

December 2009

CORPORATE CRIME

DOJ Has Taken Steps to Better Track Its Use of Deferred and Non- Prosecution Agreements, but Should Evaluate Effectiveness





Highlights of [GAO-10-110](#), a report to congressional requesters

Why GAO Did This Study

Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution. In June and November 2009, GAO testified on DOJ's use and oversight of DPAs and NPAs, and this report discusses additional findings, including (1) the extent to which DOJ has used DPAs and NPAs to address corporate misconduct and tracks use of these agreements, (2) the extent to which DOJ measures the effectiveness of DPAs and NPAs, and (3) the role of the court in the DPA and NPA process. GAO examined 152 DPAs and NPAs negotiated from 1993 through September 2009 and analyzed DOJ data on corporate prosecutions in fiscal years 2004 through 2009. GAO also interviewed DOJ officials, prosecutors from 13 DOJ offices, 20 company representatives, 11 monitors who oversee company compliance, and 12 federal judges. While not generalizable, these results provide insight into decisions about DPAs and NPAs.

What GAO Recommends

GAO recommends that DOJ develop performance measures to assess the effectiveness of DPAs and NPAs. DOJ agreed with our recommendation.

View [GAO-10-110](#) or [key components](#). For more information, contact Eileen Larence at (202) 512-8777 or larencee@gao.gov.

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DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness

What GAO Found

Since fiscal year 2004, the number of DPAs and NPAs has generally been less than the number of corporate prosecutions, and in 2009, DOJ began tracking its use of these agreements. DOJ has made more frequent use of DPAs and NPAs in recent years, entering into four agreements in fiscal year 2003 compared to a high of 38 agreements in fiscal year 2007, although use declined in fiscal years 2008 and 2009 when DOJ entered into 24 and 23 agreements, respectively. The U.S. Attorneys Offices (USAO) and DOJ's Criminal Division entered into the vast majority of agreements. From fiscal years 2004 to 2009, for USAOs, the number of DPAs and NPAs was less than the number of corporate prosecutions, whereas for the Criminal Division, the number of DPAs and NPAs was comparable to the number of corporate prosecutions. Prior to 2009, DOJ did not have a mechanism to centrally track its use of DPAs and NPAs, which inhibited its ability to accurately report the number and terms of the agreements to the Congress and the public. However, in response to GAO's requests for information, DOJ has recently taken steps to better track its use of DPAs and NPAs, steps that will allow it to more accurately report on the number and terms of DPAs and NPAs to Congress and the public and identify best practices and ensure consistency across agreements.

DOJ lacks performance measures to assess how DPAs and NPAs contribute to its efforts to combat corporate crime. Two possible measures of DPA and NPA effectiveness could be (1) whether the company repeats the criminal behavior either during or after its agreement; or (2) whether the company successfully implements the terms of the agreement; implementation could be a proxy measure for whether the company reformed because DPAs and NPAs often require companies to make improvements in internal controls, compliance programs, or training to detect and prevent future wrongdoing. By developing performance measures to evaluate DPAs and NPAs, DOJ will be better positioned to gauge whether they are effective tools in deterring and combating corporate crime.

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. GAO obtained responses from 12 U.S. district and magistrate judges who handled cases involving a DPA, and these judges reported they were generally not involved in the DPA process. Prosecutors, company representatives, monitors, and judges with whom GAO spoke more frequently cited disadvantages to greater judicial involvement—such as the lack of time and resources available to judges and concerns about the separation of powers and constitutionality of increased judicial involvement—than advantages to such involvement—such as the court's ability to act as an independent arbiter of disputes, increased transparency in the DPA process, and decreased perceptions of favoritism in selecting the monitor.

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Abbreviations

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| ACTS | Automated Case Tracking System |
| AOUSC | Administrative Office of the U.S. Courts |
| DOJ | Department of Justice |
| DPA | deferred prosecution agreement |
| EOUSA | Executive Office for United States Attorneys |
| JMD | Justice Management Division |
| LIONS | Legal Information Office Network System |
| LCMS | Litigation Case Management System |
| NPA | non-prosecution agreement |
| ODAG | Office of the Deputy Attorney General |
| USAO | U.S. Attorneys Offices |

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United States Government Accountability Office
Washington, DC 20548

December 18, 2009

Congressional Requesters

According to the Department of Justice (DOJ), one of its chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. In light of this goal, DOJ has prosecuted company executives and employees, as well as companies themselves, for crimes such as tax evasion, securities fraud, health care fraud, and bribery of foreign officials, among other illegal activities. However, over the past decade, DOJ has recognized the potentially harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior. In particular, the failure of the accounting firm Arthur Andersen, and the associated loss of thousands of jobs following its indictment and conviction for obstruction of justice for destroying Enron-related records,¹ has been offered as a prime example of the potentially harmful effects of criminally prosecuting a company. To avoid serious harm to innocent third parties and as an alternative to criminal prosecution or declining to prosecute, DOJ guidance allows prosecutors to negotiate agreements—referred to as deferred prosecution (DPA) and non-prosecution (NPA) agreements. These agreements may require companies to institute or reform corporate ethics and compliance programs,² pay restitution to victims, and cooperate with ongoing investigations of individuals in exchange for prosecutors' deferring the decision to prosecute. As part of DPAs and NPAs, prosecutors may also require a company to hire, at its own expense, an independent monitor to oversee the company's compliance with the agreement. DOJ and companies have generally worked together to select monitors, but DOJ leaves it up to the company to enter into a contract with a monitor that specifies the monitor's fees, among other things.

¹ The conviction was ultimately overturned by the Supreme Court. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). In a unanimous decision, the Court held that the jury instructions used to convict Arthur Andersen were impermissibly flawed. *Id.* at 705-07.

² The U.S. Sentencing Guidelines define a compliance and ethics program as "a program designed to prevent and detect criminal conduct." U.S. Sentencing Guidelines Manual § 8B2.1 cmt. n.1.

DOJ views DPAs and NPAs as appropriate tools to use in cases where the goals of punishing and deterring criminal behavior, providing restitution to victims, and reforming otherwise law-abiding companies can be achieved without criminal prosecution. The use of these agreements and the associated monitors, however, is not without debate. Some commentators view the use of DPAs and NPAs as encouraging disrespect for the law and failing to deter corporate crime, and others have suggested a need to evaluate the effectiveness of DPAs and NPAs as a tool to combat such crime. Further, commentators have acknowledged monitors' value in ensuring company compliance with the terms of DPAs and NPAs and in instituting corporate reform, but have also pointed to challenges associated with monitorships, such as concerns regarding potential favoritism in the monitor selection process and questions about monitor accountability, oversight, and costs. In addition, members of Congress have expressed interest in understanding the role of courts in selecting monitors and other aspects of DPAs and NPAs.

Given the discussion surrounding these agreements, the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, asked us to testify in June 2009 on DOJ's use and oversight of DPAs and NPAs,³ and in November 2009 on issues related to the selection and use of independent monitors in DPAs and NPAs.⁴ We reported that DOJ determined whether or not to use DPAs and NPAs, and what the terms of these agreements should be, based on DOJ's Principles of Federal Prosecution of Business Organizations,⁵ as well as other factors

³ GAO, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution Agreements and Non-Prosecution Agreements*, [GAO-09-636T](#) (Washington, D.C.: June 25, 2009). This statement provided preliminary observations on factors DOJ considered when entering into and setting the terms of the agreements, methods DOJ used to oversee companies' compliance, the monitor selection process, and companies' perspectives regarding the costs and role of the monitor.

⁴ GAO, *Corporate Crime: Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts*, [GAO-10-260T](#) (Washington, D.C.: Nov. 19, 2009). This statement provided additional findings on the extent to which prosecutors adhered to DOJ guidelines regarding selecting monitors for DPAs and NPAs; what previous professional experience monitors had and what were company perspectives on monitors' experience; and to what extent companies raised concerns about their monitors and whether DOJ has defined its role in resolving any concerns.

⁵ U.S. Department of Justice, *United States Attorneys' Manual* § 9-28.000, Principles of Federal Prosecution of Business Organizations.

such as the Federal Sentencing Guidelines⁶ and negotiations with companies. In addition, we reported that DOJ employed several oversight mechanisms to ensure that companies were complying with the agreements, including the use of independent monitors, where monitors were typically required to file written reports with prosecutors on the companies' progress in complying with the terms of their DPAs or NPAs. Also, we reported that DOJ generally took the lead in selecting monitors and varied in the extent to which it involved companies in monitor selection decisions. In cases where DOJ officials identified monitor candidates, they generally did so based on their personal knowledge of individuals whose reputations suggested they would be effective monitors, or through recommendations from colleagues or professional associates who were familiar with the requirements of a monitorship. We reported that for all 46 DPAs and NPAs where DOJ required independent monitors and the monitors had been selected, companies hired a total of 42 different individuals to oversee the agreements; 23 of the 42 monitors had previous experience working for DOJ—which some companies valued in a monitor choice—and those without prior DOJ experience had worked in other federal, state, or local government agencies, the private sector, or academia.

While most of the companies we interviewed did not express concerns about monitors having prior DOJ experience, some companies raised general concerns about potential impediments to independence or impartiality if the monitor had previously worked for DOJ or had associations with DOJ officials. We reported that DOJ had acknowledged concerns about the cost to companies of hiring a monitor and perceived

⁶ Pursuant to the Sentencing Reform Act of 1984, the *United States Sentencing Guidelines Manual* (“Sentencing Guidelines”) was developed by the United States Sentencing Commission, an independent body within the judicial branch of the federal government charged with promulgating guidelines for federal sentencing. 28 U.S.C. § 994. In 2005, the Supreme Court found the Sentencing Guidelines, which had previously been binding for federal judges to follow in sentencing criminal defendants, to be advisory in nature. *See United States v. Booker*, 543 U.S. 220 (2005). Regardless of their advisory nature, judges are still required to calculate properly and consider the Sentencing Guidelines and other sentencing goals, and sentences properly calculated within the guidelines range are entitled to a presumption of reasonableness upon appellate review. *See* 18 U.S.C. § 3553(a); *United States v. Rita*, 551 U.S. 338, 347-48 (2007); *Booker*, 543 U.S. at 264; *see also Gall v. United States*, 552 U.S. 38, 49 (2007) (stating that “the Guidelines should be the starting point and the initial benchmark”). The Sentencing Guidelines contain promulgated sentencing guidelines, policy statements, and commentary applicable to business organizations, such as ranges and considerations for applying fines and requirements for an effective compliance and ethics program. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8C1.1-4.11.

favoritism in the selection of monitors, and thus the need to instill public confidence in the monitor selection process, and that DOJ had made efforts to allay these concerns by issuing guidance in March 2008—known as the Morford Memo—to help ensure that the monitor selection process is collaborative and merit-based.⁷ We found that prosecutors had adhered to the Morford Memo guidance in selecting monitors required under agreements entered into between March 2008 and September 2009. However, we also found that prosecutors or the Office of the Deputy Attorney General (ODAG) were not fully documenting the steps they took to select monitors, and we recommended that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions to avoid the appearance of favoritism and instill public confidence in monitor selection. In August 2009, DOJ established such procedures.

