

COMMENT

JUDICIAL REVIEW OF CORPORATE NON-PROSECUTION AND DEFERRED PROSECUTION AGREEMENTS: A NARROW ROAD TO CHECKING PROSECUTORIAL DISCRETION

Jacob Stock

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COMMENT**JUDICIAL REVIEW OF CORPORATE NON-PROSECUTION AND
DEFERRED PROSECUTION AGREEMENTS: A NARROW ROAD TO
CHECKING PROSECUTORIAL DISCRETION***Jacob Stock****Abstract**

Non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”) are popular tools for United States Attorneys’ Offices responding to corporate crime. These agreements offer companies an opportunity to resolve cases without bringing a case to trial, with some strings attached. Prosecutors hold all the cards when negotiating these agreements, and prosecutorial discretion has resulted in an overly harsh—and at times even dystopian—response to criminal wrongdoing by corporations. Because case law has all but foreclosed the possibility of substantive judicial review of the terms of these agreements, this Comment explores a narrower but related solution: judicial review for the sole purpose of determining whether a defendant corporation materially breached a DPA or NPA.

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INTRODUCTION

Imagine the government requiring a corporation to install slot machines on its premises. Imagine a company mandated to support certain legislation or even meet a quota of job creation all on pain of penalty including an indictment, fine, or conviction that could sound a death knell for the corporation. Enter the uncanny world of corporate criminal enforcement.

Non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”) have been steadily growing in popularity as tools for United States Attorneys’ Offices responding to corporate crime. Federal prosecutors have entered into over five hundred such agreements with corporations since 2000 and over four hundred in the last decade alone.¹ These agreements are closely related methods of responding to crimes that do not require bringing a case to trial.

A key difference between NPAs and DPAs is that DPAs involve the filing of charges in federal court With a DPA, the prosecutor and the corporation agree that although the prosecutor will charge the corporation in federal court, the prosecutor will defer the continued prosecution of the charges until the end of a certain period of time agreed upon by both parties. If, at the end of the term of the agreement, the corporation has followed through on its obligations, the prosecutor will dismiss the charges. In an NPA, no charges are filed in federal court.²

While these types of agreements are distinct, this Comment will refer to them collectively as “DPAs” unless one type is being discussed individually.

Prosecutors hold all the cards when negotiating these agreements. U.S. Attorneys are afforded significant discretion in deciding when to offer DPAs as well as in crafting their terms. Corporations can be held criminally liable and fined for the criminal acts of their employees.³ Convictions, indictments, and even investigations can have enormous financial and reputational consequences for companies.⁴ The combination of extensive corporate criminal liability and

¹ GIBSON DUNN, 2019 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 1, 2 (2020).

² Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AMERICAN CRIM. L. REV. 537, 545 (2015).

³ ANTHONY S. BARKOW & RACHEL E. BARKOW, *Introduction*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 2 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

⁴ *Id.* at 2.

prosecutorial discretion has resulted in an overly harsh – and at times even dystopian – response to criminal wrongdoing by corporations.

Criticism of these agreements has persisted, and commentators have posed various solutions. One proposed check on the discretion of prosecutors in offering and creating these agreements is oversight by courts. However, recent case law has all but foreclosed the possibility of substantive judicial review of the terms of DPAs.⁵

This Comment explores a narrower but related solution: judicial review for the sole purpose of determining whether a defendant corporation materially breached a DPA. The analogous practice of judicial review for alleged breaches of plea agreements is well-established by case law.⁶ Requiring judicial review for alleged breaches of DPAs promises a constitutionally sound route to ensuring a meaningful check on the use of these types of agreements.

Part I of this Comment addresses the history and current use of DPAs in the context of federal prosecutors' responses to corporate crime. Part I also highlights the various criticisms raised by commentators with respect to these kinds of agreements. Part II explores recent case law which severely limits the possibility of substantive judicial review of the terms of DPAs. Finally, Part III explores the narrower application of judicial review as a check on the use of these types of agreements based on established case law regarding breaches of plea agreements.

I. HISTORY AND CRITICISM OF DEFERRED PROSECUTION AGREEMENTS

A. *Historical Development of Deferred Prosecution Agreements*

The use of DPAs originally stemmed from the desire to avoid imposing the collateral consequences of a criminal conviction on individual defendants.⁷ Prosecutors made arrangements with non-violent juvenile and first-time offenders to avoid the stigma associated with a criminal prosecution.⁸ The practice of offering deferred prosecutions to low-level offenders persisted through the mid to late 1900s, when language enshrining this approach was included in the Speedy

⁵ See *infra* Part II.

⁶ See *infra* Part III.

⁷ Andrea Amulic, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 125 (2017).

⁸ *Id.* at 127.

Trial Act.⁹ Up to that point in time, DPAs had exclusively been offered to non-corporate defendants.¹⁰

However, prosecutors offered the first NPA to a public company in 1992.¹¹ The NPA required investment bank Salomon Brothers to pay \$290 million for fraudulent bids on government securities.¹² The first DPA was offered to a public company shortly after to Prudential Securities in 1994.¹³ Still, DPAs did not find consistent application in the context of corporate crime until the early 2000s following the catastrophic collapse of the accounting firm Arthur Andersen.¹⁴

During the investigation of Enron by the Securities and Exchange Commission, employees of Arthur Andersen destroyed evidence of their firm's audit of Enron.¹⁵ As a result, the firm was indicted by a federal grand jury for obstruction of justice.¹⁶ Following the indictment, Arthur Andersen lost its auditing license and many of its clients.¹⁷ The firm ultimately went under, resulting in the loss of thousands of jobs.¹⁸ This case underscored the importance of avoiding the collateral consequences of criminal indictments and convictions for corporations. In the years since Arthur Andersen, the use of DPAs to respond to corporate criminal activity has increased dramatically.

⁹ 18 U.S.C. § 1361(h)(2) (“The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: (2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.”). In adopting the Speedy Trial Act, Congress referenced two programs: the Manhattan Court Employment Project in New York and Project Crossroads in Washington, D.C., both of which worked to rehabilitate individual offenders charged with low-level crimes. *See* Andrea Amulic, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 130 (2017).

