



**Rigged Justice: 2016**  
*How Weak Enforcement Lets  
Corporate Offenders Off Easy*



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Prepared by the Office of Senator Elizabeth Warren

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## I. EXECUTIVE SUMMARY

Laws are effective only to the extent they are enforced. A law on the books has little impact if prosecution is highly unlikely.

This country devotes substantial resources to the prosecution of crimes such as murder, assault, kidnapping, burglary and theft, both in an effort to deter future criminal activity and to provide victims with some degree of justice. Strong enforcement of corporate criminal laws serves similar goals: to deter future criminal activity by making would-be lawbreakers think twice before breaking the law and, sometimes, by helping victims recover from their injuries.

When government regulators and prosecutors fail to pursue big corporations or their executives who violate the law, or when the government lets them off with a slap on the wrist, corporate criminals have free rein to operate outside the law. They can game the system, cheat families, rip off taxpayers, and even take actions that result in the death of innocent victims—all with no serious consequences.

The failure to punish big corporations or their executives when they break the law undermines the foundations of this great country: If justice means a prison sentence for a teenager who steals a car, but it means nothing more than a sideways glance at a CEO who quietly engineers the theft of billions of dollars, then the promise of equal justice under the law has turned into a lie. The failure to prosecute big, visible crimes has a corrosive effect on the fabric of democracy and our shared belief that we are all equal in the eyes of the law.

Under the current approach to enforcement, corporate criminals routinely escape meaningful prosecution for their misconduct. This is so despite the fact that the law is unambiguous: if a corporation has violated the law, individuals within the corporation must also have violated the law. If the corporation is subject to charges of wrongdoing, so are those in the corporation who planned, authorized or took the actions. But even in cases of flagrant corporate law breaking, federal law enforcement agencies – and particularly the Department of Justice (DOJ) – rarely seek prosecution of individuals. In fact, federal agencies rarely pursue convictions of either large corporations

or their executives in a court of law. Instead, they agree to criminal and civil settlements with corporations that rarely require any admission of wrongdoing and they let the executives go free without any individual accountability.

The Securities and Exchange Commission (SEC) is particularly feeble, often failing to use the full range of its enforcement toolbox. Not only does the agency fail to demand accountability, the SEC frequently uses its prosecutorial discretion to grant waivers to big companies so that those companies can continue to enjoy special privileges despite often-repeated misconduct that legally disqualifies them from receiving such benefits. Lax enforcement at other agencies, such as the Occupational Health and Safety Administration (OSHA), stems primarily from a lack of important legal tools and persistent underfunding by Congress that often turn the legal rules into little more than suggestions that companies can freely ignore.

The contrast between the treatment of highly paid executives and everyone else couldn't be sharper. The U.S. has a larger prison population than any nation in the world. People are locked up for long stretches for crimes that involve thousands—or even hundreds—of dollars. Even the settlement process is different. For most people accused of a crime, prosecutors may be willing to plead out the cases, but they typically require admission of guilt and, if the crime involves more than a trivial amount of money, time in jail. Various three-strikes rules frequently put people away for life for non-violent crimes involving modest amounts of money. Politicians routinely get elected promising to be “tough on crime,” and both federal and state governments devote immense resources to put and keep criminals in prison.

The Obama Administration has made repeated promises to strengthen enforcement and hold corporate criminals accountable, and the DOJ announced in September that it would place greater emphasis on charging individuals responsible for corporate crimes. Nonetheless, both before and after this DOJ announcement, accountability for corporate crimes is shockingly weak.

This report prepared for Sen. Warren – the first of an annual series on enforcement – highlights twenty criminal and civil cases in 2015 in which the federal government failed to require meaningful accountability from either large corporations or their executives involved in wrongdoing. These twenty cases are not the



only examples of prosecutorial timidity when dealing with well-financed corporate defendants. Instead, they illustrate patterns across a range of areas from financial crimes to personal injury to environmental disasters. Despite the fact that the twenty cases listed here were among the most highly publicized cases of corporate misconduct settled in 2015, in only one case was a corporation taken to trial and an individual indicted or otherwise required to answer for their contributions to corporate wrongdoing—and that case involved multiple deaths.

Because prosecutors took only one of these twenty cases to trial and, in many cases, did not even require an admission of guilt as part of the settlement, it is not possible to officially tag most of these corporations and their executives for crimes. Even so, each case is based on widely reported—and widely admitted—facts that, on their face, raise a *prima facie* case of unlawful conduct. These corporations paid millions—or billions—of dollars to make these cases disappear before any public hearing. If each of these cases had gone to trial, it is possible that some of the companies might have raised a defense that would have created reasonable doubt in jurors' minds, but that is precisely the problem here: because the prosecutors never took any of these corporations or their executives to trial, there was never a need for anyone to answer in court under oath for their actions.

The criminal and civil cases identified include:

- ♦ **Education Management Corporation (EDMC).** In November 2015, DOJ settled a civil case with EDMC, the second-largest for-profit education company in the country. EDMC illegally paid high-pressure recruiters to enroll students and violated the False Claims Act by falsely certifying that it complied with Title IV of the Higher Education Act. EDMC received \$11 billion in payments (90% of it via federal student grants and loans) from 2003-2011 as a result of these efforts. But the settlement recovered only \$95 million – less than one percent of this total. The DOJ settlement did nothing to resolve federal student loan debts owed by those who were victims of the illegal recruitment, held no individual executives at EDMC accountable, required no admission of wrongdoing, and did nothing to prevent EDMC from receiving federal funds in the future.<sup>1</sup>