Lastly, we reported that companies we spoke with identified concerns about the monitor's cost, scope, and amount of work completed, and that DOJ had not clearly communicated to companies its role in addressing such concerns. Given that DOJ relies on monitors to assess companies' compliance with DPAs and NPAs, clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors would help increase awareness among companies and better position DOJ to be notified of potential issues related to monitor performance. We recommended in our November 2009 testimony that the Attorney General direct all litigating components and U.S. Attorneys Offices to explain in each corporate DPA or NPA what role DOJ could play in resolving such disputes, given the facts and circumstances of the case.⁸

⁷ Deputy Attorney General Craig Morford, DOJ, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (Mar. 7, 2008). The Morford Memo requires U.S. Attorneys Offices and other DOJ litigation divisions to establish ad-hoc or standing committees, consisting of the office's ethics advisor, criminal or section chief, and at least one other experienced prosecutor, to consider the candidates—which may be proposed by either prosecutors, companies, or both—for each monitorship. DOJ components are also reminded to follow federal conflict-of-interest guidelines and to check monitor candidates for potential conflicts-of-interest relationships with the company. In addition, the names of all selected monitors must be submitted to the Office of the Deputy Attorney General (ODAG) for final approval.

⁸ DOJ did not comment as to whether they agreed or disagreed with this recommendation, but provided technical comments related to the recommendation, which we incorporated in the statement as appropriate.

In this report, we discuss additional findings since our testimonies on aspects related to DOJ's use and oversight of DPAs and NPAs and the role of the judiciary, including: (1) the extent to which DOJ has used DPAs and NPAs to address corporate misconduct and tracks its use of these agreements, (2) whether and how DOJ measures the extent to which DPAs and NPAs have contributed to DOJ's efforts to combat corporate crime, and (3) the role the court has played in the DPA and NPA process, and the role select prosecutors, companies, monitors, and representatives from the judiciary believe the courts should play.

To address all 3 objectives, we identified 152 DPAs and NPAs that DOJ prosecutors had negotiated from 1993 (when the first two were signed) through September 2009 (which was the end of our review period), and reviewed copies of all but one of the agreements.⁹ Because DOJ did not begin to centrally track all DPAs and NPAs until 2009, we used four sources to identify all of the agreements. First, in May 2008, DOJ provided the House Judiciary Committee, at its request, copies of DPAs or NPAs that DOJ divisions or the U.S. Attorneys Offices entered into with corporations. Second, we reviewed recent published academic papers on DPAs and NPAs and three Web sites that included a list of DPAs and NPAs compiled from publicly available data sources.¹⁰ Third, in November 2008, we requested from DOJ's Criminal Division and the Executive Office for United States Attorneys (EOUSA) copies of DPAs and NPAs entered into after DOJ's May 2008 response to the House Judiciary Committee. Lastly, we identified additional DPAs and NPAs through DOJ press releases and our own Web searches. Through the course of our audit work, we confirmed that our list of DPAs and NPAs was consistent with information maintained by DOJ. We interviewed prosecutors from DOJ's Criminal Division and 12 U.S. Attorneys Offices (USAO) that had negotiated most (119) of the 152 agreements. We selected the Criminal Division because it had negotiated the vast majority of agreements entered into by prosecutors at DOJ headquarters, and we selected 12 specific USAOs because they were the only offices that had negotiated at least two agreements, of which at least one had been completed as of September 30, 2008. During our interviews we discussed 57 agreements. Of these 57, 25

⁹ This agreement was sealed by order of the court. We obtained a DOJ press release describing the key terms in the agreement.

¹⁰ http://www.law.virginia.edu/html/librariansite/garrett_bycompany.htm;
http://lawprofessors.typepad.com/whitecollarcime_blog/deferred_prosecution_agreements/;
<http://www.corporatecrimereporter.com/deferredreport.htm>.

were completed agreements that required companies to institute an ethics or compliance program. In addition, 15 of the 25 companies were required to hire an independent monitor; we interviewed or obtained written responses from legal representatives or compliance officials for 20 of these 25 companies who had knowledge of the DPA and NPA process,¹¹ and interviewed 11 of these monitors.¹² In addition, we reviewed DOJ guidance regarding the prosecution of business entities and spoke to DOJ headquarters officials including Senior Counsel to the Office of the Deputy Attorney General, Associate Deputy Attorney General, Deputy Assistant Attorney General for the Criminal Division, Senior Counsel to the Assistant Attorney General for the Criminal Division, Criminal Division Fraud Section Chief, and White Collar Crime Coordinator for EOUSA regarding policies and procedures related to the use and oversight of DPAs and NPAs. Since we selected a nonprobability sample of DOJ officials, company representatives, and monitors to interview, the information we obtained is not generalizable to all DOJ litigating components, U.S. Attorneys Offices, companies, and monitors involved in DPAs and NPAs.¹³ However, the interviews provided insights into the negotiation and implementation of DPAs and NPAs.

To assess the extent to which DOJ has used DPAs and NPAs to address corporate misconduct and tracks its use of these agreements, we compared the number of DPAs and NPAs entered into by the USAOs and DOJ's Criminal Division with the number of corporate criminal cases prosecuted by these offices from fiscal years 2004 through 2009.¹⁴ We chose to compare DPAs and NPAs with prosecutions in the USAOs and the Criminal Division because these offices had entered into 128 of the 130

¹¹ Five companies declined to participate in interviews.

¹² Four monitors declined to participate in interviews or did not return our calls.

¹³ DOJ's litigating components, among other things, litigate on behalf of the U.S. government by enforcing the law and defending the interests of the United States according to the law. These components include the U.S. Attorneys Offices, Criminal Division, Antitrust Division, Civil Division, Civil Rights Division, Environment and Natural Resources Division, National Security Division, and Tax Division. Seven of these litigating components—excluding the U.S. Attorneys Offices—are based at DOJ headquarters in Washington, D.C. In addition, the Office of the Solicitor General conducts all litigation on behalf of the U.S. in the Supreme Court and supervises the handling of litigation in the federal appellate courts.

¹⁴ We obtained data beginning in fiscal year 2004 from the USAOs because USAO officials told us that data on business entities were reliable for the last 6 fiscal years. We obtained data beginning in fiscal year 2004 from the Criminal Division for comparison.

agreements entered into between fiscal years 2004 and 2009. As discussed above, we identified the DPAs and NPAs entered into during this time period from DOJ data, academic papers, and Web site searches. We obtained data on the number of cases filed against business entities by USAOs and the Criminal Division from EOUSA's Legal Information Office Network System (LIONS), and the Division's Automated Case Tracking System (ACTS). The data on the number of cases filed against business entities that we obtained from these databases included both corporate criminal prosecutions and DPAs entered into by the USAOs and the Criminal Division. For each fiscal year, we computed the number of corporate criminal prosecutions by subtracting our counts of the number of DPAs entered into by all the USAOs and the Criminal Division from LIONS and ACTS data on the number of cases filed against business entities. We confirmed with EOUSA and the Criminal Division that our computations were accurate. We also reviewed documentation for LIONS and ACTS, and spoke with data specialists in EOUSA and the Criminal Division regarding how cases involving corporate entities are recorded in each system. We determined that the data were sufficiently reliable for our purposes. We also reviewed documentation on, and spoke to information technology specialists in, DOJ's Justice Management Division regarding DOJ's plans for tracking DPAs and NPAs in a case management system currently under development for DOJ's litigating components, including all the USAOs. We compared DOJ's tracking procedures with criteria in standards for internal control in the federal government.¹⁵

To assess how DOJ measures the extent to which DPAs and NPAs have contributed to DOJ's efforts to combat corporate crime, we reviewed DOJ's 2007-2012 Strategic Plan and the corresponding Performance and Accountability Reports for fiscal years 2007 through 2009 and Activities Reports for DOJ's Criminal Division Fraud Section for fiscal years 2007 and 2008.¹⁶ We also spoke with Senior Counsel to the ODAG regarding the status of DOJ's efforts to measure the effectiveness of DPAs and NPAs, and with the same selected company representatives and monitors we contacted to address all our objectives regarding their perspectives on

¹⁵ GAO, *Internal Control: Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

¹⁶ The fiscal year 2009 Fraud Section Activities Report had not been completed as of the end of our review period.

how the effectiveness of these tools might best be measured.¹⁷ We compared DOJ's current measurement practices with the requirements of the Government Performance and Results Act of 1993,¹⁸ which stipulates federal agencies are to prepare annual performance plans that articulate performance goals and indicators that are aligned with the agencies' long-term strategic goals, and with criteria in standards for internal control in the federal government.¹⁹

To assess what role the courts have played in the DPA process, we obtained written responses to structured interview questions from 12 of the 14 judges who had overseen DPAs in federal courts, where the DPA had been completed as of March 2009, and where the judge had overseen a DPA for one of the 25 companies we had selected for our interviews.²⁰ The Chair of the Judicial Conference's Committee on Criminal Law agreed to conduct, for GAO, telephone interviews of the judges who had overseen DPAs in order to protect the confidentiality of individual judges' answers. Officials from the Administrative Office of the U.S. Courts (AOUSC) assisted the Chair in carrying out the interviews.²¹ The information we obtained is not generalizable to all judges who have overseen DPAs; however, it provides insights into the range of judges' activities in overseeing DPAs. To obtain the perspectives of select prosecutors, companies, monitors, and the judiciary on the role the courts should play in the DPA and NPA process, we interviewed the same prosecutors, company representatives, and monitors we contacted to address all our

¹⁷ We discussed how DOJ could measure the effectiveness of DPAs and NPAs with 7 of the 20 companies and 5 of the 11 monitors we interviewed.

¹⁸ Pub. L. No. 103-62, 107 Stat. 285.

¹⁹ [GAO/AIMD-00-21.3.1](#).

²⁰ The 12 judges who responded also included one judge who had overseen a DPA for a company that was not among the 25 companies we had selected for interviews, because we were unable to discuss the DPA with prosecutors who had negotiated the agreement. We included this judge in our structured interviews because the USAO that had negotiated the agreement had a monitor selection policy that required prosecutors to compile a list of potential monitor candidates and submit the list to the court, where the district judge would then appoint a monitor from the list.

