DECLINING CORPORATE PROSECUTIONS

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ABSTRACT

In the aftermath of the Global Financial Crisis, people across the United States protested that "too big to jail" banks were not held accountable after the financial crisis. Little has changed. Newly collected data concerning enforcement during the Trump Administration has made it possible to assess what impact a series of new policies has had on corporate enforcement. To provide a snapshot comparison, in its last twenty months, the Obama Administration levied $14.15 billion in total corporate penalties by prosecuting seventy-one financial institutions and thirty-four public companies. During the first twenty months of the Trump Administration, corporate penalties declined to $3.4 billion in total penalties, with seventeen financial institutions and thirteen public companies prosecuted. These trends build over time. In each year, blockbuster cases come and go, creating swings in fines. However, consistent with these data, this Article describes changes in written policy, practice, and informal statements from the Department of Justice that have cumulatively softened the federal approach to corporate criminals. This Article also describes continuity between administrations. A rise in corporate declinations, for example, represents a continuation of Obama Administration policy. A decline in use of corporate monitors similarly reflects prior policy. The steady and low level of individual charging in corporate cases reflects an ongoing lack of success in efforts to prioritize individual prosecutions, exemplified by the 2015 "Yates Memo." That policy, like others, has been formally relaxed. The series of DOJ corporate prosecution policy changes has also been accompanied by institutional shifts. For example, high-level vacancies within the DOJ and other enforcement agencies may compromise ability to coordinate resolution of complex cases. This Article concludes by proposing structural changes, such as independent corporate enforcement functions, to enhance capacity and prevent pendulum shifts in enforcement. How we handle corporate crime goes to the root of power imbalances in the economy that produced the financial crisis. If we still have not learned the lessons of the last financial crisis, the next one cannot be far ahead.

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INTRODUCTION

Corporate prosecution penalties are declining in the United States at the federal level, where the most significant and complex cases have long been brought.[1] The corporate charging policies and practices of the Department of Justice have evolved over the past three decades.[2] In the 1990s, large corporate prosecutions were a novel phenomenon.[3] By the end of the decade, then-Deputy Attorney General Eric Holder cemented the growing importance of corporate prosecutions in a novel memo regarding charging corporate defendants.[4] In the early 2000s, a new approach revolutionized corporate prosecutions, as the DOJ emphasized large-scale settlements using deferred and non-prosecution agreements.[5] By 2015, federal prosecutors were charging more financial institutions than ever before.[6] Prosecutors began to use criminal statutes such as the Bank Secrecy Act and the Foreign Corrupt Practices Act (FCPA), which had been neglected in the past.[7] The changes were marked, albeit incremental, and were designed to strengthen corporate prosecutions.[8] In 2017 and 2018, however, the DOJ made a series of policy changes designed to reduce the impact of criminal prosecution on corporations.[9] This Article presents a set of empirical analyses of changed practice and policy concerning corporate prosecutions.

Comparing the penalties imposed in federal corporate prosecutions in the first twenty months of the Trump Administration with the penalties imposed in such cases in the last twenty months of the Obama Administration provides a snapshot of these changes. Updated data from the Duke and UVA Corporate Prosecution Registry show how corporate penalties have declined sharply, as have the numbers of prosecutions of public companies and financial institutions.[10] While some

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1. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 55 (2014) (providing an overview of the changing approach towards corporate prosecution during the 1990s).

2. *See id*. at 55–56.

3. *See id*. at 5, 55 (describing low average corporate penalties before 1994 and a rise in the 1990s, with a graphical illustration of the gradual rise in the 1990s).

4. *See id*. at 54–56 (providing an overview of the changing approach towards corporate prosecution during the 1990s).

5. *See id*. at 55–56 (providing an overview of the changing approach towards corporate prosecution and trends in enforcement during the 2000s); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 888–89 (2007) (describing rise in use of compliance and rehabilitative approaches towards corporate prosecutions); *see also* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006) (describing the move towards an inquisitorial system).

6. *See* Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J. F. 33, 35 (2016) (detailing changing approach towards prosecution of financial institutions).

7. GARRETT, TOO BIG TO JAIL, *supra* note 1, at 63–64.

8. *Id*. at 56 (describing goal to make federal corporate prosecutions more forceful and to more effectively obtain better results).

9. *See infra* Part III.A. (summarizing six main policy changes adopted in 2017–18).

10. *See* Brandon L. Garrett & Jon Ashley, U.VA. & DUKE U. CORP. PROSECUTION REGISTRY [hereinafter CORP. PROSECUTION REGISTRY], http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html. This registry aims to provide the most complete resource available on federal organizational prosecution,

lawyers and journalists have commented on the changes in tone, policy, and outcomes, others have disputed whether there has been a change.[11] In early 2017, then-Attorney General Jeff Sessions stated that corporate misconduct would remain a central priority during his tenure, despite the changed focus on immigration, drug, and violent offenses.[12] This Article provides the first empirical analysis of corporate prosecutions during the time period that followed. This empirical analysis describes a subsequent decline in corporate penalties and enforcement.[13] This decline was reflected in a series of policy changes, which this Article details in Parts I and II. Part I also describes changes in practice not necessarily reflected in policy, in which more lenient outcomes have resulted—particularly in cases involving banks.

In Part II, this Article aims to assess whether changes imposed towards the end of the Obama Administration, some of which remain in place formally, have succeeded in reorienting prosecutors towards individual prosecutions. Past research has found that typically, individuals were not prosecuted accompanying corporate

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including declinations, acquittals, trial convictions, deferred and non-prosecution agreements, and plea agreements with corporations.

