The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013

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Non- and Deferred Prosecution Agreements (N/DPAs) are controversial because prosecutors, not judges or the legislature, are changing the governance of leading public corporations and entire industries. To analyze N/DPAs' corporate governance implications and provide policy makers with guidance, we code all publicly available N/DPAs (N=271) from 1993 to 2013, identifying 215 governance categories and subcategories. We find evidence that the execution of N/DPAs is associated with significant corporate governance changes. The study categorizes mandated corporate governance changes for entities that executed an N/DPA as follows: (1) Business Changes, (2) Board Changes, (3) Senior Management, (4) Monitoring, (5) Cooperation, (6) Compliance Program, and (7) Waiver of Rights. We supplement the analysis of governance changes in these categories with a more in depth evaluation of the respective subcategories of governance changes. We also code and analyze preemptive remedial measures, designed by corporations to preempt the execution of an N/DPA or corporate criminal indictment. The article evaluates the implications of the empirical evidence for boards, management, and legal practitioners.

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I. Introduction

The increasing use of Non- and Deferred Prosecution Agreements ("N/DPAs")[1] has enabled federal prosecutors to incrementally expand their traditional role, exemplifying a shift in prosecutorial culture from an ex-post focus on punishment to an ex-ante emphasis on compliance.[2] N/DPAs often entail significant corporate governance changes such as mandating new board members or new management, changes in internal controls, updated compliance programs, or additional self-reporting obligations, among others.[3] Through the increasing use of N/DPAs, prosecutors are in effect reforming corporate America by changing the governance of leading public corporations and entire industries. The evaluation of issues pertaining to the effect of N/DPAs on corporate governance in prior studies is largely based on anecdotal evidence and valuable case studies.[4] To assess legitimacy concerns and provide guidance for policy makers, we code all publicly available N/DPAs [N=271] and evaluate the impact of N/DPAs on corporate governance from 1993 to 2013.

1. *See* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 Ky. L.J. 1, 4–5 (2008) (describing a myriad of variables that may explain the growth in N/DPAs: "an outgrowth of the establishment of the President's Corporate Fraud Task Force, the revision of the Principles of Federal Prosecution of Business Organizations Memo under Deputy Attorney General Larry Thompson, an increased emphasis on curtailing corporate fraud in a post-Enron world, a desire to avoid collateral consequences of prosecution such as seen in the Arthur Anderson, LLP case, a corporate need to contain possible civil litigation resulting from prosecution, or nothing more than an increased flexing of prosecutorial power." (internal citations omitted)).

2. *See* P.J. Meitl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. Ky. L. Rev. 1, 2 (2007) ("Corporate governance by its nature is a forward-looking endeavour designed to safeguard and manage the corporation. Prosecutions, on the other hand, are backward-looking as they assign liability or blame for past events.").

3. *See infra* Part V.

4. *See, e.g.*, Lawrence Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 Fla. L. Rev. 1 (2014).

N/DPAs are contractual arrangements between a corporation and the government and often function as a pretrial diversion method.[5] In the case of both Non-Prosecution Agreements ("NPAs") and Deferred Prosecution Agreements ("DPAs"), a corporation enters into an agreement with the government, and the government imposes sanctions, such as fines, restitution, and institutional changes, or the government demands additional reporting duties during the term of the N/DPA.[6] If the corporation abides by the agreed upon provisions for the allotted time, it can avoid criminal indictment. In exchange for the sanctions specified in N/DPAs, the government agrees not to prosecute in the case of NPAs or to dismiss filed charges in the case of DPAs.[7]

Several indicia suggest that the use and application of N/DPAs is likely to increase in the next ten years. After introducing N/DPAs in the early 1990s,[8] prosecutors expanded their application incrementally.[9] While N/DPAs were traditionally the domain of the Department of Justice ("DOJ"), in 2013 the SEC also started issuing DPAs against individuals and corporations.[10] Moreover, the Antitrust Division of the Department of Justice entered its first DPA in 2013.[11] Several factors can help explain the proliferation of N/DPAs. First, prosecutors and corporations have strong incentives to enter into N/DPAs and avoid a trial.[12] Once prosecutors have investigated and identified corporate wrongdoing, they can use N/DPAs to avoid an expensive trial against a sophisticated and well-funded corporate defendant.[13] N/DPAs help prosecutors to impose and enforce monetary

5. Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 Colum. L. Rev. 1863, 1864 (2005).

6. *See* Scott A. Resnik & Keir N. Dougall, *The Rise of Deferred Prosecution Agreements*, N.Y. L.J., Dec. 18, 2006, at 1.

7. *See id.*

8. Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 Brook. J. Corp. Fin. & Com. L. 45, 57 (2006) ("The genesis of the current proliferation of deferred and non-prosecution agreements in corporate criminal law may be traced to two important settlements in the Southern District of New York in the 1990s involving Salomon Brothers and Prudential Securities.").

9. *See* Gibson Dunn, Mid-Year Update on Corporate Deferred Prosecution Agreements (DPAS) and Non-Prosecution Agreements (NPAS) (2013), *available at* http://goo.gl/0l23GZ.

10. *See Baker Botts Partner Bridget Moore on SEC Deferred Prosecution Agreements*, Corp. Crime Rep. (Nov. 20, 2013, 6:55 AM), http://goo.gl/7hHr97; *SEC Negotiates First Individual Deferred Prosecution Agreement*, Corp. Crime Rep. (Nov. 12, 2013, 11:58 AM), http://goo.gl/9VQ7PQ; Gary DiBianco et al., *SEC Announces First Non-Prosecution Agreement in an FCPA Matter*, Skadden.com (Apr. 26, 2013), http://goo.gl/g53gSJ.

11. *Antitrust Division Enters into First Deferred Prosecution Agreement*, Cadawalder.com (Feb. 27, 2013), http://goo.gl/X3eGJU.

12. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295, 1301 (2013) ("The terms of the agreements are attractive to the government, because they often provide large penalties, far-reaching corporate compliance programs with outside monitors approved by the Department, and promises of cooperation by the companies involved."); *see also* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 Mich. L. Rev. 1713, 1721 (2007) ("Both the government and the firm have strong incentives to settle the case.").

13. Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. Rev. 1434, 1458 (2007) ("[G]overnment prosecutors often have to tangle with well-financed defendants capable of hiring sophisticated law firms that can match government resources.").

penalties,[14] create compliance reform,[15] and force the corporation to fund its own internal investigation.[16] Second, prosecutors favor N/DPAs because they do not entail the uncertainty of potentially catastrophic collateral consequences for the company.[17] N/DPAs allow corporations to avoid the collateral consequences often linked to federal indictment,[18] avoid costly litigation, and mitigate risk.[19] In effect, N/DPAs allow corporations to institute new policies and satisfy the demands of prosecutors while addressing concerns about the culpability of their executives.[20]

Despite these advantages over conventional prosecutions, N/DPAs remain controversial and subject to an ongoing debate about their legitimacy.[21] Judge Jed S. Rakoff prominently critiqued the use of N/DPAs and the DOJ's focus on corporate prosecutions[22] as morally and technically suspect, suggesting that

14. *See* F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121, 126 (1997) ("The United States Attorney also noted that the pre-trial diversion agreement imposed the same sanctions as those which would have resulted from a criminal conviction." (discussing the Prudential Securities 1994 DPA)).

15. Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1049 (2006) (citing the prosecutorial goal of "calibrated reform of a corrupted corporate culture").

16. Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23 (2010).

17. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U.L. REV. 311, 321–22, 379 (2007) ("[DPAs] popularity with prosecutors has increased since the public opprobrium that followed the Arthur Andersen case, in which the conviction of the accounting firm was ultimately overturned, but not before the stigma of indictment drove it out of business entirely. . . . Prosecutors should make more up-or-down decisions concerning charges against corporate entities rather than relying on threats alone and seeking flawed intermediate solutions in DPAs.").

18. *See* Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, Principles of Federal Prosecution of Business Organizations § IX, at 12–13 (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://goo.gl/F2PJYV; Greenblum, *supra* note 5, at 1863 (citing the "debilitating collateral consequences" of conviction); Christopher A. Wray & Robert K. Hur, *The Power of the Corporate Charging Decision over Corporate Conduct*, 116 YALE L.J. POCKET PART 306, 307 (2007) (explaining "collateral consequences—especially the loss of licenses, the prospect of suspension, debarment, or exclusion from federal programs, and analogous administrative effects on the company's core business—loom large, especially for the most regulated corporations"). *But see* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 831 (2013) (arguing and empirically showing that the corporate death sentence of a federal conviction is rare).

19. *See* Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, CRIM. JUST., Summer 2006, at 36.

20. *See* Orland, *supra* note 8, at 84–85 ("[T]he corporation routinely abandons attorney-client privilege and agrees not to contradict a detailed statement of culpability that often becomes the blueprint for prosecution of indicted executives. . . . The rehabilitated corporation adopts codes of ethics and compliance programs, reports to and may be managed by outside monitors, files detailed reports to the government, and cooperates with the Justice Department in the prosecution of former senior executives.").

21. *See* Warin & Schwartz, *supra* note 14; Uhlmann, *supra* note 12. These two articles represent one of the earliest critiques and one of the most recent critiques in the N/DPA debate.

22. SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (refusing to approve the SEC consent judgment because "the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest"), *rev'd*, 752 F.3d 285, 297 (2d Cir. 2014) (reversing Judge Rakoff, stating "to the extent the district court withheld approval of the consent decree. . . . that

"the failure to prosecute those responsible [for the Great Recession] must be judged one of the more egregious failures of the criminal justice system in many years."[23] Others decry N/DPAs as overly burdensome, the result of significantly unequal bargaining power between the prosecutor and the corporation.[24] Such critics often cite the potential for prosecutorial abuse,[25] the lack of governance expertise,[26] and the lack of a proper mandate[27] for the prosecutors who execute N/DPAs. The existing corporate criminal liability in combination with a lack of clear DOJ standards for charging businesses may also lead organizations to adopt unproven compliance programs and create other inefficiencies.[28]

constituted an abuse of discretion"). However, the opinion did not go unnoticed. *See* Patricia Jo, The "Rakoff Effect": The Growing Trend of Heightened Judicial Scrutiny of Government Settlements with Corporate Defendants 7 (2013) (unpublished manuscript), *available at* goo.gl/IgwFKq.

23. Jed. S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. Books (Jan. 9, 2014), http://goo.gl/AIg2py; Kara Scannell, *Top Judge Criticises DoJ for Not Holding Individuals Accountable*, Fin. Times (Nov. 12, 2013), http://goo.gl/pOEhqb (prosecuting companies that have "sometimes hundreds of innocent individuals" is morally suspect and prosecutors only charging companies for acts committed by individuals is "technically suspect").

24. *See, e.g.*, James R. Copland, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, Civ. Just. Rep., May 2012, at 1, *available at* http://www.manhattan-institute.org/html/cjr_14.htm (noting prosecutors have incredible bargaining power to force companies to "implement onerous training and reporting programs, hire senior officials to oversee companies' 'compliance' with prosecutors' legal interpretations, modify sales-force practices and compensation plans, contract with independent 'monitors' empowered to dictate modifications to business practices, and even fire and replace directors or chief executives"); Illovsky, *supra* note 19, at 37 (noting the significant power held by prosecutors with DPAs); *see also* Richard A. Epstein, *The Deferred Prosecution Racket*, Wall St. J., Nov. 28, 2006, at A14 (stating prosecutors may be abusing the threat of prosecution to coerce companies to execute DPAs); Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 853 (2007) (noting "some indications of [prosecutorial] overreaching, if perhaps not abuse of prosecutorial discretion"); Paulsen, *supra* note 13, at 1434 (DPAs "provide prosecutors with a dangerous amount of leverage over the corporations they target, creating a bargaining imbalance and a new threat of abuse").

25. *See, e.g.*, Epstein, *supra* note 24; Garrett, *supra* note 24, at 853; Paulsen, *supra* note 13, at 434 (DPAs "provide prosecutors with a dangerous amount of leverage over the corporations they target, creating a bargaining imbalance and a new threat of abuse").

26. *See, e.g.*, Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants,* 44 Am. Crim. L. Rev. 53, 112 (2007) ("[P]rosecutors, who now—often with little or no experience in corporate governance matters—are solely charged with evaluating whether a company's compliance program is adequate."); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1185 (2006) ("But the central question before the prosecutor is the degree to which the misconduct is attributable solely to rogue employees, or in some way due to the company's own failed policies, structures, procedures, or incentives. And corporate governance mechanisms properly lie at the very heart of that determination: whether the misconduct was in some way the fault of the business entity itself.").

27. *See, e.g.*, Jennifer Arlen & Marcel Kahan, Corporate Governance Regulation Through Non-Prosecution 41 (Apr. 5, 2011) (unpublished manuscript) (on file with *The Business Lawyer*) ("[Prosecutors] do not have expertise in assessing the optimal system of corporate governance and agency costs generally."); David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 Cornell Int'l L.J. 307, 310–11 (2008) ("Prosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of large-scale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies.").

28. Miriam Hechler Baer, *Insuring Corporate Crime*, 83 Ind. L.J. 1035, 1064 (2008); *see also* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487 (2003) (pointing out that in response to a vague compliance standard with vicious penalties, companies will adopt the "best practice" compliance programs dictated by prosecutors in existing N/DPAs).

There is some consensus among scholars that N/DPAs exert influence on corporate governance.[29] A key issue pertaining to the impact of N/DPAs in corporate governance is the role of the prosecutor in the expansion of corporate governance via N/DPAs.[30] Those favoring the prosecutor's involvement suggest that prosecutors can promote an ethical corporate culture through enhanced compliance measures in N/DPAs.[31] Under this theory, the DOJ's expansionary tendencies in N/DPAs are a mere extension of legally mandated compliance requirements.[32] In fact, corporate governance of the respective entity plays a major role in federal prosecutors' charging decisions.[33] The increased role of independent private sector oversight may help address the increased complexity of corporate crime and dwindling public funds.[34] Given their education and experience as well as their ability to fill a void left by the system,[35] prosecutors may be uniquely qualified to

29. *See* Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1486 (2007) ("DPAs have also taken on a structural component, often obligating corporations to undertake significant corporate governance reforms such as the addition of 'independent' directors, an internal monitor or an ethics officer."); John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13 (explaining the 2005 deferred prosecution agreements "intruded deeply into corporate governance"); Griffin, *supra* note 17, at 324 ("DPAs thus involve prosecutors in 'corporate-wide behavior modification,' prescribing what is good corporate governance rather than just prohibiting wrongful conduct."); Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 100 (2006) ("DPAs often mandate that a corporation adopt institutional reforms and best practice corporate governance, the implementation of which is overseen by the DOJ or a DOJ-appointed monitor."); Orland, *supra* note 8, at 74 ("Requirements that the corporation change corporate governance organization and responsibility appear with increasing frequency in both DPAs and NPAs."); Orland, *supra* note 8, at 75 (finding 25 out of 44 coded N/DPAs contained corporate governance changes); Thompson Memo, *supra* note 18, at 2; *see also* Cunningham, *supra* note 4, at 59.

30. Cunningham, *supra* note 4, at 50.

31. *See. e.g.*, Ryan D. McConnell et al., *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L L. 509, 584–86 (2011) (touting the benefits of an enhanced compliance program: "Companies with reputations for ethical business practices and good corporate governance tend to have higher stock prices and more satisfied employees. In these and many other regards, a company's decision to act legally and ethically can serve as a catalyst for success.").

32. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 951–52 (2009) ("[C]orporate compliance has evolved 'into a universal corporate governance activity.'").

33. John A. Gallagher, *Legislation Is Necessary for Deferred Prosecution of Corporate Crime*, 43 SUFFOLK U. L. REV. 447, 470 (2010) ("By emphasizing cooperation and reform, prosecutors commandeer internal investigations and establish their own corporate governance."); Meitl, *supra* note 2, at 12–13 ("DPAs then can be seen as an invitation for prosecutors to become an active participant in the corporate governance of a corporation."); Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008) ("By focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity's criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America. They have become the New Regulators."); Thompson Memo, *supra* note 18, at 8.

34. Thomas F. O'Neil III & T. Brendan Kennedy, *Answering to a Higher Authority: Sovereign-Mandated Oversight in the Board Room and the C-Suite*, 17 FORDHAM J. CORP. & FIN. L. 299, 385 (2012) ("As fiscal pressures continue to mount on federal, state and local agencies in the United States and sovereign entities in other nations, enforcement officials will increasingly turn to independent private sector oversight as a means of ensuring that corporate transgressors are rehabilitated and become compliant and responsible citizens in commerce.").

35. Meitl, *supra* note 2, at 3 (arguing prosecutors' education and experience are sufficient, outside experts are readily available, and most DPA decisions do not require extensive business savvy. In ad-

institute corporate governance changes.[36] Others question prosecutors' possession of the prerequisite experience in assessing and improving corporate governance mechanisms.[37] Because historically corporate governance fell under state law,[38] some scholars question the DOJ's authority to expand and police corporate governance[39] without a proper mandate.[40]

Despite the strong indicia of N/DPAs' corporate governance implications—federal prosecutors reshaping the governance of leading public corporations and entire industries—the literature has not comprehensively evaluated the impact of N/DPAs on corporate governance in the United States.[41] Studies have

dition, prosecutors are filling "a void left by regulating agencies, boards of directors, and the courts."); *see* Christie & Hanna, *supra* note 15, at 1051–54 (detailing the Bristol Meyers Squibb DPA, the federal prosecutor explained, "[o]nce we [the DOJ] decided that the separation of the chairman and CEO's [sic] position was advisable, we felt that a meeting with the entire board of directors was necessary. We travelled to a regularly scheduled board meeting in Wilmington, Delaware and engaged in a ninety-minute open exchange with the Board."); *compare* Arlen & Kahan, *supra* note 27, at 41 ("Prosecutors may well have special expertise, through the information they learned in investigating the firm and through their general law-enforcement expertise, in assessing the benefits of a mandate in inducing superior policing measures."); Uhlmann, *supra* note 12, at 1327–28 ("On the one hand, prosecutors are well informed about what makes for an ineffective corporate compliance program, but it does not follow that they have any particular expertise in how to translate that knowledge into an understanding of what constitutes an effective corporate compliance program.").

36. Meitl, *supra* note 2, at 27 ("Some question the competency of prosecutors to engage in such a foreign field but as this Article has shown, they are in fact qualified to make such decisions. The combination of the education, experience, support staff, and ability to use outside advisors creates a solid framework for the decision-making. As well, the decisions that confront prosecutors are not as foreign as one might guess after closer analysis. In the end, without prosecutorial involvement, there may be a dearth of oversight and enforcement that seems to be increasingly needed.").

37. *See, e.g.*, Bharara, *supra* note 26, at 112 ("prosecutors, who now—often with little or no experience in corporate governance matters—are solely charged with evaluating whether a company's compliance program is adequate"); Wray & Hur, *supra* note 26, at 1185 ("But the central question before the prosecutor is the degree to which the misconduct is attributable solely to rogue employees, or in some way due to the company's own failed policies, structures, procedures, or incentives. And corporate governance mechanisms properly lie at the very heart of that determination: whether the misconduct was in some way the fault of the business entity itself.").

38. *See* John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 332 (2004).

39. *See, e.g.*, *id.* at 323 ("[T]he Sentencing Commission has, without clear statutory authority, abrogated the power to regulate corporate governance.").

40. *See, e.g.*, Arlen & Kahan, *supra* note 27, at 41 ("[Prosecutors] do not have expertise in assessing the optimal system of corporate governance and agency costs generally."); Hess & Ford, *supra* note 27, at 310–11 ("Prosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of large-scale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies.").

41. *See* Cunningham, *supra* note 4; Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 35 (2006) (analyzing the existence of different provisions in DPA/NPAs through the Holder and Thompson Memos through 2006); First, *supra* note 16; Garrett, *supra* note 24, at 936 ("Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined."); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1870 (2011) ("According to the U.S. Sentencing Commission, the number of total federal corporate convictions has averaged 210 per year since 2000. This followed a gradual rise in convictions in the early 1990s when the Commission began collecting data on organizational convictions (but part of that rise may be due to improved data collection during the 1990s."); GIBSON

identified prosecutorial and other trends, such as the increasing use of N/DPAs[42] and the high usage of N/DPAs in healthcare and financial industries.[43] Garrett studied the terms in N/DPAs from 2003–2007, showing an increasing trend of compliance features.[44] Khanna and Dickinson's study focused on the use of independent monitors, finding an increased usage of monitors, as well as an expansion of the monitors' powers.[45] Markoff showed that a federal conviction rarely results in significant repercussions for the respective corporation.[46] Others considered which government divisions produced the most N/DPAs to show the variation in the utilization of N/DPAs.[47] Orland studied the corporate governance implications of N/DPAs through 2006, before the proliferation of N/DPAs, and concluded that N/DPAs produce "profound changes in the administration of corporate criminal law."[48] Many authors supplemented their empirical findings with references to individual N/DPAs to support their arguments.[49] The largest published study to date assessed 120 DPAs available through 2008.[50]

This article fills a gap in the literature by coding and analyzing the corporate governance implications of all publicly available N/DPAs. Our database comprises 271 N/DPAs [N=271] executed from 1993–2013.[51] To preview results,

Dunn, *supra* note 9; McConnell et al., *supra* note 31, at 511–14 (analysing the number of DPA/NPAs with compliance requirements and independent monitors in 2008–2010); Orland, *supra* note 8, at 75 ("Tables I and II reveal a corporate governance change requirement in 12 of the 20 NPAs and 13 of the 24 DPAs. Seven of the 24 DPAs require new management. In cases where senior executives have been indicted, new management boards have been required in 2 of the 8 DPAs and only 2 of the 9 NPAs."). *But see* Orland, *supra* note 8, at 75 (showing through the examination of forty-four agreements that "[r]equirements that the corporation change corporate governance organization and responsibility appear with increasing frequency in both DPAs and NPAs.").

