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# Deferred Prosecution Agreements: Too Big to Jail and the Potential of Judicial Oversight Combined with Congressional Legislation

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# Deferred Prosecution Agreements: “Too Big To Jail” and the Potential of Judicial Oversight Combined with Congressional Legislation

## I. INTRODUCTION

In 2002 the United States indicted Arthur Andersen, one of the major accounting firms in the nation at that time, causing Andersen’s downfall.<sup>1</sup> Since that time, prosecutors have been more cautious about indicting major financial institutions. Instead, prosecutors have utilized Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) to curb illegal corporate conduct, rather than relying on criminal charges.<sup>2</sup> HSBC’s recent record DPA of \$1.92 billion in December 2012 demonstrated the compromise prosecutors sought between a harsh money laundering indictment and the need for HSBC to be held responsible for its illegal actions.<sup>3</sup> The HSBC agreement was also notable for U.S. District Judge John Gleeson’s approval and oversight of the DPA.<sup>4</sup> Judge Gleeson’s role in HSBC’s DPA was a shift from the norm and perhaps established a precedent for future judicial oversight in DPAs, which this Note will argue could greatly improve the current way DPAs operate.

Part II of this Note analyzes the history of corporate prosecution

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1. Matt Taibbi, *New Bank Investigations: Real Action, or More of the Same?*, ROLLING STONE TAIBBLOG (Aug. 8, 2013), <http://www.rollingstone.com/politics/blogs/taibblog/new-bank-investigations-real-action-or-more-of-the-same-20130808?print=true> (taking a pretty aggressive stance by calling for high level executives to be sentenced to jail time).

2. Note that while prosecutors use both NPAs and DPAs this Note focuses solely on DPAs.

3. Ben Protess and Jessica Silver-Greenberg, *HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES (Dec. 10, 2012, 4:10 PM), <http://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering/>.

4. Jonathan Stempel, *HSBC wins OK of Record \$1.92 Billion Money-Laundering Settlement*, REUTERS (July 2, 2013, 7:15 PM), <http://www.reuters.com/article/2013/07/02/us-hsbc-settlement-laundering-idUSBRE9611B220130702>.

in America.<sup>5</sup> Part III outlines the specific case of Arthur Andersen and the prosecutorial shift to the use of DPAs.<sup>6</sup> Part IV examines the effectiveness of DPAs, while analyzing the deficiencies associated with them.<sup>7</sup> Part V discusses the impact and implementation of DPAs in the wake of the 2008 financial crisis.<sup>8</sup> Part VI examines the potential for judicial oversight in DPAs and its advantages and argues that congressional legislation is needed to amend the Speedy Trial Act to require judicial oversight in DPAs in an effort to make them fair and reasonable in light of the circumstances surrounding each agreement.<sup>9</sup>

## II. HISTORICAL ANALYSIS OF CORPORATE CRIMINAL LIABILITY

Under English common law a corporation could not be prosecuted, since in theory it could not commit a crime.<sup>10</sup> This theory was firmly entrenched until around 1700.<sup>11</sup> However, courts began to step in once corporations started to gain greater power and have significant societal consequences.<sup>12</sup> One of the first instances where the King's Bench imputed liability to a corporation was in 1635 when the Bench found a corporation liable for nonfeasance, or the failure to prevent a bad act.<sup>13</sup> After 1635, the courts had to determine whether the corporation had failed to prevent a bad act or whether the corporation actively engaged in a bad act, known as misfeasance, for which the

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5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part V.

9. *See infra* Part VI.

10. I, Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 455 (1765).

11. Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 134 (2008). Diskant compares the United States' unique practice of corporate criminal liability with some of its other Western counterparts. *Id.* In his discussion on corporate prosecutorial history, he outlines that many people before the nineteenth century did not believe corporations could be prosecuted because they lacked the required moral blameworthiness to be placed in the criminal system. *Id.*

12. Ved P. Nanda, *Chapter 2 Corporate Criminal Liability in the United States: Is A New Approach Warranted?*, 9 IUS GENTIUM 63, 66 (2011). The article argues that the need for greater corporate penalties has been severely hindered by the power of the regulatory state. *Id.* The article calls for scholars and academics to see the negative consequences of the current system and implement reform. *Id.*

13. *Id.*

corporation would not be held liable.<sup>14</sup> If a corporation committed misfeasance, it was not indicted, on the theory that a corporation was not a person and lacked the mental capacity to commit an illegal act.<sup>15</sup> These first instances of corporate criminal liability usually were against quasi-corporations, such as municipalities for a public nuisance.<sup>16</sup> Subsequently though, corporations were held liable for minor civil offenses, such as the violation of police regulations.<sup>17</sup>

By the 1800s public corporations were held criminally liable for the sort of public nuisance violations for which quasi-corporations had previously been held liable.<sup>18</sup> As the commercial corporations began to gain more power and influence, courts started to impute criminal liability to corporations for all offenses except for those that required criminal intent.<sup>19</sup> By the mid-1800s American courts held corporations liable for misfeasance.<sup>20</sup>

It was not until the twentieth century that American corporations were held liable for crimes of intent.<sup>21</sup> The case establishing this doctrine in American jurisprudence was *New York Central & Hudson River Railroad Company v. United States*.<sup>22</sup> In this seminal case, Justice Day held that a corporation is responsible for acts, not directly within its control, which it has authorized an agent to complete.<sup>23</sup> Since

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14. *Id.*

15. *Id.* at 66.

16. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1480 (1996) These instances of public nuisances usually involved a bridge or road that the previous inhabitants of a village or town had erected and maintained, which the new inhabitants of the village or town were required to maintain. *Id.*

17. James D. Cox & Thomas L  e Hazen, TREATISE ON THE LAW OF CORPORATIONS § 8:21 (3d).

18. Khanna, *supra* note 16, at 1481.

19. *Id.*, at 1481. In England this practice began to take hold around the mid-nineteenth century as it did in America. *Id.*

20. See e.g., *State v. Morris & E.R. Co.*, 23 N.J. 360 (1852) (holding that an indictment for misfeasance would stand against a corporation); see also *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. 339 (1854) (holding that a corporation could be indicted for misfeasance as well as nonfeasance). These initial cases involved public nuisance incidents similar to those quasi-corporations had previously began to be held liable for in England.

