A distinct regulatory characteristic of corporate fraud cases is the interaction between government agents and private enforcement and the outsourcing of some investigative functions. The increasing use of DPAs between the federal government and corporate defendants provides a key mechanism for regulation by prosecutors. DPAs are hybrids of plea agreements, consent decrees, and private contracts. They offer corporations an intermediate sanction that averts some of the collateral consequences of indictment and conviction, but they require in exchange full cooperation with the investigation and remedial measures after settlement. When corporations commit to assisting government agents, perform critical investigative tasks like employee interviews, and undertake prosecutor-mandated compliance programs, the boundaries between public and private roles blur. Those lines ordinarily are clearly drawn in the criminal realm, and crossing them creates some distortions. While there are significant advantages to outsourcing in light of the resource constraints and complexity of corporate criminal investigations, these partnerships tend to exacerbate a major drawback of settling cases by DPA: the piecemeal nature of the resolution. Reliance on the private sector also imports one of the most problematic features of regulatory partnerships into criminal adjudication, which is the potential for self-dealing.

To negotiate and sustain a DPA, corporations must remove legal and informational barriers between the government and their employees. In effect, prosecutors enlist the target corporation as a co-enforcer. When they do so, prosecutors cede some discretionary authority to corporations to identify culpable employees and affect the course of the investigation. The result can be ad hoc targeting of individual defendants. In addition, DPAs are less visible than adjudication, which detracts from both the coherence of the government’s enforcement strategy and the accountability of prosecutors. Prosecutors also extract inside information by capitalizing on assistance from compliance industry professionals retained by the corporation itself,
including lawyers, public accountants, private investigators, business consultants, and risk-management experts. Reliance on these intermediaries in the private sector raises both quality-control issues about the evidence and some of the concerns about capture that regulators confront in civil enforcement. Some DPAs further require corporations to retain third-party monitors to design, implement, and oversee remedial measures. The installation of monitors mandated and selected by prosecutors forces outsiders into a corporate governance role and risks added conflicts of interest.

This chapter will explore the nature of the collaboration between public enforcers and private parties that stems from current corporate enforcement strategies, the costs and benefits of those partnerships, and whether the experience of DPAs suggests that prosecutors should yield some remedial functions back to regulators. It will address as well the changing conceptions of public and private interests developing out of the 2008 economic crisis and the bailout of financial institutions and how those new entanglements might affect next steps.

I. Outsourcing:
Strategies to Address Personnel and Expertise Constraints

Some level of private-sector participation in the administration of criminal law is necessary and standard. The government outsources many public functions, including important aspects of the criminal justice system like forensic analysis and prison management. In corporate enforcement, however, the government does not simply hire contractors; rather, prosecutors require corporations to use their own resources to investigate wrongdoing and oversee compliance with settlements.

Prosecutors turn to private-sector partners because they simply do not have the resources to go it alone when conducting complex, expensive corporate investigations. Federal agents cannot replicate the work of corporate internal investigators, who may spend millions of dollars and review hundreds of thousands of documents to prepare a report. Federal Bureau of Investigation (“FBI”) staffing levels effectively account for the participation of private-sector partners. Although the Bush administration declared a “war on corporate crime” in 2002, it had already begun shifting FBI agents from domestic criminal investigations to national security assignments in response to the events of 9/11. More than 1,800 agents, including one-third of those assigned to white-collar investigations, have been transferred to counterterrorism and intelligence duties. There was an initial surge in high-
profile corporate prosecutions following the Enron and WorldCom scandals of 2001 and 2002, but the number of cases has since declined, and recent proposals to augment the enforcement budget will not fully replenish the ranks of investigators and prosecutors.

The 2009 budget, the last of the Bush administration, added 100 new FBI agents for criminal investigations, including white-collar enforcement, and the Obama administration's first budget included increased funding for both white-collar investigations and mortgage fraud enforcement, as well as a 13 percent increase in the SEC's budget. The recently enacted Fraud Enforcement and Recovery Act and the pending Supplemental Anti-Fraud Enforcement for Our Market Act ("SAFE Markets Act") will also expand the number of prosecutors, agents, and analysts devoted to financial crimes and increase the enforcement budgets of both the FBI and the SEC. This buildup is roughly comparable to the response to the savings and loan crisis of the 1980s. In its wake, strike forces in twenty-seven cities were staffed with more than 1,000 federal agents. But the $100 billion lost in the savings and loan crisis in the 1980s and the billions in losses stemming from the 2001 Enron bankruptcy and other corporate accounting restatements of that period all pale in comparison to the multi-trillion-dollar figures associated with shoring up the collapsed financial system. New funding can only support a limited number of investigators, and the administration has committed to maintaining counterterrorism staffing at the current level rather than reassigning agents within the FBI. No conceivable increase will be sufficient to keep pace with the anticipated case inventory and intensified enforcement activity. The FBI is opening new corporate fraud investigations at a rate of about one per day, and there are approximately 560 related investigations already pending, including large-scale inquiries into potential wrongdoing at Fannie Mae, Freddie Mac, AIG, Lehman Bros., Bear Stearns, and many subprime mortgage lenders.

