

**GAO**

Testimony

Before the Subcommittee on Commercial  
and Administrative Law, Committee on  
the Judiciary, House of Representatives

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## **CORPORATE CRIME**

# **Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements**

Statement of Eileen R. Larence, Director  
Homeland Security and Justice



**GAO**

Accountability \* Integrity \* Reliability

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Highlights of [GAO-09-636T](#), a testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

## Why GAO Did This Study

Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution, and may also require companies to hire an independent monitor to oversee compliance. This testimony provides preliminary observations on (1) factors DOJ considers when deciding whether to enter into a DPA or NPA and setting the terms of the agreements, (2) methods DOJ uses to oversee companies' compliance, (3) processes by which monitors are selected, and (4) companies' perspectives regarding the costs and role of the monitor. It also includes the results of GAO's recently completed work on DOJ's efforts to document the monitor selection process (discussed in objective 3). GAO reviewed DOJ guidance and 57 of the 140 agreements negotiated from 1993 (when the first 2 were signed) through May 2009; and interviewed DOJ officials, officials from 17 companies, and 6 monitors. While not generalizable, these results provide insight into decisions about DPAs and NPAs.

## What GAO Recommends

GAO recommends that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions. DOJ agreed with our recommendation.

[View GAO-09-636T](#) or [key components](#). For more information, contact Eileen Larence at (202) 512-8777 or [larencee@gao.gov](mailto:larencee@gao.gov).

## CORPORATE CRIME

### Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements

#### What GAO Found

Prosecutors in all 13 DOJ offices with whom GAO spoke said that they based their decision on whether to enter into a DPA or NPA on DOJ's principles for prosecuting business organizations, particularly those related to the company's willingness to cooperate, collateral consequences to innocent parties, and remedial measures taken by the company. However, prosecutors differed in their willingness to use DPAs or NPAs. In addition, prosecutors' varying perceptions of what constitutes a DPA or NPA has led to inconsistencies in how the agreements are labeled. In March 2008, DOJ issued guidance defining DPAs and NPAs, but this guidance is not consistently followed, in part because not all DOJ offices view it as mandatory. DOJ plans to determine the need to take additional steps to require consistency in the use of the labels DPA and NPA. While DOJ and companies generally negotiated the terms of DPAs and NPAs—such as monetary payments and compliance requirements—DOJ also considered other factors in its decisions, such as monetary gains to the company as a result of the criminal misconduct.

To ensure that companies were complying with the terms of the DPAs and NPAs, DOJ employed several oversight mechanisms, including the use of independent monitors, coordination with regulatory agencies, and other means. Of the 57 agreements GAO reviewed, 26 required the company to hire, at its own expense, an independent monitor. In the remaining agreements, DOJ relied, among other things, on reports from regulatory agencies or from monitors hired by companies under separate agreements with these agencies, and company certifications of compliance.

For the DPAs and NPAs GAO reviewed, even though DOJ was not a party to the contracts between companies and monitors, DOJ typically selected the monitor, and its decisions were generally made collaboratively among DOJ and company officials. Monitor candidates were typically identified through DOJ or company officials' personal knowledge or recommendations from colleagues and associates. In March 2008, DOJ issued guidance stating that for monitor selection to be collaborative and merit-based, committees should consider the candidates and the selection must be approved by the Deputy Attorney General. However, because DOJ does not require documentation of the process used or the reasons for particular monitor selection decisions, it will be difficult for DOJ to validate whether its monitor selection guidance—which, in part, is intended to instill public confidence—is adhered to.

Some company officials GAO spoke with reported that they had little leverage to address concerns about the amount and scope of the monitors' work and, therefore, would like DOJ to assist them. GAO in its ongoing work will assess this and other issues about the use and oversight of DPAs and NPAs.

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Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate in today's hearing to discuss the Department of Justice's (DOJ) use and oversight of deferred prosecution and non-prosecution agreements. According to DOJ, one of its chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. Recent high-profile cases of fraud and mismanagement in the financial services sector have heightened the need for the government to determine the most appropriate tools it can use to punish and deter corporate crime. Federal prosecutors continue to prosecute company executives and employees, as well as companies themselves, for crimes such as tax evasion, securities fraud, health care fraud, and bribery of foreign officials, among others. However, over the past decade, DOJ has recognized the potential harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior. The failure of the accounting firm Arthur Andersen, and the associated loss of thousands of jobs following its indictment and conviction for obstruction of justice for destroying Enron-related records,<sup>1</sup> has been offered as a prime example of the potentially harmful effects of criminally prosecuting a company. To avoid serious harm to innocent third parties, DOJ guidance allows prosecutors to negotiate agreements that may require companies to institute or reform corporate ethics and compliance programs,<sup>2</sup> pay restitution to victims, and cooperate with ongoing investigations of individuals in exchange for prosecutors deferring the decision to prosecute. These types of agreements have been referred to as deferred prosecution (DPA) and non-prosecution (NPA) agreements. As part of these agreements, prosecutors may also require a company to hire, at its own expense, an independent monitor to oversee the company's compliance with the agreement. Based on our analysis of DOJ data, DOJ has made more frequent use of DPAs and NPAs in recent years, entering into 3 agreements in 2002 compared to 41 agreements in 2007 and 22 agreements in 2008.

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

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

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DOJ views DPAs and NPAs as appropriate tools to use in cases where the goals of punishing and deterring criminal behavior, providing restitution to victims, and reforming otherwise law-abiding companies can be achieved without criminal prosecution. The use of these tools, however, is not without controversy. Some commentators view the use of DPAs and NPAs as encouraging disrespect for the law and failing to deter corporate crime. Others have suggested that the threat of an indictment gives prosecutors excessive power by which they can force companies to agree to highly unfavorable terms to avoid criminal prosecution.

Considering the balance that DOJ must achieve when determining the most appropriate way in which to address corporate misconduct, my testimony today includes preliminary observations on (1) the factors DOJ considers when deciding whether to enter into a DPA or NPA and setting the terms of the agreements, (2) the methods DOJ uses to oversee companies' compliance with DPAs and NPAs, (3) the process by which independent monitors are selected, and (4) companies' perspectives regarding the costs and responsibilities of the monitors. My comments are based on our ongoing review of DPAs and NPAs requested by you as well as the Chairman of the Senate Judiciary Committee, Patrick Leahy; the Chairman of the House Judiciary Committee, John Conyers; Congressman Frank Pallone, Jr.; Congressman Bill Pascrell, Jr.; and Congresswoman Linda T. Sanchez. The final results of this review will be issued later this year. My comments also include the results of our recently completed work related to DOJ's efforts in documenting the monitor selection process (which is discussed as part of objective three above).

To address our objectives, we reviewed DOJ guidance regarding the prosecution of business entities and the selection and use of independent monitors. To date, we also reviewed the terms of 57 of the 140 agreements we have identified that were negotiated from 1993 (when the first 2 were signed) through May 2009.<sup>3</sup> The specific terms we reviewed include the monetary penalty imposed, the duration of the agreement, the compliance program required, and the reporting requirements for the company, and, if applicable, the independent monitor. We discussed these 57 agreements with DOJ, and compared the processes that DOJ used when entering into and overseeing these agreements with criteria in standards for internal

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<sup>3</sup> For the purposes of this testimony, we decided to review the terms of the 57 agreements we discussed with officials at the 13 DOJ offices we selected for our site visits and interviews. The criteria we used to select these offices, and thus the 57 agreements, are described later in the statement.

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control in the federal government relating to appropriate documentation of transactions<sup>4</sup> and prior GAO work that suggests documenting the reasons for selecting monitors avoids the appearance of favoritism.<sup>5</sup> We interviewed officials from 13 DOJ offices that are responsible for prosecuting criminal cases, including DOJ's Criminal Division and 12 U.S. Attorneys Offices. We selected the Criminal Division because it had negotiated the vast majority of agreements entered into by prosecutors at DOJ headquarters, and we selected 12 specific U.S. Attorneys Offices because they were the only ones that had negotiated at least 2 agreements, of which at least 1 had been completed. To date, we have also interviewed representatives of 17 of the 25 companies that signed DPAs or NPAs that met the following criteria: the agreement required the company to improve or institute an ethics or compliance program; the agreement had been completed; and we had discussed the agreement with DOJ.<sup>6</sup> Fifteen of these 25 companies were also required to hire an independent monitor, and, to date, we have interviewed 6 of these monitors. Since we determined which DOJ officials, company representatives, and monitors to interview based on a nonprobability sample, the information we obtained from these interviews is not generalizable to all DOJ litigating units and all companies and monitors involved in DPAs and NPAs. However, the interviews provided insights into the negotiation and implementation of DPAs and NPAs.