11. A substantial New York Times piece developed data from several sources, including the Duke/UVA Registry, concerning civil and criminal corporate enforcement. *See* Danielle Ivory, Ben Protess & Robert Gebeloff, *4 Takeaways From the Trump-Era Plunge in Corporate Penalties*, N.Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/us/trump-corporate-penalties-sec-justice.html; *see also* Rick Claypool, *'Law and Order' Trump is Soft on Corporate Crime and Wrongdoing*, PR WATCH (July 30, 2018), https://www.prwatch.org/news/2018/07/13374/law-order-trump-soft-corporate-crime-wrongdoing; James Lartey, *Corporate Penalties Dropped As Much As 94% Under Trump, Study Says*, GUARDIAN (July 25, 2018), https://www.theguardian.com/us-news/2018/jul/25/trump-corporate-penalties-drop-public-citizen-study; Kadhim Shubber, *Antitrust Prosecutions in US Fall to Lowest Level Since 1970s; FT Analysis*, FIN. TIMES (Nov. 29, 2018), https://www.ft.com/content/27a0a34e-f2a0-11e8-9623-d7f9881e729f; Victoria Graham, *Jeff Sessions' Corporate Friendly Approach Likely to Outlast Him*, BLOOMBERG L. (Nov. 7, 2018), https://news.bloomberglaw.com/mergers-and-antitrust/jeff-sessions-corporate-friendly-approach-likely-to-outlast-him-2; Jocelyn E. Strauber & Micah F. Fergenson, *DOJ Policies Aim to Reduce Enforcement Burden on Cooperating Entities*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM (Jan. 17, 2019), https://www.skadden.com/insights/publications/2019/01/2019-insights/doj-policies-aim-to-reduce-enforcement-burden. However, citing to Gibson & Dunn data, one commentator describes a rise in corporate criminal penalties. Christopher H. Casey, *2018 Data Show No Slowdown in Corporate Prosecution At DOJ*, DUANE MORRIS (Jan. 16, 2019), https://blogs.duanemorris.com/whitecollarcriminallaw/2019/01/16/2018-data-show-no-slowdown-in-corporate-prosecutions-at-doj. Yet, that report, as discussed *infra* note 39, relies on billions in fines paid by Petrobras to Brazilian authorities, in a case initiated in the prior Administration. The foreign portion of the penalty should not be considered towards 2018 totals, in my view, and further, it represents a legacy case that does not shed light on current DOJ priorities and practices.

12. *See* Matt Zapotosky, *Sessions: Focus on Violent Crime Doesn't Mean Lax Enforcement for White-Collar Offenses*, WASH. POST (Apr. 24, 2017), https://www.washingtonpost.com/world/national-security/sessions-focus-on-violent-crime-doesnt-mean-lax-enforcement-for-white-collar-offenses/2017/04/24/d36d4034-2906-11e7-be51-b3fc6ff7faee_story.html (describing how then-Attorney General Jeff Sessions, speaking to an audience of compliance officers, emphasized that the new Administration would "still enforce the laws that protect American consumers and ensure that honest businesses are not placed at a disadvantage to dishonest businesses").

13. *See* CORP. PROSECUTION REGISTRY, *supra* note 10; *see also infra* Appendix A, Appendix B.

deferred and non-prosecution agreements.[14] In response to criticism of the lack of individual accountability in corporate prosecution cases, the DOJ adopted the Yates Memo approach in Fall 2015 by focusing on individual investigation and prosecution in its corporate prosecution guidelines.[15] However, the Yates Memo changes were not retroactive.[16] Four years since its adoption, one can now assess whether the policy changes have made an impact in practice. This Article details why there has been no noticeable increase in individual prosecutions. For the time period from 2001 to 2018, individuals were prosecuted alongside corporations entering deferred or non-prosecution agreements in 134 of the 497 total agreements with organizations (or 27%).[17] Moreover, the Trump Administration relaxed the application of the Yates Memo in a new set of amended guidelines adopted in Fall 2018, making less likely a future uptick in individual prosecutions accompanying corporate prosecutions.[18]

This Article also examines important respects with which corporate prosecution practices have been continuous across administrations. One change introduced in the Obama Administration was a novel form of declination in corporate cases. Companies that would otherwise be prosecuted were not prosecuted if they had substantially cooperated and self-reported.[19] The DOJ has now made that policy permanent.[20] Other changes regarding the role of corporate compliance and monitorships similarly reflect prior practice. Under the Obama Administration, the DOJ increasingly emphasized rigorous review of corporate compliance programs. In February 2017, the DOJ's Criminal Fraud Section produced new guidance on corporate compliance.[21] The Trump Administration declined to renew the Compliance Counsel who supervised that effort, but reissued and bolstered that

14. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at 83 (noting that individuals were prosecuted accompanying 89 of 255 agreements); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1853 (2015).

15. *See* Sally Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Memorandum to Heads of Dep't Components & U.S. Attorneys, Individual Accountability for Corporate Wrongdoing, at 1 (Sept. 9, 2015) [hereinafter Yates Memo], http://www.justice.gov/dag/file/769036/download. For discussion of the Yates Memo, see Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 61 (2016); Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51 (2015); Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS. L. REV. 1589 (2018).

16. Yates Memo, *supra* note 15, at 3 ("This guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo[.]").

17. *See infra* Part II.B.

18. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.210 (2018) [hereinafter U.S.A.M.]; Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018) ("We want to focus on the individuals who play significant roles in setting a company on a course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it.").