¹⁰ Amulic, *supra* note 7.

¹¹ Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1872 (2005).

¹² *Id.*

¹³ Alexander & Cohen, *supra* note 2, at 544.

¹⁴ Andrea Amulic, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 131 (2017).

¹⁵ BARKOW & BARKOW, *supra* note 3.

¹⁶ *Id.* Arthur Andersen was later convicted, but the conviction was overturned on appeal by the Supreme Court. Unfortunately for the firm and its many employees, the damage of criminal proceedings was already done.

¹⁷ *Id.*

¹⁸ *Id.*

B. Current Use of Deferred Prosecution Agreements

Prosecutors have used DPAs in cases involving a variety of corporate crimes including fraud, tax evasion, bribery, and antitrust violations.¹⁹ U.S. Attorneys, deciding how to resolve criminal cases against corporations, look to the guidelines published by the Department of Justice in the U.S. Attorney's Manual. The Manual lists numerous factors prosecutors may consider when making charging and resolution decisions, including whether to resolve cases with a DPA. Among these factors are "the nature and seriousness of the offense . . . the pervasiveness of wrongdoing within the corporation . . . the corporation's history of similar misconduct . . . the corporation's willingness to cooperate . . . the corporation's timely and voluntary disclosure of wrongdoing . . . [and] collateral consequences."²⁰ However, prosecutors are not limited to these factors in determining the appropriateness of a DPA. Prosecutors may also consider the impact a prosecution would have on shareholders of a company and even the viability of the market in which a firm operates.²¹ Additionally, prosecutors may consider whether the corporation under investigation did business with the government.²²

If a federal prosecutor decides to offer a DPA, charges are still filed just as in any other criminal case. Once charges have been filed, however, the process is different. The Speedy Trial Act requires federal criminal cases be brought to trial within seventy days after the filing of charges.²³ In order to successfully execute a DPA, more time is almost certainly required, so prosecutors and defendant corporations must move to exclude the time required under the agreement from counting towards the deadline mandated by the statute. In order to do so, the statute lists various situations in which time is not counted towards the seventy days.²⁴ An exclusion of time for DPAs is one such situation:

The following periods of delay shall be excluded in . . . computing the time within which the trial of any such offense must commence . . . Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written

¹⁹ Alexander & Cohen, *supra* note 2, at 537.

²⁰ U.S. DEP'T OF JUSTICE, U.S. ATT'YS' MANUAL § 9-28.300 (2020).

²¹ Greenblum, *supra* note 11, at 1881.

²² Alexander & Cohen, *supra* note 2, at 541.

²³ 18 U.S.C. § 3161(c)(1) ("In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date . . . of the information or indictment.").

²⁴ *See, e.g.*, 18 U.S.C. § 1361(h)(1).

agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.²⁵

Once the agreement is filed with the court, the prosecutor then monitors the defendant's compliance with the terms of the agreement. Prosecutors are often able to unilaterally determine whether a breach of the agreement has occurred, in which case the prosecutor may then press forward with the prosecution of the case.²⁶

In contrast to the process just described, no charges are filed in cases involving NPAs; rather, a NPA is executed solely between the prosecutor and the defendant with no involvement by the courts.²⁷ The prosecutor is often still the sole judge of breaches in NPAs and may bring charges in the event he or she decides a breach has occurred.²⁸

Most DPAs for corporations contain similar elements including an admission of the underlying facts, an agreement to cooperate, a time limit for the agreement, and an agreement to monetary and/or other penalties.²⁹ A range of sanctions may be imposed from requiring the company to fire individual employees responsible for criminal acts and hire an independent corporate monitor, to requiring the payment of fines and restitution.³⁰ Financial sanctions from these agreements result in considerable revenues for the government. Since 2009, U.S. Attorneys have recovered almost \$60 billion from companies through DPAs.³¹

Resolving cases through a DPA provides benefits to both parties. As with plea agreements, DPAs allow both parties to avoid the rigors and uncertainties of trial, thereby saving considerable time, expense, and hand-wringing. The monetary sanctions imposed through DPAs do not differ significantly from those imposed as a part of plea agreements.³² Plea agreements tend to last about three years on average, while DPAs tend to last about two years on average.³³ Courts also benefit

²⁵ 18 U.S.C. § 1361(h)(2).

²⁶ Alexander A. Zende, *Can Congress Authorize Judicial Review of Deferred Prosecution and Non prosecution Agreements? And Does It Need To?*, 95 TEX. L. REV. 1451, 1460 (2017).

²⁷ Alexander & Cohen, *supra* note 2, at 545.

²⁸ Zende, *supra* note 26.

²⁹ Alexander & Cohen, *supra* note 2, at 538.

³⁰ *Id.*

³¹ DUNN, *supra* note 1, at 3; 31 U.S. Code § 3302(b). Once restitution has been paid, funds from punitive fines levied in criminal cases are deposited in the general fund of the U.S. Treasury.

³² Alexander & Cohen, *supra* note 2, at 583.

³³ *Id.* at 586.

when cases are resolved through DPAs as the cases are kept off the dockets and judicial resources are spared.³⁴

Corporate crimes are often hard to detect,³⁵ and complex criminal litigation may take years.³⁶ This is especially true because corporations are more likely than individual defendants to be able to fund high-quality defense for their case.³⁷ Thus, for prosecutors, the ability to resolve cases in a sure and timely manner through a DPA is a draw due to the lower risk of under-enforcement of corporate crimes.³⁸ A major benefit for corporations is preventing a conviction—and potentially even an indictment—as well as the accompanying negative media coverage which can shake public and shareholder confidence.³⁹ Still, U.S. Attorneys' Offices regularly issue press releases listing any DPAs entered into with corporations, amounting to a slight reprimand for corporations and serving as a warning to others.⁴⁰ Furthermore, the admissions of a company's wrongdoing required in many DPAs also serve as a deterrent by putting others on notice of conduct that will be subject to prosecution.⁴¹

DPAs often include non-monetary sanctions such as conditions related to legal processes⁴² and governance of the corporation.⁴³ These conditions represent a chance at reform for corporations eager to conduct business legitimately and a chance at reforming those corporations for prosecutors.⁴⁴ Additionally, resolving cases through DPAs allows a tailored approach to addressing individual instances of corporate crime rather than seeking broad reforms through statutes or administrative regulations that are imposed on entire industries or markets.⁴⁵ Given the range of benefits for prosecutors, defendants, and even courts, it is not surprising these agreements have grown in popularity.