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

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<sup>4</sup> GAO, *Internal Control: Standards for Internal Control in the Federal Government*, GAO/AMD-00-21.3.1 (Washington, D.C.: November 1999).

<sup>5</sup> GAO, *Structured Settlements: The Department of Justice's Selection and Use of Annuity Brokers*, GAO/GGD-00-45 (Washington D.C.: Feb. 16, 2000).

<sup>6</sup> DOJ required 45 companies, as part of these agreements, to improve or institute an ethics or compliance program. As part of our ongoing review, we selected representatives from 25 of these companies to interview because the DPAs or NPAs these companies were involved in were completed, and these agreements were the same ones that were entered into by the DOJ offices we visited or interviewed by phone.

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In summary, DOJ prosecutors with whom we spoke have based their decisions on whether to enter into a DPA or an NPA and setting the terms of these agreements on the Principles of Federal Prosecution of Business Organizations<sup>7</sup>—which includes guidance, for example, on factoring in a company’s cooperation and collateral consequences that may result from prosecution—as well as input from companies and regulatory agencies and other factors. In addition, 10 of the 13 DOJ offices we included in our review have made efforts to be transparent in their decision making by issuing press releases that explain the reasons why they entered into these agreements. However, prosecutors differed in their willingness to use DPAs or NPAs. For instance, 3 of the 13 DOJ offices exclusively entered into DPAs, and a prosecutor from 1 of these offices asserted that entering into an NPA would be too lenient on the company. In addition, different perspectives among DOJ officials regarding the definition of DPAs and NPAs has led to inconsistent labeling of the agreements. For example, DOJ offices differ in whether they consistently file agreements they refer to as DPAs and the associated criminal charges in court, a key distinguishing factor that is of concern to companies which prefer to enter into NPAs because formal charges are not filed with the court. DOJ issued guidance in March 2008 that defined DPAs as agreements that are filed in court and NPAs as agreements that are not. However, of the 27 DPAs and NPAs entered into since DOJ issued this guidance, 3 are not labeled in accordance with the guidance and 7 are labeled as something other than DPA or NPA; one reason for this is that not all DOJ offices view this guidance as mandatory. DOJ plans to determine whether there is a need to take additional steps to require consistency in the use of labels across offices. We will continue to assess prosecutors’ willingness to use DPAs or NPAs as part of our ongoing work.

Furthermore, to help ensure that companies were complying with the terms of the DPAs and NPAs, DOJ employed several oversight mechanisms, including requiring companies to hire an independent monitor, who in most cases would periodically report to DOJ on the company’s progress; or relying upon a monitor who was already hired by the company as part of a civil or administrative agreement reached with a federal regulatory agency. Although DOJ was not a party to the contracts between companies and monitors, DOJ generally took the lead in selecting and approving the monitors. DOJ’s process for selecting monitors typically

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<sup>7</sup> U.S. Department of Justice, *United States Attorneys’ Manual* § 9-28.000, Principles of Federal Prosecution of Business Organizations.

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involved collaboration among DOJ and company officials, and monitor candidates were generally identified as a result of these officials' personal knowledge of individuals whose reputations suggested they would be effective monitors, or recommendations given to these officials by colleagues and professional associates who were familiar with monitorship requirements. DOJ issued guidance in March 2008 to help ensure that the monitor selection process is collaborative and the selection is based on merit; this guidance also requires prosecutors to obtain Deputy Attorney General approval for the monitor selection. While the guidance established policies for the selection of independent monitors, it does not require documentation of the process used or the reasons for particular monitor selection decisions. Internal control standards require that significant events, which could include how and why monitors are selected, be clearly documented and the documentation be readily available for examination. In addition, our prior work suggests that documenting the reasons for selecting a particular monitor avoids the appearance of favoritism.<sup>8</sup> Without requiring documentation, it will be difficult for DOJ to validate whether its monitors have been selected in a manner that is consistent with the guidance. Moreover, documenting its process and reasons for selecting monitors could enhance DOJ's ability to instill public confidence in the monitor selection process.

While most of the companies we interviewed were satisfied with the monitor selections, officials from 6 of the 12 companies we have spoken with thus far that were required to hire a monitor took issue with the scope of the monitor's work, which seemed too expansive, thus making the overall cost of the monitorship higher than the companies expected. Four of these companies did not feel as if they had enough leverage to address this issue with the monitors because, for example, the companies felt that the monitors' roles and responsibilities were not always clearly defined in the DPA or NPA, thus limiting the basis on which companies could assert that the monitor had expanded the scope of work. Some companies preferred that DOJ assist them in addressing any concerns they had about monitors. We have not yet been able to obtain the perspectives of DOJ and monitors regarding these concerns, but plan to do so in our ongoing review.

To enhance DOJ's ability to ensure that monitors are selected according to DOJ's guidelines, we recommend that the Deputy Attorney General adopt

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<sup>8</sup> [GAO/GGD-00-45](#).

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internal procedures to document both the process used and reasons for monitor selection decisions. We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, in an email sent to us on June 18, 2009, DOJ stated that the department agreed with our recommendation. DOJ also provided technical comments, which we incorporated into the statement, as appropriate.

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**DOJ Based the Use and Terms of DPAs and NPAs on Principles of Federal Prosecution and Other Factors, but Prosecutors' Different Perspectives on DPAs and NPAs Led to Inconsistent Use and Labeling**

DOJ prosecutors cited the Principles of Federal Prosecution of Business Organizations as a major factor in their decision on entering into a DPA or an NPA, and considered other factors, such as the Federal Sentencing Guidelines, in determining the terms of these agreements. Prosecutors also said that they generally negotiated these decisions with companies. However, in making these decisions, prosecutors differed in their willingness to use DPAs or NPAs. In addition, prosecutors' different perspectives on the definitions of DPAs and NPAs led to inconsistencies in how they labeled the agreements. DOJ plans to determine the need to require consistency in the use of the labels DPA and NPA.



