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DEFERRED PROSECUTION AGREEMENTS: PROSECUTORIAL BALANCE IN TIMES OF ECONOMIC MELTDOWN

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ABSTRACT

At times when the American economy faces enormous challenges, traditional prosecutorial measures that involve high public spending and immense collateral risks may hamper economic recovery. Economic meltdowns, such as the one we have been experiencing in recent years, call for a refreshment of the prosecutorial toolkit aimed at controlling corporate misconduct. This paper discusses the newly emerged enforcement mechanism, Deferred Prosecution Agreements (DPAs), in light of the current national goal of economic recovery. It portrays the evolution of DPAs and the stimulus for its expansion that followed recent Corporate America scandals. Based on the evaluation of the major promises and pitfalls of DPAs, it is suggested that subject to some policy adjustments, an expanded use of DPAs as an alternative for traditional prosecutorial measures may coincide with economic recovery goals.

Keywords: Economic meltdown, recession, Deferred Prosecution Agreements, corporate compliance, deterrence, enforcement policy, collateral effects, enforcement, economic recovery

JEL Classification: G38, K14, K22, K42, L50

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1. Introduction

The economic meltdown of the past three years has taken its toll on almost every aspect of American life. Ever since the liquidity shortfall in the United States banking system in 2007 triggered the Great Recession, numerous businesses have lost a substantial fraction of their value; some could not escape shutting-down their businesses; others are still struggling to survive the economic turmoil through severe budget cuts and unavoidable business compromises. Experts debate over the causes of the financial crisis and whether the worst of the economic turmoil is behind us. Most commentators agree that although first signs of recovery started appearing, the United States has a long way to go on an economic recovery. This view has spurred the recent promulgation of several policies aimed at coping with the ramifications of the economic depression, boosting the economy and stimulating its growth.\(^1\) This paper joins the growing body of scholarly literature proposing outlets from the recession through recovery-stimulating policy reforms. It addresses the particular policy niche of controlling corporate misconduct in times of economic meltdown, and discusses Deferred Prosecution Agreements (DPAs) – an enforcement instrument that has gained great significance throughout the last decade, and may comprise an invaluable enforcement instrument in current times of economic meltdown.

This paper is structured as follows: Section 2 describes the unique challenges faced by public

\(^1\) New laws signed recently by the U.S. President include the American Recovery and Reinvestment Act, which has been responsible for millions of American jobs, the Wall Street Reform, that is aimed at holding Wall Street more accountable than it was before; the Small Business Jobs Act, that provides tax breaks and better access to credit for small businesses; the Fraud Enforcement and Recovery Act, which expands the federal government toolkit with respect to investigation and prosecution of frauds.
enforcement authorities in times of economic meltdown. Section 3 provides a general overview of the newly emerged enforcement policy, DPAs. This overview includes a detailed survey of the evolution of this enforcement mechanism in the U.S. enforcement policy, and a portrayal of the common features of DPAs as developed in practice. At this part, special attention is paid to an innovative feature of many DPAs, that is, corporate monitors whose appointment has occasionally been required by the Department of Justice (DOJ) to ensure corporate compliance with the terms of the DPAs. Next, Section 4 evaluates the unique promises of DPAs as an alternative to traditional corporate prosecution in times of economic meltdown. Furthermore, this section points at some important pitfalls that may require some policy adjustments when utilizing DPAs in practice. Some recent attempts to regulate the use of DPAs and cope with these pitfalls are discussed in Section 5. Finally, Section 6 summarizes and concludes.

2. Enforcement Challenges in times of Economic Meltdown

Economically distressed times often associate with an increase in white-collar crime. This phenomenon, which is well recognized by the existing scholarly literature, may have various causes. At the outset, budget cuts forced by the financial status of corporations may dilute corporate internal compliance and monitoring actions, thereby increasing non-compliance incidents. Similarly, businesses facing financial difficulties may be more concerned about short-term consequences of their actions than middle- or long-term ones. Executives as well as employees of financially distressed corporations know that if earning targets are not met, they may simply lose their jobs. Consequently, such corporate actors may look for quick fixes to current challenges, and thereby may fraught with the temptation of entering into border-line transactions, engaging in questionable practices, and even deliberately committing crimes. On top of that, being aware of the budget-cuts faced by enforcement authorities, one may expect

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the overall enforcement activity to decline, along with the probability of detection and prosecution of corporate crime. Such circumstances may lead to under-deterrence and encourage lawbreaking among business corporations.3

A typical policy response to increased non-compliance is an aggravation of enforcement activities, including closer monitoring, stricter prosecution policy, and more rigorous penalty schemes. Such a response is supported by the deterrence theory, according to which crime rates fall in the severity and in the probability of punishment.4 Yet, in times of economic meltdown, such a typical response may encounter two major hurdles: first, as implied earlier, enforcement authorities may lack the resources required to meet the increased demand for enforcement activities.5 In that respect, an aggravation of enforcement activity is simply not feasible. Second, an aggravated enforcement activity may hamper economic recovery by imposing collateral consequences on investors, creditors, and employees. Hence, in times of economic meltdown policymakers may seek a refreshment of the enforcement policy such that it would sensibly balance deterrence goals and collateral risks, while considering existing budget concerns. Having these challenges in mind, the following section describes a newly emerged enforcement mechanism, Deferred Prosecution Agreements (DPAs), which may be useful to cope with the aforementioned challenges, and thereby, may be particularly invaluable in times of economic meltdown.

3. Deferred Prosecution Agreements (DPAs)

3.1. DPA - What is it all about?

Until recently, U.S. prosecutors have held a single weapon against culpable corporations: they

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3 See, Shover & Grabosky, White-Collar Crime and the Great Recession, p. 431 (“a widely shared perception that credible oversight is lacking transforms the supply of lure into a tide of criminal opportunities.”)


5 See, for instance, Ross Colvin, U.S. Recession Fuels Crime Rise, Police Cheefs Say, Reuters (27 January, 2009) (“Police chiefs in the United States say the economic downturn is fueling a rise in crime and warn that cuts to their budgets could handcuff their efforts to tackle it.”)
could only bring criminal charges against corporations and their top functionaries. The use of such a powerful weapon has always required prosecutors to consider not only the considerable enforcement cost involved, but also the substantial collateral consequences that such procedures may have on other stakeholders such as the shareholders, employees, and consumers. A notable example of potential collateral effects of criminal proceedings is the famous case of Arthur Andersen, then-amongst the world’s largest accounting firms (more than 85,000 employees), which imploded after being convicted for its failure to fulfill professional responsibilities in auditing Enron’s financial statements. By the time the Supreme Court overturned the indictment in 2005, the damage to the company was irreversible and the company was driven out of business. Arthur Andersen’s case has accentuated the need to consider real-world consequences that corporate indictment may have, and stimulated the further development of the new policy instrument that has been transplanted in some sporadic previous cases into the corporate crime context. This instrument, known as Deferred Prosecution Agreements (DPAs), comprises a wide verity of agreements between the prosecution and culpable corporations, under which prosecutors agree to defer prosecution of culpable corporations if these corporations fulfill their obligations to undertake dictated structural reforms and to comply with certain standards of behavior.

Although the specific content of DPAs may substantially differ from one agreement to another, in most cases, such agreements include the following components: (a) Corporate commitment to pay a combination of a criminal fine, civil penalty, and restitution; (b) Corporate obligation to cooperate with ongoing investigations; and (c) Corporate commitment to adopt a preapproved compliance management system that is designed to ensure compliance with the agreement and disrupt misconduct. On top of that,

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7 Andersen’s case is further discussed in section 4.1 below.