- ♦ **Standard & Poor's (S&P).** In February 2015, S&P agreed to pay a \$1.375 billion civil settlement to the DOJ, 19 states, and the District of Columbia. The settlement came in response to charges that the ratings agency engaged in a scheme to defraud investors when it issued inflated ratings that misrepresented the true credit risks of residential mortgage-backed securities and collateralized debt obligations – one of the chief causes of the 2008 financial crisis that cost the economy trillions of dollars. This settlement was less than one-sixth the size of the fine DOJ and the states originally sought.<sup>2</sup> The government did not require that S&P admit to breaking the law, and it failed to prosecute a single individual.<sup>3</sup>
- ♦ **“The Cartel”: Citigroup, JPMorgan Chase & Co, Barclays, UBS AG, and Royal Bank of Scotland.** In May 2015, Citigroup, JP Morgan Chase & Co, Barclays, UBS AG, and Royal Bank of Scotland (RBS) agreed to pay a combined \$5.6 billion settlement to the DOJ. Bank traders from Citicorp, JP Morgan, Barclays, and RBS created a secret group known as “The Cartel,” which for more than five years manipulated exchange rates in a way that made the banks billions of dollars at the expense of clients and investors. And, the fifth bank, UBS separately agreed to plead guilty to wire fraud charges in connection with interest rate manipulation. Although DOJ required admissions of guilt as part of the settlement – a reflection of the severity of the charges – not one single individual has yet faced any DOJ criminal prosecution. Moreover, the SEC granted waivers to each bank so that the banks could avoid the collateral consequences that were supposed to accompany a guilty plea. Those waivers meant that the banks' much-hyped guilty pleas were ultimately “likely to carry more symbolic shame than practical problems.”<sup>4</sup>
- ♦ **The Upper Big Branch Mine Disaster.** Donald L. Blankenship, former CEO of Massey Energy Company, was convicted in December 2015 of only one misdemeanor (conspiring to willfully violate mandatory mine safety and health standards) in the Upper Big Branch mine explosion that resulted in 29 deaths - despite the fact that his company had a years-long

history of safety failures, including 2,400 safety violations in 2009 alone.<sup>5</sup> The penalty in this case was so small because federal mine safety laws allow only a misdemeanor charge - not a felony - even for deadly violations of safety regulations.<sup>6</sup>

- ♦ **General Motors (GM).** GM's years-long cover-up of ignition switch problems in its vehicles resulted in at least 124 deaths and 275 injuries. But the DOJ deferred prosecution agreement in this case included a fine for GM (\$900 million) that amounted to less than one percent of the company's annual revenue, held no individual accountable for the cover-up, and suspended the criminal charges against GM - wire fraud and false statements - to be dismissed if the company complied with the agreement.<sup>7</sup>
- ♦ **Trade Law Enforcement.** In 2015 the United States Trade Representative (USTR) failed to enforce key environmental and labor requirements in trade agreements with Guatemala, Colombia, and Peru, despite substantial evidence of violations. The lack of enforcement sends a dangerous signal to our trade partners that they need not honor their promises on improving labor and environmental standards.

- ♦ **Novartis.** In November 2015, DOJ announced a \$390 million settlement of a civil lawsuit with Novartis Pharmaceuticals over allegations that the company engaged in a kickback scheme with pharmacists to increase sales of their drugs to Medicare and Medicaid patients. These kickbacks allegedly were paid even as Novartis was *already* under a corporate integrity agreement for previous violations of the law. The \$390 million represented just over 10% of the damages sought by the government. It placed no further restrictions on Novartis' participation in federal government healthcare programs, included no admission of wrongdoing, did not include an indictment of any individual responsible for the kickbacks, and was so paltry that after the settlement, Novartis's CEO claimed that "whether we change our behavior ... [in response to the settlement] remains to be seen."<sup>8</sup>

This report contains additional examples of feeble enforcement against corporate criminals in 2015. The examples raise the disturbing possibility that some giant corporations—and their executives—have decided that following the law is merely optional. For these companies, punishment for breaking the law is little more than a cost of doing business.

## II. INTRODUCTION

Much of the public and media attention on Washington focuses on enacting laws. And strong laws are important – prosecutors must have the statutory tools they need to hold corporate criminals accountable. But putting a law on the books is only the first step. The second, and equally important, step is enforcing that law. A law that is not enforced – or weakly enforced – may as well not even be a law at all.

Obama Administration officials routinely discuss the need for tough enforcement. Former Attorney General Eric Holder in 2014 said that “instilling in others an expectation that there will be tough enforcement of all applicable laws is an essential ingredient to ensuring that corporate actors weigh their incentives properly – and do not ignore massive risks in blind pursuit of profit.”<sup>9</sup> In September 2015, Deputy Attorney General Sally Quillian Yates announced a new DOJ policy stressing the importance of holding individuals accountable for corporate crime, stating that “Crime is crime. And it is our obligation at the Justice Department to ensure that we are holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom.”<sup>10</sup>

Despite this rhetoric, DOJ civil and criminal settlements – and enforcement actions by other federal agencies – continually fail to impose any serious threat of punishment on corporate offenders. This is true regardless of the scope of their crimes or their impact on the economy, on workers, on investors, or on the environment. The pattern of weak enforcement extends beyond the Justice Department to other enforcement agencies.

The failure to enforce critical financial, environmental, and public health and safety laws has had a tremendous impact on the public. To take just one example, federal regulators in the Bush Administration and the independent banking regulatory agencies had the legal authorities they needed to stop much of the fraudulent and high-risk conduct that led to the 2008 financial crisis – a crisis that caused millions of people to lose their homes, their jobs, and their savings. But regulators sat on their hands, paving the way for a devastating economic crisis and billions in taxpayer bailouts. When federal agencies fail to enforce certain laws – especially those laws that are intended to curtail

### “Mens Rea” Proposals Would Further Weaken Enforcement

*Despite already weak federal enforcement, Republicans in the House and Senate argue that the federal government is too tough on corporate wrongdoers. Currently, Republicans are using a bipartisan bill intended to reduce mandatory sentences for low-level drug offenders as a vehicle for an amendment to make it harder for federal prosecutors to prove that white collar criminals violated hundreds of different laws. If adopted, this amendment would severely weaken the already anemic enforcement of federal white-collar criminal laws.<sup>11</sup>*

misconduct by large corporations and their senior executives – the consequences can be devastating.