The economic conditions that led to the federal bailout of troubled financial institutions have also exacerbated issues of institutional competence. Even with sufficient resources, federal agents would depend on some level of outsourcing to conduct investigations. They face an unwieldy number of cases, and they confront the expanding variety and complexity of corporate fraud as well. Financial instruments grow ever more intricate, and white-collar crime tends to be private. Both of those features place enforcers at a critical informational disadvantage relative to corporate insiders. The business environment also crosses multiple jurisdictions, and technology increases the specialized knowledge required to evaluate economic crime.
Setting aside the issue of forensic expertise, the sheer volume of evidence makes every case of accounting fraud or financial statement manipulation labor-intensive. Agents could not review millions of pages of documents and interview hundreds of potential witnesses in each investigation on their own.

Moreover, the infusion of trillions of dollars in taxpayer funds into the financial system requires more oversight and opens up new avenues for criminality. Any rapid distribution of government resources—recent examples include the Iraq reconstruction and the aftermath of Hurricane Katrina—risks waste and abuse. The unprecedented scope of the cash outlay to financial institutions, combined with complex initiatives like government subsidies to private investors buying toxic assets, necessitates significant policing. The Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") has expressly outsourced some investigative functions in the conventional way, by retaining outside legal, consulting, and accounting firms at government expense. Those firms, however, will assist primarily with internal controls at TARP. SIGTARP already is launching broader investigations into the misuse of bailout funds, and ground-up forensic accounting on this scale would be impossible. For these new initiatives as well, regulators will supplement limited enforcement resources by commandeering the fruits of corporations' own internal investigations.

II. Drawing Insiders Out: Cooperating Employees and Compliance Professionals

Without the assistance of corporate insiders, prosecutors would find it difficult if not impossible to identify which individuals within a firm are involved in criminal activity. Responsibility may be shared among departments, documents may be spread among different locations, and employees may be transferred. The DOJ has acknowledged that, because of these obstacles, corporate cooperation is "critical in identifying culprits and locating relevant evidence."

That corporations' own compliance efforts should augment government inquiries has long been recognized and is codified in the organizational sentencing guidelines, which provide for reduced penalties where corporations cooperate by providing sufficient information "for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct." DOJ policies on DPAs, however, go a step further in terms of prosecutors' ongoing access to corporations and the assistance prosecutors require with identifying culpable employees and com-
pleting investigations. DPAs effectively convert private investigative activity into a prosecutorial entitlement. The Thompson Memo and its successors—which set forth the factors prosecutors should consider in weighing a corporation's cooperation and determining whether to indict—cite both "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."

And DOJ officials have described complete cooperation as nothing short of producing "all the witnesses the government will need to figure out exactly what happened." The pressure on a corporation to avoid indictment, enter into a DPA, and comply with its terms creates heavy prosecutorial leverage. Prosecutors use that power not only to obtain historical reports and the records of internal investigations but also to direct surrogate interviews with employees and impose managerial reforms.

Early criticisms of DPAs focused on potential abuses of prosecutorial authority and the lack of accountability. In a November 2006 editorial in the Wall Street Journal, Richard Epstein called them sinister, likened them to Stalinist purge trials, and decried their negative impact on corporate governance. The coercion of individual employees has also been a significant concern. Compulsory cooperation becomes problematic when prosecutors are overcoming their comparative informational disadvantage by obtaining from corporate intermediaries evidence they could not lawfully seek themselves. In the KPMG prosecution, for example, the DPA required the corporation to produce "employees who would talk, notwithstanding their constitutional right to remain silent." DPAs thus implicate prosecutors in possible Fifth Amendment violations, as well as demands that may run afoul of the Sixth Amendment, such as the requirement to waive attorney-client and work product protections, and pressure to withhold attorneys' fees from employees.