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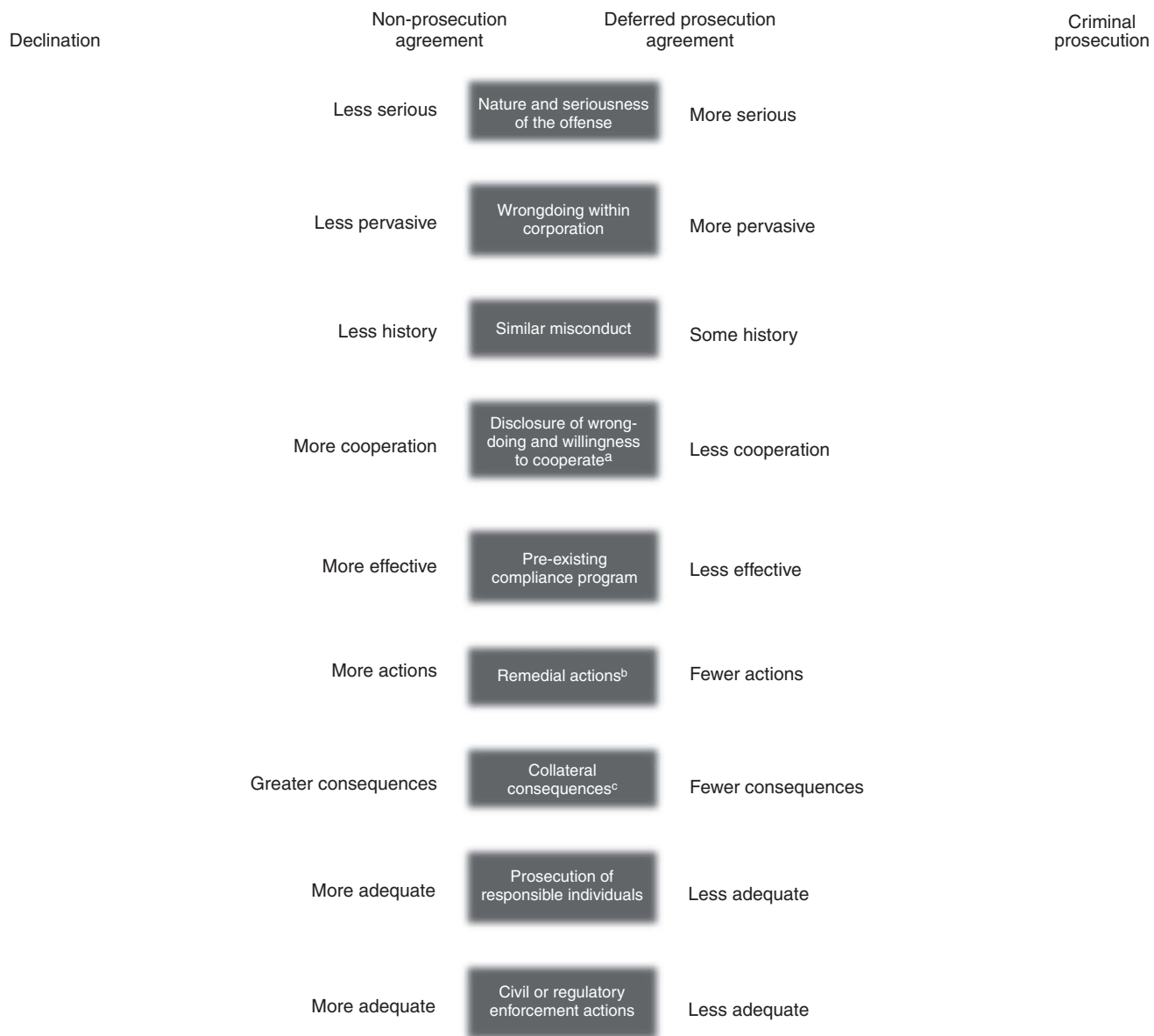
**DOJ Prosecutors Cited Principles of Federal Prosecution as Influential in Their Decision on Entering into a DPA or NPA but Were Inconsistent in their Use and Labeling of Agreements**

Prosecutors in all 13 DOJ offices we included in our review consistently said that they based their decision on whether to enter into a DPA or NPA rather than prosecute the company or decline to do so on the Principles of Federal Prosecution of Business Organizations. First issued in 1999, these principles are DOJ's guidance to federal prosecutors on investigating, charging, and negotiating a plea or other agreement with respect to corporate crimes. The principles instruct prosecutors to consider nine factors when determining how to treat a corporation suspected of criminal misconduct and provide a number of actions prosecutors may take, including declining to prosecute, entering into a DPA or NPA, or criminally prosecuting, the corporation. The principles also include guidance on when the nine factors most appropriately apply. The factors, and examples of the manner in which they influence prosecutors' choice of action, are shown in figure 1 below.<sup>9</sup>

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<sup>9</sup> GAO analysis based on the Principles of Federal Prosecution of Business Organizations. The examples given are illustrative of the manner in which prosecutors consider each factor, and the circumstances of each case will determine the relevance and weight placed on each factor.

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



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

<sup>a</sup>Willingness to cooperate includes cooperation in the government's investigation of the company's agents.

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<sup>b</sup>Remedial actions include efforts to implement or improve an effective compliance program, pay restitution, or discipline wrongdoers, among other things.

<sup>c</sup>Collateral consequences include disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, and any impact on the public arising from prosecution.

While the prosecutors with whom we spoke said that many of these factors may have influenced their decision on entering into a DPA or NPA in each case, they most frequently cited the company's cooperation with the investigation, the collateral consequences of a criminal prosecution, and any remedial measures the company had taken or planned to take as most important in their decision on entering into a DPA or NPA. For instance, one prosecutor told us that the company's cooperation is an important factor in cases involving violations of the Foreign Corrupt Practices Act<sup>10</sup> because obtaining the evidence from foreign countries in these types of cases is a cumbersome and lengthy process that could take up to 10 years. However, with the company's cooperation, which may entail assisting DOJ in tracing bribe payments through multiple overseas accounts, DOJ may be able to obtain the evidence it needs in a matter of weeks. With regard to collateral consequences, some DOJ prosecutors explained, for example, that the potential harm that prosecution and conviction of health care companies can have on innocent third parties may be a key factor in their decision on entering into a DPA or NPA with these kinds of companies. Federal law provides for health care companies convicted of certain crimes to be debarred from—or no longer eligible to participate in—federal health care programs.<sup>11</sup> Prosecutors in one office said that they chose to enter into DPAs and an NPA simultaneously with five orthopedic device companies that provided kickbacks to physicians because, combined, these companies comprised the vast majority of the market for hip and knee replacements; therefore, conviction and debarment of these companies would have severely limited doctor and patient access to replacement hips and knees. In terms of remedial measures, prosecutors cited enhancements companies made to their

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<sup>10</sup> 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff.

<sup>11</sup> The Medicare and Medicaid Patients and Program Protection Act requires the Secretary of Health and Human Services (HHS) to exclude—or debar—individuals or entities convicted of certain program-related crimes or patient abuse, or convicted of certain felonies related to health care fraud or a controlled substance, from participating in any federal health care program. 42 U.S.C. § 1320a-7. The act also permits the secretary to exclude, at the secretary's discretion, individuals or entities convicted of other offenses, including those related to fraud, obstruction of an investigation, or paying or receiving kick-backs, among others. *Id.*

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compliance programs, the termination of employees responsible for the wrongdoing, and the company's willingness to make payments to the victims of the crime as influential in their decision on entering into a DPA or NPA, rather than prosecute.

Our preliminary analysis suggests that officials from many of the DOJ offices we met with have made efforts to be transparent about the basis for their decisions on entering into DPAs or NPAs. For example, 10 of the 13 DOJ offices issued press releases explaining how they applied the Principles of Federal Prosecution of Business Organizations when deciding whether to enter into these agreements.<sup>12</sup> According to an official in the Criminal Division's Fraud section, its policy is to issue press releases upon entering into DPAs and NPAs with companies related to the Foreign Corrupt Practices Act, which helps to increase transparency. As part of our ongoing review, we will determine the extent to which DOJ offices have additional policies—including supervisory review and documentation of the reasons for their decisions to enter into a DPA or NPA—that promote transparency and accountability regarding these agreements.

DOJ's reliance on the Principles of Federal Prosecution of Business Organizations was also apparent to many of the companies involved in the DPAs and NPAs. Ten of the 17 company officials with whom we spoke as of June 5, 2009, said that they were aware that DOJ based its decision on whether to enter into a DPA or NPA on the factors articulated in the Principles of Federal Prosecution of Business Organizations.<sup>13</sup> Moreover, officials from 6 of these 10 companies reported making presentations to DOJ based on the nine factors in order to influence prosecutors' decisions on using agreements in their cases, although companies generally reported that the prosecutors made the ultimate decision about whether to enter into a DPA or an NPA.

DOJ prosecutors also made decisions about which of these agreements—DPA versus NPA—the office would enter into. A commonly accepted

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<sup>12</sup> Three additional DOJ offices issued press releases announcing that they had entered into a DPA or NPA with a company, but the press releases did not discuss DOJ's reasons for entering into the agreements.

<sup>13</sup> Three of these 17 companies did not provide information about their understanding of DOJ's consideration of the Principles of Federal Prosecution of Business Organizations in its decision whether to enter into a DPA or NPA or prosecute the company.

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distinction between these two types of agreements is that a DPA involves the filing of a charging document with the court, while, for an NPA, charges are not filed with the court. Officials from 12 of the 17 companies with whom we spoke preferred an NPA, largely because they viewed NPAs as more advantageous from a public relations perspective for the company. Some of these officials explained that, because a charge is not filed in court in association with an NPA, companies are able to report that they were not charged or prosecuted in the case; a DPA, on the other hand, involves the filing of charges in court, which can result in greater negative publicity for the company.

