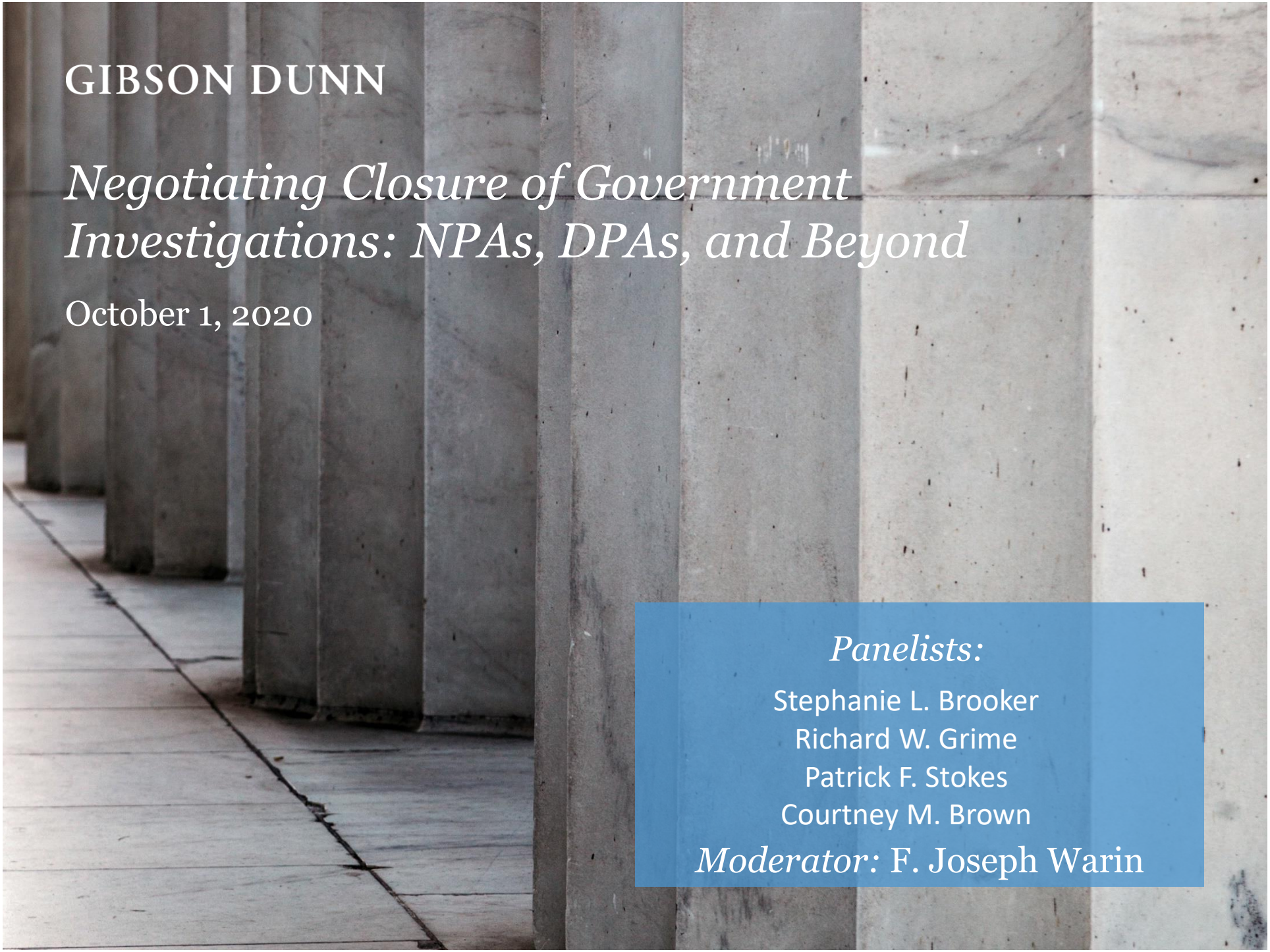

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Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond

October 1, 2020

Panelists:

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MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance via email approximately four weeks following the webcast.
- Virginia Bar Association members should anticipate receiving their certificate of attendance six weeks following the webcast.
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**

Agenda

1. **Resolution Vehicle Overview**
2. **Agreement Statistics**
3. **What Drives Outcomes Among NPAs, DPAs, and Declinations?**
4. **2020 Trends to Watch**
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

NPAs, DPAs, and Declinations

An Introduction

- **NPAs and DPAs** represent a middle ground between indictment/guilty plea/trial and declination. DOJ/SEC agrees to forgo prosecution 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 term of 3 years, and both NPAs and DPAs typically are publicly available documents.
  - **NPAs** signal a lesser form of resolution than a DPA, though they contain many of the same base provisions. NPAs are voluntary, out-of-court agreements between a corporation and DOJ/SEC. There is 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

- **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 if necessary. A DPA is subject to judicial approval, though the court does not approve the settlement terms. Fulfilling a DPA's requirements results in a dismissal of the charges after the end of the agreement's term.

NPAs, DPAs, and Declinations

An Introduction

- **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, counter-signed by the company;
    - 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.

> *"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**

  - 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 matter.

NPAs, DPAs, and Declinations

Use by SEC and DOJ

Agency	DPA	NPA	Declination + Disgorgement
	• 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 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	• 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
	• 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 enter future tolling agreement • May include financial penalties	• N/A

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

NPAs, DPAs, and Declinations

Benefits and Risks

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

NPAs and DPAs

Key Terms

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
- **Reporting Requirements**
  - Corporate monitor vs. self-reporting vs. hybrid arrangement