The perceived balance of power between firms and prosecutors has shifted somewhat, however. Few commentators would now describe corporations as hapless. Business interests effectively lobbied Congress and pressured DOJ to change its position with regard to privileges and indemnification. The Second Circuit also ruled, in United States v. Stein, that a corporation's decision not to compensate employees for attorneys' fees, when it results from prosecutorial pressure, is unconstitutional. Employees still find themselves the scapegoats in settlements between employer and enforcer, but it is increasingly clear that when prosecutors procure investigative assistance from corporations, the abuse of the government's bargaining position is only one side of the problem. Toward the end of the Bush administration, editorials began
to accuse DOJ of “going soft on corporate crime” by allowing companies to enter into DPAs.18

With some blame for the financial crisis placed on inadequate regulatory enforcement, DPAs are now being scrutinized to see if firms, for their part, used them to mask systemic failures and avoid other forms of liability. The compliance industry is populated by former prosecutors and regulators with the expertise to head off scrutiny or preempt investigations, and outsourcing investigations may place excessive discretionary authority in their hands. Corporations acquiesce in DPAs because of a clear preference to avoid indictment, but there may be other advantages as well. All things considered, firms might prefer to partner with the government and to seek deferred criminal resolutions than to face broader civil enforcement and sanctions, or “private attorneys general” bringing bounty-hunter suits like shareholders’ actions.19

Corporations may also benefit from what is ultimately an ad hoc approach to enforcement. Prosecutors’ deep dependence on insider information can lead to charging decisions governed by the degree of a firm’s cooperation and the employees it can deliver rather than compatibility with larger enforcement goals. Compliance professionals can also frame prosecutions in advantageous ways. Whether prosecutors already have engaged the corporation or the firm self-reports, blame is pushed down through organizations. Reliance on private partners to build cases means that the regulated entity exercises significant control over where that blame lands. Corporate influence over the course of the investigation arises, for instance, when corporations discover fraud by employees but choose to settle with culpable agents rather than summon regulators. Firms weigh the potential taint of a prosecution and the risk of a parallel civil suit against the internal deterrent effect of charges, the advantages of deploying mandatory federal restitution provisions, and the dangers of inviting prosecutors to discover wide-ranging misconduct. In some cases, firms determine that it is desirable to get the government’s attention, either because the firm has exposure to liability and wants to establish early cooperation or because the firm is truly a victim of employee misconduct. To facilitate the approach to the government, corporations often retain private investigative and accounting firms to conduct inquiries, record witness statements, provide grand jury testimony to the government, and prepare “courtroom-ready” cases for FBI agents and prosecutors.

One risk consulting firm, for example, distributes training materials to private investigators on “packaging the corporate investigation for prosecution.”20 Kroll recommends that clients take actions that closely track a typical prosecutorial assessment: identifying applicable statutes, ensuring that

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the statute of limitations has not run on prosecution, determining how each element of the relevant statutes can be satisfied, and confirming that documentary evidence and witness statements are sufficient to prove the case. Prosecutors understandably favor cases where private investigators have thus minimized the necessary effort and expenditure and increased the likelihood of success.

Whether corporate misconduct even amounts to criminality and, if so, who ought to be charged are always difficult questions to answer.\textsuperscript{21} Is it enough, for example, if financial analysts relay one opinion to clients and a different one to colleagues about an investment? Prosecutors ought to answer those questions with reference to legal interpretation and regulatory policy and not evidentiary ease. Yet corporate management can exploit its informational advantage to influence which investigations proceed, who gets prosecuted, and what wrongdoing remains concealed.

This direct link between corporations and the government is in part a consequence of the weak players self-regulatory organizations have become. Private sources of information independent of corporations—such as the National Association of Securities Dealers ("NASD") and the enforcement arm of the New York Stock Exchange ("NYSE") (consolidated in 2007 into the Financial Industry Regulatory Authority ("FINRA"))—atrophied in the deregulated environment of recent years. Other intermediaries who possess valuable information—such as credit ratings agencies (which may actually be incentivized now to cooperate in investigations because of their need for improved public relations)—have been discredited by the part they played in the financial crisis. As a result, the government has relied increasingly on compliance industry professionals, even though their role is ultimately to advocate for the corporations at issue.

Even setting aside the possibility of deliberate manipulation in a firm’s favor, there is a question whether regulators and prosecutors have particular expectations for private cooperation and focus on information that comports with established views and comes packaged in a recognizable form. Whistle-blowers who are neither compliance professionals nor corporate insiders may have a hard time delivering their message. The most glaring recent example is the SEC’s deference to industry insider Bernard Madoff. Harry Markopolos, a relative outsider, repeatedly warned the SEC about Bernie Madoff’s multi-billion-dollar Ponzi scheme between 2000 and 2008, but the agency failed to verify Madoff’s trades through any third parties.\textsuperscript{22} The SEC, of course, is heavily overburdened, but it was also widely regarded as in thrall to the hedge funds during this period. Madoff had a close relation-
ship with regulators, sat on an SEC advisory committee, and served as chairman of the NASDAQ. The inspector general’s report on the Madoff investigation attributes some of the lackluster enforcement to agency bias in favor of reputable broker-dealers and notes that SEC staff discounted Markopolos’s detailed complaints because of his outsider status.23