In choosing between a DPA and an NPA, prosecutors most frequently reported considering the same factors they did when deciding whether to enter into an agreement at all—namely, cooperation, collateral consequences, and the companies' remedial actions. For example, prosecutors at 6 of the 13 DOJ offices said that they considered the company's cooperation in their investigation when deciding between a DPA and an NPA. Prosecutors from one DOJ office said that once the company learned it was the target of the office's investigation, its lawyers immediately called the office seeking to cooperate and continued to cooperate extensively throughout the office's ensuing 3-year investigation, remaining in daily contact with the office and assisting in its investigation. As a result, the DOJ office chose to enter into an NPA rather than a DPA with the company. Not all of the 13 DOJ offices we included in our review reported entering into both types of agreements. For instance, 3 of the 13 DOJ offices we included in our study, including one section of the Criminal Division, exclusively entered into DPAs with companies. A prosecutor from one of these offices said that he did not consider entering into NPAs in any of its cases because he viewed NPAs as too lenient on the company. We will continue to assess this issue as part of our ongoing work.

Officials from 11 of the 17 companies with whom we spoke said that the decision between a DPA and an NPA was exclusively made by DOJ, and officials from 4 of these companies reported that DOJ's reasons for choosing between a DPA and an NPA were not made clear. On the other hand, officials from 4 other companies said that the decision was a result of negotiations between DOJ and the company.<sup>14</sup> Companies' opinions

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<sup>14</sup> Two of the 17 companies did not discuss DOJ's decision whether to enter into a DPA versus an NPA.

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varied on whether guidelines for choosing between a DPA and an NPA would be beneficial. Officials from 5 of the 17 companies we interviewed said that such guidelines would assist the companies in negotiating between a DPA and an NPA with DOJ, whereas officials from three companies believed that guidelines would make DOJ's decision between a DPA and an NPA more transparent to the company. Officials from 6 companies cited reasons why guidelines may not be useful, such as concerns that such guidelines may not address the unique circumstances of each case, would not be binding on DOJ prosecutors, and were not necessary because DOJ's rationale for choosing a DPA versus an NPA was made clear to the company.<sup>15</sup> Prosecutors at 4 of the 13 offices we spoke with stated that these guidelines would not be beneficial because they need the flexibility to choose between a DPA and an NPA based on the unique circumstances of each case.

In addition, prosecutors differ in whether they called their agreements DPAs and NPAs. For example, prosecutors from 2 of the 13 offices with whom we spoke told us that they are reluctant to file agreements in court because of their understanding that some judges do not want the case to be open on their dockets for the length of the deferral period.<sup>16</sup> While prosecutors from one of these offices called the agreements it did not file in court NPAs, the other office still labeled its agreements DPAs because it viewed DPAs as agreements in which the company admits guilt, regardless of whether charges are filed in court. Recognizing the inconsistent use of the labels DPA and NPA, in March 2008, then Acting Deputy Attorney General Craig Morford issued a memorandum—also known as the “Morford Memo”—which stated that a DPA is typically predicated on the filing of both a formal charging document and the agreement with the appropriate court, while an NPA is an agreement maintained by the parties, rather than being filed with the court. The Morford Memo also states that clear and consistent use of these terms will help DOJ more effectively identify and share best practices and track the use of DPAs and

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<sup>15</sup> Officials from the remaining four companies did not provide opinions on the usefulness of such guidelines. An official from one company is counted in both the count of company officials who believed that guidelines were useful and not useful because the official cited both advantages and disadvantages to the guidelines.

<sup>16</sup> Under 18 U.S.C. § 3161(h)(2), courts have the authority to approve the deferral of a prosecution pursuant to a written agreement between the government and the defendant. The court's approval of such an agreement tolls the period during which an indictment must be filed or a trial must commence, and the criminal charges remain on the court's docket for the deferral period.

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NPAAs.<sup>17</sup> However, based on our analysis of the agreements entered into after DOJ issued this guidance, not all the agreements were labeled in accordance with the definitions provided. Of the 27 agreements entered into after DOJ issued this guidance, 20 were labeled as DPAs or NPAs in the agreement or the press release announcing the agreement. Of these 20 agreements, 3 were not labeled in accordance with the definitions in the guidance.<sup>18</sup> The remaining 7 agreements were labeled as agreement, case disposition agreement, or pretrial diversion agreement. One reason for the differences in the manner in which agreements are labeled is that not all prosecutors believe that the use of the definitions of DPAs and NPAs in the guidance is mandatory. For instance, a prosecutor at one office told us that the office believed that the definitions were provided only for the purposes of reading the Morford Memo and not as guidance for labeling DPAs and NPAs going forward, while a prosecutor at another office believed that the Morford Memo was intended as mandatory guidance on the use of the definitions of DPAs and NPAs in the future. According to the Office of the Deputy Attorney General, DOJ intends for the definitions in the Morford Memo to be mandatory and followed consistently by prosecutors for the purpose of internal reporting and tracking of these agreements. However, DOJ does not intend for the definitions to inhibit prosecutors' ability to externally label these agreements in accordance with the unique circumstances of a particular case or the practices and preferences of a particular DOJ office, company, or judge. For instance, the company may prefer that an agreement be labeled as "agreement" rather than "deferred prosecution agreement" because companies believe this label is less severe. Thus, the prosecutor may negotiate with the company over the external label. Regardless of the external label on the agreement, DOJ intends for prosecutors to track the agreement either as a DPA or NPA in accordance with Morford Memo definitions. In addition, DOJ is aware that there may be agreements that share some of the

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<sup>17</sup> *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, (March 7, 2008).

<sup>18</sup> In addition, for 2 of the remaining 17 agreements, it is not clear how DOJ intends for the agreements to be labeled. In these cases, the companies were indicted and the charges were dismissed pursuant to the agreements; however, the agreements were not filed with the court. As the Morford Memo defines DPAs and NPAs based on two elements: (1) the filing of a formal charging document, which was done in these cases, and (2) the filing of the agreement with the court, which was not done in these cases, it is unclear whether these agreements should be labeled as DPAs or NPAs. In other cases where agreements were executed after an indictment was filed and the charges were dismissed, prosecutors have filed the agreements with the court. According to the Office of the Deputy Attorney General, DOJ has not yet assessed how it intends for such agreements to be labeled.

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elements of DPAs and NPAs but may not readily fit the Morford Memo definitions—for instance, the Office of the Deputy Attorney General explained that in one case the company had already been indicted on some of the criminal charges associated with the agreement prior to the agreement being reached, but had not been indicted on other charges associated with the agreement, and therefore it was not clear whether the agreement fit the definition of a DPA—in which charges are filed—or an NPA—in which charges are not filed. Taking into account external circumstances such as these, DOJ plans to determine whether there is a need to take additional steps to require the use of the definitions, to ensure consistency in the use of labels across offices.

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## DOJ Considers Input from Company Negotiations and Other Factors, such as the Sentencing Guidelines, When Setting the Terms of DPAs and NPAs

Prosecutors in 11 of the 13 offices and officials from 14 of the 17 companies with whom we spoke reported that they negotiated at least one of the terms in their DPAs and NPAs, including monetary payments to victims or the government, the duration of the agreement, or compliance program requirements, as well as additional terms, such as monetary donations to foundations or educational institutions.<sup>19</sup> Furthermore, according to prosecutors in all 13 DOJ offices, they considered other factors, such as guidance provided in the Federal Sentencing Guidelines<sup>20</sup>

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<sup>19</sup> We conducted content analysis of our interviews to identify the factors considered in setting the terms and whether negotiations occurred. In both DOJ and company interviews, some officials were not able to discuss the process for setting each specific term, or did not provide responses. The numbers presented represent those officials who specifically reported information on the process they used in setting the terms of the DPA or NPA.