19. U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download.

20. U.S.A.M. § 9-47.120.

21. U.S. DEP'T OF JUSTICE, EVALUATION OF CORP. COMPLIANCE PROGRAMS (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

guidance document.[22] A policy adopted in October 2018 deemphasized appointment of monitors,[23] but that change is more of a continuation of prior practice because monitor use had already been uncommon.[24]

Part III turns towards an examination of the implications of six changes formally made to DOJ corporate enforcement policy as well as accompanying changes in corporate criminal enforcement practice. During the financial crisis, people across America protested that Wall Street banks, which were treated as "too big to fail," were bailed out while individuals lost their homes, savings, and livelihoods.[25] Critics also asked why "too big to jail" banks were not held accountable for crimes.[26] The result was a series of changes designed to make corporate prosecutions more stringent.[27] Now the pendulum has swung away from large-scale corporate prosecutions. Part III also describes how institutional features of the current Administration, including turnover and high-level vacancies at the DOJ and across federal agencies, have weakened enforcement. This Article seeks to document both to what degree that has occurred and how this has affected DOJ policy and practice. This Article concludes by asking why this has occurred and what the long-term effects may be, as well as their implications for corporate accountability more generally.

One response to past corporate accountability crises has been to call for the DOJ to take the lead in generating criminal accountability for corporate crime.[28] Doing so, however, relies on a non-independent agency that has politically-set priorities, even if its policies do maintain some consistency over time. In this area, there is more consistency in policy than in practice. Enforcement practices can change quite quickly as compared with policy. Enforcement that involves leniency or simply declining cases permits ready change as a path of least resistance. At the same time, the DOJ and U.S. Attorney's Offices have prioritized bringing large quantities of relatively small individual immigration, firearms, and drug cases.[29] Doing

22. Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

23. *Id*.

24. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at 175, 178.

25. *See, e.g*., David Dayen, *Banks are Too Big to Fail Say . . . Conservatives?*, AM. PROSPECT (Mar. 21, 2013), https://prospect.org/power/banks-big-fail-say-. . .-conservatives (describing Tea Party and conservative academic concerns with bank bailouts and regulation); Curt Goering, *Occupy Wall Street: If Banks are Too Big to Fail, are People Too Small to Matter?*, GUARDIAN (Oct. 17, 2011), https://www.theguardian.com/commentisfree/cifamerica/2011/oct/17/occupy-wall-street-goering (describing the Occupy Wall Street movement).

26. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions. *See also* J.S. Nelson, *Paper Dragon Thieves*, 105 GEO. L.J. 871, 873 (2017); Michael Rothfeld, *Firms Get Penalized, but Many Workers Don't*, WALL ST. J. (Jan. 17, 2014), https://www.wsj.com/articles/no-headline-available-1389905856.

27. *See* Yates Memo, *supra* note 15.

28. *See* Rakoff, *supra* note 26.

29. *See infra* Part III.B.

so may have made it more difficult to muster resources for resource-intensive white collar and corporate matters.[30] Yet, this discussion is not just a criticism of the Trump Administration's declining corporate enforcement. In Part II, I describe both the ineffectiveness of the Obama-era Yates Memo and the rise in formal corporate prosecution declinations under the Obama-era FCPA pilot program.

The U.S. needs a permanent institutional structure for corporate investigation and prosecution. If no overall strategy exists, or if the strategy is to relax enforcement, a new corporate crime wave may result. What measures can be taken to ensure more consistency across administrations? Lessons can be learned from areas within the DOJ that have experienced more stable enforcement patterns. Following the model of the Antitrust Division and the Criminal Fraud Section unit that focuses on FCPA cases—which each have dedicated resources and staffing—could help to ensure enforcement consistency over time.[31] Other countries, including France and Ireland, have recently created corporate prosecution agencies or commissions explicitly rejecting the U.S.-style approach in which prosecutors hold the reins in corporate prosecutions.[32] While any such entity will still be subject to resource constraints, prosecutorial discretion, and policy shifts, a standing entity would better weather the types of pendulum swings we are now seeing in corporate enforcement. Independent enforcement resources are needed in order to maintain a more considered and consistent level of corporate accountability.

I. THE DECLINE IN CORPORATE CRIMINAL PENALTIES

This Part describes new data from the Duke and UVA Corporate Prosecution Registry regarding all corporate prosecutions from 2001 to present. It focuses on the beginning of the Trump Administration compared with the end of the Obama Administration, and the similar transition period from the Bush to Obama Administration. Part A describes the decline in corporate penalties in 2017 and 2018. The sections that follow describe trends that were already underway during the Obama Administration. Part B describes the rise in a novel type of corporate declination from the Obama Administration in which cases that would otherwise be prosecuted are publicly declined. Part C describes trends in bank prosecutions. Part D describes changing approaches towards compliance and a new policy on prosecutors' use of corporate monitorships, with a new emphasis on avoiding the appointment of such monitors.