42. *See, e.g.*, James T. O'Reilly et al., Punishing Corporate Crime: Legal Penalties for Criminal and Regulatory Violations 132 (2009).

43. *See, e.g.*, *id.* at 134.

44. Garrett, *supra* note 24, at 936 ("My empirical study describing the DOJ's approach can serve as a foundation for future work investigating those important questions. . . . [P]rosecutors, scholars, and other actors should make sustained efforts to assess its efficacy and delimit its scope. At minimum, such efforts could clarify the relationships between courts, Congress, prosecutors, administrative agencies, and organizations.").

45. Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 Am. J.L. & Med. 89, 96–97 (2009).

46. Markoff, *supra* note 18, at 798.

47. *See, e.g.*, Uhlmann, *supra* note 12, at 1316–19 (highlighting that the Criminal Division and five U.S. District Attorneys' offices accounted for a large portion of total N/DPAs executed).

48. Orland, *supra* note 8, at 46.

49. *See* O'Neil & Kennedy, *supra* note 34, at 328 ("Two recent DPAs [Willbros & Technip] entered in the Southern District of Texas are illustrative of current practices in federal corporate investigations."); Warin & Schwartz, *supra* note 14, at 124–28 (citing 4 cases of the earliest N/DPAs); Wray & Hur, *supra* note 26, at 1141 (showing the Thompson Memo's effects through 6 DPAs and 2 NPAs).

50. O'Reilly et al., *supra* note 42, at 122 n.17.

51. 271 executed N/DPAs were publicly available for the years 1993–2013. The authors coded all 271 N/DPAs for this article. The authors expand upon Professor Orland's initial analysis of 54 N/DPAs (through 2006) both quantitatively and qualitatively by identifying the most pertinent N/DPA provisions that affect corporate governance in the United States. Professor Orland considered: year, venue, duration, offenses, individuals charged, fine, restitution, civil penalty, agency settlement, acceptance of responsibility, monitor/examiner, public statements, discharge of employees, cooperation, factual statement, hotline, compliance program, new internal controls, waiver of privilege, waiver of statutes of limitation/Sixth Amendment, new management/board, training program, and

we show that 97.41 percent [N=264] of the public N/DPAs from 1993–2013 contained relevant corporate governance changes. We find mandated corporate governance changes for the respective entities in the following general categories: (1) Business Changes, (2) Board Changes, (3) Senior Management, (4) Monitoring, (5) Cooperation, (6) Compliance Program, and (7) Waiver of Rights. We summarize and evaluate the most significant subcategories of governance changes. Our findings suggest that the corporate governance provisions in N/DPAs have increased substantially since 2002. Our findings also suggest that N/DPAs can play a significant role in improving corporate governance.[52]

The paper has six parts. After a short introduction in Part I, Part II introduces the basic parameters of N/DPAs and discusses both the historical developments and current trends in the application of N/DPAs. We evaluate the debate on N/DPA legitimacy and purpose and analyze the scope and shortcomings of the debate on N/DPA governance implications and possible governance improvements. Part III evaluates corporate governance implications that are associated with N/DPAs. Part IV introduces the methodology used in this article by presenting the dataset and coding parameters. Part V discusses the results by first presenting descriptive statistics to summarize the basic features of the database and thereafter evaluating the governance implications of N/DPAs in our dataset. Part VI ends with a discussion of key findings, an evaluation of the implications of the data for practitioners, and a summary of implications for N/DPA policy, highlighting limitations. We suggest that more research is needed to evaluate the long-term governance implications of N/DPAs and their effects on firm value.

II. Corporate Non- and Deferred Prosecution Agreements

Non- and deferred prosecution agreements are contractual agreements between the government and a corporate entity that has engaged in some kind of wrongdoing.[53] As part of the agreement, the government may impose sanctions, such as fines, restitution, institutional changes, and additional reporting duties for the term of the agreement.[54] In exchange for the corporation's acceptance of these sanctions, the government agrees not to prosecute in a non-prosecution agreement, or the government agrees to dismiss filed charges in a deferred prosecution agreement.

The avoidance of collateral consequences is the most commonly cited reason for the use of N/DPAs.[55] Since 2002, the disintegration of Arthur Andersen,[56]

self-reporting. Orland, *supra* note 8, at 71. Professor Orland coded 44 agreements, dating from 1993 to 2006.

52. *See infra* Part V.3.

53. Greenblum, *supra* note 5, at 1864.

54. *See* Resnik & Dougall, *supra* note 6.

55. *See, e.g.*, Garrett, *supra* note 24, at 879 ("[A]n indictment has such great collateral consequences on the entire entity and also blameless employees, shareholders, consumers, and creditors.").

56. Spivack & Raman, *supra* note 33, at 165–66 (The indictment of Arthur Anderson "effectively put the eighty-nine-year-old firm out of business and forced tens of thousands of people to find new jobs. It also had a dramatic effect on the accounting industry, by turning the 'Big 5' into the 'Big 4.'"

with the substantial loss of firm value and 28,000 jobs, is commonly equated with the term "collateral consequences of corporate criminal indictment."[57] Collateral consequences can include the forfeiture of licenses or privileges such as government contracts as a result of convictions under federal law.[58] Many commentators argue for the conventional wisdom that a corporate criminal indictment equates to a "corporate death penalty."[59] Others see this as an overstatement.[60] Several recent plea deals call into question the 'death penalty' theory. In 2014, PNB Paribas pled guilty to conspiring to violate the International Emergency Powers Act[61] and paid a record fine of $8.97 billion for a long-running scheme to disguise billions of dollars in prohibited transactions.[62] In addition to PNB Paribas, Credit Suisse also pled guilty to helping clients commit tax evasion but kept its investment banking license.[63]

The literature discusses different objectives and incentives for parties to execute N/DPAs,[64] including the incentives for the corporation to avoid a criminal

(internal citations omitted)). *But see* Markoff, *supra* note 18, at 831 (providing empirical evidence that the federal indictment death penalty for corporations is extremely rate).

57. Paulsen, *supra* note 13, at 1445 (explaining that collateral consequences are "typified by the Arthur Andersen collapse").

58. *See* 33 U.S.C. § 1368(a) (2012) (prohibiting federal contracting with any person convicted under the Clean Water Act "until the [EPA] Administrator certifies that the condition giving rise to such conviction has been corrected"); Copland, *supra* note 24, at i–ii ("[B]usinesses in some industries can be debarred from government contracting or denied government licenses upon an indictment or conviction."); Greenblum, *supra* note 5, at 1863 ("Corporate offenders are uniquely susceptible to the license forfeiture and ineligibility for government contracts that may be triggered by a conviction.").

59. *See, e.g.*, Markoff, *supra* note 18, at 811; *see also* Dane C. Ball & Daniel E. Bolia, *Ending A Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 Wyo. L. Rev. 229, 248 (2009) (noting that Arthur Andersen's demise was "death by indictment"); Bharara, *supra* note 26, at 73 (describing that corporations "may not be able to survive indictment, much less conviction and sentencing . . . '[s]ince an indicted firm is a dead firm, a decision to defend an indictment is suicide'"); Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 Wash. U. L.Q. 917, 921 (2003) ("As Andersen's lawyers put it, a criminal indictment would be tantamount to a death sentence for the firm, unfairly imposing punishment before trial.").

60. *See* Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 Hastings L.J. 1121, 1156 (2013) ("The coercion point [that because an indictment is a death penalty, corporations have no power negotiating with the DOJ] can be overstated when it comes to corporations. Corporations do fear indictment, but they do not simply roll over at the mention of possible criminal penalties. It is not the case that corporations never proceed to trial: They do."); *see also* Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 Am. Crim. L. Rev. 1417, 1432 (2009); Markoff, *supra* note 18, at 831 (offering empirical support against the death penalty hypothesis).

61. Plea Agreement, United States v. BNP Paribas S.A., No. 1:14-cr-00460-LGS (S.D.N.Y. July 9, 2014).

62. Devlin Barrett, Christopher M. Matthews & Andrew R. Johnson, *BNP Paribas Draws Record Fine for 'Tour de Fraud,'* Wall St. J. (June 30, 2014), http://goo.gl/vwqMlN.

63. Katharina Bart, Karen Freifeld & Aruna Viswanatha, *Credit Suisse Guilty Plea Has Little Immediate Impact as Shares Rise*, Reuters (May 20, 2014 5:16 PM), http://goo.gl/d1OiPM ("Credit Suisse saw little immediate impact on Tuesday after it became the largest bank in decades to plead guilty to a U.S. criminal charge and will pay more than $2.5 billion in penalties for helping Americans evade taxes.").

64. *See, e.g.*, Khanna & Dickinson, *supra* note 12, at 1721 ("Both the government and the firm have strong incentives to settle the case. For the government, corporate crime cases are difficult, complex, and expensive cases to prosecute and tend to use a great deal of resources.").

indictment.[65] Some assert that the government can police and sanction more organizations through the use of N/DPAs,[66] which increases efficiency.[67] Others believe that corporate defendants are typically more sophisticated and well capitalized than an individual one, enabling the government to avoid a long, drawn-out fight.[68] The government typically has extraordinary bargaining power at the pre-charging stage, enabling it to extract fines and sanctions similar to those from a criminal conviction[69] without the risk and cost of a trial.[70] Yet others suggest that the results obtainable via N/DPAs may be preferable to the remedies available in the court system because prosecutors and companies can work together in innovative and adjustable ways to address existing problems and improve governance appropriately for the respective corporation.[71]

A. Historical Background

Since the inception of N/DPAs in 1914,[72] their use in the corporate context has increased exponentially since the 1990s.[73] A core development for the increasing use of N/DPAs in the corporate context was the introduction of Chapter Eight, Sentencing of Organizations, in to the Federal Sentencing Guidelines Manual in 1991. The DOJ incorporated Chapter 8 into the Federal Sentencing Guidelines Manual as a response to the increase in corporate criminal prosecutions in the 1990s.[74] Chapter Eight was designed to ensure that the sanctions imposed upon organizations and their agents provide adequate deterrence and

65. *See id.* ("The avoidance of severe reputational losses may be significant enough to motivate firms and executives to settle.").

66. *See, e.g.*, Garrett, *supra* note 24, at 855 ("prosecuting large organizations far more often").

67. Uhlmann, *supra* note 12, at 1324 (noting the usage of DPAs and DPAs: "It is a simple cost-benefit analysis. The benefits are equal or greater than prosecution, and the costs are less.").

68. *See, e.g.*, Khanna & Dickinson, *supra* note 12, at 1721 ("[C]orporations normally have access to greater resources than the average criminal defendant, which increases the likelihood of a vigorous defense and potential appeals.").

69. Christie & Hanna, *supra* note 15, at 1043 (DPAs "permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.").

70. Khanna & Dickinson, *supra* note 12, at 1721 ("Thus, from the government's perspective, it might be better to obtain something certain through a settlement rather than to take its chances with a lengthy, complex, and expensive trial.").

71. *See, e.g.*, Christie & Hanna, *supra* note 15, at 1043 ("[Those terms] permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.").

72. *See* James A. Inciardi et al., Drug Control and the Courts 25 (1996) (quoting Chicago Judge Jacob Braude referring to the psychological impact of prosecution and conviction on juvenile offenders); Gennaro F. Vito & Deborah G. Wilson, The American Juvenile Justice System 22 (1985); Joel Cohen & Jonathan Liebman, *Pretrial Diversion: An Alternative to Full Federal Prosecution?*, N.Y. L.J., Apr. 6, 1994, at 1; Greenblum, *supra* note 5, at 1866.

73. O'Reilly et al., *supra* note 42, at 132 (noting an average of 2 N/DPAs a year from 1992 to 2002, an average of 11 per year from 2003 to 2006, and about 28 per year from 2006 to 2008).

74. Markoff, *supra* note 18, at 803 (noting that corporate prosecutions were a "minor part of American law" until the 1990s. "[T]he DOJ began to ramp up corporate prosecutions during the 1990s.").

incentives for organizations to maintain internal mechanisms for detecting, reporting, and preventing criminal conduct.[75]

The first corporate NPA was recorded in 1991.[76] It was executed between the DOJ and Salomon Brothers, settling allegations of false and unauthorized bids.[77] The settlement included the DOJ's Civil and Antitrust Divisions, the U.S. Securities and Exchange Commission ("SEC"), and the U.S. Attorney for the Southern District of New York. The U.S. Attorney did not seek criminal charges as a result of Salomon's cooperation with the investigation.[78]

Only three years later, in 1994, the first corporate DPA was executed between Prudential Securities[79] and the U.S. Attorney's office for the Southern District of New York.[80] The U.S. Attorney had charged Prudential Securities with securities fraud for misleading investors in the sales of limited partnerships[81] but agreed to enter into the DPA partially because the DPA ensured similar sanctions as a criminal conviction and additionally avoided collateral damage resulting from a prosecution, such as harm to employees and investors.[82] The DOJ cited Prudential's willingness to cooperate,[83] acknowledgement of wrongdoing, the improved compliance program, installation of new management, and restitution payments to investors as the primary reasons to enter into the DPA.[84] The DPA required

75. U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (1991) [hereinafter GUIDELINES MANUAL 1991], *available at* http://goo.gl/b3Rz4x; *see* Ball & Boila, *supra* note 59 (discussing the history of corporate criminal liability and the changes to DOJ guidance from 1991–2008). Chapter Eight outlined factors for determining corporate culpability: (1) steps taken by organization prior to the offense to prevent and detect criminal conduct, (2) the level and extent of involvement in or tolerance of the offense by certain personnel, and (3) the organization's actions after an offense has been committed. GUIDELINES MANUAL 1991, *supra*, at 347. It outlined four factors that call for an increased punishment: (1) involvement in or tolerance of criminal activity, (2) prior history, (3) violation of an order, and (4) obstruction of justice. *Id.* at 362–64 (§ 8C2.5 Culpability Score). Mitigating factors included: (1) effective program to prevent and detect violations of law and (2) self-reporting, cooperation, and acceptance of responsibility. *Id.* at 364–65.

76. Rachel Delaney, Comment, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 93 MARQ. L. REV. 875, 878 (2009) ("The first unofficial DPA occurred in 1992 and grew out of the government's investigation of Salomon Brothers for a securities fraud violation."); Greenblum, *supra* note 5, at 1872; *see also* Spivack & Raman, *supra* note 33, at 163–64.

77. Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), *available at* http://goo.gl/XU9ZJH.

78. Richard Breeden, Chairman, U.S. Sec. & Exch. Comm'n, Statement at Press Conference Announcing Filing of Complaint Against Salomon Brothers (May 20, 1992).

79. Greenblum, *supra* note 5, at 1873.

80. Delaney, *supra* note 76, at 879 ("[T]he Prudential agreement was viewed as rare and unusual because it was one of the first of its kind."); Orland, *supra* note 8, at 59 ("Prudential Securities is the nation's first comprehensive formal federal corporate deferred prosecution agreement.").

81. *See* United States Attorney's Office, Announcement of Filing of Criminal Complaint Against Prudential Securities Incorporated (Oct. 27, 1994); *see also* Sharon Walsh, *At Prudential, The Fraud Case that Won't Die; Investigation of Partnership Sales Continue Despite Huge Settlement,* WASH. POST, Feb. 13, 1994, at H1.

82. Letter from Mary Jo White, U.S. Attorney for the Southern Dist. of N.Y., to Scott W. Muller & Carey R. Dunne, Prudential Counsel (Oct. 27, 1994) [hereinafter White Letter], *available at* http://goo.gl/EqxdJx.

83. Deferred Prosecution Agreement, United States v. Prudential Securities, Inc., No. 1:94-mj-02189 (S.D.N.Y. Oct. 27, 1994) [hereinafter Prudential DPA], *available at* http://goo.gl/k0OE36.

84. Warin & Schwartz, *supra* note 14, at 126; White Letter, *supra* note 82.

the appointment of an outside director to serve as an ombudsman in charge of complaints about ethics and compliance and the director's submission of quarterly compliance reports to the DOJ and Prudential's board.[85]

The introduction of N/DPAs in Salomon and Prudential and their effect on corporate criminal prosecutions created a lasting controversy and prompted the government to publish a number of memoranda to aid U.S. Attorneys in determining whether to charge corporations or use alternative means for achieving the DOJ's goals. On June 16, 1999, Deputy Attorney General Eric Holder distributed a memorandum titled Bringing Criminal Charges Against Corporations.[86] The guidance in the memorandum's cooperation section was controversial[87] because, among other suggestions, it encouraged prosecutors to consider corporations' waiver of attorney-client and work-product privileges as factors in determining willingness to cooperate.[88] However, the memorandum explicitly noted that the factors were meant as optional guidelines.[89]

Following the Holder Memorandum, the SEC released a report in 2001 (the "Seaboard Report") declining to pursue an enforcement action against Seaboard, Inc. for wrongdoing committed by its subsidiary's controller.[90] The SEC noted various favorable actions taken by the company, including refusal to invoke attorney-client privilege or work-product privilege, firing the controller and two supervisors, reporting the need to restate financial statements, undertaking an internal investigation, providing the SEC with the company's initial findings, as well as overall good cooperation with the SEC.[91] In considering the pursuit of an enforcement action, the SEC is evaluating various factors with an emphasis on the company's cooperation with the government, swiftness of the action taken by the company, and the installation of a compliance program.[92]

85. Prudential DPA, *supra* note 83, at 3 (the agreement required a $330 million payment to the SEC for an investor fund).

86. Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memo]. The memo lists additional factors for prosecutors to consider when deciding to charge a corporation: (1) the nature and seriousness of the crime, (2) the pervasiveness of wrongdoing within the corporation, (3) the corporation's past history of similar conduct, (4) cooperation and voluntary disclosure, (5) compliance programs established by corporate management to prevent and detect misconduct, (6) restitution and remediation, (7) collateral consequences, and (8) appropriateness of non-criminal alternatives to prosecution. *Id.*

87. *See* Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. Tex. L. Rev. 147, 147 (2003); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 147 (2000).

88. Holder Memo, *supra* note 86, § VI.A.

89. *Id.* at intro. ("These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded to specific factors in reaching their decision.").

90. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship and Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, 76 SEC Docket 220 (Oct. 23, 2001) [hereinafter Seaboard Report].

91. *Id.* at 1.

92. *Id.* at 2; *see*. Wray & Hur, *supra* note 26, at 1109 ("[T]he Report essentially identifies four broad measures of a company's cooperation: (1) self-policing prior to discovery of misconduct (i.e., the existence of effective compliance procedures); (2) thorough review and self-reporting of misconduct upon discovery to regulators; (3) remediation (including dismissing or appropriately disciplining

The DOJ's Thompson Memorandum updated the factors to be considered by the DOJ when charging a corporation[93] and largely mirrored the SEC's Seaboard Report.[94] The Thompson Memorandum added another element to the factors considered in the Holder Memorandum: the adequacy of the prosecution of individuals responsible for the corporation's malfeasance, but it contained no guidance on the additional factor.[95] The most significant change in the Thompson Memorandum was its "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" and the efficacy of its corporate governance mechanisms."[96] These mandates in the Thompson Memorandum were intended to address concerns about corporations' artificial cooperation and fake compliance programs.[97] The Thompson Memorandum did not suggest that the framework was optional,[98] making the factors integral to every prosecution of business crimes.[99]

Reacting to the Thompson Memorandum's continuing consideration of corporations' waiver of attorney-client and work-product privileges as factors in determining a corporation's willingness to cooperate, the American Bar Association ("ABA") created a Task Force on the Attorney-Client Privilege in September 2004.[100] Eventually, on May 19, 2004, the U.S. Sentencing Commission amended Chapter Eight of the U.S. Sentencing Guidelines, nullifying the requirement of waiving the attorney-client and work-product privileges for a reduction in culpability score.[101]

wrongdoers, compensating those adversely affected, and instituting internal controls and procedures to prevent recurrence); and (4) cooperation with law enforcement authorities.").

93. Thompson Memo, *supra* note 18, at intro. ("These revisions draw heavily on the combined efforts of the of the Corporate Fraud Task Force and the Attorney General's Advisory Committee to put the results of more than three years of experience with the principles into practice.").

94. Wray & Hur, *supra* note 26, at 1109 ("All of these factors are echoed in the Thompson Memo. . . .").

95. Thompson Memo, *supra* note 18, § II.A. Whereas the other eight factors each contained a paragraph titled "General Principle" which outlined the factor in more detail followed by a multiple paragraph "Comment," the new factor did not have a general principle explanation nor a commentary.

96. Thompson Memo, *supra* note 18, at intro.

97. *Id.* at intro ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. . . . The revisions also . . . ensure that [corporate governance mechanisms] are truly effective rather than mere paper programs.").

98. *Cf.* Holder Memo, *supra* note 86, at intro. ("These factors are . . . only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.").

