The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy

Court E. Golumbic* and Albert D. Lichy**

In the wake of the 2008 financial crisis, the failure of the Department of Justice ("Justice Department" or "DOJ") to bring criminal charges against any financial institutions prompted critics to question whether the DOJ maintained a policy that certain corporations are "too big to jail." The criticism piqued after the DOJ announced that it had entered into a deferred prosecution agreement ("DPA") with HSBC to resolve a massive money laundering and government sanctions investigation.

This wave of criticism is the backdrop for what the Authors call the "too big to jail" effect—two related developments, each of which has the potential to impact the future of DPAs in the corporate crime context. The first is a willingness on the part of at least one federal district court to inject a level of judicial intervention into the process of structuring DPAs. In approving the HSBC, Judge John Gleeson issued a groundbreaking opinion articulating, for the first time, a standard for district court review of the terms of a DPA. The second is an emerging willingness on the part of the DOJ to pursue criminal charges over DPAs in high-profile cases involving financial institutions. In a strong departure from past practice, the DOJ recently secured guilty pleas from the foreign subsidiaries of UBS and RBS, SAC Capital Advisors and three related entities, and the parent of Credit Suisse.

This Article examines the impact of the "too big to jail" effect on the Justice Department's corporate charging practices. The Authors argue that DPAs should not be abandoned. Instead, Congress should amend the Speedy Trial Act to require substantive, judicial review of the terms of DPAs. To this end, the Authors propose a standard of review that is designed to maximize the benefits of DPAs, while minimizing the concerns that have historically accompanied their use.

---

* Court E. Golumbic is a Managing Director and the global Anti-Money Laundering, Anti-Bribery, and Government Sanctions Compliance Officer at a major global financial institution. He is also a Lecturer-in-Law at the University of Pennsylvania Law School and a former Assistant United States Attorney with the United States Attorney's Office for the Southern District of New York.

** Albert D. Lichy graduated from the University of Pennsylvania Law School in 2011 and is one of Court Golumbic's former students. He will soon begin a clerkship in the chambers of the Hon. Thomas L. Ambro of the United States Court of Appeals, Third Circuit.

TABLE OF CONTENTS

Introduction

The financial crisis of 2008 and the ensuing economic downturn have prompted intense scrutiny of the United States Department of Justice's ("Justice Department" or "DOJ") charging practices with respect to corporate defendants.[1] Specifically, the Justice Department's failure to bring criminal charges against any financial institutions for their perceived role in causing the crisis prompted members of Congress, the press, and the public to question whether the agency has maintained a de facto policy that certain corporations are "too big jail" given their size and economic significance.[2]

Criticism of the Justice Department's approach piqued after its December 12, 2012 announcement that it had entered into a deferred prosecution agreement ("DPA")[3] with HSBC in the face of overwhelming evidence—and HSBC's own admission—that it enabled Mexican and Colombian narcotics cartels to launder more than $800 million through one if its subsidiaries, and that the bank facilitated over $660 million in transactions involving Cuba, Iran, and other jurisdictions subject to U.S. economic sanctions.[4] Statements by a senior DOJ official suggesting that the DOJ's goal in negotiating the HSBC DPA was "not to bring HSBC down, . . . not to cause a systemic effect on the economy, . . . [and] not for people to lose thousands of jobs,"[5] were met with indignation and fueled speculation that the fear of potential collateral consequences is the deciding factor dictating federal prosecutors' corporate charging decisions.[6]

The Justice Department's extension of a DPA to HSBC was not a novel move; rather, it reflects more than a decade of practice that emerged in response to another, earlier wave of criticism of Justice Department charging policy—the 2003 indictment of Arthur Andersen, then a prominent U.S. accounting firm, for its role in obstructing an investigation

---

1. *See infra* notes 143–195 and accompanying text.

2. *See infra* notes 143–195 and accompanying text.

3. A deferred prosecution agreement ("DPA") is an agreement between a prosecutor and a defendant whereby the defendant agrees to waive indictment and consents to the filing of criminal charges in exchange for certain undertakings on the defendant's part. *See* Scott A. Resnik & Keir N. Dougall, *The Rise of Deferred Prosecution Agreements*, N.Y. L.J., Dec. 18, 2006, at 1; *see also infra* notes 36–38 and accompanying text. If these undertakings are not violated for a specified period of time, the criminal charges are ultimately dismissed. *See infra* notes 36–38 and accompanying text.

4. *See* Press Release, U.S. Dep't of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012) [hereinafter DOJ's HSBC Press Release], *available at* www.justice.gov/opa/pr/2012/December/12-crm-1478.html.

5. James O'Toole, *HSBC: Too Big to Jail?*, CNNMoney (Dec. 12, 2012, 1:08 PM), http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering.

6. *See infra* notes 188–195, 202–203 and accompanying text.

into widespread accounting fraud at Enron.[7] The indictment and ultimate criminal conviction of Andersen triggered the firm's bankruptcy, and led 28,000 individuals to lose their jobs.[8] Intense scrutiny regarding potential prosecutorial overreaching in the wake of Andersen's demise, especially following the Supreme Court's reversal of the firm's conviction, caused the DOJ to abandon its traditional approach of either indicting or declining to indict corporate defendants in favor of negotiating DPAs and non-prosecution agreements ("NPAs").[9] The objective underlying this shift was simple: to avoid a repeat of the "Arthur Andersen effect."[10]

Today, more than ten years after Andersen, the Justice Department's corporate charging policies have again become the subject of scrutiny.[11] This time, however, the focus of the criticism is not the potential for the DOJ to be overzealous in its approach to corporate criminality. Instead the focus is the possibility that by maintaining a "too big to jail" policy, the DOJ is not being zealous enough.[12] The DOJ has vehemently denied that it has such a policy, including in public statements by Attorney General Eric Holder himself.[13]

---

7. *See, e.g.*, Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109–10 (2006) (describing the Arthur Andersen prosecution as "misguided"); John C. Danforth, *When Enforcement Becomes Harassment*, N.Y. TIMES, May 6, 2003, at A31 (criticizing the Justice Department for hanging Arthur Andersen for "the actions of a few").

8. *See* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 14–15 (2006) ("With the criminal indictment, Anderson [sic] could no longer audit public companies. Twenty-eight thousand people lost their jobs and Arthur Andersen became a shell of its former self."); *see also infra* notes 78–93 and accompanying text.

9. *See generally* Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components on Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; Erik Paulsen, Note, *Imposing limits on Prosecutorial Discretion in Corporate Prosecution Agreement*, 82 N.Y.U. L. REV. 1434, 1436 (2007) (explaining that the use of DPAs and non-prosecution agreements "exploded after the demise of the corporate accounting giant Arthur Andersen"); *see also infra* notes 94–125 and accompanying text. NPAs are similar to DPAs in that they are privately negotiated agreements between the DOJ and a defendant whereby the defendant consents to certain undertakings, which, if adhered to for a specified time, will result in the resolution of a criminal matter. *See generally* David Debold & Kyle C. Barry, *Consistency in Non-Prosecution and Deferred Prosecution Agreements: A Lesson From the World of Federal Sentencing*, 20 FED. SENT'G REP. 331 (2008) (highlighting the differences between DPAs and NPAs). The primary difference between a DPA and an NPA is that an NPA typically does not entail the filing of any criminal charges. *Id.* at 331.

10. We borrow the phrase "Arthur Andersen effect" from Professor Peter J. Henning. *See* Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 314 (2007). Professor Henning used the term to refer to "the collateral damage from a conviction in which innocent employees unconnected to the wrongdoing lose their jobs and investments in the firm." *Id.*

11. *See infra* notes 188–195, 202–203 and accompanying text.

12. *See, e.g.*, Shahien Nasiripour & Tom Braithwaite, *Finance: Out to Break the Banks*, FIN. TIMES, May 1, 2013, at 11 (describing popular criticism of the sentiment that banks are too big to fail and thus too big to jail); *see also infra* notes 188–195, 202–203 and accompanying text.

13. *See infra* note 196–201, 286–289 and accompanying text.

This new strand of criticism coincided with two related developments within the executive and judicial branches of the government, each of which has the potential to substantially impact the Justice Department's future corporate charging practices. We term this coincidence the "too big to jail" effect. The first development is an inclination on the part of at least one federal district judge to inject a level of substantive oversight into the process of approving DPAs.[14] In reviewing the HSBC DPA, Judge John Gleeson issued a groundbreaking opinion articulating a standard for judicial review of DPAs and assessing the HSBC DPA in light of that standard.[15]

The second development is an emerging willingness on the part of the Justice Department to pursue criminal charges over DPAs in high-profile cases involving financial institutions.[16] Only eight days after entering into the HSBC DPA, the DOJ secured guilty pleas from the Japanese subsidiaries of the United Bank of Switzerland ("UBS") and the Royal Bank of Scotland ("RBS") for their roles in a scheme to manipulate the London Interbank Offered Rates ("LIBOR").[17] A few months later, federal prosecutors indicted S.A.C. Capital Advisors and three related entities (collectively, "SAC Capital"), one of the nation's most prominent hedge fund managers, on insider trading charges.[18] SAC Capital ultimately pleaded guilty to the charges, agreeing to pay $1.8 billion and terminate its investment advisory business.[19] And most recently, in the largest departure from its post-Andersen corporate charging policies, the DOJ announced that it had secured a guilty plea from Credit Suisse Group AG, the Swiss banking giant, for conspiring to aid tax evasion.[20]

This Article examines the impact of these recent developments on the Justice Department's historical reliance on deferred prosecutions. Part I traces the evolution of the DPA from its origins as a mechanism for alternate resolution of juvenile crime and other minor cases, through

14. *See infra* notes 204–246 and accompanying text.

15. *See* United States v. HSBC Bank USA, N.A., No. 12-0763, 2013 WL 3306161, at *2–4 (E.D.N.Y. July 1, 2013).

16. *See infra* notes 249–294 and accompanying text.

17. *Id.*

18. *See* Peter Lattman & Ben Protess, *Fund Indicted; Called Magnet for Cheating*, N.Y. TIMES, July 26, 2013, at A1 (discussing charges filed against S.A.C. Capital).

19. *See* Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Announces Guilty Plea Agreement With SAC Capital Mgmt. Cos. (Nov. 4, 2013) [hereinafter DOJ's SAC Capital Press Release], *available at* http://www.justice.gov/usao/nys/pressreleases/November13/SACPleaPR.php.

20. Under the plea agreement, Credit Suisse would plead guilty to a single charge of conspiring to aid tax evasion. The fine imposed on Credit Suisse will amount to $2.6 billion. *See* Press Release, U.S. Dep't of Justice, Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns (May 19, 2014) [hereinafter Credit Suisse Press Release], *available at* http://www.justice.gov/opa/pr/2014/May/14-ag-531.html; *see also infra* notes 290–294 and accompanying text.

its early application to corporate criminal cases, to the widespread adoption of the DPA as prosecutors' tool of choice in the years following Andersen's collapse.[21]

Part II reviews the advantages and disadvantages of modern DPAs.[22] The Part shows how deferrals are an effective means of achieving the benefits of criminal prosecution while avoiding undesirable collateral consequences.[23] Part II also notes, however, that corporate defendants' incentive to avoid criminal charges at all cost, coupled with the absence of any outside check on prosecutors' discretion to structure the conditions of deferral, have resulted in agreements that have been criticized as onerous.[24]

Part III reviews the post-financial crisis and the emergence of the "too big to jail" construct. It tracks the emerging concern that the Justice Department has accorded undue weight to collateral consequences in forming its charging decisions, emanating from the DOJ's failure to bring any crisis-related prosecutions of financial institutions and the HSBC DPA.[25]

Part IV examines the "too big to jail" effect by tracing recent events that transpired in 'close temporal proximity to the surge in criticism of DOJ charging practices. The Part first reviews Judge Gleeson's opinion in the HSBC case.[26] While the standard of review Gleeson's opinion establishes is of questionable value as a check on prosecutorial discretion, it is nevertheless the first time that a court has been willing to assume a substantive role in approving DPAs.[27] The Part questions whether Judge Gleeson's opinion opens the door to more affirmative judicial review in the future.

Next, Part IV outlines the LIBOR, SAC Capital, and Credit Suisse prosecutions.[28] The significance of these cases cannot be understated, as it had been more than twenty years since the Justice Department filed criminal charges against a major financial institution.[29] The Part explores whether these cases signal a shift away from the DOJ's decade-long

---

21. *See infra* Parts I.A–B.

22. *See infra* Part II.

23. *See infra* Part II.B.

24. *See infra* Part II.A.

25. *See infra* Parts III.A, B.2.

26. *See infra* Part IV.A.

27. *See, e.g.*, John F. Savarese et al., *New Standards for Judicial Approval of Deferred Prosecution Agreements*, 50 BANK & CORP. GOVERNANCE L. REP. 907, 907 (2013) (describing the novelty of Judge Gleeson's judicial review).

28. *See infra* Part IV.

29. *See* Peter J. Henning, *UBS Settlement Minimizes Impact of Guilty Plea*, N.Y. TIMES DEALBOOK (Dec. 20, 2012, 1:54 PM), http://dealbook.nytimes.com/2012/12/20/ubs-settlement-minimizes-impact-of-guilty-plea ("[T]he guilty plea by the UBS subsidiary is the first time an arm of [a] major financial institution has been convicted of a crime since Drexel Burnham was more than 20 years ago.").

resort to DPAs as the preferred means to address corporate crime, and thus whether more aggressive tactics can be expected going forward.[30]

The Article concludes in Part V by arguing that DPAs should not be abandoned as the default approach in corporate criminal cases.[31] Instead, Congress should follow Judge Gleeson's lead and amend the Speedy Trial Act to expressly require substantive judicial review of the terms of DPAs.[32] Doing so would inject a measure of independence to guard against both prosecutorial leniency and excess. To this end, a standard for judicial review is proposed that is designed to maximize the benefits of deferred prosecutions while minimizing the concerns that have historically accompanied their use.[33]

I. The DPA: Federal Prosecutors' Weapon of Choice to Combat Corporate Crime

A. The Anatomy of a DPA

The mechanics of a deferred prosecution at the federal level are simple: once a prosecutor recommends a case for diversion, the pretrial services agency or the probation office must agree to accept the defendant into the diversion program.[34] In exchange for the prosecutor's stipulation to "defer" criminal charges, the defendant agrees to waive indictment and be charged criminally, and to fulfill certain requirements over a specified period of time.[35] If the defendant discharges her obligations, the charges against her are dismissed and she is treated as if the government declined to prosecute at the outset.[36] She therefore avoids "the potentially lifelong collateral consequences of a felony conviction, such as exclusion from jury service, government benefits, public housing, educational grants, and

30. *See infra* Parts IV.A–B.

31. *See infra* Part V.A.

32. *See infra* Part V.B.

33. *See infra* Part V.B.

34. *See* U.S. Dep't of Justice, Criminal Resource Manual § 712, *in* U.S. Attorneys' Manual (1997) (outlining pre-trial diversion procedures); Steven R. Peikin, *Deferred Prosecution Agreements: Standard for Corporate Probes*, N.Y. L.J., Jan. 31, 2005, *available at* http://www.newyorklawjournal.com/ id=900005422568/Deferred-Prosecution-Agreements:-Standard-for-Corporate-Probes?slreturn=20140117032629.

35. *See* Peikin, *supra* note 34. The defendant also agrees to waive her speedy trial rights and the tolling of any limitations period. *See id.*

36. Entering into a DPA does not increase a defendant's criminal history score under the United States Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual § 4A1.2(f) (1997) (providing that "[d]iversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted" as a sentence under U.S. Sentencing Guideline ("U.S.S.G.") § 4A1.1(c)). The same is not true of guilty pleas, which "result[] in a conviction and collateral consequences attach no differently than if the offender had been convicted in a trial." Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 Colum. L. Rev. 1863, 1869 (2005). Thus, all things considered, a defendant would much prefer diversion to pleading guilty.

voting."[37] If the defendant fails to abide by the terms of the deferred prosecution, however, she faces the specter of criminal prosecution just the same as if the government had never granted a deferral.[38]

The role of the trial court in the deferred prosecution context is quite different than its role when presented with a guilty plea. When a defendant enters into a plea bargain, the trial court assumes a substantive gatekeeper role under Rule 11 of the Federal Rules of Criminal Procedure.[39] The court must examine guilty pleas for "voluntariness, factual basis, fairness, abuse of discretion, or infringement on the judge's sentencing power."[40] If the plea bargain does not satisfy the requirements of Rule 11, the court cannot accept the defendant's admission of guilt.[41] It is also the case that the court need not accept a plea bargain if it believes "that [the] bargain is too lenient, or otherwise not in the public interest."[42]

The United States Code contemplates a much narrower role for the district court in the deferred prosecution context. While the Speedy Trial Act provides that a DPA must be presented to the district court for its approval, the Act is silent as to how the court should exercise its discretion.[43] It says only that "with the approval of the court," the government may defer prosecution pursuant to a written agreement.[44] Predictably, therefore, district courts routinely rubber stamp DPAs the

37. Greenblum, *supra* note 36, at 1866–67.

38. Some courts have held that prosecutors cannot unilaterally determine that a defendant breached her obligations under a DPA. Rather, there must be a judicial determination to that effect. *See, e.g.*, United States v. Miller, 406 F.3d 323, 334 (5th Cir. 2005) ("[I]n the context of non-prosecution agreements the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement."); United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998) ("In accordance with due process, [the defendant] was entitled to a judicial determination that he had breached the agreement before being subjected to the risk of conviction."). Nevertheless, it has become standard fare for prosecutors to include within DPAs a stipulation to the effect that it is solely within the prosecutor's discretion to determine whether the DPA has been breached. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 919 (2007) (observing that most DPAs permit a unilateral finding of breach).

39. *See* FED. R. CRIM. P. 11(b)(1)–(3); *see also* Garrett, *supra* note 38, at 906 ("Federal courts are more involved in reviewing plea bargains than charging decisions.").

40. Garrett, *supra* note 38, at 906.

41. FED. R. CRIM. P. 11(b)(2)–(3).

42. United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985) (citation omitted) (internal quotation marks omitted). Furthermore, the United States Sentencing Guidelines provide that in the case of charge bargains, "the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (2013).

43. The Speedy Trial Act provides district judges with the power to approve DPAs, but does not otherwise specify judicial involvement in the DPA process. 18 U.S.C. § 3161(h)(2) (2012).

44. *Id.*

same day they are presented for approval.[45] Indeed, in the corporate criminal prosecution context, no court has rejected, much less modified, a DPA.[46]

B. The Evolution of DPAs as the Tool of Choice to Combat Corporate Crime

1. *The E.F. Hutton, Drexel, and Salomon Cases*

Historically, prosecutors viewed their charging decision as a stark choice between indicting or declining to file charges.[47] The concept of deferring prosecution rose to prominence in the 1960s to provide a third option between these two extremes.[48] Deferred prosecutions were initially utilized only in relatively minor cases against individual offenders in the state system, such as cases involving juveniles and small-time narcotics offenders, "where prosecution would be counterproductive, ineffective or unwarranted."[49]

The federal prosecutions of E.F. Hutton ("Hutton") in 1985 and Drexel Burnham Lambert ("Drexel") in 1989 suggested that a middle option would be desirable in the corporate context as well. After Hutton pleaded guilty to multiple counts of mail and wire fraud, the company

45. *See* Douglas Gillison, *HSBC Judge, Reluctant to Bless Settlement, Explores Court's Role*, Main Justice (Mar. 29, 2013, 6:31 PM), http://www.mainjustice.com/2013/03/29/hsbc-judge-reluctant-to-bless-settlement-explores-courts-role (providing a chart that illustrates that in the last four years, Judge Gleeson is the only district judge to have spent more than two days reviewing the terms of a DPA involving a large bank).