NPAs and DPAs

Key Terms

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

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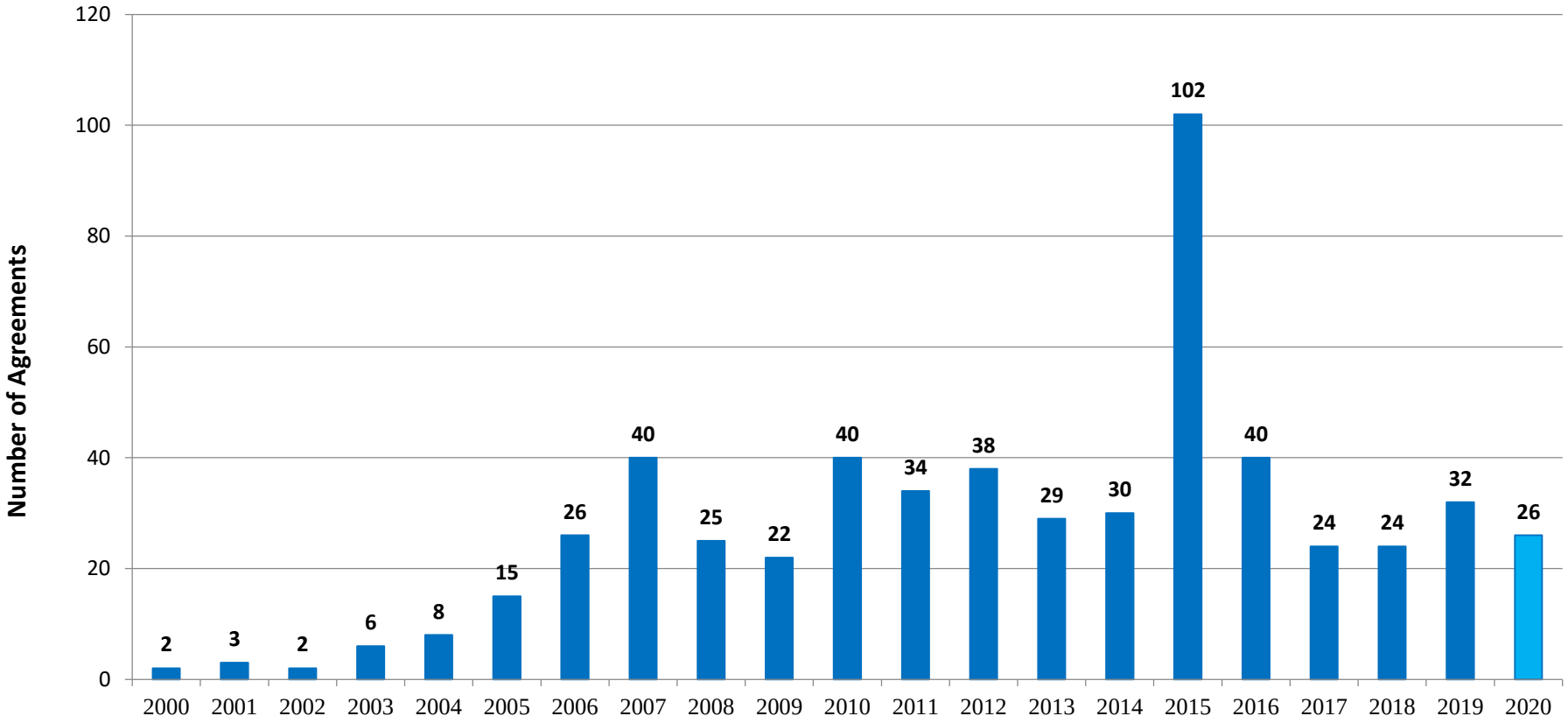
Agreement Statistics

DOJ and SEC NPA and DPA Statistics

Corporate NPAs and DPAs, 2000-Present

Corporate NPAs and DPAs 2000-2020 YTD

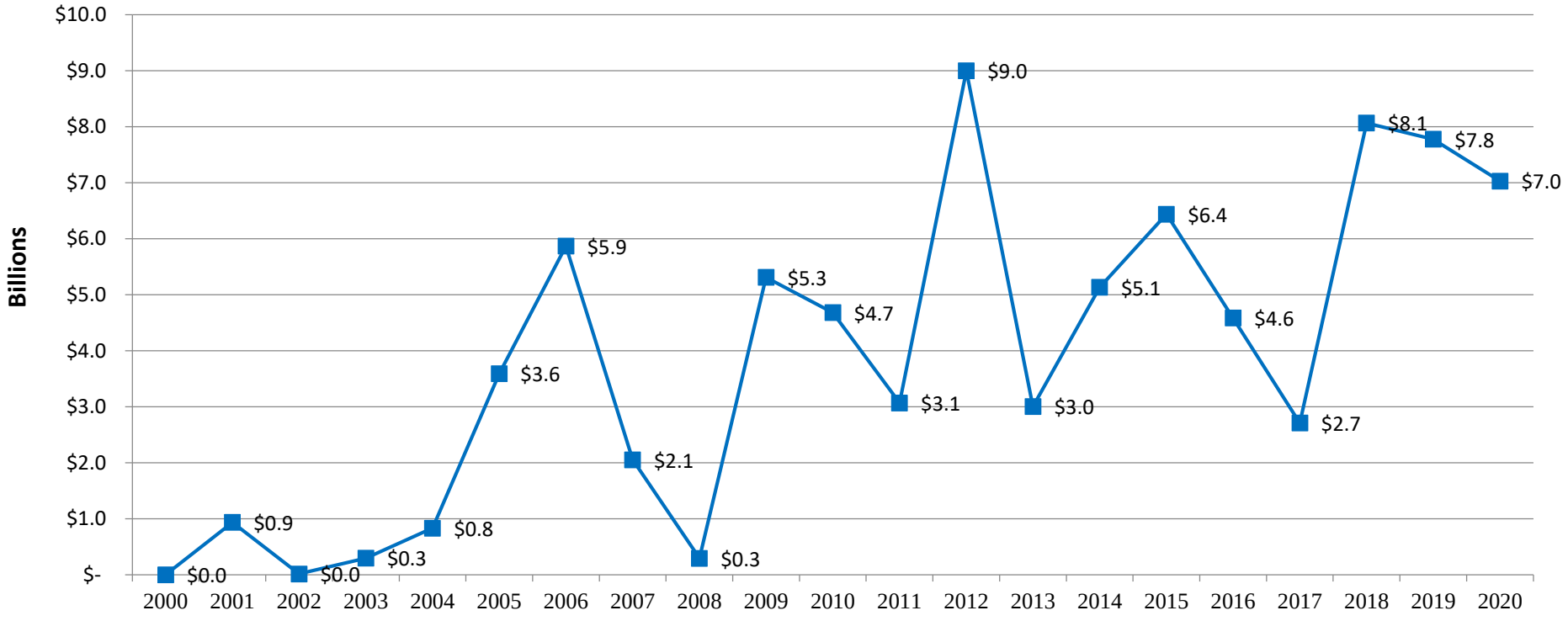


Note: The SEC entered into ten of the above corporate NPAs and DPAs: 2010 (1), 2011 (3), 2012 (1), 2013 (1), 2014 (1), 2015(1), and 2016 (2).

