	NPA	$2,527,750[d]	Self-Reporting	36 months
Hewlett-Packard Polska, SP. Z O.O.	DOJ Fraud Section	FCPA	DPA	$15,450,224[d]	Self-Reporting	36 months and seven days

APPENDIX **Deferred and Non-Prosecution Agreements in 2014**						
Intelligent Decisions, Inc.	U.S. Attorney, District of Columbia	Felony Gratuity	DPA	$300,000	No	24 months
Jefferies LLC	U.S. Attorney, District of Connecticut	Securities Fraud	NPA	$25,000,000	Yes[e]	12 months
JPMorgan Chase Bank, N.A.	U.S. Attorney, Southern District of New York	Bank Secrecy Act	DPA	$1,700,000,000	Self-Reporting	24 months
Lloyds Banking Group	DOJ Antitrust Division; U.S. Commodity Futures Trading Commission	Fraud	DPA	$86,000,000	No	24 months and seven days
Miron Construction Company, Inc.	U.S. Attorney, Eastern District of Wisconsin	Fraud	NPA	$4,000,000	Yes	36 months
Pilot Travel Centers, LLC, d/b/a Pilot Flying J[f]	U.S. Attorney, Eastern District of Tennessee	Fraud	NPA	$148,000,000	Self-Reporting	24 months
Regions Financial Corp.	SEC	Accounting Fraud	DPA	$51,000,000[g]	No	24 months

APPENDIX **Deferred and Non-Prosecution Agreements in 2014**						
Saena Tech Corp.	U.S. Attorney, District of D.C.	Bribery of a Public Official	DPA	$500,000	No	24 months
South Beach Acquisitions, Inc.*	U.S. Attorney, Southern District of California	Conspiracy	DPA	Unknown	Unknown	60 months
Stryker Corporation[h]	U.S. Attorney, District of New Jersey; DOJ Consumer Protection Branch	FDCA	NPA	$40,781,532	Self-Reporting	36 months
SunTrust Mortgage, Inc.	U.S. Attorney, Western District of Virginia	False Statements (18 U.S.C. § 1001); Fraud	NPA[i]	$320,000,000[j]	Self-Reporting	36 months
swisspartners Investment Network AG	U.S. Attorney, Southern District of New York; DOJ Tax Division	Tax Evasion	NPA	$4,400,000	No	36 months
Toray Chemical Korea, Inc.	U.S. Attorney, Eastern District of Virginia	Trade Secrets	DPA	$2,058,000	No	24 months

APPENDIX Deferred and Non-Prosecution Agreements in 2014						
Toyota Motor Corp.	U.S. Attorney, Southern District of New York	Fraud	DPA	$1,200,000,000	Yes	36 months
Vector Planning & Services, Inc.	U.S. Attorney, Southern District of California	False Claims	DPA	$6,500,000	No	36 months
Washington Gas Energy Systems	DOJ Antitrust Division; U.S. Attorney's Office, District of Columbia.	Conspiracy to Commit Fraud	DPA	$2,587,261	No	24 months
West Coast Acquisitions, Inc.*	U.S. Attorney, Southern District of California	Conspiracy	DPA	Unknown	Unknown	60 months

* The South Beach Acquisitions, Inc. and West Coast Acquisitions, Inc. DPAs are under seal.

a) The total penalty associated with the conduct underpinning the Alstom Grid and Alstom Power DPAs was paid by the parent company, Alstom S.A. Thus, while a total penalty of $772,290,000 is noted here, neither subsidiary was directly fined.

b) The Bank Leumi Group's Deferral Period is 24 months, and up to four years.

c) Endo agreed to a criminal forfeiture of $20,828,933 pursuant to its DPA and settled related civil False Claims Act allegations for $171,910,153. It also agreed to enter into a Corporate Integrity Agreement with the Office of Inspector General of the Department of Health and Human Services.

d) The agreements for Hewlett-Packard Mexico, S. de R.L. de C.V. and Hewlett-Packard Polska, SP. Z O.O. are part of a larger settlement; Hewlett-Packard Mexico's forfeiture of $2,527,750 offset Hewlett

Packard Company's disgorgement obligation in connection with Hewlett-Packard Company's settlement with the SEC.

e) The NPA requires the retention of an independent compliance consultant.

f) The agreement for Pilot Flying J was called a "Criminal Enforcement Agreement" that had terms similar to a DPA but was not presented before a court.

