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NEGOTIATING CLOSURE OF GOVERNMENT INVESTIGATIONS: NPAS, DPAS, AND BEYOND

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MCLE Certificate Information

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- Most participants should anticipate receiving their certificate of attendance via email approximately eight weeks following the webcast.
- Please direct all questions regarding MCLE to CLE@gibsondunn.com.

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1. Resolution Vehicle Overview
2. Agreement Statistics
3. What Drives Outcomes Among NPAs, DPAs, and Declinations?
4. Developments to Watch in the Upcoming Year
5. Cross-Border Considerations
6. Post-Resolution Pitfalls

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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

Other Agency Resolutions

Enforcement Responsibilities



FinCEN (Civil)



CFTC (Civil)

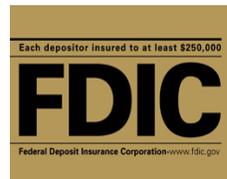


OFAC (Civil)



FINRA (SRO)

Banking Regulators



Overseas Regulators



SFO

serious
fraud
office



Liberté • Égalité • Fraternité

RÉPUBLIQUE FRANÇAISE

PARQUET NATIONAL FINANCIER

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

Overseas Regulators

- UK Serious Fraud Office
- France Parquet National Financier
- Others (Brazil, Canada)

NPAs, DPAs, and Declinations

An Introduction



NPAs and DPAs are important alternatives to indictment/guilty plea/trial.

- DOJ agrees to forgo prosecution, typically in exchange for monetary penalties, admission of responsibility, agreement not to commit further violations of law and to disclose any such violations, remediation, and cooperation—both past and future.
- Typically the agreements are for a 3-year term. NPAs and DPAs typically are publicly available.
- DOJ’s Principal Associate Deputy Attorney General emphasized recently that NPAs and DPAs are “not the end of an obligation for a company, and to the contrary [are] just [the] start.”
- The same official stated: “[I]f you violate the terms of an NPA or DPA . . . , we are going to enforce. . . . [V]iolating NPAs and DPAs may be worse than the original punishment.”

“In certain instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”

- JM 9-28.200.B

NPAs, DPAs, and Declinations

An Introduction

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DPA

- Voluntary pre-indictment alternative in which DOJ agrees to suspend prosecution for a period of years.
- Defendant pays a fine, agrees to a statement of facts, and commits to abide by certain requirements and undertakings.
- Filed in federal court along with a charging document (e.g., a criminal information) and waiver of the Speedy Trial Act, if necessary.
- Court does not approve the resolution.
- Fulfilling a DPA's requirements results in a dismissal of the charges after the term ends.

NPA

- Lesser form of resolution than a DPA, though they contain many of the same core provisions.
- Voluntary, out-of-court agreements between a corporation and DOJ/SEC.
- No indictment, no plea, and charges are not filed with a court.
- NPAs increasingly require voluntary disclosure of new conduct.
- Monitorships are less likely with an NPA than a DPA.

NPAs, DPAs, and Declinations

An Introduction

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- **Declinations with Disgorgement** arose from DOJ's FCPA Pilot Program, which was formalized as the FCPA Corporate Enforcement Policy in November 2017 (Justice Manual 9-47.120), but are no longer limited to FCPA matters.
- These resolutions are public and blur the line between traditional declinations and NPAs. Like NPAs, they:
 - are letter agreements between the company and DOJ;
 - require disgorgement;
 - may require admissions;
 - may impose continuing cooperation and compliance requirements; and
 - reserve DOJ's right to reopen investigations if the company fails to comply with the declination terms.
- Nonpublic declinations remain an option but are typically reserved for matters where there is no legal case to be made or DOJ believes another agency can adequately and fully resolve the allegations.

“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**

NPAs, DPAs, and Declinations

Used by DOJ and (rarely) by the SEC



Agency	DPA	NPA	Declination + Disgorgement
	<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • Not filed with court, but typically 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 • Less likely to include a monitorship than a DPA 	<ul style="list-style-type: none"> • Not filed with court • Public by design • No charging documents • Includes light factual statements • Disgorgement typical • Voluntary disclosure a prerequisite • Leaves door open to future charges
	<ul style="list-style-type: none"> • Not filed with court; typically public • No complaint • Includes statement of facts • Term-limited • Tolls SOLs • Financial penalties 	<ul style="list-style-type: none"> • Not filed with court; typically public • No complaint • May include statement of facts • Agreement to enter future tolling agreement • May include financial penalties 	<ul style="list-style-type: none"> • N/A

Careful Analysis Required Before Entering DPA, NPA, or Negotiated Declination

- ❑ 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 in agreements.
- ❑ 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, typical three-year compliance, disclosure, and remediation obligations associated with NPAs and DPAs (including possible corporate monitors), and material risks in event of a breach require counseled analysis before entering into a corporate resolution.

Key Considerations in Negotiating an NPA or DPA

Entity

- Parent vs. subsidiary
- Domestic vs. foreign entity

Duration

- Increasingly uniform at 3 years
- Extension and sunset provisions
- Cooperation against individuals may last until the end of individual action

Mandatory Disclosure of Other Conduct – Scope

- Conduct related to specific statutes vs. all potential criminal conduct
- Actual criminal conduct vs. “evidence” or “allegations” of potential violations

Statement of Facts – Scope

- Degree of detail and level of management involvement
- Vicarious liability considerations
- Impact of statement on parallel civil litigation

Reporting Requirements

- Corporate monitor vs. self-reporting vs. hybrid arrangement

Key Considerations in Negotiating an NPA or DPA

Penalty

- Reduction considerations, including acknowledgement of parallel resolutions

Scope of Agreement Not to Prosecute

- Narrower 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

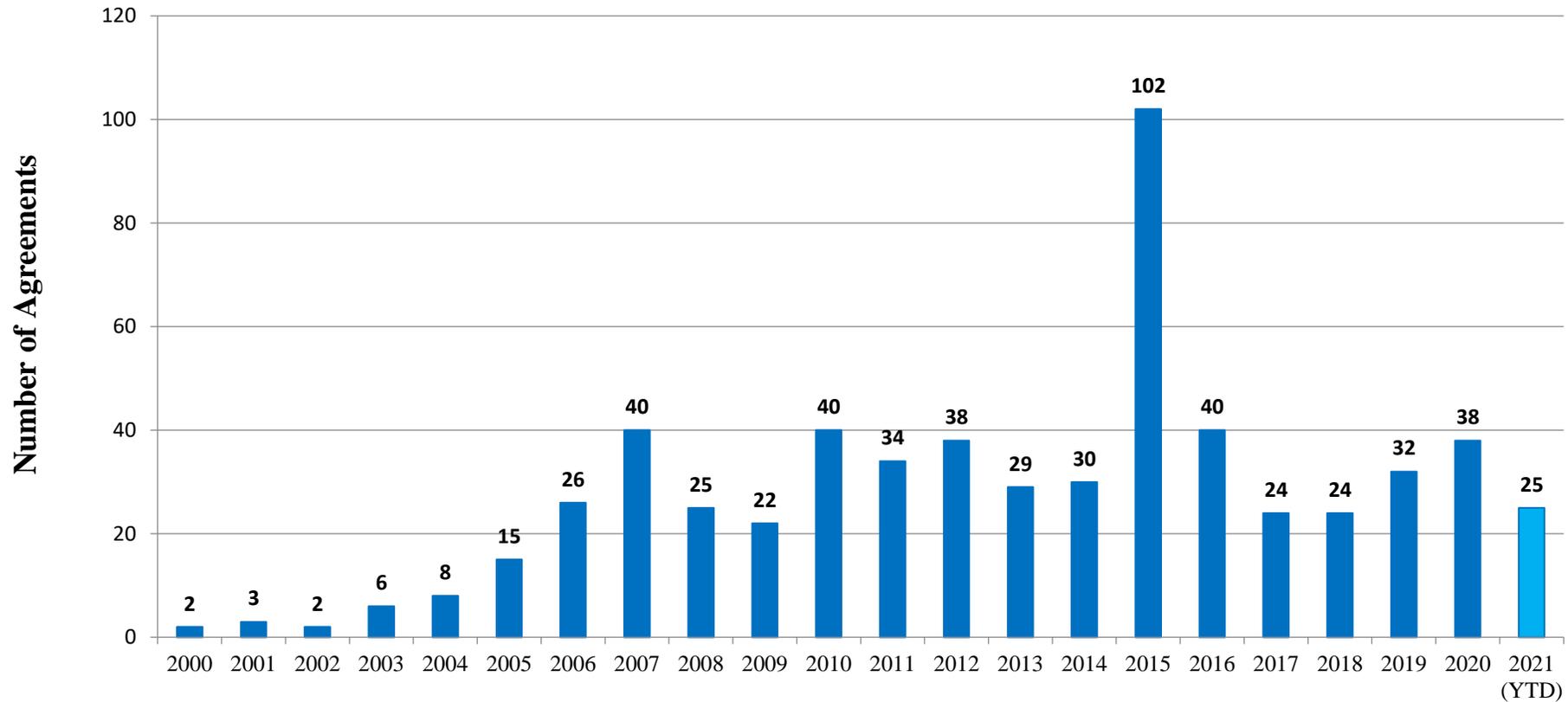
- Who determines whether breach has occurred and according to what process
- What constitutes breach; materiality considerations