The purpose of this annual report is to highlight examples of the most egregious enforcement failures from the previous year. Sometimes these weak enforcement cases are the result of laws – such as OSHA, and the federal mine safety law – that give the agencies only limited authority and allow only limited punishment.

But in most instances, these cases are a result of failure by regulators to use the tools Congress has already provided to impose meaningful accountability on corporate offenders. Whether as a result of limited resources or a lack of political will, this limp approach to corporate enforcement, particularly in response to serious misconduct that cost Americans their jobs, their homes, or, in some cases, their lives, threatens the safety and security of every American.

As the examples in this report demonstrate, federal regulators regularly let big corporations and their highly paid executives off the hook when they break the law.

### III. RIGGED JUSTICE: 2015 CASES

#### A. Financial Crimes and Offenses

- ♦ **Standard & Poor's (S&P).** In February 2015, S&P agreed to pay a \$1.375 billion civil settlement to the DOJ, 19 states, and the District of Columbia. The settlement came in response to charges that the ratings agency engaged in a scheme to defraud investors when it issued inflated ratings that misrepresented the true credit risks of residential mortgage-backed securities and collateralized debt obligations – one of the chief causes of the 2008 financial crisis that cost the economy trillions of dollars. This settlement was less than one-sixth the size of the fine DOJ and the states originally sought. The government did not require that S&P admit to breaking the law, and it failed to prosecute a single individual.<sup>12</sup>
- ♦ **“The Cartel”: Citigroup, JPMorgan Chase & Co, Barclays, UBS AG, and Royal Bank of Scotland.** In May 2015, Citigroup, JP Morgan Chase & Co, Barclays, UBS AG, and Royal Bank of Scotland (RBS) agreed to pay a combined \$5.6 billion settlement to the DOJ. Bank traders from Citicorp, JP Morgan, Barclays, and RBS created a secret group known as “The Cartel,” which for more than five years manipulated exchange rates in a way that made the banks billions of dollars at the expense of clients and investors. And, the fifth bank, UBS, separately agreed to plead guilty to wire fraud charges in connection with interest rate manipulation. Although DOJ required admissions of guilt as part of the settlement – a reflection of the severity of the charges – not one single individual faced any criminal prosecution. Moreover, the SEC granted waivers to each bank so that the banks could avoid the collateral consequences that were supposed to accompany a guilty plea. Those waivers meant that the banks’ much-hyped guilty pleas were ultimately “likely to carry more symbolic shame than practical problems.”<sup>13</sup>
- ♦ **Deutsche Bank DOJ LIBOR Settlement.** In April 2015, DB Group Services Limited, a wholly owned subsidiary of Deutsche Bank, agreed to pay a \$775 million settlement to DOJ. The settlement came in response to charges that the bank rigged the London Interbank Offer Rate (LIBOR). LIBOR is a worldwide benchmark for approximately \$10 trillion in loans including some mortgages, student loans, and auto loans. DB Group Services pleaded guilty to wire fraud, and the parent Deutsche Bank entered into a deferred prosecution agreement “to resolve wire fraud and antitrust charges.”<sup>14</sup> Deutsche Bank was singled out as an “especially aggressive participant” in the LIBOR scheme, and “also was criticized for failing to cooperate fully with U.S. and British authorities.”<sup>15</sup> Regulators’ investigations revealed 29 employees to be involved in the misconduct.<sup>16</sup> But DOJ did not prosecute any individuals and levied a fine that “isn’t likely to inflict severe damage on Deutsche Bank” and that merely “dented” Deutsche Bank profits for the first quarter of 2015.<sup>17</sup> And several weeks after the settlement, the SEC granted Deutsche Bank a waiver allowing the company to continue to enjoy special regulatory advantages designed to be available only to law-abiding banks.<sup>18</sup>
- ♦ **Citigroup.** In August 2015, two Citigroup affiliates agreed to pay nearly \$180 million to the SEC to settle allegations that they defrauded investors in the lead-up to the 2008 financial crisis. The two units of Citigroup were accused of offering and selling risky, highly leveraged bonds to investors from 2002 to 2008 with false assurances that the bonds were safe and low-risk. The behavior cost investors an estimated \$2 billion, more than ten times the amount of the settlement.<sup>19</sup> The settlement did not require Citigroup to admit to any wrongdoing, the SEC refused to identify the individuals responsible by name, and no individuals were prosecuted. In response to this settlement, *New York Times* columnist Gretchen Morgenson asked “How can we expect Wall Street’s me-first culture to change when regulators won’t pursue or even identify the me-firsters who are directly involved?”<sup>20</sup>
- ♦ **Deutsche Bank SEC Derivatives Settlement.** In May 2015, Deutsche Bank AG agreed to pay approximately \$55 million to the SEC to settle allegations that the bank hid losses of over \$1.5 billion in 2008-2009. The SEC stated that Deutsche Bank’s statements did not accurately reflect the “significant risk” it faced. Despite the fact that this was the second



significant Deutsche Bank settlement of 2015, the company did not admit any wrongdoing, no individuals were held accountable, and the settlement was so small that one analyst stated that it “isn’t relevant for Deutsche Bank.”<sup>21</sup>