21. Khanna, *supra* note 16, at 1482.

22. 212 U.S. 481, 493-94 (1909) (holding that corporations no longer were immune from criminal prosecutions). The theory was that the corporation could be imputed with knowledge of its employee's actions during the course of their employment and as a result could be criminally culpable for those actions. *Id.*

23. *Id.* at 493-94.

this case, corporations have been responsible for the criminal actions of their employees if the employees were acting to benefit the corporation and their illegal actions were within the scope of their employment.<sup>24</sup> Subsequent cases expanded this doctrine to include liability for corporate agents acting without authority or even contrary to express instructions given to them.<sup>25</sup> The doctrine was further enlarged to hold corporations liable for willful employee actions that did not have a criminal or evil purpose.<sup>26</sup>

While the doctrine for which corporations could be held criminally liable was well established in America before the 1990s, corporate indictments played a small role in criminal law.<sup>27</sup> However, the nature of corporate indictments began to change with the Sentencing Reform Act of 1984.<sup>28</sup> Congress enacted the Sentencing Reform Act to give judges more control in the ultimate length of the sentence and to reduce unjustifiably wide disparities in sentencing.<sup>29</sup> The Sentencing Guidelines drastically increased the potential consequences for illegal corporate conduct.<sup>30</sup> Moreover, the Sentencing Guidelines increased incentives for corporations to take preventative measures to ensure employees would not commit crime.<sup>31</sup> They also created incentives for

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24. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 802-803 (2013). Markoff argues that the indictment and subsequent collapse of Arthur Andersen was an atypical example of what happens to a large corporation when it is indicted. *Id.* Rather, for the vast majority of corporations an indictment is not a death sentence. *Id.*

25. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (attempting through its holding to make corporations more cognizant of their employees actions and to deter them from lackadaisical supervision of their business activities).

26. *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1963) (holding that while the truck drivers did not necessarily act with an evil or criminal intent, Steere Tank Lines could still be held accountable for their actions).

27. Markoff, *supra* note 24, at 803. While corporations were prosecuted before the 1990s, the fines were very small compared to the fines corporations are subject to today. *Id.* Part of the reason for the guidelines was to increase corporate punishment because the small fines often did not rise to the level of damaged caused. *Id.*

28. Sentencing Reform Act, 18 U.S.C § 3551 (1984); see Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 206 (1993).

29. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988) (providing background to the guidelines and outlining six different compromises included within the guidelines).

30. Markoff, *supra* note 24, at 803.

31. Nagel & Swenson, *supra* note 28, at 210.

corporations to take steps to ensure that employees who committed a crime would be held liable for their conduct.<sup>32</sup>

### III. TRANSITION TO THE USE OF DEFERRED PROSECUTION AGREEMENTS

The Department of Justice (DOJ) began using DPAs<sup>33</sup> in the 1990s.<sup>34</sup> Before the 1990s, prosecutors were forced to choose between indicting a corporation and not pressing charges at all.<sup>35</sup> In more recent years, however, DPAs have become the main tool the government uses to curtail corporate criminal conduct.<sup>36</sup> From 2000 to 2012 there were 245 corporate settlement agreements.<sup>37</sup> From 1992 to 1999 there were only twelve prosecution agreements.<sup>38</sup> In 2012 alone, the DOJ and Securities and Exchange Commission (SEC) entered into 36 settlement agreements.<sup>39</sup> The financial penalties that came with these recent DPAs have been fairly substantial, with the monetary penalties resulting from

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32. Nagel & Swenson, *supra* note 28, at 210 (noting that the sentencing guidelines established a consensus that corporate wrongdoers should be held accountable for their actions).

33. A DPA is a voluntary agreement that takes the place of a criminal charge in which a prosecutor agrees to withhold the prosecution of a defendant so long as the defendant complies with the provisions outlined in the agreement. For example a case of corporate fraud might be settled with a DPA, which could include provisions such as fines, corporate reforms, and full cooperation with the prosecution during the investigation. Once the defendant has complied with the provisions of the agreement the prosecutor will dismiss the charges. See Benjamin M. Greenblum, *What Happens to A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1863-65 (2005).

34. Memo from Cadwalader, Wickersham & Taft, LLP, *Antitrust Division Enters Into First Deferred Prosecution Agreement* (Feb. 27, 2013), [http://www.martindale.com/members/Article\\_Attachment.aspx?od=296452&id=1692684&filename=asr-1692686.Antitrust.pdf](http://www.martindale.com/members/Article_Attachment.aspx?od=296452&id=1692684&filename=asr-1692686.Antitrust.pdf) (outlining the use of DPAs by the Antitrust Division under the Obama administration).

35. *Id.*

36. *Id.* at 1.

37. Client Letter from Gibson Dunn, *2012 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)* (January 3, 2013), <http://www.gibsondunn.com/publications/Documents/2012YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf> (note that the 245 agreements include both DPAs and NPAs).

38. Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, U. OF VA. SCH. OF L., [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/home.suphp](http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp) (last updated Sept. 9, 2013) (the agreements referred to include DPAs and NPAs).

39. Gibson Dunn, *supra* note 37 at 2 (this includes NPAs as well as DPAs).

the 2012 agreements netting almost \$9 billion by themselves.<sup>40</sup> However, many people have questioned whether these penalties actually curtail corporate criminal actions.<sup>41</sup> In response to critics, leading proponents of DPAs, such as Assistant Attorney General Lanny Breuer, have argued that DPAs force corporations to acknowledge and correct their misconduct without the potentially disastrous effects of an indictment.<sup>42</sup>

#### A. *The Arthur Andersen Collapse*

The Arthur Andersen collapse in 2002 truly cemented DPAs as the preferred method for dealing with corporate misconduct. On March 14, 2002, Arthur Andersen was indicted on a felony count of obstruction of justice<sup>43</sup> resulting from employees shredding documents relating to the Enron scandal.<sup>44</sup> On June 15, 2002, Arthur Andersen was convicted in U.S. District Court for the Southern District of Texas.<sup>45</sup> However, the Supreme Court reversed the conviction on May 31, 2005.<sup>46</sup> Yet by the time the reversal took effect, the damage to Andersen had already been accomplished.<sup>47</sup> Though the maximum

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40. *Id.*

41. See, e.g., Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942 (2005) (arguing that corporations should essentially have three strikes before they are ordered to dissolve); Randall D. Eliason, *We Need to Indict Them*, LEGAL TIMES, (Sept. 22, 2008), available at [http://www.wcl.american.edu/faculty/eliason/LegalTimes\\_9\\_22\\_08.pdf](http://www.wcl.american.edu/faculty/eliason/LegalTimes_9_22_08.pdf) (arguing that DPAs will not deter corporate criminal conduct).