8 See Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice 43 The American Criminal Law Review, 1095 (2006); Robinson, Urofsky & Pantel, Deferred Prosecutions and the Independent Monitor, 325; Scott A. Resnik & Keir N. Dougall, The Rise of Deferred Prosecution Agreements New York Law Journal: Securities Litigation & Regulation (December 18, 2006); Peter Spivack & Sujit Raman, Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements 45 The American Criminal Law Review, 159 (2008). In some cases, the agreement between the prosecution and the corporations is reached before criminal charges are brought to the court against the corporation. Such agreements, called Non-Prosecution Agreements (NPAs) postpone the filing of criminal charges against corporations, provided that they adhere to the terms of the agreement. In this paper I do not distinguish between DPAs and NPAs except when otherwise noted.

many of the DPAs require corporations to appoint an independent corporate monitor that is empowered to oversee the corporate compliance management system and ensure that the corporation follows the agreement. The average period of DPAs is three years. If the corporation fulfilled its obligations, the prosecutor would dismiss all charges against the corporation for the specific misconduct associated with the agreement. However, if the corporation failed to fulfill its obligations, the prosecutor could request the court to continue with the deferred charges against the corporation. To avoid the risk of losing evidences or witnesses due to the postponement of charges, DPAs regularly require corporations to admit to substantial facts that may ground a conviction in case such agreements are breached by them.

3.2. The Evolution of Deferred Prosecution in the Corporate Arena

Deferred prosecution is not an entirely new policy instrument. In fact, the origins of this instrument can be traced back to the beginning of the twentieth century, in which deferred prosecution has been used as an alternative enforcement arrangement that promoted juvenile and drug offenders’ rehabilitation. The idea behind the development of this instrument was to minimize the potential harsh

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collateral consequences of criminal convictions. This instrument has sought to avoid the stigmatization of nonviolent first-time offenders who did not yet commit themselves to ‘criminal careers.’ In 1975 DPAs were recognized as an official policy instrument by the U.S Congress, which established special pretrial agencies to assist judges in determining offenders’ suitability to the newly created rehabilitation programs and to supervise those offenders during the deferral period. Eventually, the DOJ has promulgated unified eligibility criteria and procedures of an official ‘Pretrial Diversion Program’ as part of the U.S. Attorney’s Manual. This program was specifically designed for individual offenders and did not apply to corporate crime.

The adoption of DPAs into the corporate arena was a gradual process that has started with only a handful cases during the 1990s. The initial step was a Non-Prosecution Agreement (NPA) reached in the Salomon Brothers case in 1992. In this case, a ten-month multi agency investigation led to several allegations against Salomon Brothers according to which the company had submitted false and unauthorized bids in violation of federal forfeiture laws and the False Claims Act, and that the company and others entered into unlawful agreements with respect to trading in financing and secondary markets in violation of the Sherman Act. Nevertheless, the DOJ agreed to seek no criminal charges against Salomon Brothers with respect to these matters in exchange for Salomon brothers’ commitment to pay a $290 million in sanctions, forfeitures and restitution. In addition, the settlements required Salomon


16 See, for instance, Barry Mahoney and others, Pretrial Services Programs: Responsibilities and Potential, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2001); Greenblum, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, p. 1867.

17 See, U.S. Attorneys’ Manual (1997) (“Attorney’s Manual”), available at: http://www.justice.gov/usaio/uesa/foja_reading_room/usam/title9/22mcrm.htm, § 9-22.000. The Pretrial Diversion Program is described in § 9-22.010 as “an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.”


Brothers to continue its cooperation with various government investigations and to institute a compliance management system to prevent reoccurrence of the violations.\textsuperscript{20} In explaining its decision to refrain from criminal charges, the DOJ mainly relied on Salomon Brothers’ complete cooperation, and the potential severe collateral consequences of such charges on employees and shareholders.\textsuperscript{21}

Slightly after the Salomon Brothers’ case, in June 1993, The U.S. Attorney for the Southern district of New York reached an agreement with \textit{Sequa Corporation}. According to this agreement the U.S. Attorney agreed to refrain from prosecuting Sequa and its subsidiary for fraud in the manufacture and repair of airplane engine parts, in exchange for Sequa’s commitment to pay $5 million for "\textit{scientific testing and expert analysis of airplane parts}."\textsuperscript{22} In addition, Sequa instituted several agreed managerial changes and committed to continue its cooperation with the investigation.\textsuperscript{23} Similarly to the Salomon Brothers case, when deciding to refrain from prosecuting Sequa, the U.S. Attorney considered Sequa’s cooperation with the investigation and the potential collateral effect of criminal charges against the corporation, including the harm that may be suffered by Sequa’s employees and customers.\textsuperscript{24}

The next important stepping stone in setting the grounds for DPAs as a legitimate enforcement mechanism was the 1994 \textit{Prudential Securities} case. Prudential was charged with securities fraud related to the sale of some oil and gas limited partnerships. The allegations against Prudential included investor deception regarding the returns and tax status of the investments.\textsuperscript{25} The U.S. Attorney for the Southern District of New York agreed to enter with Prudential into a DPA, according to which the charges against Prudential would be \textit{deferred} in exchange for Prudential’s commitment to pay $330 million in restitution.


\textsuperscript{23} See, \textit{ibid.}, p. 125.

\textsuperscript{24} See, \textit{ibid.}, p.125.

In this case as well, the offender’s cooperation with the government investigation and the concerns of collateral consequences on its employees and investors set the ground for the Deferral. It should be noted that unlike the previous cases, Prudential’s agreement did not simply dismiss the charges against Prudential, but rather deferred them for a period of three years, after which, provided that Prudential has complied with the terms of the agreement and avoided additional misconduct, the criminal charges were to be dismissed. Under the specific circumstances of Prudential’s agreement, if Prudential failed to comply with the agreed conditions or engaged in wrongdoing during that period, all charges against Prudential would resurrect. To assure Prudential’s abidance, the agreement further required the company to employ an independent law firm to serve as a corporate monitor that reviews its regulatory and compliance controls. Such a ‘probation period’ became an inherent feature of all subsequent DPAs.

In 1996, the U.S. Attorney for the Central District of California reached an agreement with Cooper & Lybrand. The partnership was accused of concealing essential errors and omissions in Arizona Governor’s financial statements, as well as of receiving inside information regarding a state contract. The U.S. Attorney considered the ‘exemplary cooperation’ of Cooper & Lybrand with the investigation and entered with the partnership into an NPA, according to which the prosecution was deferred for a two-year period. In exchange, the partnership committed to pay additional $3 Million for restitution; to employ an independent corporate monitor to ensure corporate compliance; and to implement a compliance management system that would include a nationwide ethics and integrity training for its professionals. This agreement further extended the scope of DPAs/NPAs by conceiving an extrajudicial adjudicatory process, under which the prosecutors were authorized to impose a $100,000 for any breach of the agreement that they chose not to prosecute, without any judicial intervention.


27 It should be noted that ‘corporate probation’ was acknowledged even before Prudential Securities case by the Organizational Sentencing Guidelines (OSG) as an appropriate measure that can be used against culpable corporations. However, the use of probation measures was meant as part of the sentence, i.e., after the corporation was convicted. See the United States Sentencing Commission (USSC), Federal Sentencing Guidelines Manual: Chapter Eight - Sentencing of Organizations (2009), available at: http://www.ussc.gov/2007guid/CHAP8.pdf: “probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.”


29 See, Greenblum, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred
As mentioned above, the Pretrial Diversion Program that was incorporated into the U.S. Attorneys’ Manual (1997) set forth the criteria for deferred prosecution with respect to individuals. However, when corporations were concerned, prosecutors who decided to use DPAs exercised wide discretion in designing and implementing such agreements. In a nod to the emerging practices, Eric Holder, then-U.S. Deputy Attorney General has promulgated a Memorandum that laid down unified criteria, composed of eight factors that should be considered when deciding whether to bring charges against corporations (“Holder Memo”):

1. The nature and seriousness of the offense;
2. The pervasiveness of wrongdoing within the corporation;
3. The corporation's history of similar conduct;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions;
7. Collateral consequences; and
8. The adequacy of non-criminal remedies.

