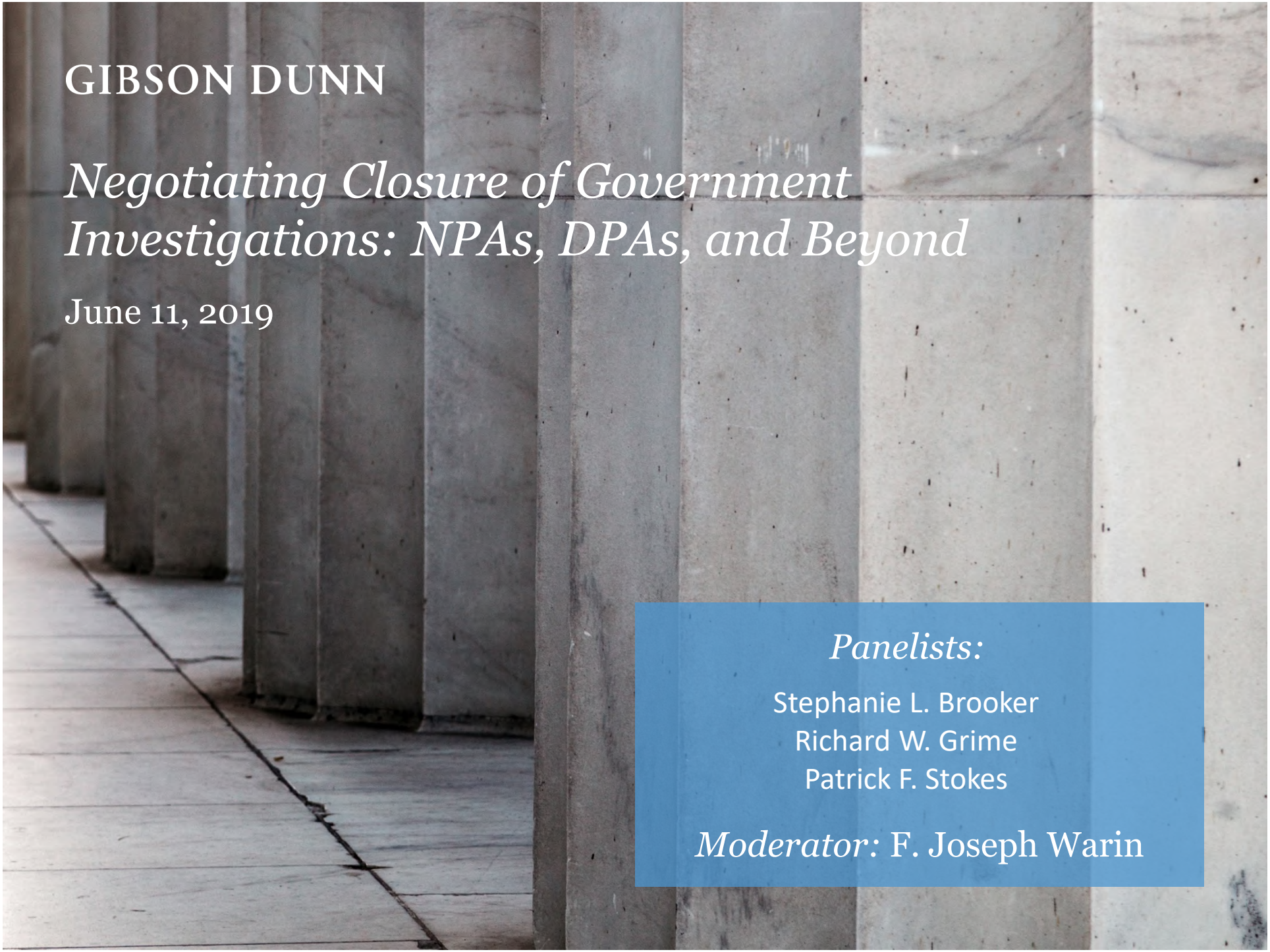


GIBSON DUNN

Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond

June 11, 2019

Panelists:

Stephanie L. Brooker
Richard W. Grime
Patrick F. Stokes

Moderator: F. Joseph Warin

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance in six weeks following the webcast.
- All questions regarding MCLE Information should be directed to Jeanine McKeown (National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com.

Agenda

1. **Overview of Resolution Vehicles**
2. **DOJ and SEC Statistics**
3. **Key Terms**
4. **Considerations and Ramifications**
5. **Navigating Corporate Monitorships**
6. **Resolution Structures Abroad**

GIBSON DUNN

Resolution Vehicle Overview

Overview of DOJ & SEC Enforcement Resolution Vehicles

Criminal:

DOJ

- Declination
- Declination w/ Disgorgement
- Non-Prosecution Agreement
- Deferred Prosecution Agreement
- Guilty Plea
- Trial

Civil:

SEC

- Declination
- Civil Injunction
- Cease-and-Desist Orders
- Non-Prosecution Agreement
- Deferred Prosecution Agreement
- Trial

NPAs, DPAs, and Declinations

An Introduction

- **NPAs and DPAs** represent a middle ground between indictment/guilty plea/trial and declination. DOJ agrees to forgo prosecution in exchange for monetary penalties, admission of responsibility, agreement not to commit further violations of law, remediation, and cooperation—both past and future. Typically the agreements are for a term of 2-3 years.
  - **NPAs** are voluntary contract agreements between a corporation and DOJ. There is no indictment, no plea, and charges are not filed with a court. NPAs increasingly require voluntary disclosure of conduct.
  - **DPAs** are voluntary pre-indictment alternatives in which DOJ agrees to suspend prosecution for a period of years. The defendant pays a fine, agrees to a statement of facts, and commits to abide by certain requirements. DPAs are filed in federal court along with a charging document (e.g., a criminal information) and waiver of the Speedy Trial Act is subject to judicial approval (the court does not approve the settlement terms). Fulfilling a DPA's requirements results in a dismissal of the charges after agreement's term.

NPAs, DPAs, and Declinations

An Introduction

- **Declinations with Disgorgement** are a new resolution option developed by DOJ though the FCPA Pilot Program, which was formalized as the FCPA Corporate Enforcement Policy in November 2017 (Justice Manual 9-47.120).
  - These resolutions are public, and blur the line between traditional declinations and NPAs by, among other things:
    - requiring disgorgement;
    - may require admissions;
    - may impose continuing cooperation and compliance requirements; and
    - reserving DOJ's right to reopen investigations if the recipient companies fail to comply with the declination terms.

> *"When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, . . . there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender."*
>
> **9-47.120 – FCPA Corporate Enforcement Policy**

Introduction to NPAs and DPAs

DOJ v. SEC Use of DPAs & NPAs

Agency	DPA	NPA
	• Filed with court as public record • Accompanies criminal information • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties • Rarely deniable in collateral litigation • Waiver of the Speedy Trial Act	• Not filed with court, but often public • No charging documents • Includes statement of facts • Usually term-limited • Tolls SOLs • Financial penalties common • Rarely deniable in collateral litigation • Voluntary disclosure increasingly required
	• Not filed with court; typically public • No complaint • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties	• Not filed with court; typically public • No complaint • May include statement of facts • Agreement to future tolling agreement • May include financial penalties

Introduction to NPAs and DPAs

Benefits and Risks

Careful Analysis Required Before Entering DPA or NPA

- ❑ May ***mitigate potential collateral consequences*** of indictment or conviction, including regulator license suspension, suspension or debarment from contracting with government entities and/or international development organizations such as the World Bank, financial impacts on the company, and other reputational harm.
- ❑ ***One press day*** with ability to negotiate factual assertions/craft the narrative.
- ❑ May ***reduce risks of indictment/conviction*** impacts on innocent corporate stakeholders (employees, pensioners, shareholders, creditors, customers, etc.).
- ❑ Enables prosecutors to ***tailor remediation and compliance measures*** to fit the nature of misconduct.

However, long-term compliance, remediation obligations (including corporate monitors), and material risks in event of a breach require counseled analysis before entering into a corporate resolution.

Similar Agreements to NPAs and DPAs

- Federal corporate compliance agreements are not limited to DOJ and the SEC.
  - Corporate Integrity Agreements ("CIA") are similar to NPAs and are often used by Health and Human Services.
- Some state governments have similar resolution vehicles.
  - State NPAs and DPAs
  - State Enforcement Actions and Consent Orders ("CO")
    - Similar to NPAs in that they provide certain baseline obligations of an effective compliance program, are voluntary agreements, and are beyond the reach of courts.
    - Example: NY Department of Financial Services has issued 12 COs since 2018.
      - Standard Chartered 2019 CO imposed a $40,000,000 penalty
      - Société Générale S.A. 2018 CO imposed a $325,000,000 penalty

Other Agency Resolutions

Enforcement Responsibilities

FinCEN (Civil)

CFTC (Civil)

OFAC (Civil)

FINRA (SRO)

Banking Regulators

FinCen and Bank Regulators

- Informal Enforcement Actions
- Public Enforcement Actions
  - Consent Orders, C&D Orders, Formal Agreements
- Civil Enforcement Measures
  - Civil Monetary Penalties (CMPs)
  - Remedial Measures, including SAR and CDD lookbacks
  - Independent Monitors and Consultants
  - Regulatory Reporting and Oversight

Maximizing Options for NPA, DPA, or Declination

DOJ Charging Considerations

*[W]here the **collateral consequences of a corporate conviction for innocent third parties would be significant**, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to **promote compliance with applicable law** and to **prevent recidivism**. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. **Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct**. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help **restore the integrity of a company's operations** and **preserve the financial viability of a corporation** that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like **prompt restitution for victims**.*

Justice Manual §§ 9-28.200, 9-28.1100

Maximizing Options for NPA, DPA, or Declination

Good Practices

Scenario

A company learns of potential misconduct through one of several channels (e.g., a whistleblower, internal report, subpoena, *The New York Times*)

- Companies must have in place robust and effective procedures to identify major issues and properly escalate them to senior management immediately: ***minutes count in the early days***.