³⁴ Greenblum, *supra* note 11, at 1866.

³⁵ See Michael Y. Xiao, *Deferred/Non-Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J. L. PUB. POL'Y 233, 242 (2013).

³⁶ *Id.* at 243.

³⁷ Vikramaditya Khanna, *Reforming the Corporate Monitor?*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 228 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011).

³⁸ Xiao, *supra* note 35, at 242.

³⁹ *Id.* at 245.

⁴⁰ *Id.* at 252.

⁴¹ *Id.* at 245.

⁴² Alexander & Cohen, *supra* note 2, at 587.

⁴³ *Id.* at 589.

⁴⁴ Xiao, *supra* note 35, at 233.

⁴⁵ See Alexander & Cohen, *supra* note 2, at 545.

C. Corporate Monitors

One condition regularly included in DPAs is the requirement that a company appoint an independent corporate monitor. About half of DPAs include such a provision.⁴⁶ Corporate monitors are individuals or entities who are tasked with overseeing a corporation to ensure its compliance with the terms of a DPA.⁴⁷ Monitors are not employees of the corporation nor agents of the prosecutor.⁴⁸ The first use of a corporate monitor was in the DPA entered into between the government and Prudential Services in 1994.⁴⁹ Corporate monitors have been required in DPAs involving a variety of crimes ranging from securities fraud to violations of the Foreign Corrupt Practices Act.⁵⁰ Corporate monitors have so far only been required in DPAs entered into with publicly traded companies.⁵¹

The terms related to a monitor's role may vary widely from agreement to agreement. For example, firms are responsible for paying the monitor's fees but compensation is decided on a case-by-case basis rather than by predetermined guidelines.⁵² Prosecutors may or may not be involved in decisions concerning compensation.⁵³ In addition to compensation, the length of the monitor's term can vary as well, usually between one and three years but in some cases up to five years.⁵⁴ The Morford Memorandum, published by the Department of Justice, instructs prosecutors to consider a variety of factors when determining the duration of a monitor's term.

Variations in the powers and duties of monitors are also common. Monitors may have a narrow role restricted to merely advising the firm with respect to its duties under a DPA or may have a more active role in the day-to-day operations of a company.⁵⁵ Monitors are frequently required to submit reports about the progress of corporations under an agreement, but how often the reports must be filed and the content of the reports can depend on the individual agreement.⁵⁶ Once a monitor has a sense of the needs of the corporation, he or she may work to develop

⁴⁶ BARKOW & BARKOW, *supra* note 3, at 4.

⁴⁷ Khanna, *supra* note 37.

⁴⁸ Memorandum from Acting Deputy Attorney General Craig S. Morford to heads of departments United States Attorneys (March 7, 2008) (unpublished internal memoranda, Department of Justice).

⁴⁹ See Khanna, *supra* note 37, at 227.

⁵⁰ *Id.* at 228.

⁵¹ *Id.*

⁵² *Id.* at 229.

⁵³ Khanna, *supra* note 37.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

compliance programs tailored to the corporation's situation.⁵⁷ Many of these minutiae are not clarified in DPAs but may instead be worked out informally once the monitor assignment has begun.⁵⁸

The Morford Memorandum issued by the Department of Justice also provides some guidance for federal prosecutors when crafting DPAs requiring the appointment of monitors.⁵⁹ Flexibility in crafting provisions related to corporate monitors is explicitly contemplated.⁶⁰ The Memorandum outlined situations in which the appointment of a monitor may be appropriate, for example, when a corporation has an insufficient system of internal controls.⁶¹ In deciding who to choose to fill the role of monitor, prosecutors are instructed to take into account the qualifications of the individual or entity to be appointed, as well as any potential conflicts of interest.⁶² Corporations may hold little sway over the decision of who to appoint.⁶³ If a particular monitor is unsuited for the assignment with a corporation, there are no clear guidelines as to how—or if—the firm can replace or remove the monitor.⁶⁴ While the proposals made by a monitor are not binding on a corporation, refusal to accept a proposal is reported to the prosecutor and may be considered when determining if the corporation is complying with the terms of the DPA.⁶⁵

DPAs have been subject to criticism despite the benefits they offer to both the government and corporations. Though some commentators have expressed concern that DPAs are merely a means for corporations to escape punishment for criminal acts, many more critics have warned of the heavy-handed practices associated with negotiating and executing DPAs.

⁵⁷ See Morford, *supra* note 48, at 5. “A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.”

⁵⁸ See Khanna, *supra* note 37.

⁵⁹ Morford, *supra* note 48.

⁶⁰ *Id.* (“[A]ny guidance regarding monitors must be . . . flexible.”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Viramaditya Khanna, *Reforming the Corporate Monitor?*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 229 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011).

⁶⁴ *Id.*

⁶⁵ *Id.*

D. Criticism of Deferred Prosecution Agreements as Overly Harsh

For those who believe DPAs result in overly harsh punishment of corporations, a central concern is the imbalance of power in the negotiation stage of the process. An indictment alone can result in the loss of a license necessary to stay in business⁶⁶ and convictions can prevent a corporation from receiving government contracts in the future.⁶⁷ The mere announcement of a criminal investigation can cause a drop in a company's stock price,⁶⁸ and shareholder wealth can diminish significantly when prosecutors initiate criminal proceedings against a corporation.⁶⁹ Furthermore, corporations can be held criminally liable for the criminal acts of their employees when an employee's crimes are committed in the scope of his or her duties or are at least in part intended to benefit the firm.⁷⁰ However, in certain states, even if an employee's actions violate company policy and do not benefit the company, criminal liability may still attach.⁷¹ And in the course of a criminal investigation, corporations cannot assert the Fifth Amendment privilege against self-incrimination.⁷²

Those who express concern about the harshness of DPAs can point to many examples in support. Under the terms of a DPA, the New York brokerage firm Marsh & McLennan, Aon, and Willis was required to support legislation prohibiting the sale of certain insurance contracts.⁷³ Critics point out this provision improperly restricted the First Amendment rights of the firm to engage in public debate about the proposed legislation.⁷⁴ Other agreements have interfered with attorney-client privilege and work-product privileges.⁷⁵ In recognition of past

⁶⁶ Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law on Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38, 4038 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011).