Although the Holder Memo did not explicitly acknowledge DPAs as formal prosecutorial instruments, the first seeds of their recognition as a legitimate enforcement instrument can be read into the commentary §VI(B) of the holder Memo:

“[A] corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. In some circumstances, therefore, granting a corporation immunity or amnesty may be considered in the course of the government's investigation.” [Emphasis added – S.O.]

Enron’s scandal, which was exposed shortly after the promulgation of Holder Memorandum, has pushed the issue of corporate controls and the desirability of DPAs to the front of the corporate governance polemic. In 2003, DPAs have gained their most substantial support by a new Memorandum


30 See Supra Notes 17 - 18 and the related text.


33 Some sources reported that even Arthur Andersen has negotiated a DPA with the DOJ, which eventually failed due to Andersen’s refusal to accept the ongoing monitoring requirement of the DOJ. See, Alan Vinegrad, Deferred Prosecution Agreements, New York Law Journal, 2003; Greenblum, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, p. 1888; Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements; Robert L. Bartley, Andersen: A Pyrrhic Victory The Wall Street Journal, A17 (June 24, 2002); Beth A. Wilkinson & Alex Young K. Oh, The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective 27 NYSBA Inside, 8 (2009); Blank Rome LLP, Keeping A Watchful Eye: Corporate Deferred Prosecution Agreements and the Selection of Corporate Monitors, Mondaq Business Briefing (2008), available at http://www.encyclopedia.com/doc/1G1-
issued by the U.S. Attorney General, Larry D. Thompson ("Thompson Memo"). The Thompson Memo reinforced - and slightly revised - the factors established by the Holder Memo for prosecution of business corporations. The major contribution of the Thompson Memo was its great emphasis of the *authenticity of corporations’ proffered cooperation* as a major factor in considering prosecution of corporations. The Memo explicitly acknowledged the possibility of prosecution deferral in exchange for corporate genuine cooperation.

Figure 1: Number of DPAs and NPAs Entered into by the DOJ over the Last Decade

During this post-Enron era, and following Thompson Memo, the use of DPAs has substantially expanded. Such an expansion has three key dimensions: first, DPAs have risen in number. As presented

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36 See Thompson Memo §VIA and B.


38 The Factors established by the Holder and Thompson Memoranda were highlighted once again in 2006 in a Memorandum issued by the Deputy Attorney General, Paul McNulty (“McNulty Memo”). See McNulty, Paul, Deputy Attorney General, *Memorandum for Heads of Department Components United States Attorneys: Principles of Federal Prosecution of Business Organizations* (December 12, 2006). The McNulty Memo repeats the consideration of the Holder / Thompson factors and adds new restrictions regarding prosecutors’ powers to require privileged information from companies.
in Figure 1, only a handful of DPAs/NPAs have entered into during the first years of the last decade. This number has constantly increased in the following years, picking at 39 agreements in 2007.\textsuperscript{39} A drop in the number of DPAs/NPAs appeared in 2008-2009, in which 19 and 21 DPAs/NPAs were entered into correspondingly. However, in 2010 the number of DPAs has claimed to 32 agreements, the second-highest record in DPAs/NPAs short history. Overall, DPAs have continued gaining significance in the past decade and became an important enforcement instrument used to combat major corporate crimes.\textsuperscript{40}

Second, the legal spectrum in which DPAs have been used has expended to include a wide range of legal areas, including healthcare, Foreign Corrupt Practices Act (FCPA), tax, accounting irregularities, mortgage, Internet gambling, money laundering, immigration, corrupt sales practices, and False Claims Act, environment, insurance fraud, banking fraud, sexually explicit labeling, and procurement fraud.\textsuperscript{41}

And lastly, the DOJ is no longer the only enforcement authority that uses DPAs. In 2010 the U.S. Securities and Exchange Commission (SEC) officially recognized DPAs as a valid enforcement practice through the promulgation of the new ‘Corporate Initiative,’ which recognizes a set enforcement

\textsuperscript{39} Slightly different numbers are reported by United States Government Accountability Office (GAO), Corporate Crime: Preliminary Observations on DOJ’s use and Oversight of Deferred Prosecution and Non-Prosecution Agreements (Statement of Eileen R. Larence, Director Homeland Security and Justice) (June 25, 2009), p. 1, according to which the DOJ has entered into 3 agreements in 2002, and 41 agreements in 2007.

\textsuperscript{40} See, Greenblum, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, p. 1875 (“since the dissemination of Thompson [Memorandum], no corporation has been charged in a major corporate fraud investigation outside a deferred agreement.”) Such agreements involve a wide spectrum of corporations, including American Express Bank International (a former subsidiary of American Express Company), Banco Popular, PNC, Merrill Lynch, Boeing, Bristol-Myers Squibb, British Petroleum, Chevron, Pfizer, A\’ktiebolaget (AB) Volvo, Wellcare Health Plans, UBS AG, KPMG, WorldCom, Credit Suisse First Boston (CSFB), AOL, Deutsche Bank, Shell Nigeria, ABN Amro Bank entered into 3 agreements in 2002, and 41 agreements in 2007.

\textsuperscript{41} See, ibid., p. 1875 (“since the dissemination of Thompson [Memorandum], no corporation has been charged in a major corporate fraud investigation outside a deferred agreement.”) Such agreements involve a wide spectrum of corporations, including American Express Bank International (a former subsidiary of American Express Company), Banco Popular, PNC, Merrill N.V., and others. See, Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements; Gibson Dunn, 2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements; Robinson, Urofsky & Pantel, Deferred Prosecutions and the Independent Monitor, 325; Vinegrad, Deferred Prosecution of Corporations; Resnik & Dougall, The Rise of Deferred Prosecution Agreements; Corporate Crime Reporter, Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements; Gibson Dunn, 2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreement; Melissa Aguilar, DPA-NPA Tally Marks Decade’s Second Highest, Compliance Week, January 4, 2011.
instruments, including DPAs, that may be used by the SEC to encourage greater cooperation by individuals and companies in SEC investigations. Altogether, as a result of their gradual recognition as a legitimate enforcement practice, DPAs have become an important tool that enriches the prosecutorial toolkit and provides an innovative means of controlling corporate misconduct.

3.3. Corporate Monitors

Many DPAs entered into by the DOJ have included an innovative surveillance mechanism, *i.e.*, corporate monitors employed to oversee corporate compliance with the DPAs’ terms. The use of third-party monitors had started long before it was adopted as part of recent DPAs. In facts, the roots of third-party monitors may be traced back to the ‘Special Masters’ appointed by the English Chancery in the early sixteenth century. A more recent form of corporate monitors was used in the U.S. during the 1980s’ as a result of the Racketeer Influenced and Corrupt Organization (RICO) Act. Civil actions under the RICO Act resulted in the appointment of corporate monitors as part of the *remedies* announced by the court. The use of corporate monitors has extended gradually through some sporadic cases during the 1990s, in which corporate monitors were appointed in an earlier stage, *before* any announcement of the court ruling. Corporations have agreed to the appointment of third-party experts to monitor their regulatory performance as a substitute for sanctions. In the recent decade, the use of corporate monitors was recognized by the DOJ as a valuable feature that may assist the DOJ in ensuring the well functioning of internal corporate governance mechanisms, especially when limited resources or expertise thwart the supervision by the DOJ.

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44 The RICO Act is a U.S. Federal law that was enacted in 1970 to eliminate the undesirable effects of organized crime on the U.S. economy. It was meant for fighting the Mafia by extending criminal penalties and a civil cause of actions for actions carried out as part of an ongoing criminal organization.


