

Deferred Prosecutions in the Corporate Sector: Lessons from LIBOR

Justin O'Brien^{*} & *Olivia Dixon*^{**}

I. INTRODUCTION

Since 2008, the global economic downturn has significantly increased operating pressures on major corporations. Profit margins have been squeezed. Increased competition, decreased demand, and the perennial pressure to meet or exceed earnings forecasts add to the bottom line pressures on corporate boards. The *2012 Ernst & Young Annual Global Fraud Survey (Ernst & Young Survey)* paints an exceptionally bleak picture.¹ It details a debilitating nexus between a challenging economic outlook and “institutional fatigue,” which inhibits capacity to deal with a pervasive and growing problem.² Hard times, it concludes, strain ethical standards.³ Significantly, this increased corporate tolerance for corruption coincides with a marked preference by regulators in settling, rather than litigating, enforcement actions.

This trend is most notable in the United States, where fines linked to deferred prosecution agreements (DPAs) have been running at record levels.⁴ Most recently, focus has shifted to corruption in the setting of benchmark interest rates, where at least sixteen banks and three brokerage houses are currently under investigation by regulatory authorities over the suspected manipulation of the London Interbank Offered Rate

^{*} Australian Research Council Future Fellow, Professor of Law and Director, Centre for Law, Markets and Regulation, UNSW Law, University of New South Wales.

^{**}Lecturer, Faculty of Law, University of Sydney.

1. ERNST & YOUNG, *GROWING BEYOND: A PLACE FOR INTEGRITY: 12TH GLOBAL FRAUD SURVEY 28* (2012) (U.K.), available at [http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/\\$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf](http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf).

2. *Id.* at 1.

3. *Id.* at 5.

4. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1776, 1793–98 (2011).

(LIBOR).⁵ To date, the United States has levied just over \$1.8 billion⁶ in penalties from three banks that have executed negotiated settlements. These agreements, which amount to extrajudicial contracts, significantly enhance the bargaining power of prosecutorial agencies. The flexing of regulatory and legal muscle is also apparent in the United Kingdom, where the Crime and Courts Act 2013 (CC Act)⁷ introduced into U.K. law for the first time the concept of deferred prosecutions.⁸

The justification offered by the United Kingdom for the introduction of deferred prosecutions, as set out in the Ministry of Justice consultation paper,⁹ is the capacity of the mechanism to enforce behavioral change.¹⁰ In particular, the consultation paper highlighted how efficacious deployment of external monitors through deferred prosecutions can be in evaluating ongoing corporate commitment to the introduction of remedial measures.¹¹ Three additional tactical and strategic advantages were also canvassed. First, it can reduce the time it takes to complete complex investigations.¹² Second, and if appropriate, demands for corporate exit from particular high-risk activities or markets can be built into the calculation.¹³ Third, significant revenue can accrue to the Treasury,

5. Brooke Masters, Patrick Jenkins & Justin Baer, *Big Banks Investigated Over Libor*, FIN. TIMES (Mar. 15, 2011), <http://www.ft.com/cms/s/0/ab563882-4f08-11e0-9c25-00144feab49a.html#axzz2hLea52Ju>; David Enrich, *Brokers Charged in Libor Investigation*, WALL ST. J. (July 15, 2013), <http://online.wsj.com/news/articles/SB10001424127887323848804578607561454417772>.

6. Barclays was fined \$160 million by the U.S. DOJ. See Press Release, U.S. Dep't of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay \$160 Million Penalty (June 27, 2012), available at <http://www.justice.gov/opa/pr/2012/June/12-crm-815.html>. UBS was fined \$500 million by the U.S. DOJ and \$700 million by the Commodity Futures Trading Commission. See Press Release, U.S. Dep't of Justice, UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates (Dec. 19, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html>. RBS was fined \$150 million by the U.S. DOJ and \$325 million by the Commodity Futures Trading Commission. See Press Release, U.S. Dep't of Justice, RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of Libor Benchmark Interest Rates (Feb. 6, 2013), available at <http://www.justice.gov/opa/pr/2013/February/13-crm-161.html>.

7. See Crime and Courts Act, 2013, c. 22 (U.K.), available at http://www.legislation.gov.uk/ukpga/2013/22/pdfs/ukpga_20130022_en.pdf.

8. This legislation is not yet in effect and is not likely to be in effect before February 2014.

9. See MINISTRY OF JUSTICE, CONSULTATION ON A NEW ENFORCEMENT TOOL TO DEAL WITH ECONOMIC CRIME COMMITTED BY COMMERCIAL ORGANISATIONS: DEFERRED PROSECUTION AGREEMENTS (2012) (U.K.), available at https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf.

10. See *id.* at 3–4.

11. See *id.* at 17.

12. See *id.* at 12.

13. See *id.* at 23.

therefore adding to the sovereign balance sheet as well as to the prosecutorial armory.¹⁴

In both the academic and practitioner communities, the expansion of prosecutorial authority is greeted with markedly different responses on either side of the Atlantic.¹⁵ In part, this can be traced to substantial variation in enforcement priorities, past performance, and the availability of liability-reducing defenses. For example, with respect to allegations of foreign bribery, the United Kingdom's Bribery Act 2010 (Bribery Act)¹⁶ closely tracks the United States' Foreign Corrupt Practices Act of 1977 (FCPA)¹⁷ in its definition of what constitutes an offense; however, the Bribery Act departs substantially in that corporate liability can be reduced if "adequate procedures" are in place.¹⁸ The relatively sanguine nature of the response in the United Kingdom also reflects the prior catastrophic failure of the Serious Fraud Office as an effective prosecutorial agency.¹⁹ This has led to an underestimation of the risks associated with providing these agencies with the power to broker settlements.

This Article argues that the expansion of prosecutorial authority without appropriate accountability restraints is a major tactical and strategic error. It examines the benefits and pitfalls of using the deferred prosecution mechanism to combat economic crime. It highlights the scope of its actual and proposed application. It assesses whether enhanced prosecutorial flexibility enhances or inhibits the capacity to enforce behavioral change. Finally, it evaluates whether the mechanism can be made subject to effective oversight. It argues that the current framework in the United States is highly problematic, leading to settlements that generate newspaper headlines but not necessarily cultural change. It

14. *See id.* at 17.

15. *See* JAMES R. COPLAND, CTR. FOR LEGAL POLICY MANHATTAN INST., *THE SHADOW REGULATORY STATE: THE RISE OF DEFERRED PROSECUTION AGREEMENTS* (2012), available at http://www.manhattan-institute.org/pdf/cjr_14.pdf; Mike Koehler, *The Façade of FCPA Enforcement*, 41 *GEO. J. INT'L L.* 907 (2010); *but cf.* CLIFFORD CHANCE, UK GOVERNMENT UNVEILS PLANS FOR DEFERRED PROSECUTION AGREEMENTS 3 (2012) (U.K.), available at http://www.cliffordchance.com/publicationviews/publications/2012/05/uk_government_unveilsplansfordeferre.html.

16. *See* Bribery Act, 2010, c. 23 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

17. *See* 15 U.S.C. § 78dd-1 (2013).

18. *See* Bribery Act § 7(2); *see also* MINISTRY OF JUSTICE, *THE BRIBERY ACT 2010: GUIDANCE* (2011) (U.K.), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; Peter Yeoh, *The UK Bribery Act 2010: Contents and Implications*, 19 *J. FIN. CRIME* 37, 44 (2011); F. Joseph Warin et al., *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 *TEX. INT'L L.J.* 1, 31–32 (2010).

19. *See* Barry A.K. Rider, *The End of a Chapter*, 18 *J. FIN. CRIME* 3, 3 (2011); *see also* Yeoh, *supra* note 18.

also runs the risk of privileging a form of enforcement that operates outside appropriate legal safeguards. The approach canvassed by the British authorities offers only a partial improvement in this process. For negotiated prosecutions to be truly effective, they require a much firmer normative basis.

The Article is structured as follows: Part II outlines the growing scale of and tolerance for economic corruption as outlined in the *Ernst & Young Survey*. Part III explores how and why deferred prosecution has become the enforcement tool of choice in the United States, with particular reference to breaches of the FCPA and the recent LIBOR scandal. Part IV evaluates the accountability deficiencies associated with its application, both in terms of over-enforcement and under-enforcement. Part V evaluates the extension of the mechanism in the United Kingdom and assesses the extent to which the refinements address the accountability deficit. Finally, Part VI concludes.

II. THE CORRUPTION NEXUS

In the United States, corporate misconduct rarely gets litigated to a conclusion. Instead, prosecutorial authorities privilege negotiated settlements with deferred prosecution agreements being routinely applied to settle allegations of bribery and corruption under the FCPA.²⁰ While this approach generates headlines, it appears powerless to either stop the incidence of corruption or provide granular guidance on how to develop more effective compliance programs. At a global level, the *Ernst & Young Survey* is one of the most detailed snapshots of the bribery and corruption challenges facing multinational corporations currently undertaken. An understanding of the scale and tolerance for economic corruption is essential to explaining the proliferation of the U.S. Department of Justice's (DOJ) preference for utilizing deferred prosecutions. The survey is drawn from a sample of 1,700 senior executives.²¹ It includes respondents drawn from incumbent chief financial officers (CFOs) and senior executives charged with running the legal, compliance, and internal audit functions of major corporations across forty-three different countries.²² One of the most "troubling" findings is what Ernst & Young deems a growing widespread acceptance of unethical business practices—for example, 64% of respondents believe that the incidence of com-

20. See *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated Jan. 9, 2014).

21. ERNST & YOUNG, *supra* note 1, at 1.

22. See *id.* at 29.

pliance failure has increased because of the downturn.²³ The trend is particularly apparent in East Asia—for example, 60% of respondents in Indonesia suggested it was acceptable to make cash payments to secure new contracts, and 36% of respondents in Vietnam suggested it was permissible to misstate financial accounts.²⁴

The decline in ethical commitment is traced to a lack of training and, more significantly, to mixed messages from senior management as to the importance of compliance with Anti-Bribery and Corruption Policies (ABACP).²⁵ As Ernst & Young conclude, if action is not taken to hold offenders to account, stated commitment to high standards remains an exercise in symbolism.²⁶ It is also an exceptionally risky strategy given the global rise in enforcement. While many of the executives surveyed reported having sophisticated compliance systems in place, these systems were not subject to ongoing external testing.²⁷ Only 33% reported using external law firms or consultants to provide assurance.²⁸ In a significant finding, 54% of CFOs surveyed had not taken ABACP training,²⁹ while 52% of all respondents reported that the board was not sufficiently aware of operating risk.³⁰ As well as specific local conditions, the survey that found boards needed to be much more cognizant of the risk associated with corporate acquisitions.³¹

Unless gaps between controls and compliance programs in each entity are identified and procedures rectified, the conflation of existence of control and effective risk management could magnify, rather than resolve, the litigation threat.³² However, the overriding identified risk, and resulting legal exposure, focused on how a corporation manages the legacy and ongoing relationships with third parties.³³

According to Ernst & Young, “many companies are failing to adopt even the most basic controls to manage these third-party relationships”³⁴ (e.g., only 59% use an approved supplier database; 56% adopted a background checking system; 50% do not check the ownership structure of the third party as part of routine due diligence; 55% either do not have

23. *See id.* at 4 fig.1, 7 fig.4.