Some recent cases underscore other potential dangers of prosecutors’ special relationships with particular private partners. In one instance, prosecutors filed charges that were not ultimately supported by the evidence after receiving the fruits of an investigation by Davis Polk & Wardwell, a private law firm representing the board of directors. Auto-parts manufacturer Collins & Aikman entered into a NPA with the government in 2007. In March 2007, the U.S. Attorney announced that agreement and the related criminal indictments of several individuals for misleading investors with false financial statements.24 Charges against CEO David Stockman included securities fraud, bank and wire fraud, false statements, and obstruction. Prosecutors also charged J. Michael Stepp, the company’s chief financial officer ("CFO"), David Cosgrove, its former controller, and Paul Barnaba, ex-director of financial analysis. According to the indictment, the executives conspired to falsify key financial metrics, including prematurely recognizing cost reductions from supplier rebates.25 Four other Collins & Aikman executives pled guilty in the case. Almost two years later, in January 2009, the U.S. Attorney requested dismissal of the indictment against Stockman, Stepp, Cosgrove, and Barnaba. In filing for a nolle prosequi, prosecutors cited only their “renewed assessment of the evidence, including evidence and information acquired after the filing of the indictment.”26 Defense lawyers, however, placed blame for the precipitous charges on Davis, Polk & Wardwell’s “fast, rushed” investigative report and the government’s willingness to outsource the investigation to the firm.27

Compliance professionals not only seek to protect corporate clients by framing individual cases but also may have exposure to criminal or civil liability themselves. When they fail at their oversight responsibilities or participate in deceptive conduct, it is in their best interests to construct a narrative in which they are blameless. Consider, for example, the Metropolitan Mortgage & Securities case of 2007. In executive Thomas Turner’s trial, one defense theory was that witnesses from accounting firm Ernst & Young accused Turner of misrepresenting the nature of transactions in order to minimize the firm’s own negligence. In parallel civil proceedings, the accounting firm was exposed to hundreds of millions of dollars in potential liability.28
Furthermore, experts often have the incentive to shape prosecutorial strategies to maximize the market for their services. Legal intermediaries in the compliance industry are “self-interested private actors with a stake in the interpretation of regulatory policy.” To the extent they are successful at manipulating enforcement priorities, they may also appropriate “more than their fair share of the social benefits of legal policy, and under[ine] its efficacy and efficiency in the process.”

The formation of investigative partnerships between private actors and the government imports the same flaws found on the private side, including self-dealing or inaccuracy, into any case pursued by the government. Although outsourcing solves the resource problem and bridges the informational divide, those gains may come at a cost. DOJ’s great strength is its autonomy: federal prosecutors are not generally beholden to the regulated industry or prone to capture, and they are subject only to diluted political considerations. But turning to the private sector to complete significant investigative tasks means relying on evidence that third parties gathered and analyzed with a self-interested slant. With no formal guidelines for interaction with the private sector, whether cases are brought and how they are resolved turns too frequently on the serendipity of inside information and makes prosecutors susceptible to manipulation by the compliance industry.

This aspect of DPAs is ripe for reform, and some initiatives are under way to better calibrate public/private boundaries. Allocating additional resources to investigators and prosecutors will make them less reliant on private cooperators. The pending Accountability in Deferred Prosecutions Act of 2009 also calls for greater transparency, published guidelines on when to enter into DPAs, and an oversight role for the courts in approving agreements to ensure that they comport with DOJ’s guidelines and the “interests of justice.” DOJ itself, however, is best positioned to establish guidelines and procedures that allow prosecutors to benefit from private compliance without depending on it. Cooperators and compliance professionals can maximize efficiency, but prosecutors need some internal checks to help minimize inequities and maintain independence while partnering with them. The Filip Memo recently addressed some of the coercive aspects of the relationship with cooperating employees and corporations by directing prosecutors not to seek waivers of attorney-client privilege or work product protection and not to consider whether corporations have advanced legal fees to employees when evaluating cooperation. The more nuanced problem in the public/private corporate enforcement partnership is the makeshift way in which it can produce targets of prosecution. DOJ should also establish internal
review procedures for both indictments in corporate fraud cases and DPAs. Applying some consistent standards could ensure the accuracy and quality of information from private partners and prevent the aggregation of too much discretionary authority in corporate hands.