46 Among these cases, corporate monitors were included in the agreements achieved in the *Prudential Securities* and *Cooper & Lybrand* cases discussed above, see the main text related to *supra notes* 25-29. For a historical overview of corporate monitors, see *ibid.*, pp. 1715-20.

47 See, United States Government Accountability Office (GAO), *Corporate Crime: Preliminary Observations on DOJ’s use and Oversight of Deferred Prosecution and Non-Prosecution Agreements* (Statement of Eileen R. Larence, Director Homeland Security and Justice), p. 19: “When deciding whether a monitor was needed to help oversee the development or operations of a company’s compliance program, DOJ considered factors such as the availability of DOJ resources for this oversight, the level of expertise among DOJ prosecutors to monitor...”
Throughout the last decade, corporate monitors have become an inherent feature in many DPAs.48 The use of corporate monitors in DPAs, including their selection, determination of roles and responsibilities, was subject to prosecutors’ discretion. Generally speaking, this surveillance mechanism includes third-parties hired as a result of the agreement between the prosecution and the corporation to serve as a neutral supervisory mechanism that ensures future corporate compliance. Such monitors are hired by corporations after the prosecution has a clear indication of wrongdoing that has been committed.49 Therefore, although their appointment stems from an agreement between the corporation and the prosecutor, such monitors comprise ‘the lesser of two evils’ for the corporations, which agree to their appointment only to avoid indictment consequences. The prevalent approach is that such corporate monitors are required as part of the sanction imposed on corporations, which is required to ensure future compliance.50 According to this approach, if the corporation had a genuine and a comprehensive compliance management system in place, such corporate monitors would not be required.51 Hence, from the government perspective, the appointment of corporate monitors substitutes complex and costly prosecution proceedings, and may achieve future compliance without using confrontational measures that may achieve opposite ends.52

**What are the roles and responsibilities of corporate monitors under DPAs?** Generally speaking, corporate monitors, which are paid by the appointing corporations,53 are appointed to oversee the internal

48 For an overview of various cases in which the appointment of corporate monitors was required by DPAs and NPAs see, Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements; Robinson, Urofsky & Pantel, Deferred Prosecutions and the Independent Monitor, pp. 333-5; Gibson Dunn, 2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements.


50 See, ibid.

51 See, Christopher M. Matthews, Fraud Chief: Effective Compliance Programs can Prevent Monitors, Main Justice: Politics, Policy and the Law (2010), available at [http://www.mainjustice.com/2010/05/24/fraud-section-chief-effective-compliance-programs-can-prevent-monitors/](http://www.mainjustice.com/2010/05/24/fraud-section-chief-effective-compliance-programs-can-prevent-monitors/), quoting the Criminal Fraud Section Chief, Denis McInerney: “If you have already established an excellent compliance program, then it will be less likely that we’ll install a compliance monitor, which can come at some cost to the company.” See also Christopher M. Matthews, Grindler Touts Importance of Compliance, but Doubts Linger, Main Justice: Politics, Policy and the Law (2010), available at [http://www.mainjustice.com/2010/05/25/grindler-touts-importance-of-compliance-but-doubts-linger/](http://www.mainjustice.com/2010/05/25/grindler-touts-importance-of-compliance-but-doubts-linger/).


53 See, Khanna & Dickinson, The Corporate Monitor: The New Corporate Czar, p. 1723. Mostly, the corporation has to bear the cost of corporate monitors in addition to the monetary payment agreed upon between the parties. An exceptional DPA, in that respect, is Sirchie Acquisition Company, LLC’s, entered into in February 2010, according to which Sirchie was allowed to partially offset the cost of its corporate monitor against the fine imposed under the
compliance management systems of corporations; to establish new compliance management systems - when such systems do not exist or were proven to be poorly administered; to review the effectiveness of corporate internal controls; and to disrupt misconduct while ensuring that the conditions of the DPAs are fulfilled. Their specific powers are determined and specified in each DPA, and they greatly differ from one case to another, ranging from merely advisory powers to most intrusive ones, including restructuring corporate internal processes and reporting any deviation from the desirable corporate behavior to the corporation and the court. For instance, in the case of AOL, which faced criminal allegations for some of its employees’ misconduct regarding a securities fraud by PurchasePro.com, the DPA entered into in 2004 specified limited ‘reviewing’ powers of the corporate monitor. Similarly, in the cases of InVision, Monsanto, Titan and DPC, all of which were related to violations of the Foreign Corrupt Practices Act (FCPA), the corporate monitors were entrusted to ‘evaluate the effectiveness’ of the companies’ FCPA compliance management system. In other cases, by contrast, the powers of the corporate monitor expanded beyond ‘review’ and ‘evaluation.’ In the Micrus case, for instance, which also involved FCPA violations, the DPA stated that “[d]uring the monitor's term, no amendments or changes will be made to the policies and procedures without the prior approval of the monitor.” Similarly, in the KPMG case, which involved allegations of designing fraudulent tax shelters, the appointed corporate monitor was empowered with wide review and monitoring powers, not only concerning the compliance management system, but also concerning the “implementation and execution of personnel decisions regarding individuals who engage in or were responsible […] for the illegal conduct described in the information


56 See, Deferred Prosecution Agreement of America Online, Inc. (AOL), 2004, §13. Available at: [http://www.corporatecrimereporter.com/documents/aol.pdf](http://www.corporatecrimereporter.com/documents/aol.pdf): “[…] The Monitor will undertake a special review of: the effectiveness of AOL's internal control measures related to its accounting for advertising and related transactions; the training related to these internal control measures; AOL's deal sign-off and approval procedures; and AOL's corporate code of conduct. AOL agrees to cooperate with the Independent Monitor.” [Emphasis added – S.O.]


58 See, Deferred Prosecution Agreement with Micrus (March 4, 2005), §13. Available at: [http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=3519453-1442113-1478480&SessionID=qZe2HSCK0r9qrl7](http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=3519453-1442113-1478480&SessionID=qZe2HSCK0r9qrl7).
and may require any personnel action, including termination, regarding any such individuals.\(^59\) In addition, in this case the corporate monitor was required to actively investigate potential misconducts and to continuously report any red flag to the corporate compliance officer along with recommendations for action needed to secure compliance. In other cases, such as CIBC, Micrus, and InVision, the corporate monitors were empowered to bridge between the governmental agencies and the corporations; they were required to file periodical reports to the agencies concerning the corporate compliance with the agreement, as well as to provide the agencies with any additional information about the corporations, as requested by the agencies.\(^60\) In some cases corporate monitors may be extremely powerful and involved in all critical corporate decisions.\(^61\) In such cases, their recommendations may be extremely powerful, up to the degree that they may render the corporate CEO’s dismissal.\(^62\)

**How are corporate monitors selected?** Corporate monitors are typically selected by the corporation with a changing level of prosecutors’ involvement.\(^63\) In some cases, such as in Monsanto and Micrus, the agreements allowed the corporations to choose corporate monitors that are ‘acceptable’ by the prosecution. In other cases, such as in CIBC, the prosecution itself selected the monitor for the corporation.\(^64\) In most cases, corporate monitors have been selected from a small group of former enforcement officials, including former judges, prosecutors, and regulatory officers that are perceived as trustworthy by the parties to the DPA.\(^65\) Until recently, such monitors were not required to meet any level


\(^{60}\) See, *ibid.*, p. 333.

\(^{61}\) See also, Jennifer O’Hare, *The use of the Corporate Monitor in SEC Enforcement Actions* 1 *Brooklyn Journal of Corporate, Financial and Commercial Law*, (2006), describing WorldCom’s corporate monitor as the most powerful person in WorldCom, who was involved in every important corporate decision.