24. *See id.* at 5 fig.2, 9 fig.5.

25. *See id.* at 6.

26. *See id.* at 28.

27. *See id.* at 1.

28. *Id.* at 7 fig.4, 11 fig.7.

29. *Id.* at 3.

30. *Id.* at 3.

31. *See id.* at 11.

32. *See id.*

33. *See id.* at 8.

34. *Id.* at 9.

audit rights or check audit procedures with the third-party entity).³⁵ According to the global professional advisory firm, this constitutes a “real problem” precisely because third-party due diligence is “increasingly expected” by the DOJ as well as the authorities in England and Wales.³⁶ Disturbingly, 15% of the CFO respondents report unawareness that the corporation can be held liable for the actions of third-party agents.³⁷ Ignorance is not, however, a defense when it comes to prosecution for violations of the Bribery Act or the incredibly malleable application of the FCPA by the DOJ.

The DOJ has secured record fine levels for the prosecution of offenses linked to FCPA violations.³⁸ Moreover, a significant strengthening of the incentives for corporate whistleblowing has emerged, linked to the introduction of a bounty system under the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank).³⁹ Section 922 of Dodd–Frank authorizes the Securities and Exchange Commission (SEC) to institute an award scheme.⁴⁰ Material information leading to a successful rendering of a fine in excess of \$1 million makes the whistleblower eligible for a payment between 10%–30% of the financial penalty.⁴¹ These reforms, which have applicability far beyond the FCPA arena, underscore the critical importance of effective systems to police deviance within the firm, as the Swiss bank UBS has most recently discovered.⁴²

The problem facing corporations is that the definition of what constitutes an effective compliance program is itself constantly shifting. Moreover, the compliance program is of variable use in defending a corporate liability action. In the United Kingdom, for example, guidance issued by the Ministry of Justice suggests that adequate procedures can constitute a defense.⁴³ Defendants must demonstrate, however, that operating risks—including sector, region, reliance on intermediaries, and use

35. *Id.* at 9 fig.6, 13 fig.9.

36. *See id.* at 9; *see also* MINISTRY OF JUSTICE, *supra* note 9, ¶¶ 37–43.

37. ERNST & YOUNG, *supra* note 1, at 13.

38. *See* Garrett, *supra* note 4, at 33.

39. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1851 (codified as amended in scattered sections of 12, 15, & 26 U.S.C.).

40. *Id.* at § 922 (codified at 15 U.S.C. § 78u-6).

41. *Id.*; *see also* SEC Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 17 C.F.R. § 240 (2011), available at <http://www.sec.gov/rules/final/2011/34-64545.pdf>; Emily Stephenson, *SEC Approves \$50,000 Payout Under New Whistleblower Program*, REUTERS (Aug. 21, 2012), <http://www.reuters.com/article/2012/08/21/us-financial-regulation-idUSBRE87K0UE20120821>.

42. *See* Patrick Temple-West & Lynnley Browning, *Whistleblower in UBS Tax Case Gets Record \$104 Million*, REUTERS (Sept. 11, 2012), <http://www.reuters.com/article/2012/09/11/us-usa-tax-birkenfeld-idUSBRE88A0TE20120911>.

43. *See* MINISTRY OF JUSTICE, *supra* note 9, at 5 n.3.

of corporate hospitality—have been taken into consideration in the design and ongoing monitoring of compliance programs. The corporation must demonstrate that it has conducted effective due diligence of all associated personnel. It must demonstrate that communication and training is in place and that commitment to the policy is warranted through, for example, external engagement with the media and practitioners.

In sharp contrast, the United States fails to define the parameters of adequate compliance in the FCPA legislation and therefore fails to provide concrete guidance for corporations. The DOJ, does, however, routinely publish the terms of compliance programs, which serve a broader demonstrative effect. For example, in *United States v. Panalpina World Transport (Holding) Ltd.*,⁴⁴ Panalpina was mandated to develop compliance standards and procedures. These mandated compliance standards and procedures, which included internal controls, ethics, and compliance programs, were based on a risk assessment addressing the individual circumstances of Panalpina. While this assessment particularly focused on the foreign bribery risks the company faced, it also addressed Panalpina's geographical organization; interactions with various types and levels of government officials; industrial sectors of operation; involvement in joint venture arrangements; importance of licenses and permits in its operations; degree of governmental oversight and inspection; and volume and importance of goods and personnel clearing through customs and immigration.⁴⁵

Furthermore, certainty cannot be assured through application of case law precedent given the extent to which prosecutions of violations of the FCPA are overwhelmingly settled rather than litigated. The result is that, in effect, what constitutes compliance means solely what the prosecutors say it means.⁴⁶

The primary battleground on which this debate is fought (and intentions ascertained) is in the negotiations over whether and on what terms a prosecutor is prepared to countenance a deferred prosecution. These pre-trial diversion agreements force corporations to accept a partial reading of the record that corresponds to the worldview of the prosecutorial agency. They prohibit questioning in return for a deferral of prosecution. Notwithstanding the criticism that its use has contributed to the

44. Deferred Prosecution Agreement C, at 1–7, *United States v. Panalpina World Transport (Holding) Ltd.*, No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-dpa.pdf>.

45. *Id.* at 66.

46. See *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 14–16 (2010) (statement of Andrew Weissman, Partner, Jenner & Block, LLP).

emergence of a “shadow regulatory state,”⁴⁷ bred over-compliance, and reflects an extrajudicial contract,⁴⁸ the deferred prosecution has emerged as one of the most potent weapons in the prosecutorial armory.

For example, the DOJ has entered into three negotiated settlements to date with respect to LIBOR manipulation, a case complicated by a number of features.⁴⁹ It involves alleged collusion by banks that were panel members for LIBOR, TIBOR, and EURIBOR.⁵⁰ Regulators across many jurisdictions are involved, including the United States, United Kingdom, European Union, Japan, Canada, and Switzerland.⁵¹ The legal issues are complex, and the evidence and investigations involve both financial regulators and antitrust regulators. From one perspective, the benefits to the regulator of entering into a negotiated settlement in such a widespread and systemic case are vast. Without access to corporate internal investigations in exchange for leniency, regulatory investigations would likely have reached a stalemate.

The *Ernst & Young Survey* is likely only to strengthen resolve at the DOJ and in London—where the United Kingdom government has been long pressed to follow the United States’ example in using creative enforcement to add to prosecutorial capacity.⁵² Partly in response to perceived failings to prosecute under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the United Kingdom introduced into law for the first time the concept of deferred prosecutions. The Solicitor General, Edward Garnier, has claimed it would provide a more effective way of “dealing with criminality without causing collateral damage.”⁵³ It is, however, a mechanism that is exceptionally susceptible to abuse. In the following section, the nature of that risk to both corporations and prosecutorial authority is traced.

47. See COPLAND, *supra* note 15.

48. See Koehler, *supra* note 15.

49. See sources cited *supra* note 6.

50. See *The Libor Scandal: The Rotten Heart of Finance*, ECONOMIST, July 7, 2012, available at <http://www.economist.com/node/21558281>.

51. *Id.*

52. See Nancy Z. Boswell, Letter to the Editor, *SFO Can Learn from US Approach to Corruption*, FIN. TIMES (July 7, 2008), <http://www.ft.com/intl/cms/s/0/21ea2326-4bc1-11dd-a490-000077b07658.html#axzz1wnbQTu00>.

53. Caroline Binham, *Plans Revealed for US-Style Plea Bargains*, FIN. TIMES (Sept. 28, 2011), <http://www.ft.com/intl/cms/s/0/3ed306d2-e9e9-11e0-a149-00144feab49a.html#axzz1wnbQTu00>.

III. TACKLING CREATIVE COMPLIANCE THROUGH CREATIVE ENFORCEMENT

A. Deconstructing the Use of Negotiated Settlements

The accounting and conflicts-of-interest scandals at the turn of the millennium rekindled interest in the use of creative enforcement to deal with economic crime. At the federal level, it followed the successful application of non-prosecution agreements by then-New York State Attorney General, Eliot Spitzer, to force both executive regime change and substantive compliance recalibration in the financial services sector.⁵⁴ Ever since, the mechanism increasingly formed a critical component of the prosecutorial toolbox across diverse corporate settings.⁵⁵

At its core, the deferred prosecution involves an extrajudicial contract between the prosecutorial authority and the individual or entity under investigation. In return for a commitment to enter into a series of legally binding undertakings, the severity of which is dependent largely on prosecutorial acumen, the entity can secure a deferral of charges or a non-prosecution agreement. The policy was originally applied to juvenile offenders as an alternative to custodial sentences and the longer-term effects on the disadvantaged or alienated of having a criminal conviction.⁵⁶ It was first used in the corporate sector in 1994, with the prosecution of Prudential Securities. It has since found application in a range of sectors,⁵⁷ most notably in cases involving corruption, where the DOJ is primarily responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions of the FCPA with respect to domestic concerns, foreign companies, and nationals. On a smaller scale, the SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.

The negotiated prosecution in the United States offers a range of immediate benefits to the prosecutor. First, executives can still be made amenable to the court, thereby serving the public policy imperative of

54. See Justin O'Brien, *The Politics of Enforcement: Eliot Spitzer, State-Federal Relations, and the Redesign of Financial Regulation*, 35 *PUBLIUS* 449 (2005).

55. See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big Too Debar*, 80 *FORDHAM L. REV.* 775, 778 (2011).

56. See generally JUSTIN O'BRIEN, *ENGINEERING A FINANCIAL BLOODBATH: HOW SUB-PRIME SECURITIZATION DESTROYED THE LEGITIMACY OF FINANCIAL CAPITALISM* 48–56 (2000); see also JUSTIN O'BRIEN, *REDESIGNING FINANCIAL REGULATION: THE POLITICS OF ENFORCEMENT* 123–69 (2006). For assessment of the DOJ's usage, see U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS* (2009), available at <http://www.gao.gov/assets/130/122853.pdf>.