<sup>20</sup> Pursuant to the Sentencing Reform Act of 1984, the *United States Sentencing Guidelines Manual* (“Sentencing Guidelines”) was developed by the United States Sentencing Commission, an independent body within the judicial branch of the federal government charged with promulgating guidelines for federal sentencing. 28 U.S.C. § 994. In 2005, the Supreme Court found the Sentencing Guidelines, which had previously been binding for federal judges to follow in sentencing criminal defendants, to be advisory in nature. *See United States v. Booker*, 543 U.S. 220 (2005). Regardless of their advisory nature, judges are still required to calculate properly and consider the Sentencing Guidelines and other sentencing goals, and sentences properly calculated within the guidelines range are entitled to a presumption of reasonableness upon appellate review. *See* 18 U.S.C. § 3553(a); *United States v. Rita*, 551 347-48 (2007); *Booker*, 543 U.S. at 264; *see also Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 596 (2007) (stating that “the Guidelines should be the starting point and the initial benchmark”). The Sentencing Guidelines contain promulgated sentencing guidelines, policy statements, and commentary applicable to business organizations, such as ranges and considerations for applying fines and requirements for an effective compliance and ethics program. *See* U.S. Sentencing Guidelines Manual §§ 8B21, 8C1.1-4.11.



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or the terms included in other DPAs or NPAs as examples, when determining the terms of their agreements.

**Monetary payments:** Of the 57 DPAs and NPAs we reviewed, 45 required monetary payments—which may include restitution to victims of the crime, forfeiture of the proceeds of the crime, and monetary penalties imposed by DOJ—ranging from \$30,000 to \$615 million. While the remaining 12 agreements did not require such payments, in 3 agreements the companies were required to make payments to organizations or individuals that were not directly affected by the crime;<sup>21</sup> for 7 agreements the company had already agreed to make payments as part of a separate agreement with another agency or DOJ division, such as the Securities and Exchange Commission or DOJ’s Civil Division; and for 1 agreement, two of the company’s subsidiaries had already agreed to make monetary payments as part of a plea agreement and a DPA. In the remaining agreement, the company was not required to make a payment and did not enter into a civil settlement in order to obtain release from its civil liability in the case. In setting the payment amounts in DPAs and NPAs, prosecutors reported that they considered the following: (1) the section of the Federal Sentencing Guidelines on determining fines for business organizations, which includes consideration of the seriousness of the offense, culpability of the organization, and the company’s cooperation, among other factors; (2) monetary gains to the company or losses to its victims as a result of its crime; and (3) the company’s ability to pay. Prosecutors in 6 of the 12 offices with whom we spoke whose DPAs and NPAs included monetary payments reported that they negotiated the monetary payments with the other party.<sup>22</sup> While representatives of 7 of the 13 companies we interviewed that were required to make monetary payments told us that they were able to negotiate the monetary payment with DOJ, representatives of 4 companies told us that they were not able

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<sup>21</sup> Payments or donations required to be paid to charitable, educational, community, or other organizations or individuals that were not victims of the crime or do not provide services to redress the harm caused by the crime are classified and discussed in this report as extraordinary restitution and, although they involve monetary payments, are not included in the count of agreements with monetary payments reported here.

<sup>22</sup> None of the DPAs or NPAs entered into by one office with which we spoke included monetary payments.

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to negotiate the payment.<sup>23</sup> Representatives from 2 of these companies did not express concern over the lack of negotiation—1 said that DOJ's reasons for setting the payment were made clear to the company, while the other said that the company had no reason to question the payment figure DOJ set. One of these companies reported that DOJ did not provide its rationale for the monetary payment, and the remaining company did not provide opinions about the process by which the payment was set.

**Duration:** The durations of DPAs and NPAs have ranged from 3 months to 5 years.<sup>24</sup> Prosecutors at 9 of the 13 DOJ offices with whom we spoke based the duration of the agreement on the amount of time they believed was necessary for the company to correct the problems underlying the criminal conduct. For instance, one prosecutor said that the company was replacing its old computer billing system, which had overbilled a federal agency, resulting in the criminal conduct underlying the DPA. The prosecutor set the duration at 27 months in order to allow the company to install the new billing system and ensure it was functioning appropriately, and not continuing to overbill the agency. Prosecutors at 5 of the 13 offices we visited also reported that they negotiated with companies over the duration of the agreement.<sup>25</sup> On the other hand, companies that had agreements with 5 other DOJ offices told us that they did not negotiate the duration, although none of these companies expressed concern over the duration of the agreement. For instance, an official from one of these companies said that the company would have preferred a shorter duration, but was satisfied with the duration DOJ set. Prosecutors in 3 DOJ offices also told us that they considered the duration of other DPAs or NPAs as examples when setting the duration of their agreements.

**Compliance program requirements:** Forty-five of the 57 DPAs and NPAs we reviewed included requirements that the company improve or enhance its compliance program, while 12 did not include this type of requirement. According to prosecutors in 6 of the 13 DOJ offices we met

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<sup>23</sup> Officials from the two remaining companies did not discuss DOJ's process for setting monetary payments in the DPA or NPA. Four of the companies we interviewed were not required to make payments to the government, to compensate victims of the crime, or to forfeit ill-gotten gains as a result of the crime, and therefore did not discuss DOJ's process for setting monetary payments in the DPA or NPA.

<sup>24</sup> One of the 57 agreements we reviewed did not specify the duration.

<sup>25</sup> Prosecutors at the remaining eight DOJ offices told us that they could not recall the process by which the duration of the agreement was determined or we did not obtain a response from them on this issue.

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with, they required companies to enhance or implement a compliance program in order to reform the company, prevent further misconduct, or help establish and publicize a compliance program standard for the industry.<sup>26</sup> In deciding not to include compliance requirements, prosecutors reported that they considered whether the company that committed the wrongdoing could engage in such criminal conduct again. For instance, one prosecutor said that a compliance program was not required as part of an agreement because the company's violations occurred during its participation in the United Nation's Oil-for-Food Program, which was no longer in existence when the agreement was signed. In addition, prosecutors were aware that 2 of the companies involved in DPAs or NPAs that did not include compliance program requirements had entered into agreements with other regulatory agencies that did include such requirements. When developing compliance requirements in DPAs and NPAs, prosecutors most commonly (8 of 13 offices) worked with regulatory agencies with relevant jurisdiction over the companies—such as Immigration and Customs Enforcement for issues related to the hiring of illegal immigrants, the Environmental Protection Agency for environmental crimes, or the Securities and Exchange Commission for issues involving accounting and financial fraud—to develop the compliance requirements included in the agreement. Several prosecutors and company officials also reported that they negotiated over the compliance requirements in the DPA or NPA. For instance, one company official said that DOJ initially developed the compliance program requirements, but when the company raised concerns about the practicality and effectiveness of the requirements, DOJ worked with the company to revise them. In the end, the official felt that the company's enhanced program was a best practice in the industry.

**Extraordinary restitution:** DPAs and NPAs have also included additional terms, such as payments or services to organizations or individuals not directly affected by the crime; these payments are sometimes referred to as extraordinary restitution. Of the 57 DPAs and NPAs we reviewed, 4 included such terms. Prosecutors and companies with whom we spoke about these provisions generally reported that the provisions were determined through negotiations between the two parties. In addition, these prosecutors were supportive of including extraordinary restitution provisions in DPAs and NPAs because, for example, they

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<sup>26</sup> Prosecutors in the remaining seven DOJ offices did not comment specifically on why they included compliance program requirements in DPAs or NPAs.

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believe such terms can help improve the availability of services in the community and prevent similar misconduct from occurring in the future, not just within the company, but in a larger context. For instance, 1 DPA required the organization to provide uncompensated medical care to the state's residents, while an NPA required the company to provide funding for a not-for-profit organization to support projects designed to improve the quality and affordability of health care services in the state. Another DPA required a company that had not complied with water treatment regulations to provide an endowment of \$1 million to the U.S. Coast Guard Academy for the purposes of enhancing the study of maritime environmental enforcement, with an emphasis on compliance, enforcement, and ethics issues. In May 2008, DOJ issued guidance prohibiting the use of terms requiring payments to charitable, educational, community, or other organizations or individuals that are not the victims of the criminal activity or are not providing services to redress the harm caused by the criminal conduct because the use of such terms could create actual or perceived conflicts of interest or other ethical issues. Based on our preliminary analysis, none of the 25 DPAs and NPAs that were entered into since this guidance was issued required companies to make payments or perform services for individuals or organizations that were not directly harmed by the crime.<sup>27</sup>

While most company officials stated that they had input into, or were able to negotiate over, whether to enter into a DPA or NPA and the terms of the agreements, officials from nine of these companies reported that DOJ had greater power in the negotiations than the company because, for instance, if the negotiations were not successful, DOJ could have proceeded with prosecution. However, prosecutors at 4 of the 13 offices with whom we spoke noted that if companies had concerns about the terms of their DPAs or NPAs, they could express them to their office, or appeal them to a

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<sup>27</sup> Although three agreements included payments to third parties to fund environmental projects, enforcement efforts, and initiatives, they appear to be encompassed by the exception for the use of community service as a condition of probation for environmental prosecutions, pursuant to guidance from DOJ's Environmental and Natural Resources Division. See U.S. Department of Justice, *United States Attorneys' Manual* § 9-16.325, Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements, and "Extraordinary Restitution." We will review this guidance to understand the nature of these payments. DPAs and NPAs have also included additional terms other than the ones discussed in this testimony, such as the provision that if the company complies with the agreement, not only would the specific DOJ office that entered into the agreement not prosecute the company, but the company would not be prosecuted by any DOJ office; or a provision that the company would conduct public training workshops throughout the state.