- ♦ **JP Morgan Conflicts of Interest.** In December 2015, JP Morgan Chase & Company agreed to pay more than \$300 million in a settlement with the SEC and CFTC in which the company was held responsible for “numerous conflicts of interest in how it managed customers’ money over a half decade.”<sup>22</sup> According to Bloomberg Business, the settlement was so weak that “JPMorgan can continue operating as it has been in one of its most profitable businesses. The \$307 million fine... account[s] for a bit more than one percent of the company’s annual operating profits, or about a month of those at its asset-management division.”<sup>23</sup> And the SEC almost immediately granted a waiver to allow JP Morgan continued access to special regulatory privileges that are designed for law-abiding banks.<sup>24</sup> In response to this settlement, the *New York Times* concluded, “The settlement between JPMorgan and the SEC offers little reason to trust that banks and regulators will be putting investors’ interests first.”<sup>25</sup>

## B. Education and Student Loans

- ♦ **Education Management Corporation (EDMC).** In November 2015, DOJ settled a civil case with EDMC, the second-largest for-profit education company in the country. EDMC illegally paid high-pressure recruiters to enroll students and violated the False Claims Act by falsely certifying that it complied with Title IV of the Higher Education Act. EDMC received \$11 billion in payments (90% of it via federal student grants and loans) from 2003-2011 as a result of these efforts. But the settlement recovered only \$95 million – less than one percent of this total. The DOJ settlement did nothing to resolve federal student loan debts owed by those who were victims of the illegal recruitment, held no individual executives at EDMC accountable, required no admission of wrongdoing, and did nothing to prevent EDMC from receiving federal funds in the future.<sup>26</sup>

- ♦ **Navient and Student Loan Servicers.** In May 2014, the Department of Justice and FDIC reached a settlement for nearly \$100 million with student loan servicer Navient (formerly known as Sallie Mae) for “intentional, willful” and systematic violations of servicemembers’ rights under the Servicemembers Civil Relief Act.<sup>27</sup> The case then moved to the Department of Education (ED). Despite the 2014 findings of repeated violations against America’s active duty and retired military, ED took no action against Sallie Mae, instead announcing it would initiate a “thorough” review of the company’s actions. Before the review was complete, ED extended the company’s \$100 million contract for an additional year. The review was finally completed in June 2015, but it failed to examine the full range of cases and violations, and did not accurately assess whether Navient and other student loan servicers were following the law.<sup>28</sup> Based on this deeply flawed report, ED did nothing, so that, despite its 2014 settlement breaking the law, Navient continues to collect tens of millions of dollars from the federal government to service student loans.

## C. Automobile Safety Law Violations

- ♦ **General Motors (GM).** GM’s years-long cover-up of ignition switch problems in its vehicles resulted in at least 124 deaths and 275 injuries. But the September 2015 DOJ deferred prosecution agreement in this case included a fine for GM (\$900 million) that represented less than one percent of the company’s annual revenue, held no individual accountable for the cover-up and included no criminal charges against any individuals, and suspends the criminal charges against GM - wire fraud and false statements - to be dismissed if the company complies with the agreement.<sup>29</sup> One critic called this settlement “shamefully weak,” and University of Virginia Law Professor Brandon Garrett, said he was “horrified” by the weakness of the deferred prosecution agreement.<sup>30</sup>
- ♦ **Honda Airbag Settlement.** In January 2015, Honda was fined \$70 million by the National Highway Traffic Safety Administration (NHTSA) for failing to disclose more than 1,700 reports of deaths, injuries, and other “early warning” information to the NHTSA



over an 11-year span.<sup>31</sup> Honda's airbag supplier Takata has now been accused of making airbags that explode violently when they deploy. Because Honda failed to tell NHTSA of reports that it received of airbags rupturing as far back as 2004, including one death, the agency—and the public—were denied the opportunity to head off this problem much earlier and before more people had been injured. Honda did not terminate the employment of anyone after an internal audit found serious problems with Honda safety reporting to NHTSA. NHTSA charged Honda on two counts and fined the company the maximum permissible under the auto safety law, allowing the agency to collect the statutory maximum of \$35 million twice.<sup>32</sup> This fine amounted to about one percent of Honda's 2015 profits. To date, DOJ has not filed any criminal charges against the company or any of its executives.

- ♦ **Graco Children's Products.** In March 2015, Graco Children's Products agreed to resolve allegations that it refused to recall approximately four million children's car seats with defective buckles.<sup>33</sup> Documents demonstrated that parents began complaining about the buckles to Graco in 2009, and the company denied that the problems were due to a defect for years, telling parents instead that the buckles should be cleaned while arguing there was not a safety issue. After determining that the buckles could endanger children in an emergency by forcing parents to cut the straps in order to free their children, NHTSA demanded a recall in 2014. Graco initially refused the request before finally recalling the seats a month later. Although the headlines indicated that the company would be penalized \$10 million, the settlement includes only a \$3 million fine and a requirement that Graco spend \$7 million to develop safety programs, including "identifying potential safety trends affecting car seats industrywide and launching a child safety awareness campaign"<sup>34</sup> – investments that would presumably be a normal course of business for a car seat manufacturer.