- ***Process matters***: DOJ guidance issued April 2019 regarding ***evaluation of corporate compliance programs***, which assists prosecutors in determining what form of resolution may be most appropriate, emphasizes the quality of a company's existing compliance program, including risk management, policies and procedures, reporting mechanism effectiveness, and response to concerns.

Maximizing Options for NPA, DPA, or Declination

Good Practices

Regardless of whether government prosecutors are involved yet, the company first evaluates the facts and then, if justified, launches a well-scoped, thorough investigation

- Take appropriate steps to ***preserve all available privileges*** over investigation.
- ***Fully document*** every investigatory step to obtain credit for the company's efforts from prosecutors.
- "Scorched earth" approach unnecessary to secure a favorable result. ***Investigations should be tailored*** to the facts and to the particular risk level of the allegations. ***Quality***, ***efficiency***, ***independence***, and ***thoroughness*** of investigation response are key.

Maximizing Options for NPA, DPA, or Declination

Good Practices

Post-investigation, the company develops a tailored remediation plan to address near-term and long-term findings

- ***Follow through*** on remediation through confirmation, testing, and audit, if necessary.
- Identifying systemic issues and devising and implementing policies and systems to ***prevent future violations*** are crucial, including periodic program reviews and updates to the company's risk assessment methodology.
- Investigation and remediation create options for the company and help achieve the best outcome possible under the circumstances should the government learn of the conduct or the company decide to voluntarily disclose.

DPAs Go Global

NPAs and DPAs Increasingly Form Part of Complex Global Settlements Involving International Conduct and Multiple Coordinating Enforcement Jurisdictions

- **Netherlands-based SBM Offshore NV** and **U.S. subsidiary SBM Offshore USA Inc.** resolved criminal FCPA charges with DOJ through a **DPA** and **guilty plea**, respectively.
- The investigation involved assistance and cooperation from Brazil's Misterio Publico Federal (MPF), the Netherlands' Dutch Public Prosecutor's Office (Openbaar Ministerie) and Switzerland's Office of the Attorney General and Federal Office of Justice.
- The penalty imposed on SBM accounted for fines to be paid to the Openbaar Ministerie via a **settlement agreement** and to the MPF through a **Leniency Agreement**. (2017)

- **Singapore-based Keppel Offshore & Marine Ltd.** and **U.S. subsidiary Keppel Offshore & Marine USA Inc.** (collectively, KOM) resolved criminal FCPA charges with DOJ through a **DPA** and **guilty plea**, respectively.
- The global resolution also involved a formal **conditional warning** from Singaporean authorities for the parent company, and a **Leniency Agreement** with Brazilian authorities for a wholly owned Brazilian subsidiary.
- The penalty imposed on KOM accounted for payments to be paid to the Attorney General's Chambers in Singapore and the MPF in Brazil. (2017)

DPAs Go Global

Many Countries Also Have Implemented or Are Considering DPA Regimes

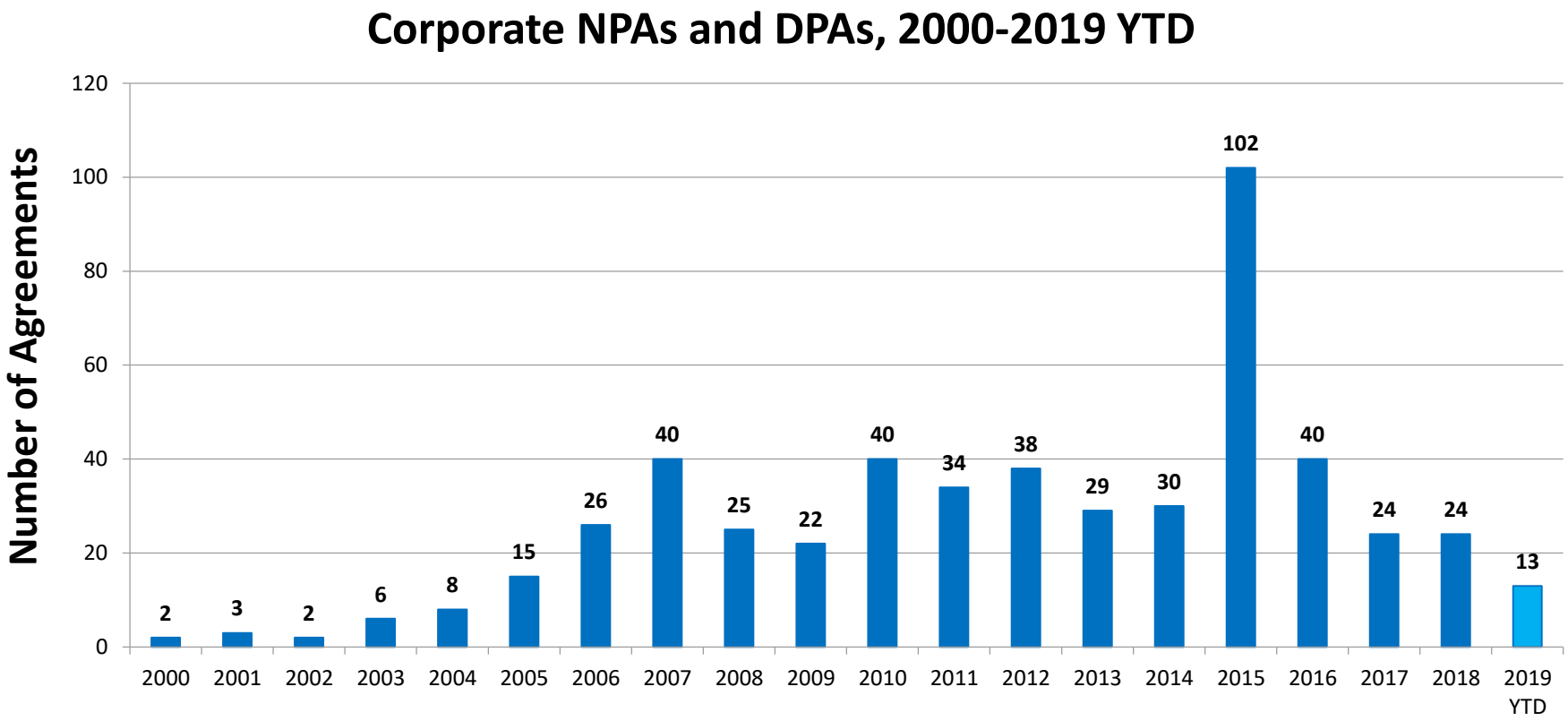
- ***More Countries Are Developing DPA regimes***
  - –DPA-like agreements are available in the U.S., UK, France, Canada, Singapore, and Scotland
  - –DPA-like agreements are proposed in Australia, Switzerland, Poland, and Ireland
  - –Leniency Agreements in Brazil and Germany
- ***Common Key Provisions***
  - –Factual narrative
  - –Fine
  - –Remediation and reporting requirements
  - –Judicial approval
- ***Key Differences from U.S. DPAs***
  - –Only available to legal entities
  - –Limited to specific offenses
  - –Oversight by court

GIBSON DUNN

DOJ and SEC Statistics

DOJ and SEC NPA and DPA Statistics

Corporate NPAs and DPAs, 2000-Present



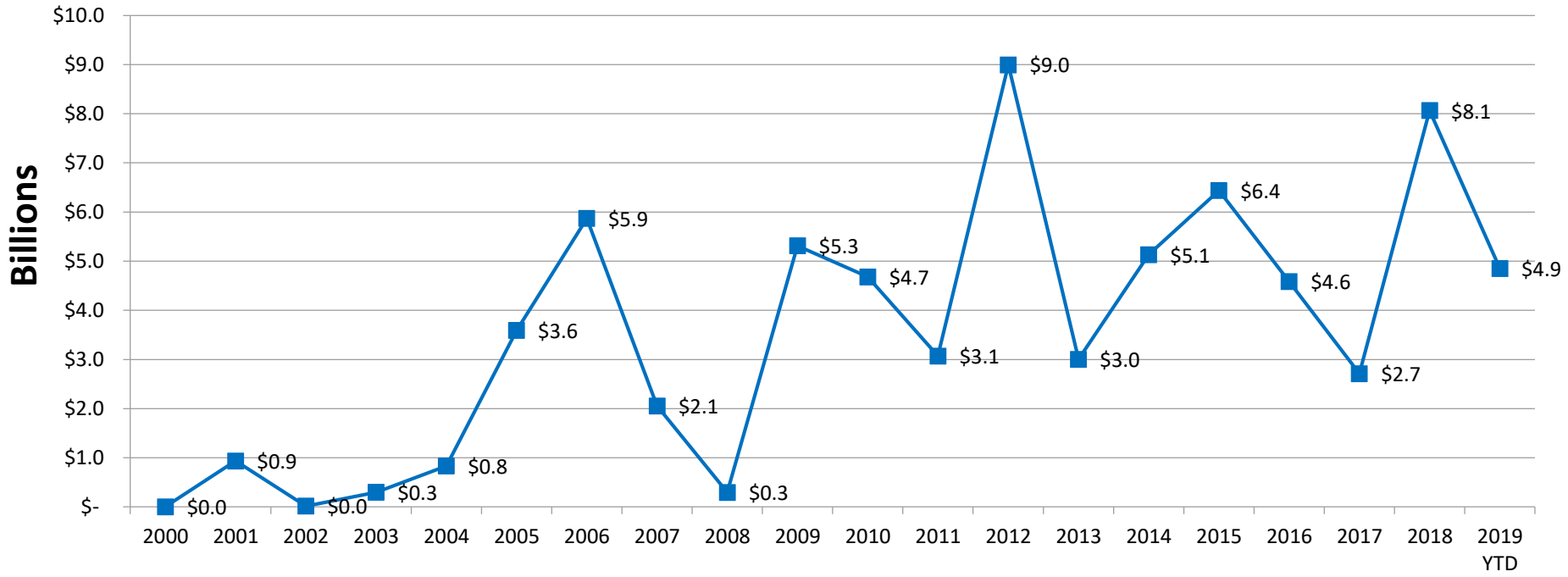
Note: The SEC entered into ten of the above corporate NPAs and DPAs: 2010 (1), 2011 (3), 2012 (1), 2013 (1), 2014 (1), 2015 (1), and 2016 (2).