99. *See* U.S. Attorney's Manual, Title 9: Criminal Resource Manual § 162 (2014), *available at* http://goo.gl/n8bjYX ("In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the [nine Thompson Memorandum] factors. . . ." (emphasis added)); Thompson Memo, *supra* note 18, at intro. ("[P]rosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself."); United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) ("Unlike its predecessor [the Holder Memorandum], however, the Thompson Memorandum is binding on all federal prosecutors.").

100. Am. Bar Ass'n Task Force on Attorney-Client Privilege, Report to the House of Delegates 3 (2006) [hereinafter ABA Report], *available at* http://goo.gl/fMNirm.

101. Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28994, 29021 (May 19, 2004) ("Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduc-

The DOJ only half-heartedly reacted to the concerns raised by the ABA with regard to the Thompson Memorandum. On October 21, 2005, Robert D. McCallum, Jr., Acting Deputy Attorney General, issued a memorandum with the subject Waiver of Corporate Attorney Client and Work Product Protection.[102] The McCallum Memo did not replace the Thompson Memorandum; it only supplemented it and did little, if anything, to quell the widespread use of attorney-client and work-product privilege waivers in DPAs.[103] The McCallum Memorandum referenced the Thompson Memorandum factor regarding cooperation including waiver of attorney-client and work-product protection. To attain uniformity within a district,[104] the McCallum Memorandum directed each district to follow a best practice for "establish[ing] a written waiver review process."[105]

Eventually, in 2006, political pressure against both the Thompson and McCallum Memos increased substantially.[106] Both the Senate and the House held hearings on the issue of waiving attorney-client privilege.[107] During the hearings, the Coalition to Preserve the Attorney Client Privilege presented survey findings showing overwhelming support for the privilege.[108] The ABA and the U.S. Chamber of Commerce also supported the cause.[109] However, the government did not amend its guidance.

Additional pressure for adjustments in DPA practices came from the judiciary. In 2005, KMPG, the auditor of Arthur Andersen, entered into a DPA with the DOJ.[110] Former employees of KMPG brought suit against the DOJ, claiming the DPA contained unconstitutional provisions specifically infringing their Fifth and Sixth Amendment rights.[111] The prosecutor for the DOJ had followed the guidance in the Thompson Memorandum, providing that paying attorney's

tion in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.").

102. Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys, Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005) [hereinafter McCallum Memo], *available at* http://goo.gl/Je76P4.

103. Keith Paul Bishop, *The McNulty Memo—Continuing the Disappointment*, 10 CHAP. L. REV. 729, 736 (2007).

104. *See* Finder & McConnell, *supra* note 41, at 29–30 ("The policy was intended to provide some flexibility and autonomy across different offices, but aimed for uniformity within each office.").

105. McCallum Memo, *supra* note 102, at 1.

106. *See* Bishop, *supra* note 103, at 737; ABA REPORT, *supra* note 100, at 3.

107. *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary*, 109th Cong. 112 (2006), *available at* http://goo.gl/RDkOnn; *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. of the Judiciary*, 109th Cong. 835 (2006), *available at* http://goo.gl/mOZujM.

108. *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 69 (2006) (Appendix C: The Decline of the Attorney-Client Privilege in the Corporate Context).

109. ABA REPORT, *supra* note 100; U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION 35-36 (2006), *available at* http://goo.gl/ReOFZG; Press Release, U.S. Chamber of Commerce, Chamber Warns of Erosion of Attorney-Client Privilege (Mar. 6, 2006), *available at* http://goo.gl/6JFElo.

110. Deferred Prosecution Agreement, United States v. KPMG, LLP, No. 05-0903 (S.D.N.Y. Aug. 29, 2005), *available at* http://goo.gl/ChPrxU.

111. United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

fees was a factor weighing against a corporation's cooperation.[112] Judge Kaplan of the Southern District of New York held in *U.S. v. Stein* that the DOJ's insistence on KPMG's discontinuance of paying for attorney's fees of its employees was a breach of those employees' Fifth and Sixth Amendment rights.[113] In contrast with the Thompson Memorandum, Judge Kaplan opined that paying attorney's fees "will not be considered in determining whether KPMG has complied with the DPA."[114]

In part capitalizing on the mounting political pressure and opposition to government DPA practices, on December 8, 2006, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act.[115] The bill was designed to preserve the attorney-client privilege and work-product protections available to corporations. Had the bill passed, it would have restricted the most controversial aspects of the Thompson Memorandum by curtailing the government's ability to consider waiver of the attorney-client privilege and work-product protections in determining whether a corporation is cooperating with the government.[116]

Four days after the introduction of Senator Specter's bill, the DOJ released new guidance, in the form of the McNulty Memorandum, which superseded the Thompson and McCallum Memoranda.[117] The McNulty Memorandum addresses the two largest public concerns: (1) waiving of attorney-client and work-product protections and (2) advancing attorney's fees.[118] The McNulty Memorandum included the same nine factors as the Thompson Memorandum, but it softened the DOJ's stance on the requirement of attorney-client and work-product privilege waivers.[119] The memorandum allowed the waiver of the protections when a "legitimate need for the privileged information" existed.[120] To determine if waiver of privileges and protections was appropriate, the memorandum contained a four-factor test, balancing the policy considerations for the protections against the law enforcement needs of the government.[121] The McNulty Memorandum also

112. Thompson Memo, *supra* note 18, at 7–8.

113. *Stein*, 435 F. Supp. 2d at 382.

114. *Id.*

115. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong.; *see* Bishop, *supra* note 103, at 737.

116. Ball & Boila, *supra* note 59, at 253–54.

117. Memorandum from Paul McNulty, Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], *available at* http://goo.gl/f6zFl0.

118. *See* Bishop, *supra* note 103, at 738.

119. McNulty Memo, *supra* note 113, at 8 ("Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. . . . Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.").

120. *Id.* at 8.

121. *Id.* at 9. The test considered: (1) the likelihood and degree to which the privileged information will benefit the government's investigation, (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver, (3) the completeness of the voluntary disclosure already provided, and (4) the collateral consequences to a corporation of a waiver. *Id.* Depending on the type of privileged information requested, prosecutors needed written authorization from either the Assistant Attorney General or the Deputy Attorney General. *Id.* at 9–10. The memo classified information into two categories. Category I information was

expanded the cooperation factor and addressed the payment of attorney's fees,[122] reiterating the language highlighted in the *Stein* case: "Prosecutors generally should not take into account whether a corporation is advancing attorney's fees to employees."[123] The memorandum did not silence the critics of the DOJ's charging policies.[124]

Most commentators and the bar were dissatisfied.[125] The McNulty Memorandum still provided ample opportunity for prosecutors to use the corporate defendant's lack of willingness to waive attorney-client privilege in the cooperation determination[126] and the attorney's fees provision had similar shortcomings. Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2008.[127] The revised version of the bill included most of the provisions from the 2006 bill.[128] However, it expanded its original scope to cover all government agencies and enforcement decisions as well as charging decisions.[129]

Finally, with the release of the Filip Memorandum on August 28, 2008, the DOJ provided its latest installment of guidance for charging corporations.[130] This guidance is unique in that the principles were codified into the United States Attorney's Manual.[131] The Filip Memorandum recites the same nine

"purely factual information." It could include "copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports." *Id.* at 9. Requests for this information required written authorization from U.S. Attorney and a consultation with the Assistant Attorney General. *Id.* If Category I information was not sufficient, Category II information could be requested. Category II information included "attorney-client communications or non-factual attorney work product," for example, "legal advice given to the corporation before, during, and after the underlying misconduct occurred." *Id.* at 10. Category II information required written authorization from the Deputy Attorney General. *Id.*

122. *Id.* at 7–12 (cooperation); Bishop, *supra* note 103, at 738 (attorney's fees).

123. McNulty Memo, *supra* note 118, at 11.

124. *See* Bishop, *supra* note 103, at 737–43 ("For example, American Bar Association President Karen Mathis stated that "[t]he Justice Department's new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.").

125. *See, e.g.*, *id.*; *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary*, 110th Cong. 24 (2007), *available at* http://goo.gl/wdMGf; *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memo: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 280 (2007), *available at* http://goo.gl/tFUiTd.

126. McNulty Memo, *supra* note 117, at 9–10. Failing to waive protections on factual information (Category I) could still be counted against the corporation's cooperation. The memo only protected refusals to waive protection on Category II information from being considered against the corporation's cooperation factor.

127. Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong.; Ball & Boila, *supra* note 59, at 257.

128. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong.; *see* Ball & Boila, *supra* note 59, at 257–58.

129. Attorney-Client Privilege Protection Act of 2008 § 3(b).

130. Memorandum from Mark Filip, Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memo], *available at* http://goo.gl/lNThj; First, *supra* note 16, at 56–57; *cf*. Uhlmann, *supra* note 12, at 1330 ("Justice Department went too far when it amended the Principles of Federal Prosecution for Business Organizations in 2008.").

131. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-28.710 (2008), *available at* http://goo.gl/Qcj8N5. The Filip guidance appears to entail a contradiction. The opening paragraph

factors seen in the Thompson Memorandum[132] but adds two important aspects.[133] It replaces the McNulty attorney-client waiver rule (including two categories of information) with a single category rule and it changes the definition of cooperation.[134] The memorandum defines cooperation as "disclosure of the relevant *facts* concerning such misconduct"[135] and recognizes that only the individuals acting on behalf of a corporation can know facts. The Filip Memorandum acknowledges that organizations that are made aware of misconduct typically conduct an internal investigation, which may include "a process that may confer attorney-client privilege or attorney work product protection."[136] Moreover, the Filip Memorandum forbids prosecutors from considering payment of attorney's fees for employees as a factor in cooperation.[137]

B. Legitimacy Concerns

Several core characteristics often associated with N/DPAs have raised concerns about their legitimacy in the literature. Critics have argued that reformation of corporations is outside the realm of the prosecutor's office,[138] citing the creation of Sentencing Guidelines as opening the floodgate that allowed prosecutors to reform corporations through prosecution.[139] Many are concerned about prosecutorial abuse[140] and unequal bargaining power.[141] Privilege waivers especially

opines the principles "will be binding on all federal prosecutors within the Department of Justice." Filip Memo, *supra* note 130, at intro. On the other hand, the last paragraph concludes the principles "provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in a matter civil or criminal." Filip Memo, *supra* note 130, at 21; *see* Ball & Boila, *supra* note 59, at 259 ("Thus, the Guidelines are not truly binding.").

132. Filip Memo, *supra* note 130, at 3–4; *cf.* Thompson Memo, *supra* note 18, at 3–4.

133. Filip Memo, *supra* note 130, at 3–4; *see* Susan B. Heyman, *Bottoms-Up: An Alternative Approach for Investigating Corporate Malfeasance*, 37 Am. J. Crim. L. 163, 177–78 (2010).

134. Filip Memo, *supra* note 130, at 8 ("waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative").

135. *Id.* at 9.

136. Filip Memo, *supra* note 130, at 10; *see* Heyman, *supra* note 133, at 178 ("[T]his focus may prove to be a distinction without a difference."); *see also* Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J., Sept. 11, 2008, at 4. ("Ironically, the Filip Memo may actually lessen the procedural protections that the McNulty Memo offered . . . [because] no approvals are required for a prosecutor to seek factual material even where its provision may require a privilege waiver.").

137. Filip Memo, *supra* note 130, at 13.

138. *See, e.g.*, Baker, *supra* note 38, at 312–13 ("[F]ederal criminal law does not address corporate reform. . . . "Congress's delegation of power in criminal matters . . . has allowed executive and independent agencies to implement policies that Congress might never approve if it actually voted on them.").

139. *See, e.g.*, Baker, *supra* note 38, at 313 ("Most importantly, the Supreme Court's decision in *Mistretta v. United States*, rejecting separation-of-powers challenges to Congress's creation of the Sentencing Commission within the judicial branch and the conferral on it of legislative authority over sentencing, made it possible to reform 'corporate culture' through actual and threatened prosecution.").

140. *See, e.g.*, Bharara, *supra* note 26, at 113 ("Only a narrower, better-fitting corporate liability rule will achieve preferred levels of discretion and respect for the rights and privileges of individual defendants.").

141. *See* Paulsen, *supra* note 13, at 1437; Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements,* 19 S. Cal. Interdisc. L.J. 163, 163–64, 180 (2009) ("It is clear that the government

have raised concerns over constitutionality and abuse of prosecutorial discretion.[142] Critics also note that N/DPAs may not be subject to the same contract defenses as plea agreements[143] and that they may create new negative externalities[144] and undermine the rule of law.[145] Others see reformation of corporations via N/DPAs as a second choice preference to punishing and deterring bad behavior[146] and suggest the leniency created by N/DPAs may result in suboptimal policy outcomes.[147]

Despite the legitimacy concerns, a majority of the literature acknowledges that N/DPAs serve an important purpose[148] but recognizes that current N/DPA practices require reform as well as additional legislation[149] and judicial

takes advantage of an entity's economic necessity to stay in business. It is indeed a Hobson's choice between indictment, which amounts to corporate death, and an inequitable agreement that at least allows the business to subsist."); Zierdt & Podgor, *supra* note 1, at 3 (worrying about prosecutorial abuse through privilege waivers, breach provisions, and attorney's fees provisions).

142. *See* Bohrer & Trencher, *supra* note 29, at 1489–92 (raising Fifth Amendment concerns for individuals when DPAs include a requirement that a corporation make employees available for interviews); Griffin, *supra* note 17, at 312–13 (expressing concern about DPAs as a "bypass around corporate employees' Fifth Amendment privilege against self-incrimination"); Griffin, *supra* note 17, at 381–82 ("Deputizing internal investigators, compelling privilege waivers, and constraining individual defendants' legal resources no doubt streamlines investigations. But '[i]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.'" (citing Escobedo v. Illinois, 378 U.S. 478, 490 (1964))); *contra* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 610–11 (2004) (arguing the language in the Thompson Memo focuses on discovering facts not legal advice, that waiving privilege is not a prerequisite for a DPA, and the waiver does not infringe on an individual's Fifth Amendment rights).

143. *See, e.g.*, Zierdt & Podgor, *supra* note 1, at 3 (highlighting duress and unconscionability as unavailable contract defences in DPAs because DPAs do not afford judicial oversight).

144. *See* Joseph G. Block & David L. Feinberg, *Look Before You Leap—DPAS, NPAS, and the Environmental Criminal Case*, 9 ENVTL. ENFORCEMENT & CRIMES COMM. NEWSL. (Am. Bar Ass'n, Chicago, IL), Feb. 2008, at 9 ("The great discretion reserved to prosecutors, ample precedent of onerous provisions, and real possibility of substantial collateral consequences can combine to make DPA/NPAs practically as harmful as a guilty plea or a conviction after trial."); Bohrer & Trencher, *supra* note 29 (investigating the collateral consequences to the various stakeholders in DPAs); Greenblum, *supra* note 5, at 1881–82 (highlighting issues of waiving attorney-client privilege, deferring solely to the prosecutor for determining breach, and the imposition of unrelated provisions").

145. *See* Uhlmann, *supra* note 12, at 1302 (arguing that use of DPAs "erodes corporate criminal liability and undermines the rule of law. . . . [D]eferred prosecution and non-prosecution agreements limit the punitive and deterrent value of the government's law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution.").

146. *See, e.g.*, Baker, *supra* note 38, at 312–13 ("Nevertheless, it is imperative to question the authority of the federal government—through the U.S. Sentencing Commission, the Justice Department, and other federal agencies, individually and collectively—to reform corporations.").

147. *See, e.g.*, Markoff, *supra* note 18, at 810.

148. *See, e.g.*, Christie & Hanna, *supra* note 15, at 1043–44 ("The Bristol-Myers' deferred prosecution agreement, we believe, achieves the goals of general and specific deterrence, full disclosure to the investing public, carefully targeted reform of a corrupted corporate culture, and restitution to victim shareholders, while minimizing collateral consequences on tens of thousands of Bristol-Myers' law-abiding employees and current shareholders.").

149. *See* Ball & Boila, *supra* note 59, at 259–61 (citing that the United States Sentencing Guidelines do not carry the force of law, can easily be changed, and do not cover civil issues or other government agencies). Delaney, *supra* note 76, at 876 ("Legislation can allay the risks inherent in today's deferred prosecution system, such as punishments that do not fit the crime, pressure to waive attorney-client privilege, non-payment of employee legal fees, and conflicts of interest in the appointment of a federal monitor to oversee implementation of the agreement."); Gallagher, *supra* note 33, at 473 ("[T]he

oversight.[150] Consistency of DOJ practices, including following its own guidance when entering N/DPAs, is of particular concern.[151] Commentators have called for more governmental guidance on N/DPAs.[152] While the U.S. Sentencing Commission created Organizational Guidelines for sentencing in 1991, the proliferation of N/DPAs may have rendered these guidelines less relevant.[153]

Attorney-Client Privilege Protection Act and the Accountability in Deferred Prosecution Act are necessary to protect corporations and individuals from prosecutorial overreaching and ensure aggressive and impartial prosecution.").

150. *See* Coffee, *supra* note 29; Copland, *supra* note 24, at 13 ("[J]udges should insist that prosecutors make out a minimal factual showing of evidence and should hold hearings to determine the benefits of an agreement's proposed terms and their potential costs and risks. Judges should also play an active role in the selection of corporate monitors, if any. Finally, judges should tell prosecutors that any allegation of a breach of a DPA must be confirmed by a judicial finding before any consequences may ensue."); Greenblum, *supra* note 5, at 1896 ("Judicial involvement in the corporate deferral process can curb the prosecutorial power that creates these new negative externalities, and it can reshape corporate deferred prosecution into a more effective and accountable mechanism for reforming delinquent corporations."); Robert J. Ridge & Mackenzie A. Baird, *The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements*, 33 U. DAYTON L. REV. 187, 202–03 (2008) ("Finally, judicial oversight is needed to provide a backstop against abuse of prosecutorial discretion."); Senko, *supra* note 141, at 163–64; F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 128 (2007) ("DOJ should surrender to the courts at the pre-indictment stage the determination of whether a corporation has materially breached the terms of a DPA."); Zierdt & Podgor, *supra* note 1, at 3 (stating the lack of judicial oversight creates DPAs "without considering theories of duress and unconscionability").

151. *See, e.g.*, Finder & McConnell, *supra* note 41, at 34–35 ("To reduce the number of adverse provisions of a pre-trial agreement after fully cooperating and promising future cooperation, companies may request that the pre-trial agreement not include provisions waiving privilege, changes in the company's business, or independent monitors. To this end, companies may argue that the Organizational Guidelines, which provided the legal groundwork for the Thompson Memo, will soon be revised and the 2004 waiver language removed. Accordingly, the DOJ should not request a privilege waiver as a condition of cooperation. As Judge Kaplan noted, the DOJ should be comfortable enough with its case and the evidence it has of criminal activity that it does not need to destroy this important protection. The collateral consequences of such a waiver should be identified and quantified for the U.S. Attorney's Office.").

152. Early critiques of N/DPAs in 1997 suggested the DOJ create specialized N/DPA guidelines. *See, e.g.*, Warin & Schwartz, *supra* note 14, at 133 (recommending five factors for deciding whether to allow deferral and seven elements that should be included in each DPA). The DOJ did not comply and the call for better guidelines was reiterated eleven years later. *See, e.g.*, Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 579 (2008) ("On one hand, we have encouraged corporations, who are also private employers, to adopt a police ethic that inevitably includes deception and secrecy. Deceptive policing, in turn, can create distrust, disloyalty, and unpredictability within the firm. At the same time, however, we have advised these same companies that they must adopt internal governance techniques that emphasize transparency and promote a sense of trust and well-being among their various stakeholders, and particularly in their employees."); Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 946–47 (2008) ("Firms benefit from clear written policies regarding cooperation during investigations. . . . DOJ Guidelines that reward provision of employer warnings would add useful incentives to clarify murky interview dynamics."); Spivack & Raman, *supra* note 33, at 161–62 ("DOJ leadership should specify the circumstances under which prosecutors can seek corporate pretrial diversion, with particular attention paid to the complex dynamics linking entity liability to individual liability in the criminal context.").

153. Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 312 (2007) ("Few companies are willing to risk an indictment, much less a criminal trial, if an alternative exists. And alternatives do exist: deferred and non-prosecution agreements offer corporations the chance to avoid an indictment altogether. That new reality means that the Organizational Guidelines are largely irrelevant.").

Many commentators recommend specific adjustments to current N/DPA practices applied by the DOJ. Some express a desire for greater uniformity in N/DPAs[154] as a method for improving oversight and propose a formal approval process for N/DPAs, comparable to the McNulty process for privilege waivers.[155] The DOJ's top-down approach to N/DPAs, focusing on executive pressure to induce employees' cooperation in return for leniency, could be improved with a bottom-up approach which would provide incentives for individuals to cooperate with the DOJ.[156] The punishment of corporate misconduct via N/DPAs ex post could also be decreased if the DOJ proactively focused on educating corporations about compliance ex ante.[157] Others suggest recasting the role of the independent monitor and instituting integrity-based compliance programs.[158] To determine whether N/DPA reforms are achieved and whether the benefits exceed the cost, some call for increased transparency in the process, from negotiation through the end of a monitorship.[159] Finally, in light of the increasing focus on rehabilitation and compliance, some recommend dissolving corporate criminal liability altogether, making N/DPAs obsolete.[160] The literature is particularly concerned about a broad application of N/DPAs, with many arguing that N/DPAs should only be used in very limited circumstances,[161] and independent

154. *See* Ridge & Baird, *supra* note 150, at 202–03 ("An analysis of recent investigations indicates that corporations satisfying identical cooperation factors have received drastically different treatment, attributable only to the jurisdiction in which the investigations took place. Clearly, the lack of uniformity that the Principles were designed to eliminate persists in the era of deferred prosecutions."); Warin & Boutros, *supra* note 150, at 126 (encouraging the DOJ to provide detailed guidance for "whether a case should be resolved through the vehicle of a guilty plea, a DPA, or an NPA. . . . [and] guidance about appropriate terms to be included in DPAs").