## D. Occupational Safety Laws

- ♦ **The Upper Big Branch Mine Disaster.** Donald L. Blankenship, former CEO of Massey

Energy Company, was convicted in December 2015 of only one misdemeanor (conspiring to willfully violate mandatory mine safety and health standards) in the Upper Big Branch mine explosion that resulted in 29 deaths - despite the fact that his company had a years-long history of safety failures, including 2,400 safety violations in 2009 alone.<sup>35</sup> The penalty in this case was so small because federal mine safety laws allow only a misdemeanor charge - not a felony - even for deadly violations of safety regulations.<sup>36</sup>

- ♦ **DuPont and Methyl Mercaptan.** In November 2014, toxic methyl mercaptan was accidentally released at DuPont's facility in LaPorte, Texas, killing one employee nearby and three others who came to her aid. In May 2015, OSHA cited DuPont for 11 violations at that factory, and in July 2015 OSHA cited DuPont for eight more violations. Despite the four deaths and multiple violations, DuPont was fined only \$372,000 by OSHA.<sup>37</sup> OSHA also placed DuPont into its Severe Violator Enforcement Program, which places them under higher scrutiny for inspections. No individual DuPont executives were held accountable. In response to this meager penalty, workplace safety expert Thomas Fuller said that "These fines are just a drop in the bucket ... OSHA is really little more than a paper tiger."<sup>38</sup>

## E. Environmental Laws

- ♦ **ExxonMobil Pegasus Pipeline Oil Spill.** In early 2013, ExxonMobil's Pegasus Pipeline ruptured, spilling approximately 134,000 gallons of heavy crude oil on Mayflower, Arkansas. The oil contaminated homes and displaced families, eventually seeping into a nearby creek, wetlands, and parts of Lake Conway. Maximum Clean Water Act fines based on the amount of spilled oil could have been as high as \$21.5 million. But in April 2015, ExxonMobil agreed in a civil settlement to pay just over \$5 million in total fines and penalties.<sup>39</sup> This was not the only problem with the settlement; the Central Arkansas Water utility said, "The proposed consent decree does nothing to protect the vital water resources within the State of Arkansas from harm when the next segment of the Pegasus pipeline

ruptures ... [and] does not require [Exxon] to perform any corrective measures or take additional precautionary measures to prevent future spills from the Pegasus pipeline.”<sup>40</sup> Not one of the corporation’s executives was held responsible.

- ♦ **Bayer CropScience LP.** In August 2008, an explosion at a Bayer pesticide plant in Institute, West Virginia, killed two workers. Bayer was alleged to have failed to comply with its risk management plan and failed to properly train employees prior to the explosion. More than seven years later, in September 2015, Bayer agreed to a \$5.6 million settlement with EPA. No individuals were held accountable. The settlement included only \$975,000 in civil fines and \$4.6 million in safety and emergency response expenditures by Bayer, much of which the company was likely to spend on similar projects even in the absence of the agreement.<sup>41</sup>
- ♦ **BP Deepwater Horizon Final Civil Claims Settlement.** In October 2015, DOJ and five states announced a final settlement with BP for civil claims for natural resource damage arising from the company’s massive 2010 Gulf of Mexico Deepwater Horizon oil spill. The settlement required the company to pay \$20.8 billion, and Attorney General Loretta Lynch, who described the oil spill as “the worst environmental disaster in American history,”<sup>42</sup> said that “BP is receiving the punishment it deserves.” The settlement was structured in a way that allowed BP to deduct \$15 billion of the payments from the company’s income for tax purposes, reducing the impact of the civil penalty – which BP will pay over 18 years – by over \$5 billion.<sup>43</sup>

## F. Failure to Enforce Trade Laws

There are numerous examples of U.S. officials failing to enforce or delaying enforcement of key provisions of trade agreement, going back decades.<sup>44</sup> Examples from 2015 include:

- ♦ After years of complaints about Guatemala’s failure to meet CAFTA labor standards, the USTR finally brought a labor enforcement case under the trade agreement; this case went to a hearing on June 2, 2015, with a panel

decision required by agreement within 120 days.<sup>45</sup> But the USTR approved an extension of this decision, and in November 2015, with the report not yet complete, a panelist withdrew and work was suspended until November 27. The report still has not been released, and it is now more than 210 days since the hearing.

- ♦ In 2015 the USTR failed to take action against countries violating key free trade law environmental obligations, neglecting new and detailed reports of illegal logging in Peru that violated the U.S.-Peru Trade Promotion Agreement.<sup>46</sup> An analysis of the problem found that USTR took “[n]o action to investigate industry, in the United States or Peru, with documented evidence of repeated and persistent engagement in illegal harvest and trade or [no action to] prosecute known violations.”<sup>47</sup>
- ♦ In April, 2015, Colombia’s National Union School issued a damning report on Colombia’s failure to comply with its labor obligations, finding that “Colombian workers have suffered more than 1,933 threats and acts of violence, including 105 assassinations of union activists and 1,337 death threats.” But the USTR has not initiated any enforcement efforts in response.<sup>48</sup>

## G. Drug Manufacturer Fraud and Misrepresentation

- ♦ **Novartis.** In November 2015, DOJ announced a \$390 million settlement of a civil fraud lawsuit with Novartis Pharmaceuticals over allegations that the company engaged in a kickback scheme with pharmacists to increase sales of their drugs to Medicare and Medicaid patients. These kickbacks allegedly were paid even as Novartis was already under a corporate integrity agreement for previous violations of the law. This \$390 million represented just over 10% of the damages sought by the government. It placed no further restrictions on Novartis’ participation in federal government healthcare programs, included no admission of wrongdoing, and did not include an indictment of any individual responsible for the kickbacks. The settlement was so paltry that after it was announced, Novartis’s CEO candidly noted that “whether we change our behavior ... [in response to the settlement] remains to be seen.”<sup>49</sup>