46. *See* Garrett, *supra* note 38, at 893 (noting that while "[c]ourts have statutory authority to approve deferral of a prosecution, . . . no court has rejected an agreement"—at least in the case of corporate crime); Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 Ky. L.J. 1, 14 (2007) ("Deferred and non-prosecution agreements often occur without judicial oversight or participation . . . . Even in the rare case that has court participation, it is usually a mere formality of the document being filed in the court."); Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 Wm. & Mary Bus. L. Rev. 37, 49 (2013) ("[A]lthough a DPA is filed with a court and could be subject to judicial scrutiny, the agreements are regularly 'rubber-stamped' by judges without modification.").

47. In the corporate criminal liability context, most prosecutors "believed their expertise lay in determining retrospective questions of criminal liability," rather than designing prospective corporate governance reforms as part of a deferred prosecution. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 Am. Crim. L. Rev. 159, 164 (2008).

48. *See Developments in the Law—Alternatives to Incarceration*, 111 Harv. L. Rev. 1863, 1902–03 (1998) (indicating that the formal practice of deferring prosecution "was developed first in the juvenile courts, but flourished outside the juvenile context after the Supreme Court's 1962 decision in *Robinson v. California*," which held that "a state law which imprisons a person . . . [for a 'status offense' such as drug addiction] inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment" (quoting Robinson v. California, 370 U.S. 660, 667 (1962))).

49. State v. Leonardis, 363 A.2d 321, 323 (N.J. 1976); *see* Greenblum, *supra* note 36, at 1866–71 (tracing the development of deferred prosecutions).

was drastically weakened and forced to merge with a competitor.[50] A year after Drexel's guilty plea to various securities fraud and other charges, the firm filed for Chapter 11 bankruptcy protection when it could not fund more than $100 million in loans.[51] These cases contributed to the general perception that a criminal conviction was not the preferred means of rehabilitating a corporation and achieving maximum deterrence.[52]

The opportunity to leverage a third option in the corporate context first arose in 1992 in connection with the DOJ's investigation of Salomon Brothers ("Salomon") for submitting false and unauthorized bids to purchase U.S. Treasury notes in violation of the federal False Claims Act[53] and the Sherman Act.[54] Rather than file charges against Salomon, federal prosecutors offered Salomon the opportunity to enter into an NPA.[55] In exchange for the government's promise not to file charges, Salomon agreed to: (1) pay $290 million in fines, forfeiture, and victim compensation; (2) continue cooperating with investigators; and (3) implement compliance procedures to prevent similar wrongdoing.[56] To justify this novel move, then-U.S. Attorney for the Southern District of New York, Otto Obermaier, whose office conducted the investigation, touted Salomon's "unprecedented" cooperation, its replacement of key figures in senior management positions, the civil penalties the Securities

50. E.F. Hutton pleaded guilty to two thousand counts of mail and wire fraud in connection with its role perpetrating a massive check-kiting scheme, which reportedly involved "obtain[ing] the interest-free use of millions of dollars by intentionally writing checks in excess of the funds it had on deposit in various banks." *E.F. Hutton Pleads Guilty to Fraud, Fined $2 Million: Used Checks to Avoid Interest*, L.A. TIMES, May 2, 1985, at 1. The guilty plea required E.F. Hutton to pay $2 million in fines and $750,000 in costs. *Id.* At the time, E.F. Hutton was one of "Wall Street's most formidable giants." R. William Ide III & Douglas H. Yarn, *Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust*, 56 VAND. L. REV. 1113, 1147 (2003).

51. In 1989, Drexel Burnham Lambert, at the time a Wall Street powerhouse and the pioneer of the high-yield junk bonds, pleaded guilty to six counts of mail, wire, and securities fraud in connection with allegations that it engaged in insider trading. *See* Stephen Labaton, *Drexel Concedes Guilt on Trading; to Pay $650 Million*, N.Y. TIMES, Dec. 22, 1988, at A1. The plea agreement required Drexel to pay $650 million. *Id.* By pleading guilty, Drexel reportedly escaped racketeering and obstruction of justice charges. *See id.*

52. *See Davis Polk's Scott Muller on the Rise of Corporate Deferred Prosecutions*, 24 CORP. CRIME REP. 37, Sept. 27, 2010, *available at* http://www.corporatecrimereporter.com/scottmuller092710_000.htm ("EF Hutton was prosecuted with over 2,000 counts of mail fraud and had gone down the tubes. So, there was a real concern about prosecuting financial institutions.").

53. 31 U.S.C. § 3729 (2012).

54. 15 U.S.C. §§ 1–7 (2012).

55. *See* Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992) [hereinafter DOJ Salomon Press Release], *available at* http://www.justice.gov/atr/public/press_releases/1992/211182.htm.

56. *See id.* Some commentators have opined that if Salomon Brothers had been tried and convicted it "would have almost certainly resulted in the financial ruin of Salomon, because of the highly regulated environment in which it operates as well as its dependence on consumer trust." F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121, 124 (1997).

and Exchange Commission ("SEC") imposed, and the collateral consequences an indictment would have triggered.[57]

2. *Prosecutors' First Use of a DPA in the Corporate Crime Context*

The Salomon NPA is credited with laying the groundwork for the first use of a DPA in the corporate crime context.[58] This occurred two years later, as federal prosecutors confronted evidence that Prudential Securities ("Prudential") had committed securities fraud in connection with sale of partnership interests in one of Prudential's mutual funds.[59]

As in the Salomon case, the DOJ stopped short of prosecuting Prudential. Instead, then-United States Attorney for the Southern District of New York, Mary Jo White, signed off on the deferred prosecution of Prudential for a period of three years, provided that the company: (1) paid $330 million; (2) cooperated with the government's investigation; and (3) appointed an independent director to Prudential's board to "serve as an independent 'ombudsman' whom [Prudential] employees can call anonymously with complaints about ethics and compliance."[60] In announcing the settlement, White noted that "[t]he public interest is well served by this agreement"[61] because "[u]pon conviction, a corporation cannot be sentenced to jail but only to pay restitution, fines and adopt measures aimed at enhancing internal controls to prevent and detect future wrongdoing."[62] In White's view, the Prudential DPA "impose[d] such sanctions."[63]

---

57. DOJ Salomon Press Release, *supra* note 55.

58. *See Davis Polk's Scott Muller on the Rise of Corporate Deferred Prosecutions*, *supra* note 52 (noting that the Prudential Securities DPA was the "first ever" DPA in the corporate context); *see also* Spivack & Raman, *supra* note 47, at 163–64 ("Though the Salomon case did not involve a formal non-prosecution agreement, it provided a clear message to companies that full cooperation, and the sincere willingness to clean house, could lead to favorable results.").

59. *See generally* Deferred Prosecution, Prudential Securities Inc. (S.D.N.Y 1994) (Mag. No. 94), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/prudential.pdf.

60. *See id.* at *5–6. Notably, Mary Jo White, the pioneer of the corporate DPA, has been one of the strongest critics of the manner in which DPAs have been deployed. *See An Informed and Forceful Critique of NPAs and DPAs By . . . Guess Who?*, FCPA PROFESSOR (Apr. 25, 2013), http://www.fcpaprofessor.com/an-informed-and-forceful-critique-of-npas-and-dpas-by-guess-who (providing numerous instances in which Mary Jo White criticized the Justice Department's use of DPAs).

61. *See* Kurt Eichenwald, *Brokerage Firm Admits Crimes in Energy Deals*, N.Y. TIMES, Oct. 28, 1994, at A1.

62. Letter from Mary Jo White, U.S. Attorney, to Scott W. Muller and Carey R. Dunne, Attorneys for Prudential Sec. Inc. (Oct. 27, 1994) (on file with Authors).

63. *Id.*

3. *The Sparing Use of DPAs in the 1990s*

The Salomon and Prudential cases are credited with providing the framework for the modern DPA.[64] Yet DPAs did not become a mainstay of corporate criminal prosecutions until about a decade later. The prevailing view in the late 1990s and early 2000s was that it took a "very special situation" for prosecutors to defer the prosecution of an organizational defendant.[65] The mindset was that the prosecutor's job was simply to "charge or not."[66]

The consensus among commentators is that the "indict or walk away" dichotomy prevailed because the Justice Department provided no guidance to prosecutors regarding when or how to utilize DPAs.[67] The then-existing version of the *United States Attorneys' Manual* made no mention of corporate DPAs.[68] Deferrals were discussed only in conjunction with individual prosecutions.[69] In light of this deficiency, and

---

64. *See, e.g.*, Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 62 (2006) (noting that the "Salomon Brothers and Prudential Securities dispositions formed the model for scores of subsequent agreements"); Greenblum, *supra* note 36, at 1873 (citing the Salomon Brothers and Prudential Securities agreements as having "laid the groundwork for the more widespread and varied use of the mechanism in the modern era").

65. *Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York*, 19 CORP. CRIME REP. 48, Dec. 12, 2005 [hereinafter *White Interview*], *available at* http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm. Years after signing off on the Prudential Securities DPA, Mary Jo White observed that "[i]t was certainly not something [she] thought [she] was likely to do again." *Id.*

66. *Id.*

67. *See* Spivack & Raman, *supra* note 47, at 164 ("The gray, uncertain area of deferrals seemed to invite prosecutors to insinuate themselves into prospective corporate governance issues. This was unappealing, especially considering the absence of formal guidance from DOJ regarding organizational prosecutions."); *see also* Warin & Schwartz, *supra* note 56, at 130 (noting that when federal prosecutors in the 1990s were "confronted with an organizational defendant for whom pre-trial diversion might seem appropriate," the decision whether to employ a DPA was left entirely to prosecutors' discretion, "with few if any applicable standards upon which to rely").

68. As a number of commentators have observed, pre-trial diversion was (and still is) "drafted with a view towards pre-trial diversion of individuals, not businesses." *See* Finder & McConnell, *supra* note 8, at 11; *see also* Warin & Schwartz, *supra* note 56, at 130 ("The specific standards for implementation are designed for individual defendants (primarily first offenders charged with less serious and non-violent crimes) and are inapplicable to corporate and other organizational defendants.") (internal quotation marks omitted). The current version of the *U.S. Attorneys' Manual* provides that a prosecutor "may divert any *individual* against whom a prosecutable case exists and who is not":

1. Accused of an offense which, under existing Department guidelines, should be diverted to the State for prosecution;
2. A person with two or more prior felony convictions;
3. A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or
4. Accused of an offense related to national security or foreign affairs.

Compare U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-22.100 (2011) (emphasis added), *with* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 712 (1997) (outlining pre-trial diversion procedures).

69. *See* U.S. ATTORNEYS' MANUAL § 712.

in the absence of any further instruction, prosecutors viewed the corporate charging decision as binary.[70]

This remained the case even after then-Deputy Attorney General Eric Holder issued the "Federal Prosecution of Corporations," colloquially referred to as the "Holder Memo," in 1999.[71] The Holder Memo, which provided corporate charging guidance to prosecutors, marked the first time the Justice Department "officially recognized what had become obvious to federal prosecutors and judges: corporate charging and sentencing decisions involve distinct variables from those at play in the charging of individuals."[72] To this end, the Holder Memo memorialized eight factors that federal prosecutors should consider in determining whether to indict a corporation.[73] These factors included: (1) the nature and seriousness of the offense; (2) the pervasiveness of the wrongdoing within the corporation; (3) the corporation's history of similar conduct; (4) its timely and voluntary disclosure of wrongdoing and willingness to cooperate; (5) the adequacy of its compliance program; (6) the corporation's remedial actions; (7) collateral consequences; and (8) the adequacy of non-criminal remedies.[74]

While the Holder Memo injected a degree of standardization into an otherwise idiosyncratic corporate charging regime, it failed to provide parameters governing the use of DPAs. In fact, the Memo failed to even acknowledge the existence of DPAs as an alternative vehicle to punish and rehabilitate corporate wrongdoers.[75] Not surprisingly, then, in 2000, the year after the Holder Memo was published, there remained a significant gulf between the number of corporate convictions and deferrals.[76] And on the rare occasions when DPAs were employed, they

---

70. *See* Greenblum, *supra* note 36, at 1871 ("Before the Justice Department recognized and promulgated standards specific to corporate deferral in 1999, prosecutors were understandably hesitant to resort to the mechanism, explaining its infrequent use in the 1990s.").

71. Memorandum from Eric Holder, Deputy Attorney Gen., U.S. Dep't of Justice, to Component Heads & U.S. Atty's, Federal Prosecution of Corporations (June 16, 1999) [hereinafter Holder Memo], *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.pdf.

72. Ryan D. McConnell et al., *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 Hous. J. Int'l L. 509, 534 (2011).

73. *See* Holder Memo, *supra* note 71, at Part II.

74. *See id.*

75. *See* Finder & McConnell, *supra* note 8, at 11 (criticizing the Holder Memo's failure to provide any guidance regarding how to implement the eight factors when deciding whether to defer prosecution and its failure to mention any of the DPAs or NPAs that predated the Memo); *see also* Rachel Delaney, Comment, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 Marq. L. Rev. 875, 885–86 (2009) (observing that the Holder Memo was not specific to the deferred prosecution context, did not provide predictable rules for prosecutorial behavior, and did not provide protection or enforceable rights for business entities under investigation).

76. While the number of organizational defendants convicted peaked at three hundred, see Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775, 1801–04 (2011), the number of DPAs entered into reached only two. *See* Gibson, Dunn & Crutcher LLP, 2013 Mid-year

were "relatively primitive" and "less draconian" compared to the modern iteration of DPAs.[77]

4. *The Arthur Andersen Case*

The collapse of Arthur Andersen in 2002 is generally viewed as the event that triggered emergence of the modern DPA.[78] The events surrounding Arthur Andersen's demise have been well documented.[79]

Just one month after the September 11th terrorist attacks, Enron Corporation, one of the largest and most revered companies, shocked the financial community when it revealed a $610 million third-quarter loss and $1.2 billion reduction of shareholder equity.[80] The news triggered an SEC investigation into Enron's accounting practices, directly implicating its lead auditor, Arthur Andersen LLP.[81] On October 23, 2001, after learning of the SEC's investigation, David Duncan, the Andersen partner in charge of the Enron engagement, instructed his team to follow the firm's document-retention policy.[82] The unmistakable meaning of this message was to destroy Enron-related documents, which is exactly what

---

Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) 1 (2013) [hereinafter Gibson 2013 Mid-year Update].

77. As Professors Finder and McConnell note, early DPAs did not require an admission of wrongdoing, did not include the appointment of a compliance monitor, and were limited to compliance reforms. *See* Finder & McConnell, *supra* note 8, at 5–7. It was not until the early 2000s that DPAs would take on a more punitive character, and their use would become widespread. *See infra*, notes 112–125 and accompanying text.

78. *See* James R. Copeland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Civ. Justice Rep., May 2012, at 11 (attributing the dramatic rise in DPAs to the collapse of Arthur Andersen); Paulsen, *supra* note 9, at 1436 (finding that the use of DPAs and NPAs "exploded after the demise of the corporate accounting giant Arthur Andersen").

79. For a thorough account, see generally Bethany McLean & Peter Elkind, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron (2003).

80. *See* Alexei Barrionuevo, *2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial: Appeals Expected*, N.Y. Times, May 26, 2006, at A1.

81. This was not the first time Arthur Andersen found itself in the government's crosshairs. Just months before the accounting improprieties at Enron came to light, Andersen settled a lawsuit brought against it by the SEC for its role in the $1.7 billion accounting fraud at Waste Management Inc. *See* Michael Schroeder, *SEC Fines Arthur Andersen in Fraud Case: Big 5 Firm to Pay $7 Million After Inquiry of Audits for Waste Management*, Wall St. J., June 20, 2001, at A3. Under the settlement agreement, Andersen was required to, among other things, pay $7 million in fines—at the time, the largest fine ever imposed against an accounting firm. *See id.*; *see also* Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 Wash. U. L. Q. 917, 922–24 (2003) (describing the settlement agreement that Andersen entered into with the SEC). Indeed, "the Waste Management litigation was the first time the SEC had ever accused a major accounting firm of securities fraud in connection with a failed audit." *Id.* at 922. The settlement agreement also enjoined Andersen from committing future violations of federal securities laws. *Id.* at 923.

82. *See* Dan Ackman, *Duncan Fingers Former Firm*, Forbes (May 14, 2002, 8:53 AM), http://www.forbes.com/2002/05/14/0514topnews.html (quoting David Duncan as saying: "I instructed people on the Enron engagement team to follow the document-retention policy, which I knew would result in the destruction of documents"). David Duncan pleaded guilty to a single count of obstruction of justice—the same charge Andersen faced. *Id.*

transpired en masse.[83] The document destruction ceased one week after it began, when the SEC issued a subpoena to Andersen to turn over its Enron-related work.[84] Andersen's counsel learned of the massive destruction of documents in the process of responding to this and other subpoenas.[85]

Recognizing that a "criminal indictment would be tantamount to a death sentence,"[86] Andersen went to great lengths to convince the Justice Department that it need not put the entire firm out of business because of the actions of a few.[87] The key sticking point in the negotiations was the prosecutors' insistence that Andersen admit wrongdoing as a firm, a non-option for Andersen because it would qualify as a clear violation of an earlier SEC injunction.[88] Andersen's proposed compromise was to admit that some of its employees engaged in wrongdoing, but not the entire firm.[89]

The DOJ refused to accept this proposal,[90] however, and on March 14, 2002, Andersen was indicted on one felony count of obstructing justice. One month later, on June 15, 2002, a jury found the firm guilty. Andersen was subsequently fined $500,000 and sentenced to five years probation.[91] By this time, however, the firm's fate was already sealed. After the grand jury issued the indictment, the firm could no longer audit public companies.[92] Andersen folded, and with it 28,000 employees lost their jobs.[93]

---

83. *See id.*

84. *See* Brickey, *supra* note 81, at 920 (reporting that Andersen's destruction of Enron-related documents began on October 23, 2001, and ended on November 9, 2001—a day after it received a subpoena from the SEC). There was, of course, nothing routine about the document destruction. *See id.* at 935 n.93 (noting that a spokesmen for Arthur Andersen "admitted that the shredding was not routine").

85. *See id.* at 935.

86. *Id.* at 921.

87. Andersen promised to, among other things: (1) clean house in its management ranks; (2) institute a new system of compliance; and (3) appoint an independent monitor to ensure that its employees would abide by the law going forward. *Id.* at 924–25. Andersen also waged a $1.5 million public relations campaign to rehabilitate its image and "humanize [its] plight." *See id.* at 942 n.129. Among its public-relations moves was hiring former chair of the Federal Reserve, Paul Volcker, to head an independent oversight board to identify and remedy management and accountability problems. *See* James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509, 513 (2006); *see also* Brickey, *supra* note 81, at 942 (describing Enron-staged demonstrations in Houston, Philadelphia, and Washington D.C.).

88. *Id.* at 925–26.

89. *Id.* at 926.

90. *See id.* at 926.

91. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 702 (2005).

92. *See* Finder & McConnell, *supra* note 8, at 14–15 ("With the criminal indictment, [Andersen] could no longer audit public companies. Twenty-eight thousand people lost their jobs and Arthur Andersen became a shell of its former self.").