57. See *infra* Figure 1.

individual accountability. Second, the corporation can be forced to ensure that control deficiencies highlighted by the investigation are adequately addressed. Third, the prosecutorial agency is given explicit operational veto over implementation of remedial reform through the option of appointing an external monitor. Fourth, as noted above, the mechanism provides a source of revenue.

Figure 1: Total Frequency of Deferred Prosecution Agreements by Crime Type (1992–2012)⁵⁸

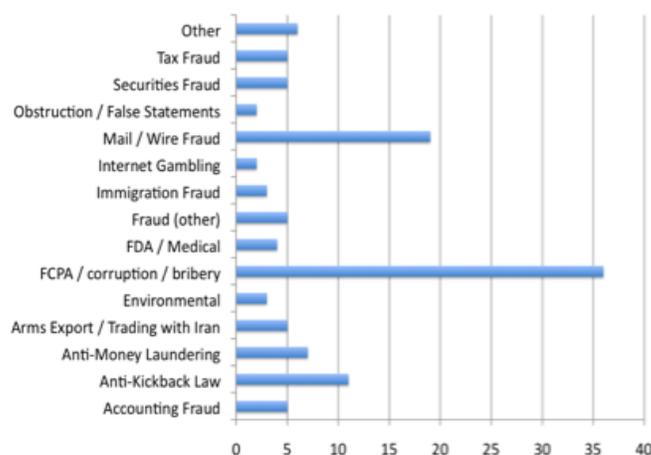


Figure 1 depicts that, over time, almost half of all deferred prosecution agreements relate to three types of crime: 31% relate to matters arising under the FCPA, 16% relate to cases of mail and wire fraud, and 9% relate to matters arising under the Medicare and Medicaid Patient Protection Act of 1987.⁵⁹ Similar percentages are observable in the use of non-prosecution agreements, where 22% relate to matters arising under the FCPA, 9% relate to mail and wire fraud, and 20% relate to drug misbranding and antitrust violations.

The rapid expansion of extrajudicial prosecutorial resolutions over time⁶⁰ can be traced to a debate within the DOJ, in particular, on how to deal with the collateral damage associated with charging a corporation

58. All empirical data sourced from Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, UNIV. VA. SCH. LAW, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last updated Jan. 1, 2014).

59. Medicare and Medicaid Patient Protection Act of 1987, 42 U.S.C. § 1320a-7b (2013).

60. See *infra* Figure 2.

with a criminal offense.⁶¹ From the beginning it was also clear that the rationale fed into a wider narrative concerning the systemic failure of corporate governance in the United States. As Larry Thompson, Deputy Attorney General, stated in 2003, the framework was designed to “address the efficacy of the corporate governance mechanisms in place within a corporation to ensure that these measures are truly effective rather than mere paper programs.”⁶²

Nine specific factors were to be taken into consideration:

the nature and seriousness of the offense, including the risk of harm to the public[;] . . . the pervasiveness of wrongdoing within the corporation[;] . . . the corporation’s history of similar conduct[;] . . . the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate[;] . . . the existence and adequacy of the corporation’s compliance program[;] . . . the corporation’s remedial actions[;] . . . collateral consequences[;] . . . the adequacy of the prosecution of individuals responsible[;] . . . the adequacy of remedies such as civil or regulatory enforcement actions.⁶³

The exceptionally broad parameters of deferred prosecutions, set out in what has been termed the “Thompson Memo,” significantly enhanced prosecutorial discretionary power to determine the public interest in charging a corporation and whether that interest is advanced by agreeing to a non-prosecution or deferred prosecution.

61. See Memorandum from Larry D. Thompson, Deputy Att’y Gen., on Principles of Federal Prosecution of Business Organizations to the Heads of Dep’t Components, U.S. Att’ys (Jan. 20, 2003), available at <http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf>.

62. *Id.* at 11; see also *Q&A with Manhattan DA Robert Morgenthau*, BUSINESS WEEK (Dec. 22, 2002), http://www.businessweek.com/magazine/content/02_51/b3813011.htm; Robert M. Morgenthau, *These Islands Aren’t Just a Shelter from Taxes*, N.Y. TIMES, May 6, 2012, at SR8, available at <http://www.nytimes.com/2012/05/06/opinion/sunday/these-islands-arent-just-a-shelter-from-taxes.html>.

63. See Memorandum from Larry D. Thompson, *supra* note 61, at 3. Following criticism of the attorney–client waiver, most notably in the prosecution of KPMG, this component was subsequently dropped. See Justin O’Brien, *Accounting and Accountability Failure: The Impact of the Kaplan Ruling on Corporate Enforcement*, 1 COMPLIANCE & REG. J. 28 (2006).

Figure 2: Total Frequency of Deferred Prosecution Agreements (1992–2012)⁶⁴

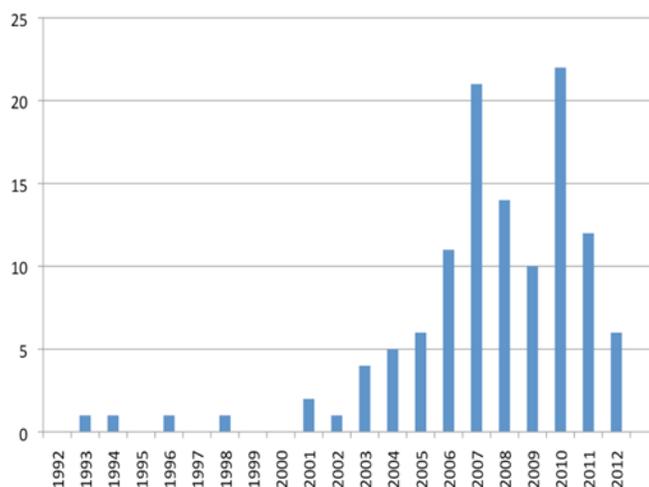


Figure 2 shows that prior to the DOJ updating its guidance through the Thompson Memo in 2003, deferred prosecution agreements were rarely pursued. Federal prosecutors trying to evaluate the appropriateness of deferred prosecution agreements were largely “left to their own discretion, with few if any applicable standards upon which to rely.”⁶⁵ The Thompson Memo provided a framework for evaluating corporate conduct. It instructed federal prosecutors to consider deferred prosecution agreements and non-prosecution agreements in appropriate circumstances.⁶⁶ Since 2003, the number of deferred prosecution agreements has consistently increased, driven by sector-specific crises such as the collapse of Arthur Andersen (accounting fraud), the U.S. Senate investigations into the U.N. Oil for Food Programme (bribery and corruption), and more generally, the political environment arising in connection with the financial downturn of 2008.⁶⁷

There are major policy imperatives for advocating such an approach. The potential collateral damage arising from criminal prosecution was highlighted by the implosion of the accounting firm Arthur An-

64. Data sourced from Garrett & Ashley, *supra* note 58.

65. F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecutions: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121, 127 (1997).

66. See Memorandum from Larry D. Thompson, *supra* note 61.

67. See generally Sharon Oded, *Deferred Prosecution Agreements: Prosecutorial Balance in Times of Economic Meltdown*, 2 LAW J. SOC. JUST. 65 (2011).

densen in 2002, which was subject to criminal prosecution over its alleged role in the Enron scandal.⁶⁸ Although Arthur Andersen had been offered, but declined, a deferred prosecution (and the guilty verdict was overturned on appeal),⁶⁹ the decision to prosecute led to the destruction of a storied brand and the loss of thousands of jobs. Thereinafter the U.S. DOJ, while emboldened by the higher prosecutorial penalties mandated in the Sarbanes–Oxley Act of 2002,⁷⁰ determined that justice be tempered by pragmatism.⁷¹

It has proved to be an exceptionally lucrative business for the DOJ,⁷² most notably in its application to alleged violations of the FCPA, with the use of deferred prosecutions centralized within the Fraud Division.⁷³ The FCPA dates back to the bribery scandals at Lockheed and coincided with the fallout from Watergate.⁷⁴ It was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.⁷⁵ Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities.⁷⁶ With the enactment of the International Anti-Bribery and Fair Competition Act of 1998,⁷⁷ the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.⁷⁸ The FCPA has extraordinary extraterritorial reach—it potentially applies to any individual, corporation, director, employee, or agent⁷⁹ whose actions satisfy at least one criterion of the act’s following three subsets:

- Practices by “Domestic Concerns”—being any individual who is a citizen, national or resident of the United States, or any

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

69. *Id.* at 698.

70. Sarbanes–Oxley Act of 2002, Pub.L.107-204, 116 Stat. 745; see also Note, *Go Directly to Jail: White Collar Sentencing After The Sarbanes–Oxley Act*, 122 HARV. L. REV. 1728 (2009).

71. See JUSTIN O’BRIEN, *WALL STREET ON TRIAL: A CORRUPTED STATE?* 283 (2003).

72. See *infra* Figure 3.

73. See *infra* Figure 4.

74. Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932–34 (2012).

75. *Id.* at 1003.

76. *Foreign Corrupt Practices Act: An Overview*, U.S. DEP’T JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Nov. 13, 2013).

77. See The International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. § 78dd-1 (2013), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>.

78. *Id.* § 78dd-2.

79. *Id.* §§ 78dd-1 to -3.

corporation, partnership, sole proprietorship, or other business organization or trust, which has the United States as its principal place of business;⁸⁰

- Practices by “Issuer”—being any corporation that issued securities registered in the United States or any corporation that is required by the SEC to file periodic reports;⁸¹ and
- Persons other than Issuers or Domestic Concerns—being any person other than an issuer or domestic concern that, whilst in the territory of the United States, makes such an act, promise, or offer.⁸²

Figure 3: Total Fines by the U.S. DOJ: Fraud (1992–2012)⁸³

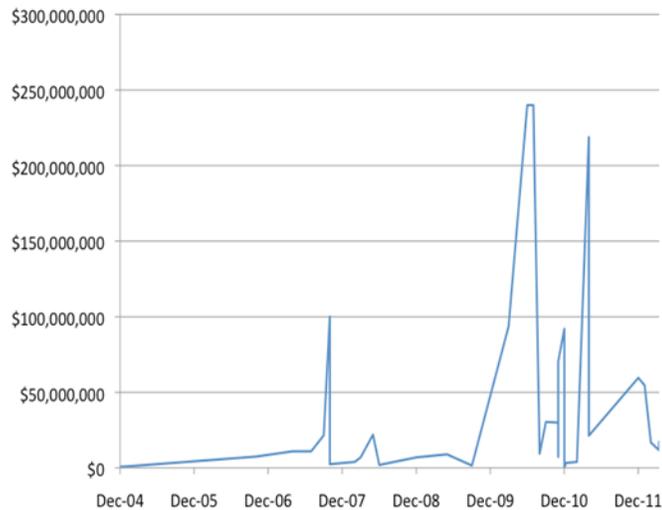


Figure 3 depicts the exponential rise in fines obtained by the U.S. DOJ, Fraud Division. In 2010, a record breaking \$830 million was collected, 80% of which was attributable to four cases: *Daimler A.G.* (\$93.6 million), *Technip S.A.* (\$240 million), *Snamprogetti Netherlands* (\$240 million), and *Alcatel–Lucent* (\$92 million), each of which relate to matters arising under the FCPA. In 2011, the Fraud Division collected approximately \$303 million, 72% of which related to a single FCPA matter

80. *Id.* § 78dd-2.