⁶⁷ Greenblum, *supra* note 11, at 1867.

⁶⁸ 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 (2007).

⁶⁹ *Id.*

⁷⁰ Epstein, *supra* note 66 at 45.

⁷¹ *Id.*

⁷² *See, e.g.*, In Re: Grand Jury Proceeding, 961 F.3d 168 (2nd Cir. 2020) ("It is well understood, however, that an individual may not assert a Fifth Amendment privilege on behalf of a 'collective entity' . . . such as a corporation or partnership."); *Hale v. Henkel*, 201 U.S. 43 (1906) ("The [Fifth] amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.").

⁷³ Epstein, *supra* note 66, at 52.

⁷⁴ *Id.*

⁷⁵ *Id.* at 55.

infringements on the right to counsel, the Department of Justice issued guidelines restricting the practice of meddling in the attorney-client relationship.⁷⁶

The terms of some DPAs could be never imposed as a sentence for a conviction and at times have little or no connection to the underlying crime. For example, in an agreement with the New York Racing Association, the organization was required to install slot machines at its racing facilities.⁷⁷ Prosecutors involved in the case included the term so tax revenue from the machines would prevent a state education budget shortfall.⁷⁸ Another agreement between prosecutors and Oklahoma-based WorldCom required the firm to create 1,600 new jobs in the state before the DPA expired.⁷⁹ When WorldCom failed to do so, the firm was fined \$280,000.⁸⁰ A DPA entered into with Bristol-Meyer Squibb mandated the company donate to a university to endow an business ethics program.⁸¹

Additionally, any violation of the terms of a DPA could result in the prosecutor bringing charges or proceeding with the case. Not only that, but the terms of DPAs almost always allow prosecutors to be the sole judges of whether a breach of the agreement has occurred.⁸² Thus, criminal sanctions could be imposed based on conduct that is perfectly legal for similarly situated companies.⁸³ Because DPAs routinely require corporations to waive the statute of limitations for the underlying offense, a prosecution may occur after the point at which they would have been barred under normal circumstances.⁸⁴ DPAs also frequently require corporations to admit wrongdoing related to the crimes under investigation.⁸⁵ In the event a prosecutor determines a breach has occurred, the admissions contained in the DPA

⁷⁶ U.S. DEP'T. OF JUSTICE, U.S. ATT'YS' MANUAL § 9-28.710 (2015) (“[W]hile a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”).

⁷⁷ Greenblum, *supra* note 11, at 1878.

⁷⁸ *Id.*

⁷⁹ Barbara Hoberock, *MCI Coughs Up \$280,000 Payment to State*, TULSA WORLD, (Mar. 31, 2005), https://tulsaworld.com/archive/mci-coughs-up-280-000-payment-to-state/article_9c5d8131-7147-593f-b9a3-2cdbe2e01e0c.html.

⁸⁰ *Id.*

⁸¹ Pretrial Diversion Agreement, *United States v. Bristol-Meyers Squibb Co.* (D.N.J. 2005). Granted, community service can be imposed as a condition of probation for organizations. *See* U.S. SENT'G GUIDELINES MANUAL § 8B1.3 (U.S. SENT'G COMM'N 2005). Nonetheless, some of the terms of DPAs seem to exceed what would fairly be considered in that category.

⁸² Zende, *supra* note 26 (finding eighty-three percent of DPAs allowed prosecutors alone to determine a breach of the agreement).

⁸³ Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation through Nonprosecution*, 84 UNIV. CHI. L. REV. 323, 348 (2017).

⁸⁴ Alexander & Cohen, *supra* note 2, at 587.

⁸⁵ Xiao, *supra* note 35, at 241.

all but guarantee a conviction.⁸⁶ The process of using the admissions at trial is further expedited by often including in a DPA a waiver of the defendant's right to challenge the admissibility of the incriminating statements at trial.⁸⁷

E. Criticism of Deferred Prosecution Agreements as Overly Lenient

While many critics have decried DPAs as bearing down too heavily on corporate crime, some claim the deals are little more than a slap on the wrist for wealthy companies. These deals are enjoyed almost exclusively by corporations even though they have their roots in benefiting individual low-level offenders.⁸⁸ This reality leads some to view prosecutors as beholden to corporate interests.⁸⁹ To defend this view, critics may point to the fact that individuals responsible for criminal acts often escape prosecution under DPAs while charges are instead brought against the corporation.⁹⁰ When General Motors "affirmatively mislead" consumers about a potentially deadly defect in one of its automobiles, no company employees faced charges and the charges against the company were eligible for dismissal after three years per the DPA.⁹¹

Corporate monitors are frequently appointed in DPAs along with fines and other sanctions, but the Morford Memorandum explicitly stated the appointment of a monitor was not intended as a punishment.⁹² Other sanctions may also be viewed as inadequate. In some cases, the fines imposed under a DPA may be less than the financial benefit of the criminal activity to the company.⁹³ The deterrent effect of the sanctions is rightly questioned under such circumstances. In some cases, companies are simply required to perform community service.⁹⁴

Nonetheless, explanations exist for some of the leniency observed in corporate criminal cases resolved by DPAs. First, prosecutors may impose fewer demands

⁸⁶ *Id.*

⁸⁷ Greenblum, *supra* note 11, at 1871.

⁸⁸ Amulic, *supra* note 7.

⁸⁹ Zende, *supra* note 26, at 1460.

⁹⁰ United States v. Saena Tech Corp., 40 F. Supp. 3d 11, 40 (D.D.C. 2015).

⁹¹ *Id.* at 41.