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higher level within DOJ. Representatives from six companies expressed reluctance to appeal any concerns they had with the terms of the agreement. Officials from two of these companies explained that appealing to a higher level in DOJ could negatively affect their interactions with the prosecutors involved in the case. On the other hand, officials from four companies told us that they would have been comfortable appealing the terms, if needed.<sup>28</sup> As part of our ongoing review, we will continue to assess the extent of the companies' role in setting the terms of the agreements and obtain DOJ's perspective on this issue.

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## DOJ Oversaw Companies' Compliance through the Use of Independent Monitors, Coordination with Regulatory Agencies, and Other Means

In 26 of the 57 DPAs or NPAs we have reviewed to date, prosecutors required that the company hire, at its own expense, an independent monitor to assist the company in establishing a compliance program, review the effectiveness of a company's internal control measures, and otherwise meet the terms of the agreements. In the remaining cases, DOJ coordinated with the relevant regulatory agency already monitoring or overseeing the company, or used other means, such as requiring companies to certify their compliance, to ensure the terms were met.<sup>29</sup>

When deciding whether a monitor was needed to help oversee the development or operations of a company's compliance program, DOJ considered factors such as the availability of DOJ resources for this oversight, the level of expertise among DOJ prosecutors to monitor compliance in more technical or complex areas, and existing regulatory oversight.<sup>30</sup> Of the 13 DOJ offices we met with, 10 utilized monitors.

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<sup>28</sup> Three additional companies did not believe an appeals process was available to them. We did not discuss the option of appealing the terms of the agreement with the remaining five companies. One company is counted twice because the official would have been comfortable appealing to the U.S. Attorney, but expressed reluctance to appeal concerns with the agreement to DOJ.

<sup>29</sup> One agreement required the company to retain the services of its outside counsel as a non-independent compliance consultant for the duration of the agreement. The responsibilities of the consultant were similar to those of the independent monitors required in other agreements, and the consultant reported directly to DOJ, but we did not include this agreement in our count of agreements with independent monitors.

<sup>30</sup> The Morford Memo states that monitors should only be used where appropriate given the facts and circumstances of a particular matter—for example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. In addition, the guidance requires that—prior to executing an agreement that includes a monitor—prosecutors must, at a minimum, notify the appropriate U.S. Attorney or Department Component Head.

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Prosecutors in four of these nine offices cited as a reason for requiring an independent monitor the limited time and resources their offices had to oversee a company's compliance program, make appropriate recommendations, and reform the company's compliance behavior, whereas monitors often have an entire staff available to them to perform these activities. Prosecutors in five of the nine DOJ offices we met with that had utilized monitors, cited as a reason for requiring an independent monitor the limited expertise the office had in overseeing company compliance in a particular area of misconduct. For example, prosecutors in one office stated that part of the company's wrongdoing dealt with commodities trading, and while they did not have this background, the monitor selected by the office had commodities trading experts on his staff. Other prosecutors cited the need for technical expertise regarding misconduct in a particular geographic region to oversee company compliance effectively—resources and skills which DOJ prosecutors did not have—as the reason to require that a company hire a monitor.

In 22 of the 26 agreements requiring an independent monitor, the monitor was required to file written reports with DOJ prosecutors.<sup>31</sup> The frequency of reporting to DOJ prosecutors varied by agreement, with 13 monitors required to report every 3 or 4 months; 2 monitors required to file semiannual reports; 5 monitors required to file annual reports or an initial report with annual or semiannual follow-up reports; 1 monitor required to report within 120 days of entering into the agreement; and 1 monitor required to report no later than 45 days and 90 days after the commencement of the agreement, on or before 90 prior to termination of the agreement and at such other times as designated by DOJ.<sup>32</sup> For two of the three agreements overseen by an independent monitor where the agreement did not specifically require written reports, the prosecutors we spoke with said that they typically met frequently with the monitor themselves to discuss the company's progress towards fulfilling the

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<sup>31</sup> The Morford Memo advises U.S. Attorneys Offices and other DOJ litigation divisions that it may be appropriate for the monitor to report in writing periodically to the government and the company regarding the monitor's activities and the company's compliance with the agreement, but does not require written reports nor does it specify the frequency of reporting. The Morford Memo requires, however, that the monitor have discretion to communicate with the government as he or she deems appropriate.

<sup>32</sup> For three of the agreements, the agreement did not clearly state whether the monitor was required to file written reports with DOJ prosecutors. An additional agreement required reporting to another federal agency and not specifically to DOJ.

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agreements.<sup>33</sup> We have not assessed whether the monitors' reports were filed in a timely fashion or covered the elements required by the agreements, but plan to obtain information on monitor reporting as part of our ongoing review.

In one instance, the district court judge also received the reports filed with federal prosecutors by the independent monitor because, in that district, the office typically involved the court in the selection of the independent monitor, and the judge had issued an order requiring quarterly reporting to the court. We are in the process of collecting information from federal judges who have been involved with DPAs to determine the extent to which judges received monitor reports, or assessments of these reports provided by DOJ, in their oversight of DPAs.

In 18 of the 57 agreements we reviewed to date, there was a requirement for companies to make improvements to existing ethics and compliance programs or implement new programs, but there was no requirement for companies to hire an independent monitor to review the effectiveness of these programs or the companies' compliance with the terms of the agreement. In 4 cases, the company had signed a civil or administrative agreement with a federal regulatory agency as part of a settlement related to the underlying criminal misconduct, which required the company to hire an independent consultant, review organization or compliance officer. In such cases, DOJ officials said that they depended on the reports of these regulatory monitors or the regulatory agency to assure themselves of companies' compliance in part to avoid unnecessary duplication. In the other 14 cases, where the company had not signed a settlement agreement with a regulatory agency requiring an independent monitor, DOJ officials stated that they used other methods to determine companies' compliance with the agreement. In 9 of the 14 cases, they stated that they depended on the regulatory agency to inform them if, in the course of its regulatory oversight, the agency discovered the company was violating any of the provisions of the agreement. For example, in 2 DPAs we reviewed where financial institutions failed to maintain effective anti-money laundering programs, DOJ prosecutors said that they communicated frequently with financial regulators, reviewed reports submitted to the regulators, and spoke to the regulators before the agreements were completed. In the

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<sup>33</sup> Prosecutors involved in one of these two agreements said that they also received written reports from the monitor. Prosecutors involved in the remaining agreement did not provide information on whether the monitor had submitted reports or the extent of DOJ communication with the monitor.

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remaining 5 cases, the prosecutors said they reviewed documents submitted by the company or depended on the companies to self-certify that they had complied with the provisions of the agreement.

For the remaining 12 of the 57 agreements that did not require companies to improve or expand ethics and compliance programs, DOJ offices conducted oversight through various mechanisms, including:

- Assuring that monetary penalties or restitution payments were paid in full. For example, an accounting firm agreed to make restitution payments to a fund established to repay wronged investors, and to pay an administrator to administer the fund. The administrator provided reports to the office on the names of victims that received payments from the fund, and the amount received.
- Assuring that the company cooperated with DOJ in continuing investigations, including responding to information requests from federal prosecutors. For example, an energy trading company in a DPA with one office agreed to continue to cooperate with federal prosecutors by providing information relevant to ongoing investigations in the natural gas industry.
- Requiring the company to certify that it had followed certain requirements in the agreement. For example, one pharmaceutical company was required to certify that it had not filled prescriptions for off-label uses of one of its drugs. In that case, the prosecutors stated that it would be easy to examine the company's prescription records at the end of the agreement to determine if the certification was accurate, and if not, the company would additionally be liable for falsely certifying compliance.