\(^{63}\) See United States Government Accountability Office (GAO), *Corporate Crime: Preliminary Observations on DOJ’s use and Oversight of Deferred Prosecution and Non-Prosecution Agreements* (Statement of Eileen R. Laurence, Director Homeland Security and Justice), pp. 2, 23-7: “For the DPAs and NPIAs GAO reviewed, even though DOJ was not a party to the contracts between companies and monitors, DOJ typically selected the monitor, and its decisions were generally made collaboratively among DOJ and company officials.” See also Blank Rome LLP, *Keeping A Watchful Eye: Corporate Deferred Prosecution Agreements and the Selection of Corporate Monitors*.

\(^{64}\) See, Robinson, Urofsky & Pantel, *Deferred Prosecutions and the Independent Monitor*, p. 332; Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements.

\(^{65}\) See, Khanna & Dickinson, *The Corporate Monitor: The New Corporate Czar*, p. 1722; O’Hare, *The use of the*
of qualification or special expertise in the relevant regulatory field. As discussed in what follows, the selection and nomination process of corporate monitors has been greatly criticized by the general public and the scholarly literature.

4. Policy Evaluation

4.1. The Promises of DPAs in times of Economic Meltdown

Two unique virtues make DPAs an invaluable alternative to the traditional criminal proceedings against business corporations, particularly in times of economic meltdown. First and foremost, as implied earlier, DPAs allow for the mitigation of collateral consequences often associated with criminal indictment. As such, the use of DPAs as an alternative to traditional corporate prosecution coincides with economic recovery goals. More particularly, criminal indictment of business corporations commonly produce poor publicity that may generate moral obloquy and social disgrace, and thereby discourage potential consumers, trading partners, and investors from entering into any business contact with the convicted corporation: “upon indictment, companies are likely to face fundamental instability, downgrading of creditworthiness, loss of market share, diminution of stock value, market and reputational damage, debarment from certain industries, regulatory proceedings, and class actions.” In extreme cases, an indictment may lead the entire corporation to collapse, while its investors, creditors, and former employees are left to bear the losses. Of course, such concerns are amplified in times of economic meltdown, in which corporations face severe financial challenges. The Arthur Andersen’s case

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66 See, Khanna, Reforming the Corporate Monitor?.
68 See, F. Joseph Warin & Andrew S. Boutros, Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform 93 Virginia Law Review, p. 129 (2007). See also Robinson, Urofsky & Pantel, Deferred Prosecutions and the Independent Monitor, p. 327, and Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements: “[the] consequences [of criminal conviction] can be especially harsh for corporations that operate in highly regulated industries. For example, a conviction for certain violations could result in a corporation losing its broker-dealer license, banking license, charter, or deposit insurance; being stripped of eligibility to be a government contractor; or being prohibited from participation in government healthcare programs.”
briefly mentioned above is a striking example of the severe collateral impacts that criminal indictment may have, and therefore it is worth a detailed reminder: In 2002 Arthur Andersen LLP., one of the largest and the most successful consulting firms in the world, was criminally convicted for violations pertaining to its failure to fulfill professional responsibilities in auditing Enron’s financial statements. Prior to its conviction, Arthur Andersen LLP. had flourished, with annual revenue of more than $9.3 billion, and more than 85,000 employees across the world (compared to Enron, with 20,000 employees). This reality has changed dramatically after Andersen’s conviction. Given its conviction - and while the appeal was still pending - Arthur Andersen was required to surrender its Certified Public Accountants (CPA) license. As a result, the firm has gradually lost most of its clients. Although eventually the verdict of Arthur Andersen was unanimously overturned by the U.S. Supreme Court in 2005, by then the damage to the firm was irreversible: the partnership entirely lost its reputation and clients, all 28,000 U.S.-based employees lost their jobs, most non-U.S. practices were taken over by local firms, and the remaining assets of the partnership were divided. Arthur Andersen LLP. has simply vanished into thin air, and has not returned to operate in the market ever since.

DPAs allow enforcement authorities to obtain deterrence goals through an alternative arrangement that is based on a cooperative resolution of past violations, rather than through a confrontational legal process. It provides corporations with the incentive to comply with the law, as well as to be proactive in ensuring compliance by their employees as the only way to avoid sanctions. In that respect, it is important to bear in mind that under U.S. federal law corporation are held liable for crimes committed by their employees within the scope of the employment even if these crimes were committed


70 See, Kurt Eichenwald, Andersen Guilty in Efforts to Block Inquiry on Enron The New York Times, (June 16, 2002), reporting that soon after the conviction, “Andersen informed the government that it would cease auditing public companies as soon as the end of August, effectively ending the life of the 89-year-old firm.” See also Bartley, Andersen: A Pyrrhic Victory, A17, referring to Rusty Hardin, Andersen's trial counsel, after the indictment saying that Andersen would definitely file an appeal, however, although a successful appeal would remove a black mark from Andersen's reputation, it will have no meaningful effect on the firm, because the firm was closing its doors. See also Wilkinson & Oh, The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective, p. 9.

against the corporate policy and to direct orders.\textsuperscript{72} Under such a liability scheme corporations may get involved in criminal investigations for accidental, inadvertent violations.\textsuperscript{73} As opposed to the harsh treatment of the traditional prosecution proceedings, DPAs allow corporations to take the required actions to improve their corporate governance scheme and enhance internal monitoring and control without suffering from the rigorous consequences of an indictment. Those corporations that cooperate with the prosecution and meet their obligations as per their DPA are able to escape the painful consequences of criminal litigation and conviction. By contrast, recalcitrant corporations that entered into a DPA insincerely are brought to the court and face the full rigor of the criminal law. In actuality, most DPAs entered into in the last decade were respected and followed by the corporations and required no further criminal proceedings.\textsuperscript{74} Altogether, DPAs may substantially alleviate \textit{collateral effects} that may otherwise be suffered by investors, creditors, and employees.

Another virtue of DPAs which is invaluable in times of economic meltdown is the public cost-


\textsuperscript{74} Notable exceptions are, first, the case of \textit{FirstEnergy Corp.}, which reached a DPA to defer charges for misrepresentations to the Nuclear Regulatory Commission. The DOJ perceived that an insurance claim brought by FirstEnergy violated the DPA. However, the DOJ eventually took no actual actions because FirstEnergy dropped the claim. In the Aibel Group case, by contrast, the DOJ decided to revoke the DPA it entered to in 2007 with Aibel after it found that Aibel did not follow its commitments. Aibel agreed to a guilty plea and reached a new agreement which resembled the DPA, accept for the requirement to employ an external corporate monitor. See, Gibson Dunn, 2008 \textit{Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements}.  

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saving that results from pursuing a DPA rather than formal criminal proceedings. Criminal proceedings involve enormous public costs. The most obvious are the direct costs of prosecution agencies, administrative costs of the court system, and the costs involved in holding a trial, including evidence collection, experts’ opinions, and witness testimonies. Beside those, criminal proceedings may involve indirect costs, such as alienation cost and error costs. All such inherent costs of the criminal system are particularly burdensome at times when not only corporate America but also enforcement authorities face severe budget cuts. The use of DPAs as an alternative for criminal proceedings may mitigate – and even eliminate - many of these enforcement costs.