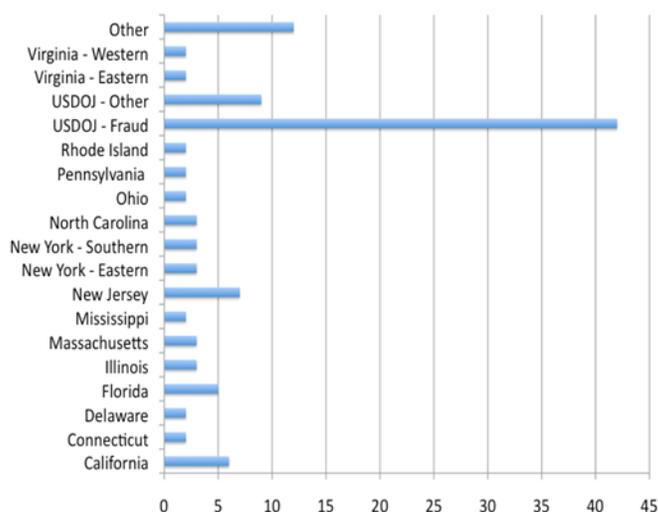
81. *Id.* § 78dd-1.

82. *Id.* § 78dd-3.

83. Data sourced from Garrett & Ashley, *supra* note 58.

against JGC (\$218 million). The DOJ has also received significant fines relating to non-prosecution agreements. It collected \$150 million on one false claims matter in 2010⁸⁴ and \$376 million from two antitrust matters in 2011.⁸⁵

Figure 4: Deferred Prosecution Agreements by Region (1992–2012)⁸⁶



The DOJ Fraud Division is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions of the FCPA with respect to domestic concerns, foreign companies, and nationals. Approximately 31% of all deferred prosecution agreements relate to FCPA matters, and as Figure 4 shows, this division is responsible for no less than 38% of all deferred prosecution agreements.

What is also apparent is the strategic manner in which the division approaches its task. The DOJ has moved progressively through a series of sectors in furthering its stated strategic goal of rooting out global cor-

84. See Side Letter Agreement Exhibit 1, at 5; *United States v. Forest Laboratories, Inc.*, No. 1:10-cr-10294-NG, 2010 WL 3643601 (D. Mass. Sept. 15, 2010), available at <http://www.justice.gov/civil/cpb/cases/cases/ForestPharm/Forest%20Laboratories%20Side%20Letter%20Agreement%20Filed.pdf>.

85. Press Release, U.S. Dep't of Justice, Wachovia Bank N.A. Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$148 Million to Federal and State Agencies (Dec. 8, 2011), available at <http://www.justice.gov/opa/pr/2011/December/11-at-1597.html>; Press Release, U.S. Dep't of Justice, JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees To Pay \$228 Million to Federal and State Agencies (July 7, 2011), available at <http://www.justice.gov/opa/pr/2011/July/11-at-890.html>.

86. Data sourced from Garrett & Ashley, *supra* note 58.

ruption. In 2009, a senior Justice Department official noted that it was “intensely focused on rooting out foreign bribery” in the pharmaceutical industry.⁸⁷ Many of these foreign pharmaceutical companies are located in countries that are known to pose greater FCPA risks—including China, India, Russia, Italy, and Argentina.⁸⁸ The DOJ has also recently brought cases against companies in the telecommunications,⁸⁹ oil and gas services,⁹⁰ engineering,⁹¹ and entertainment industries.⁹² Most recently, it is focused on corruption in relation to the setting of benchmark interest rates, with continuing investigations into LIBOR and ISDAfix.⁹³

A close examination of the use of deferred prosecutions demonstrates, however, that there are base tactical as well as laudable strategic calculations at play. In particular, there is a lack of coherence in how fines are determined, the level of discount applicable for cooperation, and whether independent monitors are mandated (the latter two acting as significant drivers for proposed extension to the United Kingdom). While the mechanism has amassed significant bounty for the exchequer (a further advantage outlined by the Solicitor General), the fines have not been passed back to the victims of the offense, either through direct transfer to the countries where such illegalities have curtailed or stunted development, or for capacity building. Equally, notwithstanding the high-flown rhetoric, there is a marked deviation in the application of the mechanism. This is most glaringly apparent in analysis of when an external monitor is deemed essential.⁹⁴

87. See Lanny A. Breuer, Assistant Att’y Gen., Criminal Div., Keynote Address to The Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf>.

88. See Mauro M. Wolfe, *Does the US Government Have Limitless Jurisdiction Enforcing the FCPA?*, CRIM. L. DIVISION (Int’l Bar Ass’n, London, U.K.), May 2010, at 1, available at http://www.martindale.com/members/Article_Atachment.aspx?od=299343&id=1055878&filename=asr-1055918.pdf.

89. See *United States v. Siemens Aktiengesellschaft*, No. 08-CR-00367-RJL (D.D.C. Dec. 12, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens-aktiengesellschaft.html>.

90. See *SEC v. NATCO Group, Inc.*, No. 4:10-CV-98 (S.D. Tex. Jan. 11, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21374.htm>.

91. See *United States v. John W. Warwick*, No. 3:09-cr-00449 (E.D. Va. Dec. 15, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/warwickj.html>.

92. See *United States v. Green*, No. 08-CR-059-GW (C.D. Cal. Jan. 16, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/greeng.html>.

93. See Matthew Leising & Ben Moshinsky, *U.K. Probing Alleged ISDAfix Manipulation, Regulator Says*, BLOOMBERG (Sept. 11, 2013), available at <http://www.bloomberg.com/news/2013-09-10/u-k-probing-alleged-isdafix-rate-manipulation-regulator-says.html>.

94. See *infra* Figure 5.

Figure 5: Frequency of External Monitor Appointment (1992–2012)⁹⁵

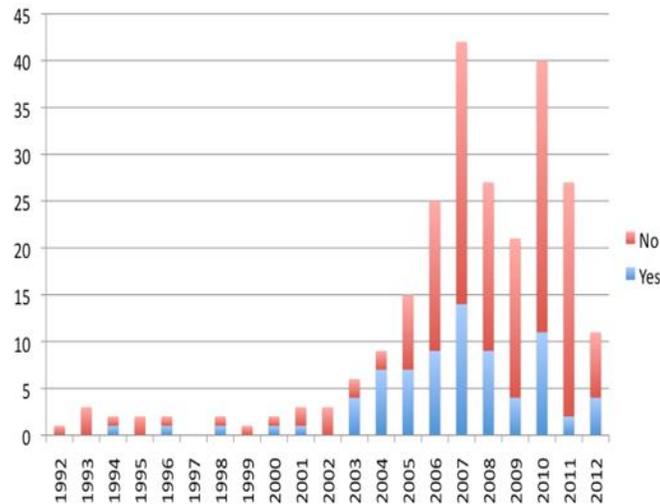


Figure 5 illustrates the frequency with which an external monitor was appointed as a proportion of the total number of negotiated settlements entered into each year. External monitors have been appointed to a wide variety of crime types.⁹⁶ The usage peaked in 2007. While the appointment of external monitors is subject to prosecutorial discretion, if the corporation had an effective compliance program in place, corporate monitors would arguably not be required.⁹⁷ Since 2007, the decrease in the appointment of external monitors has coincided, therefore, with a marked increase in the requirement to install a compliance program as a term of the deferred prosecution agreement. It does, however, indicate huge capacity to direct corporate activity.⁹⁸

95. Data sourced from Garrett & Ashley, *supra* note 58.

96. For some example of a deferred prosecution agreement, see United States v. Sci. Applications Int'l Corp., No. s3 11 Cr. 121 (GBD) (S.D.N.Y. 2012) (wire fraud), *available at* <http://www.justice.gov/usao/nys/pressconference/saicdeferredprosecutionagreementinformationandstatementofresponsibility.pdf>; United States v. KPMG, No. 05 Crim. 903 (S.D.N.Y. 2005) (tax fraud), *available at* <http://www.justice.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf>; United States v. Technip S.A., No. H-10-439 (S.D. Tex. 2010) (FCPA), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/technip-sa/06-28-10-technip-agreement.pdf>.

97. See Christopher M. Matthews, *Fraud Chief: Effective Compliance Programs Can Prevent Monitors*, MAIN JUSTICE: POL., POLICY & L. (May 24, 2010), <http://www.mainjustice.com/justanti/corruption/2010/05/24/fraud-section-chief-effective-compliance-programs-can-prevent-monitors/>.

98. See Justin O'Brien, *Staging "Macbeth" in Manhattan: Enforcement in the Aftermath of Libor and Standard Chartered*, THOMSON REUTERS ACCELUS (Aug. 31, 2012), <http://blogs.reuters.com/financial-regulatory-forum/2012/08/31/staging-macbeth-in-manhattan-enforcement-in-the-aftermath-of-libor-and-standard-chartered/>.

While the attraction of the deferred prosecution is clear, it is less immediately apparent why corporations choose to settle. In part, it is a question of salvaging reputation. Corruption allegations are notoriously difficult to defend on reputational grounds.⁹⁹ For the corporation, the deferral also offers (at surface level) a range of potential benefits. First, it is sheltered from the expansive interpretation of the federal corporate criminal liability regime, where even a low-level employee's act can be imputed to the corporation, no matter how effective the corporation's compliance program may be to deter criminal misconduct.¹⁰⁰ Second, it is shielded from ongoing legal uncertainty and negative publicity, factors of particular relevance if the corporation is public-facing (i.e., it has exposure to consumer markets). Third, it offers an opportunity for the corporation to *ex post* revitalize its compliance program and embed within organizational structure mechanisms to ensure warranted commitment to stated values.¹⁰¹ In part, corporations have an additional incentive to cooperate if the bargaining process does not mandate the appointment of an external monitor or a significant sentencing discount is applied.¹⁰² The process is best seen, therefore, not as an exercise in securing meaningful reform but as a litigation battleground in which justice and coherence play a secondary function to short-term corporate and prosecutorial calculations.