93. *See id.*

5. *The Post-Andersen Era and the Rise of the Modern DPA*

The fallout from Arthur Andersen's collapse was immediate and profound. The image of 28,000 people left jobless and one of the nation's largest accounting firms being put out of business—when only a few wrongdoers had been identified—drew allegations of prosecutorial excess.[94] This was especially so after Andersen's conviction was reversed by the Supreme Court in 2005.[95] The lesson of the Andersen case was that "a federal indictment could cripple even a strong, well-established company."[96]

Immense political pressure to avoid a repeat of the Andersen effect forced the DOJ to take a hard look at its corporate charging policies. What followed was a dramatic shift away from the traditional indict/decline charging framework for corporate defendants in favor of DPAs.[97]

This shift began with the establishment of the Corporate Fraud Task Force in July 2002,[98] which President George W. Bush created in response to Enron and a series of high-profile corporate fraud scandals

94. Mary Jo White called the decision to indict Arthur Andersen "'very wrongheaded', and a sacrifice of the best interests of the public in order to 'message send.'" Alan C. Michaels, *Fastow & Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 560 n.39 (2004) (citation omitted). Other former federal prosecutors chastised the Justice Department for hanging Andersen for "the actions of a few." John C. Danforth, Op-Ed., *When Enforcement Becomes Harassment*, N.Y. TIMES, May 6, 2003, at A31. The defense bar sounded similar criticisms, calling the Andersen prosecution "heavy-handed" and an unnecessary "death penalty." Elkan Abramowitz & Barry Bohrer, *Principles of Federal Prosecution of Business Organizations*, N.Y. L.J., Mar. 4, 2003, at 1.

95. *Arthur Andersen LLP*, 544 U.S. at 708.

96. Christopher Garcia et al., *Collateral Consequences of the UBS and RBS Settlements*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 12, 2012, 8:21 AM), http://blogs.law.harvard.edu/corpgov/2013/03/12/collateral-consequences-of-the-ubs-and-rbs-libor-settlements.

97. *See* Elkan Abramowitz & Jonathan Sack, *The 'Civil-izing' of White-Collar Criminal Enforcement*, N.Y. L.J., May 7, 2013, at 1 (discussing the post-Arthur Andersen shift away from the criminal prosecution of "among others, banks, pharmaceutical companies and military contractors"). The Justice Department's resolve to use greater caution before indicting a multi-national corporation was put to the test only a few months after the Andersen prosecution, when another accounting scandal came to light, this time involving Worldcom—then the nation's second largest long distance telecommunications company. *See* Jared Sandberg et al., *Disconnected: Inside WorldCom's Unearthing of a Vast Accounting Scandal—Internal Auditor Discovered an Unorthodox Treatment of Long-Distance Expenses—CFO's Impassioned Defense*, WALL ST. J., June 27, 2002, at A1 (detailing nature of alleged accounting fraud). While Worldcom's misdeeds were no less egregious than Andersen's, the scandal's revelation coincided with the Andersen backlash directed at the Justice Department. Indeed, Eric Holder, at the time a former Deputy Attorney General, authored an op-ed in the Wall Street Journal, entreating his former employer *not* to indict Worldcom. *See* Eric Holder, Op-Ed., *Don't Indict Worldcom*, WALL ST. J., July 30, 2002, at A14. Holder's pointed message was: "as public and political pressures mount for high-profile convictions, the Justice Department must remain true to the core principles that guide it in the use of its enormous, discretionary power," and not "feel compelled to indict more corporations simply because they can." *Id.*

98. Exec. Order No. 13,271, 3 C.F.R. 13271 (2002). The Corporate Fraud Task Force has since been renamed the Financial Fraud Task Force, which President Barack Obama created in 2009. Exec. Order No. 13,519, 3 C.F.R. 13519 (2009).

that shook investor confidence.[99] The task force's objective was "to hold wrongdoers responsible and to restore an atmosphere of accountability and integrity within corporations across the country."[100] To that end, the task force sought to increase interagency coordination in combating corporate fraud and punishing corporate wrongdoers,[101] and provide for more coordination between U.S. Attorney's Offices around the country that were beginning to prosecute white-collar crimes.[102]

Another important development was the publication by then-Deputy Attorney General Larry Thompson of a revised set of guidelines to govern corporate prosecutions.[103] The "Thompson Memo," as it is commonly called, was virtually identical to its predecessor, the Holder Memo,[104] with one critical difference: the Thompson Memo explicitly recognized pre-trial diversion as a viable option to reward a corporation's authentic cooperation.[105] Although it did not specifically direct prosecutors to weigh the DPA option before indicting a company, the Thompson Memo nevertheless "confirmed the status of DPAs . . . as arrows in the government's quiver."[106] Combined with a lingering aversion to triggering another Arthur Andersen-style collapse, it opened the door to widespread adoption of DPAs.[107]

The Justice Department's wholesale shift in favor of DPAs is evidenced dramatically by the statistics. From 1994 to 2001, the DOJ

99. *See* Andrew Weismann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411, 424 n.43 (2007) (discussing the post Enron shift to DPAs to "settle accounting fraud investigations with a series of major corporations or their subsidiaries").

100. *The President's Corporate Fraud Task Force*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/archive/dag/cftf (last visited June 1, 2014).

101. *See* Exec. Order No. 13,271, 3 C.F.R. 13271.

102. *See* Weissman & Newman, *supra* note 99, at 425 n.46. The engagement of a broader universe of U.S. Attorney's Offices in white-collar cases represented a departure from past practice, as large financial crime cases had generally been prosecuted out of the Southern and Eastern Districts of New York, or DOJ headquarters in Washington. *See* Peikin, *supra* note 34.

103. Thompson Memo, *supra* note 9.

104. *See* United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (noting that the Thompson Memo was "in many respects . . . a modest revision of the Holder Memorandum").

105. *See* Thompson Memo, *supra* note 9, at pt. IV.B; Resnik & Dougall, *supra* note 3, at 1 (explaining that the Thompson Memo's "significance lay in its highlighting of alternatives to corporate indictment"). The Thompson Memo also instructed prosecutors to consider the "collateral consequences" of indictment on "shareholders, pension holders and employees not proven personally culpable." Thompson Memo, *supra* note 9, at 3.

106. Spivack & Raman, *supra* note 47, at 166 n.40.

107. *See id.* at 166 (stating that the Thompson Memo formalized the recognition of a DPA as "an alternative somewhere in between the 'all-or-nothing choice between indicting (and destroying) a company and giving it a complete 'pass'") (quoting Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1103 (2006)); Greenblum, *supra* note 36, at 1875 n.84 ("There is consensus . . . that the Thompson Memo was ultimately a catalyst for an increase in corporate deferrals."); Peikin, *supra* note 34 ("Since 2003, prosecutors have signed DPAs with an unprecedented number of corporations.").

resolved only seven corporate criminal cases via DPAs.[108] Since then, the DOJ has entered into over 250 DPAs,[109] with 100 executed between 2010 and 2012 alone.[110] The organizational defendants that have been parties to these deferrals, moreover, are among the most well-known multinational corporations.[111]

The dramatic uptick in the use of DPAs is not the only remarkable aspect of the Justice Department's shift in charging practice. As the use of DPAs has increased, so too has the severity of the conditions prosecutors have imposed on corporate defendants. The DPAs that have been employed in the post-Andersen era have commonly included extremely stiff monetary penalties or restitution to victims.[112] Since 2000, for example, prosecutors have extracted over $31.6 billion from corporate entities, with more than $9 billion coming in 2012.[113] Between 2005 and 2013, total monetary penalties exceeded the billion dollar threshold.[114] Modern DPAs can also include the filing of detailed criminal charges[115] and some sort of admission or acknowledgement of responsibility on the company's part.[116] Notably, the defendant is not, under any circumstances,

---

108. *See* Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, U. VA. SCH. OF L. (Apr. 28, 2013), http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

109. *See* GIBSON, DUNN & CRUTCHER LLP, 2012 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AGREEMENTS (DPAS) AND NON-PROSECUTION AGREEMENTS (NPAS) 1 (2013). Since 2006, the Justice Department has entered into at least twenty agreements every year, with the exception of 2009, when it entered into nineteen. *See* GIBSON 2013 MID-YEAR UPDATE, *supra* note 76, at 1.

110. GIBSON, DUNN & CRUTCHER LLP, 2012 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AGREEMENTS (DPAS) AND NON-PROSECUTION AGREEMENTS (NPAS) 1 (2013).

111. Approximately sixty-one percent of the corporations entering into DPAs from 2001 to 2012 were public companies or their subsidiaries. *See* Brandon L. Garrett & David Zaring, *For a Better Way to Prosecute Corporations, Look Overseas*, N.Y. TIMES DEALBOOK (Sept. 24, 2013, 3:43 PM), http://dealbook.nytimes.com/2013/09/23/for-a-better-way-to-prosecute-corporations-look-overseas. Almost one third were Fortune 500 or Global 500 companies. *Id. Forbes Magazine* has referred to this list of well-known, multi-national corporations as "Club Fed Deferred." Janet Novack, *Club Fed, Deferred*, FORBES (Aug. 24, 2005, 8:40 AM), http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html.

112. *See* Peikin, *supra* note 34.

113. *See* GIBSON 2013 MID-YEAR UPDATE, *supra* note 76, at 1.

114. *See* GIBSON, DUNN & CRUTCHER LLP, 2013 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AGREEMENTS (DPAS) AND NON-PROSECUTION AGREEMENTS (NPAS) 1 (2014).

115. *See* Peikin, *supra* note 34.

116. An admission of wrongdoing is standard fare in the modern DPA. The rationale for requiring a corporate defendant to "admit a criminal violation and the facts making out that violation," is to communicate the same message of wrongdoing as a criminal proceeding. *See* Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 91 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) ("[A] DPA is crafted to retain some of the message effects of a criminal proceeding"). The consequences of such an admission can be devastating if used against the defendant in a collateral civil proceeding. *See* Sarah Kelly-Kilgore & Emily M. Smith, *Corporate Criminal Liability*, 48 AM. CRIM. L. REV. 421, 453 n.227 (2011) (stating that a corporate defendant's admission of wrongdoing "will be admissible in subsequent civil litigation and disclosures will likely be discoverable"); Jonathan S. Sack & Elizabeth Haines, *Be Careful What You Wish For: How Deferred and Non-Prosecution Agreements Can be Used in Civil Litigation*, BLOOMBERG L. (Jan. 10, 2012), http://about.bloomberglaw.com/

permitted to publicly contest or dispute its admission of wrongdoing—a requirement that can have devastating consequences in collateral civil proceedings.[117] Modern DPAs further have incorporated obligations of ongoing cooperation with the government, including the appointment of corporate monitors[118] and compulsory adherence to separate agreements reached with securities or banking regulators.[119]

Finally, post-Andersen DPAs generally include undertakings to make significant structural and procedural reforms. Among the more common are changes to the composition of the board of directors;[120] terminating specific officers and employees;[121] improving compliance and ethics procedures;[122] exiting specific lines of business;[123] and establishing

---

practitioner-contributions/deferred-and-non-prosecution-agreements (arguing that factual admissions in a DPA should be admissible as a an admission by a party opponent under Federal Rule of Evidence 801(d)(2)); Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What is the Cost of Staying in Business?*, WASH. LEGAL FOUND., June 3, 2005, at 2 ("While a company is not required to admit guilt as part of the agreement, the company very often will be required to stipulate to the Government's presentation of facts—a stipulation that a plaintiff will seek to use against the corporation in a later civil proceeding.").

117. Professor Michael Koehler has aptly coined this standard DPA provision, a "muzzle clause." Michael Koehler, *The 'Muzzle' Clause*, FCPA PROFESSOR (Mar. 26, 2013), http://www.fcpaprofessor.com/the-muzzle-clause.

118. The corporate monitor is generally mutually agreed upon. Peikin, *supra* note 34. The monitor's duties include reviewing relevant areas of the company's business and filing periodic reports to the government about the corporation's business and compliance with the DPA. *Id.* The costs associated with corporate monitors can easily run into the millions of dollars. *See* Spivack & Raman, *supra* note 47, at 185 ("[T]the simple fact of monitoring can alone cost a company, and its shareholders, millions of dollars."). The most prominent example of this came in 2008 when it was widely reported that former Attorney General John Ashcroft's consulting firm was awarded an eighteen month contract valued at $52 million, in connection with the firm's duties as corporate monitor for Zimmer Holdings, a medical device company. *See* Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES, Apr. 9, 2008, at A1.

119. DPAs frequently refer to separate agreements between the cooperating defendant and banking and securities regulators, and condition deferral on compliance with such agreements. *See* Peikin, *supra* note 34. The requirement to continue cooperating with the government can also be explicit about the type of cooperation to be provided. *Id.* This includes the requirement to assemble and organize records, make available any current or former officers or employees, and provide testimony to establish the authenticity of business records. *Id.*

120. *See, e.g.*, Deferred Prosecution Agreement ¶ 12, United States v. Computer Assocs. Int'l, Inc. (No. 04-0837) (E.D.N.Y. Sept. 22, 2004) [hereinafter *Computer Associates* DPA] (requiring Computer Associates to add three independent directors to its board).

121. While it is rare for a DPA to expressly contemplate terminating key employees, it is not uncommon for prosecutors to informally demand such terminations. For example, it has been widely reported that in connection with the DPA Bristol Meyers-Squibb entered into in 2005, Chris Christie, the then-U.S. Attorney for the District of New Jersey, demanded the ouster of Bristol Meyers-Squibb's CEO, Peter Dolan. *See* Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1070–71 (2008); *see also* Brooke A. Masters, *Bristol-Meyers Ousts Its Chief at Monitor's Urging; Dolan Had Led Firm Since 2001*, WASH. POST, Sept. 13, 2006, at D1.

122. *See, e.g.*, Deferred Prosecution Agreement ¶ 11, United States v. Pfizer H.C.P. Corp. (No. 12-0169) (D.D.C. Aug. 7, 2012) (requiring implementation of compliance and ethics program to prevent and detect violations of the Foreign Corrupt Practices Act).

business oversight and review committees.[124] While the central aim of these reforms is purportedly rehabilitative, they have been known to include obligations that bear no relation to the criminal conduct at hand.[125]

II. The Benefits and Drawbacks of the Modern DPA Regime

A. Common Criticisms of the Modern DPA

The Justice Department's resort to the modern DPA as the preferred measure in the corporate crime context has been a magnet for criticism. Some have expressed the view that DPAs do not achieve the objectives of criminal sanctions because they are not sufficiently punitive and do not deter future violations of the criminal law.[126] Most, however, contend that DPAs invite an unhealthy degree of prosecutorial excess.[127]

One way in which the potential for excess manifests is prosecutorial intrusion into matters of corporate governance. The prosecutor's role is generally understood to be limited to determining whether a given case merits federal prosecution and, if so, which charges should be brought.[128] With deferred prosecutions, however, prosecutors have been tempted

123. A recent example of this is the HSBC DPA, which required HSBC to exit a number of profitable lines of business. Deferred Prosecution Agreement ¶ 5k, United States v. HSBC USA, N.A. (No. 12-0763) (E.D.N.Y. Dec. 11, 2012) (requiring HSBC to exit the bank notes business).

124. *See, e.g.*, *Computer Associates* DPA, *supra* note 120, ¶¶ 12(b)–(c) (requiring Computer Associates to establish a compliance committee and disclosure committee).

125. The most prominent example of this is the Bristol Meyers-Squibb DPA, which required the company to endow a business ethics chair at Seton Hall University School of Law—the alma mater of the then-U.S. Attorney for the District of New Jersey, Chris Christie. Deferred Prosecution Agreement ¶ 20, SEC v. Bristol-Meyers Squibb (Civ. No. 04-3680 (FSH)) (2006), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/bristol-meyers.pdf.

126. Professor Mike Koehler has argued that prosecutors' reliance on DPAs "allow egregious instances of corporate conduct to be resolved too lightly . . . . without adequate sanctions and without achieving maximum deterrence." *See* Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. Pa. J. Bus. L. 1, 19 (2012); s*ee also* Elkan Abramowitz & Barry A. Bohrer, *The Debate About Deferred and Non-Prosecution Agreements*, N.Y. L.J., Nov. 6, 2012, at 3 (discussing the view that DPAs and NPAs "allow[] corporate criminals to receive no more than a slap on the wrist and making the decision to police criminal activity within a corporation 'just another dollars-and-cents decision'") (citation omitted); David M. Uhlmann, Op-Ed., *Prosecution Deferred, Justice Denied*, N.Y. Times, Dec. 13, 2013, at A23 ("The failure to prosecute the likes of JPMorgan, HSBC and Massey minimizes their culpability and raises doubts about the government's commitment to fighting corporate crime.").

127. *See, e.g.*, Paulsen, *supra* note 9, at 1458 ("[P]rosecution agreement[s] . . . offer[] a relatively one-sided negotiation where the prosecutor can ask for almost anything."). While we do not suggest that prosecutors make a conscious decision to exploit the power they possess, "they are, like the rest of us, only human." Jeffrey S. Parker, *Developing Consensus Solutions to Overcriminalization Problems: The Way Ahead*, 7 J.L. Econ. & Pol'y, 725, 735 (2011) (cautioning against relying on prosecutorial discretion to cabin Congress's over criminalization). And, as John Coffee has observed, there is no denying that "power corrupts and . . . prosecutors are starting to possess something close to absolute power." John C. Coffee Jr., *Deferred Prosecution: Has it Gone Too Far?*, Nat'l L.J., July 25, 2005, at 13.

128. *See* United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.").

"to experiment with corporate governance in ways that exceed their competence or entitlement."[129] Critics contend that a continued government presence in the daily affairs of a corporation can act as a drag on company's business development and stock price.[130] These critics believe that the government should withdraw when a corporation has responded appropriately to past wrongdoing and corrected deficiencies in controls, compliance, and corporate culture.[131] Indeed, Mary Jo White, one of the most vocal critics of the potential for prosecutorial excess in the use of DPAs despite having pioneered their use in corporate criminal cases, has cautioned: "For a prosecutor to get into the business of changing corporate culture is skating on fairly thin ice."[132]

In addition to prosecutorial intrusion into corporate affairs, critics argue that the risk of collateral consequences of a criminal indictment—that is, the risk of an Arthur Andersen-style collapse—leaves corporations with no choice but to settle at all costs.[133] The corporations are therefore compelled to agree to the prosecutors' terms, vesting nearly absolute power in the government's hands.[134] Armed with this unchecked power, prosecutors are free to assume "the role of judge (interpreting the law) and of legislature (setting broad policy choices about industry conduct)."[135] Moreover, without the option to take the government to trial or the availability of appellate review, "prosecutors can too easily take advantage

129. Coffee, *supra* note 127. The inclusion of corporate governance reforms in DPAs is by no means a modern innovation. In regard to the nature of these reforms, "the intrusiveness of . . . corporate decision-making has recently increased." *See id.*; *see also* Garrett, *supra* note 38, at 936 ("Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries."); Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, *in* 37th ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 820 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517, 2005) (describing prosecutors' use of DPAs to "force companies to behave and reform themselves as the prosecutors, fashioning themselves as the new corporate governance experts").

130. White, *supra* note 129 ("[Government intrusion] can . . . retard further progress and act as a drag on the company's business and stock price").

131. *See id.* ("Most cases of corporate crime should result in no action by the government against corporations that have responded appropriately to the wrongdoing and any remaining problems of controls, compliance and corporate culture. There is no need for continued government presence.").

132. *White Interview*, *supra* note 65.