III. Installing Outsiders in Corporations: Compliance Monitors

Another innovation of DPAs subject to substantial scrutiny is the use of monitors to oversee compliance with the terms of the agreement. Full consideration of the use of monitors is beyond the scope of this chapter and is addressed in more detail elsewhere in the volume. But aspects of the monitor's role shed some light on the extent to which DPAs cross boundaries between prosecutorial decision making and corporate governance. Most DPAs mandate remedial measures, including prosecutor-designed compliance programs and, in some cases, personnel changes and structural reforms. About half of all DPAs also include monitoring provisions that effectively install government representatives within corporations to review and evaluate internal controls. Once there, many monitors take on an intrusive role in corporate governance as well.

Requiring a regulated entity to enter into a private contract with a monitor as part of its settlement of criminal charges raises structural issues, particularly because monitors report to prosecutors and not to the courts. While corporations are not technically required to accept monitors' recommendations, prosecutors consider that response when making the ultimate determination whether the firm has complied with the terms of a DPA. The Obama administration's recent role in forcing out the General Motors CEO was viewed as a "dramatic government intervention[] in private industry," but prosecutors have been using DPAs to demand similar managerial changes for several years. For example, the federal monitor overseeing compliance with the Bristol-Myers Squibb DPA successfully sought the CEO's ouster at a September 2006 board meeting.

Installing a monitor allows DOJ to maintain a presence within the corporation without drawing on government resources. Monitors of DPAs are paid according to private contracts with the corporation. In theory, monitors also address the institutional competence issue because they have expert knowledge of the industry. According to the DOJ's defense of the use of monitors:

[T]he appointment of a corporate monitor can have distinct advantages for the government and the public. Monitors allow the government to ver-
ify, through the work of an independent observer, whether a corporation is fulfilling the obligations to which it has agreed. A monitor also may provide specialized expertise to oversee and ensure compliance with complex or technical aspects of a corporate agreement, in areas where prosecutors may lack such skills.38

In practice, however, many monitors are former prosecutors, regulators, or retired judges, who generally bring the same set of skills—legal analysis rather than corporate governance—that prosecutors themselves have. Of the forty monitors appointed since 2000, thirty are former government officials.39

DPAs also fail to make clear the scope of the monitor’s responsibilities. In some cases, monitors act as the eyes and ears of prosecutors and merely submit reports and recommendations; increasingly, they are the voice of the government as well.40 The DPA for medical device company Zimmer Holdings, for example, states that the monitor is there on behalf of the government, empowers him to retain other professionals at the company’s expense, and requires access to governance decisions.41 Monitors gain these powers without accompanying duties to shareholders. Most monitors have neither the expertise nor the incentive to profit-maximize, yet corporations do not generally have the authority to terminate and replace them. And once monitors are installed, information flows directly through them to the government because no privileges apply to their consultations with the corporation.

In addition, monitors raise their own set of self-dealing concerns. The appointments can be highly profitable, and many DPAs specify the monitors that corporations must hire. Former Attorney General John Ashcroft’s consulting firm notoriously received up to $52 million for monitoring Zimmer after the U.S. Attorney specified him in the DPA.42 When prosecutors direct sole-source contracts to former colleagues in the private sector, questions about conflicts of interest arise.43 Some structural suggestions for mitigating potential conflicts can be drawn from the EPA’s efforts to maintain an arms-length financial relationship when implementing Supplemental Environmental Projects (“SEPs”). SEPs often form part of settlements between the EPA and industry in Clean Air Act enforcement. They are “environmentally beneficial projects” that violators can undertake over and above their legal obligations under the injunction entered in the case. In exchange, companies can receive decreased penalties, at the discretion of the EPA. The EPA does not require or impose SEPs; the regulated entity makes a proposal for DOJ approval. The EPA’s SEP policy provides that the agency “may not play any
role in managing or controlling funds" set aside for performance of the SEP. The EPA allows the regulated entity to contract with third parties to implement the projects but will not itself endorse private organizations because “a close working relationship with such organizations could create the appearance that EPA is using the organization[s] as a means to indirectly manage or direct SEP funds.”

Similar measures could address the coercive appointments of monitors and also maximize their independence within the corporation. The Accountability in Deferred Prosecutions Act is one attempt to contend with this issue. It would require rules for the disinterested selection and compensation of independent monitors, including the creation of a national list of organizations and individuals with the necessary skills and expertise and development of a preapproved fee schedule. DOJ has taken self-regulatory action, meanwhile, to address the structural flaws and underlying conflicts. The Morford Memo directs that Main Justice be notified of any DPAs specifying a monitor and instructs prosecutors to consider both the costs to the corporation and the impact of a monitor on its operations before imposing one. The Morford Memo also precludes individual prosecutors from making unilateral decisions to appoint or veto particular monitor candidates and requires instead that the deputy attorney general approve them. In terms of the scope of the monitor’s authority and duties, the Morford Memo states that the monitor “is not an employee or agent of the corporation or of the government” and further clarifies that a monitor’s chief responsibility is to prevent recurring misconduct rather than to investigate historical wrongdoing.