²¹ We were unable to obtain responses from two judges who had retired since overseeing DPAs in their district. The 12 judges' responses were anonymous so we were unable to associate the judges' responses with the cases they oversaw. We are, therefore, unable to determine characteristics of cases that had more or less judicial involvement. However, two of the agreements overseen by two of the judges specified court involvement in the DPA.

objectives, as well as one of the two retired U.S. magistrate judges who had overseen DPAs and the Chair of the Judicial Conference Committee on Criminal Law.²²

We conducted this performance audit from September 2008 to December 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objectives.

Background

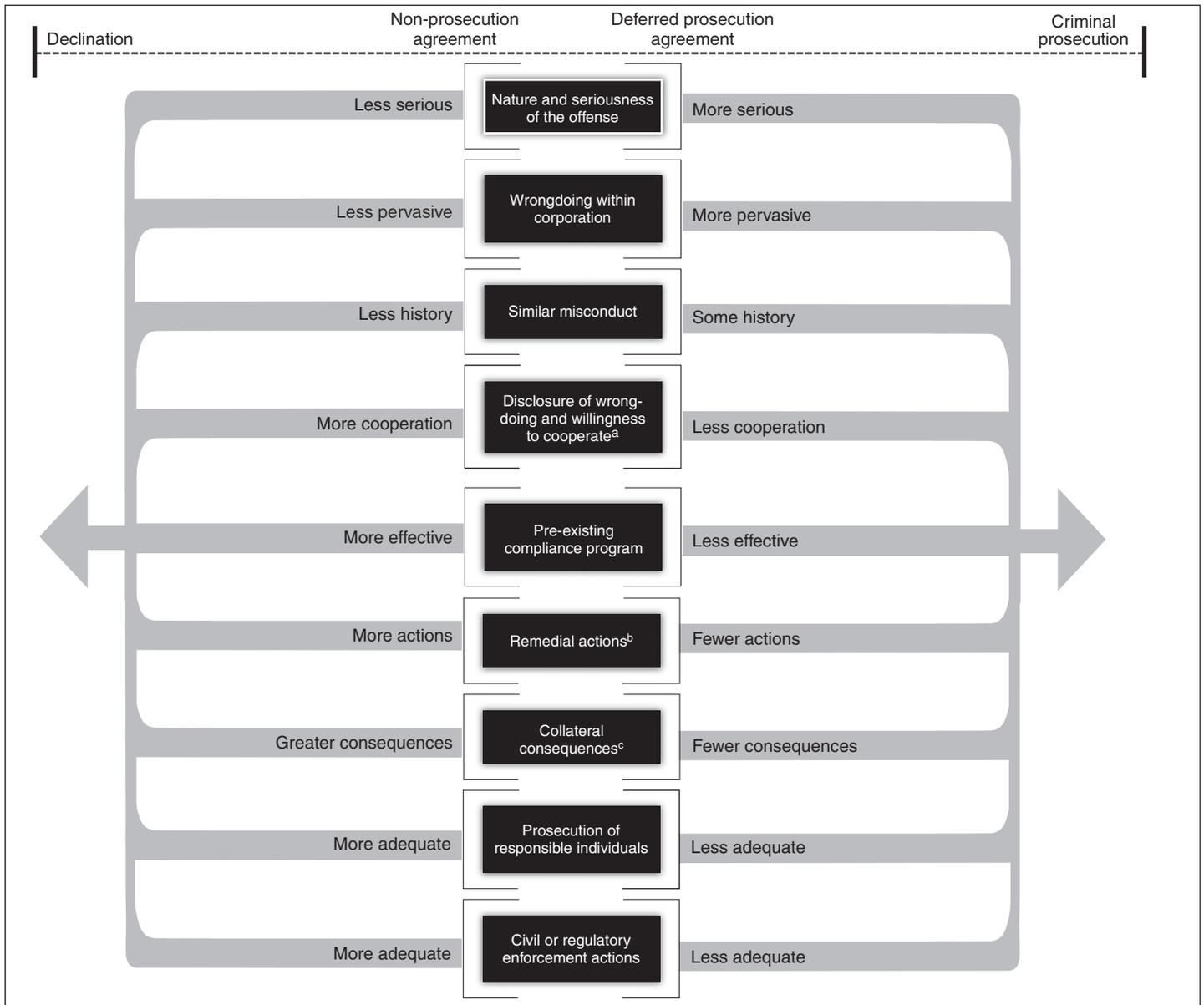
Factors Considered When Using and Setting the Terms of DPAs and NPAs

As part of its mission to defend the interests of the United States, DOJ controls all criminal prosecutions in which the United States has an interest, including those against corporations. Prosecutors' decisions on investigating, charging, and negotiating a plea or other agreement with respect to corporate crimes are guided by DOJ's Principles of Federal Prosecution of Business Organizations, which instruct prosecutors to consider nine factors when determining how to treat a corporation suspected of criminal misconduct and provide guidance on when the nine factors most appropriately apply. The principles also provide a number of actions prosecutors may take regarding a corporation, including declining to prosecute, entering into a DPA or NPA, or criminally prosecuting the corporation. According to the principles, DPAs and NPAs are an important alternative to declining prosecution against a corporation and obtaining the conviction of a company through prosecution. The nine factors, and examples of the manner in which they influence the prosecutors' choices of action, are shown in figure 1 below.²³

²² This Chair, who is also the chief judge in her federal district, also provided her perspectives on the role the courts should play in the DPA and NPA process. Her views do not necessarily represent the positions of the Judicial Conference of the United States, which has no official policy position at this time.

²³ GAO analysis based on the Principles of Federal Prosecution of Business Organizations. The examples given are illustrative of the manner in which the prosecutors consider each factor and the circumstances of each case will determine the relevance of and weight placed on each factor.

Figure 1: How the Principles of Federal Prosecution of Business Organizations Influence Prosecutors' Decisions to Decline Prosecution, Enter into a DPA or NPA, or Prosecute of the offense



Source: GAO analysis of DOJ's Principles of Federal Prosecution of Business Organizations.

^aWillingness to cooperate includes cooperation in the government's investigation of the company's agents.

^bRemedial actions include efforts to implement an effective compliance program or improve an existing one, pay restitution, or discipline wrongdoers, among other things.

^cCollateral consequences include disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, and any impact on the public arising from prosecution.

As part of DPAs and NPAs, companies are generally required to comply with a set of terms for a specified duration in exchange for prosecutors deferring the decision to prosecute or deciding not to prosecute. These terms have included:²⁴

- monetary payments—such as restitution to victims of the crime, forfeiture of the proceeds of the crime, and monetary penalties imposed by DOJ;
- requirements that the company improve or enhance its compliance program;
- requirements that the company hire, at its own expense, an independent monitor to assist the company in establishing a compliance program, review the effectiveness of a company’s internal control measures, and determine whether the company has otherwise met the terms of the agreements (The agreements typically require monitors to periodically submit written reports to track the company’s progress in complying with the terms of the DPA or NPA.); and
- extraordinary restitution provisions, which are payments or services to organizations or individuals not directly affected by the crime. (DOJ issued guidance in May 2008—which was incorporated into the United States Attorneys’ Manual—prohibiting the use of terms requiring payments to charitable, educational, community, or other organizations or individuals that are not the victims of the criminal activity or are not providing services to redress the harm caused by the criminal conduct.²⁵ According

²⁴ In our June 2009 testimony, we reviewed the terms of 57 DPAs and NPAs that we discussed with prosecutors at the 13 DOJ offices we selected for our site visits and interviews. See appendix I for the terms included in these 57 agreements.

²⁵ U.S. Department of Justice, *United States Attorneys’ Manual* § 9-16.325, Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and “Extraordinary Restitution.”

to DOJ, the use of such terms could create actual or perceived conflicts of interest or other ethical issues.²⁶⁾

Judicial Approval of Deferred Prosecutions

NPAs typically are not filed with the court, but instead are maintained by DOJ and the corporation. On the other hand, DPAs are typically filed with the court, along with a document that identifies the charges that the prosecution has brought against the corporation. The Speedy Trial Act sets time limits for the various phases of the criminal justice process—for example, a defendant’s trial must begin within 70 days of charges being filed or the date when the defendant appeared before the court—and violations of these time limits may result in the dismissal of the case.²⁷ However, the Speedy Trial Act also includes provisions that allow for certain delays that do not count towards the act’s time limits. Under one of these provisions, courts have the authority to approve the deferral of a prosecution pursuant to a written agreement between the government and the defendant.²⁸

²⁶ According to the U.S. Attorneys’ Manual, the section does not restrict this practice in limited circumstances. These include: 1) the defendant’s own decision, outside of the context of a plea agreement, deferred prosecution agreement or a non-prosecution agreement, to unilaterally pay monies to a charitable, education, community or other organization or individual; 2) “community restitution” payments made pursuant to 18 U.S.C. § 3663, where the defendant is convicted of certain offenses under the Controlled Substances Act and there is no identifiable victim, among other conditions; and 3) the use of community service as a condition of probation for environmental prosecutions, where the United States Attorneys’ Manual instructs prosecutors considering the use of community service to consult with the Environmental Crimes Section of the Environment and Natural Resources Division, which has issued guidance on the use of community service provisions. Of the 33 agreements DOJ entered into between May 2008—when the prohibition was issued—and September 2009, 30 of these agreements did not include an extraordinary restitution provision; however, the remaining 3 agreements included payments to third parties to fund environmental projects, enforcement efforts, and initiatives. According to the ODAG, the payments required in these three agreements—which were all cases involving environmental crimes—were intended to be encompassed by the exception for community service in cases involving environmental crimes.

²⁷ 18 U.S.C. § 3161.