155. *See* Paulsen, *supra* note 13, at 1437.

156. *See* Heyman, *supra* note 133, at 209 ("Corporate officials who orchestrate, tolerate, and often reward the wrongdoing should be a significant focus of the government's efforts [bottom up], but current practices focus on the individual employees who participate in the unlawful acts [top-down]."

157. *See* Ellen S. Podgor, *Educating Compliance*, 46 AM. CRIM. L. REV. 1523, 1533–34 (2009) ("[I]t is important to make certain that individuals and corporate entities work together to assure compliance with the law. This is best effectuated by having the government provide guidance to both the corporation and the individual. It offers a positive approach to achieving compliance as opposed to waiting for the criminal act and then trying to achieve this same result with rehabilitation and deterrence.").

158. *See, e.g.*, Hess & Ford, *supra* note 27, at 346 (emphasizing that the monitor should have "facilitating and problem-solving roles" and extolling the virtues of an integrity-based compliance system).

159. *See* Boozang & Handler-Hutchinson, *supra* note 45, at 99 (encouraging the creation of additional metrics and increased transparency, so scholars can perform an empirical cost-benefit analysis of the structural reforms sought by pre-trial diversion options).

160. *See, e.g.*, Meeks, *supra* note 29, at 124 ("By dissolving corporate entity criminal liability and instead exclusively dealing with corporate entity misfeasors in the civil system, several of the most pressing problems created by the conflict between these policies and the practicalities of law enforcement would be solved while furthering, and making more accountable, the processes of corporate entity deterrence, prevention, rehabilitation and punishment."); Senko, *supra* note 141, at 163–64 ("It also posits that eliminating the concept of respondeat superior from the criminal justice realm is sensible and necessary if the foundations of criminal justice are not to be compromised.").

161. *See, e.g.*, Arlen & Kahan, *supra* note 27, at 6 (asserting "that only policing agency costs can plausibly justify DPA mandates"); Block & Feinberg, *supra* note 144, at 9 ("In sum, the agreements should likely be sought only in very limited circumstances: when a declination is unreachable, when a civil or administrative resolution cannot suffice, when the consequences of indictment are ruinous.

monitor provisions specifically should only be applied in a narrow number of cases.[162]

III. The Impact of N/DPAs on Corporate Governance

Anecdotal evidence suggests that N/DPAs exert influence and are changing corporate governance in the United States.[163] Corporate governance issues were historically under the purview of ownership and management, but are included in N/DPAs to enable the DOJ to curtail corporate misconduct.[164] Through the increasing use of N/DPAs, federal prosecutors are incrementally expanding their traditional role and have started reshaping corporate America by changing the governance of leading public corporations and entire industries. The Enron scandal is considered by many as the key event precipitating government assertion of power to improve corporate governance.[165]

A key issue pertaining to the impact of N/DPAs in corporate governance is the role of the prosecutors in the expansion of corporate governance via N/DPAs. Those favoring the prosecutor's involvement suggest that prosecutors can promote an ethical corporate culture through enhanced compliance measures in N/DPAs[166] and that the DOJ's expansionary tendencies in N/DPAs are a mere

In those limited circumstances, one might attempt to convince the environmental prosecutor that a DPA/NPA will best serve the interests of justice."); Markoff, *supra* note 18, at 834–36 (stating DPAs are only needed in rare instances when a conviction will result in a business failure, as predicted by the Core Business Model); Uhlmann, *supra* note 12, at 1301–02 ("[T]he government does not need the 'middle ground' of deferred prosecution and non-prosecution agreements, except for less serious violations where there are no civil or administrative remedies or perhaps in the rare situation where prosecutors can demonstrate that a criminal conviction would cause unacceptable harm to innocent third parties.").

162. *See, e.g.*, Khanna & Dickinson, *supra* note 12, at 1714–15.

163. *See, e.g.*, Bohrer & Trencher, *supra* note 29, at 1486 ("DPAs have also taken on a structural component, often obligating corporations to undertake significant corporate governance reforms such as the addition of 'independent' directors, an internal monitor or an ethics officer."); Coffee, *supra* note 29 (explaining by 2005 deferred prosecution agreements "intruded deeply into corporate governance"); Garrett, *supra* note 152, at 936 ("Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined."); Griffin, *supra* note 17, at 324 ("DPAs thus involve prosecutors in 'corporate-wide behavior modification,' prescribing what is good corporate governance rather than just prohibiting wrongful conduct."); Meeks, *supra* note 29, at 100 ("DPAs often mandate that a corporation adopt institutional reforms and best practice corporate governance, the implementation of which is overseen by the DOJ or a DOJ-appointed monitor."); Orland, *supra* note 8, at 74 ("Requirements that the corporation change corporate governance organization and responsibility appear with increasing frequency in both DPAs and NPAs.").

164. Bohrer & Trencher, *supra* note 29, at 1500.

165. *See, e.g.*, Boozang & Handler-Hutchinson, *supra* note 45, at 89 ("It has become a truism to cite Enron as the new millennium's watershed impetus for government assertion of power to improve corporate governance."); Garrett, *supra* note 41, at 1797–98 (The agreements can be broad and intrusive. They reshape corporate governance and often require firms to hire independent monitors with sweeping powers to implement compliance programs and access documents.").

166. *See, e.g.*, McConnell et al., *supra* note 31, at 584–86 (touting the benefits of an enhanced compliance program, stating that "[c]ompanies with reputations for ethical business practices and good corporate governance tend to have higher stock prices and more satisfied employees. In these and many other regards, a company's decision to act legally and ethically can serve as a catalyst for success.").

extension of compliance.[167] The Thompson Memorandum explicitly mentions improvement of corporate governance as a focus of federal prosecutors in the charging decision.[168] The increased role of "independent private sector oversight" may help address the increased complexity of corporate crime and dwindling public funds.[169] Because historically corporate governance fell under state law,[170] some scholars question the DOJ's authority to expand and police corporate governance without a proper mandate.[171] Others opine that prosecutors may be uniquely qualified to institute corporate governance changes[172] and cite prosecutors' experience, education, and ability to fill a void left by the system.[173]

The literature's evaluations of issues pertaining to N/DPAs' effect on corporate governance are based on anecdotal evidence, case studies, and conjecture. However, given the large number of N/DPAs, the real trends and the real impact of N/DPAs are quantifiable and measurable, giving real guidance to policy makers. Some of the key issues that are quantifiable include whether the N/DPAs change how the board of directors operates or interacts, whether the N/DPAs infringe on board-level decisions about senior management, and whether N/DPAs create additional reporting requirements.

To demonstrate the evolution of N/DPAs and their impact on corporate governance, we evaluate specific corporate governance changes that are required in N/DPAs. More specifically, we identify the following general categories of N/DPA

167. *See. e.g.*, Hechler Baer, *supra* note 32, at 951–52 ("[C]orporate compliance has evolved 'into a universal corporate governance activity.'").

168. Thompson Memo, *supra* note 18, at 10 ("In evaluating compliance programs, prosecutors may consider whether the corporate has established corporate governance mechanisms that can effectively detect and prevent misconduct"); Gallagher, *supra* note 33, at 470 ("By emphasizing cooperation and reform, prosecutors commandeer internal investigations and establish their own corporate governance."); Meitl, *supra* note 2, at 12–13 ("DPAs then can be seen as an invitation for prosecutors to become an active participant in the corporate governance of a corporation."); Spivack & Raman, *supra* note 33, at 161 ("By focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity's criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America. They have become the New Regulators.").

169. O'Neil & Kennedy, *supra* note 34, at 385 ("As fiscal pressures continue to mount on federal, state and local agencies in the United States and sovereign entities in other nations, enforcement officials will increasingly turn to independent private sector oversight as a means of ensuring that corporate transgressors are rehabilitated and become compliant and responsible citizens in commerce.").

170. Baker, *supra* note 38, at 323.

171. *See., e.g.*, Arlen & Kahan, *supra* note 27, at 41 ("[Prosecutors] do not have expertise in assessing the optimal system of corporate governance and agency costs generally."); Baker, *supra* note 38, at 323 ("[T]he Sentencing Commission has, without clear statutory authority, abrogated the power to regulate corporate governance."); Hess & Ford, *supra* note 27, at 310–11 ("Prosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of large-scale, ongoing interventions into corporations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies.").

172. See, e.g., *id.* ("Some question the competency of prosecutors to engage in such a foreign field but as this Article has shown, they are in fact qualified to make such decisions. The combination of the education, experience, support staff, and ability to use outside advisors creates a solid framework for the decision-making. As well, the decisions that confront prosecutors are not as foreign as one might guess after closer analysis. In the end, without prosecutorial involvement, there may be a dearth of oversight and enforcement that seems to be increasingly needed.").

173. *See, e.g.*, *supra* note 32.

driven governance changes: (1) Business Changes, (2) Board Changes, (3) Senior Management, (4) Monitoring, (5) Cooperation, (6) Compliance Program, and (7) Waiver of Rights, supplemented by a more in-depth analysis of the respective subcategories of governance changes.

IV. Data Collection and Coding

To investigate the extent of corporate governance changes that can be traced back to executed N/DPAs in the period from 1993 to 2013, we obtained all publicly available N/DPAs and created a database containing basic parameters as a foundation for coding N/DPAs' corporate governance implications. We compiled public N/DPAs from five independent sources. Using NVIVO software, we coded all publicly available N/DPAs by uploading PDF versions obtained from the five sources into the software. NVIVO allowed us to highlight the wording in each N/DPA and assign the highlighted section to a governance subcategory

Initially, we chose a set of keywords to code into general governance categories. After coding the first thirty agreements, we further refined the general governance categories, recoded the initial thirty agreements, and then continued with the set of keywords through the entire 271 agreements. We coded provisions into 215 different general governance categories and governance subcategories. The software program allowed us to bring up the specific categories and see all of the phrases from all of the N/DPAs in one document. This function allowed us to further refine the coding pertaining to respective categories. For example, "board changes" was a single general category at first. After working through about 30 agreements, we created 16 subcategories under "board changes." These subcategories identified the types of board changes, such as "independent director," "committees," and "reporting" provisions. Upon completion of the coding, we translated the categories into an Excel coding sheet. This sheet used binary code for the 215 general categories and subcategories as each pertained to the 271 N/DPAs. The coding sheet is available upon request.

V. Results

A. NDPA Proliferation

Figure 1 shows the number of publicly available N/DPAs executed from 1993 through 2013. Particularly noticeable are the proliferation of N/DPAs after 2002 and a decrease in the number of executed N/DPAs during the financial crisis of 2007–2009. The proliferation of N/DPAs after 2002 can be explained by a number of factors, including the collapse of Enron, the dismantling of Arthur Andersen, the establishment of the Corporate Fraud Task Force, and the Thompson Memorandum.[174]

174. *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095 (2006); *see also* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 St. Louis U. L.J. 1, 14–22 (2006); McConnell et al., *supra* note 31, at 563 ("After

Figure 1:
N/DPAs Executed from 1993–2013

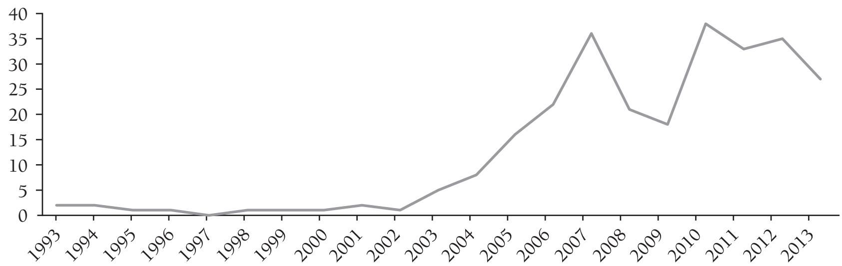
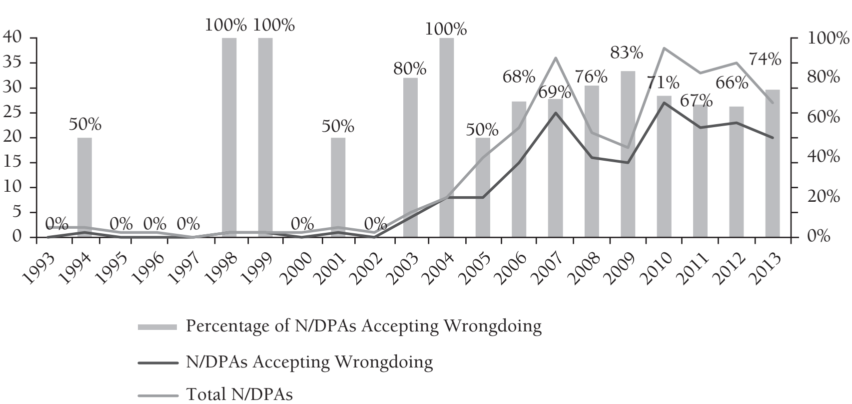


Figure 2 shows the correlation between the total number of N/DPAs executed from 1993–2013 and the number of N/DPAs that make reference to some form of acceptance of responsibility for corporate wrongdoing. We found that 69.00 percent of the N/DPAs in the sample contained provisions that related to some form of acceptance of responsibility for corporate wrongdoing.

For purposes of Figure 2, the category "Accepts Responsibility" was coded for all N/DPAs in the sample containing a provision making references to the entity accepting responsibility for past wrongful acts. Typical examples of such acceptance of responsibility include the 2008 DPA between the United States and Volvo Construction Equipment AB:

Figure 2:
N/DPA Provisions Requiring Acceptance of Responsibility for Corporate Wrongdoing 1993–2013



> Acceptance of Responsibility: AB Volvo admits, accepts, and acknowledges that it is responsible for the acts of its officers, employees, agents and its wholly-owned subsidiaries, Renault Trucks and VCE, as set forth in the Statement of Facts attached to the Agreement as Appendix A.[175]

Another prominent example for this category is the 2010 DPA between the United States and ABN AMRO Bank N.V., which provided in the context of accepting responsibility: "Acceptance of Responsibility: ABN accepts and acknowledges responsibility for its conduct and that of its employees as set forth in the Factual Statement attached hereto as Exhibit A and incorporated herein by reference."[176]

B. Preemptive Remedial Measures

The coded category "Preemptive Remedial Measures" in the sample of this study describes the variety of measures corporations institute to avoid corporate criminal indictment or the execution of an N/DPA. Such preemptive remedial measure may include any of the following actions taken before the execution of the N/DPA: (1) improved compliance measures, (2) cooperating with the DOJ, (3) disclosure of information to the government, (4) dismissing staff, (5) internal review and investigations (6) increased monitoring, (7) replacement of old and appointment of new management, (8) creation of new personnel positions, (9) increased reporting to government officials, (10) increased training, and (11) appointment of a new board.

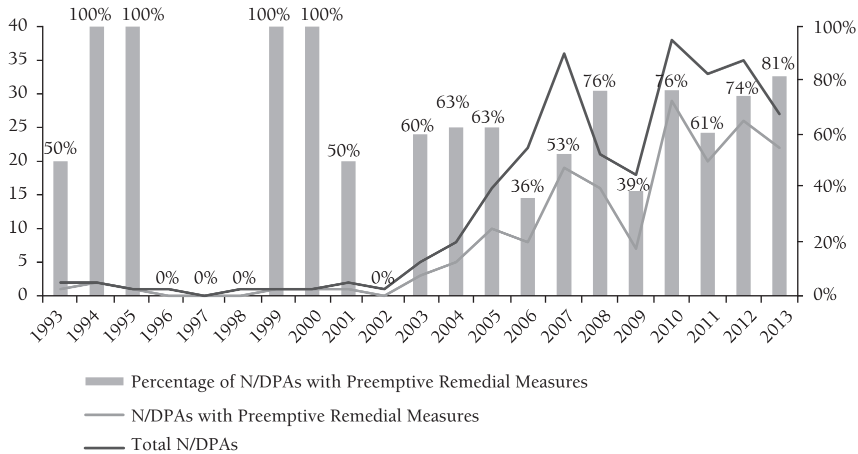
Figure 3 shows for the sample period, 1993–2013, the percentage and number of N/DPAs that included a stipulation of facts or explanation of preemptive remedial measures instituted to mitigate the corporate wrongdoing and avoid future occurrence of such corporate misconduct. We found that 63.47 percent of the N/DPAs in the sample contained references to preemptive remedial measures instituted before the execution of the N/DPA. In 2003, preemptive remedial measures occurred in 3 of the 5 executed N/DPAs (60 percent). In 2013, preemptive remedial measures occurred in 22 of the 27 executed N/DPAs (81 percent). This data shows an increase both in the percentage (60 percent versus 81 percent) and absolute number (3 versus 22) of executed N/DPAs including preemptive remedial measures. Almost half of the N/DPAs in the sample included stipulations pertaining to preemptive remedial measures instituted before the execution of the N/DPA. It is important to note that we coded only those preemptive remedial measures that were mentioned in N/DPAs. The overwhelming majority of

the indictment and implosion of Arthur Andersen in 2002 and the resulting loss of 28,000 jobs, the prevalence of these agreements spiked as the DOJ increasingly turned to DPAs and NPAs as a means of limiting the collateral consequences of corporate indictments and convictions.").

175. Deferred Prosecution Agreement at 2, United States v. Volvo Constr. Equip. AB, No. 1:08-cr-00069 (D.D.C. Mar. 20, 2008), *available at* http://goo.gl/ugrZBl (the authors did not distinguish in the coding pertaining to the respective N/DPAs between parent and subsidiary companies).

176. Deferred Prosecution Agreement at 2, United States v. ABN AMRO Bank N.V., No. 1:10-cr-00124 (D.D.C. May 10, 2010) [hereinafter ABN AMRO Bank N.V. Deferred Prosecution Agreement], *available at* http://goo.gl/J2OOUy.

Figure 3:
Preemptive Remedial Measures Preceding N/DPA Execution 1993–2013



preemptive remedial measures instituted by corporations to self-correct perceived corporate wrongdoing—without government intervention, prosecution, or the execution of an N/DPA—remain outside the scope of this study.

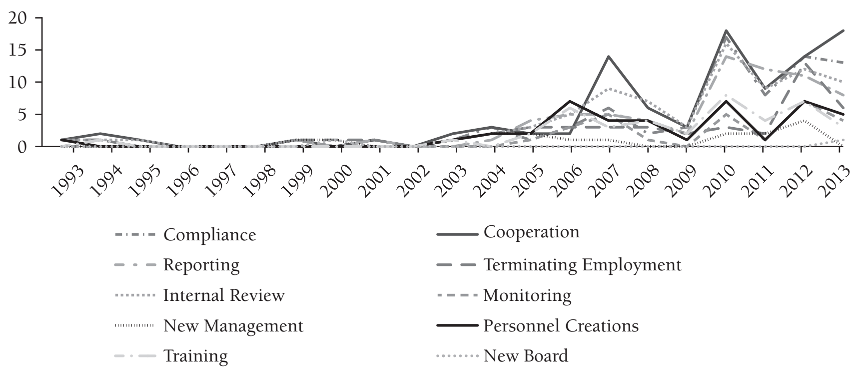
The preemptive remedial measures in Figures 3 and 4 were coded when the N/DPAs in the sample mentioned remedial measures as measures taken before the execution of the N/DPA. More specifically, the category of "Compliance" was coded when compliance measures were instituted before the execution of the N/DPA, but our coding in this category does not include compliance measures before the commission of the respective wrongdoing(s) that later lead to the execution of the N/DPA. Several N/DPAs exemplify N/DPA provisions that were coded for this category, e.g., the 2010 DPA between the United States and Exactech provided:

> The Company has further represented to the Office that it: (1) adopted, in 2004, the AdvaMed Code of Ethics on Interactions with Health Care Professionals ("the "AdvaMed Code"), and on January 1, 2009, adopted the revised AdvaMed Code six months prior to its proposed effective date; (2) instituted product development processes intended to strengthen compliance controls; (3) developed and implemented, in December 2008, a Compliance Plan which created an independent review process for the approval of consultancies.[177]

177. Deferred Prosecution Agreement at 1, United States v. Exactech, Inc., No. 3:10-cr-00837 (D.N.J. Dec. 7, 2010) [hereinafter Exactech Deferred Prosecution Agreement], *available at* http://goo.gl/2PwBn3.