99. A similar dynamic is apparent in accusations that banking entities have failed to put in place adequate procedures to combat anti-money laundering. See Justin O'Brien, *Where the Buck Stops: The Common Link in Failures and Scandals at the World's Leading Banks*, AUSTL. FIN. REV., July 27, 2012, at R1, R10–11.

100. See James Gobert, *Corporate Criminality: Four Models of Fault*, 14 LEGAL STUD. 393, 398 (1994).

101. *But see* KURT EICHENWALD, SERPENT ON THE ROCK xii–ix (2d ed. 1995); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1428 (2009).

102. See *infra* Figure 6.

Figure 6: Percent Discount in Fine Levied from United States Sentencing Guidelines Minimum¹⁰³

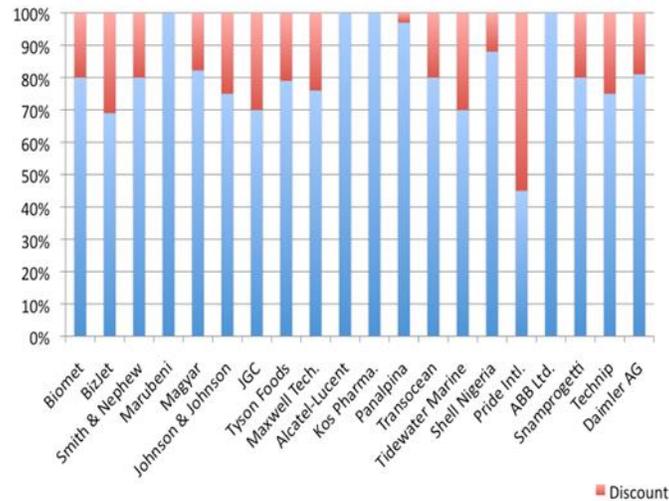


Figure 6 depicts the percentage discount received by the accused from the minimum fine recommended by the United States Sentencing Guidelines (USSG). To date, of the seventy-three deferred prosecution agreements entered into where fines were levied, only twenty have included calculations of the penalty based on the USSG. For economic crimes, the USSG directs¹⁰⁴ the court to adopt a mathematical structure where the fine range is a function of the seriousness of the crime and the culpability of the organization. The court then has discretion to make upward or downward adjustments to the fine range based on aggravating¹⁰⁵ or mitigating circumstances.¹⁰⁶ Sixteen of the twenty deferred prosecution agreements where fine calculations were disclosed received at least a 20% reduction. What the foregoing analysis also makes clear is that there is a remarkable lack of consistency in the application of the measure. To make matters worse, the manner in which these prosecutions have been handled calls into question the DOJ's standing as a model litigant. The inconsistent application also suggests that misuse and disproportionate power can call into question the legitimacy of the office, bringing the authority of the legal system into disrepute.

103. Data sourced from Garrett & Ashley, *supra* note 58.

104. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.1 (2013).

105. See *id.* §§ 8C4.2–4.6.

106. See *id.* § 8C4.10.

B. Case Study: LIBOR Settlements

In September 2012, then-Assistant Attorney General Lanny Breuer defended the DOJ's use of negotiated prosecutions, stating that

[o]ne of the reasons why deferred prosecution agreements are such a powerful tool is that, in many ways, a DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement.¹⁰⁷

With respect to each LIBOR negotiated settlement, the bank in question was required to acknowledge and admit an attached Statement of Facts, which includes the essential criteria for establishing corporate criminal liability:

[T]hat the wrongful acts taken by the participating employees in furtherance of this misconduct . . . were within the scope of their employment . . . that the participating employees intended, at least in part, to benefit [the bank] . . . [and] that due to the misconduct, [the bank] . . . has been exposed to substantial financial risk, and as a result of the penalties imposed . . . has suffered actual financial loss.¹⁰⁸

These admissions are more than symbolic and have consequences for future civil litigation.

Factual admissions made as part of a negotiated settlement will generally be admissible as statements by a party-opponent under Federal Rule of Evidence 801(d)(2). That rule provides that, when offered against an opposing party, a statement made by that party, his agent, or authorized representative, or a statement the opposing party has adopted or believed to be true, is not hearsay and is admissible if the court finds it is relevant.¹⁰⁹ Most negotiated settlements contain a provision qualifying the incorporated statement of facts as a statement adopted by the company.¹¹⁰ For example, agreements may provide that the company

107. Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't. of Justice, Remarks at the New York City Bar Association (Sept. 13, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>.

108. See, e.g., Statement of Facts to Non-Prosecution Agreement Between U.S. Dep't of Justice and Barclays Bank PLC ¶ 50 (June 26, 2012), available at <http://www.justice.gov/iso/opa/resources/9312012710173426365941.pdf>.

109. See FED. R. EVID. 801(d)(2).

110. See Statement of Facts to Non-Prosecution Agreement, *supra* note 108.

“acknowledges and accepts as accurate the facts set forth in the Statement of Facts attached” or “admits, accepts[,] and acknowledges responsibility for the conduct of its [Employees], as set forth in the Statement of Facts.” Both of these provisions plainly indicate adoption on the part of the company. The specific terms and conditions of the three negotiated settlements reached to date in the LIBOR scandal are considered below.

1. Barclays

Under the terms of the non-prosecution agreement dated June 26, 2012, for the two-year term of the agreement, Barclays must (i) commit no United States crime whatsoever; (ii) disclose non-privileged information with respect to the activities of Barclays and its agents concerning all matters about which the DOJ inquires; (iii) bring to the DOJ’s attention all potentially criminal conduct by Barclays or any of its employees that relates to fraud or violations of the laws governing securities and commodities markets; and (iv) bring to the DOJ’s attention all criminal and regulatory investigations, administrative proceedings, or civil actions brought by any governmental authority in the United States by or against Barclays or its employees that alleges fraud or violations of the laws governing securities and commodities markets.¹¹¹ As “Barclays was the first bank to cooperate in a meaningful way in disclosing its conduct . . . [, which] included relevant facts that at the time had not come to the government’s attention,”¹¹² there were no further conditions imposed aside from strengthening internal controls as mandated by the settlement with the Commodity Futures Trading Commission.¹¹³

The first-mover advantage played by Barclays has manifested itself in both directions. While Barclays has inevitably suffered more than the other panel banks in terms of reputational damage by being the first bank to settle allegations of misconduct, its misconduct was significantly mitigated through cooperation with officials. No criminal indictment was deferred against Barclays and, to date, no actions have been pursued against any individuals. The methodology used by regulators to determine the appropriate fine or sanction for misconduct is incredibly opaque. For example, when Tracey McDermott of the U.K. Financial

111. See Non-Prosecution Agreement Between U.S. Dep’t of Justice and Barclays Bank PLC, at 2 (June 26, 2012), available at <http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf>.

112. *Id.*

113. Order Instituting Proceedings In the Matter of Barclays PLC Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, C.F.T.C. No. 12-25, 2012 WL 2500330, at 34 (CTFC June 26, 2012), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf>.

Services Authority (FSA) was asked by the Treasury Select Committee how the agency arrived at the fine of £85 million for Barclays, she responded:

The penalty is set in accordance with our penalty policy that was applicable to misconduct at the time . . . there was no arithmetical calculation that applied. We take into account a number of factors, including the seriousness of the misconduct and including the level of co-operation during the investigation.¹¹⁴

Further, the Committee noted that Barclays's fine amounted to only 1% of their pre-tax profits and questioned how the FSA justified the sufficiency of that as a fine. McDermott stated:

We believe that it was appropriate. I think, as has been shown amply by this case, the impact of enforcement action is not just about the level of the penalty; it is also about what comes out in the public domain and the reputational impact that follows. This was the most significant penalty we have imposed. It was almost twice the highest penalty we have imposed in the past. That reflected our view that this was the worst misconduct.¹¹⁵

Surprisingly, the non-prosecution agreement comes less than two years after Barclays entered into a deferred prosecution agreement and paid \$298 million to settle accusations it hid payments flowing into the United States from sanctioned countries including Cuba and Iran.¹¹⁶ When Judge Emmet G. Sullivan of the District of Columbia issued an order in June 2012, asking the DOJ and Barclays to explain the ramifications of the LIBOR settlement on the earlier case, they responded in a joint filing with a technical argument: that the bank remained “‘in full compliance’ with the deferred prosecution agreement, which required it to be free of criminal conduct during the probationary period, because the LIBOR manipulation came earlier, between 2005 and 2009.”¹¹⁷ Such technical arguments highlight the difficulties in defining what constitutes

114. TREASURY SELECT COMMITTEE, MINUTES OF EVIDENCE: ORAL EVIDENCE TAKEN BEFORE THE TREASURY COMMITTEE, 2012–13, H.C. 481-II (U.K.) (Question 1088), available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/120716.htm>.

115. *Id.* (Question 1091).

116. See Press Release, U.S. Dep't of Justice, Barclays Bank PLC Agrees to Forfeit \$298 Million in Connection with Violations of the International Emergency Economic Powers Act and the Trading with the Enemy Act (Aug. 18, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-crm-933.html>.

117. See Michael Rothfeld, *Corporate Probation: Punishing or Punting?*, WALL ST. J. (Aug. 31, 2013), <http://online.wsj.com/article/SB10000872396390444772804577621780469137056.html>.

recidivist offending, a major issue in potentially drafting any accountability standards for negotiated settlements.

2. UBS

The terms and conditions of the non-prosecution agreement entered into by UBS on December 18, 2012,¹¹⁸ are identical to Barclays, with one notable exception representing what has been referred to as a significant shift in the DOJ's enforcement strategy. The DOJ filed criminal charges against the Japanese subsidiary of UBS,¹¹⁹ which pled guilty to one count of wire fraud.¹²⁰ By extracting a guilty plea from a wholly owned subsidiary, the DOJ is attempting to create a stronger deterrence mechanism by shielding the U.S.-based company from collateral damage associated with losing its license, but still sending a warning to industry. However, it is questionable as to whether criminal indictment of a minor, foreign subsidiary will have any deterrent effect on ultimate holding companies. In this case, UBS Securities Japan Co. has only limited ties to UBS¹²¹ and, as Japanese authorities notified UBS in advance to assure it that the subsidiary would not lose its license,¹²² the impact of the guilty plea both on the subsidiary's business operations and UBS itself appears to be negligible. Further, UBS is a Swiss bank. Any potential deterrent effects facilitated through a guilty plea of a wholly owned subsidiary on the U.S. market cannot be asserted until used against the subsidiary of a U.S. bank, such as JPMorgan or Citibank.