42. Lanny A. Breuer, U.S. Dep't of Justice, Address at the New York City Bar Association (Sept. 13, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131> (discussing the advantages of DPAs and the tremendous accountability they force corporations to have).

43. Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917, 921 (2003) (describing Arthur Andersen's often aggressive legal strategy in connection with its obstruction to justice charges and the fallout that they had).

44. Floyd Norris, *Execution Before Trial for Andersen*, N.Y. TIMES (Mar. 15, 2002), <http://www.nytimes.com/2002/03/15/business/enron-s-many-strands-news-analysis-execution-before-trial-for-andersen.html> (describing the consequences of an Andersen indictment and the small possibility that Andersen would be able to survive even if they won at trial).

45. *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 284 (5th Cir. 2004).

46. *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 708 (2005) (holding that due to flawed jury instruction the conviction could not be upheld).

47. James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509, 510 (July 2006).

penalty for Andersen would have been only a \$500,000 fine, many people believed the indictment itself was all that was needed to condemn the firm.<sup>48</sup> The firm was effectively destroyed well before the conviction because the vast majority of its major clients defected.<sup>49</sup> The majority of Andersen's 88,000 employees were either unemployed or no longer with the firm by the time of the initial conviction.<sup>50</sup> In America alone, 28,000 employees lost their jobs, but only a handful of them were involved in the document shredding.<sup>51</sup>

### B. *Implementation of DPAs*

DPAs allow the government to impose fines on the corporation and force the corporation to be monitored.<sup>52</sup> In this way the SEC or DOJ is able to ensure corporate compliance with the provisions established by the DPA.<sup>53</sup> In a DPA, the prosecutor files charges against the entity but agrees to suspend prosecution as long as the corporation complies with the terms outlined in the agreement.<sup>54</sup> The agreement usually consists of an affirmation that the company will fully cooperate with the government investigation, including investigations of employees.<sup>55</sup> Additionally, DPAs usually require the improvement or enactment of internal compliance programs, which may include independent monitors.<sup>56</sup> DPAs almost always include fines or penalties, and the company has to refund any illegally obtained money or place

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48. Norris, *supra* note 44, at C1.

49. Kelly, *supra* note 47, at 510 (giving a general overview of the facts behind the indictment and why Andersen was unable to survive); Penelope Patsuris, *Andersen Clients Evacuate Post-Verdict*, FORBES (Aug. 8, 2002, 4:00 PM), <http://www.forbes.com/2002/03/13/0313andersen.html>. In the six months following Arthur Andersen's prohibition from auditing clients on August 31, the firm lost almost 1.4 billion in revenue. *Id.* Some of the major clients that defected were RailWorks, Alliant Energy, and Brio Software. *Id.*

50. Kelly, *supra* note 47, at 510.

51. Taibbi, *supra* note 1.

52. Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES (April 9, 2008), [http://www.nytimes.com/2008/04/09/washington/09justice.html?\\_r=1&pagewanted=all&](http://www.nytimes.com/2008/04/09/washington/09justice.html?_r=1&pagewanted=all&).

53. *Id.*

54. P.J. Meitl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 14 (2007).

55. *Id.* at 11.

56. *Id.* at 2.



those gains in a special fund.<sup>57</sup> DPAs do not prevent the prosecution of individuals within the corporation regardless of whether the government agrees to defer prosecution.<sup>58</sup>

DPAs have created controversy in some high profile instances. One such instance was when a medical supply company agreed to pay the former Attorney General John Ashcroft's firm up to \$52 million as an independent monitor to avoid prosecution.<sup>59</sup> Oftentimes the companies that agree to the DPAs are actually the ones who negotiate the fee with the outside monitors, a situation that legal scholars indicate could open the possibility for companies to exploit the system because they may be willing to pay the independent monitors more to enhance leniency.<sup>60</sup>

### C. *Controlling Mechanisms for Deferred Prosecution Agreements*

The following memos from high-ranking Department of Justice officials provide a structure for how DPAs are implemented. As of this date, there has not been any formal congressional legislation on DPAs. While the memos have continued to make improvements to the process, there is still a need for judicial and congressional oversight.<sup>61</sup>

#### 1. The Holder Memo

In 1999 then-Assistant Attorney General Eric Holder issued a memo (the Holder Memo) dictating practices surrounding a corporation's willingness to cooperate with the DOJ.<sup>62</sup> The Memo established a series of factors to be considered when contemplating an

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57. *Id.* at 11.

58. Breuer, *supra* note 42.

59. Lichtblau, *supra* note 52.

60. Philip Shenon, *Ashcroft Deal Brings Scrutiny to Justice Dept.*, N.Y. TIMES (January 10, 2008), <http://www.nytimes.com/2008/01/10/washington/10justice.html?pagewanted=all&r=0>.

61. Inna Dexter, *Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations*, 20 GEO. J. LEGAL ETHICS 515, 516 (2007). Note though that Dexter mainly argues for congressional legislation because too much deference is given to prosecutors in DPAs. *Id.*

62. Susan B. Heyman, *Bottoms-Up: An Alternative Approach for Investigating Corporate Malfeasance*, 37 AM. J. CRIM. L. 163, 173 (2010).

indictment of a corporation.<sup>63</sup> The Holder Memo also enhanced the doctrine of *respondeat superior*.<sup>64</sup> Corporations were to be held liable for their agents' actions regardless of whether the corporations had internal policies prohibiting such conduct.<sup>65</sup> The Memo urged prosecutors to consider charging the corporation in addition to charging individual actors within the corporation.<sup>66</sup>

## 2. The Thompson Memo

In response to the Enron scandal and the Arthur Andersen crisis, then-Deputy Attorney General Larry Thompson issued a memorandum (the Thompson Memo), which superseded the Holder Memo, titled "Principles of Federal Prosecution of Business Organizations."<sup>67</sup> The Thompson memo left prosecutors with wide discretion as to whether to indict a corporation.<sup>68</sup> The disparity in power generated by the Thompson Memo created a lack of transparency and potential infringement on constitutional rights.<sup>69</sup> The Thompson Memo toughened the standards outlined in the Holder Memo and increased scrutiny on corporate cooperation.<sup>70</sup> The Department's message had

63. Memorandum from Deputy Att'y Gen. Eric H. Holder, Jr. to All Component Heads and U.S. Att'ys (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> [hereinafter Holder Memo].