133. *See* Paulsen, *supra* note 9, at 1436 ("It has become increasingly clear that the government holds all the cards in negotiations over [DPAs]. As long as the threat of prosecution lingers over a company, the corporation is compelled to agree to the prosecutor's terms, vesting nearly absolute power in the government's hands."); *id.* at 1457 ("Without the threat of trial, however, there is no assurance that the prosecutor is acting in a judicious manner."); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 997 (2010) (prosecutors occupy positions of "advocate, judge, and rule-maker," and "induce settlement through the 'carrots' and 'sticks' they possess even though many of the enforcement theories leading to these resolutions are untested and dubious").

134. *See* Copeland, *supra* note 78, at 12; *see also* Paulsen, *supra* note 9, at 1459.

135. *See* Copeland, *supra* note 78, at 12; *see also* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 87 (2010).

of vague criminal statutes to pursue new and inappropriate theories of criminal conduct."[136]

In sum, as currently employed in the corporate crime context, the deferred prosecution is viewed as placing too much unfettered discretion in the hands of the DOJ.

B. Arguments in Support of Modern DPAs

Despite the potential they create for prosecutorial abuse, DPAs have become the preferred method of resolving corporate criminal investigations in the post-Andersen era because modern DPAs are widely regarded as providing substantial benefits to both the Justice Department and corporations. From the corporations' perspective, the advantages are easy to understand. The Andersen case painted a vivid picture of the devastating consequences of a corporate prosecution.[137] Since Andersen, no corporations have collapsed after entering into DPAs with the government. The prospect of avoiding the stigma of criminal charges and a possible death sentence therefore makes pretrial diversion the preferable alternative.

From the Justice Department's perspective, DPAs minimize the likelihood of collateral damage while allowing the DOJ to achieve most of its desired remedies.[138] Filing a criminal charge permits the government to express its negative view of the corporation's conduct publicly, sending a message of the kind of behavior that it will not

136. *See* Michael N. Levy, *Prosecutorial Common Law? A Reality in the Absence of Timely Appellate Review*, McKee Nelson LLP White Collar/Investigations and Enforcement, Spring 2008, at 1 (2008). As Professor William J. Stunz noted, the risk of convicting an innocent defendant is particularly acute in white-collar cases. *See* William J. Stunz, *Self-Defeating Crimes*, 86 Va. L. Rev. 1871, 1883 (2000). In contrast to street crime, the challenge for prosecutors is not proving that the "defendant did *something*;" rather, "what isn't clear is whether what the defendant did amounts to fraud." *See id.*; *see also* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 339–40 (2007). Nowhere is this more relevant than in the Foreign Corrupt Practices Act ("FCPA") prosecutions. Many key provisions of the FCPA are ambiguous. *See generally* Court E. Golumbic & Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 Am. J. Crim. L. 1 (2011). Prosecutors have taken advantage of this ambiguity to adopt ever more aggressive interpretations in negotiations with corporate defendants that are all too uneasy to go to trial. *See id.* at 27; *see also* John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 25, 33 (2012) (crediting DPAs for the expansion of FCPA enforcement activity). Despite the U.S. government's aggressive interpretation of the FCPA's provisions, virtually no corporate defendants, big or small, have contested FCPA charges in court for the past two decades. *Id.* Instead, corporations routinely settle FCPA charges through DPAs and NPAs—a practice that has immunized the Justice Department's enforcement theories from any meaningful scrutiny. The upshot, critics contend, is that the FCPA means "what the enforcement agencies say it means." Levy, *supra*, at 1.

137. *See supra* notes 92–96 and accompanying text.

138. Garrett, *supra* note 38, at 855 (stating that DPAs allow organizations to "avoid[] the collateral consequences of an indictment" while achieving institutional reform).

condone.[139] In addition, the large fines that have been an element of modern DPAs are an effective method for exacting punishment and making restitution.[140] DPAs further permit the DOJ to ensure good corporate citizenship by mandating specific reforms, controlling how future business is conducted, monitoring the corporation's behavior, and threatening prosecution should the corporation fail to comply with the DPA.[141]

Finally, the prevalence of DPAs can to some degree be attributed to corporations having satisfied the government's expectations in responding to criminal investigations. DPAs often cite corporate cooperation and the undertaking of remedial measures as reason for deferring prosecution. DPAs can therefore be seen as a tangible reward for positive behavior, particularly in the face of a criminal investigation.

It is for all of the above reasons that then-Assistant Attorney General Lanny Breuer opined:

> A DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability.[142]

III. The Post-Financial Crisis Period and the Emergence of the "Too Big to Jail" Construct

A. Sowing the Seeds of "Too Big to Jail"

The financial crisis of 2008 wreaked havoc on Main Street and Wall Street and was followed by a deep global economic downturn.[143] In the aftermath of the crisis, the Justice Department came under increasing political pressure to take tougher measures against financial institutions deemed responsible for triggering the collapse.[144] As a consequence, the DOJ's historical reliance on DPAs has been called into question.

139. *See* Buell, *supra* note 116, at 91.

140. Indeed, in this respect, DPAs may be more effective than prosecution, since they allow the government to set fines without regard to statutory limits, and collect restitution without complying with the often cumbersome restitution statute (i.e., without loss calculations, identifying specific victims and complying with strict jurisdictional time limits). *See* Peikin, *supra* note 34, at 5.

141. *See id.*

142. *See Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association*, Justice News (Sept. 13, 2012) [hereinafter Breuer's N.Y. City Bar Remarks], http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

143. For a brief primer on the causes of the financial crisis, see Viral V. Acharya & Matthew Richardson, Restoring Financial Stability 12–25 (2009) (examining causes of the financial crisis).

144. Many wondered whether the DOJ would employ the same "brass-knuckle" approach it used in the wake of the savings and loan crisis, when it launched thousands of prosecutions, or whether it

The political scrutiny can be traced to May 2009, when Congress established the Financial Crisis Inquiry Commission ("FCIC") to examine the causes of the financial crisis and determine whether it was preventable.[145] Among the FCIC's findings was that the crisis resulted from failings of regulators and the financial services sector. According to the FCIC, the regulators failed to "critically challenge the institutions and the entire system they were entrusted to oversee,"[146] and the banks' "misjudgments . . . and misdeeds . . . resulted in systemic failures for which our nation has paid dearly."[147] The FCIC also intimated that a contributing cause of the financial crisis was widespread mortgage and securities fraud.[148]

While the FCIC's conclusions had no legal significance, the committee's report contributed to the perception that criminally culpable conduct on the part of financial institutions was a contributing cause of the crisis.[149] Nevertheless, and in stark contrast to the savings-and-loan crisis of the 1980s,[150] not a single financial institution, and few financial institution employees, were criminally prosecuted for their actions.[151]

---

would continue its post-Andersen approach of settling with rather than prosecuting corporate wrongdoers. Gretchen Morgenson & Louise Story, *As Wall St. Polices Itself, Prosecutors Use Softer Approach*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/business/in-shift-federal-prosecutors-are-lenient-as-companies-break-the-law.html.

145. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5(a), 123 Stat. 1617, 1626–27. (establishing the Financial Crisis Inquiry Commission).

146. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: COMPLETE WITH DISSENTING VIEWS xviii (2011).

147. *Id.*

148. *Id.* at xxii–xxiii (explaining that the FCIC found high rates of mortgage fraud, which executives continued to engage in even with the threat of a "financial and reputational catastrophe").

149. *See* Peter J. Henning, *Making Misconduct a Crime*, N.Y. TIMES DEALBOOK (June 24, 2013, 2:13 PM), http://dealbook.nytimes.com/2013/06/24/making-mismanagement-a-crime (describing the popular view that criminal conduct by corporations, particularly Wall Street and other financial firms, contributed significantly to the losses suffered by investors and the broader economy).

150. *See* Gretchen Morgenson & Louise Story, *A Financial Crisis with Little Guilt*, N.Y. TIMES, Apr. 13, 2011, at A1.

151. *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014 (questioning the "striking contrast" between the number of prosecutions brought during the savings-and-loan era and the 2008 financial crisis); *see also* David Zaring, *The Post-Crisis and Its Critics*, 12 U. PA. J. BUS. L. 1169, 1169 n.2 (2010) (noting the deep disparity between the amount of convictions secured after the savings and loan crisis in the early 1990s and late 1980s and the lack of any convictions after the financial crisis of 2008); Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES, Feb. 26, 2011, at B1 ("Two and a half years after the world's financial system nearly collapsed, you're entitled to wonder whether any of the highly paid executives who helped kindle the disaster will ever see jail time—like Michael Milken in the 1980s, or Jeffrey Skilling after the Enron disaster. Increasingly, the answer appears to be no. The harder question, though, is whether anybody should."); Shahien Nasiripour, *Financial Crisis Prosecutions on Wall Street Slow to Develop Despite Cries for Justice*, HUFFINGTON POST (Feb. 4, 2011, 3:24 PM), http://www.huffingtonpost.com/2011/02/04/financial-crisis-prosecutions-wall-street-slow_n_818851.html (noting that in connection with savings-and-loan crisis "roughly 3,800 bankers were prosecuted and sentenced to prison terms").

Defenders of the DOJ's record attribute the lack of prosecutions to the difficulty establishing criminal intent in complex financial fraud cases.[152] They also contend that the root cause of the financial crisis was more likely greed and poor judgment than criminal wrongdoing.[153] As then-Assistant Attorney General Breuer stated, when prosecutors "cannot prove beyond a reasonable doubt that there was criminal intent, then [they] have a constitutional duty not to bring those cases."[154]

While the Justice Department's failure to prosecute financial institutions for their role in the financial crisis can legitimately be attributed to the inability to establish that a crime occurred, the desire to avoid the Andersen effect was clearly a consideration as well. In a telling September 2012 speech to the New York City Bar Association, then-Assistant Attorney General Breuer shed light on the principal factor driving prosecutors' decision whether to advance criminal charges against an organizational defendant. According to Breuer, it was not the nature of the criminal offense, nor was it the pervasiveness of wrongdoing within a corporation.[155] Rather, the decisive factor was "the

---

152. Many commentators have made the point that in complex financial cases, criminal intent is hard to prove "because prosecutors must convince jurors, beyond a reasonable doubt, that a fraud was intentional." Jean Eaglesham, *Financial Crimes Bedevil Prosecutors*, WALL ST. J., Dec. 6, 2011, at C1. This is difficult to do in light of the fact that financial crisis investigations are backward looking. That is, prosecutors step in only long after the fraudulent conduct has taken place, and in turn the opportunity to gather evidence in a clandestine manner has long passed. *See* George Packer, *A Dirty Business: New York City's Top Prosecutor Takes on Wall Street Crime*, NEW YORKER (June 27, 2011), http://www.newyorker.com/reporting/2011/06/27/110627fa_fact_packer?currentPage=all ("[C]riminal law often founders in what prosecutors call a 'dead-body case.' During the mortgage bubble, the possible crimes were committed before any investigation had begun. By the time the government could have gathered enough evidence to obtain wiretaps, any incriminating conversations would have long since taken place."). As evidence of the difficulty in investigating and prosecuting complex financial fraud cases, commentators point to the inability of federal prosecutors in the Eastern District of New York to secure convictions against two former Bear Stearns hedge fund managers who were alleged to have committed securities fraud in connection with the collapse of the investment funds they managed. *See* Zachery Kouwe & Dan Slater, *2 Bear Stearns Fund Leaders are Acquitted*, N.Y. TIMES, Nov. 11, 2009, at A1.

153. *See* Eaglesham, *supra* note 152; Peter J. Henning, *Making Misconduct a Crime*, N.Y. TIMES DEALBOOK (June 24, 2013, 2:13 PM), http://dealbook.nytimes.com/2013/06/24/making-mismanagement-a-crime ("For all the talk about how the financial crisis must have entailed fraud, much of the conduct during that period seemed to involve a headlong rush into risky transactions without understanding the consequences."); Packer, *supra* note 152 ("At the other extreme is the argument that the crisis was caused simply by greed and stupidity, which remain legal under federal law."); *see also id.* (quoting U.S. Attorney for the Southern District of New York Preet Bharara, who remarked that "[p]eople who did bad things . . . should get punished . . . . Doesn't mean it's a criminal act. There are lots of bad people out there who I can't charge criminally.").

154. *See Lanny Breuer: Financial Fraud*, FRONTLINE (Jan. 22, 2013, 9:42 PM) [hereinafter Breuer Interview], *available at* http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/lanny-breuer-financial-fraud-has-not-gone-unpunished. Breuer's comments also confirmed that the financial crisis of 2008 and ensuing recession have amplified the DOJ's concerns about collateral consequences.

155. *See* Breuer's N.Y. City Bar Remarks, *supra* note 142.

effect of an indictment on innocent employees and shareholders."[156] Indeed, the "sober[ing] predictions that a company or bank might fail if we indict" was the sort of "consideration[] . . . that literally ke[pt] [Breuer] up at night."[157] Breuer went on to suggest that to properly discharge their prosecutorial duties, prosecutors should consult with regulators and experts to better understand the economic effect of bringing a criminal case against a large institution.[158]

B. HSBC: "Too Big to Jail"?

1. *The Deferred Prosecution of HSBC*

On December 11, 2012, a few months after Breuer delivered his speech, Justice Department officials announced that the DOJ had entered into a DPA with HSBC[159] despite evidence that the bank had laundered hundreds of millions in narcotics proceeds for Mexican and Colombian cartels and facilitated transactions with entities in Cuba, Iran, and other jurisdictions subject to U.S. government sanctions.[160] The four-count information charged HSBC with violations of the Bank Secrecy Act ("BSA"),[161] the International Emergency Economic Powers Act ("IEEPA"),[162] and the Trading with the Enemy Act ("TWEA").[163]

According to the joint Statement of Facts, from 2006 to 2010, two well-known Colombian and Mexican drug cartels[164] laundered at least

156. Prosecutors, Breuer contended, have a "duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if [they] indict the corporation." *Id.*

157. *Id.*

158. *Id.*

159. DOJ's HSBC Press Release, *supra* note 4. The named defendants were HSBC Holdings and its subsidiary, HSBC Bank USA, N.A. For ease of reference, we refer to both as simply "HSBC."

160. *Id.*

161. *See* DOJ's HSBC Press Release, *supra* note 4; *see also* 31 U.S.C. §§ 5311–5332 (2012). Congress enacted the Bank Secrecy Act in 1970 to address an increase in criminal money laundering activity through financial institutions. *See* Colin Watterson, Note, *More Flies with Honey: Encouraging Formal Channel Remittances to Combat Money Laundering*, 91 Tex. L. Rev. 711, 723–24 (2013). In 2001, Congress included in the USA PATRIOT Act an amendment to the Bank Secrecy Act, which required domestic financial institutions to establish and maintain effective anti-money laundering programs. 31 U.S.C. § 5318(h). The amendment was included to "ensure that financial institutions of all sizes implement programs to combat their vulnerabilities to those who would seek to use them to transfer or launder illegal funds." 147 Cong. Rec. H7129, H7204 (daily ed. Oct. 23, 2001). If the financial institution's failure to establish or maintain an effective anti-money-laundering program is "willful," it is subject to criminal penalties. *See* 31 U.S.C. § 5322.

162. *See* DOJ's HSBC Press Release, *supra* note 4; *see also* 50 U.S.C. §§ 1702, 1705 (2012).

163. 50 U.S.C. app. §§ 3, 5, 16 (2012). For a detailed discussion of the Justice Department's charges against HSBC, see DOJ's HSBC Press Release, *supra* note 4.

164. These cartels included the Sinaloa Cartel in Mexico and the Norte del Valle Cartel in Colombia. *See* Statement of Facts ¶ 9, United States v. HSBC Bank USA, (No. 12-0763) (E.D.N.Y. 2013) [hereinafter HSBC Statement of Facts]; *see also* Robert Mazur, Op-Ed., *How to Halt the Terrorist Money Train*, N.Y. Times, Jan. 2, 2013, at A25 (referencing a House report, which

$881 million through HSBC without detection.[165] HSBC's inability to identify this activity was due in large part to its downsized and underfunded anti-money-laundering program.[166] HSBC allegedly viewed its anti-money-laundering program as an "area where resources could be cut to increase profits,"[167] rather than a bulwark against money laundering. In light of these deficiencies, prosecutors charged HSBC with willfully failing to maintain an effective anti-money-laundering program[168] and willfully failing to conduct and maintain due diligence on correspondent bank accounts held on behalf of foreign persons[169] in violation of the BSA.[170]

The Statement of Facts also alleged that HSBC violated the IEEPA and the TWEA when, from the mid-1990s until around 2006, it knowingly accepted hundreds of millions of dollars sourced from customers located in Cuba, Iran, Libya, Sudan, and Burma—all of which were subject to sanctions enforced by the Office of Foreign Assets Control.[171] According to prosecutors, HSBC went to great lengths to disguise many of the transactions coming from these countries.[172] The upshot of this was that other U.S. banks could not properly review whether the money they accepted from HSBC violated U.S. sanctions. Accordingly, billions of dollars from these countries illegally entered the U.S. financial system.[173]

"document[ed] the collaboration between Mexican and Colombian drug cartels and Hezbollah in narcotics and human trafficking, smuggling and financial crimes in the United States and Latin America").

165. HSBC Statement of Facts, *supra* note 164, ¶ 9. The problems were so bad at HSBC that Mexican narcotics traffickers were "depositing hundreds of thousands of dollars in bulk U.S. currency each day into HSBC . . . accounts." Deferred Prosecution Agreement ¶ 50, United States v. HSBC Bank USA, (No. 12-0763) (E.D.N.Y. 2013). This easily made HSBC Mexico "the preferred financial institution for drug cartels and money launderers." *Id.* ¶ 51.

166. *See* HSBC Statement of Facts, *supra* note 164, ¶ 10(d) (describing the staffing and funding shortages of HSBC's anti-money laundering program). Even HSBC's Chief Operating Officer for Compliance found its anti-money laundering program to be "behind the times and in need of fundamental change." Government's Memorandum in Support of the Deferred Prosecution Agreement at 8, United States v. HSBC Bank USA, (No. 12-0763) (E.D.N.Y. 2013) [hereinafter Gov't Memorandum in Support of HSBC DPA] (internal quotation marks omitted). The degree to which HSBC's anti-money-laundering program was understaffed cannot be overstated. In March 2008, the bank had only *four* employees to review 13,000–15,000 suspicious wire alerts generated per month. HSBC Statement of Facts, *supra* note 164, ¶ 27. Today, by contrast, HSBC Bank USA has "roughly 430 employees reviewing suspicious wire transactions." Gov't Memorandum in Support of HSBC DPA, *supra*, at 8.

167. Gov't Memorandum in Support of HSBC DPA, *supra* note 166, at 7.

168. *See* DOJ's HSBC Press Release, *supra* note 4; *see also* 31 U.S.C. § 5318(h) (2012).

169. *Id.* § 5318(i).

170. *Id.* §§ 5311–5332. For a detailed discussion of the conduct underlying the charges, see HSBC Statement of Facts, *supra* note 164, ¶¶ 8–28.

171. HSBC Statement of Facts, *supra* note 164, ¶¶ 56–60.

172. For example, HSBC Europe devised a specific procedure in the 1990s to allow sanctioned entities to place notes in their requests or submissions of payments such that any trace of the sanctioned entity was removed. *See* HSBC Statement of Facts, *supra* note 164, ¶¶ 65, 74.

173. *See id.* ¶ 71 n.6.