4.2. The Pitfalls of the Existing DPA Policies

Despite their promises, DPAs have been subject to a growing criticism in the scholarly literature. One central line of criticism, for instance, addresses the lack of DOJ guidance. Until 2008, the DOJ issued no specific instructions as to the use of DPAs. Therefore, individual prosecutors held wide discretion in entering into such agreements. Apparently, as shown by the GAO Report of 2009, the wide


76 Given the cat-and-mouse type of game endorsed by criminal charges, violators may find it worthwhile to commit the violation (and gain the benefits associated with it), while bearing additional expenditures to cover tracks, and by doing so, reducing the expected sanction. See, Arun S. Malik, Avoidance, Screening and Optimum Enforcement 21 RAND Journal of Economics, 341 (1990); Anthony G. Heyes, Making Things Stick: Enforcement and Compliance 14 Oxford Review of Economic Policy, p. 18 (1998); Robert Innes, Violator Avoidance Activities and Self-Reporting in Optimal Law Enforcement 17(1) Journal of Law, Economics and Organization, 239 (2001). See also Scholz, Cooperation, Deterrence, and the Ecology of Regulatory Enforcement, p. 207, according to which a harsh enforcement style which leads to confrontations might motivate corporations to evade whereas by doing so they minimize their regulatory costs; and Pinaki Bose, Regulatory Errors, Optimal Fines and the Level of Compliance 56 Journal of Public Economics, 475 (1995), which develops a model, according to which high penalties can lead to the regulators’ efforts to obstruct the enforcement process, including greater incentives to challenge the regulatory sanction in court.

77 Beside the direct institutional and procedural costs, prosecution and sanctioning may involve error costs of both types; prosecuting or convicting an innocent person (type I error) or discharging a culpable one (type II error). Although procedural laws often employ various measures to reduce the probability of errors (such as standards of proof and evidence admissibility rules), error costs are unavoidable by-products of prosecutors' and courts' decisions. See, Heyes, Making Things Stick: Enforcement and Compliance, p. 55; Mitchell A. Polinsky & Steven Shavell, The Economic Theory of Public Enforcement of Law 38(1) Journal of Economic Literature, American Economic Association, p. 23 (2000).


79 See, for instance, Greenblum, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate
prosecutorial discretion led to an inconsistent use of DPAs, under which different U.S. attorneys as well as different sections within the DOJ varied substantially in the terms of such agreements.\textsuperscript{80} Obviously, such inconsistency in the application of DPAs may present a major risk of arbitrariness and inequality, and makes it difficult for corporations to map themselves out a path to follow in case of a governmental investigation.\textsuperscript{81}  

Another major criticism brought in the scholarly literature is the overreach of prosecutorial discretion embedded in DPAs.\textsuperscript{82} Such agreements are usually not a product of true negotiation between equally powered parties. In fact, given the substantial adverse impact that criminal proceeding may have on corporate reputation, corporations that are offered a DPA are de facto compelled to accept the conditions set forth by the prosecution.\textsuperscript{83} Such powers may first and for most raise a concern of over-

\textit{Deferred Prosecution Agreements, 1863; Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements; Gibson Dunn, 2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements}. See also Warin & Schwartz, \textit{Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants}, 121, who underscore the need for guidance with respect to DPAs and NPAs in the corporate context. See also Greg Burns, \textit{Corporations avoid criminal cases}, Chicago tribune (March 20, 2005), available at: http://articles.chicagotribune.com/2005-03-20/business/0503200212_1_public-marketplace-mci-prosecution/4: "Other critics say that putting off a corporate prosecution can be appropriate, but they worry the guidelines are too loose, and judicial oversight too limited." Burns also quotes Prof. John C. Coffee Jr., as saying "This is a major and largely unrecognized gear shift in the law since Arthur Andersen […] It's probably a sensible thing to do, but it is too unstructured."  

\textsuperscript{80} United States Government Accountability Office (GAO), \textit{Corporate Crime: Preliminary Observations on DOJ’s use and Oversight of Deferred Prosecution and Non-Prosecution Agreements} (Statement of Eileen R. Lawrence, Director Homeland Security and Justice), p. 2: “prosecutors differed in their willingness to use DPAs or NPAs. In addition, prosecutors’ varying perceptions of what constitutes a DPA or NPA has led to inconsistencies in how the agreements are labeled.” See also Warin & Boutros, \textit{Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform}, p. 125, 132, who compare the DPAs reached in \textit{Shell} and \textit{Bristol Meyers Squibb} cases, and conclude that the appropriate guidance must be provided to prevent future inconsistencies in designing DPAs/NPAs.  

\textsuperscript{81} See Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements: “[…] absent consistent and uniform guidance, a corporation has no way of measuring the consequences of coming forward and self-reporting potential criminal activity.” For suggested guidelines, see Warin & Boutros, \textit{Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform}, 121; Spivack & Raman, \textit{Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements}, 159.  


\textsuperscript{83} See Greenblum, \textit{What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements}, p. 1885: “[t]he offender can choose either to agree to the terms of deferral as defined by the prosecutor, or to reject the deferral and face the adverse publicity of a trial and the potential collateral consequences of a felony conviction. The corporation offender’s unique vulnerability to adverse publicity and collateral consequences sets the stage for a deferral negotiation that ‘stack[s] the deck against the defendant’ and
expansion of DPAs even in cases that would not trigger prosecution in the past. Furthermore, given their wide discretion, prosecutors are using DPAs to induce corporations to undertake *dramatic structural reforms*, without being subject to adequate judicial supervision. In the same vein, commentators have pointed at the professional judgments involved in an efficient design of corporate compliance programs and suggested that prosecutors, who often lack the required expertise, should not impose any such structural reforms. Instead, such reforms should be exercised by a civil regulatory authority that is more likely to have this expertise. Others have suggested restricting the discretion of individual prosecutors by requiring them to receive the permission of the Deputy Attorney General before entering into any DPA. An alternative proposal designates a greater involvement to the judicial system in interpreting and applying the terms of DPAs.

On top of that, scholars have also addressed the risk of *over-expansion of corporate monitors’ powers* beyond the original authority intended to be granted by court orders. One proposal suggested

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84 See, Gibson Dunn, 2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements ("in the past, the DOJ often declined to prosecute cases in which the allegations involved low-level misconduct or there was a lack of sufficient evidence. However, the increased use of DPAs and NPAs raises a question of whether this new prosecutorial tool may be encouraging the government to seek agreements with corporations in instances that previously resulted in declinations.") See also, Weissmann & Newman, Rethinking Criminal Corporate Liability, p. 414: “Contrary to the system of checks and balances that pervades our legal system, including the criminal law with respect to individuals, no systemic checks effectively restrict the government’s power to go after blameless corporations.”

85 See, Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, p. 1895. See also Gibson Dunn, 2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, reporting that most recent DPAs/NPAs include a provision that grants the DOJ “sole discretion to determine whether the agreement has been breached by the company.”

86 See, Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms, in Prosecutors in the Board Room: Using Criminal Law to Regulate Corporate Conduct, Anthony Barkow & Rachel Barkow eds., (Forthcoming).*

87 See, Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 1434.

88 See, Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, p. 1904. The author suggests reducing the risk of an abuse of prosecutorial discretion by increasing the judicial involvement “not during the negotiation phase of the [agreement], but rather during the implementation of the [agreement], where dissolution of the agreement can result in prosecution and the stakes are highest.” See also Warin & Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, p. 128: “The DOJ should surrender to the courts at the preindictment stage the determination of whether a corporation has materially breaches the terms of a DPA.”
limiting the use of corporate monitors only to very rare cases. A different proposal recommended prosecutors and corporations to better specify corporate monitors’ tasks and powers in the DPA, not leaving too much discretion for the monitors themselves to self-determine their authority. A related criticism focuses on the position of corporate monitors as surrogate policeman, acting on behalf of the government. As ‘outsiders,’ corporate monitors may face substantial difficulties in accessing all kinds of internal, informal relevant information.