Although the DOJ filed a criminal complaint in federal court in Manhattan against two Japan-based former senior UBS traders, Tom Hayes and Roger Darin, charging them with conspiracy, wire fraud, and price fixing in connection with their alleged attempts to manipulate Yen

118. See Non-Prosecution Agreement Between U.S. Dep't of Justice and UBS AG (Dec. 18, 2012), <http://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf> [hereinafter UBS Non-Prosecution Agreement]; Statement of Facts to Non-Prosecution Agreement Between U.S. Dep't of Justice and UBS AG (Dec. 18, 2012), <http://www.justice.gov/iso/opa/resources/6942012121911725320624.pdf>.

119. See Plea Agreement, *United States v. UBS Securities Japan Co.*, No. 3:12-CR-00268-RNC (D. Conn. Dec. 18, 2012), available at <http://www.justice.gov/ag/executed-plea-agreement-appendix-b.pdf>.

120. See *id.* ¶ 1; see also 18 U.S.C. § 1343 (2008).

121. See Richard Levick, *The LIBOR Scandal: Prosecutors Have a New Plan*, FORBES (Feb. 28, 2013), <http://www.forbes.com/sites/richardlevick/2013/02/28/the-libor-scandal-prosecutors-have-a-new-plan/>.

122. See Ben Protess, *Prosecutors, Shifting Strategy, Build New Wall Street Cases*, N.Y. TIMES, Feb. 18, 2013, at B1, available at <http://dealbook.nytimes.com/2013/02/18/prosecutors-build-a-better-strategy-to-go-after-wall-street/>.

LIBOR interest rates,¹²³ it declined to pursue criminal charges against UBS, “fearing such a move could endanger its stability.”¹²⁴ Given UBS’s history of recidivist offending, the settlement has fuelled political debate on “too big to fail is too big to indict.”

Forced into a \$59.2 billion government bailout after piling up the biggest losses of any European lender from the global credit crisis,¹²⁵ UBS has been the subject of a number of instances of serious misconduct over the past five years. On September 15, 2011, UBS became aware of a massive loss, originally estimated at \$2 billion, due to unauthorized trading allegedly by Kweku Adoboli, a trader on the Delta One desk of the firm’s investment bank. Adoboli was arrested and later charged with fraud by abuse of position and false accounting dating as far back as 2008. UBS’s actual losses were subsequently confirmed as \$2.3 billion¹²⁶ with the prosecutor in Adoboli’s trial noting that he “was a gamble or two from destroying Switzerland’s largest bank for his own benefit.”¹²⁷

The scale of UBS’s losses in the Adoboli incident led to renewed calls for the global separation of commercial banking from investment banking.¹²⁸ Just two years prior, on February 18, 2009, UBS agreed to pay a fine of \$780 million to the U.S. government and entered into a deferred prosecution agreement on charges of conspiring to defraud the United States by impeding the Internal Revenue Service.¹²⁹ The settlement followed a July 2008 United States Senate Report,¹³⁰ which accused Swiss banks, including UBS and LGT Group, of helping wealthy

123. See Complaint, *United States v. Hayes*, No. 12 MAG 3229 (S.D.N.Y. Dec. 12, 2012), <http://www.justice.gov/ag/Hayes-Tom-and-Darin-Roger-Complaint.pdf>.

124. See David Enrich & Jean Eaglesham, *UBS Admits Rigging Rates in ‘Epic’ Plot*, WALL ST. J. (Dec. 20, 2012), available at <http://online.wsj.com/article/SB10001424127887324407504578188342618724274.html>.

125. See Warren Giles, *UBS Gets \$59.2 Billion Bailout; Credit Suisse Raises Capital*, BLOOMBERG (Oct. 16, 2008), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ah0AFa2SEHhw>.

126. See *UBS ‘Rogue Trader’: Loss Estimate Raised To \$2.3bn*, BBC NEWS (Sept. 18, 2011), <http://www.bbc.co.uk/news/business-14965438>.

127. See *UBS Trader Kweku Adoboli Gambled Away £1.4bn*, BBC NEWS (Sept. 14, 2012), <http://www.bbc.co.uk/news/uk-19595217>.

128. See Jonathan Sibun, *UBS Rogue Trader Helps To Justify Ring-Fencing ‘Casino’ Actions of Investment Banks*, TELEGRAPH (Sept. 15, 2011), <http://www.telegraph.co.uk/finance/financial-crime/8764467/UBSRogue-trader-helps-to-justify-ring-fencing-casino-actions-of-investment-banks.html> (U.K.).

129. See Press Release, U.S. Dep’t of Justice, *UBS Enters into Deferred Prosecution Agreement* (Feb. 18, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-tax-136.html>.

130. See STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 110TH CONG., *TAX HAVEN BANKS AND U.S. TAX COMPLIANCE* (2008), available at <http://www.levin.senate.gov/imo/media/doc/supporting/2008/071708PSIRreport.pdf>.

Americans evade taxes through offshore accounts and calculated the total cost of this practice as being in excess of \$100 billion annually.¹³¹

Like Barclays, UBS's misconduct was significantly mitigated for its cooperation. The non-prosecution agreement notes that "[a]lthough UBS was not the first bank to provide the Fraud Section with helpful information, and its self-disclosure and cooperation commenced after the Fraud Section had obtained certain evidence implicating UBS and, in particular, efforts to manipulate Yen benchmarks, UBS made its self-disclosure before the Fraud Section had contacted UBS regarding the criminal investigation."¹³² This implies that proactive rather than reactive disclosure may reward a cooperating company with a non-prosecution agreement, rather than a deferred prosecution agreement.

3. RBS

In contrast to the prior two settlements, RBS entered into a deferred prosecution on February 6, 2013,¹³³ and like UBS, its Japanese securities business pled guilty to one count of wire fraud tied to manipulation of Yen LIBOR.¹³⁴ While the reasoning is opaque, it is most likely due to a number of factors. First, RBS's misconduct was mitigated through reactive cooperation with authorities rather than proactive cooperation—unlike UBS and Barclays. Second, not only did RBS lack a compliance program sufficient to detect and prevent such conduct, but it also placed derivatives traders and submitters together at the same desk, magnifying potential conflicts of interest.¹³⁵ Under the terms of the DPA, for the two-year term of the agreement, RBS must (i) implement a compliance program designed to prevent and detect manipulation and interbank coordination of benchmark rate submissions;¹³⁶ and (ii) report to the DOJ upon request regarding its remediation and implementation of any compliance program and internal controls, policies, and procedures that relate to its submission of benchmark rates.¹³⁷ No further conditions are imposed. If RBS has (i) committed any felony under U.S. federal law subsequent to the signing of the agreement; or (ii) at any time in connection with the

131. *See id.*

132. *See* UBS Non-Prosecution Agreement, *supra* note 118, at 2.

133. *See* Deferred Prosecution Agreement, *United States v. Royal Bank of Scotland PLC*, No. 3:13-CR-74-MPS (D. Conn. Feb. 6, 2013) [hereinafter RBS Deferred Prosecution Agreement], available at <http://www.justice.gov/iso/opa/resources/28201326133127414481.pdf>.

134. *See id.* ¶ 1; *see also* 18 U.S.C. § 1343 (2008).

135. *See* RBS Deferred Prosecution Agreement, *supra* note 133, ¶ 39.

136. *See id.* ¶ 9.

137. *See id.* ¶ 11.

DPA prove deliberately false, incomplete, or misleading information; or (iii) otherwise breach the DPA, RBS will be subject to prosecution.¹³⁸

Despite investigations revealing manipulation and collusion on an epic scale, each negotiated settlement agreement is void of substantive terms and conditions aimed at reforming corporate governance and effecting cultural change. No independent external monitor was appointed in any settlement. While the settlements mitigate misconduct in exchange for cooperative behavior, it will be interesting to note if some of the expected future settlements contain more substantive provisions.

IV. MAPPING THE ACCOUNTABILITY DEFICIT

The emphasis on cooperation within the deferred prosecution mechanism masks disproportionate prosecutorial leverage throughout the process. Prosecutors not only investigate potential crime—often with the complicity of the corporation to avoid actual prosecution—but also adjudicate based on guilt and degree of penalty. The agency determines whether to offer deferral and considers the extent of internal change required and degree of external oversight.¹³⁹ Such agency discretion has been the subject of recent judicial criticism in the context of the SEC's use of settlement agreements. A federal court in New York rejected a proposed \$225 million settlement between Citigroup and the SEC on the grounds that it was neither fair, reasonable, nor in the public interest.¹⁴⁰ Judge Jed Rakoff argued that the failure to secure an admission of wrongdoing from a corporation he described as a recidivist offender had, as with a previous settlement involving Bank of America, privileged the “façade of enforcement.”¹⁴¹ The SEC appealed¹⁴² the decision not to endorse the settlement suggesting that it introduced a new standard that limited regulatory capacity. In March 2012, the Second Circuit granted a stay of the District Court proceeding while it reviewed the appeal,¹⁴³ noting that Judge Rakoff did not “appear to have given deference to the SEC's judgment.”¹⁴⁴ Argument was heard on the merits of the case in February 2013, and the issue remains *sub judice*.

138. *See id.* ¶ 13.

139. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 913 (2007).

140. *See* Opinion and Order, SEC v. Citigroup Global Markets Inc., No. 1:11-cv-07387-JSR (S.D.N.Y. Nov. 28, 2011), available at <http://online.wsj.com/public/resources/documents/SECCITII1282011.pdf>.

141. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Enforcement Director's Statement on Citigroup Case (Dec. 15, 2011), available at <http://www.sec.gov/news/press/2011/2011-265.htm>.

142. *See* SEC v. Citigroup Global Markets Inc., 673 F.3d 158 (2d Cir. 2012).

143. *Id.*

144. *Id.* at 163.

Similarly, in a settlement relating to violations of the Bank Secrecy Act, HSBC and the government argued that the court “lacked any inherent authority over the approval or implementation of the DPA”¹⁴⁵ itself. Judge John Gleeson for the Eastern District of New York noted that because the parties had elected to “place a criminal matter on the docket of a federal court,” that had subjected the deferred prosecution agreement to the legitimate exercise of the court’s inherent supervisory power to ensure the agreement does not “so transgress the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court.” Judge Gleeson elected to retain supervisory power over the implementation of the DPA, ordering the parties to file quarterly reports describing “all significant developments,” resolving any “doubts about whether a development is significant . . . in favor of inclusion.”