A. *Corporate Prosecution Data*

Comparing the last twenty months of the Obama Administration with the first eighteen months of the Trump Administration reveals substantial changes in corporate prosecutions. It was telling that in the weeks just before the Trump

30. *See infra* Part III.B.
31. *See infra* Part III.D.
32. *See infra* Part III.D.

inauguration, prosecutors announced a remarkable string of massive corporate prosecution settlements. Almost two billion dollars in corporate penalties were announced, including a $710 million plea with Barclays, a $395 million plea with Royal Bank of Scotland, and a $586 million plea with Western Union.[33] The total for the last twenty months of the Obama Administration was a remarkable $14.15 billion in total corporate penalties, with seventy-one financial institutions and thirty-four public companies prosecuted.[34] Those figures include corporate cases finalized during the waning days of the Administration. After Trump's inauguration, the vast majority of the corporate penalties imposed in criminal cases were imposed in 2017, and each was an Obama Administration legacy case. The largest such case was the $2.8 billion penalty in the Volkswagen A.G. prosecution concerning emissions fraud, which was initially filed in 2016.[35] In 2017, an FCPA case against Telia involving bribes to the Uzbek government resulted in a $548 million penalty, but the case was related to a set of cases involving the Amsterdam-based company Vimpelcom that were settled in 2016.[36] Thus, although the DOJ imposed over $10 billion in corporate penalties in 2017, the bulk were imposed in a few legacy cases along with blockbuster cases finalized in the last weeks of the Obama Administration.

During the first twenty months of the Trump Administration, excluding the legacy cases filed prior to January 20, 2017, the decline is clearer: total corporate penalties declined to $3.4 billion, with seventeen financial institutions and thirteen public companies prosecuted.[37] The decline is also apparent when viewing 2018 corporate penalties in Figure 1 below, since by 2018 there were fewer legacy cases.[38] More sobering is the fact that most of the cases with large penalties in the first twenty months of the Trump Administration were legacy cases that had been initiated and investigated under the Obama Administration.[39]

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33. *See* CORP. PROSECUTION REGISTRY, *Barclays PLC*, https://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/3071.html; CORP. PROSECUTION REGISTRY, *Royal Bank of Scotland (RBS)*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/3071.html; CORP. PROSECUTION REGISTRY, *Western Union Co.*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/3059.html.

34. *See infra* Appendix A.

35. Judgment in a Criminal Case for Organizational Defendants, United States v. Volkswagen AG, No. 2:16-cr-20394 (E.D. Mich. 2017), at 4.

36. Press Release, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.

37. *See infra* Appendix B.

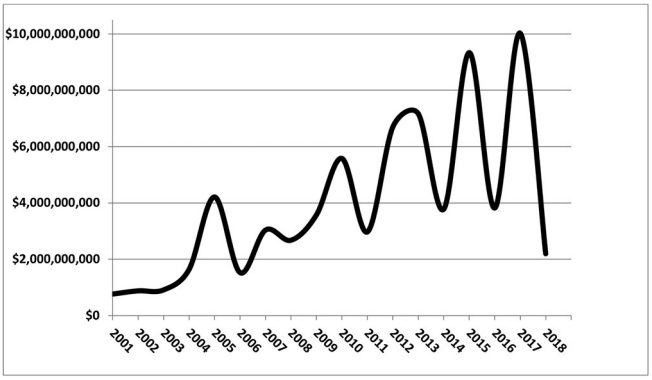
38. It is important to note that these trends build over time, and blockbuster cases come and go each year, often creating swings in fines.

39. These figures include only the fines paid to federal prosecutors in the United States. Thus, the Gibson Dunn figures show much greater penalties in 2018, since they count in the Petrobras case the vast bulk of the penalties, which were paid to authorities in Brazil. F. Joseph Warin et al., *Gibson Dunn Offers Year-End Update on Corporate Non-Prosecution and Deferred Prosecution Agreements*, CLS BLUE SKY BLOG (Jan. 19, 2019), http://clsbluesky.law.columbia.edu/2019/01/21/gibson-dunn-offers-year-end-update-on-corporate-non-prosecution-and-deferred-prosecution-agreements. These figures do not include such sums, because although U.S. prosecutors may closely cooperate

Corporate enforcement may be returning to the levels from ten years ago, just before the financial crisis. However, while the trend reflects the declining size of aggregate corporate penalties, it is not as sharp when one examines instead the number of cases filed. There continue to be many dozens of very small, chiefly environmental, corporate criminal cases. Antitrust and FCPA matters continue to be brought in similar numbers as in the past.[40] The larger cases involving public companies and financial institutions, however, have been reduced, as have the penalties imposed in such cases.[41]

Also noteworthy and easily visible in Figure 1 is that there was no noticeable change during the transition from the George W. Bush DOJ to the Obama DOJ.

Figure 1. Corporate Criminal Penalties, 2001–2018



Data from Duke / UVA Corporate Prosecution Registry[42]

Corporate fines were steadily increasing before and after the period from 2007 to 2008, and they continued to do so in the early years of the new Administration. During that time period, the DOJ corporate prosecution policy did not change; policy changes were only gradually introduced in the years to come. Nor was it a disruptive transition; there was early and orderly transition planning, and the Bush Administration cooperated in the transition to an unusual degree.[43]

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with foreign prosecutors, sums paid to those prosecutors are not U.S. penalties, and they may additionally reflect separate criminal violations abroad and harm caused to victims in foreign counties.

40. *See infra* Appendix A.

41. *See infra* Appendix A.

42. *See* CORP. PROSECUTION REGISTRY, *supra* note 10.