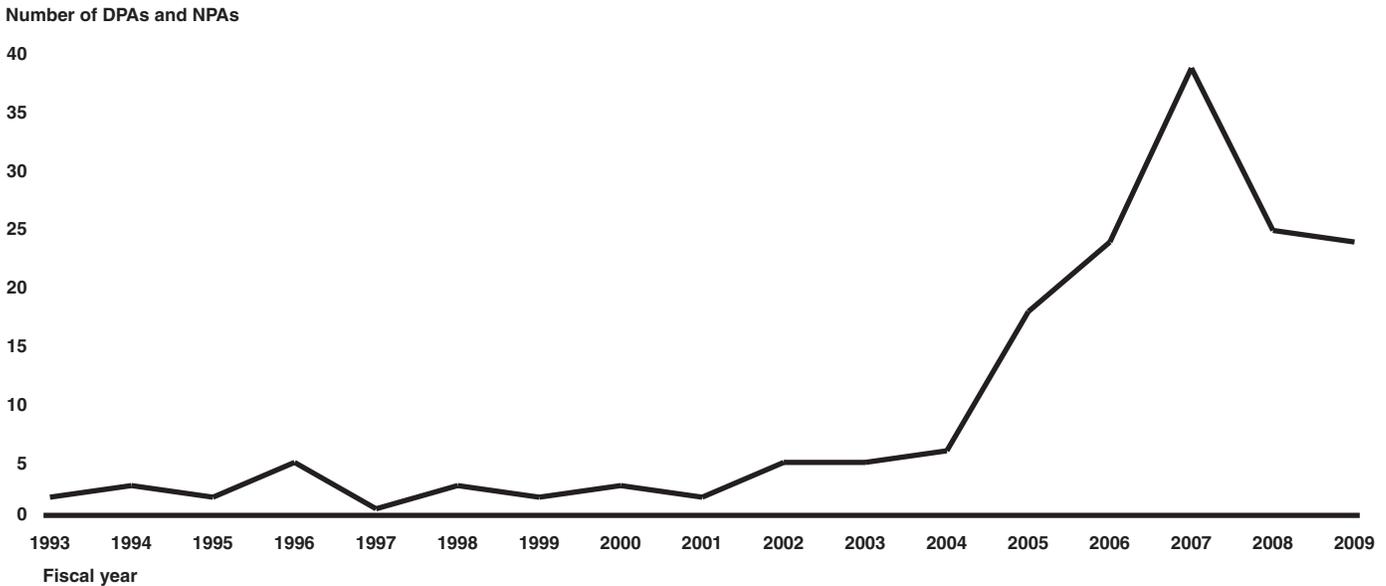
²⁸ 18 U.S.C. § 3161(h)(2).

The Number of DPAs and NPAs Has Generally Been Less Than the Number of Corporate Prosecutions, and DOJ Recently Began Tracking Its Use of These Agreements

DOJ's Use of DPAs and NPAs Peaked in Fiscal Year 2007, Then Declined, and USAOs Have Used Fewer DPAs and NPAs Than Corporate Prosecutions While the Criminal Division Has Used about the Same Number of Each

DOJ has made more frequent use of DPAs and NPAs in recent years, entering into four agreements in fiscal year 2003 compared to a high of 38 agreements in fiscal year 2007, although use declined in fiscal years 2008 and 2009 when DOJ entered into 24 and 23 agreements, respectively. According to DOJ officials, the decrease in the use of DPAs and NPAs cannot be attributed to any specific reason because DOJ is a reactive agency and experiences fluctuations in the types of cases that occur each year. However, the officials noted that fiscal year 2007 appeared to be an aberration because the use of DPAs and NPAs in fiscal year 2007 was significantly higher than in any other fiscal year. Figure 2 below depicts the number of DPAs and NPAs by fiscal year.

Figure 2: Number of DPAs and NPAs Entered Into by DOJ, per Fiscal Year



Source: GAO analysis of DOJ data.

From 1993—when the first DPA or NPA was reached—to September 2009, 38 of the 94 USAOs have entered into at least one DPA or NPA, with the total number of agreements per office ranging from 1 agreement entered into by 21 of these USAOs, to 23 agreements entered into by the USAO for the Southern District of New York. In addition, during this same time period, of the seven litigating components based in DOJ headquarters, five have entered into DPAs or NPAs, with the total number of agreements per division ranging from one agreement entered into by the National Security Division to 49 entered into by the Criminal Division. See appendix II for the number of DPAs and NPAs entered into by the USAOs and Divisions.

As shown in table 1, the number of DPAs and NPAs entered into by the USAOs is small compared to the number of corporate prosecutions they pursued, but the number of DPAs and NPAs entered into by the Criminal Division is similar to—and in some fiscal years, more than—the number of

corporate prosecutions it pursued.²⁹ For example, USAOs pursued almost 18 times more corporate prosecutions than DPAs and NPAs from fiscal years 2004 to 2009. For the same time period, the Criminal Division pursued 0.9 times more prosecutions than DPAs and NPAs, or rather 1.2 times more DPAs and NPAs than prosecutions. According to Criminal Division officials, unlike the USAOs, the number of DPAs and NPAs the division has entered into was similar to the number of corporate prosecutions it carried out for two reasons. First, the Criminal Division more often handles cases against larger multinational corporations—many of which may have federal contracts—than the USAOs do. Prosecution of such companies may have significant collateral consequences, such as the inability to contract with the federal government—a factor prosecutors are to consider based on the Principles of Federal Prosecution of Business Organizations when determining whether to enter into a DPA or NPA versus prosecute. Second, the Criminal Division handles all cases involving violations of the Foreign Corrupt Practices Act,³⁰ for which cases have increased since fiscal year 2007 and for which the Criminal Division has entered into DPAs to improve companies' compliance.

²⁹ The Criminal Division and the USAOs are responsible for overseeing criminal matters under the more than 900 federal criminal statutes. The Criminal Division develops, enforces, and supervises the application of all federal criminal laws except those specifically assigned to other divisions. For instance, according to DOJ, the Criminal Division handles all cases involving violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff. The USAOs conduct most of the trial work—including criminal cases—in which the United States is a party. Other DOJ litigating divisions that have entered into DPAs or NPAs since fiscal year 1993 include the Antitrust Division, which has entered into three agreements; the Environment and Natural Resources Division, which has entered into two agreements; the National Security Division, which has entered into one agreement; and the Tax Division, which has entered into two agreements.

³⁰ 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff.

Table 1: Number of Corporate Criminal Prosecutions to Each DPA or NPA Entered into by USAOs and the Criminal Division from Fiscal Year 2004 to Fiscal Year 2009

| | USAOs | Criminal Division |
|--|-------------|-------------------|
| Fiscal year 2004 | | |
| Prosecutions ^a | 297 | 5 |
| DPAs and NPAs ^b | 4 | 1 |
| Prosecutions per DPA or NPA | 74.3 | 5.0 |
| Fiscal year 2005 | | |
| Prosecutions | 350 | 3 |
| DPAs and NPAs | 11 | 9 |
| Prosecutions per DPA or NPA | 31.8 | 0.3 |
| Fiscal year 2006 | | |
| Prosecutions | 304 | 5 |
| DPAs and NPAs | 19 | 5 |
| Prosecutions per DPA or NPA | 16.0 | 1.0 |
| Fiscal year 2007 | | |
| Prosecutions | 257 | 11 |
| DPAs and NPAs | 31 | 10 |
| Prosecutions per DPA or NPA | 8.3 | 1.1 |
| Fiscal year 2008 | | |
| Prosecutions | 257 | 6 |
| DPAs and NPAs | 12 | 13 |
| Prosecutions per DPA or NPA | 21.4 | 0.5 |
| Fiscal year 2009^c | | |
| Prosecutions | 194 | 8 |
| DPAs and NPAs | 17 | 6 |
| Prosecutions per DPA or NPA | 11.4 | 1.3 |
| Total fiscal year 2004 through fiscal year 2009 | | |
| Prosecutions | 1659 | 38 |
| DPAs and NPAs | 94 | 44 |
| Prosecutions per DPA or NPA | 17.6 | 0.9 |

Source: GAO analysis of EOUSA and Criminal Division data.

^aProsecution data obtained from LIONS and ACTS, which are the respective EOUSA and Criminal Division case management systems, included both prosecutions of business entities and corporate DPAs, but did not include NPAs, matter data, or cases that have been declined. In LIONS, matters are referrals on which an attorney spends one hour or more of time and on which formal papers have not been filed with the court; in ACTS, a matter is an investigation on which a staff person has worked a minimum of 30 minutes. We obtained prosecution data from LIONS and ACTS and subtracted from the data for each fiscal year the number of DPAs in that fiscal year based on the agreements we identified that included court filings. We confirmed the number of DPAs to subtract from each fiscal year with EOUSA and the Criminal Division.

^bThe number of DPAs and NPAs in each fiscal year is based on the agreements we identified.

^cEOUSA provided prosecution data through July 31, 2009.

DOJ Has Improved Its Ability to Centrally Track Its Use of DPAs and NPAs

Prior to 2009, DOJ did not have a mechanism to centrally track its use of DPAs and NPAs, which inhibited its ability to accurately report the number and terms of the agreements to the Congress and the public. However, in response to our requests for information, DOJ has recently taken steps to better track its use of DPAs and NPAs, steps that will allow it to more accurately report on the number and terms of DPAs and NPAs to Congress and the public, and identify best practices and ensure consistency across agreements.

In January 2008, as part of its oversight of DOJ's efforts to combat corporate crime, the House Judiciary Committee requested that DOJ disclose all of the DPAs and NPAs that DOJ had entered into since January 20, 2003.³¹ On May 15, 2008, DOJ submitted a total of 76 agreements entered into during this 5-year time frame, but acknowledged that the DPAs and NPAs it provided to the committee did not represent all agreements entered into during the requested time period.³² According to DOJ, to respond to the committee's request, it had to ask the USAOs and litigating divisions to submit all DPAs and NPAs entered into by their respective offices. However, it appears that the USAOs and divisions did not provide all the DPAs and NPAs they had entered into because, in conducting our audit work, we found that DOJ had actually entered into 99 agreements during that time period. According to standards for internal control in the federal government, information—which could include entering into a DPA or NPA—should be recorded and communicated to management in a form and within a time frame that enables it to carry out its internal control and other responsibilities. Subsequently, in response to our inquiries, DOJ has taken several steps to better track its use of DPAs and NPAs, steps that will better position DOJ to more accurately report to Congress and the public on the number of existing DPAs and NPAs, the outcome of the cases, and the terms of the agreements. According to the

³¹ The House Judiciary Committee requested disclosure of agreements dating back to January 20, 2003, because then-Deputy Attorney General Larry Thompson issued an updated version of the Principles of Federal Prosecution of Business Organizations, known as the Thompson Memo, on that date, and the committee was aware that the use of DPAs and NPAs had grown since 2003.

³² In its response, DOJ provided a total of 86 agreements, which included 10 agreements entered into prior to January 20, 2003.