Figure 4:

Categories of Preemptive Remedial Measures 1993–2013



Similarly, the 2010 DPA between the United States and Pride International provides:

"Pride International undertook, of its own accord, remedial measures, including the enhancement of its FCPA compliance program, and agreed to maintain and enhance, as appropriate, its FCPA compliance program as contemplated by this Agreement."[178]

The category "Cooperating" was coded when the respective entity acknowledged that it would cooperate with the DOJ before the eventual execution of the respective N/DPA. Prominent examples of agreements that included "Cooperating" as a preemptive remedial measure include the 1995 Settlement Agreement between the DOJ and Lazard Freres & Company: "(d) Lazard prepared and provided the United States Attorney and Massachusetts Attorney General with extensive computer and financial analyses of business records and financial data pertinent to the Investigation."[179] Another example is provided by the 2009 DPA between the DOJ and NeuroMetrix, providing in the relevant parts:

> NeuroMetrix cooperated with the USAO in its investigation, which cooperation included making employees available for interviews and testimony without subpoena; responding promptly to requests for documents by producing hundreds of thousands of pages of documents to the USAO, without subpoena and often within a week to ten days of the request; and conducting and providing certain analyses on company computer databases for data requested by the government.[180]

178. Deferred Prosecution Agreement at 5, United States v. Pride Int'l, Inc., No. 4:10-cr-00766 (S.D. Tex. Nov. 4, 2010), *available at* http://goo.gl/a3Xfr7.

179. Settlement Agreement at 20, U.S. Dep't of Justice—Lazard Freres & Co. (Oct. 26, 1995), *available at* http://goo.gl/clCqSC.

180. Deferred Prosecution Agreement at 2, U.S. Dep't of Justice—NeuroMetrix (Jan. 26, 2009), *available at* http://goo.gl/NdV4Wo.

For the preemptive remedial measure category "Disclosure," we coded all N/DPAs in the sample that included voluntary measures to provide information to the government before the execution of the respective N/DPA. For instance the 2013 NPA between the DOJ and Ernst & Young mentions that: "E&Y has provided to this Office a formal review and assessment of its ethics and compliance program."[181] Similarly, the DPA between the DOJ and Fiat S.p.A. in 2008 provides that: "Fiat promptly and thoroughly reported all of its findings to the Department."[182] We acknowledge that to the extent that the coded categories pertaining to Cooperating, Disclosure, and Internal Review are not very close to 100 percent in the sample, there is a chance that we may be capturing a gap in what is recorded in the N/DPAs in the sample, rather than a real absence of these factors.

For the preemptive remedial category "Termination of Employment," we coded all N/DPAs in the sample that included a clause pertaining to firing or letting go of personnel. For instance, the DPA between the United States and Data Systems & Solutions L.L.C. in 2012 provided: "DS&S has engaged in extensive remediation, including terminating the officers and employees responsible for the corrupt payments."[183] Similarly, the DPA between the United States and FalconStor in 2012 provided: "terminating or obtaining the resignation of FalconStor officers and employees who were responsible and criminally culpable for the conspiracy to travel in aid of commercial bribery and to violate the securities laws, as set forth in the Complaint."[184]

"Internal Review" was another important category within preemptive remedial measures. We coded all N/DPAs in the sample for this category if the N/DPA included some form of an internal investigation before the execution of the respective N/DPA. For instance, in 2008 the DPA between the United States and Flowserve Pompes SAS provided: "In consideration of the action of Flowserve in voluntarily conducting an investigation by outside legal counsel regarding the matters described in the attached Statement of Facts."[185] Similarly, the 2006 NPA between the DOJ and HealthSouth Corp. provided: "As a further Remedial Action, and pursuant to the SEC Settlement, HealthSouth retained a qualified consultant ('Governance Consultant') to perform a review of the adequacy and effectiveness of HealthSouth's corporate governance systems, policies, plans, and practices."[186]

181. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—Ernst & Young (Feb. 26, 2013), *available at* http://goo.gl/Gr0RAa.

182. Deferred Agreement at 2, United States v. Iveco SPA, No. 1:08-cr-00377 (D.D.C. Dec. 22, 2008) [hereinafter Fiat S.p.A. Deferred Prosecution Agreement], *available at* http://goo.gl/7guDHE.

183. Deferred Prosecution Agreement at 3, United States v. Data Sys. & Solutions L.L.C., No. 1:12-cr-00262 (E.D. Va. June 18, 2012) [hereinafter Data Sys. & Solutions Deferred Prosecution Agreement], *available at* http://goo.gl/XmPUFg.

184. Deferred Prosecution Agreement at 3, United States v. FalconStor, No. 1:12-mj-00615 (E.D.N.Y. June 27, 2012), *available at* http://goo.gl/ncffnV.

185. Deferred Prosecution Agreement at 5, United States v. Flowserve Pompes SAS, No. 1:08-cr-00035 (D.D.C. Feb. 21, 2008) *available at* http://goo.gl/CTxy4H.

186. Non-Prosecution Agreement at 5, U.S. Dep't of Justice—HealthSouth Corp. (May 17, 2006) [hereinafter HealthSouth Corp. Non-Prosecution Agreement], *available at* http://goo.gl/pcQKEr.

For the preemptive remedial category "Monitoring," we coded all N/DPAs in the sample that included provisions pertaining to the respective entity's increasing its monitoring prior to the execution of the respective N/DPA. For instance, the 2010 NPA between the DOJ and CVS Pharmacy, Inc. stipulated: "CVS/pharmacy increased its monitoring of PSE sales by reducing the threshold amount of PSE products that can be ordered by the CVS/pharmacy stores."[187] Similarly, the NPA between the DOJ and Ernest & Young provided: "E&Y also has improved internal mechanisms designed to ensure that any concerns about business practices can be raised to appropriate levels."[188] The 2012 DPA between the United States and Money Gram International also provided: "MoneyGram has implemented a risk-based Agent audit program that takes into account an Agent's location and number of Consumer Fraud Reports."[189]

For the remedial measures category "New Management," we coded all N/DPAs in the sample that included a provision requiring appointment of new management before the execution of the N/DPA. For instance, the 2012 DPA between the United States and Academi L.L.C. provided: "ACADEMI LLC replaced all of its executive leadership, including its CEO, COO, and General Counsel."[190] Similarly, the 2004 DPA between the United States and Computer Associates International provided: "appointing new management, including, but not limited to, an Interim Chief Executive Officer, a new Chief Operating and Chief Financial Officer, a new Head of Worldwide Sales, and a new General Counsel."[191] Another example for this preemptive measure category is provided by the 1999 DPA between the DOJ and Credit Lyonnais, which provided: "[T]here have been substantial changes in the management and operations of CLSA since the events under investigation took place, including, inter alia, a total change of senior management."[192]

The remedial measures category "Personnel Creation" required the coding of all N/DPA provisions in the sample that made reference to the creation of new positions before the execution of the respective N/DPA. A prominent example is provided by the 2008 NPA between the DOJ and American Italian Pasta Company, which provided in part: "AIPC added a General Counsel, a Chief Compliance Officer, and a Director of Internal Audit."[193] Similarly, the 2010 NPA be-

187. Non-Prosecution Agreement at 11, U.S. Dep't of Justice—CVS Pharmacy, Inc. (Oct. 13, 2010) [hereinafter CVS Pharmacy, Inc. Non-Prosecution Agreement], *available at* http://goo.gl/jwg4gc.

188. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—Ernst & Young (Feb. 26, 2013), *available at* http://goo.gl/Gr0RAa.

189. Deferred Prosecution Agreement at 10, United States v. Money Gram Int'l, Inc., No. 1:12-cr-00291 (M.D. Pa. Nov. 9, 2012), *available at* http://goo.gl/WgxsmC.

190. Deferred Prosecution Agreement at 5, United States v. Academi, L.L.C., No. 2:12-cr-00014 (E.D.N.C. Aug. 7, 2012) [hereinafter Academic L.L.C. Deferred Prosecution Agreement], *available at* http://goo.gl/I2W12m.

191. Deferred Prosecution Agreement at 4, United States v. Computer Assocs. Int'l, No. 1:04-CR-00837 (E.D.N.Y. Sept. 22, 2004) [hereinafter Computer Assocs. Int'l Deferred Prosecution Agreement], *available at* http://goo.gl/4hvgNb.

192. Non-Prosecution Agreement at 3, U.S. Dep't of Justice—Credit Lyonnais (June 7, 1999), *available at* http://goo.gl/24swGl.

193. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—Am. Italian Pasta Co. (Sept. 12, 2008), *available at* http://goo.gl/f5Q3WG.

tween the DOJ and General Re Corporation provided: "General Re Corporation has significantly enhanced the review and reporting roles of its Internal Audit Group by implementing the following reforms: (1) appointing a Global Head of lnternal Audit. . . ."[194]

For the preemptive remedial category "Training," we coded all N/DPAs in the sample that included references to enhanced or new training initiatives in response to the corporate wrongdoing but before the execution of the N/DPA. A prominent example is provided by the 2010 NPA between the DOJ and CVS Pharmacy, which provided: "In response to the events described above, CVS/ pharmacy has implemented a program of enhanced training and compliance regarding PSE sales."[195] Similarly, the 2010 DPA between the United States and Exactech provided: "The Company has also represented that it has developed additional policies and standard operating procedures regarding employee and distributor compliance training programs."[196] Moreover, the 2006 NPA between the DOJ and HealthSouth Corp. provided: "As a further Remedial Action, and as provided in the SEC Settlement, HealthSouth is providing reasonable training and education to certain of its officers and employees to minimize the possibility of future violations of federal laws."[197]

Finally, we coded the preemptive remedial category "New Board" when N/DPA provisions in the sample made reference to the appointment of a new board of directors before the execution of the N/DPA. For instance, the 2008 NPA between the DOJ and Parkway Village provided: "(a) amending its bylaws to require that, within 30 days of the election of a new board of directors, a special transitional meeting be held to discuss significant issues affecting PARKWAY VILLAGE and to ensure a smooth transition between boards of directors."[198]

Figure 5 shows the category of preemptive remedial measures as percent of N/DPAs in the sample. Figure 5 underscores the importance of the preemptive remedial measure subcategory "Cooperation." Thirty-six percent of the N/DPAs in our sample contained references to preemptive remedial measures requiring some level of increased cooperation with the government. Other important categories of preemptive remedial measures include those relating to internal review and investigations (30 percent of sample), improved compliance measures (27 percent of sample), increased reporting to government officials (25 percent of sample), and termination of employment (17 percent of sample). Only 6 percent of N/DPAs in our sample made references to preemptive remedial measures that instituted new management and only 1 percent of N/DPAs in our sample included preemptive remedial measures that created a new board.

194. Non-Prosecution Agreement at 6, U.S. Dep't of Justice—Gen. Re Corp. (Jan. 18, 2010), *available at* http://goo.gl/e4bOVy.

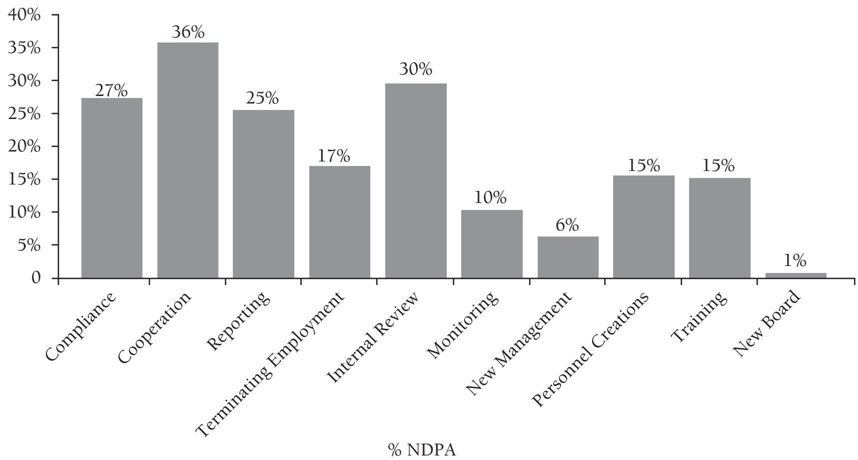
195. CVS Pharmacy, Inc.Non-Prosecution Agreement, *supra* note 188, at 11.

196. Exactech Inc. Deferred Prosecution Agreement, *supra* note 178, at 2.

197. HealthSouth Corp. Non-Prosecution Agreement, *supra* note 187, at 5.

198. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—Parkway Vill. (Aug. 5, 2008), *available at* http://goo.gl/cJfw4w.

Figure 5:
Category of Preemptive Remedial Measures as % of N/DPAs in the Sample



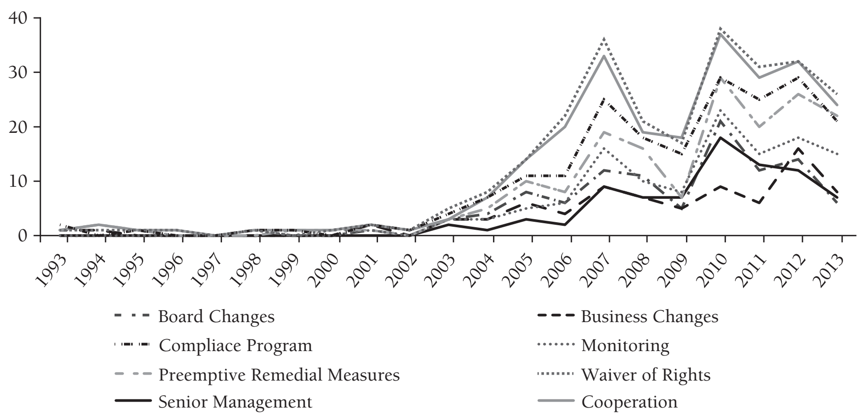
C. Governance Changes

Governance changes caused by the execution of N/DPAs can take various forms. To assess the effect of N/DPAs on corporate governance, we have coded and assessed the most common governance changes in the sample of this study, including the following: (1) Business Changes, (2) Board Changes, (3) Senior Management, (4) Monitoring, (5) Cooperation, (6) Compliance Program, and (7) Waiver of Rights. We show that these six general categories of corporate governance changes triggered by the execution of N/DPAs include multiple subcategories of governance changes.

Figure 6 provides an overview of changes in corporate governance of entities that are subject to an N/DPA from 1993 to 2013. With the increase in executed N/DPAs starting in 2002, almost all entities that executed N/DPAs agreed to some form of a waiver of their rights, followed closely by engagement in various kinds of cooperation with the government. A clear majority of entities that were subject to N/DPAs were required to institute an improved compliance program. Less often encountered governance changes included increased monitoring obligations and changes in senior management. N/DPA requirements pertaining to the nature and scope of the respective business, coded as mandatory "Business Changes," are least common in the sample.

Figure 7 shows the category of mandatory governance changes as percent of N/DPAs in the sample. Figure 7 underscores the importance of waivers of rights

Figure 6:
N/DPA Provisions Mandating Governance Changes 1993–2013



(96 percent of the sample) and cooperation with the government (91 percent of the sample), followed by the requirement of instituting an improved compliance program (75 percent of sample). Less significant categories of N/DPA mandated governance changes include increased monitoring requirements (46 percent of

Figure 7:
Category of Mandatory Governance Changes as % of N/DPAs in the Sample

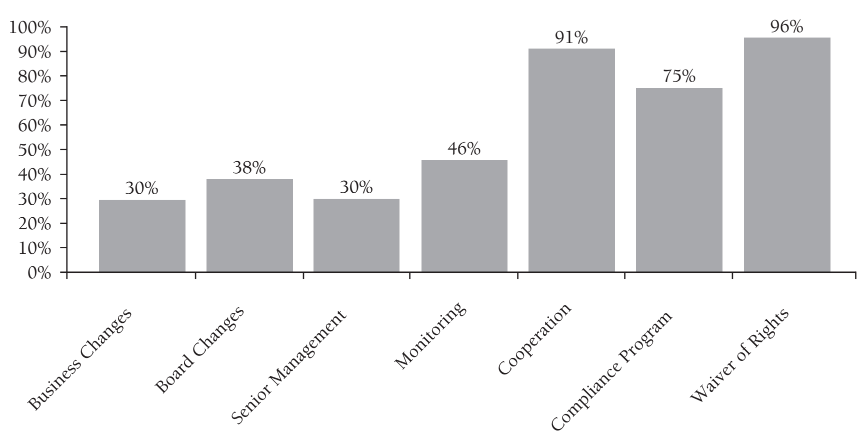
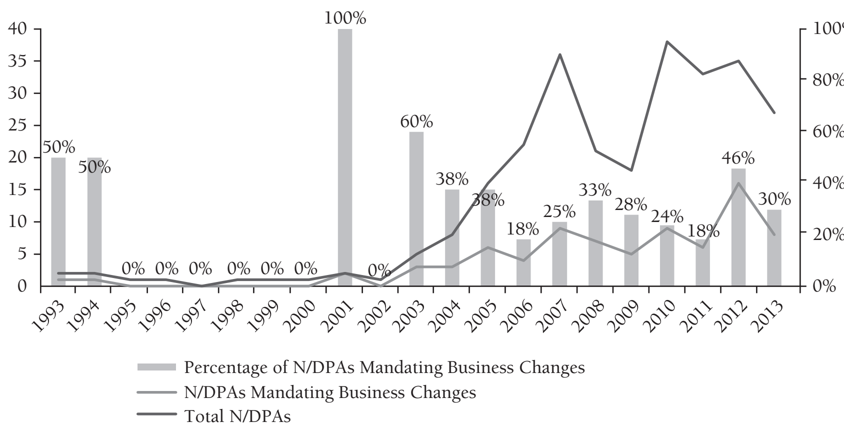


Figure 8:
N/DPA Provisions Mandating Business Changes 1993–2013



sample), N/DPA mandated board changes (38 percent of sample), business changes (30 percent of sample), and changes in senior management (30 percent of sample).

1. Business Changes

N/DPA provisions mandating a change in the respective entity's business can take a wide variety of forms and are naturally derived from the nature of the wrongdoing in the respective business segment the entity is engaged in.

Figure 8 illustrates the proportion of business changes as mandated by executed N/DPAs in the period from 1993–2013. We find that 29.5 percent (80) of the N/DPAs in the sample contained provisions that related to business changes. Figure 8 shows that starting in 2002, N/DPAs are not only increasing their inroads into corporate governance, they also are substantively changing the way in which entities that are subject to N/DPAs can conduct business. We coded business changes in all instances in which the N/DPA changed the nature or scope of the respective business practices of the entity. Examples include a prohibition from engaging in a certain business segment, a prohibition on doing business with certain counterparties, obligations to create new facilities, and mandatory changes in financing business activities or engaging in certain business practices.

Several prominent N/DPAs provide appropriate examples of our coding for the type of required business changes. The 2007 DPA between the United States and Alabama Contract Sales provided:

> ACS agrees to refrain from doing any new projects with the Alabama Department of Post-Secondary Education, and any of its subordinate institutions, including serving as a sub-contractor on or receiving income or business indirectly from any new project

for that department or its subordinate institutions, for a period of two (2) years from the date of this agreement.[199]

The 2011 NPA between the DOJ and Alpha Natural Resources provided:

> Alpha will construct and launch a new state-of-the-art safety training facility in the Julian, West Virginia area. This facility will include a mine lab of approximately 96,000 square feet in which simulated mine situations and conditions will be presented to certified supervisors and examiners to solve and correct.[200]

Another example is provided by the 2005 NPA between the DOJ and Friedman's Inc. which required the corporation to: "establish a centralized, analytics-based approach to credit, and develop a more accurate account-aging strategy"[201] and the 2005 DPA between the DOJ and KPMG which provided that: "KPMG will cease its private client tax practice by February 28, 2006, and will take on no new clients or engagements in its private client tax practice after the signing of this Agreement."[202]

2. Board Changes

Board changes mandated by N/DPAs constitute another important category of governance changes. We coded the category "Board Changes" for all N/DPA provisions in the sample that mandated a change to the then existing board, including N/DPA provisions that required structural changes, created subcommittees, made changes to the membership of the respective board, required independent directors, or imposed additional monitoring and reporting obligations on the board.

Figure 9 shows that since 2003, the number of N/DPAs in the sample that mandated changes to the board of the respective entity increased consistently. We find that 38 percent (103) of the N/DPAs in the sample contained provisions that related to board changes. N/DPA provisions mandating board changes peaked in 2007 and 2010 before leveling off in 2013.

Figure 10 shows the nature of changes to the boards of entities subject to an N/DPA. Over 30 percent of those N/DPAs that included provisions mandating board changes required additional reporting by the board. Eight percent of N/DPAs in this category required changes to the existing board committee structure of the entity, often creating new board committees. Other mandatory changes to the board included increased monitoring obligations (5 percent of sample), the addition of independent director(s) (3 percent of sample), and changes pertaining to management (4 percent of sample).

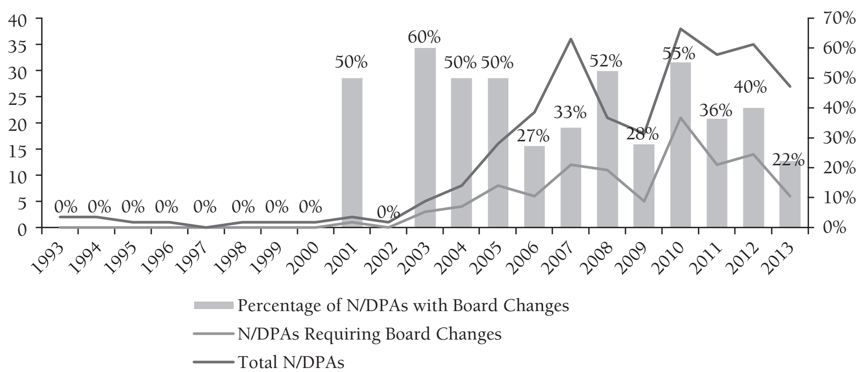
199. Deferred Prosecution Agreement at 6, United States v. Ala. Contract Sales, Inc, No. 2:07-cr-00222 (N.D. Ala. May 29, 2007), *available at* http://goo.gl/fKoxKz.