Scope of M&A provision

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Agreement Statistics

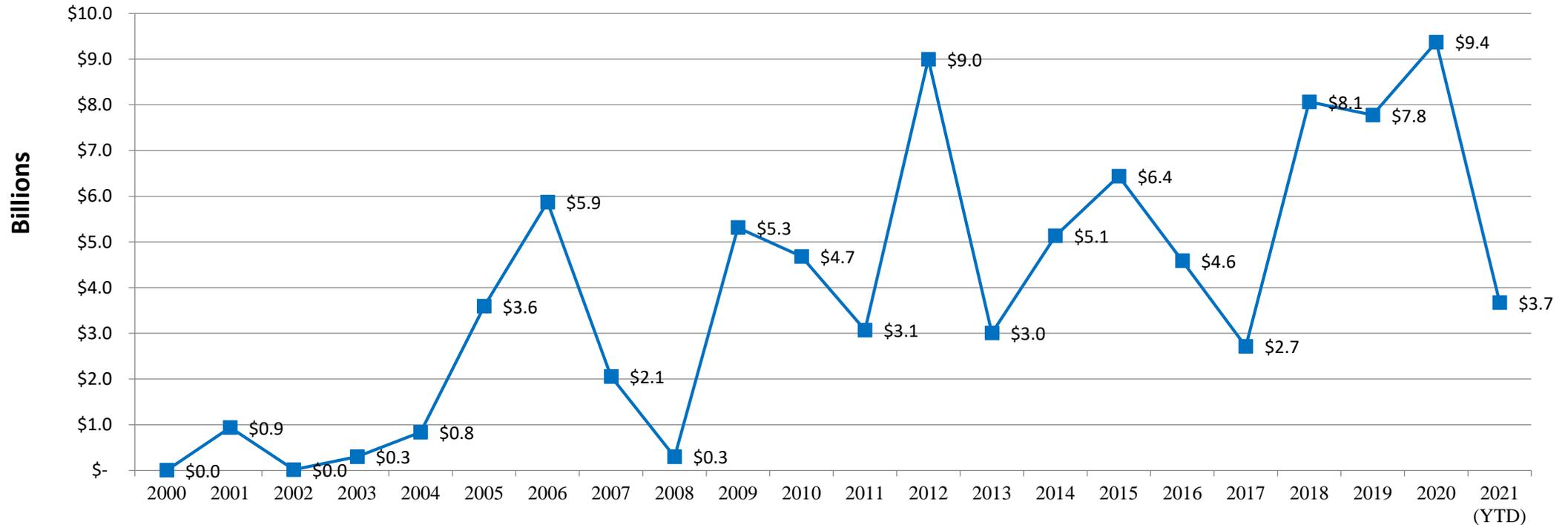
Corporate NPAs and DPAs 2000-2021 YTD



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 October 15, 2021

Total Monetary Recoveries Related to NPAs and DPAs 2000-2021 YTD*



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

*Data through October 15, 2021

Declinations with Disgorgement

- DOJ has entered into seven “declination with disgorgement” arrangements since the launch of the FCPA Pilot Program, with associated disgorgement amounts totaling approximately **\$49 million**.

Company	Year	Disgorgement Amount
HMT LLC	2016	\$2,719,412
NCH Corp.	2016	\$335,342
Linde North America, Inc.	2017	\$7,820,000
CDM Smith, Inc.	2017	\$4,037,138
Insurance Corp. of Barbados Ltd.	2018	\$93,940
Polycom, Inc.	2018	\$30,978,000*
Cognizant Technology Solutions Corp.	2019	\$2,976,210**

* Polycom disgorgement amount equals total imposed, which was comprised of \$10,672,926 to the SEC and \$10,152,537 to each of the U.S. Treasury Department and U.S. Postal Inspection Service Consumer Fraud Fund.

** Cognizant disgorgement amount equals total imposed in addition to \$16,394,351 in disgorgement ordered by the SEC in a parallel resolution, which DOJ credited in full.

- In addition, DOJ issued seven public declinations, six of which involved disgorgement imposed by the SEC.

- **Enforcement continued to be robust throughout 2020:**
 - DOJ’s Civil Frauds Section reported 922 total new matters in 2020.
 - This was the highest number since the Civil Division began reporting that statistic in 1987, and a 15% increase from 2019.
 - DOJ Antitrust reported 20 new criminal antitrust matters filed in 2020.
 - While this marked a decrease from the 26 new matters filed in 2019, it is up from the 18 new matters filed in 2018, and is generally consistent with a 10-year downward trend in criminal antitrust enforcement.
 - The SEC recovered a record high of \$4.68 billion in total financial remedies in 2020, with 715 new enforcement actions filed in 2020 (down from 2019).

- **These trends are set to continue:**

- Early signs indicate that DOJ continued its “[h]istoric level of enforcement” in 2021.

“[W]e are building up to surge resources for corporate enforcement. That has begun and we have started to redouble the [D]epartment’s commitment to white-collar enforcement.”

–Principal Associate Deputy Attorney General (October 5, 2021)

- Examples of “surge” efforts:

- Embedding FBI agents in the Fraud Section.
- Increased emphasis on data analysis to detect and prevent misconduct.

- **The most significant effects of the pandemic from an enforcement perspective will be forward looking—namely, how will the unique legal risks created in the last 20 months shift enforcement priorities?**
 - **SEC:** May 2020, the SEC announced a “Coronavirus Steering Committee” to identify and respond to COVID-related legal risks.
 - **DOJ:** Has made clear that monitoring the use of significant public funds doled out by COVID-19 response programs such as the Paycheck Protection Program and Coronavirus Aid, Relief, and Economic Security Act is a priority.

“[W]e will energetically use every enforcement tool available to prevent wrongdoers from exploiting the COVID-19 crisis.”

– Then-Principal Deputy Assistant Attorney General (June 26, 2020)

Enforcement by Other Key Agencies

- **FinCEN**

- Two enforcement actions resolved in 2020, including first action against a BitCoin “mixer” or “tumbler” for violating the Bank Secrecy Act (“BSA”).
- August 2020 guidance on approach to enforcing the BSA and anti-money laundering (“AML”) regulations.

- **OFAC**

- May 2019 “Framework for OFAC Compliance Commitments” – first expression of agency’s views on essential components of effective sanctions compliance programs.
- 2019 guidance recommending “tailored, risk-based compliance program[s]” for parties who deal in cryptocurrency.

- **CFTC**

- Record-breaking year in 2020 – 113 filed enforcement actions.
- Total of \$1,327,869,760 in monetary relief ordered in 2020.
- Increased focus on AML enforcement.
- New guidance on compliance programs and factors for imposing CMPs.

- **Coordination between agencies – BitMEX matter**

- October 2020: DOJ indictment of four individuals.
- August 2021: FinCEN/CFTC resolution imposing CMPs and SAR lookback by independent consultant.

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What Drives Outcomes Among NPAs, DPAs,
and Declinations?

What Drives Outcomes?

DOJ Guidance: NPAs and DPAs

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- DOJ's Justice Manual is intended to steer prosecutors' actions as they weigh potential investigation outcomes:
 - Section 9-28.300 of the manual provides the list of 11 factors (the "Filip Factors") that should be applied in determining whether to charge a corporation. Factors to be weighed include:
 - Nature and seriousness of the offense;
 - Pervasiveness of wrongdoing;
 - Recidivism;
 - Cooperation, including as to potential wrongdoing by individuals;
 - Adequacy and effectiveness of the corporation's compliance program;
 - Timely voluntary disclosure;
 - Remedial actions taken;
 - Collateral consequences of prosecution;
 - Adequacy of alternative remedies;
 - Adequacy of prosecution of individuals; and
 - Interests of any victims.
 - Section 9-47.120 of the manual details the FCPA Corporate Enforcement Policy, which credits voluntary self-disclosure, full cooperation, and timely and appropriate remediation.