43. Martha Joynt Kumar, *The 2008-2009 Presidential Transition Through the Voices of Its Participants*, 39 PRESIDENTIAL STUD. Q. 823, 825 (2009) (describing how "unprecedented early transition planning and actions by the George W. Bush administration led to a new level of cooperation between the outgoing and incoming

The reduced federal corporate criminal penalties should come as no surprise given statements by current DOJ officials on financial penalties imposed on corporations. For example, in a March 2018 speech, then-Deputy Attorney General Rod Rosenstein stated the desire that in corporate prosecutions, prosecutors should "avoid imposing penalties that disproportionately punish innocent employees, shareholders, customers and other stakeholders."[44] Such comments suggest that financial penalties are no longer a priority in the same way as in the past. Reflecting those remarks, the DOJ then announced a policy in May 2018 to discourage "piling on" of fines, where a company might pay fines to multiple enforcers.[45] A company may have committed crimes that impacted victims or the public in multiple jurisdictions. The DOJ was therefore careful to say that multiple payments in these cases may be justified.[46] Yet there had been no policy in need of correction that permitted duplicate penalties in the past. Indeed, regulatory agencies cannot impose the types of punitive fines that prosecutors can impose in criminal cases. In FCPA cases, for example, the SEC may impose disgorgement remedies, but the SEC is not statutorily authorized to impose non-civil penalties.[47] It is not necessarily "piling on" for prosecutors to separately impose a fine; it may permit a more comprehensive remedy.

One area in which enforcement has been more stable is in FCPA cases. Observers of FCPA activity have correctly described how penalties have increased over time, counter to the trend in corporate enforcement overall.[48] The FCPA anti-bribery provisions make it a federal crime to corruptly offer or provide anything of value to officials of foreign governments or related foreign entities with the intent to obtain or retain business.[49] In 2018, there were record penalties in FCPA matters, with particularly large penalties in the Petrobras, Société Générale, and Panasonic cases.[50] Why were penalties growing in that

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administrations," and "assignment of experienced and knowledgeable people to handle studies of White House staff structure, agency operations, policy development, and staff selection").

44. Ben Protess, Robert Gebeloff & Danielle Ivory, *Trump Administration Spares Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html.

45. Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

46. *Id.*

47. 15 U.S.C. § 7h-1(e) (providing SEC authority to impose disgorgement); 15 U.S.C. § 77h-1(g) (providing SEC authority to impose monetary penalties).

48. Lucinda Low, Brittany Prelogar & John London, *Insight: FCPA Penalties on Track for Potential Record in 2019*, BLOOMBERG L. (Apr. 22, 2019), https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-fcpa-penalties-on-track-for-potential-record-in-2019.

49. 15 U.S.C. § 78dd-1 (issuers); 15 U.S.C. § 78dd-2 (U.S. persons); 15 U.S.C. § 78dd-3 (foreign persons).

50. Richard L. Cassin, *2018 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 2, 2019), http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html.

context and declining in others? Some of those cases, like the Petrobras case, may have been in the pipeline for some time. For instance, the Petrobras case originated from the "Operation Car Wash" investigations in Brazil that began four years earlier in 2014.[51]

However, another reason more continuity in FCPA enforcement may occur is institutional and resource-based. Main Justice has exclusive authority to enforce the criminal provisions of the FCPA.[52] To do so, the DOJ Criminal Fraud Section has a dedicated FCPA Unit.[53] That Unit notably expanded toward the end of the Obama Administration; it added ten prosecutors in 2016, doubling the size of the unit, while the FBI created three squads of agents focused on FCPA matters.[54] That capacity may explain why FCPA prosecutions have persisted. Nor have policies in the FCPA shifted under the new Administration; the only change has been to make permanent a pilot program initiated in the Obama Administration.[55] There has been continuity in policy and in practice.

However, in corporate charging generally, the tenor of the new federal approach has been that prosecutors should be taking pains to penalize corporate criminals less.[56] At the time the DOJ announced the new policy to avoid "piling on," Deputy Attorney General Rosenstein stated that actual results in enforcement count when deterring corporate crime: "The Department's rhetoric gets a lot of attention—the policy memos and speeches. But performance matters most."[57] As Figure 1 illustrates, if performance does matter, then it should matter that the DOJ's corporate penalties have plummeted.

B. *The New Corporate Declinations*

One simple reason that corporate penalties are declining is that in large cases, the DOJ increasingly declines to file charges. Importantly, these are not traditional declinations in which prosecutors decide that they do not have sufficient evidence or cause to pursue a criminal matter further. Such declinations are typically not

51. Linda Pressly, '*The Largest Foreign Bribery Case in History*', BBC NEWS (Apr. 22, 2018), https://www.bbc.com/news/business-43825294.

52. U.S.A.M. § 9-47-110.

53. U.S. DEP'T OF JUSTICE, FRAUD SECTION YEAR IN REVIEW 2017, https://www.justice.gov/criminal-fraud/file/1026996/download.

54. U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE, *supra* note 19, at 1 ("[T]he Fraud Section is increasing its FCPA unit by more than 50% by adding 10 more prosecutors to its ranks."); *see also* Mayling C. Blanco et al., *FCPA Under the New Administration*, BLANK ROME LLP WHITE COLLAR WATCH, July 2017, at 8.

55. *See infra* note 70 and accompanying text.

56. *See* Kadhim Shubber, *Rod Rosenstein Leaves Lighter Burden on Companies at DOJ*, FIN. TIMES (Jan. 21, 2019), https://www.ft.com/content/ff8e63f4-198d-11e9-b93e-f4351a53f1c3.

57. Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute, *supra* note 45.

made public, since disclosing that an investigation was initiated but then terminated would harm the reputation of an innocent party.[58]

The DOJ has defined a new type of declination in the corporate setting in which a case has merit, but is not pursued. Such a declination, the DOJ explains, should be used in "a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution."[59] Thus, a corporate case that has merit and would have resulted in a conviction if pursued, is dropped. Under this policy, declinations may be made public; some (thirteen as of this writing) are listed on the DOJ website,[60] but other, more traditional declinations are not made public when they are part of a closed investigation.[61] The declinations do not always just state that charges were declined, either. They can include statements of facts describing criminal acts[62] or payments of disgorgement.[63] Consequently, it can be a fine line between a non-prosecution agreement and a declination.