g) The NPA included a $26 million civil penalty, which was offset against a $46 million penalty paid to the Federal Reserve Board. The total also includes a $5 million penalty paid to the Alabama State Banking Department.

h) Stryker Corporation's ("Stryker") NPA is labeled a "side letter agreement" in connection with a plea agreement entered into by its subsidiary, OtisMed Corporation. The penalty amount noted above was assessed in connection with the OtisMed Corporation plea agreement; no specific penalties were assessed in connection with the Stryker NPA.

i) The agreement itself is labeled "Restitution and Remediation Agreement" but contains non-prosecution provisions and other terms akin to NPAs. The DOJ press release did not refer to the non-prosecution provisions. The press release from the Office of the Special Inspector General for the Troubled Asset Relief Program announced the agreement as an NPA. *See Sun Trust Gets Non Prosecution Agreement*, Corporate Crime Reporter, July 7, 2014.

j) The agreement provides that the company will pledge $95 million of the total in the event additional restitution funds are needed.

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[1] Rahul Rose, Caldwell: Settlement a "More Powerful Tool Than Convictions," Global Investigations Review (Dec. 3, 2014), available here.

[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.

[3] SunTrust Mortgage Restitution and Remediation Agreement (July 3, 2014); Side Letter Agreement with Stryker Corporation (Aug. 29, 2014); Pilot Travel Centers LLC, d/b/a Pilot Flying J Criminal Enforcement Agreement ¶ 11 (July 10, 2014). We are aware of one other "criminal enforcement agreement" that functioned similarly to Pilot Flying J's, issued to Gibson Guitar Corporation in 2012. *See* Gibson Guitar Corp. Criminal Enforcement Agreement (July 27, 2012).

[4] Barclays Plc and Barclays Bank Plc, Report of Foreign Private Issuer, Form 6-K, Ex. 99-.1 (July 30, 2014) ("In anticipation of the expiry of the two year period, Barclays and DOJ-FS entered into a letter agreement which: (1) gives DOJ-FS until 27 June 2015 to make a determination under the NPA solely as to whether any of Barclays trading activities in the foreign exchange market during the two

year period from 26 June 2012 constituted the commission of a 'United States crime'; and (2) with respect to the ongoing investigation of those trading activities by DOJ-FS and DOJ-AD, extends Barclays' obligation to disclose non-privileged information in response to inquiries of the DOJ-FS to 27 June 2015. The two year period under the NPA has otherwise expired."); UBS Group AG, Form 6-K, n.14(8) (Oct. 28, 2014) ("UBS and the DOJ have agreed in principle to extend the terms of the NPA by one year to 18 December 2015.").

[5] *See Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Offshore Accounts: Hearing Before the Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov't Affairs*, 113th Cong. 4-5 (2014) (joint statement of James M. Cole, Deputy Attorney Gen. and Kathryn Keneally, Assistant Attorney Gen., Tax Div.).

[6] Department of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, ¶¶ I.B.9, II (August 29, 2013).

[7] Department of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, ¶ II.B (requiring participating banks to submit letters of intent setting forth a plan for complying with all program requirements within 120 days of submittal, and further requiring submittal of letters of intent by December 31, 2013); ¶ II.H (setting forth penalty requirements). (August 29, 2013).

[8] Deferred Prosecution Agreement at 6:15-19, *United States v. Bank Leumi Le-Israel*, B.M., No. 14-CR-0731 (C.D. Cal. Dec. 22, 2014); *see also* Department of Justice Office of Public Affairs, *Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Assets in Offshore Bank Accounts* (Dec. 22, 2014). The Bank Leumi Group was under investigation by DOJ at the time of the Program's publication and was therefore ineligible to participate.

[9] The total penalty associated with the conduct underpinning the Alstom Grid and Alstom Power DPAs was paid by the parent company, Alstom S.A. Thus, while a total penalty of $772,290,000 is noted here, neither subsidiary was directly fined.

[10] This figure includes those arrangements where NPAs and DPAs have involved the required retention of consultants or third-party auditors, or other similar measures. *See also Prosecutors Adhered to Guidance but DOJ Could Better Communicate: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 11 (2009) (statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office) (noting that between 1993 and September 2009, DOJ had negotiated 152 DPAs and NPAs, of which 48 required imposition of a monitor).