64. Carmen Couden, *The Thompson Memorandum: A Revised Solution or Just A Problem?*, 30 J. CORP. L. 405, 408 (2005).

65. *Id.*

66. *Id.*

67. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys, regarding Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memorandum]. See Joan-Alice M. Burn, *United States v. Stein: Has the "Perfect Storm" Led to a Sea Change?*, 32 DEL. J. CORP. L. 859, 862-4 (2007).

68. Thompson Memorandum, *supra* note 67.

69. Dexter, *supra* note 61, at 516. Companies were not informed which of the nine factors in the Thompson Memo would be most important during their investigation. *Id.* Due to this ambiguity prosecutors obtained almost limitless cooperation. *Id.* Also, to determine whether a company was cooperating, prosecutors were informed to look at whether the company had waived its attorney client privilege, and whether the company was paying the legal fees of employees under investigation. *Id.* This created incentives for companies to disregard their employees' constitutional rights. *Id.*

70. Rebecca C.E. McFadyen, *The Thompson Memo: Its Predecessors, Its Successor, and Its Effect on Corporate Attorney-Client Privilege*, 8 J. BUS. & SEC. L. 23, 26 (2007). McFadyen argues that the Thompson Memo encouraged prosecutors to assess a

two parts: (1) corporations that cooperated would receive major benefits, possibly affecting their survival,<sup>71</sup> and (2) the cooperation must be authentic to ensure that the corporation received such benefits.<sup>72</sup>

### 3. The McNulty Memo

In response to a District Court's decision that the Thompson Memo violated constitutional rights,<sup>73</sup> then-Attorney General Paul McNulty issued a memorandum on December 6, 2012, also titled "Principles of Federal Prosecution of Business Organizations" (the McNulty Memo).<sup>74</sup> This Memo superseded the Thompson Memo,<sup>75</sup> and revised its language regarding the waiver of corporate privileges.<sup>76</sup> Under the McNulty Memo, a waiver of attorney-client privilege was no longer required to find that the corporation cooperated with the government during an investigation.<sup>77</sup> Some critics viewed the Memo as an effort to quiet opponents rather than make meaningful changes because it did not take away many of the pressures that prosecutors could place on companies.<sup>78</sup> Prosecutors could still pressure companies

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corporation's cooperation by the factors outlined in the memo. *Id.* These factors essentially required corporations to be extremely deferential to prosecutors and forced corporations to help catch illegal conduct. *Id.*

71. Christopher A. Wray, Assistant Att'y Gen., Dep't of Justice, Criminal Div., Remarks to the Assoc. of Certified Fraud Exam'rs Mid-South Chapter (Sept. 2, 2002), *available at* <http://www.justice.gov/criminal/pr/speeches-testimony/2004/september/09-02-04wray-remarks-memphis.pdf>.

72. *Id.*

73. *United States v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006). The case was against KPMG employees. *Id.* The court was troubled by the fact that the Thompson Memo took into account whether KPMG would pay for the attorney fees of former employees should they be indicted. *Id.* This could affect their right to counsel and fair trial and as a result violate the Fifth and Sixth Amendments. *Id.*

74. See Memorandum from Deputy Att'y Paul J. McNulty to Heads of Dep't Components and United States Att'ys (Dec. 12, 2006), <http://www.justice.gov/criminal/pr/speeches-testimony/2004/september/09-02-04wray-remarks-memphis.pdf> [hereinafter McNulty Memorandum].

75. Heyman, *supra* note 62, at 174.

76. Stephen L. Hiyama, *Confusing Prosecutorial Discretion with Ethics: A Misguided Proposal to Amend the Michigan Rules of Professional Conduct*, MICH. B.J. 40, 40 (Feb. 2007).

77. McNulty Memorandum, *supra* note 74, at 7.

78. Heyman, *supra* note 62, at 176. While the memo appeared to make some

into waiving the right to an attorney because the McNulty Memo still allowed them to consider a company's waiver in deciding whether the corporation cooperated fully with the investigation.<sup>79</sup>

#### 4. The Filip Memo

On August 28, 2008, then-Deputy Attorney General Mark Filip announced revisions to the United States Attorney Manual (the Filip Memo) to correct existing problems with bringing corporate criminal charges.<sup>80</sup> The Memo instructs prosecutors to judge corporate compliance during an investigation by whether a corporation produces "relevant facts."<sup>81</sup> An issue with the Memo is that there will be times when the "relevant facts" are protected by the attorney-client privilege.<sup>82</sup> As a result, corporations still face the possibility of being forced to reveal privileged information should the government deem that the information contains "relevant facts."<sup>83</sup> While it appears that the government has placed more restrictions on prosecutors to request waivers, the factors for corporate cooperation have become increasingly vague.<sup>84</sup> Now corporations are left without guidance on how to gain favor with government investigations.<sup>85</sup> Since corporations still have to speculate as to what prosecutors perceive as cooperation, they will likely be forced to disclose more information than is legally required.<sup>86</sup>

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meaningful changes, many questions still remained as to the amount and nature of pressure that prosecutors were still able to place on corporations. *Id.* For example, while the McNulty Memo contained revisions for prosecutors to obtain approval for waiver requests, there was nothing in the revisions that indicated such approvals would be significant in any appreciable way. *Id.*

79. John K. Villa, *The McNulty Memorandum: A Reversal in Practice or in Name Only?*, ACC DOCKET 88, 91 (Apr. 2007).

80. Brendan J. Keefe, *Revisions of the Thompson Memorandum and Avoiding the Stein Problems: A Review of the Federal Policy on the Prosecution of Business Organizations*, 42 Conn. L. Rev. 273, 276 (2009).

81. U.S. Dep't of Justice, United States Attorneys' Manual tit. 9, § 9-28.300 (2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

82. Heyman, *supra* note 62, at 178.

83. *Id.* at 178.

84. *Id.* at 179.

85. *Id.*

86. *Id.* at 179-80.