200. Non-Prosecution Agreement at 3, U.S. Dep't of Justice—Alpha Natural Res. (Dec. 6, 2011) [hereinafrer Alpha Natural Resources Non-Prosecution Agreement], *available at* http://goo.gl/fKoxKz.

201. Non-Prosecution Agreement at 12, U.S. Dep't of Justice—Friedman's Inc. (Nov. 21, 2005) [hereinafter Friedman's Inc. Non-Prosecution Agreement], *available at* http://goo.gl/WR4iLM.

202. Deferred Prosecution Agreement at 4, United States v. KPMG LLP, No. 1:05-cr-00903 (S.D.N.Y. Aug. 29, 2005), *available at* http://goo.gl/XsgorN.

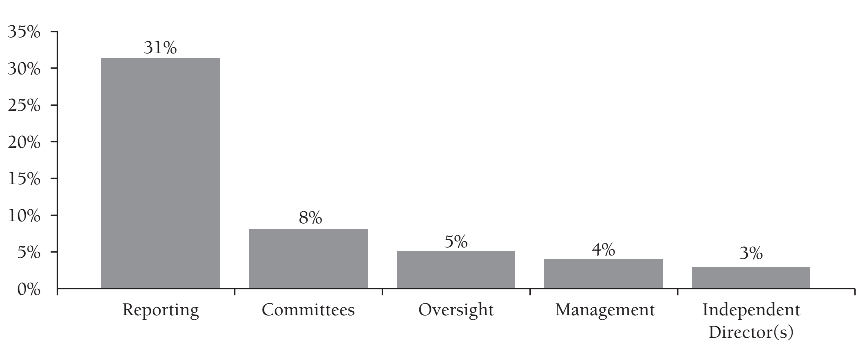
Figure 9:
N/DPA Provisions Mandating Board Changes 1993–2013



We coded the category "Reporting" when an N/DPA required additional reporting to the board by a senior official within the company. A prominent example that helps illustrate the coding for this category includes the 2010 DPA between the United States and ABB Group, which provided:

> ABB will assign responsibility to one or more senior corporate executives of ABB for the implementation and oversight of compliance with policies, standards, and procedures regarding the anti-corruption laws. Such corporate official(s) shall have direct reporting obligations to independent monitoring bodies, such as the Audit Committee of

Figure 10:
N/DPA Board Change Categories



> ABB's Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.[203]

We coded the category "Committees" when a committee was created by the execution of an N/DPA. The 2007 DPA between United States and the Aibel Group provided a good example. It requires:

> The establishment of a Compliance Committee of Aibel Group's Board of Directors, as well as of the Boards of Directors of its parent, Aibel Limited, and its Principal Subsidiaries, and their successors. Such Compliance Committee shall consist of no less than three members and at all times a majority of the members may not be affiliated with the lead shareholders, one of whom shall chair the Committee."[204]

For the category "Board Oversight" we coded all N/DPAs in the sample that included a provision requiring the board of directors to assume additional oversight duties. For instance, the 2012 DPA between the DOJ and Biomet provided:

> The Company agrees to enhance, support, and maintain its existing training and education programs, including any programs recommended by the Monitor pursuant to paragraph 18, above. The programs, which shall be reviewed and approved by the Company President and CEO, Board of Directors, Senior Vice President and General Counsel and the Monitor, shall be designed to advance and underscore the Company's commitment to exemplary corporate citizenship, to best practices of effective corporate governance.[205]

We coded the category "Independent Director" whenever an N/DPA provision required the addition of an independent director or director(s) to the board. A prominent example of an N/DPA provision for this category is the 2004 DPA between the United States and Computer Associations International ("CA"), which provided: "CA agrees to add new independent directors to its Board of Directors and to undertake corporate governance reforms."[206]

Finally, we coded the category "Management" when an N/DPA provision affected management at the highest level. For instance, the 2003 DPA between the United States and the New York Racing Association required: "The creation of an Office of the Chairman, which includes two new Co-Chief Operating Officers whose responsibilities include supervision of all business areas and departments of NYRA."[207]

203. Deferred Prosecution Agreement at 24, United States v. ABB Ltd., No. 4:10-cr-00665 (S.D. Tex. Sept. 29, 2010) [hereinafter ABB Ltd. Deferred Prosecution Agreement], *available at* http://goo.gl/pbHNSq.

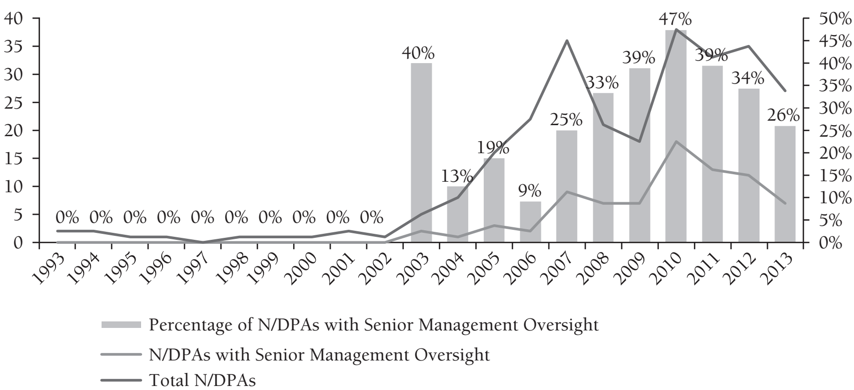
204. Deferred Prosecution Agreement at 7, United States v. Aibel Grp. Ltd. No. 4:07-cr-00005 (S.D. Tex. Feb. 6, 2007), *available at* http://goo.gl/M2svKq.

205. Deferred Prosecution Agreement at 13, United States v. Biomet Orthopedics, Inc., No. 2:07-mj-08133 (D.N.J. Sept. 27, 2007), *available at* goo.gl/XjXSgl.

206. Computer Assocs. Int'l Deferred Prosecution Agreement, *supra* note 192, at 9.

207. Deferred Prosecution Agreement at 5, United States v. N.Y. Racing Ass'n, No. 2:03-cr-01295 (E.D.N.Y. Dec. 11, 2003), *available at* http://goo.gl/zb4AL9.

Figure 11:
N/DPA Provisions Requiring Senior Management to Perform Additional Oversight Tasks 1993–2013



3. Senior Management

Figure 11 illustrates the number and percentages of N/DPA provisions in the sample that require the senior management of the respective entity to perform additional oversight responsibilities. We found that 29.9 percent (81) of the N/DPAs in the sample contained provisions that related to additional oversight responsibilities for senior management. Since 2002, the number of N/DPA provisions that required additional oversight by senior management has generally increased before peaking in 2010 and then declining.

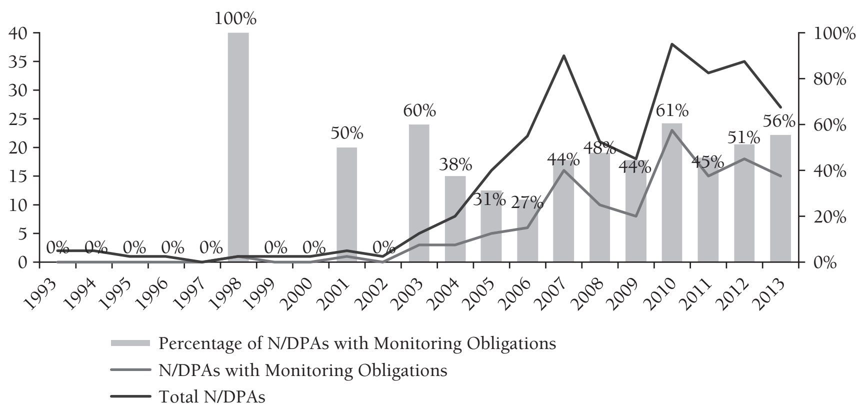
We coded the category "Senior Management" for all N/DPA provisions that required senior management to take on additional work or oversight responsibilities. For example, the 2010 DPA between the United States and ABB Group provided: "ABB will assign responsibility to one or more senior corporate executives of ABB for the implementation and oversight of compliance with policies, standards, and procedures regarding the anti-corruption laws."[208]

4. Monitoring

Figure 12 shows the number of N/DPA provisions from 1993–2013 requiring the respective entity subject to an N/DPA to perform additional monitoring obligations. We find that 45.76 percent (124) of the N/DPAs in the sample contained provisions that related to monitoring requirements. Despite drops in the number of N/DPA-related monitoring obligations from 2007 to 2009 and 2011 and 2013, N/DPA-related monitoring obligations have consistently increased since 2002.

208. ABB Ltd. Deferred Prosecution Agreement, *supra* note 204, at 24.

Figure 12:
N/DPA Provisions Requiring Entity to Perform Additional Monitoring 1993–2013



We coded the category "Monitoring" for all N/DPA provisions in the sample that specified monitoring obligations or imposed additional monitoring obligations on the entity. A prominent example in this category is the 2007 DPA between the DOJ and NETeller providing:

> NETeller agrees to monitor regularly the effectiveness of its procedures and controls designed to prevent its services from being used to conduct U.S. Gambling Transactions, and NETeller will revise and update its procedures and controls as necessary to achieve that purpose.[209]

Similarly, the 2011 NPA between the United States and Noble Corporation required:

> Noble shall review its anti-corruption compliance standards and procedures, including internal controls, ethics, and compliance programs, no less than annually, and update them as appropriate, taking into account relevant developments in the field and evolving international and industry standards, and update and adapt them as necessary to ensure their continued effectiveness.[210]

5. Cooperation

Figure 13 shows the number and percentage of N/DPAs that mandated increased cooperation in the years 1993 to 2013. We found that 91.1 percent of N/DPAs executed over this twenty-year period included a cooperation requirement.

209. Deferred Prosecution Agreement at 3, United States v. Lawrence, No. 1:07-cr-00597 (S.D.N.Y. Jul. 18, 2007), *available at* http://goo.gl/gTxZv1.

210. Non-Prosecution Agreement at B-3, U.S. Dep't of Justice—Noble Corp. (Nov. 4, 2010), *available at* http://goo.gl/A8zxg4.

Figure 13:
N/DPA Provisions Mandating Increased Cooperation 1993–2013

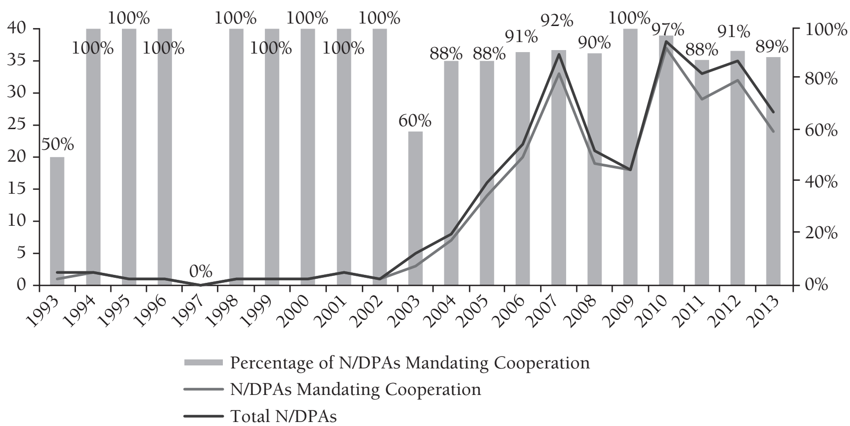


Figure 14 shows the number of N/DPA cooperation provisions from 1993 to 2013 in each subcategory of cooperation. Starting in 2004, the number of best efforts testimony provisions in N/DPA has consistently been increasing. Similarly, N/DPA provisions requiring the production of documents and imposing obligations to identify witnesses and produce knowledgeable employees, agents, or attorneys to provide information and/or materials to the government have consis-

Figure 14:
N/DPA Cooperation Provisions by Category 1993–2013

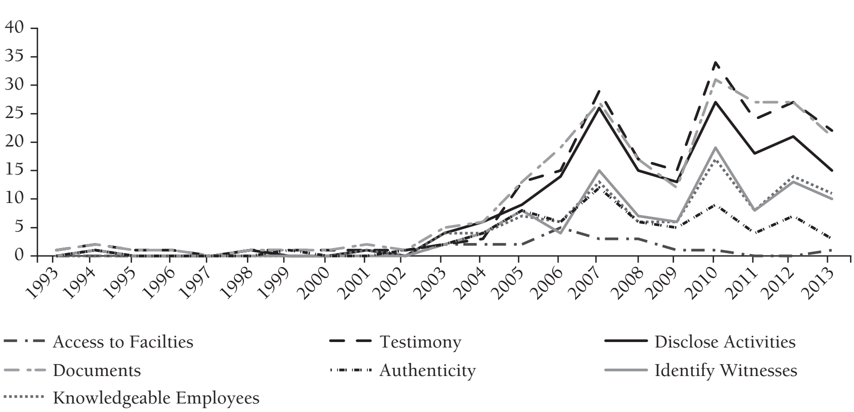
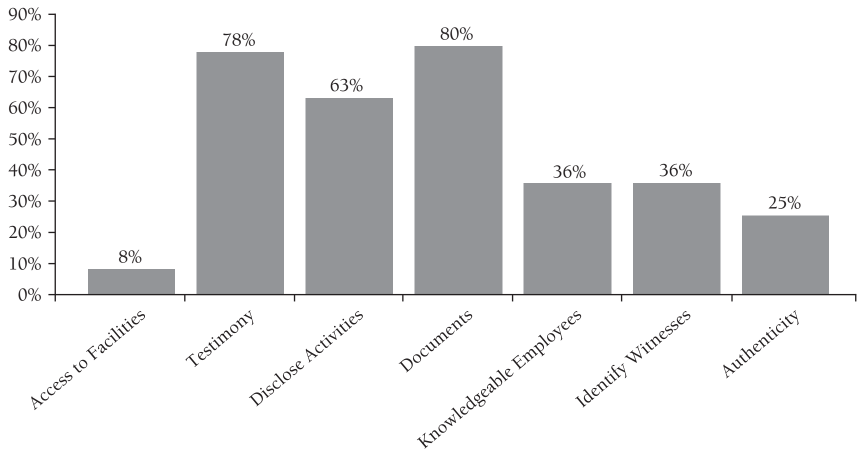


Figure 15:
N/DPA Cooperation Provisions in Sample by Category



tently increased since 2002. N/DPA provisions requiring cooperation by granting access to the respective entity's facilities have declined since peaking in 2006.

Figure 15 breaks down the cooperation requirements mandated by the N/DPAs in the sample into subcategories. We find that 91.10 percent of the N/DPAs in the sample contained provisions relating to cooperation requirements. Further, 79.70 percent of N/DPAs in our sample contained cooperation requirements pertaining to "Documents." The cooperation subcategory "Documents" pertains to N/DPA provisions in our sample that required the identifying, assembling, organizing, and producing of relevant documentation for further investigation of the corporate wrongdoing by the DOJ. 77.86 percent of N/DPAs in our sample pertained to "Testimony," requiring some form of best efforts or reasonable efforts testimony from the directors, officers, employees, or agents of the respective entity. Additionally, 63.10 percent of N/DPAs in our sample contained cooperation requirements pertaining to Disclosure of Activities. "Disclosure of Activities" pertains to the disclosure of activities to the government to increase cooperation.

We coded the "Cooperation" subcategories in Figures 14 and 15 to illustrate the impact of N/DPAs on the respective entity's cooperation with the government. We coded all N/DPAs in the "Best Efforts Testimony" subcategory of cooperation if the N/DPA contained a provision requiring the entity to use its best efforts to make its directors, officers, employees, or agents available for testimony in the context of the corporate wrongdoing. A representative example for best efforts testimony required in N/DPAs is the 2011 DPA between the United States and Bixby Energy Systems which required that:

> Bixby shall use its best efforts to make available for interviews or testimony, as requested by the government, present or former directors, officers, employees, agents and consultants of Bixby as well as the directors, officers, employees, agents and consultants of contractors and subcontractors.[211]

Another good example for best efforts is provided by the 2007 NPA between the DOJ and Chevron Corporation, which provides that Chevron "shall, at SDNY's or DANY's request, use its best efforts promptly to secure the attendance and truthful statements or testimony of any officer, agent or employee at any meeting or interview or before the grand jury or at any trial or other court proceeding."[212]

We coded the cooperation subcategory "Documents" for all N/DPAs that contained provisions that mandated the identifying, assembling, producing, and disclosure of documents pertaining to the corporate misconduct. A representative example of such an N/DPA provisions is provided by the 2011 DPA between the SEC and Fannie Mae, which required in relevant part that Fannie Mae agree to:

> identifying, assembling, organizing and producing, in a responsive and prompt manner, all non-privileged, non-attorney work-product documents, information, and other materials (including but not limited to providing reports or analyses of data concerning Respondent's models, credit risk reporting or data systems) to the Commission as requested by the Division's staff, wherever located, in the possession, custody, or control of the Respondent.[213]

Another representative example of the "Documents" subcategory in N/DPAs is provided in the 2008 DPA between the DOJ and Fiat S.p.A., which required in the relevant part:

> This obligation of truthful disclosure includes the obligation of Fiat, Iveco, CNH Italia, and CNH France to provide to the Department, upon request, any document, record, or other tangible evidence relating to such corrupt payments, books and records, and internal controls about which the Department inquires of Fiat, Iveco, CNH Italia, and CNH France.[214]

We coded the cooperation subcategory "Disclose Activities" for all N/DPAs that contained provisions mandating disclosure in the context of a cooperation requirement. We only coded this subcategory in N/DPAs that stipulated additional disclosure requirements in the context of a general cooperation provision. A prominent example for the cooperation subcategory "Disclose Activities" was provided by the 2011 NPA between the DOJ and Essie Cosmetics, which provided in the section pertaining to cooperation requirements that the corporation: "(a) shall

211. Deferred Prosecution Agreement at 8, United States v. Bixby Energy Sys., Inc, No. 0:11-cr-00376 (D. Minn. Dec. 14, 2011), *available at* http://goo.gl/C3oax1.

212. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—Chevron Corp. (Nov. 8, 2007), *available at* http://goo.gl/nZF3gz.

213. Non-Prosecution Agreement at 2, U.S. Sec. & Exch. Comm'n—Fannie Mae (Dec. 13, 2011), *available at* http://goo.gl/CungKO.

214. Fiat S.p.A. Deferred Prosecution Agreement, *supra* note 183, at 3.

truthfully and completely disclose all information with respect to the activities of Essie, its officers and employees, and others concerning all matters relating to Essie about which this Office inquires, which information can be used for any purpose, except as limited by the second paragraph of this Agreement."[215] Similarly, the 2008 NPA between the DOJ and FARO Technologies provided in the cooperation section that FARO Technologies shall: "(b) truthfully and completely disclose information with respect to the activities of FARO, its officers and employees, and others concerning all matters about which this Office inquires of it, which information can be used for any purpose, except as otherwise limited in this Agreement."[216]

We coded N/DPAs in the cooperation subcategory "Knowledgeable Employees" if the N/DPA contained provisions that required the respective entity to designate knowledgeable employees, agents, or attorneys to provide relevant information on the corporate wrongdoing to the government. A representative example in this subcategory is provided by the 2006 NPA between the DOJ and HealthSouth Corporation, which provided in the relevant section: "Upon request of the Department, with respect to any issue relevant to its investigation of HealthSouth, HealthSouth shall designate knowledgeable employees, agents or attorneys to provide information and/or materials on HealthSouth's behalf to the Department."[217] Another good example was provided by the 2011 DPA between the United States and MacKenzie Aircraft Parts, Inc., which provided in the relevant section: "Upon request of the United States, with respect to any issue relevant to its investigation of fraud involving aircraft parts, MacKenzie shall designate knowledgeable employees, agents or attorneys to provide to the United States the information and materials described in Paragraph 5."[218]

We coded N/DPAs in the sample of this study for the cooperation subcategory "Identify Witnesses" if the cooperation requirement included the identification of relevant witnesses with sufficient information on the corporate wrongdoing. A prominent example for this cooperation subcategory is provided in the 2007 DPA between the United States and Reliant Energy Services, requiring in the relevant section: "Cooperation under this paragraph shall include identification of witnesses who, to Reliant's knowledge, may have material information regarding the matters under investigation and/or prosecution."[219] Another example in this category was provided by the 2010 NPA between the DOJ and Schiavone Construction, which provided in the relevant part: "Cooperation under this paragraph shall include identification of witnesses who, to the knowledge of SCHIAVONE,

215. Non-Prosecution Agreement at 1-2, U.S. Dep't of Justice–Essie Cosmetics Ltd. (Mar. 6, 2012), *available at* goo.gl/xCcr8z.

216. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—FARO Techs., Inc. (Nov. 14, 2008), *available at* http://goo.gl/oc0huU.

217. HealthSouth Corp. Non-Prosecution Agreement, *supra* note 187, at 3.

218. Deferred Prosecution Agreement at 4, United States v. MacKenzie Aircraft Parts, Inc., No. 3:11-cr-01622 (S.D. Cal. May 4, 2011), *available at* http://goo.gl/3m37hV.