[11] Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys 4 (Mar. 7, 2008), http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[12] Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys 4-5 (Mar. 7, 2008), http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[13] Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys 4 (Mar. 7, 2008), http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[14] *See, e.g.*, Veronica Root, *The Monitor-"Client" Relationship*, 100 Va. L. Rev. 523,528 n.12 (2014) ("Despite [the] language in the [Morford Memorandum], the monitor is still perceived by the public and corporation as the government's agent and the monitorship agreements are structured to facilitate a monitor's role as government agent.").

[15] Notice Regarding Corporate Monitorship ¶ 11, *United States v. Siemens Aktiengesellschaft* (hereinafter "Monitorship Notice"), No. 08-367 (D.D.C. Dec. 18, 2012).

[16] *100Reporters v. U.S. Dep't of Justice*, No. 14-cv-1264 (D.D.C. 2014) (hereinafter "*100Reporters*").

[17] Answer, *100Reporters v. U.S. Dep't of Justice*, No. 14-cv-1264-RC (D.D.C. 2014)

[18] These motions were made under Federal Rule of Civil Procedure 24(a) and 24(b), respectively.

[19] While *100Reporters* did not dispute several of the requisites for intervention articulated by Siemens and the Monitor, factors such as the Monitor's interest, adequate representation, standing, and others were the subject of contention and were settled by the Court.

[20] 100Reporters v. U.S. Dep't of Justice, No. 14-CV-1264-RC, 2014 WL 6817009 at *4 (D.D.C. Dec. 3, 2014) (quotation omitted).

[21] Monitor's Mot. Intervene 7-8, 100Reporters v. U.S. Dep't of Justice, No. 14-1264-RC (D.D.C. Oct. 20, 2014).

[22] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *4 (D.D.C. Dec. 3, 2014).

[23] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *5 (D.D.C. Dec. 3, 2014).

[24] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *5 (D.D.C. Dec. 3, 2014).

[25] 100Reporters v. U.S. Dep't of Justice, No. 14-CV-1264-RC, 2014 WL 6817009 at *6 (D.D.C. Dec. 3, 2014). The court also rejected 100Reporters's contention that intervention as of right "must relate to a specific personal privacy interest enumerated by a FOIA Exemption," allowing the

Monitor's intervention and granting him "the opportunity to litigate the merits of his interest, including whether the interest actually is covered by a FOIA exemption, in a single proceeding involving all interested parties."

[26] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *8 (D.D.C. Dec. 3, 2014).

[27] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *8 (D.D.C. Dec. 3, 2014).

[28] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *8 (D.D.C. Dec. 3, 2014).

[29] Fed. R. Civ. P. 24(b).

[30] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *13 (D.D.C. Dec. 3, 2014).

[31] *100Reporters v. U.S. Dep't of Justice*, No. 14-CV-1264-RC, 2014 WL 6817009 at *14 (D.D.C. Dec. 3, 2014).

[32] *See generally* Veronica Root, *The Monitor-"Client" Relationship*, 100 Va. L. Rev. 523, 527 (2014) (arguing that a lack of enforceable rules for the parties involved in corporate compliance monitorships--especially those "regarding confidentiality and information sharing amongst the monitor, corporation, and government"--has led to unpredictable risks and liabilities, and advocating for the "the creation of a statutory privilege that protects communications amongst the monitor, corporation, and government, allowing the monitorship structure to be reframed as a "monitor"-'client' relationship.")

[33] S*ee generally* Stipulation and Order, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, (N.D. Cal. Apr. 25, 2014).

[34] Exhibit A, Stipulation and [Proposed] Order, at 9-11, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO (N.D. Cal. Apr. 24, 2014).

[35] Consent Mot. to Enter Third Amend. [Proposed] Final J. at 3, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, (N.D. Cal. Dec. 1, 2014).

[36] Consent Mot. to Enter Third Amend. [Proposed] Final J. at 3, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO (N.D. Cal. Dec. 1, 2014).

[37] Third Amend. Final J. at 9, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133 WHO (N.D. Cal. Dec. 2, 2014).

[38] Third Amend. Final J. at 9, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133 WHO (N.D. Cal. Dec. 2, 2014).

[39] Third Amend. Final J. at 9, *United States v. Bazaarvoice, Inc.*, 13-cv-00133 WHO (N.D. Cal. Dec. 2, 2014). *See also* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Department Components and United States Attorneys (Mar. 7, 2008), http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[40] Fisher Sand & Gravel Co., DPA ¶ 18 (April 30, 2009).

[41] Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. Times, Dec. 10, 2014.