Despite the seriousness of the allegations against HSBC (and its history of noncompliance with federal anti-money-laundering laws), the Justice Department deferred prosecution of the bank and declined to pursue charges against any of its employees.[174] At a press conference announcing the settlement, then-Assistant Attorney General Breuer explained that had prosecutors pursued criminal sanctions against HSBC, it "would almost certainly have lost its banking license in the U.S., the future of the institution would have been under threat and the entire banking system would have been destabilized."[175] "Our goal here is not to bring HSBC down, it's not to cause a systemic effect on the economy, it's not for people to lose thousands of jobs," he said.[176] Breuer's remarks fueled speculation that potential collateral consequences had been the dispositive factor in the DOJ's decision not to charge HSBC.[177]

That the Justice Department did not pursue criminal charges against HSBC is not to say the bank was let off easily. To the contrary, the penalty imposed on HSBC—approximately $1.9 billion—included the largest ever forfeiture in a bank prosecution of $1.256 billion.[178] The corporate governance measures HSBC agreed to undertake were likewise expansive. Among other changes, HSBC: (1) changed its leadership team, including its CEO, general counsel, and chief compliance officer;[179] (2) clawed back bonuses paid to senior officials;[180] (3) increased its anti-money laundering staff from ninety-two full-time employees and twenty-five consultants to 880 full-time employees and 267 consultants;[181] (4) developed a new automated monitoring system to review every wire transaction that goes through HSBC USA;[182] (5) initiated a company-wide shift to a single global anti-money laundering standard;[183] (6) tied senior executive bonuses to the maintenance of successful compliance standards;[184] (7) separated its legal and compliance departments;[185] and (8) required its anti-money laundering director to report directly to the board of

174. DOJ's HSBC Press Release, *supra* note 4.

175. *Id*.

176. *Id.*

177. Simon Johnson, *"Some of These Institutions Have Become Too Large"*, BASELINE SCENARIO (Mar. 7, 2013), http://baselinescenario.com/2013/03/07/some-of-these-institutions-have-become-too-large.

178. Gov't Memorandum in Support of HSBC DPA, *supra* note 166, at 11.

179. *See* Deferred Prosecution Agreement, *supra* note 165, ¶ 5(a) ("HSBC North America has a new leadership team, including a new Chief Executive Officer, General Counsel, Chief Compliance Officer, [Anti-Money Laundering] Director, Deputy Chief Compliance Officer and Deputy Director of its Global Sanctions program.").

180. *Id.* ¶ 5(b).

181. *Id.* ¶ 5(d); *id.* ¶ 5(c) ("In 2011, HSBC Bank USA spent $244 million on [anti-money laundering], approximately *nine* times more than what it spent in 2009." (emphasis added)).

182. *Id.* ¶ 5(i).

183. *Id.* ¶ 5(p)

184. *Id.* ¶ 5(v).

185. *Id.* ¶ 5(e).

directors and senior management regarding its BSA and anti-money laundering programs.[186] In addition to the billion-dollar fine and extensive corporate governance changes, HSBC was also required to retain an independent compliance monitor for a five year term, the first time in the anti-money laundering context that a financial institution has been required to retain an independent compliance monitor.[187]

2. *Political Backlash in the Wake of HSBC*

Despite the record penalties and other punitive features of the HSBC DPA, the DOJ's decision to defer prosecution drew the ire of lawmakers on both sides of the political divide.[188] One group of bipartisan legislators, led by Senator Elizabeth Warren, expressed the populist concern that certain financial institutions were "too big for trial,"[189] a continuation of the dynamic where "[b]ig banks are getting a terrific break, and little

---

186. *Id.*

187. *See id.* ¶¶ 9–13; Gov't Memorandum in Support of HSBC DPA, *supra* note 166, at 16. HSBC was not the only one of the government's corporate targets for violations of the BSA. On January 6, 2014, United States Attorney's Office for the Southern District of New York announced that JP Morgan Chase ("JP Morgan") had entered into a DPA, whereby JP Morgan was charged with two felony violations of the BSA in connection with the bank's failure detect and report suspicious activity undertaken by its client, Bernard L. Madoff Investment Securities. *See* Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Filing of Criminal Charges Against and Deferred Prosecution Agreement with JP Morgan Chase Bank, N.A., in Connection with Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme, (Jan. 7, 2014) [hereinafter DOJ JP Morgan Press Release], *available at* http://www.justice.gov/usao/nys/pressreleases/January14/JPMCDPAPR.php*; see also* Deferred Prosecution Agreement, United States v. J.P. Morgan Chase Bank (No. 14 CR-00007-PKC-1) (S.D.N.Y. 2014) [hereinafter JP Morgan DPA]. The DPA, which was summarily approved by Judge P. Kevin Castel, required JP Morgan to do the following: (1) accept responsibility for its conduct by stipulating to the accuracy of an extensive statement of facts; (2) pay a $1.7 billion penalty to the victims of the Madoff fraud through a parallel civil forfeiture complaint; (3) refrain from future criminal conduct and cooperate fully with the Government; and (4) continue reforms of its BSA/Anti-Money Laundering compliance program pursuant to previous undertakings with federal banking regulators. *Id.* The significance of the JP Morgan DPA cannot be understated—JP Morgan became the first U.S. company in recent years to enter into a DPA with the DOJ for alleged violations of the BSA. Dan Fitzpatrick, *No Penalty for J.P. Morgan Officials*, WALL ST. J., Jan. 7, 2014, at C2. In announcing the JP Morgan DPA, United States Attorney Preet Bharara stated, "Today, the largest financial institution in the country stands charged with two criminal offenses. Institutions, not just individuals, have an obligation to follow the law and to police themselves." *See* DOJ JP Morgan Press Release, *supra*.

188. *See, e.g.*, Letter from Senators Sherrod Brown (D-Ohio) & Charles Grassley (R-Iowa) to Attorney Gen. Eric H. Holder, Jr. (Jan. 29, 2013) [hereinafter Brown & Grassley Letter], *available at* http://www.brown.senate.gov/newsroom/press/release/sens-brown-grassley-press-justice-department-on-too-big-to-jail (criticizing the Justice Department for creating the perception that some Wall Street banks are too big to jail—a "perception [that] undermines the public's confidence in our institutions and in the principal that the law is applied equally in all cases").

189. Letter from Sen. Elizabeth Warren (D-Mass.) to Chairman Ben Bernanke, Attorney Gen. Eric Holder, & Chairman Mary Jo White (May 14, 2013), *available at* http://www.warren.senate.gov/documents/LtrtoRegulatorsre2-14-13hrg.pdf.

banks are just getting smashed."[190] Pointing to the HSBC case, Senator Warren noted:

> If you're caught with an ounce of cocaine, the chances are good you're gonna go to jail. If it happens repeatedly, you may go to jail for the rest of your life . . . . But evidently if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your bed at night—every single individual associated with this. And I think that's fundamentally wrong.[191]

In Senator Warren's view, the Justice Department should do the same to corporations as local prosecutors do to ordinary citizens: "squeez[e] [them] on sometimes very thin grounds, and tak[e] them to trial in order to make an example."[192]

A second line of criticism, voiced most prominently by Senator Charles Grassley, focused more narrowly on whether the Justice Department maintained a "too big to jail" policy that delegitimized the rule of law and failed to deter corporate misconduct. According to Senator Grassley, the "fail[ure] to prosecute individuals or banks when they have committed crimes will result in perverse incentives and ultimately undermine the integrity of the U.S. financial system and economy."[193] Like Senator Warren, Senator Grassley criticized the HSBC

190. Mollie Reilly, *Elizabeth Warren Takes on Eric Holder's 'Too Big to Jail' Statement*, Huffington Post (Mar. 7, 2013, 8:09 AM), http://www.huffingtonpost.com/2013/03/06/elizabeth-warren-eric-holder_n_2823618.html.

191. Mark Gongloff, *Elizabeth Warren: Banks Get Wrist Slaps While Drug Dealers Get Jail*, Huffington Post (Mar. 7, 2013, 5:19 PM), http://www.huffingtonpost.com/2013/03/07/elizabeth-warren-hsbc-money-laundering_n_2830166.html.

192. Cheyenne Hopkins, *Elizabeth Warren Decries 'Too-Big-for-Trial' Approach to Banks*, Bloomberg (Feb. 14, 2013, 6:46 PM), http://go.bloomberg.com/political-capital/2013-02-14/elizabeth-warren-decries-too-big-for-trial-approach-to-banks.

193. *See* Letter from Sen. Charles Grassley (R-Iowa) to Attorney Gen. Eric H. Holder, Jr. (Dec. 13, 2012) [hereinafter Grassley Letter], *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=43551; *see also* Letter from Sen. Jeff Merkley (D-Or.) to Attorney Gen. Eric Holder (Dec. 13, 2012), *available at* http://www.merkley.senate.gov/newsroom/press/release/?id=42a606e4-7c45-42ed-8348-c77c508f9281 (expressing his deep concern "that the [Justice] Department's continuing application of deferred prosecution agreements on the grounds of financial stability runs contrary to the intent of Congress and undermines the accountability to the rule of law that is so fundamental to a healthy, functioning free market economy"). In a later letter to Eric Holder, Senator Grassley and Senator Sherrod Brown expressed their joint concern regarding Lanny Breuer's comment that prosecutors have a duty to consult with experts to understand the economic impact of bringing criminal charges against a financial institution. The letter: (1) quoted former Assistant Attorney General Breuer's remarks; (2) asked whether his comments meant that the DOJ followed a "too big to jail" policy; and (3) questioned its apparent decision not to prosecute corporations. *See* Brown & Grassley Letter, *supra* note 188. The senators also requested that the Justice Department respond to the following questions:

> 1. Has the Justice Department designated certain institutions whose failure could jeopardize the stability of the financial markets and are thus, "too big to jail"? If so, please name them.
>
> 2. Has the Justice Department ever failed to bring a prosecution against an institution due to concern that their failure could jeopardize financial markets?

DPA as "no more than a parking ticket" that "does little to discourage future lawbreakers, and leaves the U.S. financial system highly vulnerable to exploitation by drug cartels and terrorists."[194]

Congressional outrage reached a breaking point when, at a March 6, 2013 hearing before the Senate Judiciary Committee, Attorney General Eric Holder conceded that some institutions are, in fact, too big to charge. Attorney General Holder opined that "the size of some of these institutions becomes so large that it does become difficult . . . to prosecute them when [prosecutors] are hit with indications that if [they] do prosecute . . . it will have a negative impact on the national economy, perhaps even the world economy."[195]

3. *The Justice Department's Rhetorical Shift*

In the wake of the March 6 hearing the DOJ's rhetoric began to shift. On May 15, 2013, in testimony before the House Judiciary Committee, Attorney General Holder took a very different stance when he stated: "Let me be very, very, very clear . . . . Banks are not too big to jail. If we find a bank or a financial institution that has done something wrong, if we can prove it beyond a reasonable doubt, those cases will be brought."[196]

This position was reinforced a few months later by then-acting Assistant Attorney General Mythili Raman who, at a House Financial Services Committee hearing convened to address the "too big to jail" issue, assured the committee that "[n]o institution and no individual is

---

> 3. Are there any entities the Justice Department has entered into settlements with, in which the amount of the settlement reflected a concern that markets could be impacted by such a settlement? If so, for which entities?
>
> 4. Please provide the names of all outside experts consulted by the Justice Department in making prosecutorial decisions regarding financial institutions with over $1 billion in assets.
>
> 5. Please provide any compensation contracts for these individuals.
>
> 6. How did DOJ ensure that these experts provided unconflicted and unbiased advice to DOJ?

194. *See* Grassley Letter, *supra* note 193, at 2 (internal quotation marks omitted).

195. Mark Gongloff, *Eric Holder Admits Some Banks are Just Too Big to Prosecute*, HUFFINGTON POST (Mar. 6, 2013, 6:56 PM), http://www.huffingtonpost.com/2013/03/06/eric-holder-banks-too-big_n_2821741.html.

196. Jason M. Breslow, *Eric Holder Backtracks Remarks on "Too Big to Jail"*, FRONTLINE (May 16, 2013, 2:15 PM), http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/eric-holder-backtracks-remarks-on-too-big-to-jail.

immune from prosecution because of its size."[197] That is, "size does not equal immunity."[198]

Then, in November 2013, at a money laundering enforcement conference, Deputy Attorney General James Cole began his address with the "fundamental proposition that no individual or business — including a financial institution — is immune from prosecution . . . ." Speaking on behalf of the Justice Department, his message was clear: "We are committed to holding banks and their employees responsible for their misconduct."[199] Thus, while earlier statements may have raised concerns regarding the Justice Department's motives,[200] since that time the rhetoric from its most senior officials has been clear and consistent: "No institution should rest easy in the belief that it is too big to jail."[201]

Despite these assurances, key congressional leaders continued to wonder aloud whether large financial institutions were effectively permitted to avoid criminal prosecution by paying fines.[202] Congressman Emanuel Cleaver summarized these concerns in dramatic fashion: "[W]hen we hear that none of the Wall Street culprits have gone to trial, it contributes to this feeling out here that if you have money, you can get off. If you rob a convenience store, you are going to go to jail. If you rob the Nation, you just get richer, and you pay a fine."[203]

---

197. *See generally Who is Too Big to Fail: Are Large Financial Institutions Immune From Federal Prosecution? Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 113th Cong. (2013) [hereinafter *Who is Too Big To Fail? Hearing*]; *see also* Sarah N. Lynch, *Justice Department Tells Lawmakers No Bank is Too Big to Jail*, REUTERS (May 22, 2013, 6:55 PM), http://www.reuters.com/article/2013/05/22/us-banks-jail-idUSBRE94L1AM20130522.

198. Raman also stressed that under the Justice Department's corporate charging guidelines, collateral consequences are but one factor that prosecutors are directed to consider. *See* Lynch, *supra* note 197; *see also* Evan Weinberger, *Top Justice Official Says No Bank Too Big to Jail*, LAW360 (May 22, 2013, 6:12 PM), http://www.law360.com/articles/443957/top-justice-official-says-no-bank-too-big-to-jail.

199. James M. Cole, Deputy Attorney Gen., Remarks at Money Laundering Enforcement Conference in Washington, D.C. (Nov. 18, 2013), *available at* http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131118.html.

200. *See supra* notes 155–158, 175–177, 195 and accompanying text.

201. *See* Press Release, U.S. Attorney's Office, Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Insider Trading Charges Against Four SAC Capital Management Companies and SAC Portfolio Manager (July 25, 2013), *available at* http://www.justice.gov/usao/nys/pressreleases/July13/SACPR.php [hereinafter DOJ SAC Press Release]; *see also* Jenny Strasburg & Michael Rothfeld, *U.S. Readies SAC Charges—Criminal Case Against Hedge-Fund Firm Would Follow Multiyear Insider Probe*, WALL ST. J., July 23, 2013, at A1 (quoting Preet Bharara, United States Attorney for the Southern District of New York); Patricia Hurtado, *JP Morgan-Madoff Case Won't Be the Last Big One, Bharara Says*, BLOOMBERG (Jan. 28, 2014, 7:05 AM), http://www.bloomberg.com/news/2014-01-27/jpm-case-tied-to-madoff-not-the-last-big-case-bharara-says.html ("JPMorgan is not going to be the last big case that my office brings in this area, I can promise that." (quoting Preet Bahara, United States Attorney for the Southern District of New York)).

202. *See id.* (summarizing legislators' concerns).

203. *See Who is Too Big to Fail? Hearing*, *supra* note 197, at 9. In an extreme expression of dissatisfaction with the HSBC settlement, in October 2013 Congresswoman Maxine Waters, the top Democrat on the House Financial Services Committee, introduced a bill entitled the "Holding

IV. The "Too Big to Jail" Effect

The intense political scrutiny that culminated with the HSBC case provides the backdrop for a phenomenon we call the "too big to jail" effect. Specifically, two significant developments have taken place within the government in the wake of the HSBC DPA, each of which could substantially impact the DOJ's approach to corporate criminality.

A. Judge Gleeson's Opinion in *United States v. HSBC*

The first is Judge Gleeson's opinion in the HSBC case.[204] On December 20, 2012, eight days after the HSBC DPA was filed, Judge Gleeson, the district judge to whom the case had been assigned, called the parties in for a status conference. The purpose of the conference was not to announce his approval of the DPA, but to ask the parties to address the scope of a district court's review of such an agreement. Specifically, Judge Gleeson questioned whether Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 11(c)(1)(A) and U.S. Sentencing Guideline ("U.S.S.G.") § 6B1.2 governed, thereby permitting him to reject the DPA if he found that it did not "adequately reflect[] the seriousness of the defendants' offense behavior."[205] Judge Gleeson's query was remarkable because no court had ever considered this question before. Prior to this time, the

Individuals Accountable and Deterring Money Laundering Act." Rachel Louise Ensign & Michael R. Crittenden, *New Anti-Money Laundering Bill Targets Bank Executives*, Wall St. J. Risk & Compliance J. (Oct. 23, 2014, 1:36 PM), http://blogs.wsj.com/riskandcompliance/2013/10/23/new-anti-money-laundering-bill-targets-bank-executives. Among other things, the bill includes a requirement that the DOJ explain to Congress "'why it did or did not pursue prison sentences' when it settles an anti-money laundering probe for a financial penalty." *Id.*

204. *See, e.g.*, Savarese et al., *supra* note 27, at 907 ("Judge Gleeson's opinion in *HSBC* is the first carefully considered judicial ruling establishing the basis for a court's authority to review and approve a proposed DPA."). Before the "too big to jail" effect, both the government and corporate defendants were right to assume that the court's approval of a DPA was a mere formality. *See* Gillison, *supra* note 45 (providing a chart that illustrates that in the last four years, Judge Gleeson is the only district judge to have spent more than two days reviewing the terms of a DPA involving a large bank). Even the great weight of scholarly literature described the prospect of judicial review of a DPA as a "pipedream." F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 Va. L. Rev. Brief 121, 122 (2007). Judge Gleeson's opinion was thus extraordinary by any measure. *See* Savarese, *supra* note 27, at 907 (describing Gleeson's opinion as both novel and important).

205. Transcript of Status Conference at 6, United States v. HSBC Bank USA, N.A., (No. 12-0763) (E.D.N.Y. 2012). Fed. R. Crim. P. 11(c)(1)(A) contemplates that the DOJ and a defendant can reach a charge bargain providing that if the defendant pleads guilty or nolo contendere to a charged offense or a lesser related offense, "the plea agreement may specify that an attorney for the government will . . . not bring, or will move to dismiss, other charges." Fed. R. Crim. P. 11(c)(1)(A). U.S.S.G. § 6B1.2 is triggered by such a plea bargain. HSBC's Pretrial Memorandum at 2, United States v. HSBC Bank USA (No. 12-0763) (E.D.N.Y. 2013) [hereinafter HSBC's Pretrial Memorandum]. It provides that the district court may accept a charge bargain provided "the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." 18 U.S.S.G. § 6B1.2.

uniformly-held view had been that only the Speedy Trial Act governed a district court's review of a DPA.[206]

While at the hearing the Justice Department and HSBC expressed initial agreement with Judge Gleeson's position,[207] their subsequent written submissions presented a much different picture.[208] In their submissions, both parties argued that Fed. R. Crim. P. 11(c)(1)(A) and U.S.S.G. § 6B1.2 were inapposite since HSBC had not agreed to plead guilty or nolo contendere, and the DOJ had not agreed to dismiss other charges in exchange for HSBC's guilty plea.[209] The DOJ and HSBC contended instead that section 3161(h) of the Speedy Trial Act applied, and that subsection (h)(2) "provides the applicable legal standard for the Court's review, as it requires the Court's approval for the exclusion of time."[210] HSBC further asserted that because "subsection (h)(2) does not itself set forth a standard for the exclusion of time in the deferred prosecution context," subsection (h)(7), the Act's catch-all provision, controlled.[211] The scope of the court's review was therefore limited to

---

206. *See, e.g.*, Zierdt & Podgor, *supra* note 46, at 14 (noting that DPAs are presented to a federal court only to satisfy the Speedy Trial Act, which "exempts the deferral of criminal matters from the speedy trial constraints"); GIBSON 2013 MID-YEAR UPDATE, *supra* note 76, at 9 (noting that the role of courts in the DPA context traditionally has been limited to "approval of time exclusions under the Speedy Trial Act for the length of deferral periods and dismissal of charges following successful completion of those periods"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 25 (2009) ("The Speedy Trial Act allows judges to approve the deferral of prosecution pursuant to a written agreement between the government and the defendant, for the purpose of allowing the defendant to demonstrate its good conduct; however, the law does not otherwise specify judicial involvement in the DPA process.").