Senior Counsel to the ODAG, DOJ wants to track the agreements internally to help identify best practices and ensure consistency across agreements, with the recognition that the agreements will need to vary based on the facts of each case. The new tracking efforts include:

- In April 2009, EOUSA—which provides administrative and operational support to the USAOs—updated the case management system USAOs use to maintain workload information, the Legal Information Office Network System (LIONS), and issued guidance to prosecutors on the procedure for tracking their use of DPAs and NPAs in LIONS.³³ According to an EOUSA data official, instructing all USAOs to enter data on DPAs and NPAs in LIONS will provide EOUSA with the capability to centrally track the use of these agreements across the USAOs.
- Similarly, in May 2009, the Criminal Division updated its case management system, the Automated Case Tracking System (ACTS), and issued guidance to prosecutors on the procedure for tracking DPAs and NPAs in this system. According to a Criminal Division data official, prosecutors were already tracking their use of DPAs and NPAs largely in the manner described in the guidance, but the updates to the system allowed the Criminal Division to centrally track DPAs and NPAs separately, a process that it could not do previously.³⁴ Doing so will provide the Criminal Division with the capability to centrally maintain data on the use and characteristics of both types of agreements.
- DOJ is currently in the process of developing a new case management system—the Litigation Case Management System (LCMS)—that seven of DOJ’s litigating components are to eventually use, including the USAOs and four of the five headquarters-based components that have entered into

³³ Following the April 2009 guidance, prosecutors at the USAOs are to code all cases in which the United States has entered into an NPA or DPA with a business entity as “CPA” in the case type field in LIONS.

³⁴ Prior to the issuance of the May 2009 guidance, Criminal Division prosecutors were able to track DPAs and NPAs using a code for DPAs. After the May guidance, codes were available for both DPAs and NPAs, allowing the prosecutors to differentiate between the types of agreements and track them separately. To track DPAs and NPAs following the May guidance, prosecutors at the Criminal Division, upon reaching a DPA or NPA, are to enter the disposition code “DP” for a DPA or “NPA” for an NPA under the Defendant tab in ACTS, and enter information regarding the terms of the agreements, including the duration, in the Notes section of ACTS.

DPAs and NPAs.³⁵ According to officials from DOJ's Justice Management Division (JMD) responsible for the implementation of LCMS, the system is to enable prosecutors to centrally track their use of DPAs and NPAs as it is implemented throughout the USAOs and litigating components.³⁶ This in turn will provide DOJ with the ability to centrally collect data on its use of DPAs and NPAs across all DOJ components.

According to the Senior Counsel to the ODAG, centrally tracking its use of DPAs and NPAs will provide DOJ with the capability to internally monitor the circumstances in which the agreements are being used by prosecutors, including whether the agreement requires a monitor. Further, centrally tracking DPAs and NPAs in these databases will allow DOJ to assure itself that it has a reliable count of the universe of DPAs and NPAs in order to be responsive to requests from Congress.

In addition to tracking DPAs and NPAs in DOJ data systems, the March 2008 Morford Memo required, among other things, that prosecutors submit copies of DPAs and NPAs involving the use of a monitor to the Assistant Attorney General for the Criminal Division in order for DOJ to capture data on agreements that required monitors. As such, on January 15, 2009, DOJ issued guidance outlining the process by which prosecutors were to submit DPAs and NPAs to the Criminal Division, and requiring that all DPAs and NPAs—not only those involving the use of monitors—be

³⁵ The National Security Division was established in 2006, after development of LCMS had begun; therefore, the National Security Division was not included in DOJ's planning for LCMS. Further, because LCMS is an unclassified system and much of the National Security Division's case information is classified, it may be difficult for LCMS to handle the National Security Division's case information. LCMS will replace the components' data systems when implemented and is to be rolled out to the litigating components in three stages, beginning with the USAOs. According to officials from DOJ's Justice Management Division (JMD) responsible for the implementation of LCMS, LCMS is to be piloted at one USAO in the first quarter of fiscal year 2010, but further roll-out dates to the remaining USAOs following this initial pilot are not yet set. The officials said that the current plan is to begin to deploy LCMS to the litigating components other than the USAOs in fiscal year 2011, although the schedule is subject to change.

³⁶ According to the JMD officials, the framework for data collection used in EOUSA's current database—which includes the ability to track DPAs and NPAs, following the April 2009 guidance—is to be incorporated into LCMS, and prosecutors at the USAOs are to be able to track DPAs and NPAs in the same way they are tracked in their current data system. As LCMS is rolled out to the other litigating components besides the USAOs, whose data systems may handle the coding and tracking of DPA and NPA data differently than LCMS, the officials said that DOJ will determine whether there is a need to standardize the process for tracking DPAs and NPAs. Regardless of whether or not the process is standardized, however, the officials told us that LCMS is to allow prosecutors to centrally track their use of DPAs and NPAs in LCMS.

submitted, along with a reporting form detailing certain information about the agreement, including whether it required a monitor and whether it was filed in court. Since the issuance of the January 2009 guidance, DOJ has entered into 13 agreements, and the Criminal Division has received copies of the agreements and the associated reporting forms for all of these agreements. As a result, according to the Senior Counsel, DOJ is in a position to review and analyze the characteristics of these agreements—for instance, DOJ can determine whether there is variation among the DPAs and NPAs and whether any such variation is appropriate given the facts and circumstances of the case.

DOJ Lacks Performance Measures to Evaluate How DPAs and NPAs Contribute to Its Strategic Objective to Combat Corporate Crime

According to DOJ, along with prosecution, DPAs and NPAs are invaluable tools in achieving its strategic objective to combat public and corporate corruption, fraud, economic crime, and cybercrime, although the public, as well as the Congress, have called into question the effectiveness of these agreements. However, DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs—in addition to other tools, such as prosecution—contribute to the department’s efforts to combat corporate crime because it has no measures to assess their effectiveness. Specifically, DOJ intends for these agreements to promote corporate reform; however, DOJ does not have performance measures in place to assess whether this goal has been met.³⁷ Therefore, it could be difficult for DOJ to justify its increasing use of these tools.

The Government Performance and Results Act of 1993³⁸ requires that federal agencies prepare annual performance plans that articulate performance goals and indicators that are aligned with their long-term strategic goals in order to generate information congressional and executive branch decision-makers need in considering measures to improve government performance and reduce costs. In addition, standards for internal controls in the federal government state that activities need to be established to monitor performance measures and indicators, and that controls aimed at both organizational and individual performance need to

³⁷ While DOJ does not have performance measures to assess the effectiveness of any of its efforts to combat corporate crime, including prosecution, because the scope of our work was focused specifically on DPAs and NPAs, we only discuss performance measures related to these types of agreements.

³⁸ Pub. L. No. 103-62 107 Stat. 285.

be implemented.³⁹ Performance measures are established in order to assess whether a program has achieved its objectives and are expressed as measurable, quantifiable indicators. Outcome-oriented performance measures, in particular, assess a program activity by comparing it to its intended purpose or targets.⁴⁰ Although DOJ has a strategic objective to combat public and corporate corruption, fraud, economic crime, and cybercrime, which includes the use of DPAs and NPAs, it has not determined how it will measure the extent to which these agreements have helped it to achieve this strategic objective to demonstrate the effectiveness of these tools, despite its increased use of these tools in recent years.

DOJ has mechanisms to assess how litigating divisions achieve favorable results in criminal cases in general, but not for corporate criminal cases in particular, including the use of DPAs and NPAs to resolve these cases.⁴¹ Specifically, DOJ measures the performance of its litigating divisions in meeting the strategic goal of preventing crime, enforcing federal laws, and representing the rights and interests of the American people by measuring the percent of cases in which prosecutors achieve a favorable resolution. DOJ's fiscal year 2009 Performance and Accountability Report stated that 92 percent of criminal cases were favorably resolved.⁴² However, this performance measure does not specifically address corporate criminal cases or litigating division efforts to achieve the strategic objective of combating public and corporate corruption, fraud, economic crime, and cybercrime. Further, while one of the measures the Fraud Section uses to report its annual accomplishments is counting and reporting on the number of DPAs or NPA it initiates, among other things,⁴³ this measure does not provide an evaluation of the effectiveness of DPAs or NPAs.

³⁹ [GAO/AIMD-00-21.3.1](#).

⁴⁰ See 31 U.S.C. § 1115(g)(2).

⁴¹ The FBI has performance measures for the strategic objective to combat public and corporate corruption, fraud, economic crime, and cybercrime, but the FBI is not a DOJ litigating division, and its measure focuses on the results of its investigations, rather than results from litigation.

⁴² Favorably resolved cases include those cases that resulted in court judgments favorable to the government, as well as settlements. U.S. Department of Justice, *FY 2009 Performance and Accountability Report*, Strategic Goal II, p 25.

⁴³ Fraud Section, DOJ Criminal Division, *Fraud Section Activities Report, Fiscal Year 2008*, p 2.

DOJ officials acknowledged that one of DOJ's goals in using DPAs and NPAs is to help reform the company. In our discussions with the Senior Counsel to the ODAG as well as the five monitors and seven companies that provided opinions on how DOJ could measure the effectiveness of DPAs and NPAs, these officials suggested two possible models for measuring effectiveness by considering (1) a company's recidivist behavior—or the extent to which the company re-engages in criminal misconduct—after the agreement is complete or during the term of the DPA or NPA, or (2) whether the company successfully met the terms of the agreement, which often include requirements to establish or enhance compliance programs as a means to reform the company.

While half of the company officials and monitors with whom we spoke who discussed the use of recidivism as a measure did not have concerns with using such a metric, an equal number did express concerns about using this as the sole metric.⁴⁴ One consideration is that DOJ would have to define the types of criminal misconduct engaged in by the company and the organizational level of employees engaging in the misconduct that would constitute recidivism. For example, according to the Senior Counsel to the Assistant Attorney General for the Criminal Division, DPAs and NPAs are tailored to address the violations of a specific law based on specific misconduct. Therefore, if the company entered into a DPA or NPA because it violated the Commodity Exchange Act, for example, it could be problematic to consider subsequent violations of the Foreign Corrupt Practices Act as recidivism. In addition, DOJ may have to consider whether criminal misconduct committed by an individual employee should be considered recidivism—for instance, one company official said that, at a large international company, it is possible that individual employees may engage in misconduct in violation of the company's compliance program, but this should not constitute recidivism on the part of the entire company.

Another consideration regarding measuring recidivism after the completion of the DPA or NPA, according to DOJ officials with whom we spoke, is that DOJ does not have the resources to monitor a company's activities after the agreement has been completed over the long term, nor is it the mission of DOJ to do so. DOJ officials further stated that criminal

⁴⁴ Two monitors and five companies discussed the use of recidivism as a measure of the effectiveness of DPAs and NPAs. One monitor and two companies did not have concerns with using this metric, while one monitor and two companies did. The remaining company was not sure.

misconduct committed after completion of the agreement is not reasonably within DOJ's control because, once the agreement has ended, DOJ is not monitoring the company's behavior, and any further misconduct may be influenced by other factors—such as the characteristics of the corporation—and not the effectiveness of the agreement. Finally, according to the Senior Counsel to the Assistant Attorney General for the Criminal Division, if the company re-engaged in criminal misconduct, and the misconduct was reported to federal law enforcement officials, the Principles of Federal Prosecution of Business Organizations instruct prosecutors to consider the company's recidivist behavior in determining how to treat the company.⁴⁵ However, the Senior Counsel said that, because one of DOJ's goals in entering into the DPA or NPA is to reform the company, DOJ takes responsibility for monitoring any recidivist behavior on the part of the company during the term of the DPA or NPA.