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## Prosecutors We Contacted Varied in the Extent to which They Involved Companies in the Monitor Selection Process, and DOJ Does Not Require Documentation of the Process and Reasons for Selecting Monitors, Making It Difficult to Determine whether Monitor Selection Guidance Is Followed

We reviewed 26 agreements that required the company to hire a monitor. Although DOJ was not a party to the contracts between companies and monitors, DOJ generally took the lead in approving the monitors. Specifically, according to officials in the 10 DOJ offices we contacted that entered into DPAs and NPAs that required monitors, DOJ had the final say in selecting the monitor for all but one of these agreements. However, according to these officials, the monitors were not selected by any one individual; rather, the decision was made among several DOJ officials and, in most instances, companies were able to provide input to DOJ on who the monitor should be, although the extent of company involvement varied.<sup>34</sup>

- For 12 of the agreements we reviewed, DOJ prosecutors said that the companies proposed a single monitor or a list of several monitors from which DOJ could choose. In all of these cases, DOJ officials said they were able to select an appropriate monitor for the DPA or NPA based on the company's suggestions.<sup>35</sup>
- For three of the agreements we reviewed, DOJ prosecutors said that they and the company developed separate lists of monitor candidates, shared their lists with one another, and worked together to choose the monitor.
- For seven of these agreements, DOJ prosecutors said that they chose the monitor. For five of the seven agreements, according to DOJ officials, the prosecutors selected the monitors and later provided the companies with the opportunity to meet with the selected individual. According to the prosecutors, they gave companies the option to object to DOJ's monitor selection, but none of the companies did so. However, our preliminary work suggests that at least one company reported that they did not have this opportunity. For one of these agreements, DOJ officials said that they sought the companies' input on monitor qualifications before making their selection. For another of these agreements, it was unclear whether the company had any discussion with DOJ regarding monitor qualifications before DOJ selected the monitor.<sup>36</sup>

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<sup>34</sup> Representatives from 7 of the 12 companies we interviewed that had monitors confirmed that they had some input in monitor selection and 5 companies said they were not involved in monitor selection.

<sup>35</sup> In two cases, the monitor has not yet been selected.

<sup>36</sup> In one agreement, the company selected the monitor with no involvement from DOJ. Prosecutors involved in the three remaining agreements did not provide information on the extent of company involvement in the monitor selection process.

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For the agreements we reviewed where DOJ officials identified monitor candidates, the selection processes employed across these offices were similar. DOJ officials generally stated that in these instances, they identified monitor candidates based on their personal knowledge of individuals whose reputations suggest they would be effective monitors, or through recommendations from colleagues or professional associates who were familiar with requirements of a monitorship. After identifying several candidates, the prosecutors established a committee, which generally consisted of individuals such as the prosecutors involved in the case, the DOJ office section chief, and sometimes the Chief Assistant U.S. Attorney or a Deputy U.S. Attorney. The committees were responsible for evaluating the candidates and selecting a monitor. Prosecutors said they evaluated candidates based on whether they had any conflicts of interest with the company and their qualifications and expertise in a particular area.

Officials from the five companies we interviewed who identified monitor candidates for DOJ approval used a similar process as DOJ. For example, officials from one company reached out to their associates who they believed could help them identify individuals who would be effective monitors. Company officials said that they were looking for a monitor with experience working with DOJ and knowledge of the specific area of law that the company violated. From these suggestions, the company developed a list of candidates to interview, and based on the results of the interviews, generated a shorter list of candidates from which DOJ would choose the monitor.

In selecting the monitors, DOJ sometimes sought input from federal regulatory agencies. According to prosecutors in DOJ's Criminal Division, it is not uncommon for the division to collaborate with agencies such as the Securities and Exchange Commission to select a monitor to serve under agreements both agencies have reached with a company, particularly if the agreements contain similar requirements for the company. The prosecutors said having two different monitors could be cost-prohibitive and result in duplication of effort.

Courts were rarely involved in monitor selection. Of the 26 agreements we reviewed that had monitor requirements, 2 required court approval of the selected monitor.<sup>37</sup> One of the 13 DOJ offices included in our review has a

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<sup>37</sup> Of these 26 agreements, 7 were not filed in court.

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formal monitor selection policy. According to the prosecutors in this office, court involvement in monitor selection limits the possibility of favoritism in monitor selection by the office. The policy requires prosecutors to compile a list of potential monitor candidates and submit the list to the court, where a district judge would then appoint a monitor from this list. We plan to solicit input on court involvement from the judiciary as a part of our ongoing review.

When we asked DOJ officials, company representatives, and monitors about other methods to prevent the appearance of favoritism in monitor selection, such as developing a national list of prescreened monitors from which DOJ would make its selection, they identified both advantages and disadvantages. Some of the advantages identified were (1) assurance that the monitors have been prescreened and are considered qualified by the government, (2) increased consistency in the monitor selection process, and (3) the ability to expedite the monitor selection process. The disadvantages they cited were (1) not all of the monitors on the list would have the specific expertise required for certain cases, such as commodities trading expertise; (2) based on their own experiences searching for monitors, it is likely that many of the monitors on a prescreened list will have conflicts of interest with the companies—such as the monitor having previously provided services for the company in an unrelated matter; (3) use of the list would limit company input in monitor selection; and (4) use of the list may actually increase the likelihood of favoritism because DOJ officials could populate the list with their associates, and could exclude other qualified monitor candidates. As a part of our ongoing work, we will continue to identify other models that aim to reduce favoritism in monitor selection. For example, one company official with whom we spoke cited the International Association of Independent Private Sector Inspectors General (IAIPSIG) as a possible model for developing a national pool of monitors. Members of this association are individuals or private sector firms with legal, auditing, investigative, and management skills who are available to be employed by an organization to ensure compliance with relevant laws and regulations. According to IAIPSIG, members—who may be retained by the government to prevent fraud in contracting and by private firms conducting internal investigations—must also adhere to the principles and standards in IAIPSIG’s code of ethics which require, among other things, that its members remain independent of both the monitored entity and the entity to which it is reporting, and refrain from accepting or performing work involving an actual or potential conflict of interest.

In March 2008, the Acting Deputy Attorney General issued the Morford Memo to help ensure that the monitor selection process is collaborative,

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results in the selection of a highly qualified monitor suitable for the assignment, avoids potential and actual conflicts of interest, and is carried out in a manner that instills public confidence.<sup>38</sup> The guidance requires U.S. Attorneys Offices and other DOJ litigation divisions to establish ad hoc or standing committees, consisting of the office's ethics advisor, criminal or section chief, and at least one other experienced prosecutor to consider the candidates for each monitorship. DOJ components are also reminded to follow federal conflict of interest guidelines<sup>39</sup> and to check monitor candidates for potential conflict of interest relationships with the company. In addition, the names of all selected monitors must be submitted to the Office of the Deputy Attorney General for final approval. According to the Senior Counsel to the Deputy Attorney General, this approval is required in order to ensure public integrity in the monitor selection process.

While the Morford Memo established policies and guidance for the selection of independent monitors, including that the Office of the Deputy Attorney General approve the monitor selection, the memo does not require documentation of the process used and the reasons for selecting a specific monitor. Standards for internal control in the federal government state that all transactions and significant events, which could include the selection of monitors, should be clearly documented and that the documentation be readily available for examination. In addition, our prior work suggests that documenting the reasons for selecting a particular monitor helps avoid the appearance of favoritism and verify that selection processes and practices were followed.<sup>40</sup> Since the release of the Morford Memo, we have identified two DPAs and NPAs that DOJ entered into for which monitors have been selected.<sup>41</sup> According to the Office of the Deputy Attorney General, which is responsible for approving monitor selections, the United States Attorneys Offices involved in these two cases submitted e-mails to predecessors in the Office of the Deputy Attorney

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<sup>38</sup> The Morford Memo was released after most of the agreements we reviewed were entered into.