One issue the Morford Memo does not address is the high level of compensation that monitors receive. The contracts are so lucrative that monitors’ own independence is in doubt, and they may come to identify with the corporations they are supposed to be monitoring. Ratings agencies like Moody’s, Standard & Poors, and Fitch provide an interesting analogue. Although in theory they serve as a check on financial institutions, they are compensated by the same firms whose products they rate, which has prompted proposals to shift fees to end users. The 2008 financial crisis exposed the fact that models could be gamed in favor of both issuers and investors, as many of the products that precipitated the market downturn received triple-A ratings from the agencies. To address these potential distortions in the appointment of monitors, proposals for published fee schedules, advance work plans, and reporting requirements all merit consideration.

Whether monitors are effective in ensuring compliance is also open to question. Take the example of AIG, the insurance company that received
approximately $180 billion in federal funds—the largest government bailout of a private firm in U.S. history—after it sustained staggering losses from insurance policies on subprime mortgages. AIG had entered into two different DPAs and had an on-site monitor throughout the four-year period preceding its near collapse in September 2008. The monitor—who received $20 million in fees from the insurer—had oversight responsibility for the very same financial-products group that wrote billions in credit-default-swap contracts. He was also tasked with examining internal controls on financial reporting and overseeing compliance programs.  

IV. Signaling for Broader Compliance: The Impact of Partnerships on Deterrence

The AIG example is but one indication that, despite its efficiencies, regulation by prosecutors via third-party intermediaries may not be working all that well. DPAs increase cooperation against employee defendants and thus have an impact according to metrics of criminal adjudication, but they fall short with regard to the goals of regulation. There have been mixed results in terms of specific deterrence at corporations receiving DPAs, and general deterrence may actually suffer.

The nature of criminal enforcement is to punish, and the Corporate Fraud Task Force set out to “ensure just and effective punishment of those who perpetrate financial crimes.” The ability to deputize corporate insiders does expedite the prosecution of individual defendants and increases the total number of indictments and convictions. By exerting pressure to cooperate, DPAs have thus increased symbolic punishment and some retributive effects.

But DOJ’s approach to corporate crime has evolved so that it is not solely, or even primarily, retributive. Prosecutors envision DPAs as mechanisms of industry-wide deterrence. The Thompson Memo and its successors describe enforcement as “a force for positive change of corporate culture.” In a recent defense of the agreements, DOJ officials further explained that “by requiring solid ethics and compliance programs, the agreements encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates.” As many commentators have detailed, DPAs have the structural potential to achieve prospective compliance and systemic reform. The partnerships with private parties that DPAs facilitate are derived from regulatory models and should be similarly effective at establishing norms. In theory, they allow prosecutors to act as
“norm entrepreneurs,” not only setting standards but also communicating values.

It is not clear, however, that forming public/private partnerships has led to additional internalization of compliance norms. To date, there is little evidence that prosecutors have succeeded in filling the gaps left by deregulation. This is in part because prosecutors are oriented to a command-and-control approach—reflected, for example, in the demands placed on cooperating employees—rather than the collaborative ideals of horizontal negotiation described by administrative law scholars. It is also because, despite their resemblance to regulation, DPAs are still piecemeal adjudications of individual corporate liability that only occasionally have industry-wide impact.

The limited expressive success of DPAs may in part be a product of the regulatory era in which they have operated. The financial crisis exposed the gaming that has flourished throughout corporate culture, and the availability of DPAs ultimately fosters this norm. DPAs suggest that corporate actors can “bear the risk of legally questionable business practices” and later cut a deal if discovered. Many regulations are so lax, and loopholes so large, that corporations can profit-maximize by bending but not quite breaking rules. Compliance officers, ethics professionals, and risk assessors were virtual nonentities while financial institutions were leveraging heavily and signing on collateralized debt obligations. The private side of the enforcement partnership has not held up its end as an overseer, and prosecutors have not been particularly good at distinguishing effective compliance programs from cosmetic ones. Up until this point, an insincere but facially adequate compliance program accomplished the goal of deflecting regulation and prosecution almost as well as a robust one.