[42] Barclays Bank Plc., Non-Prosecution Agreement, 2 (June 26, 2012); UBS AG, Non-Prosecution Agreement, 3 (Dec. 18, 2012); Standard Chartered Bank, Deferred Prosecution Agreement ¶¶ 6-7 (Dec. 10, 2012).

[43] Barclays Bank Plc, Non-Prosecution Agreement, 2-3 (June 26, 2012); UBS AG, Non-Prosecution Agreement, 4 (Dec. 18, 2012); *see also* Standard Chartered Bank, Deferred Prosecution Agreement ¶¶ 8-10 (Dec. 10, 2012) (acknowledging the government's right to prosecute for "willful and material breaches").

[44] Barclays Plc and Barclays Bank Plc, Report of Foreign Private Issuer, Form 6-K, Ex. 99-.1, Financial Statement Notes (July 30, 2014).

[45] UBS Group AG, Form 6-K, n. 14(8) (Oct. 28, 2014).

[46] Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. Times, Dec 10, 2014.

[47] Standard Chartered Bank, Deferred Prosecution Agreement ¶ 4.

[48] Chad Bray, Standard Chartered Agrees to 3-Year Extension of Nonprosecution Agreements, N.Y. Times, Dec. 10, 2014.

[49] Saena Tech DPA, att. A, at 2-4 (April 16, 2014).

[50] Saena Tech DPA ¶¶ 6-9 (April 16, 2014).

[51] Saena Tech DPA ¶ 7 (April 16, 2014).

[52] Saena Tech DPA ¶ 4 (April 16, 2014).

[53] Saena Tech DPA ¶ 4 (April 16, 2014).

[54] Transcript of Hearing at 2-3, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. July 17, 2014).

[55] Transcript of Hearing at 10-11, *United States v. Saena Tech Corporation*, No. 1 1:14-cr-00066-EGS (D.D.C. July 17, 2014).

[56] Transcript of Hearing at 22, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. July 17, 2014).

[57] Transcript of Hearing at 22, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. July 17, 2014).

[58] Order Appointing Amicus Curiae, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. July 22, 2014).

[59] Government's Supplemental Brief at 6-7, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 8, 2014) (citing *United States v. HSBC*, No. 12-CR-763, 2013 WL 3306161 at *3 (E.D.N.Y. July 1, 2013).

[60] Government's Supplemental Brief at 8, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 8, 2014).

[61] Government's Supplemental Brief at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 8, 2014) (quoting *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973)).

[62] Memorandum of Law of *Amicus Curiae* Law Professor at 2-3, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[63] Memorandum of Law of *Amicus Curiae* Law Professor at 2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[64] Memorandum of Law of *Amicus Curiae* Law Professor at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[65] Memorandum of Law of *Amicus Curiae* Law Professor at 6-7, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[66] Memorandum of Law of *Amicus Curiae* Law Professor at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[67] Memorandum of Law of *Amicus Curiae* Law Professor at 2-3, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[68] Memorandum of Law of *Amicus Curiae* Law Professor at 17, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[69] Memorandum of Law of *Amicus Curiae* Law Professor at 17-18, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[70] Memorandum of Law of *Amicus Curiae* Law Professor at 18, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[71] Memorandum of Law of *Amicus Curiae* Law Professor at 18, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[72] Memorandum of Law of *Amicus Curiae* Law Professor at 19, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 22, 2014).

[73] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 1-2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

[74] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29 2014).

[75] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

[76] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 2, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

[77] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 3-4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014).

[78] Government's Reply to Memorandum of Law of *Amicus Curiae* Law Professor at 6, *United States v. Saena Tech Corporation,* No. 1:14-cr-00066-EGS (D.D.C. Aug. 29, 2014). Indeed, in *SEC v. Citigroup Global Markets*, the district court not only took issue with the SEC's supposed leniency, but also with the fact that Citigroup did not have to admit or deny liability. Interestingly, even though the Second Circuit later said in its reversal of the district court that admitting liability is not necessary for a consent judgment, the SEC has changed its policy to demand admissions of liability as a condition of settlement in certain cases in response to the judicial pushback it has received.

[79] Minute Order, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Sep. 5, 2014).

[80] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[81] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 4, *United States v. Saena Tech*

Corporation, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014) (citing *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987)).

[82] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[83] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 4, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[84] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 4-5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[85] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 5, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[86] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 5-6, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[87] Government's Supplemental Brief Addressing the Scope of Certain Aspects of the Court's Authority in the Context of a Deferred Prosecution Agreement at 7-8, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 13, 2014).