Agency discretion has been similarly criticized in Australia in the context of civil penalty settlements. Like the United States, the usual practice in Australia is for courts to endorse an agreed penalty;¹⁴⁶ however, this view was recently challenged by the Victorian Court of Appeal in *ASIC v. Ingleby*.¹⁴⁷ The court’s reasoning is instructive:

The lack of transparency in negotiated settlements may reinforce a perception that agreed penalties are not adequately grounded in fact and legal principle; In some cases, negotiated penalties appear to be inappropriately low; and some courts have expressed reservations as to the accuracy and sufficiency of the statements of agreed facts presented to them to ratify such penalties.¹⁴⁸

Crucially, the entire negotiation takes place outside the formal judicial arena with a waiver of attorney–client privilege, while no longer demanded, implicitly required.¹⁴⁹ The extent to which this has called into question the standing of the DOJ has been evident in a number of high-profile failures, most notably in the overreach in the prosecution of individual tax partners at KPMG. A federal judge found the prosecution to

145. Memorandum and Order, *United States v. HSBC Bank USA*, No. 1:12-cr-00763-JG (E.D.N.Y. July 1, 2013), available at <http://www.mainjustice.com/wp-admin/documents-databases/127-1-HSBC-7.01-Order.pdf>.

146. *Nw. Frozen Foods Pty Ltd. v Austl. Competition & Consumer Comm’n* [1996] FCR 1134 (Austl.).

147. *See Austl. Sec. & Invs. Comm’n. v Lindberg* [2012] VSC 332 (Austl.).

148. *Austl. Sec. & Invs. Comm’n. v Ingleby* [2013] VSCA 49 (Austl.).

149. *See* Christopher A. Wray, Remarks to the ABA White Collar Luncheon Club in Washington, D.C. (Feb. 25, 2005); *see also* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in the Post-Enron World*, 43 AM. CRIM. L. REV. 1095 (2006); *Interview with Mary Jo White*, 19 CORP. CRIME REP. 48 (Corp. Crime Reporter, D.C.) (2005), available at <http://corporate.crimereporter.com/maryjowhiteinterview010806.htm>.

be unconstitutional precisely because the accused partners, who had been following corporate policy, were denied ongoing legal representation at KPMG's expense under the terms of a settlement agreement that included the appointment of an external monitor, the payment of a \$415 million fine, and a commitment to exit the individual high net worth tax planning market.

For Justice Kaplan, the DOJ had been—at best—economical in its representations to the court, and its claim that the legal fee issue was made without “coercion” and “bullying” tactics could “be justified only by tortured definitions of those terms.”¹⁵⁰ The decision, which was upheld on appeal, significantly reduced prosecutorial discretion in this one area.¹⁵¹ The accountability problem is that the aggression is not confined to the capacity of individuals to secure representation.

When cases have gone to trial, the willingness of prosecutors to act as model litigants is far from clear. In a Central California District Court last December, Justice A. Howard Matz found that the DOJ had overstepped the boundary of acceptable conduct in the prosecution of senior executives from the Lindsey Manufacturing Company.¹⁵² They had been accused of bribing two high-ranking employees of an electric utility company wholly owned by the Mexican government through payments made to an intermediary.¹⁵³ Lurid testimony showed how these payments had funded the purchase of a Ferrari, a yacht, and American Express charges.¹⁵⁴ The problem for the prosecutors is that the framing itself constituted a framing. The ruling striking down the charges is instructive:

150. *United States v. Stein*, No. S1 05 Crim. 0888 (LAK), at 81 (S.D.N.Y. June 26, 2006), available at http://www.jonesday.com/files/News/80f37a36-d061-40a6-a1ab-8f405936a7a2/Presentation/NewsAttachment/a9ea3f74-e097-417d-bcff-a981aaecc632/ReferenceMaterial2_Stein_Thompson_Kumar.pdf; see also Editorial, *A Conspiracy Theory Debunked*, WALL ST. J. Dec. 20, 2008, at A14, available at <http://online.wsj.com/article/SB122973258821422991.html>; Justin O'Brien, *Accounting and Accountability Failure: The Impact of the Kaplan Ruling on Corporate Enforcement*, 1 COMPLIANCE & REG. J. 28 (2006).

151. See *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008). See generally Christopher McNamara, Note, *How the Decisions in Favor of the Stein Thirteen Will Effect the Litigation of Corporate Crime and DOJ Policies and Expand the Sixth Amendment Right to Counsel*, 78 FORDHAM L. REV. 933 (2009); Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 861 (2009); Memorandum from Mark Filip, Deputy Attorney Gen., on Principles of Federal Prosecution of Business Organizations to the Heads of Dep't Components, U.S. Attorneys (Aug. 28, 2008), available at <http://www.justice.gov/dag/readinroom/dag-memo-08282008.pdf>.

152. *United States v. Noreiga*, No. 2:10-cr-01031-AHM (C.D. Cal. Dec. 1, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/aguilare/2011-12-01-aguilare-governments-notice-of-appeal.pdf>.

153. *Id.* at 3.

154. *Id.*

[I]t is with deep regret that this Court is compelled to find that the Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with disclosure obligations, posed questions to certain witnesses in violation of the Court's rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.

The Government has acknowledged making many 'mistakes' as it characterizes them. 'Many' indeed. So many in fact, and so varied, and occurring over so lengthy a period (between 2008 and 2011) that they add up to an unusual and extreme picture of a prosecution gone badly awry. To paraphrase what former Senator Everett Dirksen supposedly said, '[A] few mistakes here and a few mistakes there and pretty soon you're talking misconduct.'¹⁵⁵

The misconduct extends to investigative stages. In a second high profile case, known as the "Africa Sting" operation, the DOJ charged twenty-two employees of military and law enforcement agencies of conspiring to bribe government officials in West Africa. It followed an extensive undercover FBI investigation.¹⁵⁶ The operation focused on luring the defendants to believe that a 20% commission payment to an intermediary would be used to secure a \$15 million procurement order to upgrade the presidential guard, with at least half of the money going directly to the Gabonese Minister of Defense.¹⁵⁷ The high profile operation led to the arrest of twenty-one individuals at a trade show in Las Vegas and a further individual in Miami on June 18, 2010.¹⁵⁸

The DOJ claimed it was the "largest single investigation and prosecution of individuals in the history of the DOJ's enforcement of the [FCPA]."¹⁵⁹ One hundred and fifty field officers were involved in the operation in the United States. In addition, the Metropolitan police exe-

155. Notice of Appeal, *id.* at 2, 5; see also Alison Frankel, *What FCPA Defendants Can Learn from Blockbuster Lindsay Win*, REUTERS (Dec. 5, 2011), <http://blogs.reuters.com/alison-frankel/2011/12/05/what-fcpa-defendants-can-learn-from-blockbuster-lindsey-win/>.

156. *Corporate Corruption: A Historic Takedown*, FED. BUREAU INVESTIGATIONS (Jan. 26, 2010), http://www.fbi.gov/news/stories/2010/january/fcpa_012610#sthash.WW3DeMbl.dpuf.

157. See Press Release, U.S. Dep't of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

158. *Id.*

159. *Id.*

cuted search warrants in London. The sting operation was, according to the FBI, played out “with all the intrigue of a spy novel.”¹⁶⁰

Unfortunately, for both the DOJ and the FBI, there was little if anything of substance. In a rare piece of British reporting on the scandal, which led to the arrest and prosecution of a British citizen, David Painter, the mid-market tabloid the *Daily Mail* described the sting as “a huge, sleazy[,] and ultimately doomed FBI operation. . . . [A] deadly weapon in their arsenal against corruption but the biggest investigation of its type in DOJ–FBI history brought only humiliation, controversy[,] and complete legal defeat.”¹⁶¹ David Painter, who lost his business and accrued millions of dollars in legal fees, is quoted as stating, “[W]ith the complicity of the DOJ and FBI, I was told this deal had been approved by the U.S. State Department.”¹⁶² Richard Bistrong, then-husband of Nancy Soderberg, a former United States ambassador to the United Nations, was instrumental in pitching the deal, adding to its authenticity.¹⁶³ The DOJ was forced, eventually, to file a motion to dismiss with prejudice.

In accepting the argument, following a second trial, Judge Richan Leon found that the federal prosecutors were susceptible to pursuing a “very, very aggressive conspiracy theory that was pushing its already generous elasticity to its outer limits. Of course in the second trial that elastic snapped in the absence of the necessary evidence to sustain it.”¹⁶⁴ He also castigated the DOJ for its handling of the discovery process, saying it constituted a degree of “sharp practice that had no place in a federal courtroom.”¹⁶⁵

It is apparent from these techniques that while the enforcement environment is, as Ernst & Young reports, “aggressive,” it has also revealed significant tactical and strategic weaknesses.¹⁶⁶ There is a significant danger that without considerable enhancements in oversight that the mechanism could disrepute the legitimacy of prosecutorial agencies and the authority of the judicial system. As will be explored more fully below, the United Kingdom proposals differ from the mechanism used in the United States in that non-prosecution agreements are not to be pur-

160. *Corporate Corruption: A Historic Takedown*, *supra* note 156.

161. Sarah Oliver, *The Vegas Sting*, DAILY MAIL (May 28, 2012), <http://www.dailymail.co.uk/news/article-2150337/The-Vegas-Sting-A-cunning-FBI-trap-ensnared-British-businessman-destroyed-life-David-Painter-completely-innocent.html> (U.K.).

162. *Id.*

163. *See id.*

164. Mike Koehler, *What Percentage of DOJ FCPA Losses Is Acceptable?*, 90 CRIM. L. REP. 893 (2012) (citing Transcript of Status Conference, *United States v. Goncalves*, No. 1:09-cr-00335-RJL (D.D.C. Feb. 21, 2012)).

165. *Id.*

166. *See* ERNST & YOUNG, *supra* note 1.

sued. Secondly, the proposals signal the desirability of judicial scrutiny much earlier in the process to address explicitly the lack of accountability.¹⁶⁷ Although the refinement has the capacity to enhance transparency and accountability, much detail remains to be ironed out. The absence of detail, combined with the evidence of extortionary impulses in the United States, suggests the need for caution before adopting such invasive powers.