*Data through June 10, 2019

DOJ and SEC NPA and DPA Statistics

Monetary Recoveries, 2000-Present

Total Monetary Recoveries Related to NPAs and DPAs 2000-2019 YTD*



Note: Values include all applicable known domestic civil penalties, criminal penalties, and related civil and criminal settlement amounts.

*Data through June 10, 2019

NPA and DPA Statistics

DOJ Sections Entering into NPAs and DPAs, 2000-Present

- DOJ has brought 513 of 523 NPAs and DPAs identified from 2000-Present.
- DOJ litigating units (Fraud, Tax, AFMLS/MLARS, Antitrust, Environment and Natural Resources, etc.) have been party to 294 – more than half.
- U.S. Attorney Offices in New York, California, Massachusetts, and New Jersey are frequently a party.

NPAs and DPAs (2000-Present)
Most Active DOJ Offices*

Office/District	NPAs	DPAs	Total
DOJ Fraud	55	80	135
DOJ Tax	87	7	94
S.D.N.Y.	31	20	51
E.D.N.Y.	17	13	30
D. Mass.	14	9	23
C.D. Cal.	10	11	21
DOJ AFMLS/MLARS	2	18	20
D.N.J.	3	15	18
DOJ Antitrust	11	5	16
E.D. Va.	7	5	12
DOJ Civil	6	6	12
S.D. Cal.	2	8	10
D.D.C.	4	5	9
E.D.N.C.	5	4	9
S.D. Tex.	6	2	8
N.D. Cal.	3	5	8
M.D. Pa.	4	2	6

*Counts include cases involving multiple DOJ offices. For example, if a case was resolved by both DOJ Fraud and D. Mass, it is counted once for each office.

GIBSON DUNN

Key Terms

Key Terms: An Overview

Key Considerations in Negotiating an NPA or DPA

- **Entity**
  - Parent vs. subsidiary
  - Domestic vs. foreign entity
- **Duration**
  - 2-3 years
  - Extension and sunset provisions
- **Mandatory Disclosure of Other Conduct – Scope**
  - Similar conduct to Statement of Facts vs. all potential criminal conduct
  - Actual criminal conduct vs. "evidence" or "allegations" of potential violations
- **Statements of Fact – Scope**
  - Level of management involvement
  - Vicarious liability considerations
- **Reporting Requirements**
  - Corporate monitor vs. self-reporting vs. hybrid arrangement

Key Terms: An Overview

Key Considerations in Negotiating an NPA or DPA

- **Penalty**
  - Reduction considerations, including acknowledgement of parallel resolutions
- **Government Release – Scope**
  - Conduct in Statement of Facts vs. broader
  - Date limitations
  - Violations of specified laws
- **Admissions**
  - Admission vs. non-admission
  - Clear admission vs. acknowledgment of actions by employees
- **Publicity**
  - Non-denial clause (publicly, and in subsequent or collateral litigation)
- **Cooperation**
  - Specified other agencies vs. all; foreign authority cooperation requirements
  - Related to conduct in Statement of Facts vs. broader
- **Breach**
  - Who determines whether breach has occurred and according to what process
  - What constitutes breach; materiality considerations

Presentation of Facts

- DOJ DPAs and NPAs feature a "Statement of Facts," which is attached as Appendix A to the NPA letter or the DPA filing, and is a negotiated document
  - DOJ typically requires companies to admit to NPA and DPA Statements of Facts

> The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents as set forth in the attached Statement of Facts, and that the facts described therein are true and accurate. The Company also admits, accepts, and acknowledges that the facts described in the attached Statement of Facts constitute a violation of law, specifically the Foreign Corrupt Practices Act ("FCPA"), Title 15, United States Code, Section 78m. The Company expressly agrees that it shall not, through present

PETROBRAS
DOJ NPA, 2018

> 6. MTB ENTITIES admit and stipulate that the facts set forth in the Statement of Facts, attached hereto as Exhibit C and incorporated herein, are true and accurate based upon MTB ENTITIES' internal investigation and information provided to MTB ENTITIES by the Government. In sum, MTB ENTITIES admit that they are responsible under United States *respondeat superior* law for the acts of their employees.

MIZRAHI TEFAHOT
DOJ DPA, 2019

- When there is no parallel criminal resolution, companies often consent to SEC orders "without admitting or denying the findings" in the order

> Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-

dun & bradstreet
SEC Settlement, 2018

Presentation of Facts, cont.

- DOJ, SEC, and other agencies announce DPAs and NPAs in press releases.
  - These releases include a brief recitation of the facts.
  - Although companies do not "admit" these facts, press releases nonetheless can drive media coverage of the agreement, and companies typically are prohibited from making conflicting statements.

Justice Department Announces Deferred Prosecution Agreement With Basler Kantonalbank

Bank Admits to Helping U.S. Taxpayers Conceal Income and Assets from the United States; Agrees to Pay $60.4 Million

Basler Kantonalbank (BKB), a bank headquartered in Basel, Switzerland, entered into a deferred prosecut
(DPA) that was approved today by the U.S. District Court for the Southern District of Florida, announced
Assistant Attorney General Richard E. Zuckerman of the Department of Justice's Tax Division, United Sta
Benjamin G. Greenberg, and Chief Don Fort for Internal Revenue Service-Criminal Investigation. As part
Basler Kantonalbank will pay $60.4 million in total penalties.

LAW360 Tax Authority

a LexisNexis® company

FEDERAL ··· STATE & LOCAL ··· INTERNATIONAL

Swiss Bank Will Fork Over $60.4M To DOJ For Tax Evasion

By **Amy Lee Rosen** · August 28, 2018, 8:00 PM EDT

A Swiss bank is on the hook for more than $60 million to the government after it agreed Tuesday to cooperate fully with the U.S. Department of Justice's investigation into unreported...

Financial Penalties

- Financial penalties generally consist of a combination of the following:

Penalty

- Many federal statutes contain specific fine and forfeiture provisions. For example:
  - Alternative Fines Act allows for a penalty of 2x loss or gain.
  - The Bank Fraud statute provides for fines of up to $1M/violation.
  - The FCPA provides for penalties up to $2M/criminal violation.

Restitution

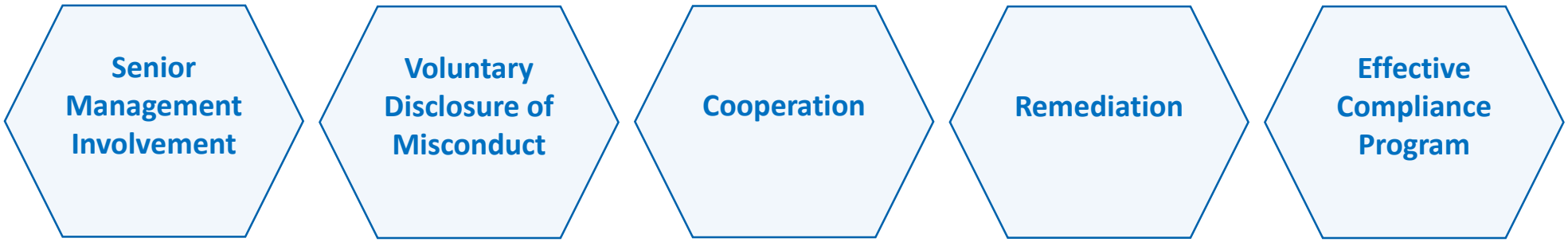
- Restitution is an equitable remedy in criminal actions intended to compensate alleged victims for their loss.

Disgorgement

- Disgorgement is intended to deprive the defendant of its profits or other gain associated with the alleged conduct.

Financial Penalties

- ***Chapter 8 of the U.S. Sentencing Guidelines*** drives DOJ's assessment of the appropriate fine or penalty for organizations.
- Other agencies have similar published policies that guide the determination of penalties.
- ***Calculating penalties is not, however, purely arithmetic***
  - The USSG and other enforcement policies contain reductions and enhancements that affect fine calculations.
  - Enforcers have significant discretion when determining fine amounts. ***Some considerations***:



Complex, Multi-Entity Resolutions

- NPAs and DPAs often form part of complex resolution packages involving multiple entities with varying degrees of culpability/fact pattern involvement.

Parent company entered into a DPA relating to internal controls (but not bribery) violations of the FCPA. **Three subsidiaries pled guilty** to violations of the anti-bribery provisions of the FCPA in connection with the United Nations Oil for Food Program, and to export controls violations under the International Emergency Economic Powers Act and the Trading With the Enemy Act, in connection with the unlicensed export or re-import of U.S.-origin goods into Cuba, Iran, Sudan, and Syria. (2013)

Parent company pled guilty to FCPA books-and-records and internal controls (but not bribery) allegations; **Swiss subsidiary pled guilty** to conspiracy to violate the anti-bribery provisions of the FCPA; and two **U.S.-based subsidiaries entered into DPAs** in which they admitted conspiracy to violate the anti-bribery provisions of the FCPA, in connection with global anti-corruption allegations involving more than $75 million in bribes to secure $4 billion in projects around the world. (2014)

Self-Reporting

- DOJ requires companies entering into NPAs and DPAs to self-report new or continuing violations of law, ***including, in some cases, violations of law unrelated*** to the conduct underpinning the agreement.

NPA (2018)

Office upon request, any document, record, or other tangible evidence relating to matters about which this Office or any designated law enforcement agency inquires of it; (c) bring to this Office's attention all criminal conduct by or criminal investigations of RCS or any of RCS's agents or employees acting within the scope of their employment related to violations of federal laws of the United States, as to which RCS's Board of Directors and/or senior management and/or legal counsel are aware; (f) bring to this Office's attention any administrative or

DPA (2017)

6. In addition to the obligations in Paragraph 5, during the Term, should the Company learn of any evidence or allegation of conduct that may constitute a violation of the FCPA anti-bribery provisions had the conduct occurred within the jurisdiction of the United States or a violation of U.S. federal law, the Company shall promptly report such evidence or allegation to the United States.

Continuing Cooperation

- **Continuing cooperation requirements** typically involve a pledge to cooperate not only with DOJ but also other U.S. agencies, and—at DOJ's request—foreign enforcement and regulatory entities.