[88] Supplemental Memorandum of Law of *Amicus Curiae* Law Professor at 2-3, *United States v. Saena Tech Corporation*, No. 1:14-cr-00066-EGS (D.D.C. Oct. 21, 2014).

[89] United States v. HSBC Bank, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

[90] United States v. HSBC Bank, 2013 WL 3306161 at *6 (E.D.N.Y. July 1, 2013).

[91] United States v. HSBC Bank, 2013 WL 3306161 at *3 (E.D.N.Y. July 1, 2013).

[92] United States v. HSBC Bank, 2013 WL 3306161 at *3 (E.D.N.Y. July 1, 2013).

[93] Fokker Services DPA, att. A at 6 (June 5, 2014).

[94] Fokker Services DPA, att. A at 6-7 (June 5, 2014).

[95] Fokker Services DPA, att. A at 8 (June 5, 2014).

[96] Fokker Services DPA, att. A at 11-12 (June 5, 2014).

[97] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 5, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014)

[98] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 2, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[99] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 1-2, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[100] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 2, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[101] Section 9-28.300 of the U.S. Attorney's Manual sets forth nine factors to be considered in the context of a resolution of a corporate investigation: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, and whether corporate management was implicit in the wrongdoing, (3) the company's history of similar misconduct, (4) the company's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation, (5) the existence and effectiveness of the company's pre-existing compliance program, (6) the company's remedial actions, (7) the collateral consequences, (8) the adequacy of the prosecution of individuals responsible for the company's malfeasance, and (9) the adequacy of remedies such as civil or regulatory enforcement actions.

[102] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 7-8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[103] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 10, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[104] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 12-13, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[105] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[106] Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V. at 15, United States v. Fokker Services B.V., No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014). Indeed, it is noteworthy that not only was the total penalty in this case three times the

size of the actual *profits* the company made, but also the government independently verified that this was at the outer limit of what the company was able to pay. *See* Exhibit B to Government's Memorandum in Support of Deferred Prosecution Agreement Reached with Fokker Services B.V., Declaration of Financial Analyst Jeffrey A. Friedman, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 7, 2014).

[107] Andrew Zajac and Greg Farrell, *Fokker Iran Sanctions Deal Stalls on Judge's Concerns*, Bloomberg News, July 9, 2014.

[108] Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement with Fokker Services B.V. at 1, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[109] Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement with Fokker Services B.V. at 10, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014); Fokker Services B.V.'s Memorandum in Support of the Deferred Prosecution Agreement with the Government at 2-4, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[110] Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement with Fokker Services B.V. at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014) (quoting *United States v. HSBC Bank*, 2013 WL 3306161 at *6 (E.D.N.Y. July 1, 2013)); Fokker Services Memorandum in Support of the Deferred Prosecution Agreement with the Government at 5-6, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[111] Government's Supplemental Memorandum in Support of Deferred Prosecution Agreement with Fokker Services B.V. at 15, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[112] Fokker Services B.V.'s Memorandum in Support of the Deferred Prosecution Agreement with the Government at 7-8, 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[113] Fokker Services B.V.'s Memorandum in Support of the Deferred Prosecution Agreement with the Government at 7, 1:14-cr-00121-RJL (D.D.C. July 18, 2014).

[114] Transcript of Status Conference at 8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Aug. 21, 2014).

[115] Transcript of Status Conference at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Aug. 21, 2014).

[116] Transcript of Status Conference at 14, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Aug. 21, 2014).

[117] Government's Status Report at 7-8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Sept. 30, 2014).

[118] Government's Status Report at 8, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Sept. 30, 2014).

[119] Government's Status Report at 15, *United States v. Fokker Services B.V.*, No. 1:14-cr-00121-RJL (D.D.C. Oct. 29, 2014).

[120] Christie Smythe, *Fokker Judge Says He May Reject Accord on Iran Sanctions*, Bloomberg News, Oct. 29, 2014.

[121] Christie Smythe, *Fokker Judge Says He May Reject Accord on Iran Sanctions*, Bloomberg News, Oct. 29, 2014.

[122] Crime and Courts Act, 2013, c. 22, § 7, sch. 17.

[123] Department for Business, Innovation & Skills, U.K. Anti-Corruption Plan, 2014, ¶ 4.64; *see also* Bribery Act, 2010, c. 23, § 7.

[124] See Department for Business, Innovation & Skills, U.K. Anti-Corruption Plan, 2014, ¶ 4.64.