DOJ and SEC NPA and DPA Statistics

Monetary Recoveries, 2000-Present

Total Monetary Recoveries Related to NPAs and DPAs 2000-2020 YTD*



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

Declinations with Disgorgement

- DOJ has entered into 6 "declination with disgorgement" arrangements since the launch of the FCPA Pilot Program, with associated disgorgement amounts totaling approximately **$18 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
Cognizant Technology Solutions Corp.	2019	$2,976,210*

* 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.

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What Drives Outcomes Among NPAs, DPAs, and Declinations?

What Drives Outcomes?

DOJ Guidance: NPAs and DPAs

- 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?

DOJ Guidance: NPAs and DPAs

Justice Manual Principles of Federal Prosecution of Business Organizations

- "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
- "[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. . . . 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." JM 9-28.1100.B.

What Drives Outcomes?

NPAs and DPAs in Practice

- DOJ has not made a clear policy statement distinguishing when an NPA, DPA, or declination with disgorgement is appropriate.
- 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

"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, Assistant Attorney General Benczkowski 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" in order 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

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 President, General Counsel, COO and VP of Administration.
  - President and General Counsel allegedly authorized payment of the approximately $2 million bribe and concealed the bribe through false construction invoices.
  - President and 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

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

FRESENIUS MEDICAL CARE

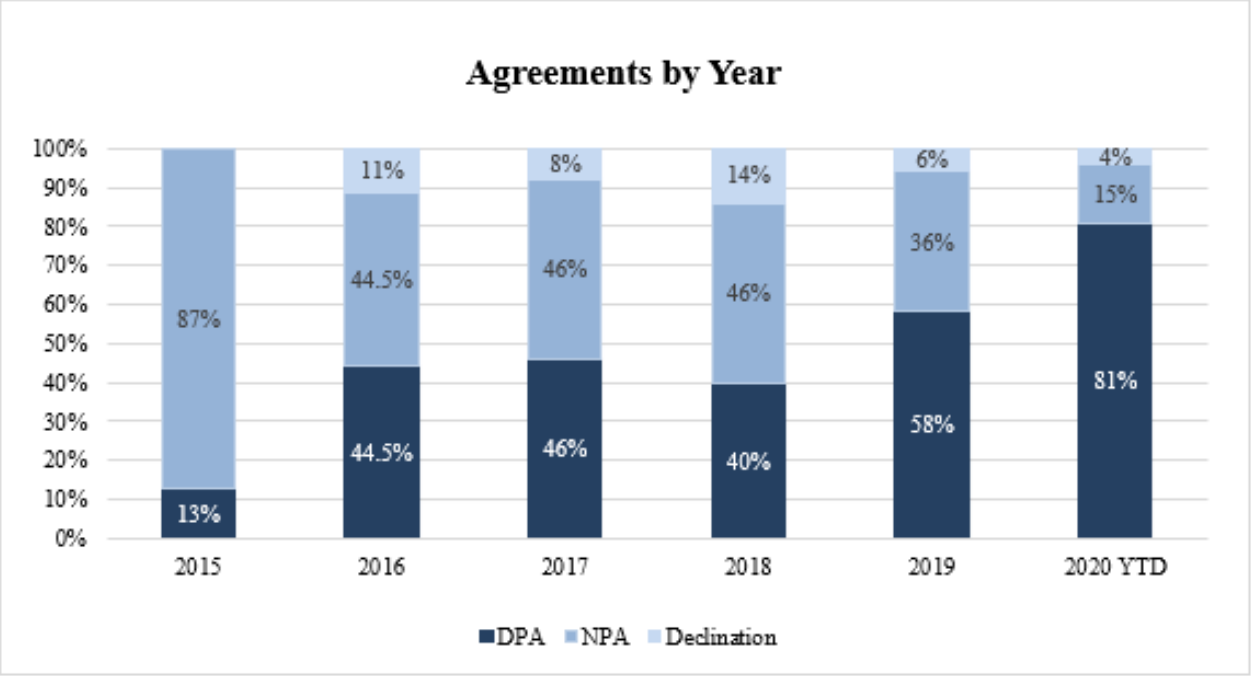
2019

- Fresenius self-disclosed potential FCPA violations resulting in:
  - An NPA and criminal penalty of approx. $85 million.
  - An SEC cease-and-desist order requiring Fresenius to pay $147 million in disgorgement + PJI.
- Although Fresenius received voluntary self-disclosure credit, the company did not receive full cooperation credit because it allegedly did not timely respond to certain requests or provide fulsome responses.
- Alleged aggravating circumstances: Pervasiveness of misconduct (misconduct allegedly occurred in 13 countries and continued in certain countries for 4 years after self-disclosure); significant profits ($140 million); length of alleged scheme (9 years).

What Drives Outcomes?

NPAs and DPAs in 2020

- 22 of the 26 NPAs and DPAs to date this year have been DPAs, marking a sharp decline in the percentage of NPAs on an annual basis.
  - There has been only one declination with disgorgement to date in 2020, so the balance of NPAs is not being subsumed by this new category of agreement.
- Since 2016, the number of DPAs and NPAs has been roughly even each year.



What Drives Outcomes?

NPAs and DPAs in 2020

- Four agreements concluded to date this year—all with mitigating circumstances—were NPAs.
- ***Alutiiq International Solutions, LLC ("AIS")*** **(June 2020)**
  - The NPA cited the fact that AIS's profits went directly to support Alaskan Native shareholders, who are residents of, or descendants of residents of, two Alaskan Native villages that are severely economically disadvantaged.
- ***Bank Hapoalim B.M. ("BHBM") and Bank Hapoalim (Switzerland) Ltd. ("BHS")*** **(April 2020)**
  - The NPA noted that BHS is in the process of closing its operations. The extreme measure of effectively going out of business may have weighed in favor of unusual leniency.
- ***Power Solutions International ("PSI")*** **(September 2020)**
  - The NPA noted that PSI had already settled a civil class action lawsuit and paid the SEC a civil monetary fine; it also noted that PSI would not be able to pay a criminal penalty "without seriously jeopardizing the Company's continued viability."
- ***Rockwater Northeast LLC and Select Energy Services, Inc.*** **(September 2020)**
  - These were alleged Clean Air Act violations investigated by the EPA and DOT, and six individuals pleaded guilty. Adequacy of prosecution of individuals is one factor that DOJ considers in making charging decisions.