Events may have addressed this failure in hybrid enforcement in a way that no reform proposal could. The 2008 market meltdown provides an occasion to rethink enforcement strategies and correct for some of the distortions in DPAs. Rising fear and renewed understanding about the harm of corporate malfeasance create an opportune moment to transmit norms of compliance to firms. The partnership model requires, and has been missing, a sense of common cause. Public calls for increased regulation and a clamor to assign responsibility recall the post-Enron environment, but there is now a much more profound sense on the part of corporations themselves that compliance is linked to survival and not just a protection against indictment. Actively managing risk made the difference between some firms that minimized losses, such as teachers' pension fund TIAA-CREF and J. P. Morgan, and others that failed, such as Lehman Bros., Bear Stearns, and Merrill

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Lynch. Goldman Sachs’s announcement of blockbuster quarterly earnings in July 2009, the highest in its 140-year history, raises the question whether the firm internalized the lessons of its own ability to weather the risk-management storm. The profits reflect record revenues in the units trading mortgage and other credit instruments, and a steady increase as well in the firm’s value-at-risk (a statistical model of potential portfolio losses and exposure to market risk). This is among the disheartening signals that whatever window the financial crisis opened for regulatory reform and increased compliance already has closed. The market collapse did, however, prompt at least a temporary suspension of the “bonus culture.” In that ongoing conversation about shared interests in the health of financial firms, there is a chance to align personal, institutional, and governmental objectives through regulatory cueing. A window has opened as well to the “publicization”—in terms of the extension of norms of accountability—of the private corporations enlisted as enforcers by the government.

Although concerns about conflicts of interest arise when executives from the private sector move in and out of government positions, that process itself has some potential to extend norms of compliance in one direction while increasing financial expertise in the other. Investment bankers from Goldman Sachs occupy key regulatory positions, including leadership posts at the Treasury Department, TARP, the Commodity Futures Trading Commission, and the Federal Reserve. The extent of the firm’s influence in the current administration has garnered particular attention, but it is only one example of the revolving door between the market and regulators. Prosecutors have long continued their careers as compliance professionals, and it now appears that if the ranks of federal regulators swell, the inflow will include some laid-off employees from the financial industry. At an April 2009 job fair in New York, the shift in financial power from Wall Street to Washington was visibly represented by hundreds of veterans of financial institutions lining up to interview with the SEC, the FBI, the Federal Deposit Insurance Corporation, and other agencies.

V. Expanding the Role of Regulators: The Need for an Integrated Approach

Prosecutors are now better positioned to signal that the government and corporations have a mutual interest in preventing broader economic harm, but they may also have discovered that administrative enforcement best serves that interest. DOJ functionally makes regulation through DPAs by using them to
establish what conduct merits sanction and to enlist corporations in preventing it. In the end, though, this only approximates regulation. Many DPAs are not published, and press releases do not make lasting policy. With rare exceptions like the medical device industry, regulation by settlement reaches only a fraction of the relevant firms, and enforcement is unpredictable and inconsistent.

Nor is it clear that prosecutors should address all wrongdoing associated with the failure of financial institutions. The crisis appears to be primarily the result of the uncalculated risk-taking and unbridled greed that flourished in a deregulated environment, rather than the product of criminality per se. A common response when economic declines coincide with revelations of corporate wrongdoing is to create new crimes. That may meet some political objectives and placate an angry public, but it only perpetuates the current model of ad hoc targeting and will not fill the enforcement gap. With more than 4,000 federal laws already on the books, there are adequate tools to address every species of fraud that may have been perpetrated. The existing mail and wire fraud provisions alone could be interpreted to fit thousands of cases of misfeasance, but it is not realistic or practical to criminally punish every bad actor who contributed to the economic collapse. Even with regulatory features, criminal enforcement focuses on people as causal agents; administrative regulation is better situated to deal with failed products, like credit default swaps and value-at-risk models. Just because prosecutors have a point of entry to approach corporate compliance criminally does not mean that they should pass through it. Some high-profile prosecutions of misfeasance will emerge, and to the extent restitution and asset recovery are possible retrospectively, prosecutors should bring charges against entities and individuals as necessary to accomplish it. But backward-looking criminal liability will do little to restore the economy, and hearings and investigations will more likely serve to set the stage for prospective civil regulation.

Although DPAs resemble regulation, they sometimes reproduce its worst features (like gaming and self-dealing) without the advantages of industry-wide reform through horizontal regulation. Regulators have been behind the scenes of many DPAs while pursuing parallel enforcement and have formed similar relationships with the compliance industry. If a staffed-up and better financed SEC takes a more active role in policing corporations, and civil authorities assume responsibility for evaluating compliance programs, public/private partnerships could become more productive. An expert regulatory response, framed with administrative accountability, might better establish self-regulation and achieve "synergy between punishment and persuasion." Once relieved of the compulsion to operate as de facto government agents,
corporate insiders, the private bar, and the compliance industry may be more effective at stimulating compliance. When self-regulation fails, professional regulators can adjust the rules accordingly and broadly enlist the assistance of the private sector in enforcing them. Criminal cases—including indictments and threatened indictments—should occupy the space at the top of the enforcement pyramid. Prosecutors may function best as the “benign big gun” and send the strongest signals to comply with a few well-chosen indictments rather than many DPAs.