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

[126] David Green, Director, U.K. Serious Fraud Office, Ethical Business Conduct: An Enforcement Perspective at PwC (Mar. 6, 2014); Alun Milford, General Counsel, U.K. Serious Fraud Office, Corporate Criminal Liability and Deferred Prosecution Agreements at the Annual Employed Bar Conference (Mar. 26, 2014); Alun Milford, General Counsel, U.K. Serious Fraud Office, Speech to the Global Investigations Summit (Oct. 15, 2014); Ben Morgan, Joint Head of Bribery and Corruption, U.K. Serious Fraud Office, Deferred Prosecution Agreements: What Do We Know So Far? at the U.K. Aerospace and Defence Industry Seminar (July 1, 2014); Stuart Alford QC, Joint Head of Fraud, U.K. Serious Fraud Office, Enforcing the U.K. Bribery Act – The U.K. Serious Fraud Office's Perspective at the Anti-Corruption in Oil & Gas Conference 2014 (Nov. 17, 2014).

[127] David Green, Director, U.K. Serious Fraud Office, Ethical Business Conduct: An Enforcement Perspective at PwC (Mar. 6, 2014).

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Washington, D.C.

F. Joseph Warin (+1 202-887-3609, fwarin@gibsondunn.com)
David P. Burns (+1 202-887-3786, dburns@gibsondunn.com)
David Debold (+1 202-955-8551, ddebold@gibsondunn.com)
Michael Diamant (+1 202-887-3604, mdiamant@gibsondunn.com)
John W.F. Chesley (+1 202-887-3788, jchesley@gibsondunn.com)
Daniel P. Chung (+1 202-887-3729, dchung@gibsondunn.com)

New York

Reed Brodsky (+1 212-351-5334, rbrodsky@gibsondunn.com)
Joel M. Cohen (+1 212-351-2664, jcohen@gibsondunn.com)
Lee G. Dunst (+1 212-351-3824, ldunst@gibsondunn.com)
Barry R. Goldsmith (+1 212-351-2440, bgoldsmith@gibsondunn.com)
Christopher M. Joralemon (+1 212-351-2668, cjoralemon@gibsondunn.com)
Mark A. Kirsch (+1 212-351-2662, mkirsch@gibsondunn.com)
Randy M. Mastro (+1 212-351-3825, rmastro@gibsondunn.com)
Marc K. Schonfeld (+1 212-351-2433, mschonfeld@gibsondunn.com)
Orin Snyder (+1 212-351-2400, osnyder@gibsondunn.com)
Alexander H. Southwell (+1 212-351-3981, asouthwell@gibsondunn.com)
Jim Walden (+1 212-351-2300, jwalden@gibsondunn.com)
Lawrence J. Zweifach (+1 212-351-2625, lzweifach@gibsondunn.com)
Adam P. Wolf (+1 212-351-3956, awolf@gibsondunn.com)

Denver

Robert C. Blume (+1 303-298-5758, rblume@gibsondunn.com)
Ryan T. Bergsieker (+1 303-298-5774, rbergsieker@gibsondunn.com)

Orange County
Nicola T. Hanna (+1 949-451-4270, nhanna@gibsondunn.com)

Los Angeles
Debra Wong Yang (+1 213-229-7472, dwongyang@gibsondunn.com)
Marcellus McRae (+1 213-229-7675, mmcrae@gibsondunn.com)
Michael M. Farhang (+1 213-229-7005, mfarhang@gibsondunn.com)
Douglas Fuchs (+1 213-229-7605, dfuchs@gibsondunn.com)
Eric D. Vandevelde (+1 213-229-7186, evandevelde@gibsondunn.com)

San Francisco
Thad A. Davis (+1 415-393-8251, tadavis@gibsondunn.com)
Marc J. Fagel (+1 415-393-8332, mfagel@gibsondunn.com)
Charles J. Stevens (+1 415-393-8391, cstevens@gibsondunn.com)
Michael Li-Ming Wong (+1 415-393-8234, mwong@gibsondunn.com)
Winston Y. Chan (+1 415-393-8362, wchan@gibsondunn.com)

Hong Kong
Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)
Oliver D. Welch (+852 2214 3716, owelch@gibsondunn.com)

London
Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)
Mark Handley (+44 20 7071 4277, bmhandley@gibsondunn.com)

Munich
Benno Schwarz (+49 89 189 33-110, bschwarz@gibsondunn.com)
Mark Zimmer (+49 89 189 33-130, mzimmer@gibsondunn.com)

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