⁹² Morford, *supra* note 48 ("A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement . . . not to further punitive goals.").

⁹³ United States v. HSBC Bank USA, N.A. 863 F.3d 125 (2nd Cir. 2017). HSBC Bank was required to pay 1.9 billion dollars in fines under an agreement with the government—no paltry sum—but an amount that pales in comparison to the nearly one trillion dollars worth of money laundering the bank committed.

⁹⁴ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 917 (2007).

on companies that have an effective compliance program.⁹⁵ Additionally, culpable individuals in a corporation may not have sufficient assets to pay restitution or fines in the amount a prosecutor deems appropriate, so, instead, the government must look to the deeper pockets of companies.⁹⁶ And while DPAs were originally developed in the context of individual prosecutions, the lessons learned from catastrophes, such as Arthur Andersen, counsel the wisdom of offering these agreements in cases of corporate crimes. Though corporations are overwhelmingly the current beneficiaries of DPAs, nothing prevents prosecutors from offering these same agreements to individuals.⁹⁷

F. General Criticism of Deferred Prosecution Agreements

Some of the critiques of DPAs arise from issues unrelated to the harshness of the agreements. Because prosecutors do not necessarily have business training, some critics have expressed concern when U.S. Attorneys demand changes to the business practices of corporations.⁹⁸ And while DPAs demand less of the limited resources available to prosecutors, monitoring the compliance of different corporations with often complex agreements may still put a strain on the budgets and time of U.S. Attorneys' Offices.⁹⁹

Importantly for the discussion in Parts III and IV below, the resolution of corporate criminal cases through DPAs limits the development of legal authority in this area given that courts rarely resolve these cases.¹⁰⁰ An adjacent issue is the challenge facing corporate and defense lawyers when trying to effectively counsel their clients given the lack of case law.¹⁰¹ Together, these problems may paradoxically undermine the legislative scheme of responding to corporate crime with DPAs: a corporation lacking assurances that cooperation will bear fruit may be more hesitant to enter into agreements with prosecutors in the first place.¹⁰² The uncertainties surrounding a corporation's duties under a DPA may impact other business decisions. For example, because corporations inherit the debts and

⁹⁵ *Id.* at 891; For factors considered to determine whether a firm's compliance program is effective, see U.S. DEP'T OF JUST., U.S. ATT'YS MANUAL § 9-29.800 (2015).

⁹⁶ Arlen & Kahan, *supra* note 83.

⁹⁷ 18 U.S.C. § 1361(h)(2).

⁹⁸ Alexander & Cohen, *supra* note 2, at 556.

⁹⁹ Arlen & Kahan, *supra* note 83, at 349.

¹⁰⁰ *Id.* at 566.

¹⁰¹ See Warin & Boutros, *supra* note 68, at 122.

¹⁰² *Id.*

liabilities of an acquired firm under the successor liability doctrine, mergers and acquisitions may be chilled when questions related to criminal liability remain.¹⁰³

Regardless of the grounds for criticism, the unchecked discretion of prosecutors is often cited as a core problem.¹⁰⁴ Though the Department of Justice has issued guidance for prosecutors to consider whether offering a DPA is appropriate,¹⁰⁵ it has yet to issue guidance for determining whether a corporation has complied with such an agreement.¹⁰⁶ Given the high stakes of a breach for corporations, a remedy is clearly needed.

II. LIMITATIONS ON JUDICIAL REVIEW OF DEFERRED PROSECUTION AGREEMENTS

Commentators have proposed judicial review of DPAs as a remedy to a number of the criticisms raised regarding these types of agreements. If unchecked prosecutorial discretion has resulted in widely acknowledged problems, the thinking goes, then neutral courts may be able to place some restraint on the practice of offering and crafting DPAs. However, recent case law has indicated courts are only willing to engage in substantive review of the terms of DPAs in the most extreme cases. In considering the value of judicial review of the terms of DPAs it is also important to consider that courts cannot pick and choose which terms of an agreement to adopt; rather, the entire agreement must be approved or denied.¹⁰⁷ Not only is judicial review nearly foreclosed by current case law, as discussed below, it is far from the most effective route to remedying the problems posed by DPAs.

A. *United States v. Fokker Servs. B.V.*¹⁰⁸

In *United States v. Fokker Servs. B.V.*, the D.C. Circuit held the phrase “with the approval of the court” in the Speedy Trial Act did not empower courts to refuse a DPA based on its terms. This case was groundbreaking as it was the first time a district court judge did not automatically approve a DPA.¹⁰⁹

Both the government and Fokker Services appealed the district court decision denying a joint motion to exclude time in order to execute the DPA.¹¹⁰ The court

¹⁰³ *Id.* at 131.

¹⁰⁴ Alexander & Cohen, *supra* note 2, at 557.

¹⁰⁵ See generally U.S. DEP'T OF JUSTICE, U.S. ATT'YS' MANUAL § 9-28.000 (2015).

¹⁰⁶ Warin & Boutros, *supra* note 68.

¹⁰⁷ See Garrett, *supra* note 94, at 957.

¹⁰⁸ *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016).

¹⁰⁹ *United States v. Saena Tech Corp.*, 140 F.Supp.3d 11, 25 (D.D.C. 2015).

¹¹⁰ *Fokker Services B.V.*, 818 F.3d. at 738.

refused to approve the agreement because no culpable individuals were set to be prosecuted.¹¹¹ In stern terms, the district court declared approving the DPA would “promote disrespect for the law” because the defendant corporation had been “prosecuted so anemically for engaging in such egregious conduct.”¹¹²

That a prosecutor was too lenient, the circuit court ruled, is not grounds for a court to refuse a DPA.¹¹³ Rather, the court construed the “approval” clause of the Speedy Trial Act narrowly to permit refusal only in the case a DPA amounted to nothing more than a pretext to avoid the requirements of the Act.¹¹⁴ The court found this narrow interpretation was supported by legislative history. The Senate Committee Report on the Speedy Trial Act explicitly stated the “approval of the court” language was to prevent the government and defendants from merely circumventing the Act’s strictures.¹¹⁵ Finally, the court reasoned that granting judges the power to scrutinize the terms of DPAs may undermine the legislative intent of the provision by discouraging prosecutors from entering into the agreements in the first place.¹¹⁶

The reasoning of the court in *Fokker Servs.* was also based on separations of power considerations:

The Constitution allocates primacy in criminal charging decisions to the Executive Branch. The Executive’s charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought. It has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences.¹¹⁷

In holding that these types of decisions are the sole province of the executive branch, the court dimmed the possibility of the judiciary functioning as a check on prosecutorial discretion in the context of DPAs. The court also briefly addressed an argument advocating broader judicial discretion in approving DPAs based on a comparison to plea agreements. In dismissing this argument, the court held that unlike in cases involving plea agreements, courts are not involved in the imposition

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 741.