What Drives Outcomes?

NPAs and DPAs in 2020

There were certain cases that would appear to have been strong contenders for NPAs in previous years, suggesting a possible move away from NPAs.

Propex Derivatives Pty Ltd (DPA) (2020)	***Merrill Lynch Commodities, Inc. (NPA) (2019)***
Propex entered into a DPA with DOJ Fraud and agreed to pay a combined $1 million to resolve allegations that from July 2012–March 2016, one of the company's traders engaged in "spoofing" (i.e. creating a false impression of increased supply/demand by placing orders on the market that one intends to cancel before execution).	MLCI entered into an NPA with DOJ Fraud and agreed to pay a combined $25 million to resolve allegations that from 2008–2014, MCLI's precious metal traders engaged in spoofing.
Propex engaged an independent compliance consultant to evaluate its program and "undertook a significant enhancement of its compliance program and internal controls."	Unlike Propex, Merrill Lynch did not engage an independent third party.
No voluntary disclosure credit; received credit for cooperation. The DPA did, however, note that the Spoofing Orders continued through March 2016, despite the trader's conduct being flagged for senior management in May 2014.	No voluntary disclosure credit; received credit for cooperation and remedial measures.

What Drives Outcomes?

NPAs and DPAs in 2020

Other companies similarly engaged in significant cooperation, but nonetheless received a DPA.

Pentax Medical (DPA) (2020)	***Fresenius (NPA) (2019)***
Entered into a DPA and paid $43 million in criminal fine and forfeiture to resolve allegations that the company violated the Federal Food, Drug, and Cosmetic Act.	Entered into an NPA for alleged FCPA violations and paid $85 million in criminal fine, $147 million in disgorgement and PJI.
Pentax did not receive voluntary self-disclosure credit, but DOJ awarded full cooperation credit for "proactively identifying issues and facts that would likely be of interest," "advising the [NJ USAO and DOJ] about facts and issues that were not the focus of the subpoena," submitting Medical Device Reports to the FDA before DOJ began its investigation, engaging in remedial measures, and enhancing its compliance program.	Fresenius received voluntary self-disclosure credit and partial credit for its cooperation, including, among other things: "conducting a thorough internal investigation; making regular factual presentations to the Department; . . . [and] collecting, analyzing, and organizing voluminous evidence and information from multiple jurisdictions for the Department."

What Drives Outcomes?

NPAs and DPAs in 2020

What conclusions can we draw?

- The decision to enter an NPA is driven by multiple factors (cooperation, remediation, severity of misconduct, etc.).
- Voluntary self-disclosure appears increasingly to be an important factor to obtaining an NPA.
  - With only one declination announced to date in 2020, it would appear that NPAs in 2020 have not been replaced with declinations.

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2020 Trends to Watch

2020 Trends to Watch

- **Focus on Corporate Compliance Programs**
- **DOJ Antitrust DPAs and NPAs**
- **Parent- vs. Subsidiary-Level Agreements**
- **Installment Payments**

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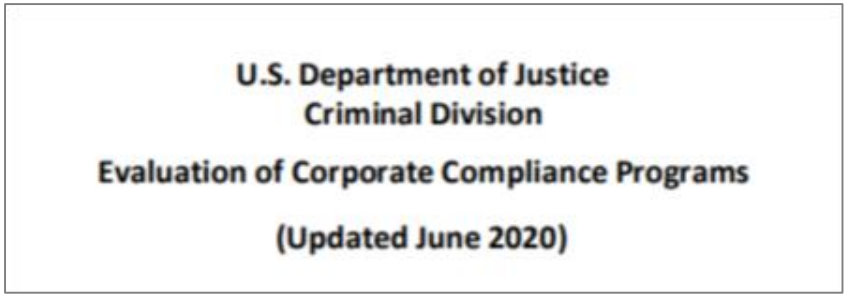
Trends to Watch 1: Focus on Corporate Compliance Programs

Trends to Watch: Compliance Program Focus

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.
- **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


U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

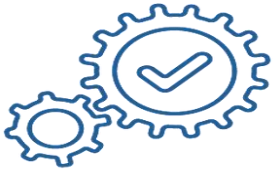
(Updated June 2020)

For additional information: https://www.gibsondunn.com/doj-updates-guidance-regarding-evaluation-of-corporate-compliance-programs/

Trends to Watch: Compliance Program Focus

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**?

Trends to Watch: Compliance Program Focus

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

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated June 2020)

Introduction

The "Principles of Federal Prosecution of Business Organizations" in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, the memorandum entitled "Selection of Monitors in Criminal Division Matters" issued by Assistant Attorney General Brian Benczkowski (hereafter, the "Benczkowski Memo") instructs prosecutors to consider, at the time of the resolution, "whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future" to determine whether a monitor is appropriate.

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

1

Trends to Watch: Compliance Program Focus

- 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.**

Trends to Watch: Compliance Program Focus

- Compliance program enhancements are a major policy focus for DOJ when negotiating DPAs and NPAs.

We've moved away from simply seeking ever-larger fine payments from corporations, and are in every case taking great care to achieve the maximum public benefit available using all of the tools at our disposal, be they fines, other monetary payments, improvements to internal processes such as compliance or reporting functions, or any number of oversight and assurance mechanisms.

This attention not just to corporate punishment, but also to corporate rehabilitation—which of course is a key way to deter future criminal conduct, decrease recidivism, and otherwise protect the public—is having, we believe, a real impact on corporate behavior, and it is something I have every confidence the Criminal Division will continue to prioritize in the years ahead.

--Acting Assistant Attorney General Brian C. Rabbitt (Remarks at Practicing Law Institute White Collar Conference (Sept. 23, 2020)

Trends to Watch: Compliance Program Focus

- 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.