UniCredit Bank

NPA (2019)

The Bank shall cooperate fully with the Offices in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and other conduct related to U.S. sanctions violations, subject to applicable law and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the Term has expired. At the request of the Offices, the Bank shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies in any investigation of the Bank, its parent company or its affiliates, or any of its present or former officers, directors, employees, agents, consultants, or any other party, in any and all matters relating to conduct described in this Agreement and the attached Statement of Facts and other conduct related to U.S. sanctions violations during the Term. The Bank agrees that its cooperation shall include, but not be limited to, the following:

- Continuing cooperation generally involves, as required: (1) truthful factual disclosure; (2) witness interviews and sworn testimony; and (3) relevant information relating to the company, its affiliates, and its present or former officers, directors, employees, agents, consultants, and other parties.

Waivers of Rights

- DOJ requires waivers of rights from companies in connection with NPAs and DPAs, including:

Waiver of statutory time limits

- E.g., Credit Suisse, NPA (2018) – *"[T]he Company and CSAG agree that the statute of limitations as to any violation of U.S. federal law that occurs during the Term will be tolled from the date upon which the violation occurs until the earlier of the date upon which the Offices are made aware of the violation or the duration of the Term plus five years, and that this period shall be excluded from any calculation of time for purposes of the application of the statute of limitations."*

Waiver of objection to admissibility in any subsequent criminal proceedings

- E.g., Mobile Telesystems PJSC DPA (2019) – *"[T]he Company stipulates to the admissibility of the attached Statement of Facts in any proceeding by the Fraud Section and the Office, or any other component of the Department of Justice . . . ."*

Waiver of any objection to venue in any subsequent criminal proceeding

- E.g., UniCredit Bank Austria, AG NPA (2019) – *"[T]he Bank . . . Knowing[ly] waiv[es] . . . Any objection with respect to venue in the United States District Court for the District of Columbia."*

Waiver of sixth amendment rights in any subsequent criminal proceeding

- E.g., Standard Chartered Bank DPA (2019) – *"SCB accepts the terms and conditions of this Agreement, including . . . a knowing waiver of its right to a speedy trial pursuant to the Sixth Amendment."*

Breach Determinations

- DOJ typically reserves the exclusive right to determine that breach has occurred, subject to notice and remediation provisions. Alternative arrangements are rare.

any other appropriate venue. Determination of whether the Company has breached the Agreement and whether to pursue prosecution of the Company shall be in the Fraud Section and the Office's sole discretion. Any such prosecution may be premised on information provided by

16. In the event the Fraud Section and the Office determine that the Company has breached this Agreement, the Fraud Section and the Office agree to provide the Company with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty days of receipt of such notice, the Company shall have the opportun

MTS

- In some cases, breach may be viewed broadly to include willful violations of coordinated settlement agreements.

20. SG shall comply with any and all terms of the Related Settlements, including but not limited to implementing all remedial changes to its compliance programs required by the Related Settlements, and shall further comply with any other Consent Order, Cease-and-Desist Order, or equivalent order issued by any of its U.S. Federal or State regulators regarding its sanctions or Bank Secrecy Act/anti-money laundering compliance programs. A failure by SG to comply with the Related Settlements or such orders by its U.S. Federal or State regulators shall not constitute a violation of this Agreement unless the failure to comply was willful and intentional. The determination of whether SG has failed to comply and whether such a violation was willful and intentional, for purposes of this Agreement, shall be within the sole discretion of the Office.

SOCIETE GENERALE

Ongoing Compliance/Remediation Obligations

DOJ Guidance on Corporate Compliance Programs

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Tuesday, April 30, 2019

Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs

- On **April 30, 2019**, DOJ released updated guidance to prosecutors on how to assess corporate compliance programs when conducting an investigation, in making charging decisions, and in negotiating resolutions.
- Criminal Division announced that guidance, "seeks to better harmonize . . . with other [DOJ] guidance" and "provid[e] additional context to the multifactor analysis of a company's compliance program."
- **Focuses on three questions**: (1) Is the corporation's compliance program **well designed**? (2) Is it being applied earnestly and in good faith—i.e., is it being **implemented effectively**? (3) Does the corporation's compliance program **work in practice**?
- **Key Takeaways**:
  - Starting with risk assessment and building on "lessons learned"
  - Importance of compliance personnel
  - Responsibility for third parties
  - Cascading tone from the top

For additional information: https://www.gibsondunn.com/updated-doj-criminal-division-guidance-on-evaluation-of-corporate-compliance-programs/

Ongoing Compliance/Remediation Obligations, cont.

- FCPA NPAs and DPAs always include an attachment setting forth corporate compliance program requirements, which have become minimum requirements for a company's program.
- As other agencies and divisions of DOJ increase focus on corporate compliance programs, expect similarly detailed requirements in other agreements.

Examples*

1. High-level commitment from directors and senior managers
2. Creation of anti-corruption compliance policy
3. Development of compliance policies and procedures designed to reduce the possibility of anti-corruption law and corporate compliance code violations
4. Implementation of system of financial and accounting procedures, and internal controls
5. Development of compliance policies and procedures to be made on periodic risk assessment basis
6. At least annual review and update of anti-corruption compliance policies and procedures
7. Proper oversight by one or more senior corporate executives with adequate independence
8. Periodic training and certification
9. Maintenance of an effective system for providing guidance on relevant policies and procedures
10. Establish and maintain effective system for confidential reporting of violations
11. Establish and maintain effective process for responding to and investigating allegations
12. Implementation of mechanisms to enforce compliance code, policies and procedures
13. Establish appropriate disciplinary measures to address violations of the anti-corruption laws and the company's anti-corruption compliance code, policies, and procedures
14. Develop and implement risk-based due diligence and compliance requirements for third parties and business partners
15. Include standard anti-corruption provisions in third-party agreements
16. Develop and implement policies and procedures related to M&A, including pre-acquisition due diligence
17. Ensure that the company's compliance code, policies and procedures are applied as quickly as practicable to newly acquired businesses
18. Conduct periodic reviews and testing of compliance code, policies and procedures

*Adapted from the 2018 Petrobras DPA with DOJ.

Ongoing Compliance/Remediation Obligations, cont.

- In addition to compliance program upgrades or updates, the occasional NPA or DPA also imposes dramatic corporate governance changes.
- Examples have included:
  - Changes in business practices (e.g., temporary prohibitions against performing certain business activities or working with certain business partners) (e.g., TNT Software LLC NPA 2015).
  - Changes in board composition, including the appointment of new members, the creation of independent member positions, and changes to company management (e.g., Aibel DPA, 2007).
  - The imposition of new board oversight responsibilities, including the creation of compliance committees and direct oversight requirements (e.g., Aibel DPA, 2007).

Corporate compliance programs are sometimes compared to preventative medicine. It's a good analogy. Getting an annual physical doesn't mean you won't get sick. But those screenings – just like a robust compliance program – help to ensure that issues will be detected and addressed at an early stage. . . . ***Companies without adequate compliance programs need to undertake more dramatic efforts to remediate damage and change their culture.***

-- Former Deputy Attorney General, May 21, 2018

Ongoing Compliance/Remediation Obligations, cont.

Other Regulators Have Similar Expectations

- Guidance published by OFAC on May 2, 2019, sets out the agency's views on *the* ***essential components of an effective sanctions compliance program***, including:
  - **Management commitment**
  - **Risk assessment**
  - **Internal controls**
  - **Testing and auditing**
  - **Training**
- Now that OFAC is on record regarding sanctions compliance best practices, companies should treat this new guidance as setting ***baseline expectations*** for sanctions compliance policies and procedures.
- In recent settlements—for example, with Stanley Black & Decker—***OFAC has begun requiring companies to annually certify*** that they have implemented an extensive set of sanctions compliance commitments.
- Whether all of these components are present in a company's compliance program will bear heavily on both the monetary penalty and the compliance commitments imposed by OFAC.

**** Due to webex technical difficulties – the audio was dropped during the discussion on this slide. We apologize for this inconvenience and invite you to please contact the presenters with any questions.***

GIBSON DUNN

Considerations and Ramifications

Extensions

- **Standard Chartered Bank DPA (2012)**: Extended five times between 2014 and 2019, with an additional $1.1 billion in penalties imposed in April 2019; original NPA was set to last for two years

- **Biomet DPA (2012)**: Was set to expire in March 2015, but was extended to 2016 on the basis of new allegations; extension included extension of independent compliance monitor and a new charge

- **MoneyGram International Inc. DPA (2012)**: Extended eight times in the 2017–2018 period; $125 million in additional forfeiture imposed due to alleged breach of agreement

Termination/Revocation

- Revocation or termination of agreements has occurred occasionally.
- DOJ has previously emphasized its willingness to "***tear up a DPA or NPA and file criminal charges, where such action is appropriate and proportional to the breach.***"

  \- Assistant Attorney General, April 14, 2015

  – DOJ has not indicated any sort of retreat from this approach.

  – The Justice Manual continues to list, among the advantages for the government of DPAs and NPAs, "the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement." (JM 9-28.1100)

– Consequences for perceived breach can also include the extension of an agreement plus the imposition of additional penalties, as in the Standard Chartered and MoneyGram cases.

Government Contractor Collateral Consequences

Suspension and Debarment

- ***Suspension and debarment*** (and cross-debarment) from government contracts under U.S., EU, and global development bank rules can represent a corporate death sentence for contractors and pharmaceutical companies with substantial government sales.
  - Under ***EU contracting rules (Directive 2014/24)***, debarment is mandatory for a company convicted of specified criminal economic offenses; eligibility may be restored through proof of "self-cleaning," i.e., rehabilitation.
  - Implemented into UK law by the ***Public Contracts Regulations 2015***. Debarment is discretionary up to three years for a company convicted under Section 7 for its failure to prevent bribery—a strict liability violation. All other violations of the Act trigger mandatory debarment for a maximum of five years.
  - A DPA is not a conviction, and a DPA requires no admission of guilt.
  - The ***U.S. has multiple suspension and debarment provisions***, including under the Federal Acquisition Regulation, the Clean Water or Clean Air Acts, and the Food, Drug, and Cosmetic Act. States and localities also have similar policies.
  - The ***World Bank's "base sanction"*** for misconduct is a three-year debarment with conditional release.
- In the United States, ***the risk of suspension or debarment increases dramatically with conviction***. A declination would be highly unlikely to lead to suspension or debarment. NPAs and DPAs may also help to mitigate risk.