VI. Further Entangling Public and Private Interests: Regulators as Stakeholders

The market collapse shifts the paradigm not only of public and private roles but also of public and private interests. The government and corporations share common cause in economic health generally and in some companies specifically. Where the government now has partial ownership of companies, regulators are navigating new entanglements. The idea that the regulatory system involves arm’s-length oversight of market actors making private investment decisions no longer holds. As former SEC chair Christopher Cox has explained, “When the government becomes both referee and player, the game changes rather dramatically for every other participant.” The government’s role as enforcer and stakeholder combined introduces new complications, and addressing the variety of potential conflicts will be a difficult but important task as regulatory roles are redefined.

With its 80 percent stake in AIG, for instance, the government could literally get a seat in the boardroom, although the presence of regulators there might not be the most effective way to protect taxpayers’ investment. Officials have repeatedly disavowed any interest in making operational decisions for financial institutions accepting government funds, but curbs on executive compensation are one example of a pending intervention, and action on investment preferences and corporate governance policies could follow.

Another recent example involves Bank of America’s acquisition of Merrill Lynch and the role that the Treasury and the Federal Reserve may have played in negotiating the $50 billion merger. Chairman Bernanke and Secretary Paulson allegedly cautioned against disclosure of Merrill Lynch’s deteriorated value to Bank of America shareholders, while threatening personnel changes and promising additional TARP funds. As a growing number of financial institutions require scaffolding with government funds, questions arise whether regulators will reveal negative information that could jeopard-
dize the replacement of federal investment with private capital. Disclosures that diminish the value of the government’s stake harm taxpayers generally, but guarding material information exposes public shareholders to risk. The SEC is tasked with regulating from a layer above, scrutinizing transactions for the protection of shareholders even where the government’s broader interest in stabilizing the financial markets counsels against regulation. Should a corporation in which the government has a substantial stake come under criminal investigation by DOJ, how that new dimension of the public interest factors into the calculus whether to indict, negotiate a deferred prosecution, or decline the case altogether also remains to be seen.

VII. Conclusion

Given the enormous variety and complexity of corporate crime and the tight resource constraints, prosecutors have taken the necessary step of enlisting corporations and compliance professionals in enforcement. DPAs enable them to commandeer the fruits of private investigations by making the threat of indictment a bargaining tool. Prosecutors not only appropriate inside information but also install outside observers in corporations. DPAs can impose monitors and specify detailed compliance provisions that approximate regulation. But despite the parallels to regulatory methods, DPAs retain the piecemeal resolution that characterizes adjudication and import as well as the conflicts of interest that are the most significant drawback of public/private partnerships in regulation. Nor have they achieved the advantages of industry-wide regulation or succeeded in inculcating broad norms of compliance. The financial crisis itself now sends a strong signal of mutual interest in risk management and good corporate citizenship and thus corrects for some of the expressive shortcomings of regulation by prosecutors. It also demonstrates, however, that selective criminal enforcement—even according to a regulatory model—cannot substitute for robust regulations themselves.

NOTES


12. See Comey Interview, supra note 1, at 1–2.


17. See United States v. Stein, 541 F.3d 130 (2d Cir. 2008).


22. See Report of Investigation, United States Securities and Exchange Commission Office of Inspector General, Case No. OIG-509, Investigation of Failure of the SEC to
23. See id. at 17.
30. Id.
33. See infra Vikramaditya Khanna, Reforming the Corporate Monitor?
38. Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to John Conyers, Jr., Chairman, House Committee on the Judiciary (May 15, 2008) [hereinafter Benczkowski Letter].
39. See id.


44. Memorandum from John Peter Suarez, Assistant Administrator, EPA, to Regional Counsels, Enforcement Managers, Media Division Directors, and Enforcement Coordinators, Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds, pt. II, ¶ B (Dec. 15, 2003), available at http://www.epa.gov/compliance/resources/policies/civil/seps/seps-thirdparties.pdf.


49. See Filip Memo, supra note 16.

50. Benczkowski Letter, supra note 38, at 3.


54. Lichtblau, supra note 42 (quoting Vikramaditya S. Khanna).


59. See Freeman, supra note 52, at 1351.

62. See supra Jennifer Arlen, Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Imose Structural Reforms.
64. See id. at 35–41.
66. See Epstein, supra note 14.