## IV. ENDNOTES

- 1 Department of Justice, *For-Profit College Company to Pay \$95 Million to Settle Claims of Illegal Recruiting, Consumer Fraud, and Other Violations* (Nov. 16, 2015) (<http://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and>); Letter from Sens. Warren, Durbin, and Blumenthal to The Honorable Loretta Lynch, Attorney General of the United States, and the Honorable Arne Duncan, U.S. Secretary of Education (Nov. 30, 2015) ([http://www.warren.senate.gov/files/documents/2015-11-30\\_Letter\\_to\\_Depts\\_of\\_Edu\\_and\\_Justice\\_re\\_EDMC\\_Settlement.pdf](http://www.warren.senate.gov/files/documents/2015-11-30_Letter_to_Depts_of_Edu_and_Justice_re_EDMC_Settlement.pdf)). A separate settlement by state Attorneys General required that EDMC forgive student loan debts it was owed by former students, but neither this settlement nor the DOJ settlement required forgiveness of federal student loans. Had an admission of guilt been obtained by DOJ, students would “have had potential grounds to discharge their [federal] loans taken out to attend the college.” New York Times, *(For-Profit College Operator EDMC Will Forgive Student Loan)* (Nov. 16, 2015) ([http://www.nytimes.com/2015/11/17/us/for-profit-college-operator-edmc-will-forgive-student-loans.html?\\_r=0](http://www.nytimes.com/2015/11/17/us/for-profit-college-operator-edmc-will-forgive-student-loans.html?_r=0)).
- 2 Wall Street Journal, *State Lawsuits Could Add to S&P Exposure* (Feb. 6, 2015); (<http://www.wsj.com/articles/SB10001424127887324906004578288441441869834?cb=logged0.32419539988040924>).
- 3 Department of Justice, *Justice Department and State Partners Secure \$1.375 Billion Settlement with S&P for Defrauding Investors in the Lead Up to the Financial Crisis* (Feb. 3, 2015) (<http://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors>); USA Today, *Critics Blast Justice Department’s S&P Settlement* (Feb. 3, 2015) (<http://www.usatoday.com/story/money/business/2015/02/03/sp-settlement-14b-wrongdoing-change/22808017/>).
- 4 New York Times, *Rigging of Foreign Exchange Market Makes Felons of Top Banks* (May 20, 2015) (<http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>).
- 5 New York Times, *Mixed Verdict for Donald Blankenship, Ex-Chief of Massey Energy, After Coal Mine Blast* (Dec. 3, 2015) (<http://www.nytimes.com/2015/12/04/us/donald-blankenship-massey-energy-upper-big-branch-mine.html>).
- 6 Charleston Gazette-Mail, *After Blankenship Trial, Seeking Stiffer Penalties for Mine Safety Crimes* (Dec. 4, 2015) (<http://www.wvgazette.com/article/20151204/GZ15/151209762/>).
- 7 New York Times, *Many Messages in the GM Settlement* (Sep. 21, 2015) ([http://www.nytimes.com/2015/09/22/business/dealbook/many-messages-in-the-gm-settlement.html?\\_r=0](http://www.nytimes.com/2015/09/22/business/dealbook/many-messages-in-the-gm-settlement.html?_r=0)).
- 8 Department of Justice, *Manhattan U.S. Attorney Announces \$370 Million Civil Fraud Settlement Against Novartis Pharmaceuticals For Kickback Scheme Involving High-Priced Prescription Drugs, Along With \$20 Million Forfeiture Of Proceeds From The Scheme* (Nov. 20, 2015) (<http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-370-million-civil-fraud-settlement-against-novartis>); Law360, *Five Takeaways From the Novartis FCA Settlement* (Nov. 1, 2015) (<http://www.law360.com/articles/720152/5-takeaways-from-the-novartis-fca-settlement>).
- 9 Department of Justice, *Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law* (Sep. 17, 2014) (<http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>).
- 10 Department of Justice, *Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing* (Sep. 10, 2015) (<http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>).
- 11 National Journal, *Divided GOP Ponders Way Forward on Criminal Justice Reform* (Jan. 20, 2016) (<http://www.nationaljournal.com/s/508111/divided-gop-ponders-way-forward-criminal-justice-reform>).
- 12 Department of Justice, *Justice Department and State Partners Secure \$1.375 Billion Settlement with S&P for Defrauding Investors in the Lead Up to the Financial Crisis* (Feb. 3, 2015) (<http://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors>); USA Today, *Critics Blast Justice Department’s S&P Settlement* (Feb. 3, 2015) (<http://www.usatoday.com/story/money/business/2015/02/03/sp-settlement-14b-wrongdoing-change/22808017/>).
- 13 New York Times, *Rigging of Foreign Exchange Market Makes Felons of Top Banks* (May 20, 2015) (<http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>).
- 14 Bloomberg, *Deutsche Bank to Pay Record \$2.5 Billion to Resolve LIBOR Probes* (Apr. 23, 2015) (<http://www.bloomberg.com/news/articles/2015-04-23/deutsche-bank-to-pay-record-2-5-billion-to-resolve-libor-probes>); Department of Justice, *Deutsche Bank’s London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR* (Apr. 23, 2015) (<http://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation>).
- 15 Wall Street Journal, *Deutsche Bank to Pay \$2.5 Billion to Settle Libor Investigation* (Apr. 23, 2015); (<http://www.wsj.com/articles/deutsche-bank-settles-libor-investigation-with-u-s-u-k-authorities-1429791118>).
- 16 Bloomberg, *Deutsche Bank Staff Probed Over LIBOR by Frankfurt Prosecutors* (June 29, 2015) (<http://www.bloomberg.com/news/articles/2015-06-29/deutsche-bank-staff-probed-over-libor-by-frankfurt-prosecutors>).
- 17 Wall Street Journal, *Deutsche Bank to Pay \$2.5 Billion to Settle Libor Investigation* (Apr. 23, 2015); (<http://www.wsj.com/articles/deutsche-bank-settles-libor-investigation-with-u-s-u-k-authorities-1429791118>).
- 18 Law360, *SEC Grants Deutsche Bank WKSI Waiver After Guilty Plea* (May 6, 2015) (<http://www.law360.com/articles/651174/sec-grants-deutsche-bank-wksi-waiver-after-guilty-plea>).
- 19 New York Times, *An S.E.C. Settlement With Citigroup That Fails to Name Names* (Aug. 28, 2015) (<http://www.nytimes.com/2015/08/30/business/sec-settlement-with-citigroup-holds-no-one-responsible.html>).
- 20 New York Times, *An S.E.C. Settlement With Citigroup That Fails to Name Names* (Aug. 28, 2015) (<http://www.nytimes.com/2015/08/30/business/sec-settlement-with-citigroup-holds-no-one-responsible.html>).