In addition to recidivism—both after and during the agreement—whether the company successfully met the terms of the DPA or NPA could be a proxy measure—or indirect indicator—for whether the agreement was effective at successfully reforming the company. As part of the DPA or NPA, companies are often required to establish or enhance internal controls or company compliance programs, or engage in training to detect and prevent further wrongdoing. According to DOJ officials, if a company meets all of these requirements, it is likely that the company has reformed. Overall, five of the seven companies and three of the five monitors with whom we discussed this issue reported that such a performance measure would be a useful way to measure the effectiveness of DPAs and NPAs. For instance, to show whether companies meet the objectives of their agreements, DOJ could report the percentage of companies that successfully meet the terms of their agreements, the percentage of companies that violate the terms of their agreements and face prosecution, and the percentage of agreements DOJ extends because the company has not yet complied with the terms of the agreement. Of the 152 DPAs and NPAs that DOJ had entered into as of October 2009, we are aware of at

⁴⁵ We are aware of at least two cases of recidivism that involved further criminal misconduct after the successful completion of an agreement. In one case, the company entered into a subsequent agreement to address the additional misconduct. According to the prosecutor who entered into this subsequent agreement, prosecutors considered the company's recidivist behavior when deciding to enter into the agreement, but other factors—such as the fact that the entity that had committed the wrongdoing had been sold to another company—were also considered in the decision. In the other case, the company was prosecuted.

least one company that was prosecuted because it violated the terms of its DPA while the agreement was still ongoing and two companies for which DOJ extended the agreement because the company had not yet complied with the terms of the agreement.

However, it may be difficult to determine the extent to which the agreement itself, rather than other factors, was responsible for corporate reform. For example, according to one company official, companies can commit to making necessary compliance changes even before entering into a DPA or NPA, so the agreement did not cause the reforms. Yet, because the Principles of Federal Prosecution of Business Organizations instruct prosecutors to consider a company's remedial actions—such as its efforts to implement or enhance an effective compliance program—when determining how to treat the corporation, this factor may motivate a company to institute reforms in order to influence DOJ's decision as to whether to use a DPA or NPA. The Senior Counsel to the ODAG also believed that measuring whether companies successfully meet the terms of their agreements would be valuable, and that the fact that companies do not often violate their agreements and subsequently face prosecution was an indicator that agreements have helped companies to successfully reform.

Several factors would have to be considered in developing these—or any other—measures, such as clearly defining what is meant by recidivism and assessing the feasibility of tracking recidivism. However, by developing measures to evaluate DPAs and NPAs, DOJ will be able to gauge whether the agreements are effective tools in achieving its strategic objective and reassure those with concerns about the appropriate use of these tools that they are effective in deterring and combating corporate crime.

Courts Generally Had Limited Involvement in the DPA Process, and Prosecutors, Company Officials, Monitors, and Judges More Frequently Cited Disadvantages Than Advantages to Greater Court Involvement

Judges Reported Limited Involvement in the DPA Process

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 his good conduct; however, the law does not otherwise specify judicial involvement in the DPA process.⁴⁶ We obtained responses from 12 U.S. district and magistrate judges who handled cases involving a DPA, and these judges reported they were generally not involved in the DPA process.⁴⁷ Specifically:

- Nine of the 12 judges stated that they did not hold a hearing to review the DPA or its terms, while the 3 remaining judges held hearings. One of these judges did so in the context of a plea hearing. Another judge held a hearing to arraign the company; at which time, the company and DOJ informed the judge that they intended to enter into a DPA. The judge then had a second hearing to approve the DPA.⁴⁸ The third judge conducted a hearing to

⁴⁶ 18 U.S.C. § 3161(h)(2). Because NPAs typically do not involve court filings, judges are not involved in the NPA process.

⁴⁷ The judges' responses were anonymous so we were unable to associate the judges' responses with the cases they oversaw. We are therefore unable to determine the characteristics of cases that had more or less judicial involvement. However, two of the agreements overseen by two of the judges specified court involvement in the DPA.

⁴⁸ An arraignment must be conducted in open court, at which time the court must ensure that the defendant has a copy of the indictment or information; read the indictment or information to the defendant or state to the defendant the substance of the charge; and then ask the defendant to plead to the indictment or information. Fed. R. Crim. P. 10(a).

arraign the company and verify that the company's decision to enter into the DPA was informed and voluntary. Ten of the 12 judges reported that they relayed their decision approving the DPA through a written order. One judge relayed the decisions orally at a hearing, and one judge did both.

- Ten of the 12 judges reported that they did not have a role in the selection of a monitor required under the DPA, while the remaining 2 judges did. In one of the 2 cases, the company identified the names of five monitor candidates, the DOJ prosecutors in the case determined three of the five candidates were acceptable, and the judge extensively interviewed the three candidates before selecting one of the candidates to serve as monitor. In the other case, the DOJ prosecutors interviewed and identified monitor candidates, and the judge made a final selection from this group.
- Ten of the 12 judges stated that the monitors did not report any information to the court during the DPA, and the remaining 2 judges stated they received information from the monitor. In one of these two cases, the monitor filed quarterly reports with DOJ and the company's board of directors, and the court received a copy of the monitor's final report. In the other case, the court received a copy of the reports the monitor was required to prepare as part of the DPA and also spoke with the monitor occasionally. Similarly, 11 of the 12 judges did not receive any information from DOJ regarding the monitor's compliance with monitoring obligations under the DPA. The remaining judge received calls from DOJ after the monitor submitted bills to the court in order for DOJ to confirm to the court that the monitor was in compliance with the monitoring obligations in the DPA.
- Eleven of the 12 judges reported that they played no role in determining the terms of the monitor's contract or setting the monitor's fees. The remaining judge set, reviewed, and approved the monitor's fees. Ten of the 12 judges did not receive copies of the monitoring contracts, while 1 judge received a copy and another judge was uncertain.
- Ten of the 12 judges said that they dismissed the charges against the company after receiving information or a court filing from DOJ or the monitor reflecting compliance, but did not report taking actions to independently assess the company's compliance with the DPA. One additional judge stated that he ensured the company understood the agreement before dismissing the charges, and the final judge reported that the court would review DOJ's submission to determine whether dismissal of the charges against the company was warranted.

Prosecutors, Company Officials, Monitors, and Judges with Whom We Spoke Identified More Disadvantages than Advantages to Greater Court Involvement in the DPA Process

Prosecutors from 7 of the 13 DOJ offices, officials from 9 of the 20 companies, and 6 of the 11 monitors with whom we spoke reported disadvantages to a greater court role, while no prosecutors, 7 of 20 company officials, and 3 of 11 monitors described advantages to a greater court role. Two company officials did not believe there were advantages or disadvantages to greater court involvement, and another company official said that the advantages and disadvantages would depend on the judge involved in the case.⁴⁹ We also spoke with 2 judges, and 1 cited disadvantages to greater court involvement, while the other cited both advantages and disadvantages.⁵⁰

The advantages cited most often included:

- the court's ability to act as an independent arbiter of disputes that companies and DOJ identify, or to handle significant events in the DPA process, such as the determination of a breach;
- court involvement in monitor selection could decrease the appearance of favoritism and add to the perception of fairness in the monitor's selection; and
- court involvement could increase transparency in the DPA process by, for example, making monitor reports filed in the case publicly available.

The disadvantages most frequently cited were:

- the lack of time and resources available to judges to become more involved in the DPA process or their willingness to do so. For instance, three prosecutors, one monitor, one company official, and one judge noted that, because of already high caseloads, judges may not have the time or resources to thoroughly review the terms of a DPA, interview and select appropriate monitor candidates, review monitor reports, or determine whether a company is in compliance with the DPA;
- concerns over the appropriateness of judges playing a larger role in the DPA process. For example, two officials noted that judges are prohibited

⁴⁹ Prosecutors from six DOJ offices, seven company officials, and three monitors did not respond or were not asked their opinion of court involvement in the DPA process. Five company officials and one monitor are included in both counts because they reported both disadvantages and advantages to a greater court role, and another company is double-counted because one company official cited advantages to greater court involvement, while another believed it would depend on the judge.

⁵⁰ We obtained views from a retired U.S. magistrate judge who had overseen a DPA, and the chief judge in one federal judicial district. We did not obtain opinions from the 12 judges who handled cases involving a DPA because our questions were limited to their roles in these cases.

from participating in plea bargaining between two parties in a case and believed that negotiations over DPAs were similar to plea bargaining.⁵¹ Others believed that decisions in the DPA process—such as whether to enter into a DPA instead of prosecute, set the terms of the agreement, or determine whether a company has complied with or breached an agreement—were functions of the executive rather than the judicial branch. For example, one judge noted that if a judge disagreed with the prosecutor’s determination that a company had complied with the DPA, the judge’s authority to refuse the prosecutor’s request to dismiss the indictment and proceed with prosecution is unclear. Thus, greater court involvement might create a problem related to the separation of powers under the Constitution, as well as inhibit prosecutors’ discretion in their cases. According to DOJ officials, DOJ does not have a position on whether greater judicial involvement in the DPA process creates separation of powers issues; however, DOJ believes that judicial involvement in the NPA process would create concerns related to the separation of powers because no judicial review is involved for NPAs, as they typically do not involve court filings.

- the additional time and processes associated with court involvement, such as hearings, which may slow down the DPA process; and
- judges’ lack of knowledge and expertise about the case or its subject matter, such as the operation of an environmental management system at a wastewater treatment plant, which prosecutors in the case may have spent years developing.

Conclusions

According to DOJ, DPAs and NPAs can be invaluable tools for fighting corporate corruption and helping to rehabilitate a company, although use of these agreements has not been without controversy, including questions about the effectiveness of these tools. DOJ has taken several steps to better track its use of DPAs and NPAs, steps that will better position DOJ to more accurately report to Congress and the public on the number of existing DPAs and NPAs, the outcome of the cases, and the terms of the agreements. However, while DOJ has stated that DPAs and NPAs are useful tools for combating and deterring corporate crime, without performance measures, it will be difficult for DOJ to demonstrate that these agreements are effective at helping the department achieve this goal. Models exist that would allow DOJ to create such measures, including

⁵¹ Federal Rule of Criminal Procedure 11 states that an attorney for the government and the defendant’s attorney, or the defendant when he or she does not have an attorney, may discuss and reach a plea agreement, but the court must not participate in these discussions. Fed. R. Crim. P. 11(c)(1).

measuring whether a company reengages in misconduct over the long-term or during the course of the agreement or whether a company successfully meets the terms of its DPA or NPA. By developing performance measures to evaluate DPAs and NPAs, DOJ will be better positioned to gauge whether they are effective tools in deterring and combating corporate crime.