¹¹⁴ *Id.* at 744.

¹¹⁵ *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 745 (D.C. Cir. 2016).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 737.

or adoption of DPAs, so judicial involvement could not be justified by an analogy to plea agreements.¹¹⁸

Later dicta in the opinion emphasized the limited nature of the involvement of the courts in cases governed by DPAs:

[T]he court plays no role in monitoring the defendant's compliance with the DPA's conditions. For instance, defendants who violate the conditions of their DPA face no court-ordered repercussions. Rather, the prosecution—and the prosecution alone—monitors a defendant's compliance with the agreement's conditions and determines whether the defendant's conduct warrants dismissal of the pending charges.¹¹⁹

Here, the court clarified its view of the limited role of the judiciary in the administration of DPAs. This limited role was reaffirmed in another circuit just one year later.

*B. United States v. HSBC Bank USA*¹²⁰

The Second Circuit reiterated the limited role of courts in cases involving a DPA in *United States v. HSBC Bank USA*. The court rejected the argument that district courts may invoke their inherent supervisory power to refuse approval of a DPA based on its terms.¹²¹

The question in *HSBC Bank USA* concerned whether a report filed by a corporate monitor appointed under a DPA could be sealed as a judicial document.¹²² In essence, a circuit court was once again asked to determine whether district court judges could review DPAs based on the merits of the agreement. The court answered this question in the negative. The judge succinctly reiterated that courts' duties with respect to DPAs are "limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise."¹²³

Here, the discussion centered around the limits of courts' inherent supervisory authority. Supervisory authority broadly consists of overseeing the administration

¹¹⁸ *Id.* at 746.

¹¹⁹ *Id.* at 745.

¹²⁰ *United States v. HSBC Bank USA*, N.A. 863 F.3d 125 (2nd Cir. 2017).

¹²¹ *Id.* at 129.

¹²² *Id.*

¹²³ *Id.*

of criminal cases between the government and defendants,¹²⁴ but is a power which courts are admonished to use sparingly.¹²⁵ Additionally, the court again emphasized separation of powers in making its decision. Prosecutors enjoy a presumption of regularity with respect to the discharge of their duties, including in the drafting of DPAs.¹²⁶ But despite emphasizing the deference given to prosecutorial decision making, the court's opinion announced a narrow caveat: "Though that presumption [of regularity] can of course be rebutted in such a way that warrants judicial intervention, it cannot be preemptively discarded based on the mere theoretical possibility of misconduct."¹²⁷ The facts in the case at bar obviously did not rise to that level in the eyes of the judges. Nonetheless, the court had reached a different conclusion in a case decided a few years earlier.

C. *United States v. Stein*¹²⁸

In *United States v. Stein*, the Second Circuit decided that in extraordinary cases involving infringement of a defendant's constitutional rights, courts could refuse to approve a DPA. Specifically, the court found a DPA had impermissibly interfered with the right to counsel for various employees of a corporation.¹²⁹

After an investigation for tax fraud, the accounting firm KPMG, LLP entered into a DPA.¹³⁰ The terms of the DPA required payment of a fine and admission of wrongdoing.¹³¹ The DPA also required that legal fees paid to defend employees be "capped at \$400,000 per employee; conditioned on the employee's cooperation with the government; and terminated when an employee was indicted."¹³² Per the agreement, KPMG stopped paying the legal fees of sixteen employees when they were indicted.¹³³ The firm's previous practice was to pay for legal defense of employees without caps or conditions.¹³⁴

¹²⁴ *Id.* at 135.

¹²⁵ *Id.* at 129.

¹²⁶ *United States v. HSBC Bank USA, N.A.* 863 F.3d 125, 129 (2nd Cir. 2017) ("In the absence of evidence to the contrary, the Department of Justice is entitled to a presumption of regularity—that is, a presumption that it is lawfully discharging its duties.").

¹²⁷ *Id.*

¹²⁸ *United States v. Stein*, 541 F.3d 130 (2nd Cir. 2008).

¹²⁹ *Id.* at 136.

¹³⁰ *Id.* at 139.

¹³¹ *Id.*

¹³² *Id.* at 138.

¹³³ *Id.* at 139-40.

¹³⁴ *United States v. Stein*, 541 F.3d 130, 140 (2nd Cir. 2008).

The district court judge dismissed the indictment against the employees of KPMG finding the terms of the DPA interfered with the employees' Sixth Amendment right to "choose the lawyer or lawyers he or she desires and to use one's own funds to mount the defense that one wishes to present."¹³⁵ On appeal, the circuit court affirmed.¹³⁶

This case represents a departure from courts generally refusing to engage in substantive analysis of the terms of DPAs. In the eyes of the court, interference with the right to counsel rose to the level of rebutting the presumption of regularity mentioned in *HSBC Bank USA*.¹³⁷

The court referenced a memorandum issued by the Department of Justice which concerned the payment of legal fees by corporations suspected of criminal activity. The court noted that prosecutors in *Stein* relied on the Thompson Memorandum which stated prosecutors could consider whether a corporation paid for the legal defense of employees alleged to have committed crimes when determining whether that corporation was genuinely cooperating in an investigation.¹³⁸

Of further note is the potential for the reasoning in *Stein* to allow courts to review NPAs in limited circumstances. Though *Stein* involved a DPA, the court hinted at a route by which NPAs could be invalidated based on their terms:

The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment. In other words, the government's pre-indictment conduct was of a kind that would have post-indictment effects of Sixth Amendment significance, and did. When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment.¹³⁹

¹³⁵ *Id.* at 141-42.