## IV. ISSUES RELATED TO DPAS

A. *DPA Deficiencies*

## 1. DPAs Lack a Deterrent Effect

Opponents argue that DPAs do not deter misconduct and often result in a meager reprimand for corporate criminal activity.<sup>87</sup> Critics maintain that the approach of letting corporations escape with monetary fines as long as they promise to self-regulate creates no disincentives for corporations to abstain from fraud or white-collar crime.<sup>88</sup> Other concerns about DPAs have come from the white-collar criminal defense bar over the payment of attorney fees,<sup>89</sup> the use of independent monitors,<sup>90</sup> and the destruction of the attorney-client privilege.<sup>91</sup>

Critics of the current policy argue that DPAs do not offer the same deterrent effect as a criminal prosecution.<sup>92</sup> One theory is that a criminal prosecution carries with it much more weight and stigma than a DPA entered into with the government.<sup>93</sup> Corporations may be able to portray fines and negotiated agreements as “business as usual,” but it would be very difficult for them to characterize a criminal indictment in the same way.<sup>94</sup> Critics argue that because the threat of criminal liability is off the table corporations are more willing to toe the line of corporate misconduct or even step over it.<sup>95</sup>

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87. Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, N.Y. TIMES (Jul. 7, 2011), <http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html?pagewanted=all>.

88. *Id.*

89. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1794-95 (2011).

90. *Id.* at 1795.

91. *Id.*

92. See e.g., Ramirez, *supra* note 41, at 942 (arguing for a corporate death penalty law); Kyle Noonan, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 614 (2012) (arguing for Congress to pass legislation authorizing prosecutors to revoke state charters in certain situations).

93. Eliason, *supra* note 41.

94. *Id.*

95. *Id.*

The legal system suffers when prosecutors choose not to indict corporations where the fraud and misconduct were especially egregious.<sup>96</sup> The penalties that the DPAs enforce are relatively small compared to the overall revenues of the large financial institutions that enter into the agreements.<sup>97</sup> Some lawyers suggest that companies are willing to take more risks because they know that if they get into trouble they have a high probability of getting a DPA.<sup>98</sup> DPAs may make it financially viable for corporations to bear the risk of criminal business practices due to financial gains made from such practices without the threat of an indictment.<sup>99</sup> Moreover, because of the enormous size, resources, complexity, and infrastructure of large financial institutions, they are able to commit illegal conduct on a scale that is unachievable by an individual.<sup>100</sup> Some argue that while indicting a corporation does have drawbacks, such as harming innocent third parties, these defects are part of the criminal system as a whole.<sup>101</sup> For instance, when an individual is sent to jail, his small family economic unit must bear the ill effects of his incarceration.<sup>102</sup>

## 2. The Misconception of the Corporate Death Sentence

There is a further issue about the necessity of DPAs. Some scholars argue that the failure of Arthur Andersen following its indictment was an anomaly and that in reality corporate indictments are not the death sentences that they are made out to be.<sup>103</sup> Excluding Arthur Andersen, no company indicted between 2001-2010 went out of business following a conviction.<sup>104</sup> There are three explanations for why this has not occurred. The first is that public conviction and subsequent destruction of a company is the exception rather than the

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96. Editorial, *Too Big to Indict*, N.Y. TIMES, Dec. 11, 2012, at A38.

97. *Id.*

98. Lichtblau, *supra* note 52.

99. *Id.*

100. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1484 (2009).

101. *Id.* at 1486.

102. *Id.*

103. *See generally* Markoff, *supra* note 24.

104. *Id.* at 827 (noting that Arthur Andersen was initially convicted but the Supreme Court reversed the decision and Andersen's demise was the result of the indictment).

rule.<sup>105</sup> The second possibility is that uncertainty of conviction at trial as an alternative to the more lenient DPAs is what causes companies to fail.<sup>106</sup> The third possible explanation is that the DOJ is only pursuing the companies that are financially able to weather an indictment and letting the weaker ones go or entering into DPAs with them.<sup>107</sup>

*B. Why DPAs Are More Effective Than Corporate Indictments*

1. Corporations Are Incapable of Moral Responsibility

Many scholars argue that it is a mistake to attribute the moral responsibility that comes with a criminal prosecution to a corporation.<sup>108</sup> Corporations lack the intentional characteristics to make it morally responsible for actions they take.<sup>109</sup> Additionally, with the current system of vicarious liability, corporations are punished even though they may have been supervising their employees.<sup>110</sup> Because of the significant consequences of criminal charges and the lack of a defense to vicarious liability, the possibility of an indictment due to the actions of a single employee has forced corporations to settle weak claims and has forced individuals with a stake in the company to bear the burden of sanctions never approved by a judge.<sup>111</sup> In the case of Arthur Andersen, only a tiny fraction of the company's employees were actually involved in shredding documents, yet almost 28,000 employees lost their jobs because the corporation was alleged to be responsible for

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105. *Id.*

106. *Id.* (observing that Arthur Andersen's conviction was overturned by the Supreme Court and most of the other convictions referred to were the result of guilty pleas and not jury trials).

107. *Id.*

108. John Hasnas, *The Centenary of A Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1331 (2009).

109. Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531, 545, 551 (2003). According to Velasquez, a corporation's "lack of intentional characteristics" means that just because we may attribute intentional qualities to groups that comprise a corporation the collective body of the groups does not have real intentions. *Id.* For example, nobody believes that all the groups in the United States who collectively buy and sell a particular commodity make a distinct intentional agent. *Id.*

110. See Khanna, *supra* note 16, at 1495-96.

111. Cheryl L. Evans, *The Case for More Rational Corporate Criminal Liability: Where Do We Go from Here?*, 41 STETSON L. REV. 21, 29 (2011).

the actions of a few. Similarly, holding that corporation criminally liable based on the collective knowledge of all of its employees places unrealistic burdens on corporations to monitor their employees.<sup>112</sup>

## 2. The Public Ramifications of an Indictment are Too Great

Furthermore, the public benefits that are gained from indicting a corporation are often outweighed by the consequences. For example, even if Arthur Andersen had ultimately been convicted, no one would have been eligible for imprisonment under the law.<sup>113</sup> While Arthur Andersen had to pay the maximum statutory penalty, it was still significantly less than what they would have paid if they had entered into a DPA with a government agency.<sup>114</sup>

Fundamentally, DPAs arm prosecutors with formidable weapons to ensure corporate compliance without disastrous collateral consequences. Under the appropriate circumstance, DPAs can correct and restore a company's operating practice and preserve its viability into the future.<sup>115</sup> While DPAs do not come with the stigma of a criminal indictment, they allow prosecutors to achieve many of the same goals while leaving out the problems inherent with criminal indictments. As Lanny Breuer stated in a speech to the New York Bar Association, DPAs give prosecutors something other than a "blunt instrument" to wield against corporations.<sup>116</sup>

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112. Nanda, *supra* note 12, at 85.

113. Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109 (2006).

114. *Id.*

115. Nanda, *supra* note 12, at 80 (commenting that a DPA gives a company a chance to maintain its financial integrity into the future by forcing the company to amend its corrupt business practices and pay a hefty fine while not destroying a company the way an indictment would).

116. Breuer, *supra* note 42.



## V. DPAS IN THE WAKE OF THE 2008 FINANCIAL CRISIS

A. *The Use of DPAs in the Wake of the Financial Crisis*

## 1. SAC and the Lack of Indictments Relating to the Credit Crisis

Following the 2008 financial crisis, the DOJ and state prosecutors have routinely used DPAs for institutions that were considered “too big to fail.” The most recent example of this is the JP Morgan Chase DPA. On January 7, 2014, JP Morgan Chase and CEO Jamie Dimon agreed to a \$1.7 billion DPA for their role in Bernie Madoff’s Ponzi scheme.<sup>117</sup> JP Morgan was not prosecuted despite turning a “blind eye” to the scheme and helping Madoff build a “house of cards.”<sup>118</sup> However, in other instances prosecutors have occasionally signaled their willingness to indict major financial institutions on charges related to the financial crisis. On November 8, 2012, SAC became the first major Wall Street firm in the last twenty-five years to plead guilty to criminal charges.<sup>119</sup> SAC’s guilty plea included a \$1.2 billion penalty, including \$900 million in criminal fines and a \$284 million civil forfeiture of profits.<sup>120</sup> SAC Capital had delivered an average annual net return of thirty percent over the past twenty years.<sup>121</sup> The DOJ alleged that SAC permitted a pervasive insider-trading scheme that generated hundreds of millions of dollars and even hired employees that had questionable insider trading histories.<sup>122</sup> Preet Bhara, the U.S.

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117. Brian Ross & Aaron Katersky, *Once Again, Is JP Morgan Chase Too Big to Jail?*, ABC NEWS (Jan. 7, 2014), <http://abcnews.go.com/Blotter/madoff-ponzi-scheme-prosecutors-find-jpmorgan-chase-big/story?id=21448264>.

118. *Id.*

119. Ben Protess, *SAC Pleads Guilty, Then Judge Calls a Timeout*, N.Y. TIMES, Nov. 8, 2013, at B2 (under the headline *Hedge Fund Pleads Guilty, Then Judge Calls a Timeout*).

120. *Id.* These fines were in addition to \$616 million in fines SAC already had to pay to the SEC to resolve a related civil case.

121. Robert Wood, *SAC Indictment Could Have Silver Lining*, FORBES (Aug. 26, 2013, 8:57 AM), <http://www.forbes.com/sites/robertwood/2013/08/26/sac-indictment-could-have-silver-lining/>.

122. Peter Lattman & Ben Protess, *SAC Capital Is Indicted, and Called a Magnet for Cheating*, N.Y. TIMES, July 25, 2013, at A1 (under the headline *Fund Indicted; Called Magnet for Cheating*).

attorney in Manhattan who has led the investigation of SAC,<sup>123</sup> stated that the situation at SAC was “substantial, pervasive and on a scale without known precedent in the history of hedge funds.”<sup>124</sup> In addressing the rarity of indicting major institutions, Bhara stated that the “pendulum may have swung too far in the direction of not holding institutions accountable.”<sup>125</sup>

While SAC’s indictment may indicate that major institutions are not above prosecution, no high level Wall Street executive has faced criminal charges in relation to the financial crisis.<sup>126</sup> Even though the DOJ has indicated that it is investigating civil charges against major banks for their part in falsifying mortgage-backed securities, the statute of limitations for most of the alleged crimes has passed.<sup>127</sup> Moreover, federal prosecutors and Attorney General Eric Holder have warned against prosecuting big banks in the wake of the financial crisis.<sup>128</sup> Some critics have argued that SAC’s indictment did not signal an end to the “too big to jail” theory on big banks.<sup>129</sup> Critics have indicated that even when SAC was at its peak it was not in the top ten of the largest hedge funds and its failure would not threaten the financial system.<sup>130</sup>

## 2. DPAs Following the Financial Crisis

While prosecutors have been reluctant to indict firms relating to the 2008 crisis, there have been a number of significant DPAs. One of the most recent DPAs involves J.P. Morgan. In October 2013, J.P. Morgan’s executives and the DOJ entered into a tentative \$13 billion

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123. Peter Lattman, *SAC Is Said to Weigh Plea Deal in Insider Trading Case*, N.Y. TIMES, Oct. 8, 2013, at B1 (under the headline *SAC is Said to Weigh Plea Deal to End Case*).

124. Lattman & Protess, *supra* note 122.

125. Protess, *supra* note 119.

126. Kara Scannell, *Top Judge Criticises DOJ for Not Holding Individuals Accountable*, FIN. TIMES (Nov. 12, 2013, 9:48 PM), <http://www.ft.com/cms/s/0/db1923d0-4bd2-11e3-8203-00144feabdc0.html#axzz2kpYAfi>.

127. *Id.*

128. Mark Gongloff, *SAC Capital Indictment Does Not Mean the End of ‘Too Big to Jail’*, HUFFINGTON POST (July 25, 2013, 11:53 AM), [http://www.huffingtonpost.com/2013/07/25/sac-capital-indictment-too-big-to-jail\\_n\\_3652646.html](http://www.huffingtonpost.com/2013/07/25/sac-capital-indictment-too-big-to-jail_n_3652646.html).