207. FED. R. CRIM. P. 11(c)(1)(A).

208. *See* Gov't Memorandum in Support of HSBC DPA, *supra* note 166, at 2 n.1 (noting that while "the government did not object to the Court's characterization of the DPA as falling within the parameters of Federal Rule of Criminal Procedure 11(c)(1)(A) . . . a subsequent, more careful review of the rule and the law" shows that "the DPA *does not* fall within that rule" (emphasis added)); HSBC's Pretrial Memorandum, *supra* note 205, at 2 (noting that Federal Rule of Criminal Procedure 11(c)(1) is "limited by its terms to cases where the defendant pleads guilty or nolo contendere" (emphasis omitted) (internal quotation marks omitted)).

209. *See* Gov't Memorandum Support of HSBC DPA, *supra* note 166, at 2 n.1; HSBC's Pretrial Memorandum, *supra* note 208, at 2.

210. *See* Gov't Memorandum in Support of HSBC DPA, *supra* note 166, at 2; *see also* HSBC's Pretrial Memorandum at 2. Pursuant to section (h)(2), "[a]ny period of delay during which the prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct shall be excluded . . . in computing time within which the trial of any such case must commence." 18 U.S.C. § 3616(h)(2).

211. *See* HSBC's Pretrial Memorandum, *supra* note 205, at 2 ("While subsection (h)(2) does not itself set forth a standard for the exclusion of time in the deferred prosecution context, subsection (h)(7), the Act's catch-all provision, provides that time should be excluded if the interests of justice served by the exclusion outweigh the best interests of the defendant and the public in a speedy trial.").

whether the DPA was in "the best interests of the defendant and the public in a speedy trial."[212]

Seizing on this proposed standard, the DOJ and HSBC laid out in great detail why, in their respective views, Judge Gleeson should accept the proposed DPA. The government's submission emphasized two points: (1) HSBC had implemented substantial reforms voluntarily and "long before any charging decisions were made;"[213] and (2) the $1.256 billion forfeiture amount imposed against HSBC was the largest ever,[214] and was not tied to the amount of money that circulated through HSBC—as was the alleged money laundering activity.[215]

For its part, HSBC focused on that fact that the old guard had been relieved of its duties, and an entirely new U.S. senior management had been appointed.[216] HSBC noted that the bank had invested $290 million in remediating its anti-money laundering program, which included the hiring of important figures from the Treasury Department.[217] HSBC further highlighted the extent of its past cooperation and promise to assist the government's ongoing investigation of the case.[218]

Despite the sensitive nature of the HSBC DPA and the potential damage that a rejection could cause, Judge Gleeson did not immediately approve. Indeed, he delayed expressing his approval for almost seven months.[219] The delay allowed a number of concerned citizens, including a former HSBC employee, to submit letters seeking to persuade Judge Gleeson to reject the DPA.[220] It also fueled speculation among commentators that he would do just that.[221]

---

212. *See id.*

213. Gov't Memorandum in Support of HSBC DPA, *supra* note 166, at 11–12. These reforms, the agency contended, eliminated the institution-wide absence of accountability that permeated the firm. *See id.* at 12–14.

214. *See id.* at 17.

215. *See id.* ("The forfeiture . . . is based on the amount of drug trafficking proceeds and sanctioned entity transactions that moved through HSBC, and not the revenue that HSBC earned from the transactions."); *cf.* Transcript of Hearing on the Joint Motion for Approval of DPA 6:12–21, United States v. Barclays Bank PLC (No. 10-0218) (D.D.C. 2010) (criticizing the government for requiring Barclays to pay back only what it illegally obtained).

216. *See* HSBC's Pretrial Memorandum, *supra* note 205, at 2–3.

217. *See id.*

218. *See id.* at 4–5. Alternatively, HSBC argued that under the Due Process Clause, it is "plainly entitled to its essential contractual right—the deferral of prosecution—because it gave up substantial rights in reliance on the Agreement." *Id.* at 5.

219. The parties filed the DPA on December 12, 2012. Judge Gleeson did not extend his approval of the DPA until July 1, 2013. United States v. HSBC Bank USA, N.A., No. 12-0763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013)

220. *See* Letter from Liviu Vogel to Judge John Gleeson (May 2, 2013) (on file with Author) (requesting that the court consider whether the approval of the proposed non-prosecution agreement should be conditioned upon HSBC's payment of some portion of the criminal forfeiture to thousands of victims of Iranian terrorism); Letter from Berenice Mosca to Judge John Gleeson (on file with Author) (urging Judge Gleeson to "not approve this grossly inadequate settlement offer"); Letter from Robert Warner to Judge John Gleeson (Mar. 18, 2013) (on file with Authors) ("Acceptance of this terrible

Judge Gleeson finally expressed his approval of the HSBC DPA on July 1, 2013.[222] He did so, importantly, in a detailed twenty-page opinion that bore no resemblance to the formulaic orders that had been standard fare in the DPA context.[223] Contrary to the assertions of the DOJ and HSBC, Judge Gleeson determined that the Speedy Trial Act does not govern a district court's review of a DPA. Judge Gleeson opined that the "ends-of-justice" balancing test in section 3161(h)(7) applies only in the narrow context where the parties seek a continuance because the "the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial."[224] But where, as here, the parties sought to "exclude the delay occasioned by a deferred prosecution agreement,"[225] the operative provision is section 3161(h)(2), which provides that delay is excluded by a deferred prosecution upon acceptance by the district court.[226] The problem, Judge Gleeson observed, is that section 3161(h)(2) "is silent as to the standard the court should employ when evaluating whether to grant 'approval' to a deferred prosecution agreement"—a question that is distinct from the whether the court should "approv[e] the exclusion of delay during the deferral of prosecution."[227] The latter question triggers only upon approval of the DPA.[228]

agreement would permit our government to escape its responsibility and set a dangerous precedent for American justice."); Letter from Anonymous Individual to Judge Gleeson (on file with Authors) (detailing compliance issues at HSBC); Letter from Marie Kerr to Judge John Gleeson (May 24, 2013) (on file with Authors) (offering her assistance to help remediate HSBC's compliance issues).

221. *See, e.g.*, Matthew Mosk, *Will Judge Go Rogue, Reject DOJ Settlement With Big Bank?*, ABC NEWS (Mar. 13, 2013), http://abcnews.go.com/Blotter/hsbc-judge-rogue-reject-doj-settlement-big-bank/story?id=18717423 (quoting Sam Buell, who opined that "[i]t does not seem likely that the judge would have taken this much time if he was not at least thinking hard about whether to accept the agreement").

222. *See HSBC Bank USA, N.A.*, 2013 WL 3306161, at *1.

223. *See, e.g.*, Steven E. Fagell et al., *The HSBC DPA—Approved, But at What Cost?*, LAW360 (July 8, 2013, 3:09 PM), http://www.cov.com/files/Publication/a5ced455-cc43-40f1-80ff-52485645fabb/Presentation/PublicationAttachment/dcd98c07-67f7-4fbc-9201-58e51da1c475/The_HSBC_DPA_Approved_But_At_What_Cost.pdf (observing that "Judge Gleeson's opinion will likely increase the pressure on both companies and the Justice Department to consider carefully whether the provisions of a DPA are likely to withstand judicial scrutiny"). Judge Gleeson's opinion was strikingly similar to Judge Jed Rakoff's decision in *S.E.C. v. Citigroup Global Markets Inc.*, 827 F. Supp. 2d 328, 329 (S.D.N.Y. 2011). *See infra* note 246; *see also* Anthony S. Barkow & Matthew D. Cipolla, *Increased Judicial Scrutiny of Deferred Prosecution Agreements*, N.Y. L.J., Aug. 20, 2013, at 1, *available at* http://jenner.com/system/assets/publications/12185/original/NYLJ_Barkow_Cipolla_082013.pdf?1377117135 (observing that Judge Rakoff's scrutiny of the *Citigroup* consent decree provided the backdrop for Judge Gleeson's decision in *HSBC*).

224. *HSBC Bank USA*, 2013 WL 3306161, at *3.

225. *Id.* (emphasis added).

226. *See id.* (explaining that the "DPA at issue here is, without a doubt, about diverting HSBC from criminal prosecution," thus triggering the application of 18 U.S.C. § 3161(h)(2)).

227. *Id.*

228. *See id.* ("[T]he question of whether to exclude the duration of the DPA from the speedy trial clock hinges on a determination of whether the Court approves the DPA.").

To fill the void, Judge Gleeson turned to the federal court's supervisory power, which "permits federal courts to supervise the administration of criminal justice among the parties before the bar"[229] and "protect[s] the integrity of judicial proceedings."[230] He opined that, by entering into a DPA, the parties had chosen to implicate the Court in their resolution of the matter, and by doing so "the parties [had] subjected their DPA to the legitimate exercise of that court's authority."[231] Judge Gleeson conceded, however, that the invocation of a court's supervisory power in the context of a deferred prosecution would be atypical, and the scope of the power unexplored.[232] The more typical case is where "the defendant raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety"[233]—an unlikely scenario in the deferral context "given the risk of derailing the deferral."[234] That said, Judge Gleeson cataloged a few instances where a court would be well within its supervisory power to intervene.[235]

In the end, Judge Gleeson approved the HSBC DPA, finding no impropriety that "implicates the integrity of the Court."[236] While he acknowledged the "heavy public criticism" of the DPA,[237] as well as the "unsolicited input from members of the public urging [him] to reject the DPA," he stressed that the decision to hold HSBC criminally liable is squarely in the government's hands, not his.[238] Judge Gleeson reasoned that "[t]he Executive Branch alone is vested with the power to decide

229. *Id.* at *4 (citing United States v. Payner, 447 U.S. 727, 735 n.7 (1980).

230. *Id.* In 1997, Judge Gleeson published a law review article examining the scope of the supervisory power. *See generally* Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & Pol'y 423 (1997). The article advocated that despite pressure on district judges to rein in the all-powerful prosecutor, judges should resist the temptation to supervise them. *Id.* at 428. This is because, in Judge Gleeson's view, judges are not "well-suited to supervise criminal investigations, a process which is generally best left to the executive branch." *Id.*

231. *HSBC Bank USA*, 2013 WL 3306161, at *3.

232. *Id.*

233. *Id.*

234. *Id.*

235. They include: (1) where the DPA requires cooperation of such nature that it may violate a company's attorney-client privilege or work produce protection or its employees' constitutional rights; (2) where the remedial actions prosecutors require the defendant to take have no nexus to the alleged criminal wrongdoing; and (3) where an independent monitor is selected based solely on his or her relationship to the prosecutor. *See id.*

236. *Id.* at *7.

237. *Id.* (citing Editorial, *Too Big to Indict*, N.Y. Times, Dec. 11, 2012, at A38; Jesse Singal, *HSBC Report Should Result in Prosecutions, Not Just Fines, Say Critics*, Daily Beast (July 18, 2012), http://www.thedailybeast.com/articles/2012/07/18/hsbc-report-should-result-in-prosecutions-not-just-fines-say-critics.html; Matt Taibbi, *Gangster Bankers: Too Big to Jail*, Rolling Stone (Feb. 14, 2013, 8:00 AM), http://www.rollingstone.com/politics/news/gangster-bankers-too-big-to-jail-20130214.

238. *HSBC Bank USA*, 2013 WL 3306161, at *7. Judge Gleeson also acknowledged that "if the government moved under [Fed. R. Crim. P.] 48(a) to dismiss the Information, it would be an abuse of discretion not to grant that motion." *Id.*

whether or not to prosecute,"[239] and that judges must be "mindful that they have no business exercising [prosecutorial] discretion and, as an institutional matter, are not equipped to do so."[240]

Nevertheless, Judge Gleeson examined the DPA provision-by-provision, noting the extent to which it requires HSBC to implement remedial measures that address its systemic compliance failures.[241] He also highlighted the substantial amount that HSBC is required to forfeit and the fact that it must admit criminal wrongdoing.[242] Given these facts, and the broad deference the judicial branch owes to the executive branch, Judge Gleeson "approve[d] without hesitation both the DPA and the manner in which it has been implemented thus far."[243] In a move equally novel to his invocation of the federal courts' supervisory power, however, he maintained that so long as the criminal case remains on his docket, the "implementation of the DPA [must] remain[] within the bounds of lawfulness and respect[] the integrity of this Court."[244] To this end, he required the parties to submit "quarterly reports with the Court to keep it apprised of all significant developments in the implementation of the DPA."[245]

Judge Gleeson's ruling on the HSBC DPA is a radical departure from past judicial practice. Rather than rubber-stamp the DOJ's decision to defer prosecution, he introduced a new standard for district courts to apply in their review of a DPA's content.[246] But by his own admission, the

239. *Id.* (citation omitted).

240. *Id.* at *8.

241. *See id.* at *10.

242. *Id.* at *11 ("Indeed, taking into account the fact that a company cannot be imprisoned, it appears to me that much of what might have been accomplished by a criminal conviction has been agreed to in the DPA.").

243. *Id.*

244. *Id.*

245. *Id.* The inspiration for this requirement appears to come from the Accountability in Deferred Prosecution Act of 2009, H.R. 1947, 111th Cong. § 7, which never made it out of committee. The bill provided that each party to a DPA as well as any independent monitor required under the DPA to "submit to the court in which the agreement is filed quarterly reports on the progress made toward the completion of the agreement, and describing any concern the filer has about the implementation of the agreement." *Id.* § 7(b). For a more detailed discussion of the Accountability in Deferred Prosecution Act, see *infra* notes 319–322 and accompanying text.

246. Judge Gleeson is not alone in the refusal to sign off on a privately negotiated agreement between the federal government and a big bank. He is just one among a growing group of federal judges who have recently expressed a willingness to insert themselves into the process of reviewing settlements with the government. The indisputable leader of this group is Judge Jed Rakoff, who in December 2011 declined to approve a settlement reached between the SEC and Citigroup Global Markets, Inc. ("Citigroup"), arising from Citigroup's role in causing the collapse of the market for mortgage-backed securities. SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011). In Judge Rakoff's view, as expressed in the opinion in *Citigroup*, a rubber-stamping judiciary "is worse than mindless, it is inherently dangerous." *Id.* at 335. For a more detailed discussion of Judge Rakoff's opinion in *Citigroup*, see generally Edward Wyatt, *Judge Blocks Citigroup Settlement with S.E.C.*, N.Y. TIMES (Nov. 28, 2011), http://www.nytimes.com/2011/11/29/business/judge-rejects-sec-

standard itself is so stringent that it is not likely to disturb any but the most outrageous agreements. His opinion is nevertheless extraordinary in that it opens the door for substantive judicial intervention in the deferral process.

Notably, one additional federal judge delayed approval pending a review of the terms of a corporate DPA during the same time frame, albeit without attempting to articulate an applicable legal standard.[247] It remains to be seen whether, going forward, district judges will provide the same level of scrutiny or accord the same degree of deference to the Justice Department.[248] Because the law governing judicial review of DPAs is largely unwritten, the answer is as of yet unclear.

B. The LIBOR, SAC Capital, and Credit Suisse Cases: The DOJ's Recent Return to Criminal Prosecutions of Financial Institutions

While the "too big to jail" effect contemplates an open door to meaningful judicial participation in the deferral process, it also translates into a second significant development: a re-examination by the Justice Department of its decade-long reliance on DPAs in the corporate criminal context. Simply put, in the wake of the HSBC case, the DOJ appears to have taken the intense congressional scrutiny of its charging practices to heart, and in several recent cases federal prosecutors have shown a willingness to embrace criminal charges as a means of addressing corporate misconduct.

1. *The LIBOR Prosecutions: The New Middle Ground?*

At the same time as federal prosecutors were investigating HSBC, wrongdoing of a different sort landed in the Justice Department's lap.

---

accord-with-citi.html. Notably, the Second Circuit cast serious doubt on Judge Rakoff's decision, finding "no indication in the record that the court gave deference to the S.E.C.'s judgment" that the settlement was in the public interest. *See* SEC v. Citigroup Capital Mkts., 673 F.3d 158, 164 (2d. Cir. 2012).

247. In *United States v. Wakemed*, Judge Terrance Boyle twice delayed approval of a DPA resolving an investigation into fraudulent Medicare billing practices by Wakemed. *See* Transcript of Docket Call, United States v. Wakemed, No. 5:12-0398 (E.D.N.C. Jan. 17, 2013); Transcript of Disposition Hearing and Arraignment, United States v. Wakemed, No. 5:12-0398 (E.D.N.C. Feb. 5, 2013); *see also* Anthony S. Barkow and Matthew D. Cipolla, *Increased Judicial Scrutiny of Deferred Prosecution Agreements*, N.Y. L.J., Aug. 20, 2013, at 2, *available at* http://jenner.com/system/assets/publications/12185/original/NYLJ_Barkow_Cipolla_082013.pdf?1377117135. Boyle initially refused to approve the DPA based on concerns about the extent of the wrongdoing, a perceived lack of protection for privately insured patients who may have been improperly billed, and the absence of charges against senior level managers. *Id.* He eventually approved the DPA after determining that it was in the public interest. United States v. Wakemed, No. 5:12-0398, 2013 WL 501784, at *2 (E.D.N.C. Feb. 8, 2013). In particular, Judge Boyle reasoned that a prosecution would harm the public because it would bar Wakemed from participating as a Medicare and Medicaid provider, thus impeding patients' access to these services. *Id.* Unlike Judge Gleeson, however, Judge Boyle did not seek to supply a standard of review beyond "consider[ing] the equities at issue." *Id.*

248. Fagell et al., *supra* note 223.

Beginning in the spring of 2009, bank regulators were alerted to a financial scandal orchestrated by some of the biggest banks in the world involving LIBOR rates, the reference point for over $350 trillion in financial products.[249] At the simplest level, the allegations were that bankers and brokers employed at the banks used to set LIBOR colluded to boost profits from their in-house trading positions.[250] The banks involved in this alleged scandal included Barclays, Citigroup, JP Morgan Chase, RBS, and UBS, among others.[251]

Consistent with past practice, the DOJ entered into settlement discussions with the targets of its investigation.[252] Barclays was the first to cooperate, and for its effort was offered an NPA, under which it would have to pay a $160 million penalty.[253] Several months later, on December 19, 2012, UBS entered into an NPA of its own, under which it agreed to pay a fine of $400 million.[254] The DOJ then entered into a DPA

---

249. *See* Christine A. Edwards et al., *Implications for Commercial Organizations of the Global Investigations into LIBOR*, 129 BANKING L.J. 831, 831 (2012) (stating that LIBOR is the benchmark interest rate at which banks lend to one another, and that the products tied to it include domestic mortgages, swaps, and futures); *see also* Shahien Nasiripour, *Effect of Libor on US Loans Examined*, FIN. TIMES (July 11, 2012, 7:11 PM), http://www.ft.com/intl/cms/s/0/1b2d25aa-cb66-11e1-911e-00144feabdc0.html#axzz20Q1kN0xj (noting that at least 900,000 outstanding home loans indexed to LIBOR originated during the time the rate was allegedly rigged—from 2005 to 2009).