<sup>39</sup> See 18 U.S.C. § 208 and 5 C.F.R. pt 2635.

<sup>40</sup> [GAO/GGD-00-45](#).

<sup>41</sup> At the time of our review, we identified an additional four DPAs and NPAs that were entered into since the Morford Memo and required the selection of a monitor. According to DOJ, monitors have not yet been selected for these agreements. For one additional DPA, the department has determined that the agreement, which requires an external auditor, is not subject to Morford Memo guidelines regarding monitor selection.

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General regarding their proposed monitor selections. DOJ provided us with a summary of the correspondence from the prosecutors seeking Deputy Attorney General approval. While the correspondence in one case included information describing how prosecutors adhered to the processes required by DOJ guidance, the correspondence in the other case did not. For instance, the correspondence did not describe the membership of the committee that considered the monitor candidate. In addition, because the approval of one of the monitors was relayed via telephone and no documentation was readily available at the Office of the Deputy Attorney General, DOJ officials had to reach out to the individuals who were involved in the telephone call to obtain information regarding the monitor's approval. As this example demonstrates, without requiring documentation of the process used and the reasons for selecting a particular monitor, it may be difficult for DOJ to validate whether its monitors have been selected and approved across DOJ offices in a manner that is consistent with the Morford Memo, which established monitor selection principles intended to instill public confidence.

In commenting on a draft of this report in June 2009, the Office of the Deputy Attorney General agreed that documenting the process used and reasons for monitor selection would be beneficial. However, because the office has not had to approve any monitor selections since the presidential transition in January 2009, the office did not believe it was in a position to determine exactly what internal procedures should be adopted to document the monitor selection process until it had reviewed more selection proposals. From January 2009 through May 2009, DOJ had four ongoing agreements that required the appointment of a monitor where, to date, the monitors have not yet been selected. We expect that when the Office of the Deputy Attorney General reviews the monitor proposals for these agreements, once they are submitted, the office will be in a better position to establish procedures for documenting monitor selection decisions.

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## Companies We Contacted Reported that Monitors Generally Charged Their Customary Rates but Raised Concerns about Scope of Monitors' Work; Companies Would Like DOJ to Help Them Address Issues with Monitors

Of the 12 companies we have met with so far for which DOJ required a monitor, 6 told us that they did not have any concerns about the rate charged by the monitor, 3 expressed concern that the monitor's rate was high, and the remaining 3 did not comment on the monitor's rate.<sup>42</sup> Officials from 6 of the 12 companies perceived that the monitors were either charging their customary rates or, in two additional cases, lower rates because the companies could not afford the customary rates.<sup>43</sup> While the companies we met with generally did not express concern about the monitors' rates, they reported concerns with other aspects of the monitorship that affected the overall compensation to the monitor. Specifically, 6 of the 12 companies raised concerns about the scope of the monitor's responsibilities or the amount of work completed by the monitor; and four of the six companies reported that they did not feel they could adequately address their concerns by discussing them with the monitors. For instance, 1 company said that the monitor had a large number of staff assisting him on the engagement, and he and his staff attended more meetings than the company felt was necessary, some of which were unrelated to the monitor responsibilities delineated in the agreement. As a result, the company believes that the overall cost of the monitorship was higher than it needed to be. While the company reportedly tried to negotiate with the monitor over the scope of work and number of staff involved, the company stated that the monitor was generally unwilling to make changes. The company did not feel that there was a mechanism at DOJ whereby it could raise concerns regarding monitor costs because the costs were not delineated in the agreement. Instead, the costs were identified in an agreement between the company and the monitor and, therefore, DOJ was not responsible for overseeing the costs of the monitorship. Another company reported that its monitor did not complete the work required in the agreement in the first phase of the monitorship, which necessitated the monitor completing more work than the company anticipated in the final phase of the monitorship. This led to unexpectedly high costs in the final phase. The company official believed it was DOJ's responsibility, not the company's, to address this issue because the monitor had failed to complete the requirements DOJ had delineated in the agreement. As part of our ongoing review, we plan to obtain the perspectives of DOJ officials and monitors, in addition to

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<sup>42</sup> An official from one of these companies did not comment on the monitor's rate specifically because this individual was not involved in early negotiations with the monitor.

<sup>43</sup> The companies we spoke with did not always have precise information on the monitor's customary rates.

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companies, regarding the amount and scope of the monitors' work and the most appropriate mechanisms companies can use to address any concerns they may have related to this issue.

Two company officials reported that they had little leverage to negotiate fees, monitoring costs, or the monitor's roles and responsibilities with the monitor because the monitor had the ability to find that the company was not in compliance with the DPA or NPA. Officials from three companies suggested that DOJ should play a larger role in helping companies address concerns with their monitors. For example, one company official said that DOJ may need to develop a mechanism for companies to raise issues regarding their monitors without fear of retribution, while another company official suggested that DOJ meet routinely with the company to allow for a conversation between the company and DOJ about the monitoring relationship. Two companies felt that having a sense of the potential overall costs at the beginning of the monitorship, such as developing a work plan and estimated costs, would be beneficial for companies. For instance, one of these officials said that this would help establish clear expectations for the monitor and minimize unanticipated costs. DOJ has taken some actions which may address these concerns. In 2 of the 26 DPAs or NPAs we discussed with DOJ that had monitoring requirements, the monitor was required to submit a work plan prior to the monitor's first review of the company. Additionally, an official in the Criminal Division Fraud Section said that it is the section's general practice to meet with the monitor to discuss the monitor's work plan. The Morford Memo also instructs DOJ prosecutors to tailor the scope of the monitor's duties to address the misconduct in each specific case, which the memo indicates may align the expense of the monitorship with the failure that led to the company's misconduct covered by the agreement. However, we have not yet been able to evaluate how these actions may address companies' concerns. We will continue to obtain information on the ways in which company concerns regarding the monitors' responsibilities and workload can be addressed.

We are conducting a survey of companies to solicit more comprehensive information on monitors' fees, total compensation and roles and responsibilities, as well as the companies' perceptions of the monitor costs in relation to the work performed. We will integrate these survey results into our final report. In addition, we are continuing to assess the potential need for additional guidance or other improvements in the use of DPAs and NPAs in our ongoing work.

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## Conclusions

One of DOJ's chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. DOJ has increasingly employed the tools of DPAs and NPAs in order to carry out this mission, and has recognized the potential long-term benefits to the company and the public of assigning an independent monitor to oversee implementation of a DPA or NPA. On the other hand, DOJ has also acknowledged concerns about the cost to the company of hiring a monitor and perceived favoritism in the selection of monitors, and thus the resultant need to instill public confidence in the monitor selection process. DOJ has made efforts to allay these concerns by issuing guidance requiring prosecutors to create committees to consider monitor candidates; evaluate potential conflicts of interest the monitor may have with the government and the company; and obtain approval of selected candidates from the Office of the Deputy Attorney General. Nevertheless, more could be done to avoid the appearance of favoritism. Requiring that the process and reasons for selecting a specific monitor be documented would assist DOJ in validating that monitors were chosen in accordance with DOJ's guidance that is intended to help assure the public that monitors were chosen based on their merits and through a collaborative process.

We are continuing to assess the potential need for additional guidance or other improvements in the use of DPAs and NPAs in our ongoing work.

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## Recommendation for Executive Action

To enhance DOJ's ability to ensure that monitors are selected according to DOJ's guidelines, we recommend that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions.

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## Agency Comments and Our Evaluation

We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, in an email sent to us on June 18, 2009, DOJ stated that the department agreed with our recommendation. DOJ also provided technical comments, which we incorporated into the statement, as appropriate.

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## GAO Contact and Staff Acknowledgments

For questions about this statement, please contact Eileen R. Larence at (202) 512-8777 or [larencee@gao.gov](mailto:larencee@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this statement include Kristy N. Brown, Jill Evancho, Tom Jessor, Danielle Pakdaman,



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and Janet Temko as well as Katherine Davis, Sarah Kaczmarek, Amanda Miller, Janay Sam, and Mandana Yousefi.

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