Yet another change to DOJ policy on corporate prosecutions was to decline all criminal charges against fully cooperating corporations accused of foreign bribery violations. This policy, announced in Spring 2018, prohibits prosecutors from filing charges if they find that a company sufficiently cooperated and reported their crimes.[64] The four factors to be considered are: (1) voluntary self-disclosure; (2) full cooperation with the DOJ; (3) remediation; and (4) disgorgement of ill-gotten gains.[65] Such declinations have begun to mount in FCPA matters, including in cases involving major companies like *Johnson Controls* and *Dun & Bradstreet*.[66] During the first year of the pilot program, which began in 2016, five companies

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58. Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1453, 1497–98 (2004); *see also* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 247 n.7 (1980).

59. U.S.A.M. § 9-47.120.

60. The Criminal Fraud Section maintains a list of its FCPA declinations on its website. *See* U.S. Dep't of Justice, Criminal Division, Fraud Section, Declinations, https://www.justice.gov/criminal-fraud/pilot-program/declinations.

61. Marc A. Bohn & James G. Tillen, *Evaluating FCPA Pilot Program: Declinations on the Rise*, LAW360 (Apr. 10, 2017), https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise. In the past, declinations in FCPA matters had not normally been made public. *See* Mark, *supra* note 15, at 1647. For examples of such declinations involving closed investigations, see Richard Cassin, *2018 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 2, 2019), http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html.

62. Bruce E. Yannett, Andrew M. Levine & Philip Rohlik, *The Difficulty of Defining a Declination: An Update on the DOJ's Pilot Program*, NYU COMPLIANCE & ENF'T BLOG (Nov. 16, 2016), https://wp.nyu.edu/compliance_enforcement/2016/11/16/the-difficulty-of-defining-a-declination-an-update-on-the-dojs-pilot-program.

63. *See id.* ("The benefits of a Pilot Program declination are therefore muted by the requirement to pay disgorgement[.]").

64. U.S.A.M. § 9-47.120.

65. *See id.*

66. *See id.* For criticism of the pilot program, see Mike Koehler, *Grading the DOJ's Foreign Corrupt Practices Act 'Pilot Program'*, 11 BLOOMBERG BNA WHITE COLLAR CRIME REP. 353, 354 (2016); Mark, *supra* note 15, at 1642 ("[T]he two incentives that the Pilot Program offered were nothing new. The DOJ had

received declinations in FCPA cases.[67] Each was required to disgorge profits but otherwise received no penalty.[68] Some of those cases involved conduct by Chinese subsidiaries,[69] and thus U.S. jurisdiction might have been difficult to assert.

In November 2017, the DOJ announced a new FCPA corporate enforcement policy, making permanent the prior pilot program.[70] These new guidelines extended declinations to corporations that self-report conduct in a timely manner that prosecutors were not previously aware of.[71] In addition, these companies must fully cooperate and appropriately remediate.[72] The Deputy Attorney General explained: "[w]e expect the new policy to reassure corporations that want to do the right thing. It will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals."[73] The pilot program would "increase the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove."[74] As discussed in the next Part, there is no evidence that the pilot program has had such an effect.

Also notable about the declinations in FCPA cases is that they ostensibly reward enhanced "full" cooperation, but the only case declined to date—the Cognizant case—involved charges against individuals.[75] Johnson Controls, for example, received a declination in 2016, lauding its "provision of all known relevant facts about the individuals involved in or responsible for the misconduct."[76] Yet, its Chinese subsidiary had previously settled an FCPA matter involving its York

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previously offered companies that voluntarily disclosed, cooperated, and remediated up to and sometimes more than a 50% reduction from the minimum amount suggested by the Sentencing Guidelines.").

67. Mark, *supra* note 15, at 1645 (summarizing enforcement during first year of the pilot program).

68. *Id*.

69. Andrew M. Levine et al., *Early Thoughts on the DOJ's Pilot Program, the Continued Breadth of the Accounting Provisions, and Possible Implications for Self-Reporting*, 7 DEBEVOISE & PLIMPTON FCPA UPDATE 14, 20–21 (2016).

70. *See* U.S.A.M. § 9-47.120.

71. *See id*. § 9-47.120(1).

72. *See id*. § 9-47.120(1).

73. Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practice (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

74. U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE, *supra* note 19, at 2.

75. Press Release, U.S. Dep't of Justice, Former President and Former Chief Legal Officer Of Publicly Traded Fortune 200 Technology Services Company Indicted in Connection with Alleged Multi-Million Dollar Foreign Bribery Scheme (Feb. 15, 2019) ("A federal grand jury returned an indictment yesterday against the former president and the former chief legal officer of Cognizant Technology Solutions Corporation, a publicly traded Fortune 200 technology services company based in Teaneck, New Jersey, in connection with an alleged foreign bribery scheme.").

76. U.S. Dep't of Justice Declination Letter, Johnson Controls, Inc., June 21, 2016, https://www.justice.gov/criminal-fraud/file/874566/download.