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Trends to Watch 2:
DOJ Antitrust DPAs and NPAs

Trends to Watch: DOJ Antitrust DPAs and NPAs

Leniency and DPAs/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 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.

Trends to Watch: DOJ Antitrust DPAs and NPAs

Leniency and DPAs/NPAs

Consistent with its general disfavoring of NPAs, the Antitrust Division has entered into ***NPAs*** associated with ***only two investigations since 2006***.

- First, in **2011**, the Division, in connection with a number of other agencies participating in an interagency Financial Fraud Enforcement Task Force, reached NPAs with four major financial institutions (GE Funding, JPMorgan Chase, UBS AG, and Wachovia) to resolve allegations of anticompetitive conduct in the municipal bond derivatives market.

- Then, in **2016**, the Division reached NPAs with two defense contractors in connection with a broader investigation into alleged efforts to defraud the Foreign Military Financing Fund.

Trends to Watch: DOJ Antitrust DPAs and NPAs

Leniency and DPAs/NPAs

- Before 2019, the Division entered into ***only three DPAs***, all in 2013-2014.
- Two of these agreements were reached with major financial institutions—Royal Bank of Scotland and Lloyds Banking Group—on charges of manipulating LIBOR submissions. These DPAs were reached in conjunction with the DOJ Criminal Division. They were in part motivated by collateral consequences to the banks' abilities to do business that convictions could cause. The Antitrust Division at the time reiterated its general aversion to DPAs, and the then-Deputy Assistant Attorney General reinforced that there is ***no "exception for financial institutions permitting the use of NPAs or DPAs."***
- The third DPA, reached with Washington Gas Energy Systems for conspiracy to violate Federal procurement laws, was reached in conjunction with a number Federal agencies, including the US Attorney's Office for the District of Columbia, General Services Administration, SBA, and FBI.

Trends to Watch: DOJ Antitrust DPAs and NPAs

Increase in Antitrust DPAs

- Beginning in June 2019, we have seen a sharp increase in the use of DPAs by the Antitrust Division. The Division has since entered into ***six DPAs***, representing the first examples of these agreements being used to resolve ***purely antitrust-based charges***.
- ***Five*** of these agreements have been with companies connected to a common conspiracy investigation into anticompetitive conduct in the generic drug industry. In addition to the five that have entered into DPAs thus far, the Antitrust Division has charged two more companies in connection with this investigation.
  - Gibson Dunn navigated negotiation of the first of these agreements, which carried a criminal penalty of $225,000. Criminal penalties associated with this investigation have since ranged as high as $205 million.
- The ***sixth*** DPA was with Florida Cancer Specialists to resolve allegations of anticompetitive conduct in the oncology industry.

Trends to Watch: DOJ Antitrust DPAs and NPAs

Increase in Antitrust DPAs

Guidance for Practitioners

1. The six recent Antitrust DPAs, all in health care fields, indicate that the Division could be more willing to pursue a DPA where convictions would have collateral consequences such as exclusion from Federal health care programs. All of the DPAs have referenced such consequences as motivating factors.
2. Multiple of these agreements also included coverage for corporate directors, officers, and employees.
3. It is also noteworthy that the Division has not imposed continuing monitoring and reporting requirements in any of the six recent DPAs beyond one obligation to self-certify at the end of the DPA term; such requirements are not typical for Antitrust Division agreements.

Trends to Watch: DOJ Antitrust DPAs and NPAs

Antitrust Further Opens the Door for DPAs

- Additionally, in July 2019, **Assistant Attorney General Makan Delrahim** announced a formal 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.

Trends to Watch: DOJ Antitrust DPAs and NPAs

Antitrust Further Opens the Door for DPAs

- The invitation to use DPAs resulted in some speculation regarding Division's longstanding leniency program. Specifically, ***the availability of DPAs caused some to ask what incentives remain for companies to be first-movers for leniency purposes***, in particular because self-reporting was indicated as a factor in considering deferred prosecution.

Deputy Assistant Attorney Richard Powers remarked that the Division had heard that "***companies uncovering cartel conduct may no longer feel the need to seek leniency as quickly as possible***, but may instead sit tight and later advocate for a DPA if leniency is no longer available."

Powers explained that such a wait-and-see approach could be a "costly mistake," noting that ***"[l]eniency's exclusive benefits include complete immunity from criminal prosecution*** for the company and its covered cooperating employees" in addition to other benefits.

Powers has additionally stated that "[f]ull and truthful representations can pave the way for a fine reduction or . . . resolution by deferred prosecution agreement rather than by guilty plea" but that "cooperation is a potential mitigating factor, but it alone is not dispositive."

Trends to Watch: DOJ Antitrust DPAs and NPAs

Antitrust Further Opens the Door for DPAs

Guidance for Practitioners

1. This policy shift allows Antitrust Division prosecutors for the first time to consider compliance programs at the charging stage and not solely at sentencing.
2. Still, it remains to be seen exactly how the Division's consideration of compliance programs and the availability of DPAs generally will co-exist with the leniency program in practice.

GIBSON DUNN

Trends to Watch 3: Parent- v. Subsidiary-Level Resolutions

Trends to Watch: Spotlight on Entity Decisions

- Negotiating a subsidiary-level vs. parent-level agreement can help mitigate reputational and other collateral impacts—such as suspension or debarment.
- Depending on several factors, including the involvement and responsibility of the parent company and the length and severity of the offending conduct, among others, outcomes can look very different:

  - Parent-level NPA or DPA, only
  - Declination with disgorgement for parent or subsidiary
  - NPA obligating subsidiary only
  - NPA imposing continuing obligations on both parent and subsidiary
  - DPA with subsidiary, only
  - Plea Agreement

  Violations by multiple subsidiaries may resolve in a combination of these, or in a parent-only resolution

- Even in cases where the parent is not a signatory to the agreement, they can be on the hook for significant continuing obligations

Trends to Watch: Parent-Only Resolutions

Fresenius Medical Care AG & Co. KGaA ("Fresenius"), NPA 2019

- *Approximately $231 million imposed on parent to resolve investigations by the DOJ and SEC*
  - *$84,715,273 in criminal penalties*
  - *$147 million in disgorgement*
- *NPA resolved DOJ investigation into Fresenius's alleged corrupt scheme to obtain business in multiple foreign countries. Fresenius admitted to making improper payments to government officials to obtain or retain business in Angola and Saudi Arabia.*
- *Fresenius self-disclosed; it received partial cooperation credit.*
- *Fresenius agreed to an independent compliance monitor for two years, and self-monitoring for one year.*
- *On October 21, 2019, German prosecutors confirmed they are conducting an investigation based on findings in the NPA.*