Lastly, criticism was raised with respect to the selection process of corporate monitors. In the absence of specific guidelines, corporate monitors were subject to no qualifications or expertise requirements, and their appointment was widely influenced by the personal discretion of the individual prosecutors in charge. Interestingly, such monitors were usually selected from a small group of former public officials, rather than through any market mechanism. This susceptible aspect of corporate monitors drew the media’s attention and rendered intensive criticism in 2007, when the New Jersey U.S. Attorney Chris Christie awarded a $52 million worth contract to a consulting firm founded by the former Attorney General John Ashcroft, to serve as a corporate monitor. To prevent the tangible risk of abuse of prosecutorial powers, scholars have strongly suggested that the government verifies corporate monitors’ background and expertise and appoints them on a merit basis through a transparent process. In the same vein, scholars suggested that corporate monitors, who are not selected by shareholders and are not subject to market forces that could discipline their behavior, should be subject to fiduciary duties to shareholders and become accountable to them.

89 See, for instance, O'Hare, The use of the Corporate Monitor in SEC Enforcement Actions, 89.
91 See, Sue Reisinger, Designated Drivers, Corporate Counsel, October 2004.
93 See, supra notes 65-53 and the related text.
95 See, Khanna, Reforming the Corporate Monitor?.
96 See, O'Hare, The use of the Corporate Monitor in SEC Enforcement Actions, p. 105, who explains that the corporate monitors’ primary responsibility is not to benefit shareholders, but rather to further the court order; See also, Khanna & Dickinson, The Corporate Monitor: The New Corporate Czar, p. 1742, who suggest to establish a
5. Emerging DPAs Policies

In a nod with the growing criticism of DPAs and of the lack of adequate policies concerning corporate monitors, the use of DPAs has declined in 2008-2009, along with the employment of corporate monitors (See Figure 2 below). The cumulative experience gained with respect to DPAs, coupled with the growing criticism of this mechanism brought U.S. policymakers to take initial steps to regulate the use of DPAs. The first attempts were undertaken in 2008 and 2009, through several Bills presented before the U.S. Congress, aiming at requiring the DOJ to promulgate official guidelines of the appointment and function of corporate monitors. These bills acknowledge the use of DPAs and corporate monitors, and address the criticism raised in the literature through several suggestions for amendments to the prevalent policy.

97 Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements suggests that the ‘downturn’ in the use of DPAs and NPAs may “reflect the debate surrounding DPAs and cautious approach that the DOJ took in entering into DPAs while awaiting further legislative and guidance.” See also Corporate Crime Reporter, Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements.


99 All following references to the content of the Bills are brought with respect to the most recent Bill, H.R. 1947, supra note 98. This Bill defines DPA as “an agreement between a Federal prosecutor and an organization to conditionally defer prosecution of that organization in a criminal case in which charges are filed;” an NPA is defined as “an agreement between a Federal prosecutor and an organization to conditionally decide not to file criminal charges against the organization;” and an ‘independent monitor’ is defined as “a person or entity outside the Department of Justice that is selected to oversee the implementation of a deferred prosecution agreement or nonprosecution agreement.”
Figure 2: Corporate Monitors required by DPAs and NPAs in recent years

- **Clear guidelines** – The Bills require the Attorney General to issue public written guidelines for DPAs; Such guidelines should cover, *inter alia*, the criteria under which it would be appropriate for Federal prosecutors to enter into DPAs; the appropriate terms and conditions of DPAs; the circumstances in which corporate monitors are warranted, as well as the duties and powers of such monitors.\(^{101}\)

- **A Core of Corporate Monitors** – the Bills require the Attorney General to create a publicly available ‘national list of possible corporate monitors.’ Such a list shall include “organizations and individuals who have the expertise and specialized skills necessary to serve as independent monitors.”\(^{102}\)

- **Selection process and compensation of Corporate Monitors** - the Bills require the Attorney General to establish rules for the selection of corporate monitors for DPAs that will ensure the credibility of the selection process, while allowing for an “open, public, and competitive process for the selection of such monitors.” In addition, the Attorney general is required to establish a publicly available ‘fee schedule’ for the compensation of independent monitors.\(^{103}\) Furthermore, the Bills seek to ensure the credibility of the selection process by prohibiting the participation of attorneys who are involved in the prosecution, in the selection process of corporate monitors,

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\(^{100}\) **Figure 2** is adopted from Gibson Dunn, *2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreement*, p. 10.

\(^{101}\) Sec 4 of the Bill H.R. 1947, *Supra note 99*.

\(^{102}\) Sec 5(a)-(b) of the Bill H.R. 1947, *Supra note 99*.

\(^{103}\) Sec 5(a), (c)-(d) of the Bill H.R. 1947, *Supra note 99*.
accept for suggesting qualifications for such monitors.\textsuperscript{104}

- **Judicial Oversight of DPAs** – the Bills propose a court oversight mechanism of DPAs. DPAs must get a court approval before entering into force; the parties to the agreement as well as the corporate monitors are required to submit to the court quarterly reports on the progress made toward the completion of the DPA, to allow the court to ‘assure that the implementation or termination of the DPA is consistent with the interests of justice.’\textsuperscript{105}

Due to the growing interest in DPAs and the practical need in official guidelines, while the Bills are pending with the U.S. Congress, the DOJ has promulgated its first official guidance regarding the selection and use of corporate monitors in DPAs. The new guidelines were issued on March 7, 2008 in a Memorandum by Craig S. Morford, Deputy Attorney General ("Morford Memo"), which covers substantial issues regarding the use of corporate monitors in DPAs:\textsuperscript{106}

- **When Corporate Monitors Should be Used** – The Morford Memo strives to assure an efficient use of corporate monitors in DPAs. Therefore, it explicitly states that monitors should be used only when appropriate given the specific circumstances at hand. This Memo sets forth a ‘cost-benefit’ criterion for the use of corporate monitors, that is, before requiring the appointment of a corporate monitor, the prosecutor is required to consider the ‘potential benefits that employing a monitor may have for the corporation and the public’ against ‘the cost of a monitor and its impact on the operations of a corporation.’\textsuperscript{107} The Memo provides specific examples for such circumstances: (a) where a company does not have an effective internal compliance program; (b) when the company needs to establish necessary internal controls.\textsuperscript{108}

- **Criteria for Selecting a Monitor** – To ensure that appointed corporate monitors possess the required expertise and qualifications; the Morford Memo sets forth the criteria for the appointment of corporate monitors. Such criteria require the monitor, first and for most, to be ‘a highly qualified and respected person or entity based on suitability for the assignment and all of

\begin{footnotesize}
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\item 104 Sec 6(b) of the Bill H.R. 1947, Supra note 99.
\item 105 Sec 7 of the Bill H.R. 1947, Supra note 99 above.
\item 106 See, Morford, Craig S., Acting Deputy Attorney General, Memorandum for Heads of Department Components United States Attorneys: Selection and use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008).
\item 107 See, ibid., Sec. I.
\item 108 See, ibid.
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the circumstances; in addition, the corporate monitor must be independent, such that its appointment avoids any ‘potential or actual conflicts of interest.’ Furthermore, the Morford Memo creates a detailed procedure for the selection of monitors. Such a process starts by a discussion between the corporation and the government, which is aimed at identifying the qualifications for a monitor at the particular case. Then, it requires the creation of a specialized committee that will consider all corporate monitor candidates. Finally, the appointment must be approved by the Office of the Deputy Attorney General.

**Role and Responsibility** – the Morford Memo clarifies the role of corporate monitors to “assess and monitor a corporation’s compliance with the terms of the agreement specifically designed to address and reduce the risk of reoccurrence of the corporation’s misconduct, and not to further punitive goals.” To prevent the risk of overreaching powers, the Morford Memo clarifies that “the monitor’s responsibility should be no broader than necessary to address and reduce the risk of recurrence of the corporation’s misconduct.” In the same vein, it is made clear that the corporate monitor is not responsible for the corporation’s shareholders, and therefore “the responsibility for designing an ethics and compliance program that will prevent misconduct should remain with the corporation, subject to the monitor’s input, evaluation and recommendations.” On top of that, according to the Morford Memo corporate monitors may be required to provide the government and the corporation with periodic written reports on their activities, the corporate compliance with the agreement, as well as recommendations for changes required to foster corporate compliance with the agreement. If the corporation chooses not to adopt such recommendations, a report must be submitted to the government along with the corporation’s reasoning.