219. Deferred Prosecution Agreement at 4, United States v. Reliant Energy Servs., Inc., No. 3:04-cr-00125 (N.D. Cal. Mar. 6, 2007), *available at* http://goo.gl/gb1nv0.

may have material information regarding the Unlawful Conduct, or records which may have material information regarding the Unlawful Conduct."[220]

With regard to the cooperation subcategory "Access to Facilities," we coded N/DPAs in the sample in this cooperation subcategory if the N/DPA required reasonable access to the entity's facilities, documents, and employees. Two DPAs appropriately illustrate the coding for this cooperation subcategory. The 2005 DPA between the DOJ and Micrus Corportation required: "providing reasonable access to Micrus' documents relating to the Subject Matters, and to all directors, officers, employees, agents, salespeople, attorneys and affiliates, whether or not located in the United States, and to Micrus' facilities for that purpose."[221] Similarly, the 2005 DPA between the United States and Monsanto Company provided: "This obligation of truthful disclosure includes an obligation to provide to the Fraud Section access to MONSANTO COMPANY's facilities, documents, and employees."[222]

We coded the cooperation subcategory "Authenticity" for N/DPA provisions in the sample that required authentication or other evidentiary foundations necessary to admit documents into evidence. The 2005 DPA between the DOJ and Bristol-Meyers Squibb Co. appropriately illustrates our coding. It provided in the relevant part that the company's continuing cooperation shall include: "(f) Providing testimony, certifications, and other information deemed necessary by the Office or a court to identify or establish the original location, authenticity, or other evidentiary foundation necessary to admit into evidence documents in any criminal or other proceeding as requested by the Office."[223] Similarly, the 2007 DPA between the DOJ and DePuy Orthopaedics provided the company's continuing cooperation shall include: "Providing testimony, certifications, and other non-privileged information deemed necessary by the Office or a court to identify or establish the original location, authenticity, or other evidentiary foundation necessary to admit into evidence documents in any criminal or other proceeding relating to compliance with health care laws as requested by the Office."[224]

6. Compliance Program

Figure 16 shows the number and percentage of N/DPAs in the twenty-year sample that require setting up or improving a compliance program for the respective entity subject to an N/DPA. 74.9 percent of the N/DPAs in the sample contained provisions relating to a new or improved and expanded compliance

220. Non-Prosecution Agreement at 6, U.S. Dep't of Justice—Schiavone Constr. Co. (Nov. 29, 2010), *available at* http://goo.gl/pBYj0b.

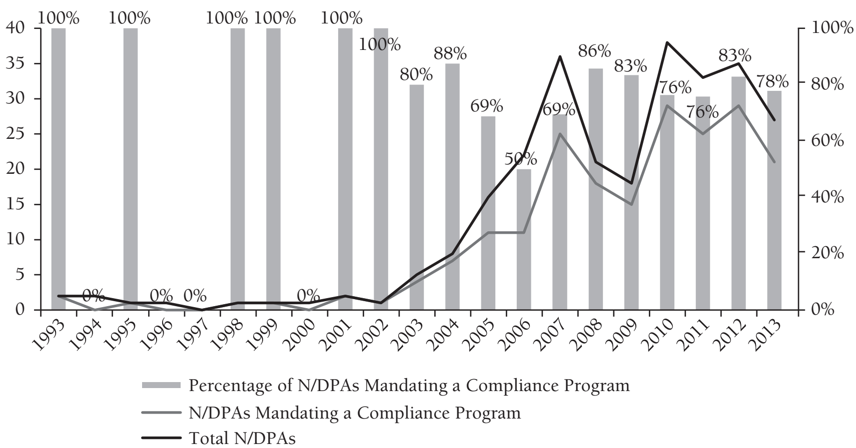
221. Deferred Prosecution Agreement at 6, U.S. Dep't of Justice—Micrus Corp. (Feb. 28, 2005), *available at* http://goo.gl/BD1kof.

222. Deferred Prosecution Agreement at 4, United States v. Monsanto Co., 1:05-cr-00008 (D.D.C. Jan. 6, 2005), *available at* http://goo.gl/ihkfiC.

223. Deferred Prosecution Agreement at 9, United States v. Bristol-Meyers Squibb Co., No. 2:05-mj-06076 (D.N.J. June 15, 2005), *available at* http://goo.gl/jrbdj1.

224. Deferred Prosecution Agreement at 16, United States v. DePuy Orthopaedics, Inc., No. 2:07-mj-08131 (D.N.J. Sept. 27, 2007), *available at* http://goo.gl/OAqEyQ.

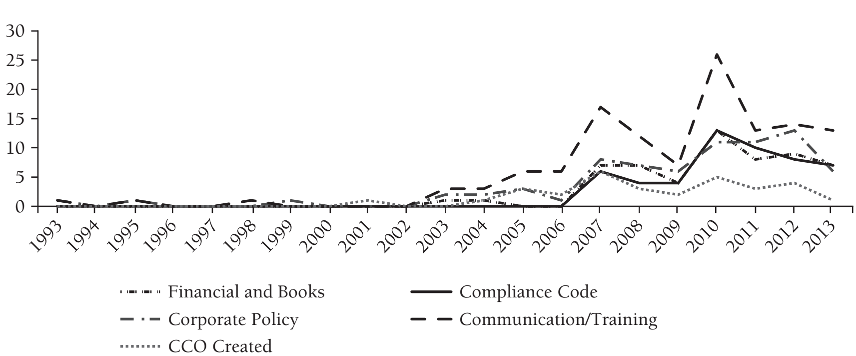
Figure 16:
N/DPA Provisions Requiring a Compliance Program 1993–2013



program. Since 2002, the number of N/DPA provisions pertaining to compliance programs has been increasing consistently.

Figure 17 shows the most significant categories of N/DPA provisions requiring improvements with regard to the entity's compliance program. The largest proportion of N/DPA compliance provisions pertain to required improvements of communication and training. Other significant compliance categories in the sample pertain to N/DPA compliance provisions requiring the creation of a chief

Figure 17:
N/DPA Compliance Program Categories 1993–2013



compliance officer ("CCO"), the changing of corporate policy, the creation or improvement of a compliance code, and the disclosure of books and records.

We coded N/DPAs in the sample for the compliance category "Communication/Training" if the N/DPA required communication of policies and training. For example, the 2010 DPA between the United States and Shell Nigeria required Shell Nigeria to ensure "its anti-corruption policies, standards, and procedures are communicated effectively. . . . These mechanisms shall include: (a) periodic training for all directors and officers, and, where necessary and appropriate, employees, agents, and business partners."[225]

For the compliance category "Corporate Policy," we coded the N/DPAs in the sample if the N/DPA required a clearly articulated and visible corporate policy in the context of compliance improvements. For instance, the 2012 DPA between the United States and Data Systems & Solutions provided in the relevant compliance section: "DS&S will develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA and other applicable foreign law counterparts (collectively, the 'anti-corruption laws,'), which policy shall be memorialized in a written compliance code."[226]

We coded "Compliance Code" for all N/DPAs that contained compliance provisions requiring the establishment of a rigorous anti-corruption and compliance code. For instance, the 2007 DPA between the United States and Rand Italiana S.p.A. provided in the relevant part for: "Promulgation of a compliance code, standards, and procedures designed to reduce the prospect of violations of the FCPA, other applicable anti-corruption laws, and Ingersoll's compliance code."[227]

The compliance category "Financial and Books" was coded for N/DPAs in the sample that included this provision requiring: "A system of financial and accounting procedures, including a system of internal accounting controls, designed to ensure the maintenance of fair and accurate books, records and accounts."[228]

We coded the compliance category "CCO" for N/DPA provisions that required the creation of a chief compliance officer position. The Johnson & Johnson/Depuy DPA provides a representative example:

> Appoint a senior corporate executive with significant experience with compliance with the FCPA, including its anti-bribery, books and records, and internal controls provisions, as well as other applicable anticorruption laws and regulations (hereinafter 'anticorruption laws and regulations') to serve as Chief Compliance Officer. The Chief Compliance Officer will have reporting obligations directly to the Audit Committee of the Board of Directors.[229]

225. Deferred Prosecution Agreement at C-5, Shell Nigeria Exploration & Production Co., No. 4:10-cr-00767 (S.D. Tex. Nov. 4, 2010), *available at* http://goo.gl/K1Z9XI.

226. Data Sys. & Solutions Deferred Prosecution Agreement, *supra* note 184, at C-1.

227. Deferred Prosecution Agreement at 8, United States v. Ingersoll-Rand Italiana S.p.A., No. 1:07-cr-00294 (D.D.C. Nov. 14, 2007), *available at* http://goo.gl/FdV5Us.

228. Deferred Prosecution Agreement at 90, United States v. Daimler AG, No. 1:10-cr-00063 (D.D.C. Mar. 22, 2010), *available at* http://goo.gl/bftAuZ.

229. Deferred Prosecution Agreement at 33, United States v. Depuy, Inc., No. 1:11-cr-00099 (D.D.C. Apr. 08, 2011), *available at* http://goo.gl/589qdj.

Figure 18:
Compliance Category as % of N/DPAs in the Sample

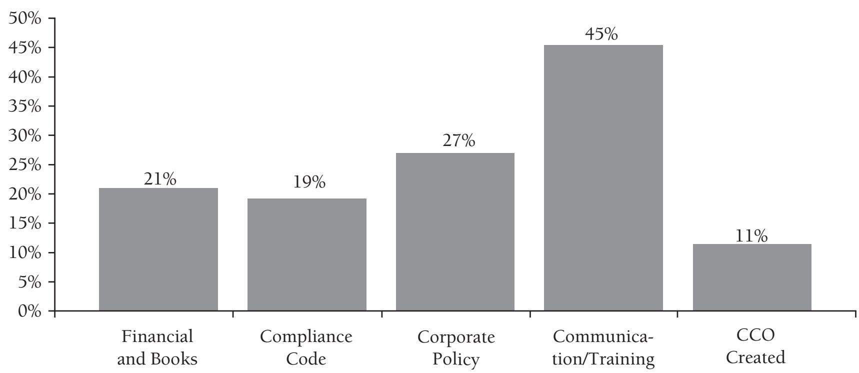


Figure 18 shows the subcategories of compliance requirements as percent of N/DPAs in the sample. Figure 18 underscores the importance of the "Communication/ Training" subcategory of compliance measures in N/DPAs. Forty-five percent of N/DPAs in the sample contained provisions pertaining to improved communications and training requirements. Twenty-seven percent of N/DPAs in the sample required an updating of compliance policy. Required improvements pertaining to books and records were found in 21 percent of sample and the requirement of a compliance code were found in 19 percent of sample. Only 11 percent of the N/DPAs in our sample required the creation of a chief compliance officer.

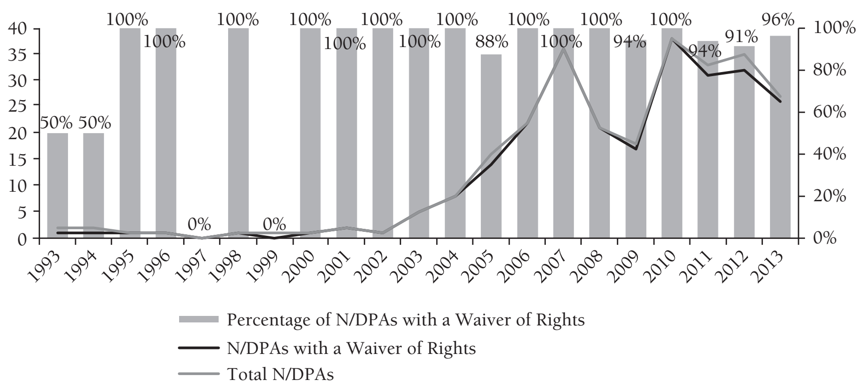
7. Waiver of Rights

Figure 19 shows a significant rise from 2002 to 2007 in N/DPA provisions requiring some form of a waiver of the entity's or its agent's rights. With a slowdown in the execution of N/DPAs, the number of N/DPA provisions requiring a waiver of rights temporarily decreased between 2008 and 2009, but increased again in 2010, declining slightly in 2011 and 2013. The overall trend in the years 2002 –2013 suggests that the waiver of rights provisions in N/DPAs may continue to play a role.

Figure 20 shows the respective importance of various forms of N/DPA-related waivers of rights in the sample period 1993–2013. Waivers of the applicable statute of limitations pertaining to the corporate wrongdoing constitute the most important category of waivers for the N/DPAs in the sample, followed by the waiver of the right to challenge admissibility of documents in court, and the Sixth Amendment waiver. Other relevant waiver categories include venue, disclosure, and indicment.

Figure 21 shows that the largest category of N/DPA-related waivers of rights pertains to the waiver of applicable statutes of limitations (79.70 percent of

Figure 19:
N/DPA Provisions Requiring a Waiver of Rights 1993–2013



the sample), followed by waiver of admissibility (73.43 percent of the sample), and waiver of the Sixth Amendment right (46.13 percent of the sample). Other important categories of waivers pertain to waiver of indictment (31.00 percent of the sample) and waiver of venue (23.62 percent of the sample).

We coded the waiver category "Statute of Limitations" for all N/DPAs in the sample that included provisions pertaining to a waiver of the right to bring a challenge on statute-of-limitation grounds. A representative example of an N/DPA provision in this context was provided by the 2013 DPA between the United States and Adams Thermal Systems, which provided in the relevant section: "Adams Thermal further knowingly waives any claim to assert that the prosecution is

Figure 20:
Categories of Waiver of Rights 1993–2013

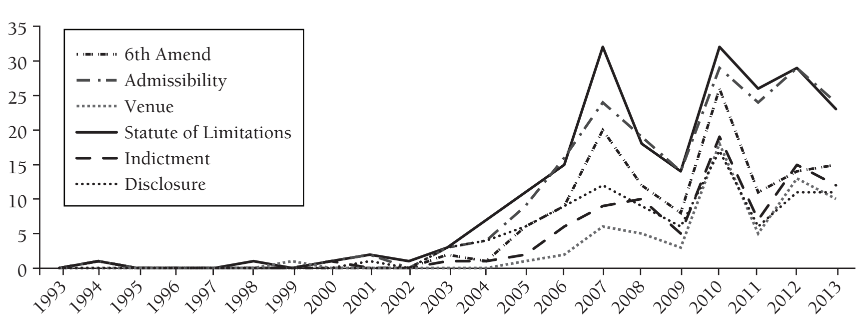
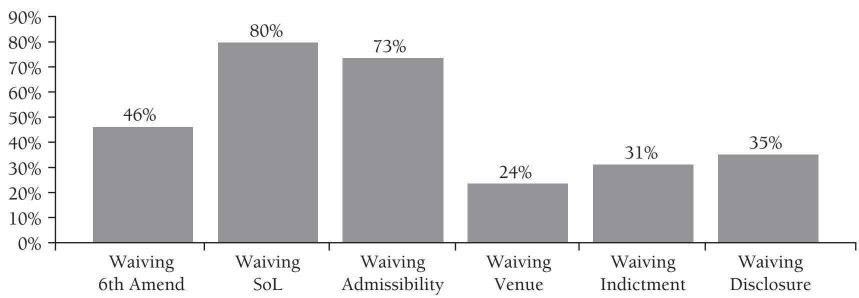


Figure 21:
Categories of Waiver of Rights as % of N/DPAs in the Sample



time barred under the statute of limitations or any other provision."[230] Similarly, the 2012 DPA between the SEC and Amish Helping Fund stipulated: "The Respondent agrees that the running of any statute of limitations applicable to any action or proceeding against it authorized, instituted, or brought by or on behalf of the Commission arising out of the Investigation (an 'Enforcement Action'), including any sanctions or relief that may be imposed therein, is tolled and suspended during the Deferred Period."[231]

For the waiver category "Admissibility," we coded those N/DPAs in the sample that contained provisions pertaining to a waiver to challenging admissibility of evidence. For instance, the 2010 DPA between the United States and ABN AMRO Bank N.V. provided in the context of waiving admissibility: "ABN agrees that it will neither contest the admissibility of the Factual Statement, reports, or any other documents provided by ABN to the United States or the government of the Netherlands, nor contradict in any such proceeding the facts contained within the Factual Statement."[232] Similarly, the 2005 NPA between the DOJ and Adelphia Communications Corporation provided in the relevant section:

> [A]ll statements made by Adelphia to this Office, the SEC, or other designated law enforcement agents, and any testimony given by any then current officer, agent or employee of Adelphia before a grand jury or other tribunal, whether prior to or subsequent to the signing of this Agreement, and any leads from such statements or testimony, shall be admissible in evidence in any criminal proceeding brought against Adelphia; and (b) Adelphia shall assert no claim under the United States Constitution, any statute, Rule ll(e)(6) of the Federal Rules of Criminal Procedure, Rule 410

230. Deferred Prosecution Agreement at 2, United States v. Adams Thermal Sys. Inc., No. 4:13-cr-40095 (D.S.D. Sept. 5, 2013), *available at* http://goo.gl/8ZDZVw.

231. Deferred Prosecution Agreement at 2, U.S. Sec. & Exch. Comm'n—Amish Helping Fund (July 17, 2012), *available at* http://goo.gl/ZVa83Z.

232. ABN AMRO Bank N.V. Deferred Prosecution Agreement *supra* note 177, at 3.

of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed.[233]

We coded the waiver category "6th Amendment" for all N/DPA provisions that pertained to the entity's waiver of its rights to a speedy trial. For instance, the 2012 DPA between the United States and Academi, L.L.C. provided: "By entry into this Agreement, ACADEMI LLC and its former affiliates expressly waive all rights to a speedy trial pursuant to the Sixth Amendment of the United States Constitution."[234]

The waiver category "Indictment" required us to code all N/DPA provisions in the sample that pertained to a waiver of the right to indictment. For example, the 2009 DPA between the United States and Novo Nordisk A/S provided under the waiver-of-rights provision: "Novo knowingly waives its right to indictment on the charges described in Paragraph 2 and contained in the Information."[235]

For the waiver category "Venue," we coded all N/DPA provisions in the sample that pertained to a waiver of venue. For instance, the 2005 NPA between the DOJ and Friedman's Inc. provided: "Friedman's agrees that such proceeding may be commenced in the Eastern District of New York and Friedman's hereby waives any right to challenge the venue in the Eastern District of New York."[236]

We coded the waiver category "Disclosure" for all N/DPA provisions in the sample that required the entity to consent to any and all disclosures. For instance, the 2004 DPA between the United States and American Online required in the relevant part:

> With respect to any information, testimony, document, record or other tangible evidence provided to the Department of Justice pursuant to this Agreement, AOL consents to any and all disclosures to the SEC and law enforcement entities of such materials as the Department of Justice, in its sole reasonable discretion, deems appropriate in furtherance of its criminal investigation of any individuals related to the subject matters.[237]

Figure 22 shows the numbers of N/DPA agreements containing mandated waivers of attorney-client privilege, mandated partial waivers of attorney-client privilege, and no waiver of attorney-client privilege. The data collected in the sample period shows that from 2002 to 2008, N/DPAs in the sample contained provisions in all three categories. Starting in 2008, the number of N/DPAs that required no attorney-client privilege waiver increased steadily until 2012, while the number of N/DPA provisions that required an attorney-client privilege waiver disappeared completely by 2009. The number of limited attorney-client waivers has steadily declined since peaking in 2005.

233. Non-Prosecution Agreement at 5, U.S. Dep't of Justice—Adelphia Commc'ns Corp. (Apr. 25, 2005), *available at* http://goo.gl/Z8BFd3.

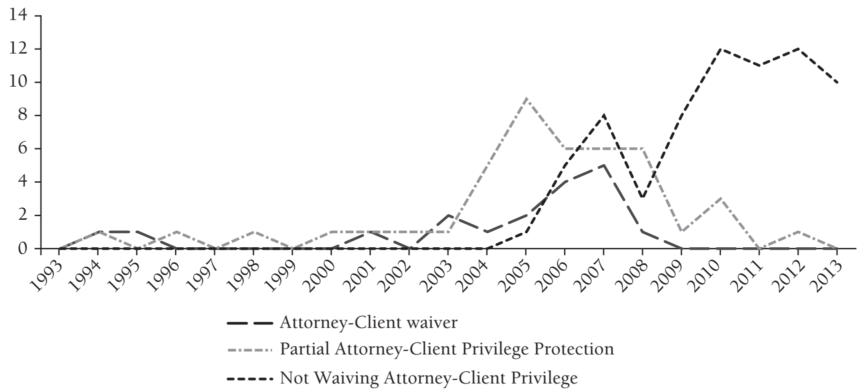
234. Academi L.L.C. Deferred Prosecution Agreement, *supra* note 191, at 11.

235. Deferred Prosecution Agreement at 1, United States v. Novo Nordisk A/S, No. 1:09-cr-00126 (D.D.C. May 11, 2009), *available at* http://goo.gl/wQnbQv.

236. Friedman's Inc. Non-Prosecution Agreement, *supra* note 202, at 17.

237. Deferred Prosecution Agreement at 7, United States v. Am. Online Inc., No. 1:04-mj-01133-1 (E.D. Va. Dec. 15, 2004), *available at* http://goo.gl/vw446O.