V. THE PERILS OF TRANSPLANTATION

The difficulties associated with prosecuting white-collar and general economic crime continue to dog prosecutorial authorities in the United Kingdom. The decision by the Serious Fraud Office to discontinue an investigation into the collapse of Britain's largest hedge fund, based on the grounds that there was no reasonable chance of a criminal conviction, has done much to undermine already weakened confidence in prosecutorial power and acumen.¹⁶⁸ The decision mirrored the explanation offered by the FSA not to prosecute those involved in the collapse of RBS. The collapse of RBS was talismanic of poor corporate governance in the United Kingdom.¹⁶⁹ The foreword of the FSA's report into the failure, penned by the organization's chairman, Lord Adair Turner, provides the rationale for the exhaustive investigation: "Quite reasonably, . . . people want to know why RBS failed. And they want to understand whether failure resulted from a level of incompetence, a lack of integrity, or dishonesty, which can be subject to legal sanction."¹⁷⁰ The short answer provided is that it cannot. According to the FSA, the legal framework in the United Kingdom made it impossible to launch proceedings that had a reasonable prospect of success.¹⁷¹

One mechanism to address both sets of failings has been the introduction of the deferred prosecution, as provided by the CC Act.¹⁷² The model for England and Wales looks to the United States' deferred prosecution agreement model for guidance. However, it seeks to incorporate a

167. See MINISTRY OF JUSTICE, *supra* note 9, at 21.

168. See Sam Jones & Caroline Binham, *SFO May Face Legal Challenge on Wavering*, FIN. TIMES (May 30, 2012), <http://www.ft.com/intl/cms/s/0/5e39842c-aa3e-11e1-8b9d-00144feabdc0.html#axzz1wnbQTu00>.

169. See Sam Jones, *HBOS: The Moore Memo*, FIN. TIMES (Feb. 11, 2009), <http://ftalphaville.ft.com/blog/2009/02/11/52320/hbos-the-moore-memo/>.

170. FIN. SERVS. AUTH., *THE FAILURE OF ROYAL BANK OF SCOTLAND 1 (2011) (U.K.)*, *available at* <http://www.fsa.gov.uk/pubs/other/rbs.pdf>.

171. See Justin O'Brien, *The Façade of Enforcement: Goldman Sachs, Negotiated Prosecutions, and the Politics of Blame*, in *HOW THEY GOT AWAY WITH IT: WHITE COLLAR CRIMINALS AND THE FINANCIAL MELTDOWN 178* (Susan Will et al. eds., 2012).

172. Crime and Courts Act, 2013, c. 22, § 45, sch. 17, pt. 1–3 (U.K.).

far greater level of judicial oversight, transparency, and consistency throughout the process, ultimately requiring judicial approval before a deferred prosecution agreement can be entered into.

As noted above, one of the major accountability deficiencies associated with the application of the deferred prosecution mechanism in the United States is the lack of an underpinning statutory basis. Instead, prosecutors rely upon the United States Attorney's Manual, *Principles of Federal Prosecution of Business Organizations*. This manual sets out the circumstances in which it is appropriate to enter into a deferred prosecution agreement and the factors to consider when investigating, charging, and discussing an agreement with respect to corporate crimes.¹⁷³

The U.K. consultation paper called for consideration of similar factors.¹⁷⁴ The paper noted that the Director of Public Prosecutions and the Director of the Serious Fraud Office should publish a Code of Practice setting out the factors prosecutors should take into account in deciding whether to enter into a deferred prosecution agreement.¹⁷⁵ The requirement to publish a Code of Practice is mandated under the CC Act,¹⁷⁶ although the Code itself has yet to be drafted. The unresolved policy question focuses on the degree to which the Code of Practice can limit prosecutorial discretion. Further, the CC Act provides that any decision to enter into a deferred prosecution agreement must be exercised personally¹⁷⁷ by a "designated prosecutor."¹⁷⁸ By contrast, in the United States, there is no requirement for an equivalent designated prosecutor, the Attorney General, to determine whether and when deferred prosecution agreements are appropriate.

In contrast to the United States' approach, where the terms and conditions of the deferred prosecution are ad hoc and subject to prosecutorial discretion, under the United Kingdom model, the content of a deferred prosecution agreement is set out under the CC Act. In addition to requiring a statement of facts, the terms and conditions may include, but are not limited to, the following requirements:

173. See U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS 3-4 (2008), available at http://federalevidence.com/pdf/Corp_Prosec/Bus_Proc_D_OJ_Guidelines_08.pdf.

174. See MINISTRY OF JUSTICE, *supra* note 9, § 92.

175. See *id.*

176. See Crime and Courts Act, § 45(6).

177. See *id.* § (45)(3)(2).

178. Defined as "(a) the Director of Public Prosecutions; (b) the Director of the Serious Fraud Office; or (c) any prosecutor designated . . . by an order made by the Secretary of State." *Id.* § 45(3)(1).

1. To pay the prosecutor a financial penalty;
2. To compensate victims of the alleged [offense];
3. To donate money to a charity or other third party;
4. To disgorge any profits made by a person from the alleged offence;
5. To implement a compliance program relating to the person's policies or to the training of person's employees or both;
6. To cooperate in any investigation related to the alleged [offense];
7. To pay any reasonable costs of the prosecutor in relation to the alleged [offense] or the DPA.¹⁷⁹

Perhaps the biggest departure from the United States model is the inclusion of early judicial intervention. Under the United Kingdom approach, a judge is to be involved in determining whether a deferred prosecution agreement was justified in the first instance. This would, according to the consultation paper, ensure that a “prosecutor is not entering into a ‘cosy deal’ with a commercial organization ‘behind closed doors.’”¹⁸⁰ Under the CC Act, once a prosecutor has made a decision in principle that a deferred prosecution is likely to be suitable and appropriate, preliminary proceedings would commence before the Crown Court.¹⁸¹ At the initial proceedings, the court would be presented with an outline of the basic agreed facts, a draft indictment or charge sheet, the proposed conditions of the deferred prosecution agreement, and an outline of the areas still being considered.¹⁸² The court would consider whether the proposed deferred prosecution agreement was in the interests of justice based on the facts presented and that the proposed terms were “fair, reasonable[,] and proportionate.”¹⁸³

In the United States, the presiding judge is not involved in the negotiation of the terms of the deferred prosecution agreement. The analogous standard with respect to settlement agreements proposed by the SEC is whether the agreement is “fair, reasonable, adequate, and in the public interest,” although such a broad mandate has, as discussed above,

179. *Id.* § 45(5)(3).

180. MINISTRY OF JUSTICE, *supra* note 9, § 80.

181. Crime and Courts Act, § 45(7).

182. MINISTRY OF JUSTICE, *supra* note 9, § 108.

183. Crime and Courts Act, § 45(7)(1)(b).

recently caused significant judicial and academic controversy.¹⁸⁴ Under the United Kingdom model, judicial approval is also required for the final agreement.¹⁸⁵ The hearing for this purpose would start in private to allow the agreed deferred prosecution agreement terms to be presented to the judge and allow discussion and resolution of any final issues.¹⁸⁶ The court would then determine if the final deferred prosecution agreement was in fact “fair, reasonable[,] and proportionate.” If so, it would be approved in open court to ensure openness and transparency.¹⁸⁷

The advantage of the United Kingdom approach is that an indication could be obtained at the initial hearing as to whether the court considers the deferred prosecution agreement to be appropriate in principle. This preliminary hurdle may avoid some of the issues that are currently arising in the United States as to what is deemed to be in the “public interest.” It would also provide an opportunity for the court to question the prosecutorial methods deployed in presenting the case. However, the same factors that convince a corporation to accept an agreement—a desire to settle to avoid ongoing reputational risk or avoid public exposure of compliance failure—may also inhibit willingness to challenge, leaving the court in a difficult position of striking out the liberty to contract on intuition rather than evidence.

The second area in which the United Kingdom model attempts to differ from the United States template is in the emphasis on transparency and consistency. The consultation paper suggests specific guidelines would provide “more detailed starting points or ranges for financial penalties and perhaps other conditions.”¹⁸⁸ This approach appears to be replicating the ranges, categories, and starting points for deferred prosecution agreement penalties and conditions that the sentencing guidelines do.¹⁸⁹ However, the court is given permission to stray from the guidelines, if the “interests of justice” so demand.¹⁹⁰ In contrast, the United States does not publish guidelines as to the terms that might compose a deferred prosecution agreement, which is left to the total discretion of the prosecutor. While the number of answered questions—including the scope of the yet to be drafted code of practice for prosecutors, procedural

184. *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 307 (S.D.N.Y. 2011) (citing *SEC v. Bank of America Corp.*, No. 09 Civ. 6829(JSR), 2009 WL 2842940, at *1 (S.D.N.Y. Aug. 25, 2009)).

185. *See* Crime and Courts Act, § 45(8).

186. *See* MINISTRY OF JUSTICE, *supra* note 9, § 112.

187. Crime and Courts Act, § 45(8)(6).

188. MINISTRY OF JUSTICE, *supra* note 9, § 99.

189. *See id.* §102.

190. *See id.* §103.

rules and operational guidance, and the capacity of deferred prosecutions to extend to global settlements—remain undefined, the stated benefits associated with the United Kingdom’s approach are best seen as potential rather than achieved. Without much more granular information, it is foolhardy to expect that the actual operation of the United Kingdom system will differ in substance from that in the United States. It is unlikely, for example, that a major corporation having entered into a settlement agreement would complain to a judge that it was forced to do so. Equally, there is no evidence, to date, that the British authorities have drawn up granular guidance on how independent experts should operate. These lacunae make the negotiated prosecution mechanism subject to major accountability deficits.

VI. CONCLUSION

Irrespective of whether they are domiciled in the United States or the United Kingdom, multinational corporations now face significantly enhanced litigation risk if they have operations within or pass financing through these jurisdictions. The enforcement net is progressively widening. As a consequence, multinational corporations must adopt a much more considered approach as to what constitutes effective compliance, irrespective of whether domestic enforcement is either lacking or robust. Understanding the variable enforcement agendas and associated litigation risks are therefore pivotal corporate as well as policy imperatives. Those enforcement agendas provide increasing power to prosecutorial agendas that have the capacity to undermine regulatory effectiveness, precisely because the lack of accountability risks overreach.

In the United States—as the LIBOR settlements demonstrate—although a corporation may admit to extensive and pervasive abuse of the law, prosecutorial discretion can allow it to escape criminal indictment and substantive governance overhauls in exchange for cooperation. In the absence of rehabilitative terms and conditions, it is difficult to see how these settlements achieve accountability or can be deemed to be in the public interest. Although steps have been taken to improve the accountability of deferral in the United Kingdom, they lack the granularity to provide confidence that abuses seen in the United States will be ameliorated in full. The Exchequer may find itself a net beneficiary, but the sustainability of reform as well as its coherence may not.