International subsidiary in 2007.[77] In the 2016 case, the DOJ noted that Johnson Controls had "separat[ed] from the Company all 16 employees found to be involved in the misconduct, including high-level executives at the Chinese subsidiary."[78] Perhaps there were no relevant employees over which prosecutors could obtain jurisdiction. In the Petrobras case, forty-two individuals were charged in Brazil, but none in the United States. This may be appropriate where the bulk of the corporate fines were paid to authorities in Brazil and the conduct was centered in Brazil.[79]

In March 2018, the DOJ apparently began to extend the new declination approach to all corporate prosecutions beyond FCPA matters. Barclays Bank received a declination in a case involving "frontrunning" conduct in foreign exchange transactions with Hewlett Packard.[80] As a DOJ official explained, "[w]hen a company discovers corporate misconduct and quickly raises its hand and tells us about it, that says something. It shows the company is taking misconduct seriously and not willing to tolerate it. And we are rewarding those good decisions."[81] The explanation did not make clear why a declination was needed to supply the appropriate reward for self-reporting, however. After all, while this particular case was limited to a single corporate victim who received restitution, Barclays had repeatedly been prosecuted and settled multiple criminal actions in recent years.[82] Individual criminal offenders do not benefit from any leniency-oriented policy of that type; they must provide substantial cooperation to receive sentencing reductions, not outright declinations.[83] Nor was it clear in that case that individual offenders would be prosecuted. Indeed, a Barclays trader, along with traders at other banks, had been acquitted in prior federal trials.[84]

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77. *See* CORP. PROSECUTION REGISTRY, *York Int'l Corp.*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/135.html.

78. Declination Letter, Johnson Controls, Inc., *supra* note 76.

79. *Brazil Prosecutors Charge 42 People in Alleged Petrobras Bribery Scheme*, REUTERS (Dec. 21, 2018), https://www.reuters.com/article/us-brazil-corruption/brazil-prosecutors-charge-42-people-in-alleged-petrobras-bribery-scheme-idUSKCN1OK2A8.

80. Benjamin D. Singer, Chief, Criminal Division, Fraud Section, U.S. Dep't of Justice, Letter to Alexander J. Willscher, Sullivan & Cromwell LLP (Feb. 28, 2018), https://www.justice.gov/criminal-fraud/file/1039791/download.

81. Jody Godoy, *DOJ Expands Leniency Beyond FCPA, Lets Barclays Off*, LAW360 (Mar. 1, 2018), https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off.

82. *See* CORP. PROSECUTION REGISTRY, *Barclays Bank*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/575.html; CORP. PROSECUTION REGISTRY, *Barclays Bank PLC*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/658.html; CORP. PROSECUTION REGISTRY, *Barclays PLC*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/3072.html.

83. *See* 18 U.S.C. § 3553(e) (2012); U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012) [hereinafter U.S.S.G.].

84. Jonathan Stempel, *In Rare Move, U.S. Judge Orders Acquittal of Barclays Currency Trader*, REUTERS (Mar. 4, 2019), https://www.reuters.com/article/barclays-trader/in-rare-move-u-s-judge-orders-acquittal-of-barclays-currency-trader-idUSL1N20R0Y5; *see also* Bob Van Voris, Lananh Nguyen & Chris Dolmetsch, *British Cartel Traders Acquitted of Rigging Currency Market*, BLOOMBERG (Oct. 26, 2018), https://www.bloomberg.com/news/articles/2018-10-26/jury-rejects-charge-that-chatroom-was-used-to-fix-fx-prices.

To date, the new corporate declination policy has not been applied further to non-FCPA cases. It remains to be seen whether more types of corporate crimes will be eligible for declinations under the new approach. This shift means that still-more-lenient declinations for corporate crimes are now displacing non-prosecution agreements.

C. *Bank Settlements*

Perhaps no criminal law topic had a higher profile after the financial crisis than whether banks and bank executives would be held criminally accountable.[85] In the years after the crisis, the DOJ's approach towards banks noticeably changed. Far larger numbers of banks were prosecuted, fines grew dramatically, and banks pleaded guilty rather than receiving deferred or non-prosecution agreements as in the past.[86] Plea agreements with banks involved penalties that broke records for the largest fines ever imposed in criminal cases in the U.S., namely the almost $9 billion total penalty French bank BNP Paribas paid as part of its plea for sanctions violations.[87] Although there has been no formal policy change, the practice appears to have changed quite a bit. As noted above, fewer prosecutions of banks have been brought since 2017. Furthermore, in the last twenty months of the Obama Administration, seventy-one financial institutions were prosecuted, while during the first twenty months of the Trump Administration, seventeen financial institutions were prosecuted.[88]

Figure 2 below displays penalties in corporate prosecutions involving financial institutions. Since 2015, the fines have declined markedly. The bulk of the penalties in 2017 were legacy cases, and the UBS, RBS, Barclays, JPMorgan, and Citicorp cases involved currency manipulation-related charges.[89] Eliminating those cases from the total in 2017 would make the decline even more stark. When accounting for the legacy cases that resolved themselves in 2018, penalties have reached their lowest level since 2011. To be sure, aggregate corporate penalties are still higher than they were before 2008, as one can see in Figure 2 below. Penalties in the tens or even hundreds of millions of dollars are still levied.[90] The blockbuster multi-billion-dollar penalties imposed upon financial institutions, though, are not part of this picture.[91] Compare the transition from the George W. Bush Administration to the Barack Obama Administration. When one examines

85. *See, e.g.*, Rakoff, *supra* note 26.

86. Garrett, *The Rise of Bank Prosecutions*, *supra* note 6, at 35–39.

87. Plea Agreement, U.S. Dep't of Justice to Karen Patton Seymour, Esq., Sullivan & Cromwell LLP, United States v. BNP Paribas S.A. (June 27, 2014), http://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/plea-agreement.pdf. For analysis regarding how that fine amount was calculated, see Garrett, *The Rise of Bank Prosecutions*, *supra* note 6, at 39–40.