129. *Id.*

130. *Id.*

DPA for Morgan's alleged sales of fraudulent mortgage-backed securities.<sup>131</sup> Thirteen billion dollars represents the largest penalty levied against a single company for actions relating to the financial crisis.<sup>132</sup>

The DOJ's settlement with J.P. Morgan followed a practice of entering into agreements with major financial institutions in connection with the LIBOR rate fixing scandal. In June 2012, Barclays settled LIBOR-related charges for a record \$450 million.<sup>133</sup> In the middle of the financial crisis, creditors claim that Barclays reported false figures that at times influenced a benchmark for student loans, credit cards, and mortgages.<sup>134</sup> Regulators were concerned that major banks set certain rates to their advantage during the crisis to alleviate concerns that they were not financially secure.<sup>135</sup> UBS also entered into a DPA with the DOJ over the LIBOR scandal. UBS agreed to pay \$1.5 billion in penalties to settle claims with U.S., U.K., and Swiss authorities.<sup>136</sup> The DPA into which UBS entered with the U.S. DOJ covered all of its subsidiaries except UBS Securities Japan.<sup>137</sup> The investigation leading to the DPA revealed six years of misconduct by 45 members of UBS's staff who attempted to influence interest rates in an effort to strengthen

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131. Doug Stanglin & Kevin McCoy, *JPMorgan, DOJ Near \$13B Settlement*, USA TODAY (Oct. 19, 2013, 7:23 PM), <http://www.usatoday.com/story/money/business/2013/10/19/jp-morgan-justice-department-deal-settlement-13b/3052383>. Note that this DPA is distinct from the one that JP Morgan entered into with the DOJ over the Bernie Madoff Ponzi scheme. This record-setting DPA was a reflection of JP Morgan's actions during the 2008 financial crisis.

132. Sari Horwitz & Danielle Douglas, *JPMorgan Agrees to Tentative \$13 Billion Settlement with U.S. over Bad Mortgages*, WASH. POST (Oct. 19, 2013), [http://www.washingtonpost.com/business/economy/jpmorgan-close-to-13-billion-deal-with-justice/2013/10/19/7f51c918-38f8-11e3-80c6-7e6dd8d22d8f\\_story.html](http://www.washingtonpost.com/business/economy/jpmorgan-close-to-13-billion-deal-with-justice/2013/10/19/7f51c918-38f8-11e3-80c6-7e6dd8d22d8f_story.html).

133. Hala Touryalai, *Why UBS Is Better Off Than Barclays in Libor Rigging Case*, FORBES (Dec. 3, 2012, 1:05 PM), <http://www.forbes.com/sites/halahtouryalai/2012/12/03/why-ubs-is-better-off-than-barclays-in-libor-rigging-case/>.

134. Ben Protess & Mark Scott, *Barclays Settles Regulators' Claims Over Manipulation of Key Rates*, N.Y. TIMES (June 27, 2012), <http://dealbook.nytimes.com/2012/06/27/barclays-said-to-settle-regulatory-claims-over-benchmark-manipulation/>.

135. *Id.*

136. Mark Thompson & James O'Toole, *UBS Pays \$1.5 Billion to Settle Libor Claims*, CNN MONEY (Dec. 19, 2012, 7:45 AM), <http://money.cnn.com/2012/12/19/news/companies/ubs-libor/>.

137. *Id.*

the bank's image during the financial crisis.<sup>138</sup>

In December 2012, following the DPAs involving Barclays and UBS, HSBC agreed to forfeit \$1.2 billion and enter into a DPA with the DOJ and the Manhattan District Attorney's Office.<sup>139</sup> In addition to the \$1.2 billion forfeiture, the DPA required HSBC to pay \$700 million in fines.<sup>140</sup> The DPA stemmed from allegations that HSBC transferred billions to Iran and nations like it and enabled Mexican drug cartels to transfer money through HSBC's U.S. subsidiaries.<sup>141</sup> The DPA required HSBC to strengthen internal controls, refrain from illegal activity for five years, and for an independent monitor to assess the bank's progress and the strength of its internal controls.<sup>142</sup> The \$1.92 billion penalty was the largest U.S.-imposed penalty against a bank.<sup>143</sup> However, the HSBC DPA was different from both the Barclays and UBS DPAs because of judicial involvement. HSBC's settlement was announced on December 11, 2012, but U.S. District Judge John Gleeson did not approve it until July 2, 2013.<sup>144</sup> While both HSBC and the government contended that the Court did not have the authority to approve or reject the DPA, Judge Gleeson stated that he was exercising his supervisory power over the agreement.<sup>145</sup> Judge Gleeson's opinion appears to be the first time that a judge has established that he has the power to review and approve a DPA.<sup>146</sup>

Judge Gleeson reasoned that because HSBC and the DOJ had placed their matter before the court, they had subjected themselves to the court's authority.<sup>147</sup> The Court was called to approve the DPA because otherwise it would have been in violation of the Speedy Trial

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138. *Id.*

139. Protess & Silver-Greenberg, *supra* note 3.

140. *Id.*

141. *Id.*

142. *Id.*

143. Stempel, *supra* note 4.

144. *Id.*

145. Christie Smythe, *HSBC Judge Approves \$1.9B Drug-Money Laundering Accord*, BLOOMBERG (July 3, 2013 4:06 PM), <http://www.bloomberg.com/news/2013-07-02/hsbc-judge-approves-1-9b-drug-money-laundering-accord.html>.

146. See Melissa Maleske, *Judge Approves HSBC Deferred Prosecution Agreement - with a Catch*, INSIDE COUNSEL (Aug. 30, 2013), <http://www.insidecounsel.com/2013/08/30/judge-approves-hsbc-deferred-prosecution-agreement>.

147. Smythe, *supra* note 145.

Act's requirement that a trial begin within seventy days of an indictment.<sup>148</sup> Judge Gleeson instructed both the DOJ and HSBC to make written submissions justifying the DPA and the Court's authority in the process.<sup>149</sup> While Judge Gleeson did not find that the Speedy Trial Act required him to review the DPA, his authority to approve the DPA came from his inherent supervisory authority and not from Rule 11, which prohibits judicial involvement in plea negotiations.<sup>150</sup>

While Judge Gleeson's treatment of the HSBC case was novel, there have been other instances in recent years where judges have delayed approval of a DPA. One such instance occurred when Judge Terrence Boyle from the Eastern District of North Carolina delayed approval of a DPA between the U.S. Attorney's Office for the Eastern District of North Carolina and WakeMed Health and Hospitals over WakeMed's illegal Medicare billing practices.<sup>151</sup> The district attorney and WakeMed agreed to the DPA on December 19, 2012, but the judge did not approve it until February 8, 2013, after he determined the DPA was in the public's best interest.<sup>152</sup> This judicial scrutiny of DPAs appears to originate from recent decisions by district court judges in their rejection of settlements where companies do not admit responsibility for illegal acts.<sup>153</sup> The most notable of these rejections came from Judge Jed S. Rakoff on November 28, 2011, when he refused to approve a settlement between Citigroup Global Markets and the SEC for \$285 million.<sup>154</sup> The SEC asserted that \$285 million was a compelling settlement, but Rakoff countered that there was a lack of meaningful sanctions or an effort to fundamentally reform Citigroup.<sup>155</sup> Judge Rakoff has been openly critical of how the DOJ has handled

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148. Anthony S. Barkow & Matthew D. Cipolla, *Increased Judicial Scrutiny of Deferred Prosecution Agreements*, N.Y. L.J., (Aug. 20, 2013), at 2, [http://jenner.com/system/assets/publications/12185/original/NYLJ\\_Barkow\\_Cipolla\\_082013.pdf?1377117135](http://jenner.com/system/assets/publications/12185/original/NYLJ_Barkow_Cipolla_082013.pdf?1377117135).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Bill Singer, *Judge Rakoff Rejects SEC's "Contrivances" in Citigroup Settlement*, FORBES (11/29/2011 12:23PM), <http://www.forbes.com/sites/billsinger/2011/11/29/judge-rakoff-rejects-secs-contrivances-in-citigroup-settlement/>.