- 21 Wall Street Journal, *Deutsche Bank Agrees to Pay \$55 Million to SEC* (May 26, 2015) (<http://www.wsj.com/articles/deutsche-bank-agrees-to-pay-55-million-to-sec-1432651289>); Bloomberg, *Deutsche Bank to Pay \$55 Million to Settle Derivatives Probe* (May 26, 2015) (<http://www.bloomberg.com/news/articles/2015-05-26/deutsche-bank-to-pay-55-million-to-settle-sec-derivatives-probe>); Securities and Exchange Commission, *SEC Charges Deutsche Bank With Misstating Financial Reports During Financial Crisis* (May 26, 2015) (<http://www.sec.gov/news/pressrelease/2015-99.html>).
- 22 Bloomberg, *JP Morgan Admits It Didn't Tell Clients About Conflicts* (Dec. 18, 2015) (<http://www.bloomberg.com/news/articles/2015-12-18/jpmorgan-pays-267-million-to-settle-conflict-of-interest-claims>).
- 23 Bloomberg, *JP Morgan Admits It Didn't Tell Clients About Conflicts* (Dec. 18, 2015) (<http://www.bloomberg.com/news/articles/2015-12-18/jpmorgan-pays-267-million-to-settle-conflict-of-interest-claims>).
- 24 Bloomberg, *JP Morgan Said to Win Relief in SEC Case on Sale of Its Own Funds* (Dec. 10, 2015) (<http://www.bloomberg.com/news/articles/2015-12-10/jpmorgan-said-to-win-relief-in-sec-case-on-sale-of-its-own-funds>).
- 25 New York Times, *Why Investors Are Right to be Distrustful* (Dec. 23, 2015) ([http://www.nytimes.com/2015/12/23/opinion/why-investors-are-right-to-be-distrustful.html?ref=opinion&\\_r=0](http://www.nytimes.com/2015/12/23/opinion/why-investors-are-right-to-be-distrustful.html?ref=opinion&_r=0)).
- 26 Department of Justice, *For-Profit College Company to Pay \$95 Million to Settle Claims of Illegal Recruiting, Consumer Fraud, and Other Violations* (Nov. 16, 2015) (<http://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and>); Letter from Sens. Warren, Durbin, and Blumenthal to The Honorable Loretta Lynch, Attorney General of the United States, and the Honorable Arne Duncan, U.S. Secretary of Education (Nov. 30, 2015) ([http://www.warren.senate.gov/files/documents/2015-11-30\\_Letter\\_to\\_Depts\\_of\\_Edu\\_and\\_Justice\\_re\\_EDMC\\_Settlement.pdf](http://www.warren.senate.gov/files/documents/2015-11-30_Letter_to_Depts_of_Edu_and_Justice_re_EDMC_Settlement.pdf)). A separate settlement by state Attorneys General required that EDMC forgive student loan debts it was owed by former students, but neither this settlement nor the DOJ settlement required forgiveness of federal student loans. Had an admission of guilt been obtained by DOJ, students would “have had potential grounds to discharge their [federal] loans taken out to attend the college.” New York Times, *For-Profit College Operator EDMC Will Forgive Student Loan* (Nov. 16, 2015) ([http://www.nytimes.com/2015/11/17/us/for-profit-college-operator-edmc-will-forgive-student-loans.html?\\_r=0](http://www.nytimes.com/2015/11/17/us/for-profit-college-operator-edmc-will-forgive-student-loans.html?_r=0)).
- 27 Department of Justice, *(Justice Department Reaches \$60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans)* (May 13, 2014) ([www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging](http://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging)); FDIC, *(FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act)* (May 13, 2014) ([www.fdic.gov/news/news/press/2014/pr14033.html](http://www.fdic.gov/news/news/press/2014/pr14033.html)).
- 28 Senator Elizabeth Warren, *(An Analysis of the Department of Education's Review of Student Loan Servicers Compliance with the Servicemembers Civil Relief Act)* (August 2015).
- 29 New York Times, *Many Messages in the GM Settlement* (Sep. 21, 2015) (<http://www.nytimes.com/2015/09/22/business/dealbook/many-messages-in-the-gm-settlement.html>).
- 30 Corporate Crime Reporter, *Critics Rip GM Deferred Prosecution Agreement in Engine Switch Case* (Sep. 17, 2015) (<http://www.corporatecrimereporter.com/news/200/critics-rip-gm-deferred-prosecution-in-switch-case/#sthash.JSSOCK0E.dpuf>).
- 31 Detroit News, *(U.S. Fines Honda Record \$70 Million for Safety Lapses)* (Jan. 8, 2015) (<http://www.detroitnews.com/story/business/autos/foreign/2015/01/08/honda-fine/21444089/>).
- 32 New York Times, *Honda Fined for Violations of Safety Law*, (Jan. 8, 2015) (<http://www.nytimes.com/2015/01/09/business/honda-fined-70-million-in-underreporting-safety-issues-to-government.html>).
- 33 National Highway Traffic Safety Administration, *U.S Transportation Secretary Foxx Announces \$10 Million Civil Penalty Against Child Car Seat Manufacturer* (Mar. 20, 2015) ([http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/Car-seat-maker-Graco-fined-\\$10-million](http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/Car-seat-maker-Graco-fined-$10-million)).
- 34 New York Times, *Graco to Pay \$10 Million for Delay in Recall of Defective Child Seats* (Mar. 20, 2015) (<http://www.nytimes.com/2015/03/21/business/graco-to-pay-10-million-for-delay-in-recall-of-defective-child-seats.html>).
- 35 New York Times, *Mixed Verdict for Donald Blankenship, Ex-Chief of Massey Energy, After Coal Mine Blast* (Dec. 3, 2015) (<http://www.nytimes.com/2015/12/04/us/donald-blankenship-massey-energy-upper-big-branch-mine.html>).
- 36 Charleston Gazette-Mail, *After Blankenship Trial, Seeking Stiffer Penalties for Mine Safety Crimes* (Dec. 4, 2015) (<http://www.wvgazette.com/article/20151204/GZ15/151209762/>).
- 37 Occupational and Safety Health Administration, *Deaths Of Four Workers Prompts Deeper Look At Dupont Safety Practices* (July 9, 2015) (<https://www.osha.gov/newsrelease/reg6-20150709.html>).
- 38 USA Today, *OSHA Adds DuPont to Severe Violator List After Leak* (July 13, 2015) (<http://www.usatoday.com/story/money/business/2015/07/13/feds-add-dupont-to-severe-violator-program/30111419/>).
- 39 Department of Justice, *ExxonMobil to Pay \$5 Million to Settle U.S. and Arkansas Claims for 2013 Mayflower Oil Spill* (Apr. 22, 2015) (<http://www.justice.gov/opa/pr/exxonmobil-pay-5-million-settle-us-and-arkansas-claims-2013-mayflower-oil-spill>); Inside Climate News, *Exxon's Deal for Arkansas Pipeline Spill Leaves Water Vulnerable, Groups Warn* (July 28, 2015) (<http://insideclimatenews.org/news/28072015/exxon-mobil-deal-mayflower-arkansas-pipeline-oil-spill-leaves-water-vulnerable-groups-warn-tar-sands-diblit>); Inside Climate News, *Exxon's Maligned \$5M Settlement for Pegasus Spill Ruled 'Fair and Reasonable'*, (Aug. 13, 2015) (<http://insideclimatenews.org/news/13082015/exxon-maligned-5m-settlement-pegasus-spill-ruled-fair-judge-arkansas>).
- 40 Inside Climate News, *Exxon's Deal for Arkansas Pipeline Spill Leaves Water Vulnerable, Groups Warn.* (July 28, 2015) (<http://insideclimatenews.org/news/28072015/exxon-mobil-deal-mayflower-arkansas-pipeline-oil-spill-leaves-water-vulnerable-groups-warn-tar-sands-diblit>).