What Drives Outcomes?

NPAs and DPAs in Practice

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- DOJ does not have a clear policy statement regarding the criteria for NPAs, DPAs, or declinations with disgorgement.
- Historically, although there is no formal guidance distinguishing what conduct will yield an NPA or DPA, NPAs generally have been reserved for cases where companies:
 - have fully cooperated and remediated;
 - in certain statutory schemes—notably FCPA, tax and, more recently, sanctions enforcement—have voluntarily self-disclosed;
 - engaged in less facially egregious conduct than might merit a DPA; and/or
 - are subject to related resolutions in other countries and DOJ wishes to account for certain sensitivities in the multijurisdictional resolutions.
- Penalty and forfeiture amounts also tend to be lower for NPAs than for DPAs, but final payment amounts may be negotiated after deciding on a resolution vehicle, and the lower values may be a product of multiple factors, most notably the nature of the underlying allegations.

What Drives Outcomes?

DOJ Guidance: Declinations with Disgorgement

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“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

- Aggravating circumstances include but are not limited to:
 - involvement by executive management of the company in the misconduct;
 - a significant profit to the company from the misconduct;
 - pervasiveness of the misconduct within the company; and
 - criminal recidivism
- In 2019, a then-Assistant Attorney General clarified that the presence of one or more aggravating factors will “not necessarily preclude a declination” where the subject company is otherwise in full compliance with the policy.
- The revised enforcement policy makes clear that the obligation to disclose “all relevant facts” to qualify for voluntary disclosure credit applies only to those facts “known to [the company] at the time of the disclosure.”

What Drives Outcomes?

Voluntary Disclosure and Declinations with Disgorgement

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Cognizant

Since the 2016 policy change, **all** of the DOJ declinations with disgorgement announced have involved voluntary disclosures. Voluntary disclosure is a prerequisite to declination and can, at least in some cases, neutralize substantial alleged aggravating factors.

- Cognizant **self-disclosed** the payment of an approximately \$2 million bribe to Indian government officials. Resulting in:
 - An SEC cease-and-desist proceeding for alleged FCPA bribery, books-and-records, and internal controls violations. Cognizant agreed to pay a \$6 million civil penalty together with disgorgement (\$16,394,351) and prejudgment interest (\$2,773,017).
 - A DOJ declination with disgorgement, requiring Cognizant to disgorge additional profits (\$2,976,210) allegedly earned outside the SOL period covered by the SEC resolution.
- **Aggravating Circumstances:**
 - Alleged involvement of former President, former General Counsel, COO and VP of Administration.
 - Former President and former General Counsel allegedly authorized payment of the approximately \$2 million bribe and concealed the bribe through false construction invoices.
 - Former President and former General Counsel were charged criminally by DOJ and civilly by SEC.
 - COO consented to SEC cease-and-desist order for books-and-records and internal controls violations and agreed to pay a civil penalty of \$50,000.

What Drives Outcomes?

Voluntary Disclosure and Declinations with Disgorgement

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Voluntary self-disclosure is not, however, sufficient to guarantee a declination.



2021

- SAP SE (“SAP”) voluntarily disclosed violations of the Export Administration Regulations and the Iranian Transactions and Sanctions Regulations, resulting in an NPA with DOJ and concurrent administrative agreements with the Department of Commerce’s Bureau of Industry and Security and OFAC.
- According to the NPA, SAP received full credit for its timely disclosure, as well as credit for extensive cooperation with the government and for spending more than \$27 million on remediation efforts.
- However, certain aggravating factors existed, including:
 - SAP senior managers were aware that the company did not have filters sufficient to identify and block the Iranian downloads, but SAP failed to institute remedial controls; and
 - SAP admitted that its export violations endangered U.S. national security.

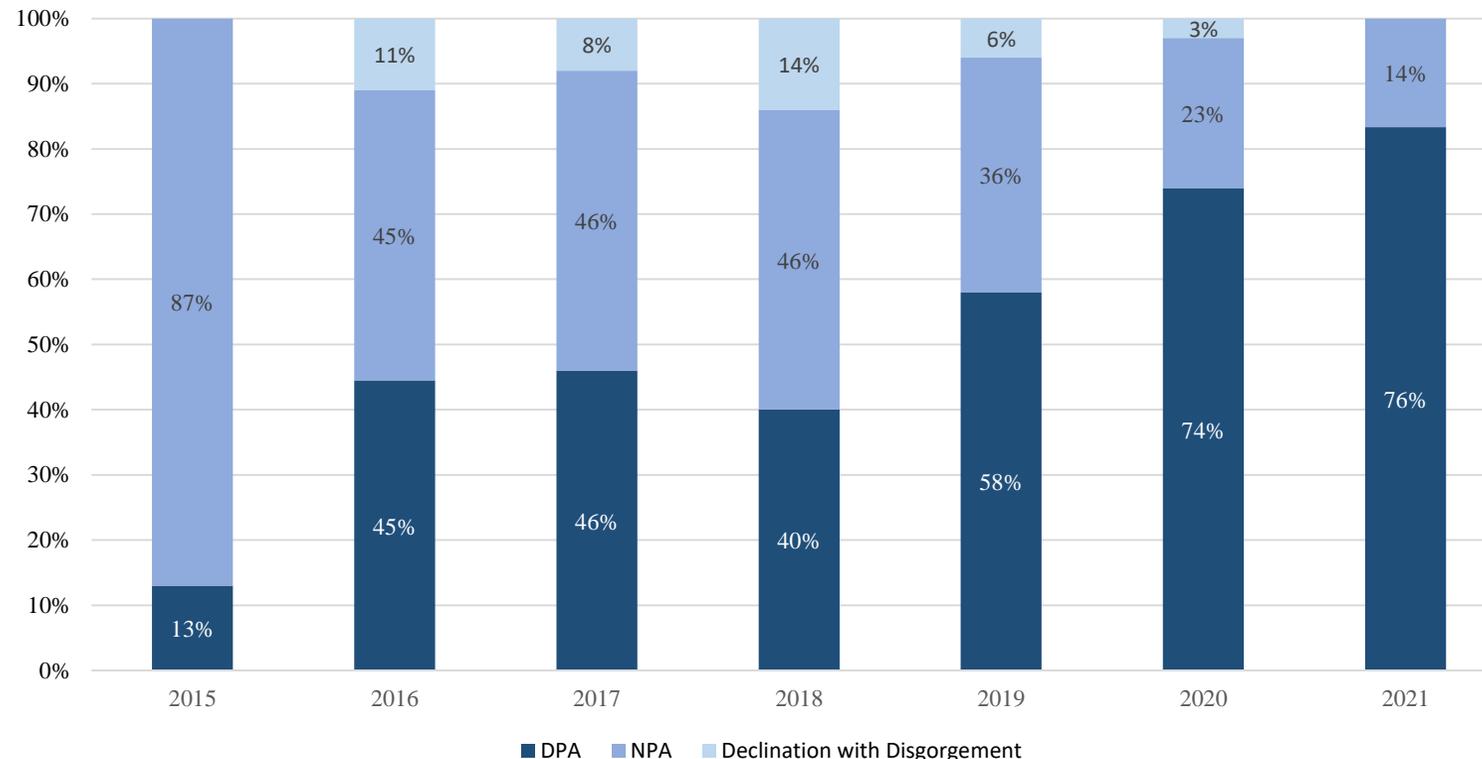
What Drives Outcomes?

NPAs and DPAs in 2021

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- While from 2016 to 2018 the number of DPAs and NPAs each year was roughly equal, the last three years have shown a steady decline in the percentage of NPAs on an annual basis.
- **29 of the 38** NPAs and DPAs in 2020, and **19 of the 25** NPAs and DPAs to date this year, have been **DPAs**.

Agreements by Year (2015 – Present)



What Drives Outcomes?

NPAs and DPAs in 2021

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What conclusions can we draw?