155. *Id.*

criminal prosecutions in the wake of the financial crisis.<sup>156</sup> While Judge Rakoff has indicated his disdain for the concept that some institutions are “too big to jail,” his recent criticisms have centered on the lack of individual prosecutions following the financial crisis.<sup>157</sup> Perhaps following Judge Rakoff’s lead Judge Victor Marrero, and judges from Wisconsin and Colorado, have also delayed approval of SEC settlements.<sup>158</sup>

## VI. THE NEED FOR JUDICIAL OVERSIGHT

The new standard of judicial review for DPAs that Judge Gleeson called for in the HSBC case is a positive development. Judicial oversight of DPAs could limit the potential for prosecutorial power and abuse under the Filip Memo that is often associated with DPAs.<sup>159</sup> Judicial oversight could also provide a check to ensure that the terms of the DPA are not too lenient on the company.<sup>160</sup> While Judge Gleeson established a precedent for the court to use its supervisory power to regulate DPAs, a more concrete authority is needed.<sup>161</sup> Although the supervisory standard gives judges some basis to intervene, it would be difficult for them to do so unless the DPA was severely deficient in some way.<sup>162</sup>

To remedy this issue, Congress should amend the Speedy Trial Act to establish a legislative basis to require judicial approval and review of DPAs.<sup>163</sup> Congress attempted to enact the Accountability in Deferred Prosecution Act (the ADPA) in 2009, which was intended to bring uniformity to the implementation of DPAs and to provide

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156. Yves Smith, *Judge Rakoff Blasts Bruer, Prosecution of Companies Rather Than Individuals in Bar Speech*, NAKED CAPITALISM (Nov. 14, 2013), <http://www.nakedcapitalism.com/2013/11/judge-rakoff-blasts-breuer-prosecution-of-companies-rather-than-individuals-in-bar-speech.html>.

157. Antoine Gara, *Fed Judge Rakoff Sees No Prosecution for Top Wall Street Execs*, THE STREET (11/12/13 5:45 PM EST), <http://www.thestreet.com/story/12106189/1/federal-judge-sees-no-prosecution-for-top-wall-street-execs.html>

158. Barkow & Cipolla, *supra* note 148.

159. Albert Lichy, *The “Too Big to Jail” Effect and the Impact on the Justice Department’s Corporate Charging Policy*, HASTINGS L.J. (forthcoming), (manuscript 57) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2350245](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350245).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 58.

guidelines to prosecutors in DPA negotiations.<sup>164</sup> The proposed legislation included a provision that required judicial approval of the DPA but only if it was “consistent with the guidelines for such agreements and is in the interests of justice.”<sup>165</sup> While the proposed ADPA included meaningful reforms, a stronger form of the proposed legislation is needed to enable judges to conduct a thorough analysis of DPAs. In order to approve a DPA, Congress should amend the Speedy Trial Act to require the court to find the following: (1) whether the DPA’s terms are fair and reasonable in connection with the type of conduct in which the company engaged;<sup>166</sup> (2) whether the company has engaged in the particular type of misbehavior before;<sup>167</sup> (3) whether the individual defendants that actually engaged in the acts have individually been prosecuted;<sup>168</sup> (4) whether the fines that will be levied against the company deter further violations and punish the company for past ones;<sup>169</sup> (5) whether the company can financially survive an indictment;<sup>170</sup> and (6) whether the company’s required remedial measures are the “least intrusive to promote deterrence and rehabilitation.”<sup>171</sup>

This type of review would not result in institutions automatically receiving a DPA because there is a belief that they are “too big to jail.”<sup>172</sup> If a judge were required to make the above findings before a DPA could be implemented there would be a clear record to ensure that each DPA was fair and appropriate in each circumstance that a prosecutor seeks to implement one.<sup>173</sup> Furthermore, one of the main criticisms of DPAs is that there is no check on prosecutor behavior, resulting in less transparency in DPA negotiations.<sup>174</sup> With this proposed legislation, companies will have greater incentives to be more

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164. Rachel Delaney, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 902 (2009).

165. H.R. 1947, 111th Cong. (2009).

166. Lichy, *supra* note 159, at 59.

167. *Id.*

168. *Id.* at 60.

169. *Id.*

170. *Id.*

171. *Id.*

172. Lichy, *supra* note 159, at 60.

173. *Id.*

174. Delaney, *supra* note 164, at 903.

transparent in DPA negotiations if they know that a judge will be required to approve the DPA's reasonableness before it can take effect.

## VII. CONCLUSION

While there is a potential debate that corporate indictments do not always spell death for a corporation, it is evident that they have resulted in disastrous collateral consequences before. To remedy this problem, prosecutors have turned to DPAs. These settlements have their advantages, but also have the potential for prosecutorial abuse while not providing a sufficient deterrent effect to the companies that enter into them. Currently all that guides prosecutors in these agreements is the Filip Memo.<sup>175</sup> Especially in the case of independent monitors, who can wield vast amounts of power, there is little guidance other than the Morford Memo.<sup>176</sup> Congressional legislation is needed to provide more structure to the process and to require judicial oversight to ensure that each DPA is fair and reasonable both to the public and the parties in light of the circumstances in each case. Oftentimes the last thing companies want is additional congressional interference. However, judicial oversight could provide greater transparency in the DPA process and greater accountability from both prosecutors and corporate entities.

ELLIS W. MARTIN

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175. *See Supra* Part III.

176. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't. Components, U.S. Attorneys (Mar. 7, 2008) *available at* <http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf>.