250. The LIBOR rate is a calculation that is based upon submissions from a panel of banks selected by the British Bankers' Association ("BBA"). *See* Non-Prosecution Agreement Between the U.S. Department of Justice and UBS AG App'x A at 1 (Dec. 18, 2012), *available at* http://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf. The BBA defines LIBOR as "[t]he rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11:00 [a.m.] London Time." *Id.* In connection with the rate-rigging scheme, traders at the banks implicated in the scheme coordinated with each other to make submissions that "would benefit the traders' trading positions, rather than rates that complied with the definitions of LIBOR." *Id.* at 8.

251. *See* Shahien Nasiripour, *Nine More Banks Added to Libor Probe*, FIN. TIMES (Oct. 26, 2012, 4:59 AM), http://www.ft.com/intl/cms/s/0/6f4e7960-1f1a-11e2-be82-00144feabdc0.html#axzz2dO4UORJO.

252. Patrick Jenkins & Brooke Masters, *Banks Pushed for Next Libor Settlement*, FIN. TIMES (Oct. 28, 2012, 9:01 PM), http://www.ft.com/intl/cms/s/0/aa28764c-1f85-11e2-b273-00144feabdc0.html#axzz32DD5jxYs.

253. *See* Liam Vaughan et al., *Diamond Pays Penalty for Being First Mover in Libor Probe*, BLOOMBERG (July 4, 2012, 1:37 AM), http://www.bloomberg.com/news/2012-07-03/diamond-pays-penalty-for-being-first-mover-in-libor-probe.html (noting that "Barclays was the first bank to cooperate 'in a meaningful way'" with the Justice Department); *see also* Press Release, Dep't of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty (June 27, 2012), *available at* http://www.justice.gov/opa/pr/2012/June/12-crm-815.html (describing allegations and penalties imposed).

254. *See* Press Release, Dep't of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012) [hereinafter UBS Press Release], *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html.

with RBS on February 6, 2013, requiring RBS to, among other things, pay $150 million.[255]

In an extreme departure from past practice, however, the DOJ followed the settlements with UBS and RBS by filing criminal charges against the Japanese subsidiaries of those banks for their roles in the LIBOR-rigging scheme.[256] On December 19, 2012, and February 6, 2013, the same days the DOJ disclosed its respective settlements with the parent companies, it announced that it had secured guilty pleas from UBS Securities Japan Co., Ltd. ("UBS Japan") and RBS Securities Japan Limited ("RBS Japan"), respectively, for coordinating with one another to manipulate LIBOR rates in their favor.[257] UBS Japan agreed to pay a $100 million fine in connection with its guilty plea;[258] RBS Japan agreed to pay $50 million.[259] Then-Assistant Attorney General Breuer heralded the pleas as "extraordinary results" involving "significant financial institutions."[260] "Our message is clear," he added, "no financial institution is above the law."[261]

The UBS Japan and RBS Japan guilty pleas are landmark developments.[262] Not since Drexel Burnham more than twenty years prior had the Justice Department filed criminal charges against an arm of a major a financial institution.[263] Some commentators speculated that the DOJ used the UBS Japan and RBS Japan prosecutions as test cases for a new model of corporate criminal prosecutions.[264] The UBS and RBS

---

255. *See* Deferred Prosecution Agreement ¶ 7, United States v. Royal Bank of Scotland PLC, (No. 3:13-CR-74-MPS) (D. Conn. 2013).

256. *See generally* Plea Agreement, United States v. UBS Secs. Japan Co., Ltd. (No. 3:12-cr-00268-RNC) (D. Conn. 2012), [hereinafter UBS Plea Agreement]; Plea Agreement, United States v. RBS Secs. Japan Ltd. (No. 3:13-CR-73-MPS) (D. Conn. 2013) [hereinafter RBS Plea Agreement]. Some commentators have opined that this strategy of settling criminal charges with the parent company while securing a guilty plea from one of its subsidiaries is not entirely new for the Justice Department. *See* Garcia et al., *supra* note 96 (observing that the Justice Department has pursued this "middle" strategy in a few FCPA enforcement actions).

257. *See* UBS Press Release, *supra* note 254; Press Release, Dep't of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6, 2013) [hereinafter RBS Press Release], *available at* http://www.justice.gov/opa/pr/2013/February/13-crm-161.html.

258. *See* UBS Plea Agreement, *supra* note 256, ¶ 15.

259. *See* RBS Plea Agreement, *supra* note 256, ¶ 15.

260. RBS Press Release, *supra* note 257.

261. *Id.*

262. *See* Peter J. Henning, *UBS Settlement Minimizes Impact of Guilty Plea*, N.Y. TIMES DEALBOOK (Dec. 20, 2012, 1:54 PM), http://dealbook.nytimes.com/2012/12/20/ubs-settlement-minimizes-impact-of-guilty-plea ("[T]he guilty plea by the UBS subsidiary is the first time an arm of [a] major financial institution has been convicted of a crime since Drexel Burnham was more than 20 years ago.").

263. *Id.*

264. *See* Richard Levick, *The LIBOR Scandal: Prosecutors Have a New Plan*, FORBES (Feb. 28, 2013, 7:22 AM), http://www.forbes.com/sites/richardlevick/2013/02/28/the-libor-scandal-prosecutors-have-a-new-plan ("While LIBOR-type cases have been the focus so far, there are expectations that a successful

subsidiaries reportedly had "few ties to American arms of the banks, containing any threat to the [U.S.] economy."[265] By focusing charges on non-U.S. subsidiaries, therefore, the DOJ could "shield the parent company from losing its license, but still send a warning to the financial industry."[266] This middle-ground approach reduced the risk of an Andersen-style collapse while still capturing the expressive function of a criminal conviction.[267] As then-Assistant Attorney General Breuer made clear, the goal was "not to destroy a major financial institution,"[268] but to send a strong message that criminal wrongdoing would be dealt with a heavy hand.

In any event, the UBS Japan and RBS Japan prosecutions were the first signal that the Justice Department's approach to corporate criminal prosecutions was evolving, and that for the first time in many years, criminal charges against a high-profile financial institution were back on the table.[269]

2. *SAC Capital Advisors: Controlled Criminal Prosecution*

To the extent that the UBS Japan and RBS Japan cases reflect the Justice Department's willingness to pursue a middle-ground approach to corporate criminal prosecutions, the indictment of SAC Capital Advisors demonstrated that the DOJ was prepared to go all the way as well.[270]

On July 25, 2013, the U.S. Attorney's Office for the Southern District of New York announced the indictment of SAC Capital and three affiliates—investment managers responsible for managing the portfolio of a group of affiliated hedge funds—for engaging in a "[d]ecade-[l]ong [i]nsider [t]rading [s]cheme on a [s]cale [w]ithout [k]nown [p]recedent in the [h]edge [f]und [i]ndustry."[271] The indictment,

---

beta test involving purported rate manipulation by UBS and Royal Bank of Scotland—as well as ongoing inquiries regarding Citigroup and JPMorgan Chase—will lead to broader application in the future.").

265. Ben Protess, *Prosecutors, Shifting Strategy, Build New Wall Street Cases*, N.Y. TIMES DEALBOOK (Feb. 18, 2013, 10:00 PM), http://dealbook.nytimes.com/2013/02/18/prosecutors-build-a-better-strategy-to-go-after-wall-street. In addition, in both instances, DOJ officials reportedly received assurance from Japanese regulators that a corporate conviction would not amount to a loss of license. *See* Levick, *supra* note 264 ("The fact that a Japanese regulator reassured UBS ahead of time that its subsidiary would not lose its license is widely cited as an example of the essential frailty of this new regime.").

266. Garcia et al., *supra* note 96.

267. *See id.*

268. Jim Puzzanghera, *U.S. Says UBS Was Motivated by "Sheer Greed" in Libor Rigging*, L.A. TIMES (Dec. 19, 2012), http://articles.latimes.com/2012/dec/19/business/la-fi-mo-ubs-libor-fine-justice-20121219.

269. *See* Garcia et al., *supra* note 96 ("[I]f the UBS and RBS subsidiaries weather prosecution without significant harm, the DOJ may well pursue this approach on a wider scale.").

270. *See id.* (describing the Justice Department's deferred prosecution of the parent entity while securing guilty pleas from a subsidiary as a "middle way" approach).

271. *See* DOJ SAC Press Release, *supra* note 201; *see also* Sealed Indictment, United States v. S.A.C. Capital Advisors, L.P. (No. 13 Crim. 541) (S.D.N.Y. 2013).

the product of an extensive investigation of the venerable firm,[272] alleged that from 1999 through at least 2010, numerous SAC Capital portfolio managers and research analysts obtained and traded on material, non-public information, or recommended trades based on such information to SAC Capital's owner, Steven Cohen.[273] The "systematic insider trading" that took place was allegedly "the predictable and foreseeable result" of an institutional failure at SAC Capital, namely a business culture that encouraged the "relentless pursuit of an information 'edge'" with "no meaningful commitment to ensuring that such 'edge' came from legitimate research and not Inside Information."[274] The scheme purportedly netted SAC Capital and Cohen "hundreds of millions of dollars" in profits.[275]

Despite the indictment, there remained the possibility that prosecutors and SAC Capital would enter into a DPA, allowing SAC Capital to escape without the stain of a criminal conviction. In a departure from post-Andersen practice, however, prosecutors instead demanded a guilty plea.[276] In November 2013, SAC Capital pleaded guilty to four counts of insider trading and one count of wire fraud.[277] The firm also agreed to both pay $1.8 billion in penalties—a record sum[278]—and terminate its investment advisory business, thus closing the fund to outside investors.[279]

---

272. *See* DOJ SAC Press Release, *supra* note 201.

273. *See id.* ¶ 4. At the time of the indictment, SAC Capital had close to $14 billion under management; a little more than half of which came directly from Steven Cohen. *See* Gretchen Morgenson, *How to Gauge SAC on the Richter Scale*, N.Y. Times (July 27, 2013), http://www.nytimes.com/2013/07/28/business/how-to-gauge-sac-on-the-richter-scale.html (discussing various factors regarding whether S.A.C. Capital will be able to survive the indictment).

274. *See* Sealed Indictment, *supra* note 271, ¶ 7. As charged in the indictment, the institutional failure manifested in three ways: (1) a focus on recruiting portfolio managers and analysts who had proven networks of public company contacts, with little corresponding effort to ensure that such contacts were not exploited to obtain inside information; (2) a system of providing financial rewards to employees for recommending to SAC Capital's principal "high conviction" trading ideas that had an "edge" over other investors; and (3) limited compliance measures designed to detect or prevent insider trading. *See* David Deitch, *The Problems with the SAC Capital Indictment*, Law360 (July 26, 2013, 12:14 PM), http://www.law360.com/articles/460326/the-problems-with-the-sac-capital-indictment; *see also* DOJ SAC Press Release, *supra* note 201; Sealed Indictment, *supra* note 271, ¶ 11.

275. *See* Sealed Indictment, *supra* note 271, ¶ 7.

276. *See* Michael Rothfeld, *SAC Will Plead Guilty to Insider-Trading—Hedge-Fund Firm to Pay Biggest Fine in U.S.'s Prosecution of Financial Crimes*, Wall St. J., Nov. 4, 2013, at C1 (describing the SAC Capital prosecution as "a turning point for criminal prosecution of corporations").

277. *See* Plea Agreement at 1, United States v. S.A.C. Capital Advisors, L.P. (No. 13 Cr. 541 (LTS)) (S.D.N.Y. 2013).

278. *See id.* at 2; *see also* DOJ's SAC Capital Press Release, *supra* note 19 (describing the penalty imposed as "the largest insider trading penalty in history"). The $1.8 billion penalty consisted of a $900 million in connection with the criminal case and the forfeiture of $900 million in connection with the settlement of the civil forfeiture action filed against SAC Capital. *Id.*

279. *See* Plea Agreement, *supra* note 277, at 2. Critics contend that the charges against SAC Capital were an inappropriate proxy for the government's inability to marshal sufficient evidence against Cohen himself. *See* Deitch, *supra* note 274 (observing that because the prosecutors were unable to collect sufficient evidence to prosecute Cohen, it "is obvious . . . that the government's

The charges against SAC Capital represented an even more significant deviation from the norm than the LIBOR cases discussed above. Rather than extracting guilty pleas from foreign subsidiaries as part of a negotiated settlement, as it did with UBS and RBS, the DOJ indicted and obtained the criminal conviction of a well-known U.S. investment advisory firm.[280] This marked the first occasion when the government resorted to such an extreme tactic in the corporate criminal context since the Arthur Andersen case more than ten years ago.[281] It was thus a bold step by any measure.[282]

---

decision to indict the SAC Companies is a proxy for charges against Cohen"); Katherine Rautenberg, *Attorneys React to SAC Capital Indictment*, LAW360 (July 25, 2013, 6:29 PM), http://www.law360.com/articles/460233/attorneys-react-to-sac-capital-indictment (quoting Glen Donath, who opined that "[t]he government rarely decides to charge a company and not its owner or CEO"). That is, the Justice Department's fallback strategy should not have been to destroy Cohen's firm because the evidence against him was weak. *See* Deitch, *supra* note 274 ("Having failed to develop evidence to support a criminal case to send Steven Cohen to prison, the government is instead seeking to destroy the company he has built."); Rautenberg, *supra* ("It is remarkable that federal prosecutors would indict SAC without enough evidence to bring serious charges against Steven Cohen . . . . This indictment will effectively sink SAC, devastating the lives and investment portfolios of countless innocent individuals."); *id.* ("Given the somewhat unique circumstances of this case and its very high public profile, this decision to indict the company . . . . should be seen more as an effort to save face after the [government's] inability to develop the evidence necessary to indict Mr. Cohen despite years of sustained efforts to do so."). Others suggest that there is nothing improper about the government's case against SAC Capital, as it is a relatively straightforward application of the "collective knowledge" doctrine, which imputes to an organization the collective knowledge of individual employees. *See, e.g.*, *id.* (describing the relative ease of filing charges against SAC under the collective knowledge doctrine of corporate criminal liability). This indeed appears to be the DOJ's theory, as the indictment focuses in significant part on the conduct of eight current or former employees—all of whom have been charged and convicted of insider trading. Nate Raymond, *SAC Capital's Martoma Found Guilty of Insider Trading*, REUTERS (Feb. 6, 2014, 6:13 PM), http://www.reuters.com/article/2014/02/06/us-sac-martoma-idUSBREA131TL20140206 (observing that the conviction of former SAC Capital employee Mathew Martoma was the eighth conviction of a current or former SAC Capital employee).

280. Mark Gongloff, *SAC Capital Indictment Does Not Mean the End of "Too Big to Jail"*, HUFFINGTON POST (July 25, 2013, 6:29 PM), http://www.huffingtonpost.com/2013/07/25/sac-capital-indictment-too-big-to-jail_n_3652646.html (noting that the government has taken an "unusually tough" stance against SAC).

281. *See* Rautenberg, *supra* note 279 (quoting Stanley A. Twardy Jr., who observed that "[t]he indictment of SAC is the first significant federal criminal prosecution of an American company since the Government charged Arthur Andersen, which caused the demise of Arthur Andersen").

282. Julie Creswell, *A Relentless Prosecutor's Crowning Case*, N.Y. TIMES DEALBOOK (July 25, 2013, 8:24 PM), http://dealbook.nytimes.com/2013/07/25/a-relentless-prosecutors-crowning-case/?ref=preetbharara&_r=0 (describing the SAC indictment as "a rare and bold step by the government"). Less than a month after the announcement of SAC Capital's guilty plea, it was reported that JP Morgan was nearing a settlement with the Justice Department and various federal regulators for the bank's alleged role in facilitating the massive Ponzi scheme perpetrated by Bernard Madoff. Jessica Silver-Greenberg & Ben Protess, *Criminal Action is Expected for JP Morgan in Madoff Case*, N.Y. TIMES, Dec. 12, 2013, at A1. On January 7, 2014, the DOJ announced that it had entered into a DPA with JP Morgan pursuant to which the bank would consent to pay $1.7 billion in penalties. Press Release, U.S. Attorney's Office, Southern District of New York, Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Filing of Criminal Charges Against And Deferred Prosecution Agreement With JP Morgan Chase Bank, N.A., In Connection With Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme (Jan. 7, 2014), *available at* http://www.justice.gov/usao/nys/pressreleases/January14/JPMCDPAPR.php. JP

At the same time, the decision to indict SAC Capital might not be seen as a dramatic shift from prior practice. Because the bulk of SAC Capital's assets under management belonged to Steven Cohen, and because the firm had only about 1000 employees, SAC Capital's demise did not appear to present the sort of collateral risk that prosecutors had historically sought to avoid.[283] In fact, many commentators have questioned whether, after a lengthy investigation focusing on Steven Cohen's role in a pervasive criminal scheme, putting the firm out of business was the DOJ's precise objective.[284]

When viewed in conjunction with the LIBOR cases, then, the Justice Department's approach to SAC Capital could be viewed as a controlled exercise that continued to maintain a healthy degree of respect for the Andersen effect.

3. *Credit Suisse: The Beginning of the End of Modern DPAs?*

To the extent that the LIBOR and SAC Capital cases raise any doubts about the DOJ's abiding preoccupation with the Andersen effect, recent developments have put those doubts to rest. In both words and deeds, the DOJ appears to be undergoing a generational shift in mindset—one in which the threat of collateral consequences may be overstated.[285]

In March 2014, in remarks before a gathering of securities industry legal and compliance professionals, Preet Bharara, U.S. Attorney for the Southern District of New York, repudiated the notion of federal

---

Morgan also agreed to pay an additional $1 billion to federal regulators for its alleged programmatic violations of the Bank Secrecy Act ("BSA"). *Id.* Notably, before determining to enter into a DPA with JP Morgan, the DOJ reportedly considered demanding that the bank plead guilty to a criminal violation of the BSA. Silver-Greenberg & Protess, *supra*, at A1.

283. *See* Morgenson, *supra* note 273 ("SAC's $14 billion under management is not enough to pose a risk to the financial system."); Gongloff, *supra* note 280 ("SAC Capital is hardly the test case for whether the government will indict a big, important financial firm."). While opinions may differ as to whether SAC Capital case represented a permanent shift in the DOJ's approach to corporate criminality, it is clear that the government did not entirely abandon its concern about the collateral consequences of such prosecutions. To ensure that SAC Capital would continue operating during the pendency of the proceedings against it, the DOJ agreed to the imposition of a protective order permitting SAC to continue to do business. Patricia Hurtado, *SAC Judge Lets Firm Keep Operating While Facing Charges*, BLOOMBERG BUSINESSWEEK (Aug. 10, 2013), http://www.businessweek.com/news/2013-08-09/sac-allowed-by-judge-to-keep-operating-while-facing-charges-1.

284. By all indications, the Justice Department succeeded. On August 28, 2013, it was reported that SAC Capital lost its last outside investor. *See* Jenny Strasburg, *SAC Loses One of Its Most Loyal Investors*, WALL ST. J. MONEYBEAT (Aug. 28, 2013, 4:05 PM), http://blogs.wsj.com/moneybeat/2013/08/28/sac-loses-one-of-its-most-loyal-investors/tab/print. In March 2014, SAC Capital announced that it had changed its name to Point72 and would operate as a family office. *SAC Capital, Meet Point72 Asset Management*, N.Y. TIMES DEALBOOK (Apr. 7, 2014, 12:24 PM), http://dealbook.nytimes.com/2014/04/07/sac-capital-meet-point72-asset-management.