¹³⁶ *Id.* at 158.

¹³⁷ *United States v. HSBC Bank USA, N.A.* 863 F.3d 125, 129 (2nd Cir. 2017).

¹³⁸ *Stein*, 541 F.3d at 136. The Thompson Memorandum, published in 2003, was later superseded by the McNulty Memorandum in 2006. The McNulty Memorandum restricted when a prosecutor could consider payment of legal fees by a corporation as non-cooperation to only those times when payment of the fees amounted to impeding the criminal investigation. See Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States' Attorneys, *Principles of Federal Prosecution of Business Organizations* (2006).

¹³⁹ *Stein*, 541 F.3d at 153.

Per the court's logic, even if an NPA did not involve filing charges at the outset, a later indictment brought after an alleged breach of the NPA may still be reviewable if a defendant's right to counsel was abridged. A court theoretically would be able to review the government's pre-indictment conduct for impermissible interference with the constitutional rights of the defendants. Though as the court in *Stein* made clear, the NPA terms in question must be more than undesirable in the opinion of the judge; rather, they must be unconstitutional.

*D. United States v. Saena Tech Corp.*¹⁴⁰

The decision in *United States v. Saena Tech Corp.* stands in sharp contrast to prevailing case law on the question of substantive judicial review of DPAs. Whereas *Stein* represented an exception to the rule prohibiting substantive judicial review in extreme circumstances, *Saena Tech Corp.* had a much broader holding. Regardless, the case still did not pave the way for judicial review of the terms of DPAs because of its limited precedential value.

During the course of an investigation for bribery of a public official, the government entered into a DPA with Saena Tech Corp. and one of its former executives.¹⁴¹ Ultimately, the district court granted the parties' joint motion for exclusion of time under the Speedy Trial Act in order to execute the DPA.¹⁴² However, the judge argued in dicta for expanded power by courts to review such agreements in future cases. The court's reasoning emphasized approval, per the language of the Speedy Trial Act, should rest on a determination of whether an agreement truly allows a defendant to demonstrate good conduct.¹⁴³ Making that determination, the court concluded, "necessarily involves limited review of the fairness and adequacy of an agreement, to the extent necessary to determine the agreement's purpose."¹⁴⁴ The court offered an example of when a DPA may be invalidated by a judge:

An agreement that contained neither punitive measures (such as fines) nor requirements designed to deter future criminality (such as compliance programs and independent monitors) could not be said to be designed to secure a defendant's reformation and should be rejected. Even an agreement that contained some of these

¹⁴⁰ *United States v. Saena Tech Corp.*, 140 F.Supp.3d 11 (D.D.C. 2015).

¹⁴¹ *Id.* at 14.

¹⁴² *Id.* at 46-47.

¹⁴³ *Id.* at 29.

¹⁴⁴ *Id.* at 31 (emphasis omitted).

elements could be ineffective if the obligations were found to be so vague or minimal as to render them a sham.¹⁴⁵

The analysis in this hypothetical was grounded in courts' established duty of rejecting DPAs which simply seek a way around the timeframes required by the Speedy Trial Act. Nonetheless, it is unlikely *Saena Tech Corp.* will serve as a basis for any significant expansion of the court's role in approving DPAs. The reasoning in the decision is largely contradicted by what would be binding D.C. Circuit precedent in *Fokker Servs.* Because the case was not appealed for the D.C. Circuit to consider, looking to *Saena Tech Corp.* to support an argument for expanded judicial review of the terms of DPAs is a long shot since the reasoning would likely be rejected on appeal.

III. JUDICIAL REVIEW OF ALLEGED BREACHES

While courts have generally refused to engage in substantive review of the terms of DPAs, a more limited application of judicial review promises a check on prosecutorial discretion in cases resolved by DPAs. Recall that for the majority of DPAs, prosecutors can unilaterally declare a breach by the corporation,¹⁴⁶ and currently no guidelines have been issued by the Department of Justice to inform that determination.¹⁴⁷ One solution is to allow courts to review alleged breaches of DPAs rather than rely on the sole discretion of prosecutors.

This solution is not entirely novel. In fact, several DPAs entered into by federal prosecutors include a provision requiring the government to bring alleged breaches of the DPA to a district court for review.¹⁴⁸ Analogously, court review of alleged breaches of plea agreements is well established in case law.

The Supreme Court made clear in *Santobello v. New York* that plea bargains are enforceable contracts between prosecutors and defendants.¹⁴⁹ When the government breaches its promises under a plea agreement, defendants have the

¹⁴⁵ *Id.*

¹⁴⁶ Alexander A. Zendeh, *Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does It Need To?*, 95 TEX. L. REV. 1451, 1460 (2017).

¹⁴⁷ Warin & Boutros, *supra* note 68, at 126.

¹⁴⁸ See Pretrial Diversion Agreement, *United States v. BDO Seidman LLP* (S.D. Ill. Apr. 12, 2002) ("In the event that the government believes that BDO has violated the conditions of pre-trial diversion, and that BDO has not adequately cured the breach, the government shall initiate proceedings in the District Court to determine whether a violation has occurred."); see also Pretrial Diversion Agreement, *United States v. Sears Automotive Marketing Svcs., Inc.* (S.D. Ill. Dec. 27, 2001) (containing nearly identical language).

¹⁴⁹ *Santobello v. New York*, 92 S. Ct. 495 (1971).

option to remedy the breach either by requesting specific performance of the government's duties or withdrawing a guilty plea.¹⁵⁰ If a defendant materially breaches the agreement, the government is relieved of its duty to perform.¹⁵¹ However, the enforceability of plea agreements is not a two-way street. Defendants' Fifth Amendment right against self-incrimination prohibits compelling inculpatory testimony even if required under the agreement.¹⁵² Thus, the government's only option in case of a breach is rescission of the agreement.¹⁵³ Another Fifth Amendment right—Due Process—is also implicated in alleged breaches of plea agreements. Specifically, defendants are entitled to a hearing in which a court determines whether a material breach of the plea agreement has actually occurred.¹⁵⁴ In contrast, current case law has not established a similar right in the context of DPAs.¹⁵⁵

Though plea agreements and DPAs differ in some respects relevant to judicial review, the status of both types of agreements as contracts places them within the well-established authority of courts. Unlike thornier questions related to whether courts can substantively review the provisions of DPAs, court review of alleged breaches of a contract is not at all constitutionally suspect.