Collateral Litigation

- Because they contain ***factual admissions by companies***—in the form of statements of facts, statements of responsibility, or criminal informations accompanying the agreements—NPAs, DPAs, and even declinations with disgorgement, create risks in follow-on civil litigation.
- NPAs and DPAs continue to include ***non-contradiction clauses*** forbidding companies from making statements (including in litigation) that contradict the facts stated in the agreement.
- **Motion-to-dismiss stage**
  - Courts have taken notice of, and given weight to, factual admissions in a DPA.

Davis v. Beazer Homes, U.S.A., Inc.:* Denying Beazer Homes's motion to dismiss, in part because "Beazer Homes has admitted some level of misconduct relating to 'certain' of its home sales [in its DPA], as least insofar as federal law is concerned. While neither [the DPA nor the Information] speaks to the particulars of Plaintiff's case, or to whether Defendants' conduct is actionable under [North Carolina law], the Court considers this development a significant factor in assessing the 'plausibility' of Plaintiff's . . . claim."

* - 2009 WL 3855935 (M.D.N.C. 2009)

Collateral Litigation (cont'd)

- **Summary judgment stage**
  - NPAs and DPAs have been deployed with mixed results in summary judgment.

***Malone v. Nuber*[1]**

- Defendants moved for summary judgment.
- Plaintiffs argued that a tax-related DPA entered into by a non-party bank (which had been dismissed from the case) provided circumstantial evidence that the defendants had breached the contract at issue in the case.
- The court took judicial notice of the DPA's terms, but held that plaintiffs needed direct evidence to support their claims and granted summary judgment for defendants.

***Rezner v. Bayerische Hypo-Und Vereinsbank AG*[2]**

- District Court had granted summary judgment in favor of plaintiff in RICO case, in part by relying on defendant's prior DPA with the government regarding alleged tax shelter transactions.
- The Ninth Circuit reversed, holding that while the admissions in the DPA established that the bank defrauded the United States, they did not prove that the bank's conduct was the proximate cause of an injury to plaintiff.

***In re General Motors LLC Ignition Switch Litigation*[3]**

- District Court denied in part GM's motion for summary judgment, in light of "admissions contained in [GM's] Deferred Prosecution Agreement," which the court held "provided enough of a basis for [one of the plaintiffs] to pursue a 'half-truth' theory of fraudulent misrepresentation by omission at trial."

1 - 2010 WL 3430418 (W.D. Wash 2010)
2 - 630 F.3d 866 (9th Cir. 2010).
3 - 2016 WL 874778, at *5 (S.D.N.Y. Mar. 3, 2016)

Collateral Litigation (cont'd)

- **Mitigating risk in collateral litigation**
  - When presenting or producing materials, providing witness interview proffers, or otherwise engaging with the Government on the facts, be mindful of the risk of partial waiver and that disclosed information may be discoverable in collateral civil litigation.
  - One advantage of an NPA or DPA is the opportunity to negotiate agreement language, including the wording of factual admissions.
  - At the outset of negotiations over an NPA or DPA, assert to the government that any statements made by the company are being made as part of settlement negotiations protected by Federal Rule of Evidence 410.
  - Seek FOIA confidential treatment for all documents produced in the course of the investigation and resolution negotiations.
  - If a corporate monitor is imposed, seek to include non-waiver provisions in monitorship agreement.

Judicial Engagement with DPAs

- While an NPA usually takes the form of a letter agreement, a DPA is filed in court.
- Most often, judges have approved the DPAs that come before them, and have stayed the cases until the agreements' terms expire while excluding time under the Speedy Trial Act, and then have dismissed the cases after the defendants have fulfilled their obligations under the DPAs.
- However, in the past several years, some judges have scrutinized the terms of the DPAs that have come before them.
  - ***District Courts' efforts to question the substantive terms of DPAs have been overturned by Circuit Courts.***

Judicial Engagement with DPAs (cont'd)

Fokker Services B.V. DPA (2014)

- DPA between DOJ and Fokker Services B.V., a Dutch aerospace services provider, regarding alleged export control violations; company agreed to pay $21 million in forfeiture and civil penalties.
- In 2015, Judge Richard J. Leon (D.D.C.), who had previously expressed reservations about the DPA, refused to approve the settlement.
  - The ruling stated the penalty was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world."
  - Judge Leon justified his ruling on the basis of his inherent powers "to supervise the administration of criminal justice among the parties before the bar."
- In 2016, the D.C. Circuit overruled the District Court, holding that ***the Speedy Trial Act does not confer on judges the power to "second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges."***

Judicial Engagement with DPAs (cont'd)

United States v. HSBC Bank USA, N.A., & HSBC Holdings plc

- **2012:** DPA between DOJ and HSBC Bank USA/HSBC Holdings, imposing a monitorship.
- **2013:** Former Judge John Gleeson (E.D.N.Y.) held that "the inherent supervisory power [of the judiciary] serves to ensure that courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."
  - The opinion also required the submission of progress reports by a monitor to the court.
- **2016:** The monitor filed its first such report under seal, which was challenged by a member of the public; the court held that the report was a "judicial document" and ordered its unsealing in January 2016.
- **2017:** Second Circuit reversed the unsealing order and held that the ***District Court's invocation of its supervisory power "impermissibly encroached on the Executive's constitutional mandate*** to 'take Care that the Laws be faithfully executed.' . . . . In the absence of evidence to the contrary, the ***Department of Justice is entitled to a presumption . . . that it is lawfully discharging its duties.*** . . . A district court's role vis-à-vis a DPA is [generally] limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise."

Judicial Engagement with DPAs (cont'd)

Saena Tech DPA (2014)

- April 2014 DPA between DOJ and Saena Tech over allegations of bribes to a U.S. Army Contracting Officer to obtain subcontracts; company agreed to pay a $500,000 penalty and implement a compliance and ethics program.
  - Under the DPA, the government also promised not to prosecute the company's managing director, whom DOJ did not charge.
- Judge Emmet G. Sullivan (D.D.C.) approved the DPA, determining that he did not have the authority to reject the DPA outright for what he perceived to be a lack of fairness.
- However, Judge Sullivan also expressed the following:
  - The agreement's treatment of Saena Tech's Managing Director showed a lack of commitment by DOJ to the Yates Memorandum.
  - DOJ should consider expanding the use of DPAs to non-corporate parties where the individuals in question seem capable of rehabilitation.

GIBSON DUNN

Navigating Corporate Monitorships

Navigating Corporate Monitorships

What is a Corporate Monitor?

The corporate monitor has been known by many titles…

- Independent Monitor (e.g., Avon Products)
- Compliance Monitor (e.g., Micrus Corporation)
- Compliance Officer (e.g., Fisher Sand & Gravel)
- Independent Examiner (e.g., Bank of New York)

…but the core functions of this role are the same.

- In recent years, agreements have coalesced around the term ***Independent Compliance Monitor.***
- The corporate monitor's role is to oversee the company's compliance with applicable laws and regulations going forward, and to ensure that the company institutes proper policies and procedures to promote compliance.
- Monitors are imposed as part of: DPAs or NPAs, plea agreements, suspension and debarment proceedings, administrative agreements, and other settlements.

Commonly articulated reasons for imposing a corporate monitor in recent years have included:

- Undeveloped or underdeveloped compliance program
- Continuation of alleged misconduct beyond start of investigation

Navigating Corporate Monitorships

What is a Corporate Monitor?

Monitors are imposed in a variety of scenarios. For example . . .

FCPA

Statoil

Anti-Kickback Statute

World Bank

Securities Fraud

Environmental

DOYON DRILLING, INC.

Accounting Fraud

Navigating Corporate Monitorships

When is a Monitor Imposed?

- ***2018 Memorandum by AAG Brian A. Benczkowski ("Benczkowski Memorandum")***
  - Stated purpose to "further refine the factors that go into the determination of whether a monitor is needed, as well as clarify and refine the monitor selection process."
  - Balancing analysis pits ***potential benefits of a monitor for the corporation*** against the ***cost and potential impacts on corporate operations***.

"Benefit" Considerations

- Type of misconduct (inadequate books & records? Exploitation of inadequate controls?);
- Pervasiveness of the misconduct, and whether it was approved or facilitated by senior management;
- Company's investments in, and improvements to, its corporate compliance program and internal control systems; and
- Whether remedial improvements to the compliance program and internal controls have been tested to demonstrate effective deterrence.

Key Considerations

- **Duration**
  - For duration of NPA/DPA vs. shorter
  - Early termination clause
- **Type**
  - Hybrid vs. traditional
- **Scope**
  - Specific laws
  - Geographic scope
- **Disclosure Obligations**
  - Scope of conduct that Monitor must report to government upon discovery
- **Recommendations**
  - Does company see draft recommendations before they are shared with the government
  - Practicability of implementation
- **Reports**
  - Type and timing
  - Scope
  - Drafts shared with the company vs. blind
  - Coordination with other agency resolutions
- **Monitor Qualities**
  - Credentials and reputation
  - Experience in particular area of law
  - Resources and availability
  - Conflicts
- **Monitor Certification at Conclusion of Monitorship – Scope**
  - "reasonably designed"
- **Budget Considerations**
  - Projections

Navigating Corporate Monitorships

Terms

- Both DOJ and the SEC continue to regularly impose monitorships and self-reporting obligations.
- Durations have ranged from one year to five years.
- The terms most commonly imposed fall into three main categories:
  - Traditional corporate monitorships
  - Self-reporting
  - Hybrid (monitorship + self-reporting)

NPAs and DPAs, 2014-Present

Agreements	% global resolutions involving monitors	% global resolutions with self-reporting	% global resolutions with hybrid/ other	% of total with some form of monitoring
231	15%	32%	3%	50%

Navigating Corporate Monitorships

How is a Monitor Selected?