- 41 Washington Examiner, *Bayer to Pay \$5.6 Million in Settlement with EPA* (Sep. 21, 2015) (<http://www.washingtonexaminer.com/bayer-to-pay-5.6-million-in-settlement-with-epa/article/2572548>); EPA, *Bayer Cropscience to Enhance Safeguards at Chemical Facilities in Four States to Settle Violations at W.V. Plant* (Sep. 21, 2015) (<http://yosemite.epa.gov/opa/admpress.nsf/0/FB43A837CDBE194085257EC7006D9F46>); Associated Press, *Bayer Cropscience Settles For \$5.6M Over Deadly Blast* (Sep. 21, 2015) (<http://bigstory.ap.org/article/367f13b3230a4fb89f55346804c4125d/bayer-cropscience-settles-56m-over-deadly-blast>).
- 42 Department of Justice, *U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill* (Oct. 5, 2015) (<http://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater>).
- 43 Paul Caron, Pepperdine University School of Law, TaxProfBlog, *BP Settlement Generates \$15 Billion Tax Deduction* (Oct. 6, 2015) ([http://taxprof.typepad.com/taxprof\\_blog/2015/10/bp-settlement-generates-15-billion-tax-deduction.html](http://taxprof.typepad.com/taxprof_blog/2015/10/bp-settlement-generates-15-billion-tax-deduction.html)).
- 44 Sen. Elizabeth Warren, *Broken Promises: Decades of Failure to Enforce Labor Standards in Free Trade Agreements* (May 2015) (<http://www.warren.senate.gov/files/documents/BrokenPromises.pdf>).
- 45 Cornell International Law Journal, *Reality Check: The U.S. Labor Action Against Guatemala* (2014) (<http://cornellilj.org/reality-check-the-u-s-labor-action-against-guatemala/>).
- 46 Environmental Investigation Agency, *USTR Fails to Implement and Enforce Key U.S.-Peru FTA Provisions* (June 4, 2015) (<http://eia-global.org/news-media/failure-to-implement-and-enforce-key-us-peru-fta-provisions>).
- 47 Environmental Investigation Agency, *USTR Fails to Implement and Enforce Key U.S.-Peru FTA Provisions* (June 4, 2015) (<http://eia-global.org/news-media/failure-to-implement-and-enforce-key-us-peru-fta-provisions>).
- 48 AFL-CIO, *Despite Labor Action Plan, Colombian Unionists Still Targeted for Death* (Apr. 7, 2015) (<http://www.aflcio.org/Blog/Global-Action/Despite-Labor-Action-Plan-Colombian-Unionists-Still-Targeted-for-Death>).
- 49 Department of Justice, *Manhattan U.S. Attorney Announces \$370 Million Civil Fraud Settlement Against Novartis Pharmaceuticals For Kickback Scheme Involving High-Priced Prescription Drugs, Along With \$20 Million Forfeiture Of Proceeds From The Scheme* (Nov. 20, 2015) (<http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-370-million-civil-fraud-settlement-against-novartis>); Law360, *Five Takeaways From the Novartis FCA Settlement* (Nov. 1, 2015) (<http://www.law360.com/articles/720152/5-takeaways-from-the-novartis-fca-settlement>).