- Although the trend toward DPAs could signal a shift toward requiring self-disclosure to achieve an NPA, this year's NPAs highlight the importance of fact-specific circumstances and mitigating factors: **self-disclosure and cooperation are not dispositive.**
- With no declinations with disgorgement in 2021 and only one declination in 2020, we are not seeing declinations taking the place of what previously would have been NPAs.
- Non-US based companies are frequently the enforcers' target.

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Developments to Watch in the Upcoming Year

Developments to Watch in the Upcoming Year

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- **Corporate Compliance Program Guidance in Practice**
- **Developments in Whistleblower Programs**
- **Update on DOJ Antitrust Agreements**
- **DOJ National Security Division Agreements**
- **Legislative Developments**

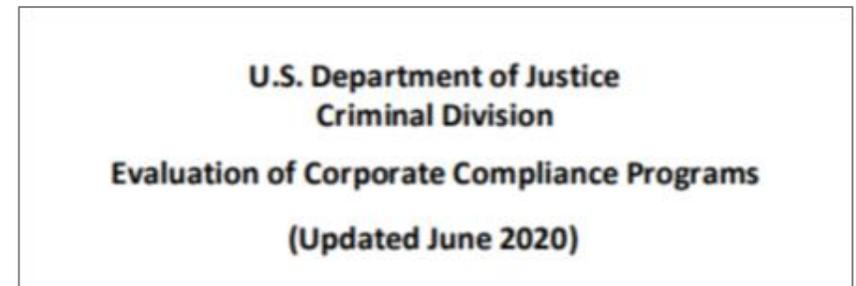
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Developments to Watch 1:
Corporate Compliance Program
Guidance in Practice

Developments to Watch: Corporate Compliance Program Guidance in Practice

DOJ Guidance on Corporate Compliance Programs

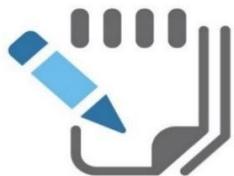
- On **June 1, 2020**, DOJ updated its guidance to prosecutors on how to assess corporate compliance programs when conducting an investigation, in making charging decisions, and in negotiating resolutions.
- The June update calls for “a reasonable, individualized determination in each case” of the effectiveness of a company’s compliance program. The update also reflects the ongoing evolution and increasing sophistication of DOJ’s compliance program expectations.
- It appears that the June 2020 guidance has had its intended effect: DOJ and U.S. Attorneys’ Offices are, at least in some instances, tailoring the programs for individualized situations, and other foci of the June 2020 guidance are making their way into resolutions.
- **Key Takeaways**
 - Importance of ongoing risk assessments
 - Importance of adequate resources and accessibility
 - Testing the design of the program
 - Continued focus on third parties
 - M&A due diligence
- DOJ’s oversight of compliance programs and monitorships occurs both within prosecuting units and via a separate supervisor dedicated full-time to these issues.



See GDC client alert here: <https://www.gibsondunn.com/doj-updates-guidance-regarding-evaluation-of-corporate-compliance-programs/>

Developments to Watch: Corporate Compliance Program Guidance in Practice

DOJ's Criminal Division's updated guidance regarding the **"Evaluation of Corporate Compliance Programs"** focuses on **three "fundamental questions"** that DOJ prosecutors should ask in assessing compliance programs.



1

Is the program **well designed**?



2

Is the program being applied earnestly and in good faith?
Is the program **adequately resourced and empowered**
to function effectively?



3

Does the program **work in practice**?

Developments to Watch: Corporate Compliance Program Guidance in Practice

- In considering those three fundamental questions, DOJ prosecutors will focus on how companies:

Key DOJ Areas of Focus

Assess Risk

- Implement learnings from their periodic reviews in policies, procedures, and controls
- Emphasize lessons learned (e.g., tracking and incorporating any of these lessons into its periodic risk assessments)

Monitor and Test

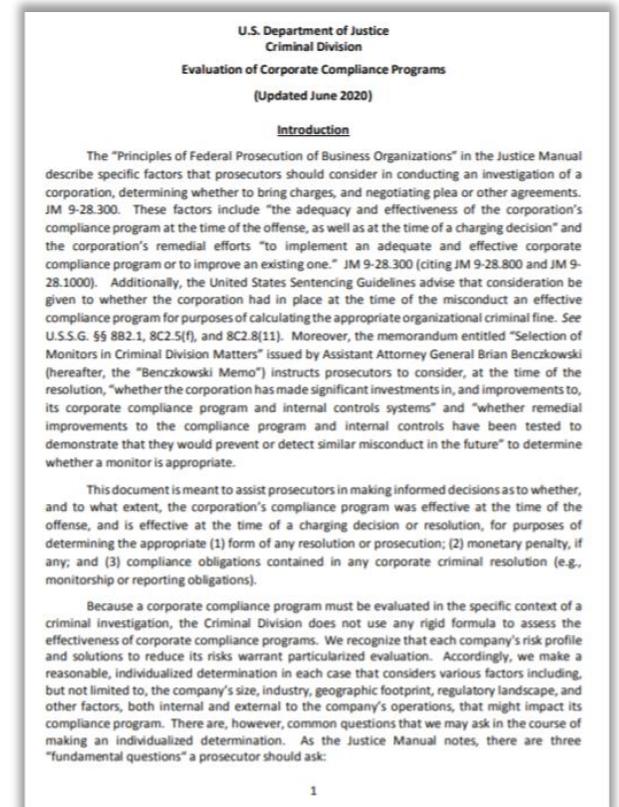
- Adapt controls to address areas of risk identified through the implementation of their programs
- Meaningfully review their compliance programs (and key risk areas)

Allocate Adequate Resources and Provide Access

- Provide their compliance functions adequate resources and access to their boards, management teams, employees, and data sources

Manage Third Parties

- Manage third parties “throughout the lifespan of the relationship”
- Document the business rationale for utilizing a third party and conduct appropriate due diligence based on the third party’s particular risk profile



Developments to Watch: Corporate Compliance Program Guidance in Practice

- The FCPA Resource Guide was also updated July 2020, which gives insight into how DOJ and SEC evaluate compliance programs:

“These considerations reflect the recognition that a company’s compliance program was not generally effective. DOJ and SEC understand that ‘no compliance program can ever prevent all criminal activity by a corporation’s employees,’ and they do not hold companies to a standard of perfection.”

--FCPA Resource Guide, 57.

Developments to Watch: Corporate Compliance Program Guidance in Practice

- Compliance enhancements that have already been implemented are seen as a significant mitigating factor.

In a September 2020 DPA with JPMorgan Chase, DOJ highlighted compliance program enhancements implemented since the time of the alleged conduct:

- Adding hundreds of compliance officers and internal audit personnel, with significant increases in compliance and internal audit spending;
- Improving anti-fraud manipulation and policies;
- Revising trade surveillance program, with continuing modifications to the parameters used to detect potential spoofing in response to lessons learned;
- Increasing electronic communications surveillance program, with ongoing updates to the universe of monitored employees and regular updates to the lexicon used;
- Implementing tools to better supervise traders, including a Supervisory Portal that integrates metrics ranging from attendance at trainings to trading-related alerts;
- Taking employees' commitment to compliance into account in promotion and compensation decisions by seeking feedback from risk and control professionals; and
- Implementing quality assurance testing of processing of surveillance alerts.

Developments to Watch: Corporate Compliance Program Guidance in Practice

- Although DOJ often uses the same template as a starting point in many resolutions to detail corporate compliance programs requirements, **context-specific requirements** are also appearing in resolutions.

In a January 2021 DPA with Epsilon, DOJ added a category for “Consumer Rights” not found in the compliance program requirements incorporated in other resolutions.

- The Epsilon DPA alleges that employees at Epsilon sold customer data to clients that were engaging in consumer fraud.
- The Epsilon DPA requires Epsilon to provide individual customers with processes to both request the individual’s data that Epsilon may sell to clients and to request that Epsilon not sell the individual’s data at all.

In an April 2021 NPA with SAP, DOJ added a requirement that SAP audit newly acquired companies within 60 days of acquisition and inform DOJ of any potential violations.

- The SAP NPA alleges that SAP did not fully integrate newly acquired companies into SAP’s compliance program.
- The SAP NPA requires SAP to audit newly acquired companies within 60 days of acquisition and inform DOJ of any potential violations.
- The SAP NPA requirement is much more stringent than DOJ’s 2008 Opinion Release, which allowed a 180-day grace period to audit acquisitions and report potential violations.

Developments to Watch: Corporate Compliance Program Guidance in Practice

- Recent resolutions also reflect the June 2020 guidance that companies' risk assessments should be based on **“continuous access to operational data and information across functions”** into resolutions.