Recommendation for Executive Action

To assess its progress toward meeting its strategic objective of combating public and corporate corruption, the Attorney General should develop performance measures to evaluate the contribution of DPAs and NPAs towards achieving this objective.

Agency Comments and Our Evaluation

On December 15, 2009, DOJ provided written comments on a draft of this report, which we discussed with the Associate Deputy General Counsel for ODAG and the White Collar Crime Coordinator for EOUSA on December 17, 2009. DOJ agreed with our recommendation. The full text of DOJ's written comments is included in appendix III.

In its letter, DOJ stated that the department uses a variety of tools to achieve its mission of protecting the public from corporate corruption, and in some cases, DPAs and NPAs are appropriate tools and offer a number of benefits, such as the avoidance of negative collateral consequences of prosecution and conviction to companies and innocent third parties.

DOJ agreed with our recommendation that the Attorney General develop performance measures to evaluate the contribution of DPAs and NPAs toward achieving its strategic objective of combating public and corporate corruption, and recognizes the value of appropriate performance measures in this area. DOJ did not think that the Government Performance and Results Act of 1993 (GPRA) was a relevant a criterion for the development of performance measures for DPAs and NPAs, stating that it requires agencies to develop performance measures for broader program activities, such as those set forth in agency budgets, and not for tools such as DPAs and NPAs, which are used less frequently and are narrowly defined to rectify specific wrongdoing. While we acknowledge that GPRA does not require the department to develop performance measures at levels below the program activities set forth in the agency's budget, we also note that a practice among leading organizations when implementing results-oriented management practices consistent with GPRA has been to develop performance measures for each organizational level, which could help managers and staff understand how their daily activities contribute to

attaining organizationwide strategic goals. Also, there are other criteria in addition to GPRA that we cited in our draft report—specifically, the standards for internal control in the federal government—which state that agencies should establish activities to monitor performance measures and indicators and implement controls aimed at organizational performance. Additionally, with regard to DOJ’s comment that DPAs and NPAs are relatively few in number, while that may be the case for the U.S. Attorneys’ Offices, as we stated in our report, the Criminal Division has entered into about the same number of DPAs and NPAs as the number of prosecutions it has pursued.

As to the specific types of performance measures DOJ could adopt, we proposed in our draft report that DOJ might measure whether the company successfully met the terms of the agreement or whether the company re-offended, as two potential measures of the effectiveness of DPAs and NPAs. In its comments, DOJ identified some of the same limitations as we did in our report regarding the use of recidivism as a performance measure. Specifically, DOJ stated that it would be difficult to determine whether a company recidivated if the company’s subsequent violation was different than the original violation that resulted in the DPA or NPA. However, DOJ stated that the recent efforts under way by EOUSA and the Criminal Division to track the department’s use of DPAs and NPAs and monitor the disposition of these agreements will help DOJ know whether the corporation has fulfilled all of the terms of the agreement, knowledge that could be useful information for the department as it develops its performance measures for DPAs and NPAs.

We also received written comments from the Administrative Office of the U.S. Courts (AOUSC) on December 17, 2009, and the full text of the Office’s written comments is included in appendix IV.

AOUSC in its comments emphasized concerns about greater judicial involvement in the use of DPAs and NPAs, including concerns about constitutional and other separation of powers issues contained in the report, and suggested these be given greater emphasis. We maintain that we have accurately and objectively represented the views of prosecutors, company officials, monitors, and judges as presented to us in the course of our review and have reflected these issues in the report.

As agreed with your offices, we plan no further distribution of this report until 24 days from its date, unless you publicly announce its contents earlier. At that time, we will send copies of this report to the Attorney General, the Director of AOUSC, selected congressional committees, and other interested parties. The report will also be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any further questions about this report, please contact me at (202) 512-8777 or larencee@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in app. V.



Eileen R. Larence
Director, Homeland Security and Justice Issues

List of Requesters

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
House of Representatives

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives

The Honorable Frank Pallone, Jr.
House of Representatives

The Honorable Bill Pascrell, Jr.
House of Representatives

The Honorable Linda T. Sanchez
House of Representatives

Appendix I: Terms of 57 DPAs and NPAs Reviewed and Discussed in June 2009 Testimony

The terms of the 57 DPAs and NPAs we previously reviewed for our June 2009 testimony included:¹

- durations ranging from 3 months to 5 years (One of the 57 agreements we reviewed did not specify the duration.);
- monetary payments ranging from \$30,000 to \$615 million (Forty-five of the 57 DPAs and NPAs we reviewed required monetary payments, while 12 did not.);
- requirements that the company improve or enhance its compliance program (Forty-five of the 57 DPAs and NPAs we reviewed included compliance program requirements, while 12 did not.);
- requirements that the company hire, at its own expense, an independent monitor to assist the company in establishing a compliance program, review the effectiveness of a company's internal control measures, and determine whether the company has otherwise met the terms of the agreements (Twenty-six of the 57 DPAs and NPAs required companies to hire independent monitors.); and
- extraordinary restitution provisions, which are payments or services to organizations or individuals not directly affected by the crime. (Four of the 57 DPAs and NPAs we reviewed included such terms. However, DOJ issued guidance in May 2008 prohibiting the use of terms requiring payments to charitable, educational, community, or other organizations or individuals that are not the victims of the criminal activity or are not providing services to redress the harm caused by the criminal conduct.)

¹ For the purposes of our June 2009 testimony statement, we reviewed the terms of the 57 agreements we discussed with prosecutors at the 13 DOJ offices we selected for our site visits and interviews. The criteria we used to select these offices, and thus the 57 agreements, are described earlier in this report.

Appendix II: Number of DPAs and NPAs by Each U.S. Attorney's Office and DOJ Litigating Division

Table 2: Number of DPAs and NPAs Entered into by Each U.S. Attorney's Office (USAO)

| | USAO | Number of DPAs and NPAs entered into as only office | Number of DPAs and NPAs entered into jointly with other office | Total |
|----|----------------------------------|--|---|--------------|
| 1 | Southern District of New York | 20 | 3 | 23 |
| 2 | Massachusetts | 11 | 1 | 12 |
| 3 | Eastern District of New York | 11 | 0 | 11 |
| 4 | Central District of California | 10 | 1 | 11 |
| 5 | New Jersey | 7 | 0 | 7 |
| 6 | Northern District of California | 3 | 2 | 5 |
| 7 | Western District of Virginia | 3 | 1 | 4 |
| 8 | Northern District of Alabama | 1 | 1 | 2 |
| 9 | Connecticut | 2 | 0 | 2 |
| 10 | Southern District of Mississippi | 2 | 0 | 2 |
| 11 | Rhode Island | 1 | 1 | 2 |
| 12 | Eastern District of Virginia | 0 | 2 | 2 |
| 13 | Southern District of Ohio | 1 | 1 | 2 |
| 14 | Northern District of Georgia | 1 | 1 | 2 |
| 15 | Western District of Missouri | 2 | 0 | 2 |
| 16 | Southern District of Texas | 2 | 0 | 2 |
| 17 | Northern District of New York | 2 | 0 | 2 |
| 18 | Eastern District of Arkansas | 1 | 0 | 1 |
| 19 | Southern District of California | 1 | 0 | 1 |
| 20 | District of Columbia | 1 | 0 | 1 |
| 21 | Northern District of Florida | 0 | 1 | 1 |
| 22 | Southern District of Illinois | 0 | 1 | 1 |
| 23 | Southern District of Indiana | 0 | 1 | 1 |
| 24 | Northern District of Iowa | 1 | 0 | 1 |
| 25 | Western District of Kentucky | 1 | 0 | 1 |
| 26 | Eastern District of Missouri | 1 | 0 | 1 |
| 27 | Northern District of Mississippi | 1 | 0 | 1 |
| 28 | New Mexico | 1 | 0 | 1 |
| 29 | Northern District of Ohio | 0 | 1 | 1 |
| 30 | Western District of Pennsylvania | 1 | 0 | 1 |
| 31 | Southern District of Florida | 0 | 1 | 1 |
| 32 | Middle District of Florida | 1 | 0 | 1 |

**Appendix II: Number of DPAs and NPAs by
Each U.S. Attorney's Office and DOJ
Litigating Division**

| USAO | Number of DPAs and NPAs entered into as only office | Number of DPAs and NPAs entered into jointly with other office | Total |
|---------------------------------------|--|---|--------------|
| 33 North Dakota | 0 | 1 | 1 |
| 34 Western District of North Carolina | 1 | 0 | 1 |
| 35 Northern District of Illinois | 1 | 0 | 1 |
| 36 Kansas | 1 | 0 | 1 |
| 37 Alaska | 0 | 1 | 1 |
| 38 Western District of Oklahoma | 1 | 0 | 1 |

Source: GAO analysis of DOJ data

Note: The USAOs not listed in this table had not entered into any DPAs or NPAs as of September 2009.

Table 3: Number of DPAs and NPAs Entered into by Each DOJ Litigating Division

| Division and Section | Number of DPAs and NPAs entered into as only office | Number of DPAs and NPAs entered into jointly with another office | Total |
|--|--|---|--------------|
| 1 Criminal Division | | | |
| Fraud Section | 29 | 7 | 36 |
| Asset Forfeiture and Money Laundering Section | 6 | 0 | 6 |
| Enron Task Force | 2 | 0 | 2 |
| Obscenity Prosecution Task Force | 0 | 1 | 1 |
| Public Integrity Section | 0 | 1 | 1 |
| Criminal Division, no section listed | 1 | 2 | 3 |
| Total Criminal Division | | | 49 |
| 2 Antitrust Division | 2 | 1 | 3 |
| 3 Environment and Natural Resources Division | | | |
| Environmental Crimes Section | 0 | 2 | 2 |
| Total Environment and Natural Resources Division | | | 2 |
| 4 Tax Division | 0 | 2 | 2 |
| 5 National Security Division | 0 | 1 | 1 |

Source: GAO analysis of DOJ data

Note: The DOJ litigating divisions not listed in this table—the Civil Division and Civil Rights Division—had not entered into any DPAs or NPAs as of September 2009.