Celadon Group, Inc., DPA 2019

- *$42.2 million in victim restitution and administrative cost assessed to parent, Celadon Group; no fine or further financial penalty*
- *DPA resolved alleged conspiracy between Celadon Group and its wholly owned subsidiary, Quality Companies, LLC, regarding securities fraud and books and records violations*
- *Celadon did not voluntarily disclose the conduct, however it:*
  - *retained an external law firm for independent investigation*
  - *informed DOJ of the investigation and its intent to cooperate*
  - *conducted significant remedial measures including separation of responsible individuals, new Chief Accounting Officer and Internal Auditor, and compliance program enhancements*
- *SEC separately charged two former top executives*

Trends to Watch: Subsidiary-Only Resolutions (FCPA Examples) Without Continuing Parent-Level Obligations

Panasonic Avionics Corp ("PAC"), DPA 2018

- *Subsidiary-level agreement ($137,403,812 penalty)*
- *Parent-level resolution with SEC ($143,199,019 disgorgement + PJI)*
- *No voluntary disclosure; full cooperation*
- *PAC: remedial measures, enhanced compliance program, continued cooperation, independent compliance monitor*
- *Alleged Facts: PAC high-level executive involvement and conduct "lasted for at least six years and spanned multiple countries"*
- *No continuing requirements for parent*

Panasonic
Panasonic Avionics Corporation

BK Medical, NPA 2016

- *Subsidiary-level agreement ($3,402,000 penalty)*
- *Parent-level resolution with SEC ($11,482,962 disgorgement + PJI)*
- *Voluntary disclosure by parent; incomplete cooperation*
- *BK Medical: "extensive" remedial measures and continued reporting and cooperation*
- *Alleged Facts: ten-year scheme*
- *No continuing requirements for parent*

bk medical

Polycom Declination with Disgorgement, 2018

Polycom

- *Subsidiary-level agreement ($30,978,000 disgorgement)*
- *Subsidiary-level resolution with SEC ($143,199,019 disgorgement + PJI)*
- *"Prompt, voluntary self-disclosure" by Polycom of subsidiary conduct; full cooperation*
- *Alleged Facts: conduct by Chinese subsidiary senior managers, including subsidiary VP; ultimate parent company was successor in interest with no responsibility for the underlying facts prior to acquisition in 2018*
- *No continuing requirements for ultimate parent*

Trends to Watch: Subsidiary-Only Resolutions (FCPA Examples) With Continuing Parent-Level Obligations

Microsoft Hungary, NPA 2019

- *Subsidiary-level agreement ($8,751,795 penalty)*
- *Parent-level resolution with SEC ($16,565,151 disgorgement + PJI)*
- *No voluntary disclosure; full cooperation*
- *MS Hungary and Microsoft:*
  - *engaged in extensive remedial measures*
  - *enhanced compliance program and internal controls*
  - *agreed to continued reporting and cooperation*
- *Agreement executed by both parent and subsidiary; corporate compliance program remedial requirements specific to Microsoft*

JPMorgan Securities (Asia Pacific) Limited ("JPM APAC"), NPA 2016

- *Subsidiary-level agreement ($72,000,000 penalty)*
- *Subsidiary-level resolution with SEC ($143,199,019 disgorgement + PJI)*
- *No voluntary disclosure; full cooperation*
- *JPM APAC and JPMorgan:*
  - *implemented remedial measures*
  - *enhanced compliance program and internal controls*
  - *agreed to continued reporting, cooperation*
- *Agreement executed by both parent and subsidiary; corporate compliance program remedial requirements specific to JPMorgan*
- *JPMorgan also paid $61.9M to Fed. R. Board*

Trends to Watch: Subsidiary-Only Resolutions (FCPA Examples) With Continuing Parent-Level Obligations (Continued)

Hewlett Packard 2014

HP Co. (Parent)

- *Parent-level resolution with SEC ($34,000,000 disgorgement + PJI)*
- *No separate DOJ resolution*
- *Bound by terms of all three subsidiary-level agreements*

Poland: DPA

- *Subsidiary-level agreement ($15,450,224 penalty)*
- *HP Poland:*
  - *credited for past and continuing cooperation*
- *HP Co. (Parent):*
  - *agreed to corporate compliance program enhancements, future reporting*
- *Only subsidiary can breach*
- *Alleged Facts:*
  - *involved one HP Poland executive*
- *Executed by subsidiary*

Mexico: NPA

- *Subsidiary-level agreement ($2,527,750 forfeiture)*
- *Both HP Mexico and HP Co.:*
  - *cooperated*
  - *implemented remedial measures*
  - *enhanced compliance program and internal controls*
  - *agreed to continued reporting, cooperation*
- *Only subsidiary can breach*
- *Alleged Facts: low-level employee and third-party conduct*
- *Executed by subsidiary*

Russia: Plea Agreement

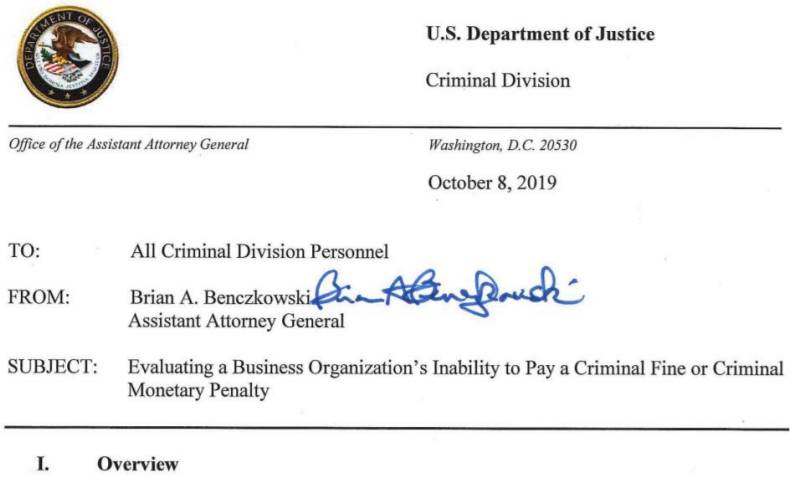
- *Subsidiary-level agreement ($58,772,250 penalty)*
- *HP Russia:*
  - *agreed to continued reporting, cooperation*
  - *enhanced compliance program and internal controls*
- *HP Co. (Parent): agreed to corporate compliance program enhancements, future reporting*
- *Parent and sub can breach*
- *Alleged Facts:*
  - *involved HP Russia executives and $ millions in payments using slush funds*
- *Executed by subsidiary*