The Epsilon DPA includes a detailed and context-specific requirement for “periodic reviews and testing” of the company’s compliance policies.

Epsilon will conduct periodic reviews and testing of its compliance code, policies, and procedures related to preventing and detecting the transfer or sale of consumer data to entities and individuals engaged in fraudulent or deceptive marketing campaigns that are designed to evaluate and improve their effectiveness in preventing and detecting the transfer or sale of consumer data to entities and individuals engaged in fraudulent or deceptive marketing campaigns and any related violations of the Company’s code, policies, and procedures related to the transfer or sale of consumer data to entities and individuals engaged in fraudulent or deceptive marketing campaigns. The Company’s reviews and tests shall take into account relevant developments in the industry and any evolving international, domestic, and industry standards related to the transfer or sale of consumer data to entities and individuals engaged in fraudulent or deceptive marketing campaigns.

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Developments to Watch 2:
Expanded SEC
Whistleblower Rules

Developments to Watch: Expanded SEC Whistleblower Rules

2020 Amendments to the SEC Whistleblower Rules

- On **December 7, 2020**, the SEC's amended whistleblower rules went into effect, including an amendment that expanded eligibility for whistleblower awards to expressly include whistleblowers whose information leads to an NPA or DPA.
- **Key Takeaways:**
 - Larger awards possible for whistleblower complaints.
 - Increased risk of employees reporting possibly illegal conduct to law enforcement authorities before reporting such conduct internally.



(3) For purposes of making an award under [§§240.21F-10](#) and [240.21F-11](#), the following will be deemed to be an administrative action and any money required to be paid thereunder will be deemed a monetary sanction under [§240.21F-4\(e\)](#):

(i) A non-prosecution agreement or deferred prosecution agreement entered into by the U.S. Department of Justice; or

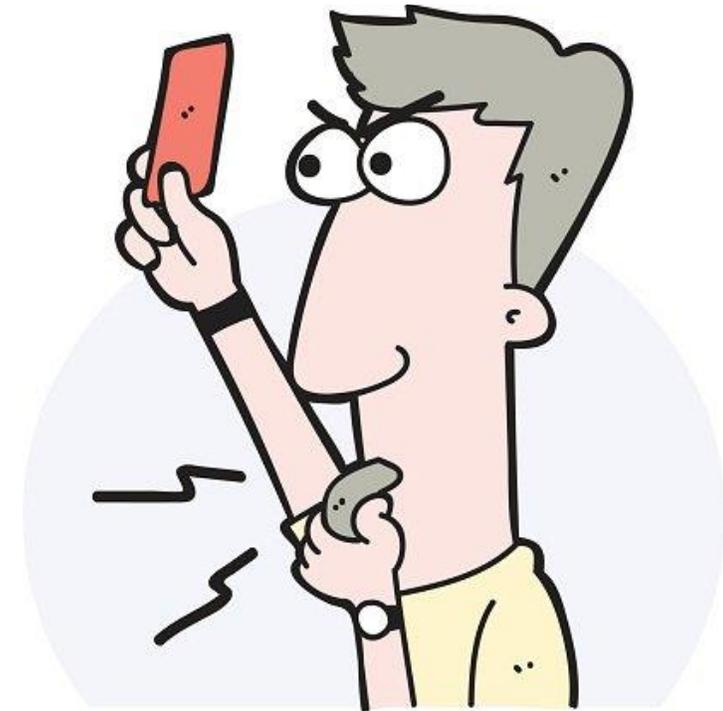
(ii) A similar settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws.

17 C.F.R. § 240.21F-4(d)(3)

Developments to Watch: Expanded SEC Whistleblower Rules

2020 Amendments to the SEC Whistleblower Rules

- On February 23, 2021, the SEC put these expanded rules into action, announcing a **\$9.2 million** award to a whistleblower who provided information that led to “successful related actions by the U.S. Department of Justice, one of which was a non-prosecution agreement (NPA) or deferred prosecution agreement (DPA).”
- The SEC also noted in its press release that the unnamed whistleblower “provided significant information” about “an ongoing fraud to the SEC” that “enabled a large amount of money to be returned to investors harmed by the fraud.”
- The press release did not comment on the nature of the fraud of the specific statutes at issue.



Developments to Watch: Expanded SEC Whistleblower Rules

- An uptick in whistleblower complaints and subsequent enforcement activity is expected to continue to grow in these areas due to the increasing avenues to by which government agencies can issue significant awards for whistleblower cooperation.
- For example, the SEC’s whistleblower program reached record highs in 2020:

“In FY 2020, the Commission awarded approximately \$175 million to 39 individuals — both the highest dollar amount and the highest number of individuals awarded in a given fiscal year . . . The Commission also received the highest number of whistleblower tips [over 6,900] in a fiscal year.”

--2020 SEC’s Annual Report to Congress: Whistleblower Program, at 2.

- With even more legislation expanding whistleblower protections and agencies’ increasing ability to award larger amounts for successful complaints, these records may continue to be broken in the coming years.

Developments to Watch: Expanded Whistleblower Rules

Other Recent Changes to Whistleblower Rules

- On December 23, 2020, the President signed the **Criminal Antitrust Anti-Retaliation Act of 2019**, to “provide anti-retaliation protections for antitrust whistleblowers” by expanding protections for employees cooperating with an investigation into criminal antitrust claims.
- On January 1, 2021, the U.S. Senate overrode a presidential veto to pass the National Defense Authorization Act, which included, as part of it, the **Anti-Money Laundering Act of 2020**.
 - The law significantly expanded the whistleblower award program with respect to AML violations, including a provision that when an AML enforcement action results in monetary sanctions greater than \$100 million, the Secretary of the Treasury “shall” pay an award of up to 30 percent of what was collected to whistleblowers who “voluntarily provided original information” that led to the successful enforcement action.
- Congress is also currently considering the **Whistleblower Protection Improvement Act of 2021**, which proposes further strengthening protections for whistleblowers, including faster legal recourse for retaliation claims and a prohibition on agencies launching retaliatory investigations.

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Developments to Watch 3:
DOJ Antitrust DPAs and NPAs



- Under the DOJ Antitrust Division's longstanding policy, the first company or individual to self-report an antitrust violation can qualify for *leniency*, but the Division has historically required others involved in the conspiracy to plead guilty or face indictment.

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

- Thus, to incentivize early self-reporting, the Division has historically expressed that it *disfavors the use of NPAs and DPAs* to resolve antitrust investigations for companies that do not qualify for leniency.



- In July 2019, DOJ Antitrust announced a policy shift to allow prosecutors to more actively consider resolving antitrust investigations with DPAs in certain circumstances.

“Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs”

“This change in the Division’s approach is a ***recognition that even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel investigation.*** . . .

The Division’s new approach allows prosecutors to proceed by way of a deferred prosecution agreement (DPA) when the relevant Factors, including the adequacy and effectiveness of the corporation’s compliance program, weigh in favor of doing so

We will, however, continue to disfavor non-prosecution agreements (NPAs) with companies that do not receive leniency because complete protection from prosecution for antitrust crimes is available only to the first company to self-report and meet the Corporate Leniency Policy’s requirements.”

The new policy considers the ***four hallmarks of “good corporate citizenship”***:

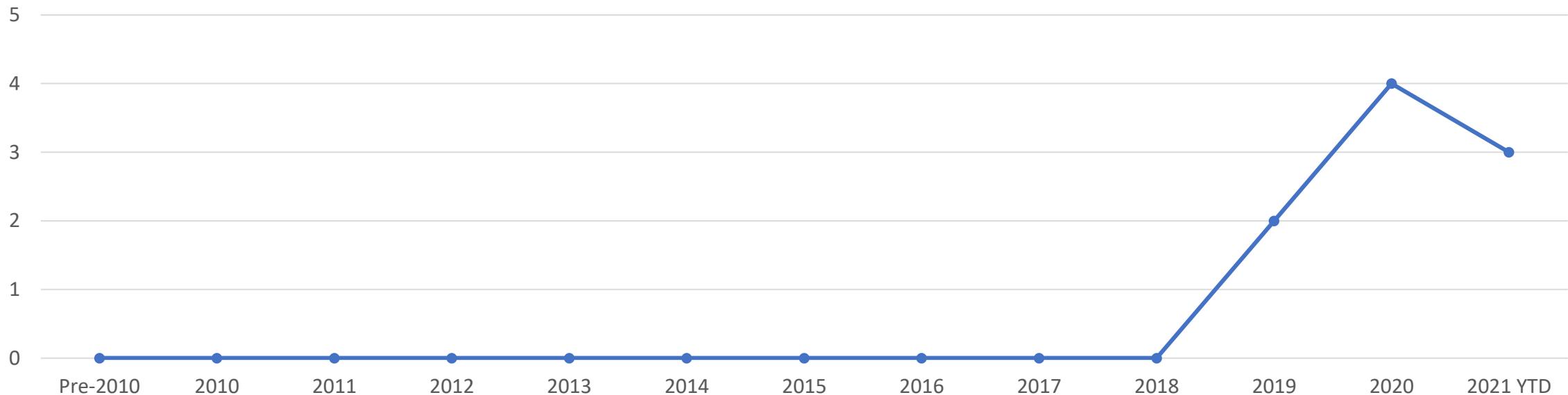
- (i)** having an effective compliance program, **(ii)** self-reporting wrongdoing,
- (iii)** cooperating with investigations, and **(iv)** remedying past misconduct.