- ***2018 Benczkowski Memorandum***

Company Recommends Three Qualified Candidates to Criminal Division

- "Qualified Candidate" defined by (1) general background, education, experience, and reputation; (2) substantive expertise; (3) ability to be objective and independent; and (4) access to adequate resources.
- Company certifies no conflicts and non-affiliation with monitor candidate for two years following monitorship.

Criminal Division Makes Recommendation(s) to Standing Committee

- Standing Committee = (1) DAAG with supervisory authority for Fraud Section; (2) Chief of Fraud Section or relevant section; and (3) Deputy Designated Agency Ethics Official for Criminal Division.

Standing Committee Votes on Recommendation

- Following vote, DAAG reviews recommendation and determines whether to grant final approval.

- Certain U.S. Attorney Offices, like S.D.N.Y. and E.D.N.Y., have separate procedures.

Navigating Corporate Monitorships

What Does a Monitor Do?

- Reviews the ethics and compliance program
- Conducts analyses, studies, and testing
- Reviews documents and policies
- Interviews employees
- Assesses ethical culture
- Makes on-site inspections and observations
- Makes recommendations for improvement
- Issues reports to enforcement authorities

Navigating Corporate Monitorships

Corporate Monitors: Potential Pitfalls of the Corporate Monitor Relationship and How to Avoid Them

Potential challenges in the company-monitor relationship include:

- ***Adversarial vs. Cooperative Relationship***
  - In recent years, concerns regarding contentious company-monitor relationships have increased; to avoid intervention by enforcement authorities, both parties should work toward respectful cooperation; feasible recommendations calibrated to the nature (size, geographic location, corporate culture, etc.) of the monitored entity; constant feedback and communication; and transparency.
- ***Indirect Costs***
  - A positive working relationship seeks to minimize costly disruption of business; ancillary follow-up work; and unnecessary drains on corporate resources.
- ***Direct Costs***
  - Monitorship fees can exceed tens of millions of dollars. The monitored company can minimize this by dedicating liaison resources; meeting requests quickly and providing feedback on work plans; thinking creatively to leverage internal resources where possible; and requesting detailed budgets and invoices.

Navigating Corporate Monitorships

Corporate Monitors: Potential Pitfalls of the Corporate Monitor Relationship and How to Avoid Them

- ***Unnecessary Re-Investigation of Pre-Resolution Misconduct***
  - Unless expressly mandated by the organizing agreement, the monitor should endeavor not to re-investigate past conduct, instead relying on pre-settlement factual findings and adopting a forward-looking view of compliance.

The Monitor's Report(s): Ultimately, the monitor's report(s) should provide visibility into the company's compliance program, including:

- a record of the work performed by the monitor and methodologies used
- specific conclusions and recommendations
- evidence supporting those conclusions and recommendations
- the company's acknowledgement of the issues identified in the report
- a timeline for implementing proposed recommendations identified in the report

- For additional information *see* F. Joseph Warin, Michael Diamant & Veronica Root, "Somebody's Watching Me: FCPA Monitorships and How They Can Work Better," *University of Pennsylvania Journal of Business Law* (2011)

GIBSON DUNN

Resolution Structures Abroad

Brazil

Leniency Agreements

- Brazil's Comptroller General of the Union ("CGU") and Brazil's Federal Attorney General's Office ("AGU") may enter into **leniency agreements.**
- Leniency agreements are available to **corporate entities** to resolve **civil liability** under the **Clean Companies Act**.
- **Resolution No. 07/2017** sets forth binding guidelines for the Federal Prosecutors' Office for the negotiation and execution of the agreements.
- Parties to leniency agreements must:
  - Admit liability and cease illicit conduct
  - Implement a compliance program and submit to an external audit
  - Cooperate fully with investigations during the life of the agreement
  - Pay applicable fines and damages
  - Declare that all information supplied is correct and accurate
- Leniency agreements (for corporations only) generally are negotiated subsequent to criminal plea agreements (for individuals).
- Agreements are sent to the **5th Chamber of Prosecutors** for ratification.

Brazil

Recent Agreements

In July 2018, Odebrecht S.A. signed a leniency agreement with the CGU and AGU in the amount of 2.7 billion reais (approx. $715.84 million USD). The amount is to be taken from the $2.39 billion fine Odebrecht agreed to pay as part of a global settlement with authorities in the U.S., Brazil, and Switzerland.

In July 2017, UTC Engenharia signed a leniency agreement for fraud related to 29 contracts with state-owned companies. UTC agreed to pay 574 million reais (approx. $175 million USD), including a fine, damages, and unjust enrichment. The agreement required UTC to adopt an integrity program monitored by the CGU and to pay its fine within 22 years.

In May 2017, J&F Investimentos agreed to pay a record 10.3 billion reais (approx. $3.21 billion USD) fine for over 25 years of corrupt acts committed by companies controlled by J&F. However, the agreement was suspended and subject to renegotiation after the company's former owners, Joesley and Wesley Batista, were charged with insider trading and manipulation of financial markets.

United Kingdom

Resolution Structure

- ***DPAs*** are available to the Crown Prosecutorial Service (CPS) and the Serious Fraud Office (SFO) under ***Schedule 17 of the Crime and Courts Act 2013.***
  - Governed by the **DPA Code of Practice** published by the Director of Public Prosecutions and the Director of the SFO.
- The UK regime is similar to that in the United States, but there are important differences.
  - UK DPAs **apply only to organizations**.
  - UK DPAs are **available only for certain offenses**, which are primarily economic in nature, including bribery, money laundering, various types of fraud, and certain financial sector crimes.
  - Require judicial approval of the final agreement and to modify the terms of the DPA. In the U.S., by contrast, judicial approval is only of waiver of the Speedy Trial Act.
  - The judiciary also is responsible for determining whether the agreement has been breached, whereas regulators in the United States typically reserve such judgment for themselves.

United Kingdom

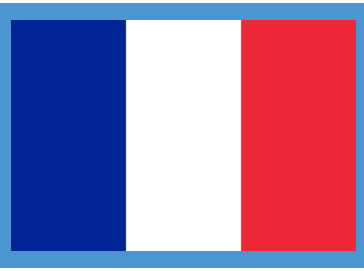
Recent Agreements

In January 2017, Rolls Royce agreed to the largest penalty ever levied by the SFO in a bribery matter as part of a DPA to settle charges of conspiracy to corrupt, false accounting, and failure to prevent bribery. In addition to a £239,082,645 penalty, the DPA required Rolls-Royce to disgorge all alleged profits (£258,170,000), reimburse the SFO's costs for the investigation (£12,960,754), and implement an anti-bribery and compliance program at its own expense. Even though Rolls Royce did not self-report the violations, the court recognized that the company later reported conduct more extensive than the SFO might otherwise have identified.

In April 2017, Tesco agreed to a DPA to resolve allegations that it overstated its profits in 2013 and 2014. The agreement marked the first UK DPA to be entered into for offenses other than bribery and corruption. The full statement of facts and the Crown Court's fairness determination remained confidential until the conclusion of the trials against three former Tesco Ltd. employees in connection with the same underlying set of facts. Earlier this year, the SFO's case against two of the individuals was dismissed. The SFO subsequently offered no evidence against a third individual.

France

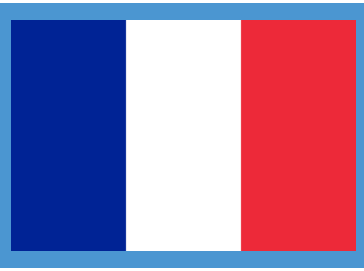
Resolution Structure



- ***Convention judiciaire d'intérêt public ("CJIP")*** (the French equivalent of a DPA) is available to the French Public Prosecutor under *Loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique ("**Sapin II**").*
- The French regime is similar to that in the UK
  - CJIPs apply only to **legal entities**.
  - CJIPs are **available only for certain offenses**, specifically corruption, trading in influence, or laundering tax proceeds.
- CJIPs must be submitted for judicial approval.
- Companies have the option to withdraw from a CJIP within ten days after judicial approval.
- CJIPs may require that subjects pay fines up to 30% of annual turnover over the past three years and to pay additional damages to victims.
- Monitors appointed to supervise remedial measures must report to the French anti-corruption authority (***Agence française anticorruption***).
- If the terms of a CJIP are complied with for three years, a definitive order is entered precluding further prosecution under the same facts.

France

Recent Agreements



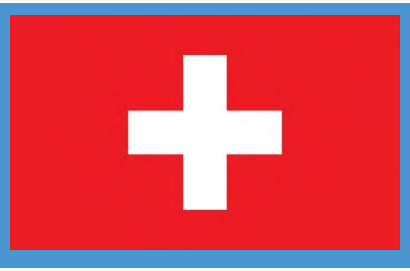
HSBC: *PBRS, the Swiss subsidiary of HSBC, agreed to pay €300 million to settle tax evasion and money laundering charges arising from its alleged failure to prevent clients from using PBRS services for improper purposes. The CJIP did not require any ongoing compliance measures.*

Kaefer Wanner, SET, SAS POUJAUD: *Three French companies entered agreements stemming from allegations that they agreed to pay bribes to an employee of Electricité de France, a French public utility company, in exchange for new or renewed government contracts. The companies admitted responsibility for the underlying activities and were fined up to the amount of the benefits that resulted from the alleged bribes, within a cap of 30% of their average revenue calculated over the previous three years. Two companies agreed to monitoring by the AFA.*

Societe Generale: *French Bank Societe Generale ("SocGen") agreed to pay a penalty, implement a compliance program, and cooperate with a two-year compliance monitorship to settle claims that it paid bribes to obtain investments from Libyan state-owned financial institutions. The agreement was announced in conjunction with a settlement reached between SocGen, DOJ, and the CFTC.*

Switzerland

Pending Resolution Structure



- In March 2018, the Swiss Office of the Attorney General proposed a DPA scheme similar to the U.S. model. The proposal is pending review by the Swiss parliament.
- Under the proposed regime, agreements would include:
  - a **statement of the underlying facts** acknowledged by the company
  - the **amount of the fine(s)** to be paid or assets to be released or confiscated
  - a **summary of the company's efforts and internal controls** to prevent future offenses
  - the appointment of an **independent auditor** at the company's expense to monitor implementation of internal control measures
  - a provision for **periodic reports** by the independent auditor to the prosecutor
  - a **"probation period"** of two to five years
  - specified consequences for violation of terms of the agreement

Germany

Settlement Agreements

- Under current German law, there is no corporate criminal liability.
- However, companies may be subject to ***administrative sanctions*** if directors or officers commit a criminal or regulatory offense or fail to take required supervisory measures.
- ***Administrative fines*** typically are imposed by way of a ***sanctioning order***; in cases of a negotiated settlement of the underlying charges, the sanctioned party will not contest such order or waive its right to appeal.
- Companies can be ***fined up to €10 million*** for intentional criminal offenses and up to €5 million for negligent criminal offenses.
  - If the economic advantage gained exceeds €10 million, the fine limit may be exceeded.
- Prosecutors have discretion to initiate investigations and determine settlement amounts within the fine limits.
- In March 2018, the major German political parties announced a ***coalition agreement***, which proposed new laws on corporate sanctions including:
  - The elimination of prosecutorial discretion to initiate investigations
  - The adoption of clear procedural rules
  - A fine limit of 10% of revenue for companies with more than €100 million in revenue;
  - The public announcement of sanctions.