GIBSON DUNN

Trends to Watch 4:
Installment Payments

Trends to Watch: Installment Payments for NPAs and DPAs

- **Installment Payments**
  - Lump sump payments are the **norm** for DPAs and NPAs. An unusual number of agreements in 2020 have incorporated staggered or installment payments.
  - Typically, installment payments occur in "ability to pay" situations in which a company demonstrates—according to factors in DOJ Criminal Division guidance*—its inability to pay a full penalty immediately.
    - In seeking an ability to pay settlement, a Company generally must provide a set of financial material to the government including audited financial statements, information regarding liens and encumbrances, and officers' compensation.



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 8, 2019

TO: All Criminal Division Personnel

FROM: Brian A. Benczkowski
Assistant Attorney General

SUBJECT: Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty

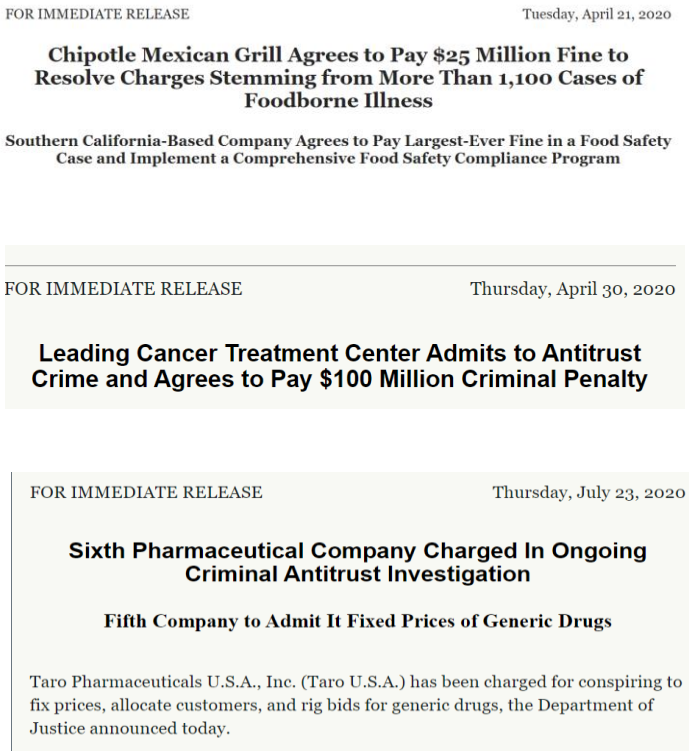
I. Overview

GIBSON DUNN

* Memorandum from Brian A. Benczkowski, Assistant Attorney General, to All Criminal Division Personnel, Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (Oct. 8, 2019).

Trends to Watch: Installment Payments for NPAs and DPAs (cont.)

- **Recent Installment Payment Examples**
  - **Chipotle** (April 2020): $25,000,000 criminal penalty.
    - One lump sum payment followed by three equal installments over the following 90 days with payments every 30 days.
  - **Florida Cancer Specialists & Research Institute LLC** (April 2020): $100,000,000 criminal penalty.
    - Five unequal installments over three-and-a-half years with payments every six-months-to-a-year.
  - **Taro Pharmaceuticals U.S.A.** (July 2020): ~$205,000,000 criminal penalty.
    - Two equal installments over one year with payments at the start and end of the one-year period.



FOR IMMEDIATE RELEASE Tuesday, April 21, 2020

Chipotle Mexican Grill Agrees to Pay $25 Million Fine to Resolve Charges Stemming from More Than 1,100 Cases of Foodborne Illness

Southern California-Based Company Agrees to Pay Largest-Ever Fine in a Food Safety Case and Implement a Comprehensive Food Safety Compliance Program

FOR IMMEDIATE RELEASE Thursday, April 30, 2020

Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay $100 Million Criminal Penalty

FOR IMMEDIATE RELEASE Thursday, July 23, 2020

Sixth Pharmaceutical Company Charged In Ongoing Criminal Antitrust Investigation

Fifth Company to Admit It Fixed Prices of Generic Drugs

Taro Pharmaceuticals U.S.A., Inc. (Taro U.S.A.) has been charged for conspiring to fix prices, allocate customers, and rig bids for generic drugs, the Department of Justice announced today.

GIBSON DUNN

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 Technip FMC plc ("Technip")** entered into a **DPA** with DOJ in 2019 to resolve FCPA bribery allegations based on two independent bribery schemes in Brazil and Iraq by predecessor entities.
- Technip also reached a **settlement** with the SEC and **Leniency Agreements** with three Brazilian authorities.
- DOJ credited 72% of the payments to Brazilian authorities.

- **Brazil-based Petróleo Brasileiro S.A. – Petrobras ("Petrobras")** entered into an **NPA** with DOJ in 2018 to resolve FCPA accounting allegations based on the conduct of former executives who were engaged in a scheme of embezzlement and political payoffs.
- Petrobras also reached a **settlement** with the SEC and **a Leniency Agreement** with Brazil's Misterio Publico Federal (MPF).
- The DOJ credited 90% of the payments to the SEC and the MPF, and the SEC also credited the disgorgement amount against a prior shareholders' class action settlement. Both the DOJ and the SEC recognized Petrobras's cooperation, including in proceedings in Brazil.

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

Cross-Border Considerations

The *Airbus DPA* was the result of novel international law enforcement collaboration, that interestingly included express recognition by DOJ of the limits of U.S. jurisdiction.