Developments to Watch: DOJ Antitrust DPAs and NPAs



The mid-way mark of 2019 represented a shift in the Division's traditional practices. The Division has since entered into *nine DPAs*, representing the first examples of these agreements being used to resolve purely antitrust-based charges.

Antitrust Division DPAs Resolving *Purely Antitrust-based Charges*
2010 - Present



Developments to Watch: DOJ Antitrust DPAs and NPAs



- In part addressing concerns that Antitrust’s NPA/DPA policy could impact leniency program self-reporting, the Acting Assistant Attorney General recently elaborated on the Division’s approach to enforcement in a speech on **July 21, 2021**. He noted:
 - The Division has worked in recent years to “ensure th[e] approach to corporate resolutions is consistent with Department policy, including the Justice Manual’s Federal Principles of Prosecution of Business Organizations.”
 - The Division hopes knowing that the Justice Manual’s principles will be considered will encourage even companies that may not qualify for leniency to self report, even when “truly ruinous collateral consequences” would result from a conviction.
 - Notwithstanding a push to align with broader Department policy, Antitrust’s leniency program remains one of the Division’s “most powerful tools” – “Not one word of the leniency policy has changed since the early 1990s.”

“[E]xperience and common sense tell us that antitrust crimes might sometimes occur even when a company makes real efforts to implement a compliance program. We’ve recently also seen that crediting forward-looking compliance commitments at the sentencing phase can incentivize investments in compliance.”

-Acting AAG



Guidance for Practitioners

1. The Antitrust Division will consider the full range of Justice Manual considerations in potentially resolving an antitrust investigation with a DPA. Division prosecutors are now considering compliance programs at the charging stage and not solely at sentencing.
2. Notwithstanding attempts at clarification, possible tension remains between the availability of DPAs and the incentives to report early for leniency purposes.
3. NPAs remain off the menu in responding to an Antitrust investigation, though immunity is available through the Division's leniency program.

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Developments to Watch 4:
National Security Division DPAs and NPAs

Developments to Watch: DOJ NSD DPAs and NPAs

2019 NSD Guidance on VSDs



- In December 2019, DOJ's National Security Division ("NSD") released updated guidance governing the treatment of voluntary self-disclosures (or "VSDs") in criminal sanctions and export control investigations.
- To incentivize self-reporting, the NSD guidance established a presumption that a company that makes a VSD of a criminal sanctions or export control violation ***will receive an NPA and will not pay a fine.***

With those goals in mind, it is the Department's policy that when a company (1) **voluntarily self-discloses export control or sanctions violations to CES**, (2) **fully cooperates**, and (3) **timely and appropriately remediates**, consistent with the definitions below, there is a presumption that the company will receive a non-prosecution agreement and will not pay a fine, absent aggravating factors. Aggravating factors, as described below, include exports of items that are particularly sensitive or to end users that are of heightened concern; repeated violations; involvement of senior management; and significant profit.

- If ***aggravating factors*** are present such that a DPA or guilty plea is warranted, DOJ will recommend a reduced fine and will not require a monitor if the other requirements in the guidance (i.e. VSD, full cooperation, remediation, and the implementation of an effective compliance program) are met.

Developments to Watch: DOJ NSD DPAs and NPAs

Recent Resolutions



Since the NSD guidance was published in December 2019, NSD has entered into *five* corporate resolutions.

- In 2020 and early 2021, NSD entered into **DPAs** with Airbus SE, Essentra FZE, and PT Bukit Muria Jaya (“BMJ”).
 - **Airbus SE** agreed to pay combined penalties of \$3.9 billion to authorities in France, the United Kingdom, and the United States to resolve foreign bribery and export control charges. Airbus SE received VSD credit for the ITAR-related conduct underlying the DPA, but given that the resolution was cross-border and also involved FCPA-related conduct, it is difficult to determine the impact of the VSD on the ultimate resolution.
 - **Essentra FZE** entered into a DPA for conspiring to violate IEEPA and defraud the U.S. in connection with evading sanctions on North Korea. Essentra FZE did not self-disclose and did not receive VSD credit, and the Company agreed to pay a fine of \$665,112, representing twice the value of the transactions in the DPA.
 - **BMJ** entered into a DPA to resolve allegations of conspiracy to commit bank fraud in connection with providing goods to North Korea. BMJ did not self-disclose and therefore did not receive VSD credit. The Company paid a \$1.5 million penalty.

Developments to Watch: DOJ NSD DPAs and NPAs

Recent Resolutions



- In 2021, NSD has entered into **NPAs** with Avnet Asia Pte. Ltd (“Avnet”) and SAP SE.
 - **Avnet** entered into a two-year NPA to resolve allegations related to an alleged criminal conspiracy carried out by former employees to violate U.S. export laws by shipping U.S. power amplifiers to Iran and China. Although Avnet did not receive VSD credit, the NPA suggests that it may have made a self-disclosure to DOJ *after* prosecutors initiated their own investigation. Avnet paid a \$1.5 million penalty.
 - **SAP SE** entered into a three-year NPA after making VSDs to DOJ, BIS, and OFAC acknowledging violations of the Export Administration Regulations (“EAR”) and Iranian sanctions through the export of software to Iranian end users. SAP SE received full credit for its timely VSD and, consistent with the 2019 NSD guidance, SAP SE was required to disgorge \$5.14 million but was not required to pay additional financial penalties pursuant to the NPA.





Guidance for Practitioners

- **Relevance:** NSD has historically played a secondary role to civil enforcement agencies, but in recent years has become more heavily involved in the criminal enforcement of U.S. sanctions and export controls.
- **Timing:** The 2019 NSD guidance includes a stringent timing requirement for VSDs. To receive full mitigation credit, NSD requires that a company submit a VSD to NSD at substantially the same time that a VSD is submitted to the appropriate regulatory agency (e.g. DDTC, BIS, or OFAC).
- **Disgorgement:** As illustrated by the SAP SE NPA, even if a company receives full VSD credit under the NSD guidance the company will still be required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct.
- **Careful Consideration:** A company that discovers a potential willful export control or sanctions violation still must carefully consider the likelihood that DOJ will discover the misconduct; at what stage in an investigation the misconduct should be disclosed to the government; and to what agencies the disclosure should be made and in what sequence.

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Developments to Watch 5: Legislative Developments

Developments to Watch: Legislative Developments

Settlement Agreement Database Act of 2021

- In January 2021, Congressman Gary Palmer of Alabama introduced the **Settlement Agreement Information Database Act of 2021**, that, if passed, would require Executive agencies to submit any information regarding settlement agreements to a public database.
- The bill defines a “settlement agreement” broadly and includes any agreement, including a consent decree, that:
 - 1) “[I]s entered into by an Executive agency” and
 - 2) “[R]elates to an alleged violation of Federal civil or criminal law.”
- Submissions under the bill would be required to cover:
 - 1) Specific violations underlying the action;
 - 2) Settlement amount and classification as a civil penalty or criminal fine;
 - 3) Description of data/methodology behind the agreement’s terms;
 - 4) Length of the agreement; and
 - 5) Other identifying factors.