Judicial review of alleged breaches addresses many of the criticisms raised against DPAs. First, the balance of power is leveled when prosecutors are not unilaterally able to define a breach of a DPA. Additionally, if courts take a more active role in determining breaches of DPAs, the case law surrounding these agreements will develop accordingly. An increase of case law would in turn assist defense and corporate counsel in giving advice to defendant corporations regarding compliance. Judicial review of alleged breaches would also assist prosecutors by creating more clear rules to apply when monitoring the compliance of defendant

¹⁵⁰ *Id.* at 499.

¹⁵¹ Julie A. Lumpkin, *The Standard of Proof Necessary to Establish that a Defendant has Materially Breached a Plea Agreement*, 55 FORDHAM L. REV. 1059, 1060-61 (1987).

¹⁵² *Id.*

¹⁵³ *Id.* at 1068.

¹⁵⁴ *Id.* at 1061; *see also* United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998) (“[D]ue process prevents the government from unilaterally determining that the defendant breached the agreement.’ Rather, the government must obtain a judicial determination of the defendant’s breach.”) (internal citation omitted).

¹⁵⁵ Currently, only the Seventh Circuit and the Western District of Pennsylvania have found a right to a pre-indictment hearing in the case of an alleged breach of a NPA. *See* United States v. Meyer, 157 F.3d 1067 (7th Cir. 1998); *see also* United States v. Lamana, 2016 WL 616580 (W.D. Penn. 2016). The Third Circuit has explicitly found such a right does not exist. *See* Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3rd Cir. 2006).

companies. And if courts can prevent cases involving minor breaches from resulting in further prosecution, judicial resources will be spared.

To be sure, some issues related to DPAs would persist even if judicial review of alleged breaches were implemented. Many of these pertain to the terms of DPAs which would remain beyond the control of the courts. Whether culpable individuals are charged and what fines or governance reforms are imposed will still be up to prosecutors and corporations to negotiate in the agreements. Other issues unrelated to terms may also continue. The economic consequences for firms when there is news of an investigation or indictment will be unaffected by changes to the process of adjudicating breaches of DPAs.¹⁵⁶ And other legal doctrines—the individual nature of the Fifth Amendment privilege against self-incrimination, the respondeat superior criminal liability of corporations, and the successor liability doctrine, will not be impacted by the proposed solution.¹⁵⁷

Nonetheless, if alleged breaches of the terms of DPAs are scrutinized by courts, so too will the terms themselves. And though the road to invalidating the terms of a DPA is narrow as discussed above, more terms may be found to be unconstitutional as courts take a more active role in reviewing breaches of DPAs. While it is difficult to predict the direction that different circuits will take, others may follow the D.C. District Court in *Stein* and carve out a greater role for courts in reviewing the terms of DPAs. Until these cases come before courts in the first place, no such developments are likely to occur.

CONCLUSION

Assuming the desirability of judicial review for the purpose of deciding whether a material breach of a DPA has occurred, the question remains as to how

¹⁵⁶ Still, the possibility remains that a corporation party to a NPA could avoid an indictment in the event of an alleged breach of the NPA. It is unsettled whether courts can enjoin prosecutors from indicting a defendant after an alleged breach of a plea agreement if the agreement precludes indictment on that particular charge. If a corporation is able to avoid a prosecution altogether, the accompanying economic impacts could be lessened or prevented. *See supra* text accompanying note 155.

¹⁵⁷ A 2006 DPA between Boeing and federal prosecutors provided that a breach of the terms of the agreement by an employee below the level of executive management would not constitute a material breach. *See* Pretrial Diversion Agreement, *United States v. The Boeing Co.* (C.D. Cal. & E.D. Va. 2006). If case law develops in a similar direction in the context of DPAs, the criminal liability of corporations based on the actions of its employees could be accordingly limited. For a discussion on a similar approach in plea agreements see *United States v. Castaneda*, 162 F.3d 832, 838 (5th Cir. 1998) (finding government is not entitled to rescission of a plea agreement “[i]f non-performance does not thwart the purpose of the bargain, and is wholly dwarfed by that party’s performance.”).

such an approach would be implemented. As has already been the case in some DPAs, the parties could simply agree to a provision requiring prosecutors to bring alleged breaches of the agreement before the court for a hearing. In order to ensure a more widespread application of this approach, more is needed than to leave the decision of how to determine breaches up to the discretion of individual prosecutors.

In 2014, the Accountability in Deferred Prosecution Act was introduced as a measure to compel the Department of Justice to create guidelines regarding the terms of DPAs.¹⁵⁸ Though not enacted, the bill proposed requiring the Department of Justice to publish guidance on a number of aspects of DPAs including how to determine whether a breach occurred.¹⁵⁹ In the future, Congress could revisit the approach attempted in the Accountability in Deferred Prosecution Act as a step in the direction of addressing the issues related to DPAs. However, because no legal remedy exists for prosecutors failing to follow the guidelines published by the Department of Justice,¹⁶⁰ Congress may need to take a more direct approach and mandate through standalone legislation that any alleged breach of a DPA must be determined by the court.

Current trends suggest that DPAs will remain a popular tool for resolving corporate crime. If DPAs are here to stay, so too is the need to improve the practice related to these agreements.

¹⁵⁸ Accountability in Deferred Protection Act, H.R. 4540 113th Cong. (2014).

¹⁵⁹ *Id.* at § 4(b)(5) (“The guidelines issued under this section shall provide direction in the following areas . . . [t]he manner and method for determining a breach of the agreement.”).

¹⁶⁰ Garrett, *supra* note 94, at 915-16.