AIRBUS

2020

- **France-based Airbus SE** entered into a **DPA** with DOJ in 2020 to resolve FCPA, Arms Export Control Act (AECA), and International Traffic in Arms Regulations (ITAR) charges.
- The global resolution also involved a **DPA** with the UK's Serious Fraud Office (SFO) and a **settlement** with France's Parquet National Financier (PNF).
- Airbus agreed to pay combined penalties of more than **$3.9 billion**, and DOJ will credit a portion of the amount the Company pays to PNF.
- Just months after the global settlement, the SFO brought additional charges against Airbus subsidiary GPT for alleged corruption in Saudi Arabia.

*"The Airbus resolution was particularly noteworthy because it reflected a collaborative and cooperative effort between the United States and our counterparts in the United Kingdom and France – a combination of enforcement authorities not seen before in this area of the law."**

"[T]he Company is neither a U.S. issuer nor a domestic concern, and the territorial jurisdiction over the corrupt conduct is limited; in addition, although the United States' interests are significant enough to warrant a resolution, France's and the United Kingdom's interests over the Company's corruption-related conduct, and jurisdictional bases for a resolution, are significantly stronger, and thus the [U.S. government has] deferred to France and the United Kingdom to vindicate their respective interests as those countries deem appropriate[.]" – Airbus DPA

* Statement by Acting Assistant Attorney General Brian C. Rabbitt on September 23, 2020 at the PLI White Collar Conference in Washington, D.C.

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, 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 not obtain cooperation credit unless it waives privilege over witness accounts, notes, and transcripts obtained during the course of the company's investigation.
    - 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.***
  - 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 <u>eight</u> corporate DPAs since the UK introduced its DPA program in 2014, with the most recent in July 2020.

GIBSON DUNN

Post-Resolution Pitfalls

Post-Resolution Pitfalls

Overview

- Recent cautionary tales have illustrated that companies should not view an executed resolution as the end of the road—rather, the government will track 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.
- Significant lapses beyond to-be-expected compliance issues could be cause to extend—and, in some cases, expand—monitorships, self-reporting, or other government oversight for months or even years and invite further scrutiny or investigations.

ODEBRECHT

2016

- 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.

Post-Resolution Pitfalls

Agreement Extensions

2013

- In 2013, **German engineering conglomerate Bilfinger** entered into a DPA regarding FCPA charges. As part of the DPA, DOJ imposed a corporate monitor for 18 months to oversee the company's efforts in improving its compliance program.
- in 2016, the independent compliance monitor reported to DOJ that the company had not done enough to improve its compliance program. DOJ, as a result, extended Bilfinger's DPA for an additional two years.

2013

- In November 2012, **Moneygram** entered into a five-year DPA after allegedly willfully failing to maintain an effective AML program and aiding and abetting wire fraud.
- During the course of the DPA, MoneyGram allegedly experienced significant weaknesses in its AML and anti-fraud program, inadequately disclosed these weaknesses to the government, and failed to complete all of the DPA's required enhanced compliance undertakings. As a result, MoneyGram allegedly processed at least $125 million in additional consumer fraud transactions between April 2015 and October 2016.

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.

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.

UniCredit Bank

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.

practice fusion

2020

7. It is understood that Practice Fusion shall:

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;

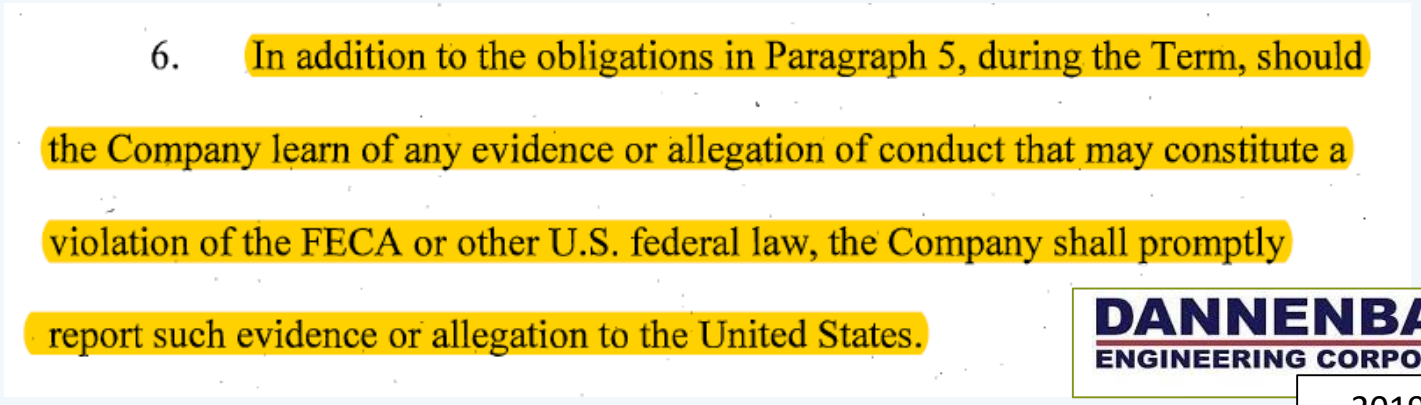
TechnipFMC

2019

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.

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.

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

AIRBUS

2020

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.

INSYS THERAPEUTICS, INC.

2019

Key Post-Resolution Terms: Breach Determinations

- The length of a possible extension under an NPA/DPA varies but is often one year.

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. Any extension

Ericsson 2019

- Some agreements also cap the length of the total term of the deferral-of-prosecution period.

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.

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 yea

FRESENIUS MEDICAL CARE

2019

- 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.

(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.

MTS

2019

There has been a downward trend in the DOJ imposing monitorships over the last several years. Only one independent monitor has been imposed in 2020 (Telefonaktiebolaget LM Ericsson). However, the imposition of monitors is proliferating in other enforcement organizations, such as DFS, Antitrust, and ENRD.

Key Post-Resolution Terms: Monitorship Provisions

- In cases where a monitorship is warranted, the Benczkowski 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 candidate have **no adversarial relationship with the USAO in *any* matter**.
- A facial reading of this provision in an NPA or DPA could preclude virtually all white collar defense practitioners from serving as monitors.

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

ambiance Apparel

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.

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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.

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

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.

Collateral Litigation

- **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)

Collateral Litigation (cont.)

- **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.)

- **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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*** Continued on next page**

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