285. Kara Scannell, *Shift in Tactics pays off for DOJ*, FIN. TIMES, May 20, 2014, at 16 (noting that "Credit Suisse's guilty plea reflects a dramatic evolution in thinking within the DOJ under [Eric] Holder").

prosecutors maintaining a "too big to jail" charging policy in perhaps the most forceful terms to date. "No one," he maintained, "should receive a get-out-of-jail-free card based on size."[286] In Bharara's view, "after Arthur Andersen, the pendulum has swung too far and needs to swing back a bit."[287] Bharara went on to offer his own perspective on the issue of collateral consequences:

> Companies, especially financial institutions . . . have a natural and powerful incentive to make prosecutors believe that death or dire consequences await on the other side of such an action . . . . I have heard assertions made with great force and passion that if we take any criminal action, the skies will darken; the oceans will rise; the nuclear winter will be upon us; and the world as we know it will end . . . . What I have found typically is that, in reality, as we suspected, the sky does not fall . . . . And so, this repeated Chicken Little routine . . . begins to wear thin. And the result is that we view with more and more skepticism . . . all the breathless claims of catastrophic consequences made by companies large and small.[288]

Having thus down played concerns regarding the Andersen effect, Bharara predicted that "before too long a significant financial institution will be charged with a felony or be made to plead guilty to a felony, where the conduct warrants it."[289]

Less than two months later, on May 19, 2014, the Justice Department announced that Credit Suisse Group AG ("Credit Suisse"), the parent company of the Swiss-based global bank, pleaded guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns with the Internal Revenue Service ("IRS").[290] According to the plea agreement, Credit Suisse employed a variety of methods to assist U.S. clients in concealing their undeclared accounts, including: assisting clients in using sham entities as beneficial owners; destroying account

---

286. Press Speech, SIFMA's Compliance and Legal Society Annual Seminar: Prepared Remarks of U.S. Attorney Preet Bharara (Mar. 31, 2014), http/www.justice.gov/usao/nys/pressspeeches/2014/SIFMARemarks2014.php [hereinafter Bharara SIFMA Remarks].

287. *See id.*

288. *See id.* ("They predict that the stigma and reputational damage from any criminal action—even a deferred prosecution—will be too much to bear: the stock price will plummet; clients will vanish; customers will flee; key employees will quit; and senior executives will be so ashamed to be associated with a criminal resolution that they themselves may have to consider whether they can even stay on as leaders.").

289. *Id.* Bharara expressed the view that perhaps the "greatest existential threat" to a corporation came not from the prosecutor, but from "the regulator who has the power to revoke a charter." *Id.* "[B]anking regulators with whom the revocation decision ultimately rests," he observed, "are often loathe to commit to a decision before or even at the same time as the prosecutor." *Id*. If the regulator does not rule out the possibility of a charter revocation, "then prosecutors must continue to consider that as a possibility." *Id.* Because "not all corporate criminal misconduct is deserving of a death sentence," moreover, "prosecutors cannot be as aggressive as perhaps they should be." *Id.* Bharara opined that prosecutors and regulators should work in concert so as to avoid creating "a gaping liability loophole that blameworthy companies are only too willing to exploit." *Id.* He noted that this dynamic was "changing for the better," and predicted that there would be "proof of that in the future." *Id.*

290. *See* Credit Suisse Press Release, *supra* note 20.

records sent to the United States for client review; and structuring funds transfers to avoid transaction reporting requirements.[291] Credit Suisse admitted to having operated an illegal cross-border banking business that assisted thousands of U.S. clients in opening and maintaining offshore bank accounts in a manner designed to conceal their assets and income from the IRS.[292] Credit Suisse also agreed to pay approximately $2.6 billion in fines to the DOJ and other federal and state regulators.[293]

The importance of the Credit Suisse case cannot be overstated. It marks the first time a financial institution of this size has pleaded guilty to criminal charges since 1989.[294] After more than a decade of heavy reliance on DPAs as the preferred approach to addressing corporate criminal conduct, the DOJ now appears ready to challenge the basic assumption underlying such reliance: that DPAs are an effective hedge against the collateral consequences of corporate prosecutions. The Credit Suisse case confirms that the Andersen effect, once of paramount concern, may be of dubious certainty and severity in the minds of federal prosecutors.

The question then arises whether the Credit Suisse case marks the beginning of a new era of corporate charging practice, one in which the modern DPA assumes a less prominent role.

V. Conclusion: In Defense of Deferred Prosecutions, Subject to a New Standard of Judicial Review

The collapse of Arthur Andersen prompted a wave of scrutiny of the Justice Department's corporate charging approach, and the eventual adoption of deferred prosecutions as the preferred measure to address corporate misconduct.[295] More than a decade later, the financial crisis of 2008 and ensuing economic downturn have triggered a new wave of scrutiny, this time of the DOJ's reliance on DPAs.[296] The scrutiny reached its peak when the DOJ entered into a DPA with HSBC despite evidence of egregious misconduct on HSBC's part, causing key legislators and other critics to question whether the DOJ has maintained a de facto "too big to jail" policy with respect to major financial institutions.[297] Since May 2013, the DOJ has consistently denied that such a policy exists.[298]

291. *Id.*
292. *Id.*
293. *Id.*
294. Ben Protess & Jessica Silver-Greenberg, *Credit Suisse Pleads Guilty in Tex Evasion Case*, N.Y. Times DealBook (May 19, 2014, 4:50 PM), available at http://dealbook.nytimes.com/2014/05/19/credit-suisse-set-to-plead-guilty-in-tax-evasion-case/?emc=edit_na_20140519&nlid=52411902.
295. *See supra* notes 78–93 and accompanying text.
296. *See supra* notes 94–125 and accompanying text.
297. *See supra* notes 196–201, 286–289 and accompanying text.
298. *See supra* notes 196–201, 286–289 and accompanying text.

Supporters and detractors of the Justice Department alike would agree that the new wave of scrutiny has coincided with two interesting developments within the judicial and executive branches of the government. The first, as reflected in Judge Gleeson's opinion in connection with the review of the HSBC DPA, is a willingness of at least one federal district court to assume a more central role in the review of deferred prosecutions.[299] The second, as evidenced by the LIBOR, SAC Capital, and Credit Suisse cases, is an emerging willingness on the part of the DOJ to pursue criminal charges over DPAs against corporations, including financial institutions.[300] Both can be considered to have a substantial impact on future DOJ charging practices.[301]

A. In Defense of Deferred Prosecutions

The Justice Department's recent efforts to secure criminal convictions from high-profile corporate defendants is concerning.[302] The potential for a large, viable firm to be annihilated by the filing of criminal charges should be avoided at all costs.[303] Moreover, when the target of such charges is a major financial institution, the potential damage to the broader United States'—or even the global—economy counsels in favor of prosecutorial restraint.[304] That no corporations have collapsed after entering into DPAs with the government since the Andersen case is a clear indication that the DOJ's decade-long charging policy has been effective, and should not be disturbed.

Despite the potential harm that a criminal conviction can visit on a corporation, there is a growing sentiment in the Justice Department that the risk of another Andersen-style collapse is illusory, and that historical concerns were overblown.[305] U.S. Attorney Preet Bharara has been the

---

299. *See infra* Part V.A.

300. *See infra* Part V.B.

301. *See infra* Part V.B.

302. Commentators have criticized Congress for taking the same reactive approach when passing criminal justice legislation to respond to dramatic instances of white-collar criminality. For example, "[i]n the aftermath of the savings and loan crisis of the 1980s, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989. Likewise, following the Enron debacle, the Sarbanes-Oxley Act was passed by Congress." Ellen S. Podgor, *White Collar Crime and the Recession: Was the Chicken or Egg First?*, 200 U. Chi. Legal F. 205, 213–14 (2010). According to Podgor, "[t]he reactive model typically used after a crisis provides immediacy to solving the problem, but it often does not educate for comprehensively solving future legal issues." *Id.* at 216.

303. *See, e.g.*, *supra* notes 79–93 and accompanying text (examining conditions that led to Arthur Andersen's demise).

304. *See* Steven L. Schwarcz, *Systemic Risk*, 97 Geo. L.J. 193, 198 (2008) (describing systemic risk as the risk "that a trigger event, such as an economic shock or institutional failure, causes a chain of bad economic consequences—sometimes referred to as a domino effect").

305. In a recent article, for example, Gabriel Markoff provided empirical evidence demonstrating that of the fifty-four public companies convicted from 2001 to 2010, only five "suffered fates that could reasonably be described as business failures." Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. Pa. J.

leading voice articulating this new view, diminishing the "breathless claims of catastrophic consequences made by companies large and small."[306] The DOJ's willingness to abandon ten years of calamity-free experience to pursue criminal charges against a succession of high-profile corporate defendants suggests that more prosecutions of financial institutions may be on the horizon. Indeed, as of this writing media reports indicate that the DOJ is seeking to extract a guilty plea from the parent company of BNP Paribas, and a fine as high as $5 billion, to resolve an investigation into extensive scheme to violate government sanctions.[307]

For the Justice Department, the solution is not to jettison DPAs in favor of ramped-up corporate prosecutions; DPAs have consistently proven to be an effective way to minimize the risk of the Andersen effect, while allowing the DOJ to achieve most of its desired remedies. The filing of criminal charges and a statement of facts permit the government to send a strong public message regarding the type of conduct that it will not tolerate.[308] The large fines that typically accompany DPAs are an effective method for exacting punishment and making restitution.[309] By mandating extensive reforms, monitoring ongoing performance, and threatening prosecution in the event of compliance deficiencies, DPAs modify future corporate behavior.[310]

The lone concern regarding the use of DPAs in the corporate crime context is the unfettered discretion the Justice Department has enjoyed to negotiate their terms.[311] The incentive to avoid criminal prosecution at

---

BUS. L. 797, 823 (2013). Of these five failures, he noted, none "could reasonably be said to have suffered a business failure because of their convictions." *Id*. From this, Markoff argues, "[t]here is no empirical evidence to support the existence of the Andersen Effect." *Id.* at 830. The suggestion that Markoff's empirical findings debunk the notion that indictment is tantamount to the corporate death penalty is off the mark. For one thing, only two of the fifty-four convictions Markoff cited were for offenses involving fraud. *See id.* at 821. In addition, not one involved a financial institution. *See id.* Markoff himself concedes that his study supports only the narrow conclusion that where an organizational defendant is prosecuted for a crime that does not involve its core business model, the risk of the Andersen effect is not as prevalent. *See id.* at 832–34.

306. *See* Bharara SIFMA Remarks, *supra* note 286; *see also* Michelle Jones, *Preet Bharara at the DealBook Conference*, VALUEWALK (Nov. 12, 2013, 11:28 AM), http://www.valuewalk.com/2013/11/preet-bharara-at-the-dealbook-conference (quoting an interview in which Bharara stated that the collateral consequences argument is "overstate[d]," and that "accountability matters," even when a financial institution is involved).

307. Maya Nikolaeva & Matthias Blamont, *BNP Paribas Warns U.S. Sanctions Fine Could Exceed Provision*, REUTERS (May 14, 2014), http://www.reuters.com/article/2014/05/14/us-bnp-paribas-agm-idUSBREA4D0HL20140514; Christopher Matthews, Noeme Bisserbe, & Andrew Grossman, *Why U.S. Is Pushing for Guilty in BNP Sanctions Probe*, WALL ST. J. (May 9, 2014), http://online.wsj.com/news/articles/SB10001424052702303701304579551792387975638; Yalman Onaran & Greg Farrell, *BNP Paribas Risks $5 Billion Fine, Customer Flight*, BLOOMBERG (May 21, 2014), http://www.bloomberg.com/news/2014-05-21/bnp-paribas-risks-5-billion-fine-customer-flight.html.

308. *See supra* notes 139, 142 and accompanying text.

309. *See supra* notes 140, 142 and accompanying text.

310. *See supra* notes 141–142 and accompanying text.

311. *See supra* notes 127–136 and accompanying text.

all costs essentially vests all power in the hands of federal prosecutors, who have developed the practice of structuring arrangements that provide for a potentially excessive degree of intrusion into a corporation's operations.[312] Absent some kind of check, therefore, the clear benefits of deferred prosecution can be eclipsed by the potential for prosecutorial excess.[313]

B. A New Standard of Judicial Review of DPAs

For the better part of the last decade, district judges have assumed a sidelines role in corporate criminal prosecutions.[314] As Judge Gleeson observed, the Speedy Trial Act describes only the effect of a court's approval of a DPA; it does not serve as a guide for judges' exercise of their discretion.[315] District judges generally appear on the scene only after the DPA is a *fait accompli*, and then provide automatic approval to terms dictated by the government.

The new standard of judicial review of DPAs that Judge Gleeson proposed in the HSBC case is a welcome development. Judicial intervention can serve as a vital safeguard against prosecutorial abuse of the sort that has been associated with modern DPAs.[316] It can also provide a measure of independent assurance that the terms of settlement are not unduly lenient. At a minimum, a more prominent judicial role may provide more legitimacy and transparency to the process.

Judge Gleeson's reference to a federal court's supervisory power falls short of the optimal standard, however. Courts generally invoke their supervisory power only upon a defendant's urging.[317] In other words, it would be odd for a district judge to intervene on a corporate defendant's behalf if the DPA reflects a bargained-for exchange, and does not, as Judge Gleeson described, "transgress[] the bounds of lawfulness or propriety."[318]

To fill the void, Congress should amend the Speedy Trial Act to provide a clear framework for judicial review and approval of DPAs. A promising starting point for this discussion is a proposal originally considered by Congress back in 2009. The Accountability in Deferred Prosecution Act ("ADPA") was intended to "promote uniformity and to

312. *See supra* notes 133–236 and accompanying text.

313. *See* Koehler, *supra* note 133, at 997 (finding that prosecutors occupy positions of "advocate, judge, and rulemaker," and "induce settlement through the 'carrots' and 'sticks' they possess even though many of the enforcement theories leading to these resolutions are untested and dubious").

314. *See* Gillison, *supra* note 45.

315. *See* United States v. HSBC Bank USA, N.A., No. 12-0763, 2013 WL 3306161, at *3 (E.D.N.Y. July 1, 2013).

316. *See supra* Part II.A.

317. "In the typical supervisory power case, the defendant raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety." *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *6 (citation omitted).

318. *Id.*

assist prosecutors and organizations as they negotiate and implement deferred prosecution agreements."[319] ADPA directed the Attorney General to "issue public written guidelines for deferred prosecution agreements and non-prosecution agreements."[320] ADPA also provided that approval of a DPA should issue only "if the court determines the agreement is consistent with the guidelines for such agreements and is in the interests of justice."[321] ADPA further ensured judicial review on the back end of the process, providing that "[t]he court shall, on motion of any party or the independent monitor if there is one, review the implementation or termination of the agreement, and take any appropriate action, to assure that the implementation or termination is consistent with the interests of justice."[322]

Congress would be well advised to complete the work it began in 2009 by enacting the ADPA. To empower district judges to engage in a meaningful review of the terms of corporate DPAs, however, a revitalized version of the Act should also include a prescriptive roadmap for the inquiry a court must undertake to ascertain whether a proposed DPA is "in the interests of justice."[323] As a condition of granting approval of a DPA, the court should be required to consider, and render findings of fact with respect to whether the terms of the DPA are fair and reasonable in relation to the acknowledged corporate misconduct. To support this review, the court should specifically address the following issues:

---

319. H.R. 1947 § 4(a), 111th Cong. (2009). The ADPA was never voted out of committee, and therefore was never enacted.

320. *Id.* § 7(a).

321. *Id.*

322. *Id.* § 7(c). Recently, lawmakers in the United Kingdom introduced DPAs to their corporate crime enforcement regime via the Crime and Courts Bill, which received Royal Assent on April 25, 2013, and became the Crime and Courts Act 2013. *See* Crime and Courts Act, 2013, c. 22, sch. 1–25 (Eng.). The central contribution of the Crime and Courts Act is its introduction of DPAs to the UK. *Id.* § 1, sch. 17 (defining DPA). In contrast to the use of deferred prosecution in the United States, the act authorizes prosecutors to enter into DPAs only with corporations, partnerships, and unincorporated associations, not with individuals. *Id.* § 4(1)–(3). The Act provides that after prosecutors and the corporate entity begin their negotiations, but before the parties agree to the terms of the DPA, "the prosecutor must apply to the Crown Court for a declaration that entering into a DPA with [the corporate entity] is in the interests of justice, and the proposed terms of the DPA are fair, reasonable and proportionate." *Id.* § 7(1). Only upon the Crown Court's declaration that the DPA meets both standards does the DPA become effective. *Id.* § 8(3). Whether the Crown Court extends or withholds approval, it "must give reasons for its decision on whether or not to make a declaration." *Id.* § 7(2). If the Court withholds its approval, it can do so in private. But if it approves the DPA "it must do so, and give its reasons, in open court." *Id.* § 8(6). For a detailed discussion of the UK deferred prosecution process, see Speech, Oliver Heald, Solicitor Gen., The Mechanics of Deferred Prosecution Agreements in the U.K. (June 26, 2013) (transcript published June 28, 2013), *available at* https://www.gov.uk/government/speeches/the-mechanics-of-deferred-prosecution-agreements-in-the-uk.

323. H.R. 1947 § 7.

(1) Whether the admitted facts prove each element of the alleged criminal violation[324];

(2) The legal precedent supporting the DOJ's interpretation of the relevant criminal statute;

(3) Whether the corporate defendant has a history of similar misconduct;

(4) Whether the individuals whose acts contributed to the alleged misconduct have been prosecuted for the wrongdoing attributed to the corporation;

(5) Whether the proposed fine against the corporate defendant is sufficient to achieve the objectives of punishment and restitution;

(6) Whether the governance measures the corporate defendant is required to undertake are the least intrusive to promote deterrence and rehabilitation; and

(7) Whether the prosecutor and corporate defendant's fear of collateral consequences is well-founded.

A standard of review of this sort would ensure that judges are actively engaged in reviewing proposed deferred prosecutions. The requirement to delineate the Justice Department's legal analysis and precedential foundation would therefore provide transparency regarding the DOJ's interpretation of key provisions and would address concerns regarding potential prosecutorial overreaching. Examination of the corporate defendant's admitted misconduct and any prior history of similar offenses, the extent to which individuals have been prosecuted, and the propriety of the proposed fine and governance measures would provide greater assurance that a DPA is not granted based exclusively on a perception that a corporate defendant is "too big to jail." The process of rendering findings of fact with respect to all of these issues would provide a clear record confirming that the terms of the DPA were evaluated and deemed reasonable in light of all the relevant factors.[325]

In short, the standard of review contemplated herein would capture the benefits of deferred prosecutions while avoiding the pitfalls that have accompanied their use historically.

---

324. *See* Pete J. Georgis, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 277 (2012) (arguing for a process of judicial review of DPAs and NPAs "in which a federal court should demand detailed information as to how the admitted facts violate the specific provisions of the [FCPA]").

325. The benefits of this approach were astutely summarized by Judge Frank Easterbrook: "Explanation produces intellectual discipline; a judge who sets down in writing (or articulates in court) the methods pro and con, and his method of reaching a decision, must work through the factors before deciding, and we then may be sure that his decision is based on appropriate considerations even if not necessarily one we would have reached ourselves." Horn v. Transcon Lines, Inc., 898 F.2d 589, 592 (7th Cir. 1990).