Germany

Recent Agreements

SIEMENS

In 2008, Siemens agreed to pay a fine of €395 million (about $569 million) to settle legal proceedings in Germany related to bribery allegations. The fine was levied on top of a €201 million fine Siemens paid in October 2007 to settle a related action brought by the Munich Public Prosecutor. German prosecutors began investigating Siemens in 2005, and in 2006, U.S. authorities became involved because the company's shares are listed on the NYSE. In 2008, Siemens plead guilty to FCPA violations in the U.S. and agreed to pay $450 million in criminal fines.

In June 2018, German prosecutors fined Volkswagen €1 billion ($1.18 billion) to resolve regulatory offense proceedings against Volkswagen for diesel emissions cheating. The fine was based in part on Volkswagen's estimated savings from the cheating scheme. Volkswagen accepted the fine and admitted responsibility for the misconduct. The previous year, Volkswagen agreed to pay $4.3 billion as part of a U.S. plea agreement to resolve criminal and civil penalties related to the scheme.

Jurisdictions Considering or Implementing DPAs

Australia

- The **Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017** pending before Parliament would allow the Commonwealth Director of Public Prosecutions to invite **a corporation** that is alleged to have engaged in serious corporate crime to enter into a DPA.
- The Attorney-General's Department has developed a draft code of practice in consultation with key government agencies.

Canada

- On September 18, 2018, Canada's version of a DPA Program, the **Remediation Agreement Regime**, became effective.
- The regime **applies only to organizations** and **certain criminal offenses.**
- Agreements are subject to **judicial approval**.
- At the end of the DPA, the prosecutor applies to the judge for an order of successful completion.
- The court has discretion to determine whether to publish the agreement and subsequent order.

Jurisdictions Considering or Implementing DPAs

Poland

- Poland is considering legislation that would make it easier for prosecutors to charge corporations with criminal violations, but allow corporate defendants to resolve such charges through U.S.-style DPAs.
- Under the proposed regime, if a corporation **self-disclosed** misconduct, **provided authorities with evidence related to specific individuals** implicated in that misconduct, **agreed to compensate any victims** of wrongdoing, and **pay a penalty** of up to zł3 million (approximately $801,258), authorities would have the discretion to suspend the prosecution.

Ireland

- At the recommendation of Ireland's Law Reform Commission, Ireland is considering introducing a DPA regime which would allow **legal entities** to enter DPA with the **Director of Public Prosecutions**.
- DPAs would be available only for serious economic crimes.
- DPAs would be **overseen by the High Court** and the admission of wrongdoing would be published.

Jurisdictions Considering or Implementing DPAs

Singapore

- Singapore adopted a DPA regime on March 19, 2018 as part of its **Criminal Justice Reform Act**.
- DPAs are only available for specific offenses, including **corruption, money laundering, and receipt of stolen property offenses**, but not the primary fraud offense of "cheating" (similar to common law fraud).
- DPAs only apply to **corporate bodies** and the terms of the DPA must be **approved by the Singaporean High Court**. The court's approval of a DPA, the terms of the agreement, and the underlying facts are a matter of public record.

Scotland

- Currently, Scotland has a **non-statutory, civil settlement regime** which operates **at the discretion of the Crown Office and Procurator Fiscal Service** (COPFS). For a company to be considered for a civil settlement it must submit a detailed self-report. Under the current regime, there is no financial penalty beyond the disgorgement of profits and there is no judicial supervision of the process.
- Scotland is considering codifying an English-style DPA regime that would **require judicial approval** of the agreement and allow **financial penalties**.

F. Joseph Warin

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.887.3609
FWarin@gibsondunn.com

F. Joseph Warin is chair of the nearly 200-person Litigation Department of Gibson Dunn's Washington, D.C. office, and he is co-chair of the firm's global White Collar Defense and Investigations Practice Group. Mr. Warin's practice includes representation of corporations in complex civil litigation, white collar crime, and regulatory and securities enforcement – including Foreign Corrupt Practices Act investigations, False Claims Act cases, special committee representations, compliance counseling and class action civil litigation.

Mr. Warin is continually recognized annually in the top-tier by *Chambers USA*, *Chambers Global*, and *Chambers Latin America* for his FCPA, fraud and corporate investigations expertise. *Who's Who Legal* named Mr. Warin to their 2019 "Thought Leaders: Global Elite" list for Business Crime Defense – Corporate and Investigations. In 2019, Mr. Warin was selected by *Chambers USA* as a "Star" in FCPA and White Collar Crime and Government Investigations, a "Leading Lawyer" in the nation in Securities Regulation: Enforcement, and a "Leading Lawyer" in the District of Columbia in Securities Litigation. In 2017, *Chambers USA* honored Mr. Warin with the Outstanding Contribution to the Legal Profession Award, calling him a "true titan of the FCPA and securities enforcement arenas." He has been listed in *The Best Lawyers in America*® every year from 2006 – 2018 for White Collar Criminal Defense. *U.S. Legal 500* has repeatedly named him as a "Leading Lawyer" for Corporate Investigations and White Collar Criminal Defense Litigation. He has been recognized by *Benchmark Litigation* as a U.S. White Collar Crime Litigator "Star" for nine consecutive years (2011-2019), and was named to *Securities Docket's* "Enforcement 40" for 2017. In 2019, *Latinvex* named Mr. Warin one of Latin America's Top 100 Lawyers in the category of FCPA & Fraud. In 2018, *Washingtonian Magazine* named Mr. Warin as one of Washington's "Top Lawyers" in White Collar Criminal Defense. BTI *Consulting* named Mr. Warin to its 2017 "BTI Client Service All-Stars" List.

Mr. Warin's group was recognized by *Global Investigations Review* in 2018 as the leading global investigations law firm in the world. This is the third time in four years to be so named. *Global Investigations Review* reported that Mr. Warin has now advised on more FCPA resolutions than any other lawyer since 2008. In 2016 *Who's Who Legal* and *Global Investigations Review* named Mr. Warin to their list of World's Ten-Most Highly Regarded Investigations Lawyers based on a survey of clients and peers, noting that he was one of the "most highly nominated practitioners," and a "'favourite' of audit and special committees of public companies." *Best Lawyers®* named Mr. Warin 2016 Lawyer of the Year for White Collar Criminal Defense in the District of Columbia, and he was named among the *Lawdragon* 500 Leading Lawyers in America in 2016.

Mr. Warin has handled cases and investigations in more than 40 states and dozens of countries. His clients include corporations, officers, directors and professionals in regulatory, investigative and trials involving federal regulatory inquiries, criminal investigations and cross-border inquiries by dozens of international enforcers, including UK's SFO and FCA, and government regulators in Germany, Switzerland, Hong Kong, and the Middle East. His credibility at DOJ and the SEC is unsurpassed among private practitioners – a reputation based in large part on his experience as the only person ever to serve as a compliance monitor or counsel to the compliance monitor in three separate FCPA monitorships, pursuant to settlements with the SEC and DOJ: Statoil ASA (2007-2009); Siemens AG (2009-2012); and Alliance One International (2011-2013). He has been hired by audit committees or special committees of public companies to conduct investigations into allegations of wrongdoing in a wide variety of industries including energy, oil services, financial services, healthcare and telecommunications.

Mr. Warin's civil practice includes representation of clients in complex litigation in federal courts and international arbitrations. He has tried 10b-5 securities and RICO claim lawsuits, hostile takeovers and commercial disputes. He has handled more than 40 class action cases across the United States for investment banking firms, global corporations, Big 4 accounting firms, broker-dealers and hedge funds.

Early in his career, Mr. Warin served as Assistant United States Attorney in Washington, D.C. As a prosecutor, he tried more than 50 jury trials and was awarded a Special Achievement award by the Attorney General. Mr. Warin was awarded the Best FCPA Client Service Award by Main Justice in 2013 and he joined the publication's FCPA Masters list. He was named a Special Prosecutor by the District of Columbia Superior Court in 1988.

Mr. Warin graduated from the Georgetown University Law Center, where he was Editor of *Law and Policy in International Business*. He received his Bachelor of Arts degree *cum laude* from Creighton University, where he was student body president. He served as a law clerk for United States District Court Judge J. Calvitt Clarke, in the Eastern District of Virginia. He has been a member of the American Bar Association's White Collar Criminal Law Committee since 1988 and served as president of the Assistant United States Attorneys Association. Mr. Warin has been selected to serve on insurance company panels for securities class actions. He is currently a member of the Board of the International Association of Independent Corporate Monitors.

Stephanie L. Brooker

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.887.3502
SBrooker@gibsondunn.com

Stephanie L. Brooker, former Director of the Enforcement Division at the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) and a former federal prosecutor, is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. She is Co-Chair of the Financial Institutions Practice Group and a member of White Collar Defense and Investigations Practice Group. As a prosecutor, Ms. Brooker tried 32 criminal trials, investigated a broad range of white collar and other federal criminal matters, briefed and argued criminal appeals, and served as the Chief of the Asset Forfeiture and Money Laundering Section in the U.S. Attorney's Office for the District of Columbia.