Developments to Watch: Legislative Developments

Settlement Agreement Database Act of 2021

- The bill passed the House on January 5, 2021 and was referred to the Senate Committee on Homeland Security and Governmental Affairs.
- Its provisions echo a reporting requirement imposed on DOJ via a provision in the National Defense Authorization Act, whereby DOJ is now required to report to Congress annually on DPAs and NPAs concerning the Bank Secrecy Act.
- Congressman Palmer introduced the bill after DOJ failed to respond to a FOIA request from a University of Virginia Law School professor requested all DPAs and NPAs for the school's Corporate Prosecution Registry, which tracks such agreements.
- There is no regulatory or policy obligation for various DOJ units to report DPAs and NPAs and Gibson Dunn does not believe that a master database exists. The passage of the bill would greatly enhance transparency in and around these resolutions.



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Cross-Border Considerations

Cross-Border Considerations

NPAs and DPAs increasingly form part of complex global settlements involving international conduct and multiple coordinating enforcement jurisdictions.



- **UK-based Amec Foster Wheeler Energy Limited (“AFWEL”)** (acquired by Wood Group PLC in 2017) entered into a three year-**DPA** with DOJ and the USAO-EDNY in June 2021 to resolve FCPA bribery allegations based on an alleged bribery scheme in Brazil.
- AFWEL also received final court approval for a **DPA** with the United Kingdom’s Serious Fraud Office (“SFO”) and concluded **Leniency Agreements** with three Brazilian authorities.
- DOJ credited a portion of payments made to the SFO and Brazilian authorities toward the total owed to the United States.



- **Vitol, Inc. (“Vitol”)**, the **US affiliate of Netherlands-based Vitol group**, entered into a three-year **DPA** with DOJ in December 2020 to resolve FCPA bribery allegations related to improper payments made to state-owned oil companies in Brazil, Ecuador, and Mexico.
- Vitol also reached a **settlement** with the CFTC and a **Leniency Agreement** with Brazil’s Ministerio Publico Federal (MPF).
- DOJ credited \$45 million (about 1/3 of total criminal penalty) in payments made to the Brazilian authorities toward the total DOJ penalty amount.

Resolving allegations involving international conduct without coordinating across jurisdictions may create a risk of follow-up investigations.

Cross-Border Considerations

Many Countries Also Have Implemented or Are Considering DPA Regimes

- More countries are developing DPA regimes
 - DPA-like agreements are available in Canada, France, Singapore, and the UK
 - DPA-like agreements have been proposed in Australia, Ireland, Poland, Japan, and Switzerland
 - Leniency Agreements are available in Brazil
- **Common Key Provisions**
 - Factual narrative
 - Fine
 - Remediation and reporting requirements
 - Judicial approval
- **Common Key Differences from U.S. DPAs**
 - Only available to legal entities
 - Limited to specific offenses
 - Substantive oversight by court

*The DOJ's policy against "piling on" is a key consideration for coordinating settlements across jurisdictions if the underlying conduct at issue is cross-border. The Justice Manual states that DOJ attorneys should "coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."**

* U.S. Dep't of Justice, Justice Manual, § 1-12.100 Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct.

Cross-Border Considerations

Spotlight on the UK's Serious Fraud Office (“SFO”)

- In 2019, the SFO published new guidance on the steps companies should take in order to receive cooperation credit in the SFO's charging decisions.
 - The SFO Guidance outlines similar steps to those set forth in the Justice Manual, with some key differences.
 - The SFO Guidance indicates that a company may obtain cooperation credit if it waives privilege over witness accounts, notes, and transcripts obtained during the course of the company's investigation. On the other hand, a company's assertion of privilege will be treated neutrally.
 - In contrast, the Justice Manual states that prosecutors should not ask for privilege waivers in corporate prosecutions.
- In January 2020, the SFO also released internal guidance on evaluating corporate compliance programs that provides additional guidance regarding when a DPA is appropriate. In October 2020, the SFO published a new chapter of the internal Operational Handbook to “provide further transparency” on cooperation expectations.
- Similar to the Justice Manual, the SFO guidance emphasizes the importance of assessing the corporation's compliance program at the time of the offense as well as at the time of the charging decision.

The SFO has entered into twelve corporate DPAs since the UK introduced its DPA program in 2014, with the most recent in July 2021 involving two related unnamed companies.

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Post-Resolution Pitfalls

Post-Resolution Pitfalls

Overview

- The government tracks activities closely during any post-resolution period.
- In recent years, DOJ has shown it is willing to extend agreement terms in more egregious cases where it has perceived that companies have failed to fulfill important compliance terms outlined in their resolutions.
- Most recently, one DOJ official stated that “violating NPAs and DPAs may be worse than the original punishment [T]o make sure that we are being fair and just and equitable . . . we are going to be firm with those who do not comply with the terms and the agreements that they have signed up to.”

ODEBRECHT

2016-2020

- In 2016, **Brazilian construction giant Odebrecht SA** pled guilty to conspiring to violate the anti-bribery provisions of the FCPA and agreed to retain an independent compliance monitor for three years and adopt and implement a compliance and ethics program. The monitorship was set to expire in February 2020.
- In January 2020, DOJ said the company had failed to fulfill its compliance and ethics obligations and extended the agreement through November 16, 2020, when DOJ ended its oversight.

Post-Resolution Pitfalls

Agreement Extensions



- In 2012, Biomet, since acquired by **Zimmer**, entered into a DPA after allegedly providing improper payments Biomet and its subsidiaries made in China, Argentina, and Brazil between 2000 and 2008. The DOJ included a corporate monitor for 18 months.
- In 2015 the monitor was extended for one year after Biomet discovered additional potentially improper activities in Mexico and Brazil.
- In 2017, Zimmer entered into another DPA regarding FCPA internal controls provisions, acknowledging that Biomet failed to comply with terms of the 2012 DPA. Zimmer agreed to appoint a monitor for three years, concluding in 2020. The DPA was terminated in February 2021.



- In November 2012, **Moneygram** entered into a five-year DPA for failure to maintain an effective AML program and aiding and abetting wire fraud.
- MoneyGram allegedly processed at least \$125 million in additional consumer fraud transactions during the course of the DPA due to alleged weaknesses in its AML and anti-fraud program.
- On November 8, 2018, DOJ filed a motion to extend all the terms of MoneyGram's DPA for 30 months and amend and enhance MoneyGram's compliance requirements pursuant to the DPA. This agreement was extended eight times in the 2017–2018 period, and DOJ ultimately imposed additional forfeiture of \$125 million.
- In May 2021, DOJ terminated the DPA after the company's monitor certified that MoneyGram's AML compliance program was "reasonably designed and implemented to detect and prevent fraud and money laundering and to comply with the Bank Secrecy Act."

Key Post-Resolution Terms: 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.



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.

Key Post-Resolution Terms: 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.

 <p>2020</p>	<p>7. It is understood that Practice Fusion shall:</p> <p>h. bring to the Office's attention all criminal conduct by Practice Fusion or any of its agents or employees acting within the scope of their employment related to violations of the Federal laws of the United States, as to which Practice Fusion's Board of Directors, senior management, or legal and compliance personnel are aware;</p>
 <p>2019</p>	<p>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's anti-bribery or accounting provisions had the conduct occurred within the jurisdiction of the United States, the Company shall promptly report such evidence or allegation to the Fraud Section and the Office.</p>

Key Post-Resolution Terms: Self-Reporting

- Companies are increasingly required to report *evidence* or *allegations* of misconduct, as well as actual violations of law.
- Recent trend towards inclusion of “any” evidence as opposed to merely “credible” evidence in past agreements.
 - For example, FCPA DPAs and NPAs moved from using a “credible” evidence provision to a provision requiring the reporting of “any” evidence in 2016.
- There continues to be some variety in these terms, suggesting DOJ has not coalesced around a single approach, and there may still be room for negotiation.

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 FECA or other U.S. federal law, the Company shall promptly report such evidence or allegation to the United States.

DANNENBAUM
ENGINEERING CORPORATION

2019

Key Post-Resolution Terms: Breach Determinations

- DOJ typically reserves the exclusive right to determine that a breach has occurred, subject to notice and remediation provisions. Alternative arrangements are rare.
- If DOJ determines a breach occurred, most NPAs/DPAs allow DOJ two options: prosecution of the company or an extension of the NPA/DPA.