Figure 22:
N/DPA Attorney-Client Privilege Waiver, 1993–2013



The 2004 NPA between the DOJ and AIG Financial Products Corporation provides a representative example of an N/DPA-related attorney-client privilege waiver by stipulating that the corporation's cooperation includes:

> Not asserting a claim of attorney-client or work-product privilege as to any documents, information, or testimony requested by the Department or the SEC related to factual internal investigations or contemporaneous advice given to AIG-FP concerning the subject matters. In making production of any such documents, AIG-FP neither expressly nor implicitly waives its right to assert any privilege that is available under law against entities.[238]

The 2005 NPA between the DOJ and Boeing is an example of a limited waiver. It provided: "[I]f requested by the USAOs, negotiate in good faith to attempt to arrive at a limited waiver of the attorney-client privilege and work-product doctrine sufficient to allow the USAOs to be provided with identified materials otherwise withheld under a claim of these protections."[239]

The 2011 NPA between the DOJ and Alpha Natural Resources is an example of an NPA with no waiver requirement. It provided: "Nothing in this Agreement shall be construed as a waiver by Alpha or Massey of the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege or protection with respect to documents or records requested by the Government."[240]

238. Non-Prosecution Agreement at 2, U.S. Dep't of Justice—AIG Fin. Prods. Corp. (Nov. 30, 2004), *available at* http://goo.gl/feMNid.

239. Non-Prosecution Agreement at 5, U.S. Dep't of Justice—Boeing Co. (June 30, 2006), *available at* http://goo.gl/5yPc06.

240. Alpha Natural Resources Non-Prosecution Agreement, *supra* note 201, at 6.

VI. Discussion

The findings discussed in this article are intended to clarify open issues pertaining to the effects of N/DPAs on corporate governance. We provide government decision makers as well as the boards and management of those entities that are subject to N/DPAs with an evaluation of relevant N/DPA governance data. The findings in this study can help improve policy making and facilitate cooperation between the government and private industries.

A. Summary of Key Findings

The results reported in this study suggest that N/DPAs instituted broad and far-reaching corporate governance changes for entities subject to an N/DPA in the sample period 1993–2013. More specifically, we show that the number of publicly available executed N/DPAs increased substantially since 2002. Of the publicly available N/DPAs from 1993–2013, 97.41 percent contained provisions that mandated substantive governance improvements in the following N/DPA governance categories: (1) Business Changes, (2) Board Changes, (3) Senior Management, (4) Monitoring, (5) Cooperation, (6) Compliance Program, and (7) Waiver of Rights. Each of these governance categories includes multiple subcategories of governance changes.

The percentage of N/DPAs in the sample that contained provisions pertaining to these seven governance categories highlights the relative importance of these N/DPA mandated governance changes. Ninety-six percent of the sample contained waivers-of -rights provisions, 91 percent cooperation with the government provisions, and 75 percent improved compliance programs. Less significant categories of N/DPA mandated governance changes include increased monitoring requirements (46 percent of the sample), N/DPA mandated board changes (38 percent of the sample), business changes (30 percent of the sample), and changes in senior management (30 percent of the sample).

We show that 29.5 percent of the N/DPAs in the sample contained provisions mandating business changes that substantively changed the way in which the respective entities could conduct their businesses. N/DPA mandated business changes identified in this study could require the respective entity to fundamentally change its business model or shut down entire business units, among other possible business changes.

Thirty-eight percent of the N/DPAs in the sample contained provisions that required board changes. Over 30 percent of those N/DPAs that included provisions mandating board changes required additional reporting obligations for the board. Eight percent of N/DPAs in this category required changes to the existing board committee structure of the entity, often creating new board committees. Other mandatory changes to the board included increased monitoring obligations (5 percent of the sample), the addition of independent director(s) (3 percent of the sample), and changes pertaining to management (4 percent of the sample).

Of the N/DPAs in the sample, 45.76 percent contained provisions that related to monitoring requirements. The number of N/DPA provisions that required additional oversight by senior management has generally increased since 2001 and peaked in 2010. Overall, 29.9 percent of the N/DPAs in the sample contained provisions related to additional oversight responsibilities for senior management. Similarly, N/DPA-related monitoring obligations have generally increased since the year 2002.

Cooperation with the government is an increasingly common N/DPA feature in the sample period 1993–2013. Of the N/DPAs in the sample, 91.10 percent contained provisions relating to cooperation requirements. Several cooperation subcategories are of particular importance. For instance, the cooperation subcategory "Documents" pertains to N/DPA provisions in our sample that required the identifying, assembling, organizing, and producing of relevant documentation for further investigation of the corporate wrongdoing by the DOJ. In our sample, 79.70 percent of N/DPAs contained cooperation requirements pertaining to "Documents." Similarly, the cooperation subcategory "Testimony" pertains to N/DPAs that required some form of best efforts or reasonable efforts testimony from the directors, officers, employees, and agents of the respective entity. In our sample, 77.86 percent of N/DPAs contained requirements pertaining to "Testimony" and 63.10 percent of N/DPAs contained cooperation requirements pertaining to "Disclosure of Activities." This subcategory of cooperation pertained to the disclosure of activities to the government to increase cooperation.

Since 2002, N/DPA provisions in our sample pertaining to compliance programs have been increasing. In the sample, 74.9 percent of the N/DPAs contained provisions relating to a new, improved, or expanded compliance program. Several subcategories of cooperation requirements as percentage of the total N/DPAs executed in the sample are particularly important. Forty-five percent of N/DPAs in the sample contained provisions pertaining to improved communications and training requirements. Twenty-seven percent of N/DPAs in the sample required an updating of compliance policy, 21 percent required improvements pertaining to books and records, and 19 percent required a compliance code. Only 11 percent of the N/DPAs in our sample required the creation of the position of chief compliance officer.

The waiver-of-rights provisions constitute the most significant governance category in the N/DPAs in our sample. Ninety-six percent of the sample contained waivers-of-rights provisions. The largest category of N/DPA-related waivers of rights pertains to the waiver of applicable statutes of limitations (79.70 percent of the sample), followed by waiver of admissibility (73.43 percent of the sample), and waiver of the Sixth Amendment right (46.13 percent of the sample). Other important categories of waivers pertain to waivers of indictment (31.00 percent of the sample) and waiver of venue (23.62 percent of the sample). We show that trends pertaining to N/DPA attorney-client privilege waivers reversed in 2008. While the number of N/DPAs that did not require an attorney-client privilege waiver increased steadily starting in 2008, N/DPA provisions that did require an attorney-client privilege waiver disappeared completely by 2009.

While 69 percent of the N/DPAs in the sample contained provisions that related to some form of acceptance of responsibility for corporate wrongdoing, 63.47 percent of the N/DPAs in the sample contained references to preemptive remedial measures instituted before the execution of the N/DPA. More specifically, 36 percent of the N/DPAs in our sample contained references to preemptive remedial measures requiring some level of increased cooperation with the government. Other important categories of preemptive remedial measures include internal review and investigations (30 percent of the sample), improved compliance measures (27 percent of the sample), increased reporting to government officials (25 percent of the sample), termination of employment (17 percent of the sample). Only 1 percent of N/DPAs in our sample included preemptive remedial measures that created a new board. Only 6 percent of N/DPAs in our sample made references to preemptive remedial measures that instituted new management.

B. Implications for Boards, Management, and Legal Counsel

The evidence provided in this article suggests that the corporate governance changes instituted through the increasing use of N/DPAs could over time require a reexamination of corporate practices. While the N/DPA-related obligations and governance changes can result in governance reform for the respective entities during the term of the N/DPA and beyond, it remains an open question if N/DPAs are likely to result in lasting and meaningful corporate governance reform. Currently, N/DPAs enable companies to resolve allegations of corporate criminal conduct, strengthen corporate compliance mechanisms to prevent such conduct in the future, and mitigate the risks that collateral consequences of a conviction can bring for companies, their shareholders, employees, and the economy.

The trends in our data suggest that directors, officers, and their legal counsel will increasingly have to address N/DPA-related governance requirements in addition to other regulatory demands. Legal counsel are traditionally hired in the context of corporate wrongdoing to advise corporate clients on the possible threats of federal lawsuits, class actions, and investigations by the SEC and other regulatory bodies. The evidence provided in this article suggests that since 2002 the increasing execution of N/DPAs has heightened the overall regulatory burden for corporate entities that are subject to N/DPAs. At the end of the data collection process, we were not aware of indicia that would suggest that the N/DPA execution trend evidenced in the dataset of this study would not continue in future years. Should these trends continue, entities that are facing investigation and/or self-reported corporate wrongdoing, directors, officers, and their legal counsel would increasingly have to take into account the possible involvement of the DOJ. The threat of corporate criminal indictment can fundamentally change the negotiation position of a corporate entity and often has knock-on effects on related litigation matters and settlements.

The focused targeting of particular industries via N/DPAs has the potential to lead to lasting substantive governance reform and the associated reexamination of corporate practices. Should the leading corporations in a particular industry be bound by the terms of substantially similar N/DPAs with similar or overlapping terms, business and governance practices in that industry may at least be temporarily changed in accordance with the terms of the N/DPAs. Given the government's privileged access to information and continuing government oversight, even after the N/DPA term expires, business and governance practices in that industry could encounter lasting change.

We do not claim that all N/DPA governance changes associated with these seven categories examined in this study will have a lasting impact on corporate governance or would necessitate a systematic rethinking of corporate governance. However, the trends in the data suggest that especially N/DPA-related business changes, board changes, and cooperation requirements[241] could over time have a substantive impact on corporate governance, especially if the DOJ targeted a particular industry. High profile N/DPAs and plea agreements executed in 2012 and 2014 suggest that the DOJ is in fact already effectuating large-scale corporate governance changes in the financial industry.[242]

Boards and officers may currently not take the effects of N/DPAs sufficiently into account in conducting the affairs of corporations. Our data predominantly identifies the effects of N/DPAs on the entity that executed the N/DPA. The factors that can optimize incentives for management and boards to avoid corporate wrongdoing, implement appropriate preemptive remedial measures, optimize governance, and avoid N/DPA execution seem of particular interest but are currently not sufficiently determinable in our data or in the literature. N/DPA-related measures currently do not force a significant number of officer changes or board membership changes for the respective entity (38 percent of the sample).[243] The N/DPA-related board changes reported in this article largely relate to additional reporting obligations for senior officials and board committee reform.[244] These reforms alone may not create sufficient incentives for boards and management to improve governance and avoid N/DPA execution. However, the threat of bad press, reputational harm, legal costs, stock price declines, and the cost of implementing N/DPA governance changes can help counteract lacking incentives for boards and management to optimize governance and protect the entity from entering into a N/DPA.

N/DPA-related cooperation requirements identified in this study may result in an increasing need to anticipate prosecutorial actions. We identify that N/DPA-related cooperation requirements play a comparatively large and important role, especially in the context of identifying witnesses, which appears to be a real gain for the government. Should the N/DPA cooperation trend evidenced in the

241. *See supra* figs. 8–11.

242. *See* Deferred Prosecution Agreement, United States v. HSBC Bank, USA N.A. and HSBC Holdings plc, No. 1:12-cr-00763 (E.D.N.Y. Dec. 11, 2012), *available at* http://goo.gl/52Ygh3; Deferred Prosecution Agreement, United States v. JPMorgan Chase Bank, N.A., No. 1:14-cr-00007 (S.D.N.Y. Jan. 6, 2014), *available at* http://goo.gl/xjKIig; Plea Agreement, United States v. BNP Paribas S.A., No. 1:14-cr-00460 (S.D.N.Y. July 9, 2014); Plea Agreement, United States v. Credit Suisse AG, No. 1:14-cr-00188 (E.D. Va. May 19, 2014), *available at* http://goo.gl/4VV8HT.

243. *See supra* figs. 9 & 10.

244. *See supra* fig. 10

dataset of this study continue, legal counsel will increasingly have to guide corporate clients on how to manage prosecutors who have near unlimited access to company information. The associated need to anticipate prosecutors' regulatory actions could have long-term effects on business practices and corporate governance. Future research can help identify how prosecutors' near unlimited access to company information and the corporate wrongdoers' anticipation of prosecutors' regulatory actions can be utilized for dynamic and anticipatory forms of regulation.[245]

Preemptive remedial measures instituted by the respective corporate wrongdoer to avoid the execution of N/DPAs (63.47 percent of the N/DPAs in the sample) and the associated governance changes may play an increasing role for legal practitioners and their clients. While many factors affect the execution of N/DPAs and many of the factors can be out of the control of the entity's management or board, we code only captured preemptive remedial measures referenced in executed N/DPAs. Given the execution of N/DPAs after the institution of preemptive remedial measures (63.47 percent of the N/DPAs in the sample), the current quantity, quality, comprehensiveness, and effectiveness of preemptive remedial measures may be insufficient. High-quality effective preemptive remedial measures are part of good corporate governance and can help avoid investigations and prosecutions and the associated execution of N/DPAs. Boards, management, and corporate counsel could benefit from increasing the effectiveness of preemptive remedial measures. This seems especially true should future N/DPAs increasingly mandate the replacement of senior management and members of the board. Future research can help identify possible applications of preemptive remedial measures in dynamic forms of regulation.[246]

The data provided in this article can help provide guidance on sound corporate compliance. Industry advice on building an effective compliance program[247] is necessarily mostly general because the advice is meant to apply to a multitude of companies. However, in practice, no two companies are sufficiently alike to effectively provide general guidance on compliance programs. For instance, an effective compliance program for an oil company doing business in Nigeria will look very different from an effective compliance program for a global pharmaceutical company. The N/DPA governance categories and subcategories in this article can be seen as common denominators for companies in a wide variety of industries. Anticipating the governance issues suggested in the N/DPA governance categories can provide general guidance on core elements for an effective compliance program.

Boards, management, and corporate counsel may also be able to learn from N/DPAs that were executed between the DOJ and competitor corporations. Learning from competitor N/DPAs can be associated with the terms of the respective

245. This research could provide a theoretical framework for possible forms of dynamic and anticipatory regulation, Wulf A. Kaal, *Dynamic Regulation via Governmental Contracts*, *in* LIBER AMICORUM PETER NOBEL (forthcoming 2014).

246. *See id.*

247. *See, e.g.*, PROTIVITI, VIEWING YOUR ANTI-CORRUPTION EFFORTS THROUGH THE LENS OF THE HALLMARKS OF AN EFFECTIVE COMPLIANCE PROGRAM (2013), *available at* http://goo.gl/nI8StR.

N/DPA or the lack thereof. Competitor's proactive steps to avoide the harshest N/DPA provisions, e.g., the entity already had a pre-existing compliance program, self-disclosed violations, instituted an internal investigation, and engaged in meaningful cooperation before the execution of an N/DPA etc., can function as a roadmap for management and corporate counsel, helping with the preparation for future investigations and handling the eventual investigation. In effect, boards, management, and counsel can learn from the provisions in their competitors' N/DPAs, the lack of competitors' N/DPA provisions and associated preemptive remedial measures, and from the respective structure of N/DPAs for their own governance practices.

Regulators can also learn from governance reforms associated with N/DPAs.[248] Governance measures in this context include preemptive remedial measures instituted by corporations to avoid an investigation or the execution of a N/DPA, the eventual DOJ investigations, and executed N/DPAs. Regulators can learn from preemptive remedial measures instituted by corporate wrongdoers because such measures highlight possible areas of governance concern in a particular industry and provide insights into increased needs for regulatory actions. Similarly, the information generated by the DOJ's investigations of particular corporate wrongdoers generates highly relevant, decentralized, and institution-specific information for rulemaking. Should the DOJ target particular industries with plea agreements and N/DPAs, such as the financial industry,[249] the information generated through such investigations can provide regulators with relevant, relatively specific, and decentralized information on regulatory needs in the respective industry. The learning process taking place between regulators and the DOJ can help facilitate dynamic and anticipatory forms of regulation.[250]

Governance reform associated with N/DPAs can be an efficient regulatory supplement. The learning process between regulators and the DOJ, preemptive remedial measures preceding the execution of N/DPAs, and associated N/DPA feedback effects can help create a framework for dynamic and anticipatory forms of regulation as a regulatory supplement.[251] N/DPA-related governance reform is relatively "cheap" for corporations because comparatively few board and management positions are adversely affected. Furthermore, N/DPA-related governance reform is a measure supported by most corporate insiders as it is seen as beneficial for investors.[252] Until regulators belatedly realize the threat posed by

248. *Id.*

249. *See supra* note 243.

250. *See* Kaal, *supra* note 246.

251. *See id.*

252. *See* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 129–130 (2007) ("Empirical studies have shown that the mere announcement of a criminal investigation triggers a significant drop in a company's stock price. Shareholder wealth also takes an exceptionally harsh hit when the government, rather than a private plaintiff, initiates proceedings against a company. Without much needed guidance, all companies will be made to wait in the queue of uncertainty, a situation disfavored by investors and the capital markets."); *see also* F. Joseph Warin et al., *"Potential Game-Changer" at Two Years: The SEC's Use of Deferred and Non-Prosecution Agreements*, FINDLAW (May 25, 2012), http://goo.gl/af3wnB ("[A] DPA can be favorably described as the SEC's decision not to take an enforcement

particular industry practices, as identified in N/DPAs, and consider acting upon it, N/DPA-related governance reform is entity specific and increases the availability of relevant, decentralized, and institution specific information for regulatory action.[253] Despite these benefits, N/DPA governance reform is less predictable than legislative governance reform. Because of the large reputational implications of prosecution and N/DPA execution, corporate wrongdoers are unlikely to favor "regulation by prosecution" to regulation by legislation. Regulation by prosecution also does not allow corporations to influence regulations in their favor through the comment process and lobbying. In the long run, however, increased regulation by prosecution may be able to offset many of the shortcomings of legislative governance reforms.[254]

It is unclear if N/DPA measures identified in this study can result in lasting governance reform. Given that N/DPAs typically have a limited duration/term, it remains unclear if N/DPA-related governance reforms can be successful in the long-term, i.e., if they "stick." Moreover, it is unclear if corporate wrongdoing is the result of a failure of corporate governance or other factors. If corporate wrongdoing is not the result of lacking corporate governance, it seems possible that N/DPA related governance reform is just a method of settlement rather than a lasting reform effort. We acknowledge that there is a risk that the alleged (and settled) corporate wrongdoing may not in all cases be linked to an identifiable and specific past failure. Future studies will have to identify the specific N/DPA-related corporate wrongdoing and the effect on firm value and stock price. It is also unclear to what extent government agencies monitor the implementation and effectiveness of N/DPA-related governance reforms. More research may be needed to identify if N/DPA-related governance reforms persist after the N/DPA term ends, how a particular N/DPA reform measure can be sustained, and what institutional and regulatory changes would have to be instituted to ensure sustainability of N/DPA governance reform. Identifying successful parameters for lasting N/DPA governance reform in specific industries may require additional research. In particular, it is unclear which N/DPA provisions may be most relevant in the reformation of corporate governance and what industries are particularly susceptible to N/DPA measures and would merit targeting by the DOJ.

C. Limitations and Future Research

The findings in this study suggest that N/DPAs can play a legitimate role in addressing corporate governance shortcomings. N/DPAs may be an efficient

action against the defendant, a meaningful distinction for a company's public image and reputation. Additionally, the SEC's comments regarding the company's extensive cooperation and remediation can bolster a company's efforts to demonstrate to constituents, investors and other regulators that it is an earnest, law-abiding entity."). *But see* Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in PreTrial Bargaining Under the Foreign Corrupt Practices Act*, 10 Hastings Bus. L.J. 347, 392 (2014) ("[L]ook out for the investors who tend to bear the brunt of monetary penalties imposed on the corporation through DPAs and NPAs.").

253. *See* Kaal, *supra* note 246.

254. *See id.*

tool in the evolution of corporate governance in the United States. However, it is important to note that the findings in this study can merely highlight general trends and possible implications of corporate governance contributions deriving from the use of N/DPAs. The underlying corporate governance problems in U.S. corporations could be more severe than N/DPAs can adequately address. As identified in the evaluation of preemptive remedial measures, most corporations identify and address governance issues themselves before they become public or self-report to the DOJ with the help of counsel in cases of serious violations that have not been adequately remedied. The corporate governance trends identified in this study only pertain to corporations that have executed N/DPAs. Given that a disproportionately large number of corporations will identify and address corporate governance shortcomings themselves or self-report to the DOJ, the corporate governance issues and N/DPA trends reported in this paper may simply be the tip of the proverbial iceberg.

Future research is needed to identify the impact of N/DPA measures on corporate governance in U.S. corporations. In particular, it is unclear which N/DPA provisions may be most relevant in the reformation of corporate governance and what industries are particularly susceptible to N/DPA measures and would merit targeting by the DOJ. Future studies could further clarify the application and benefits of N/DPAs by evaluating the impact of N/DPAs on firm value, the financial performance of the respective entity, impact on Tobin's Q, impact on stock price and other performance measures, industry indices, and market capitalization, among other criteria.

VII. Conclusion

The use and application of N/DPAs has proliferated since their inception in the early 1990s. N/DPAs are making significant and controversial contributions to corporate practices, exemplifying a shift in prosecutorial culture from an ex-post focus on punishment to an ex-ante emphasis on compliance. Based on case studies and anecdotal evidence, the literature is largely concerned about the use, application, and legitimacy of N/DPAs. This study provides empirical evidence of corporate governance changes mandated in N/DPAs since the early 1990s. We find that corporate governance provisions in N/DPAs significantly increased in the last decade, boosting prosecutors' influence over corporate governance to unprecedented levels. Additional research is needed to fully evaluate the data made available in this study and its implications.