Appendix III: Comments from the Department of Justice



U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

December 15, 2009

Ms. Eileen Larence
Director
Homeland Security and Justice
U.S. Government Accountability Office
Washington, DC 20542

Re: *GAO REPORT 10-110 - CORPORATE CRIME: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*

Dear Ms. Larence:

Thank you for the opportunity to review the Government Accountability Office (GAO) draft Report entitled "CORPORATE CRIME: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness" (the "draft Report"). The draft Report has been reviewed by various components of the Department of Justice (the "Department"), including the Executive Office of U.S. Attorneys (EOUSA), the Criminal Division, and the Environment and Natural Resources Division. This letter serves as the formal comments of the Department and it is requested that this letter be included by the GAO in its final report.

The Department's Use of DPAs and NPAs to Combat Corporate Crime

As the draft Report states, one of the chief missions of the Department is "to ensure the integrity of the nation's business organizations and protect the public from corporate corruption."¹ In fulfilling its mission, the Department has vigorously investigated and pursued criminal corporate conduct. Indeed, since 2002, the Department has obtained approximately 1,300 corporate fraud convictions, including convictions of more than 350 senior corporate executives. In addition to prosecuting individuals, the Department has prosecuted and/or settled a substantial number of corporate fraud cases against corporations. Further, the Department has prosecuted corporations for a variety of other federal criminal violations involving, for example, environmental violations and corruption relating to international bribery. In the last year alone,

¹ Draft Report at 1 (draft Report transmitted December 4, 2009).

due to the Department's efforts, corporations have paid over \$1 billion in criminal penalties and have been subjected to a variety of stringent guidelines to detect and prevent future criminal conduct.

To achieve its mission of protecting the public from corporate corruption, the Department uses a variety of tools, including corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs). Criminally charging and convicting a company or corporation runs the risk of triggering significant negative consequences for innocent third parties who played no role in the criminal conduct, were unaware of it, or were unable to prevent it, including employees, pensioners, shareholders, creditors, customers, and the general public. Furthermore, in certain circumstances, the collateral consequences of such prosecutions -- such as the exclusion from government contracting pursuant to debarment rules -- may be unjustified where a corporation fully cooperates with the government's investigation, appropriately disciplines culpable individuals, implements comprehensive compliance reforms and other remedial measures, and makes restitution to all the victims. In these circumstances, DPAs and NPAs are an appropriate tool to resolve a corporate case while still bringing justice to innocent victims and the public.

DPAs and NPAs in corporate cases give the Department an alternative to outright prosecution or declination, and are used effectively by the Department. The obligations imposed upon a business organization in a DPA or NPA generally include:

1. the payment of restitution to victims and/or financial penalties to the Government;
2. cooperation by the business organization with ongoing Government investigations of potentially culpable individuals and/or other business organizations; and
3. the implementation of a remedial ethics and compliance program, including internal controls that will effectively prevent, deter, detect, and respond to possible future misconduct.

These alternative dispositions are beneficial for a variety of reasons. First, as noted above, DPAs and NPAs often require the payment of restitution to victims and/or financial penalties. Because a DPA or NPA is the result of a negotiated disposition, the payments to the victims can be accomplished more quickly and efficiently as the restitution can be obtained without the delays resulting from the formal charging of a company, the protracted litigation, post-conviction restitution hearings and administration, and appeals.

Second, DPAs and NPAs promote the public interest in ferreting out crime more quickly by requiring corporate cooperation. DPAs and NPAs require companies to cooperate with the government in obtaining evidence necessary to prosecute individuals and other corporations who have engaged in misconduct, including culpable corporate executives and employees. Notably, prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals, and corporate cooperation has proved to be invaluable in a variety of corporate and financial fraud cases against individual defendants.

Third, many DPAs and NPAs benefit the public by requiring the corporation to initiate comprehensive ethics and compliance programs. The agreements help ensure that going forward, the business entity roots out illegal and unethical conduct, appropriately disciplines culpable employees, prevents recidivism, and adheres to business practices that meet or exceed applicable legal and regulatory mandates. There is a dual benefit to this approach: it helps to prevent future illegal conduct and to restore the integrity and preserve the financial viability of a corporation that has been mired in corruption or fraud.

Fourth, DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct. A vast majority of the DPAs and many NPAs are made available to the public by the Department or by the corporation. DPAs are typically filed with a court and are available to the public through the local clerk's office (or may be available electronically as most courts now post pleadings online). Further, copies of DPAs and NPAs are frequently made available by the Department online or are otherwise available upon request. Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry. Furthermore, the agreements contain information about the type of remedial efforts the Department and, in certain circumstances our regulatory partners, will require the company to take. This is beneficial in helping companies determine "best practices" in their industry.

Finally, DPAs and NPAs allow the Department to achieve these benefits without necessarily subjecting companies to the collateral consequences of prosecution and conviction. Importantly, all of this is achieved while preserving the Department's ability to prosecute the business organization, using a set of facts to which the organization has already admitted, if the agreement is materially breached.

Response to the GAO's Recommendation

The draft Report recommends the following:

To assess its progress towards meeting its strategic objective of combating public and corporate corruption, the Attorney General should develop performance measures to evaluate the contribution of DPAs and NPAs towards achieving this objective.

The Department understands the value of performance measures and why the GAO made this recommendation. Also, we recognize the time and thought the GAO has expended on its audit work, the thoroughness of the draft Report, and the recommendation that the Department develop performance measures to evaluate the contribution of DPAs and NPAs.

Twice during the course of this audit, the GAO issued testimony reports in this matter with suggestions for the Department to improve its procedures with regard to DPAs and NPAs. In both instances the Department worked with GAO to implement its recommendations. In the

first instance, the Department agreed with the recommendation, provided the GAO with our position, and wrote to Congress about our efforts that satisfied the recommendation. When the GAO presented the Department with its second draft testimony/report, the Department provided the GAO with comments about how the recommendation could be edited to make it more comprehensive; the Department's suggested edits expanded the reach of the draft recommendation to include all litigation divisions at the Department and litigation conducted in the 94 Offices of the United States Attorneys. The GAO incorporated our suggestions when it issued its Report issued June 25, 2009.

With respect to the current recommendation, we believe the Department's method for capturing and measuring the performance of the requirements in DPAs and NPAs provides a useful and appropriate performance measure that takes into account the varied nature of DPAs and NPAs. Indeed, as noted in the draft Report, the Department has already started updating its case tracking systems to that end. In Spring 2009, as the draft Report notes, EOUSA and the Criminal Division began monitoring DPA and NPA progress and case dispositions based upon whether the corporation has abided by all of the terms of the agreement. This determination is made either by the prosecuting attorney or a federal judge (if the matter is filed with a court). This approach lets us know whether corporations have fulfilled the terms of their agreements – terms which were designed to rectify actions that the Department had deemed violated the law.²

In its draft Report, the GAO made several references to the Government Performance and Results Act of 1993 (GPRA) when the GAO discussed the value of performance measures. *See* discussion at the top of page 22. The discussion implied that the GPRA applies to the circumstances at hand. We believe the circumstances do not justify the development of performance measures like those associated with and constructed pursuant to the GPRA. In fact, the law limits the applicability of the GPRA. The law requires "each agency to prepare an annual performance plan covering each *program activity* set forth in the budget of such agency." The GPRA defines a *program activity* as "a specific activity or project as listed in the program and financing schedules of the annual budget of the United States Government." DPAs and NPAs do not constitute program activities; DPAs and NPAs are merely tools used, where appropriate, in lieu of prosecutions. They are relatively few in number and of limited duration, usually three years, unlike government "programs" that continue over many years. Also, DPAs and NPAs are narrowly defined to rectify specific exposed wrongdoing. Consequently, DPAs and NPAs are not like the budgetary program activities covered by the GPRA. Accordingly, DPAs and NPAs are not listed in the program and financing schedules of the annual budget.

² In addition, the Department is exploring the development of a performance measure that would assess the Department's effectiveness in combating corporate crime, the subject of footnote 36 in the draft Report. Although the GAO's comments in this regard were outside the scope of its recommendation, the Department agrees that this is an important area of focus and is working to develop performance measurements to assess the Department's effectiveness in the area of corporate crime.

Also, the Department evaluated carefully the suggestion by the GAO that we develop a performance indicator that measured whether DPAs and NPAs prevented companies from re-offending. We feel that our performance measures fit the circumstances more so than would the development of a "recidivism" measure suggested by the GAO. Each DPA or NPA addresses specific violations of law. Those violations vary widely by type. For example, the corporation that enters into a DPA because a subsidiary bribed a foreign official could, at a later date, find that one of its employees at a wholly different subsidiary violated a securities fraud statute. Any performance measure tracking recidivism would capture the second violation. However, capturing the securities fraud would not indicate progress or lack thereof relative to the earlier public corruption matter. Even the draft Report noted that, half of the company officials and monitors with whom the GAO spoke expressed concerns about using recidivism as a sole metric.³

The Department agrees with the GAO on the value of appropriate performance measures in this area. We believe that the performance measures we are developing will provide an effective means for evaluating the contribution of DPAs and NPAs towards achieving the goal of combating public and corporate corruption. We appreciate the suggestions the GAO made in this regard, and find them useful in refining our thoughts about performance measures.

The Department appreciates the work done by the GAO, the findings made in this draft Report, and this opportunity to comment.

Sincerely yours,



Edward N. Siskel
Associate Deputy General Counsel
Office of the Deputy Attorney General

³ See Draft Report at 23.

Appendix IV: Comments from the Administrative Office of the U.S. Courts



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

December 17, 2009

Ms. Eileen R. Larence
Director, Homeland Security and Justice
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

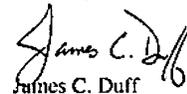
Dear Ms. Larence:

Thank you for the opportunity to review the draft report entitled *CORPORATE CRIME: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* (GAO-10-110). We commend and appreciate the study team's professional work and cooperation on this complex study.

In light of pending legislation that would increase judicial responsibilities for Deferred Prosecution Agreements and Non-Prosecution Agreements, it would be helpful if the report covered more prominently the important concerns contained in the report regarding any increased judicial role in these agreements. We note that GAO has not recommended additional Judicial Branch involvement in corporate oversight. Considering the serious and potentially definitive nature of some of the problems identified, such as Constitutional and other separation-of-powers issues, you could emphasize these points in the highlights section and earlier in the report than they now appear.

I hope these comments are helpful. We are providing technical comments separately.

Sincerely,


James C. Duff
Director

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

Eileen R. Larence, (202) 512-8777 or larencee@gao.gov.

Staff Acknowledgments

In addition to the contact named above, Kristy N. Brown, Assistant Director; Jill Evancho; Tom Jessor; Danielle Pakdaman; Sarah Kaczmarek; Janet Temko; Amanda Miller; Katherine Davis; and Mandana Yousefi made significant contributions to this report.

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