2020

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, NSD, and the Office's sole discretion. Any such prosecution may be premised on information provided by the Company

20. In the event the Fraud Section, NSD, and the Office determine that the Company has breached the Agreement, the Fraud Section, NSD, 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 opportunity



2019

10. **Requirement to Obey the Law:** If the United States determines during the term of this Agreement that Insys has committed any federal crime after the date of the signing of this Agreement, Insys shall, in the sole discretion of the United States, thereafter be subject to prosecution for any federal crimes of which the United States has knowledge, including but not limited to the conduct described in the Statement of Facts. The discovery by the United States of any purely historical criminal conduct that did not take place during the term of the Agreement will not constitute a breach of this provision.

Key Post-Resolution Terms: Breach Determinations

- The length of a possible extension under an NPA/DPA varies but is often one year.
- Some agreements also cap the length of the total term of the deferral-of-prosecution period.

Company, as described in Paragraphs 11-14 below (the “Term”). The Company agrees, however, that, in the event the Fraud Section and the Office determine, in their sole discretion, that the Company has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of the Company’s obligations under this Agreement, an extension or extensions of the Term may be imposed by the Fraud Section and the Office, in their sole discretion, for up to a total additional time period of one year, without prejudice to the Fraud Section and the Office’s right to proceed as provided in Paragraphs 17-19 below. An

Ericsson
2019

12. HSBC Switzerland agrees that, in the event that the Office determines during the Deferral Period described in Paragraph 11 above (or any extensions thereof) that HSBC Switzerland has violated any provision of this Agreement, an extension of the period of the Deferral Period may be imposed in the sole discretion of the Office, up to an additional 1 year, but in no event shall the total term of the deferral-of-prosecution period of this Agreement exceed four years.

HSBC
2019

Key Post-Resolution Terms: Monitorship Provisions

- Monitorships can also be extended.

German Health
Care Company

2019

Extension of the Term of the Monitorship

22. If, however, at the conclusion of the ninety (90) calendar-day period following the issuance of the follow-up report, the Department concludes that the Company has not by that time successfully satisfied its compliance obligations under the Agreement, the Term of the Monitorship shall be extended for a reasonable period of time not to exceed one year.

- Recent FCPA NPAs/DPAs include provisions that if a monitor discovers potential FCPA violations, it must report it to the company and *may* report it to DOJ.



2019

(collectively, “Potential Misconduct”), the Monitor shall immediately report the Potential Misconduct to the Company’s General Counsel, Chief Compliance Officer, and/or Audit Committee for further action, unless the Potential Misconduct was already so disclosed. The Monitor also may report Potential Misconduct to the Fraud Section and the Office at any time, and shall report Potential Misconduct to the Fraud Section and the Office when it requests the information.

There has been a downward trend in the DOJ imposing monitorships over the last several years. Only one independent monitor has been imposed in 2021 (State Street Corporation). However, the imposition of monitors is becoming more prevalent by other enforcers, such as DFS, Antitrust, and ENRD.

Key Post-Resolution Terms: Monitorship Provisions

- In cases where a monitorship is warranted, the controlling DOJ Memorandum outlines certain criteria on which DOJ should evaluate candidates, including:
 - General background, education, experience, and reputation;
 - Substantive expertise in the particular area(s) at issue;
 - Objectivity and independence from the company;
 - Access to adequate resources to effectively discharge his or her responsibilities; and
 - “**Any other factor** determined by the Criminal Division attorneys, based on the circumstances, to relate to the qualifications and competency of” the candidate “as they may relate to the tasks required by the monitor agreement and nature of the business organization to be monitored” (emphasis added).
- A recent plea agreement added the unusual requirement that the monitor candidates have “[n]o **adversarial relationship with the USAO in any matter.**”
- A facial reading of “no adversarial relationship . . . in *any matter*” could preclude virtually all white collar defense practitioners from serving as monitors.

e. No adversarial relationship with the USAO in any matter.

ambiance Apparel

2020

- NPAs, DPAs, and even declinations with disgorgement create risks in follow-on civil 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 and DPAs continue to include **non-contradiction clauses** forbidding companies from making statements (including in litigation) that contradict the facts stated in the agreement.

AIRBUS
2020

Does not apply to statements made by individuals in their own defense, unless speaking on behalf of the Company.

25. The Company expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Company make any public statement, **in litigation or otherwise**, contradicting the acceptance of responsibility by the Company set forth above or the facts described in the Statement of Facts.

This Paragraph does not apply to any statement made by any present or former officer, director, employee or agent of the Company in the course of any criminal, regulatory or civil case initiated against such individual, unless such individual is speaking on behalf of the Company.

- **Motion-to-dismiss stage**

- Courts have taken notice of, and given weight to, factual admissions in a DPA, but companies can still prevail.

Davis v. Beazer Homes, U.S.A., Inc.:¹ 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.”

Smallen v. The Western Union Co.:² Affirming dismissal of securities fraud claims because “[a]lthough the complaint may give rise to some plausible inference of culpability on the part of Defendants,” plaintiffs had failed to plead “particularized facts giving rise to the strong inference of scienter required to state a claim under the PSLRA.” Plaintiff had pleaded “very few particularized allegations, if any, showing Defendants made their statements with either intent to defraud investors or conscious disregard of a risk shareholders would be misled,” despite DPA admissions to “willfully failing to implement an effective AML compliance program.”

1 - 2009 WL 3855935 (M.D.N.C. 2009)
2 - 950 F.3d 1297 (10th Cir. Feb. 25, 2020)

- **Summary judgment stage**

- NPAs and DPAs have been cited in summary judgment briefing and decisions.

***Salt Aire Trading LLC v. Enterprise Bank and Trust Corp.*¹**

- Defendants moved for summary judgment. Plaintiff argued that a DPA in which one of the defendants admitted to defrauding the IRS precluded dismissal of plaintiff's fraud claims.
- The court granted defendants' motion for summary judgment, finding that the DPA only admitted to perpetrating fraud on the IRS and "d[id] not confer 'unwitting victim' status upon [Plaintiff], where the evidence establishes that he was an active participant in formulating the terms of the shelter."

***Yale v. Community One Bank*²**

- Defendant moved for summary judgment, arguing that the DPA it entered with DOJ put plaintiffs on notice and triggered the applicable statute of limitations.
- The court granted the motion, finding that the entity's public statement regarding the DPA and the DOJ's press release on the DPA put the plaintiffs on notice.

1 - 967 N.Y.S.2d 869, 2013 WL 775747 (N.Y. Sup. Ct. 2013).

2 - 2018 WL 3977885 (W.D. N.C. 2018).

*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."

³ 2016 WL 874778, at *5 (S.D.N.Y. Mar. 3, 2016)

- **Shareholder Litigation**

- DPAs and NPAs can lead to shareholder litigation in which the company's ability to present a defense is limited by factual admissions in the DPA or NPA. However, in certain circumstances courts have dismissed shareholder claims despite admissions in a DPA or NPA.

In re FalconStor Software, Inc.⁴

- Plaintiffs claimed they were excused from Delaware's pre-suit demand requirement because FalconStor's DPA showed that the directors faced serious liability, making demand futile. The court found that plaintiffs failed to adequately plead demand futility because the DPA did not provide "any particularized facts [indicating] that the FalconStor directors" breached their fiduciary duties.

4 - 966 N.Y.S.2d 642, 647-48 (N.Y. Sup. Ct. 2013)

- **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 of privilege provisions in monitorship agreement.

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Upcoming White Collar Group Webcasts & Additional Resources

Upcoming Webcasts

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- **October 19** | **The False Claims Act – 2021 Update for Drug and Device Manufacturers** | 12:00 – 1:30 pm ET
To register, please [click here](#).
- **October 26** | **False Claims Act – 2021 Update for Health Care Providers** | 12:00 – 1:30 pm ET
To register, please [click here](#).
- **November 3** | **Compliance Monitors: Everything that you wanted to know but were afraid to ask** | 12:00 – 1:30 pm ET To register, please [click here](#).
- **November 9** | **Managing Internal Audit and Investigations** | 12:00 – 1:30 pm ET To register, please [click here](#).
- **December 9** | **What's Next: Spoofing and Manipulation in Commodities and Derivatives Markets** | 12:00 – 1:15 pm ET To register, please [click here](#).

Publications

- **2021 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements** [click here](#)
- **Big Changes Afoot for FCPA and Anti-Bribery Enforcement?** [click here](#)

Recorded Webcasts

- **October 6 | The False Claims Act – 2021 Update for Financial Services** [click here](#)
- **January 26 | FCPA 2020 Year-End** [click here](#)
- **February 23 | Challenges in Compliance and Corporate Governance** [click here](#)

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