Ms. Brooker's practice focuses on internal investigations, regulatory enforcement defense, white-collar criminal defense, and compliance counseling. She handles a wide range of white collar matters, including representing financial institutions, multi-national companies, and individuals in connection with criminal, regulatory, and civil enforcement actions involving sanctions, anti-corruption, anti-money laundering (AML)/Bank Secrecy Act (BSA), securities, tax, wire fraud, and "me-too" matters. Ms. Brooker's practice also includes BSA/AML compliance counseling and due diligence and significant criminal and civil asset forfeiture matters. Ms. Brooker was named a *National Law Journal "*White Collar Trailblazer" and a *Global Investigations Review* "Top 100 Women in Investigations".

Before joining Gibson Dunn in April 2016, Ms. Brooker served as the first Director of FinCEN's Enforcement Division, which is the lead federal regulator with responsibility for enforcing the U.S. AML laws and regulations. In this role, she oversaw all of FinCEN's domestic and foreign enforcement and compliance under the BSA, such as civil money penalty actions and injunctions against a wide range of financial institutions, including banks, credit unions, money services businesses, cryptocurrency entities, casinos, broker-dealers, futures, insurance, and dealers in precious metals, stones and jewels. She also oversaw rulemaking actions under Section 311 of the PATRIOT Act against foreign institutions and jurisdictions, Geographic Targeting Orders, and examination and enforcement actions against cryptocurrency companies following FinCEN's 2013 cryptocurrency guidance.

As Enforcement Director, Ms. Brooker also oversaw for the agency litigation of contested enforcement actions, including several cases of first impression in federal court handled by the Department of Justice (DOJ) on behalf of the agency. She also oversaw examinations of regulated financial institutions and development of compliance strategies. Ms. Brooker worked closely with a wide range of state and federal partners, including DOJ/Asset Forfeiture and Money Laundering Section, U.S. Attorneys' offices, State Department, Securities and Exchange Commission, Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Consumer Financial Protection Bureau, Financial Industry Regulatory Authority, and the Conference of State Bank Supervisors. Prior to serving as Enforcement Director, Ms. Brooker served as Chief of Staff and Senior Advisor to the Director of FinCEN.

Ms. Brooker served from 2005 to 2012 as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia, where she served for many years as a trial attorney and then as the first Chief of the new Asset Forfeiture and Money Laundering Section from 2010 to 2012. This Section was responsible for all asset forfeiture and money laundering issues in Criminal Division cases and for litigation of civil forfeiture cases. In this role, she investigated and prosecuted complex civil and criminal forfeiture cases involving high-priority enforcement areas, such as national security, sanctions violations, and major financial fraud. She established the USAO's first DC Financial Crimes Task Force and supervised the investigation and prosecution of BSA and money laundering cases. In 2012, she received the U.S. Attorney's Award for Creativity and Innovation in Management. She was awarded three Special Achievement Awards for Superior Performance and the Office's Criminal Division Award.

Ms. Brooker serves as Treasurer of the Board of Directors of the Robert A. Shuker Scholarship Fund. Ms. Brooker is admitted to practice in the District of Columbia.

Richard W. Grime

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.955.8219
RGrime@gibsondunn.com

Richard W. Grime is a litigation partner in Gibson, Dunn & Crutcher's Washington, D.C. office and a member of the White Collar Defense and Investigations Practice Group. He is also co-chair of the Securities Enforcement Practice Group.

Mr. Grime's practice focuses on representing companies and individuals in a full range of corruption, accounting fraud, and securities enforcement matters before the Securities and Exchange Commission and the Department of Justice. Mr. Grime also conducts internal investigations and counsels clients on compliance and corporate governance matters.

Mr. Grime is ranked nationally *by Chambers USA* as a leading attorney in FCPA and Securities Regulation: Enforcement. He is described as "top notch – smart, practical and a very good lawyer" with "great insight into regulators' views." He is also ranked *by Chambers Global* as a leading attorney in FCPA and was recently selected by his peers for inclusion in *The Best Lawyers in America©* 2018 in the field of Criminal Defense: White Collar. Mr. Grime was recognized in *Who's Who Legal*: *Investigations 2018* and *2016* and was noted as "brilliant" for internal investigations, compliance and corporate governance work. Mr. Grime was recognized as one of the 3000 "Leading Lawyers in America" in *Lawdragon Magazine* 2011. He is also a longstanding and frequent speaker to legal and industry practitioners particularly on anti-corruption and securities enforcement topics.

Prior to joining Gibson Dunn, Mr. Grime spent over nine years in the Division of Enforcement at the Securities and Exchange Commission in Washington, DC. In his last four years at the Commission he was an Assistant Director. While at the SEC, Mr. Grime supervised the filing of over 70 enforcement actions covering a wide range of the Commission's activities. These included a series of FCPA cases, numerous accounting fraud cases involving retail, technology and financial services companies, regulated entity cases involving broker-dealers, transfer agents and investment advisers, along with multiple insider trading and Ponzi-scheme enforcement actions.

Mr. Grime received his law degree with First Class Honors from Oxford University in 1986 and qualified as a solicitor in London. After practicing in London, and before joining the SEC, Mr. Grime was a litigator for 10 years in Los Angeles and Washington DC.

Patrick F. Stokes

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306, USA
Tel: +1 202.955.8504
PStokes@gibsondunn.com

Patrick Stokes is a litigation partner in Gibson, Dunn & Crutcher's Washington, D.C. office. He is a member of the firm's White Collar Defense and Investigations, Securities Enforcement, and Litigation Practice Groups.

Mr. Stokes' practice focuses on internal corporate investigations, compliance reviews, government investigations, and enforcement actions regarding corruption, securities fraud, and financial institutions fraud. He has tried more than 30 federal jury trials as first chair, including high-profile white-collar cases, and handled 16 appeals before the U.S. Court of Appeals for the Fourth Circuit. Mr. Stokes is equally comfortable leading confidential internal investigations, negotiating with government enforcement authorities, or advocating in court proceedings. In 2019, Mr. Stokes was ranked nationally by *Chambers USA* as a leading attorney in FCPA.

Prior to joining Gibson Dunn, Mr. Stokes spent nearly 18 years with the U.S. Department of Justice (DOJ). From 2014 to 2016 he headed the FCPA Unit, managing the DOJ's FCPA enforcement program and all criminal FCPA matters throughout the United States, covering every significant business sector, and including investigations, trials, and the assessment of corporate anti-corruption compliance programs and monitorships. Mr. Stokes also served as the DOJ's principal representative at the OECD Working Group on Bribery working with law enforcement and policy setters from 41 signatory countries on anti-corruption enforcement policy issues.

From 2010 to 2014, he served as Co-Chief of the DOJ's Securities and Financial Fraud Unit. In this role, he oversaw investigations and prosecutions of financial fraud schemes involving accounting fraud, benchmark interest rate manipulations, insider trading, market manipulation, Troubled Asset Relief Program (TARP) fraud, government procurement fraud, and large-scale mortgage fraud, among others.

From 2002 to 2008, Mr. Stokes served as an Assistant United States Attorney in the Eastern District of Virginia, where he prosecuted a wide variety of financial fraud, immigration, and violent crime cases. From 1998 to 2002, he served in the DOJ's Tax Division as a trial attorney in the Western Criminal Enforcement Section.

Mr. Stokes received various awards while at the DOJ, including the Attorney General's Distinguished Service Award in 2013 and 2014 and the Assistant Attorney General's Exceptional Service Award (Criminal Division) in 2011 and 2014.

Mr. Stokes received his bachelor's degree and Juris Doctor from the University of Virginia, where he was an editorial board member of the Virginia Journal of Social Policy and the Law.

Mr. Stokes is a member of the Maryland State Bar and the District of Columbia Bar.

Our Offices

Beijing
Unit 1301, Tower 1
China Central Place
No. 81 Jianguo Road
Chaoyang District
Beijing 100025, P.R.C.
+86 10 6502 8500

Brussels
Avenue Louise 480
1050 Brussels
Belgium
+32 (0)2 554 70 00

Century City
2029 Century Park East
Los Angeles, CA 90067-3026
+1 310.552.8500

Dallas
2100 McKinney Avenue
Dallas, TX 75201-6912
+1 214.698.3100

Denver
1801 California Street
Denver, CO 80202-2642
+1 303.298.5700

Dubai
Building 5, Level 4
Dubai International Finance Centre
P.O. Box 506654
Dubai, United Arab Emirates
+971 (0)4 318 4600

Frankfurt
TaunusTurm
Taunustor 1
60310 Frankfurt
Germany
+49 69 247 411 500

Hong Kong
32/F Gloucester Tower, The Landmark
15 Queen's Road Central
Hong Kong
+852 2214 3700

Houston
811 Main Street
Suite 3000
Houston, TX 77002
+1 346.718.6600

London
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
England
+44 (0) 20 7071 4000

Los Angeles
333 South Grand Avenue
Los Angeles, CA 90071-3197
+1 213.229.7000

Munich
Hofgarten Palais
Marstallstrasse 11
80539 Munich
Germany
+49 89 189 33-0

New York
200 Park Avenue
New York, NY 10166-0193
+1 212.351.4000

Orange County
3161 Michelson Drive
Irvine, CA 92612-4412
+1 949.451.3800

Palo Alto
1881 Page Mill Road
Palo Alto, CA 94304-1125
+1 650.849.5300

Paris
166, rue du faubourg Saint Honoré
75008 Paris
France
+33 (0)1 56 43 13 00

San Francisco
555 Mission Street
San Francisco, CA 94105-0921
+1 415.393.8200

São Paulo
Rua Funchal, 418, 35°andar
Sao Paulo 04551-060
Brazil
+55 (11)3521.7160

Singapore
One Raffles Quay
Level #37-01, North Tower
Singapore 048583
+65.6507.3600

Washington, D.C.
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
+1 202.955.8500