The Morford Memo, which for the first time laid down the basic rules for the use of corporate

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109 See, 318, sec. II. According to the Morford Memo, the corporation must commit itself ‘not to employ or be affiliated with the monitor’ during the period of the agreement and an additional one year after its termination. See also Sec III, according to which monitors must be independent third-parties, not employees or agent of the corporations or of the government.

110 See, *ibid.*, Sec. II.

111 See, *ibid.*, Sec. I and III.B.3.

112 See, *ibid.*, Sec. 1 and III.B.4.

113 See, *ibid.*, Sec. III.B.3.

114 See, *ibid.*, Sec. III.C.5-6.
monitors, substantially contributed to the selection process of corporate monitors in subsequent DPAs.115 The DPAs reached in Willbros Group’s116 and AGA Medical’s117 cases, for instance, explicitly required the corporate monitors to possess ‘demonstrated expertise with respect to the FCPA, including experience counseling on FCPA issues;’ and ‘experience [in] designing and/or reviewing corporate compliance policies, procedures and internal controls, including FCPA-specific policies, procedures and internal controls;’118 Nevertheless, the Morford Memo did not go as far as creating a publicly available ‘core of corporate monitors’ as proposed in the Bills discussed above. Hence, the appointment of corporate monitors remained, thus far, a matter of particular negotiation between the government and the relevant corporation – a process that is still being criticized and may require future reevaluations.

On May 14, 2008, the Deputy Attorney General, Mark Filip, issued a new Memorandum dealing with Federal Prosecution of Business Organizations (“Filip Memo”).119 Filip Memo reinforces the factors previously determined in the Holder and Thompson Memos with some minor adjustments,120 and supports the use of DPAs as a valuable prosecutorial means of controlling corporate behavior.121

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

115 See Gibson Dunn, 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements.


118 See Willbros Group’s and AGA Medical’s DPAs, supra notes 116-117. See also Blank Rome LLP, Keeping A Watchful Eye: Corporate Deferred Prosecution Agreements and the Selection of Corporate Monitors.


added – S.O.]

The development of DPAs continues in 2010 by the promulgation of a new Memorandum by Deputy Attorney General, Gary G. Grindler on May 25, 2010 (“Grindler Memo”). This Memo supplements the Morford Memo by an additional principle that guides prosecutors to explicitly explain in future DPAs “what role the Department [of Justice] could play in resolving any disputes between the monitor and the corporation, given the facts and circumstances of the case.” The Grindler Memo requires prosecutors to consider incorporating a specific provision in future DPAs, according to which if corporations consider any recommendation made by their monitors to be ‘unduly burdensome, impractical, unduly expensive, or otherwise inadvisable,’ they may bring their concerns to the attention of the DOJ, that will determine whether the corporations have fully complied with their obligations under the agreement. Furthermore, the Grindler Memo requires prosecutors to consider incorporating another provision that requires corporations and DOJ representatives to meet together at least annually to discuss “the monitorship and any suggestion, comments, or improvements the company may wish to discuss with or propose to the [DOJ], including with respect to the scope or costs of the monitorship.”

Although the DOJ policy concerning DPAs has substantially progressed along the last years, it seems that not all potential concerns were fully addressed by the policymakers. For instance, despite of the guidance provided by the DOJ in recent years, the actual content of DPAs is still subject to considerable discretion of prosecutors. Indeed, most recent DPAs entered into by the DOJ show some initial standardization in their components. Yet, details such as the severity of fines imposed and the length of the agreement are still decided on a case to case basis. In that respect, a publicly available list of factors determining the content of DPAs may increase transparency and consistency of DPAs. On top of that, the guidance provided in the DOJ memoranda with respect to the selection and appointment of corporate monitors seems to considerably improve the heavily criticized procedures previously followed by prosecutors. Yet, the cost-benefit criterion established by the Morford Memo for the use of corporate monitors may turn out too vague. A list of factors that should be factored in when deciding whether to

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122 See, Grindler, Gary G., Acting Deputy Attorney General, Memorandum for Heads of Department Components United States Attorneys: Additional Guidance on the use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, (May 25, 2010).

123 See, ibid.

124 See, Gibson Dunn, 2009 Mid-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements.

125 Such a scheme was created by the OSG with respect to sentencing of convicted corporations. A similar scheme that regulates the determination of sanctions and length of DPAs may promote transparency and consistency in the use of this policy instrument.
request the appointment of corporate monitor may promote the transparency and consistency of the use of DPAs. In the same vein, future development of prosecutorial policies may embrace the idea of creating a core of corporate monitors that consists of professional individuals and organizations that have been screen and selected ex ante, according to their skills and expertise to serve as independent monitors. The creation of such a pool of corporate monitors will not only improve the transparency of the selection process of corporate monitors, but will also subject such monitors to some market forces that may enhance their trustworthiness and credibility.126

6. Conclusions

This paper discusses the emerging enforcement instrument, DPAs, which hinges upon prosecutors’ agreement to defer criminal charges against culpable corporations in exchange for corporations’ commitment to adhere to some codes of conduct that are aimed at preventing reoccurrence of corporate crime. Unlike traditional criminal proceedings, DPAs may reach a unique prosecutorial balance between deterrence objectives and the unique challenges arising in times of economic meltdown. DPAs promote deterrence goals through a forward looking cooperation between enforcement authorities and corporations that got involved in lawbreaking. As such, this mechanism may save enormous enforcement costs and minimize undesirable collateral effects – virtues that make this instrument particularly invaluable in times of economic meltdown.

Many of the substantial concerns brought in the scholarly literature regarding DPA and the use of corporate monitors in DPAs were addressed in the series of memoranda promulgated by the DOJ in 2008-2010. Some concerns are still to be addressed in the future. Nevertheless, the recent developments in U.S. enforcement policy concerning DPAs have paved the way for a better deployment of DPAs as a key prosecutorial instrument. In actuality, these recent development are correlated with a significant increase

126 The idea of creating a market for corporate monitors has been promoted in Ronald J. Gilson & Reinier Kraakman, Reinventing the Outside Director: An Agenda for Institutional Investors 43 Stanford Law Review, 863 (1991). See also, Reinier Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy 2 Journal of Law, Economics, and Organization, pp. 67-8 (1986), who shows that “[w]henever entry to a gatekeeping market requires significant capital, including investment in specific human capital or reputation, simple legal penalties such as civil damages, fines, or license revocations can be powerful deterrents.” Similarly, Eugene Bardach & Robert A. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness, pp. 61-2, Philadelphia, Temple University Press (1982), argues: “Large corporations now have staffs of professionals concerned with regulatory matters – academically trained industrial hygienists, environmental engineers, toxicologists, safety experts, biologists, lawyers, occupational physicians, and specialists in administering affirmative action programs. These specialists are by no means uninterested in their corporation’s balance sheet, but they also have some loyalty to the standards of their profession. ‘I’m a licensed engineer, I’m not going to risk my license by lying to an agency,’ a corporate environmental engineering told us.” [Emphasis added – S.O.]
in the number of DPAs entered into in 2010, along with significant increase in the number of corporate monitors employed in this year (See Figure 2).127 It is for the future to tell whether this is a beginning of a new trend that utilizes this valuable instrument in promoting deterrence along with economic recovery goals.

127 The number of DPAs increased from 19 and 21 agreements in 2008 and 2009 correspondingly, to 32 DPAs in 2010. Similarly, the number of DPAs requiring corporate monitors increased from 6 and 1 in 2008 and 2009 correspondingly, to 10 in 2010.