88. *See infra* Appendix B.

89. Garrett, *The Rise of Bank Prosecutions*, *supra* note 6, at 42 n.32, 43.

90. *See infra* Appendix A, Appendix B.

91. *See infra* Appendix B.

Figure 2. Federal Financial Institution Criminal Penalties, 2001–2018[92]

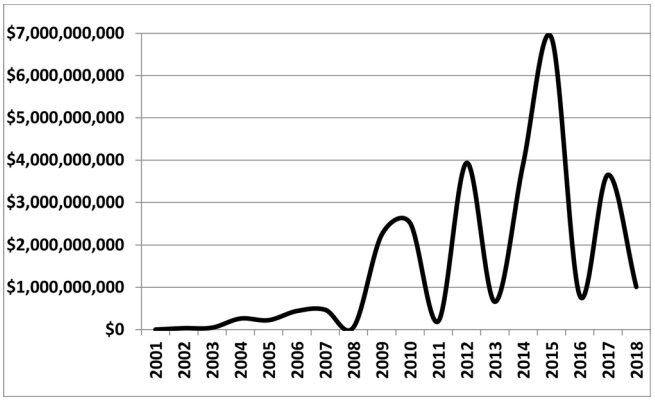

Figure 2, it is clear that there was a decline in corporate penalties in 2008, and the 2007-2008 period was the height of financial crisis. During the 2009 transition year, however, a sustained rise in corporate penalties began.

One sensible reaction to these data is that corporate misconduct can come and go, and that much of the rise in fines post-2008 was in response to the financial crisis. It may also be argued that there may be less corporate crime today than there was a decade ago. The rates of corporate crime are very difficult to know anything about. Crimes like fraud by their nature rely on deceit and intention, and therefore tend to go undetected.[93]

In the past two years, cases that could have been significant were resolved in a manner that appears highly lenient by the standards of DOJ practice over the past decade. A few examples from settlements with financial institutions show that not only have the number of cases involving banks and fines declined, but also that the approach has become even more lenient towards corporate criminals, including banks. In May 2017, the first criminal prosecution was settled with a bank under the Trump Administration.[94] Federal prosecutors settled a money laundering case with Banamex, a defunct subsidiary of Citibank, with a non-prosecution agreement.[95] In

92. Data depicted here is available on the CORP. PROSECUTION REGISTRY, *supra* note 10; *see also infra* Appendix A, Appendix B.

93. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at Ch.3.

94. CORP. PROSECUTION REGISTRY, *Banamex USA*, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail-files/3152.html; Michael Corkery & Ben Protess, *Citigroup Agrees to $97.4 Million Settlement in Money Laundering Inquiry*, N.Y. TIMES (May 22, 2017), https://www.nytimes.com/2017/05/22/business/dealbook/citigroup-settlement-banamex-usa-inquiry.html.

95. Corkery & Protess, *supra* note 94.

that case, the bank forfeited $97 million dollars.[96] The DOJ described a wholesale failure to prevent money laundering at Banamex subsidiary; for example, of 18,000 suspicious transactions, fewer than ten were investigated and only nine were accompanied by required reports.[97] But the DOJ emphasized a "number of factors" justifying the non-prosecution, including how well the bank had cooperated with the investigation, and other investigations of individual officers and employees.[98] No criminal charges were filed against the bank itself or against any individuals.

A second sign of increased leniency was the handling of HSBC, the large multinational bank based in the U.K. In January 2018, HSBC settled a new deferred prosecution agreement over rigging currency transactions by paying $101.5 million in fines.[99] The reduced fine in that case reflected "extensive remediation" by the bank.[100] What made the timing of the HSBC agreement particularly surprising, if not uncanny, was that its five-year federal monitorship for massive money laundering and other criminal violations ended just a month earlier.[101] The prior case was a flashpoint—HSBC had become synonymous with "too big to jail" handling of bank misconduct.[102] HSBC paid a $1.9 billion fine—a record at the time—but no employees or officers were prosecuted and the bank avoided a conviction. Nor was the five years of monitorship a quiet period. During that period, HSBC successfully opposed release of the corporate monitor's reports, which criticized the company's compliance efforts.[103]

This made it particularly concerning that within weeks of being let off the hook, it received yet another deal for yet another crime—and praise for its compliance.

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96. *Id.*

97. Press Release, U.S. Dep't of Justice, Department of Justice, Banamex USA Agrees to Forfeit $97 Million in Connection with Bank Secrecy Act Violations (May 22, 2017), https://www.justice.gov/opa/pr/banamex-usa-agrees-forfeit-97-million-connection-bank-secrecy-act-violations.

98. In that case, four executives faced civil fines or debarment; none were criminally prosecuted. *Id.*

99. Jonathan Stempel & Sangameswaran S, *HSBC to Pay $100 Mln to Settle U.S. Probe into Currency Rigging*, REUTERS (Jan. 18, 2018), https://www.reuters.com/article/us-hsbc-settlement/hsbc-to-pay-100-mln-to-settle-u-s-probe-into-currency-rigging-idUSKBN1F739N.

100. *Id.*

101. *See* Stempel & Sangameswaran, *supra* note 99; *see also* Ben Protess & Jessica Silver-Greenberg, *HSBC to Pay $1.92 Billion to Settle Charges of Money Laundering*, N.Y. TIMES (Dec. 10, 2012), https://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering.

102. For criticism, see, e.g., Press Release, Senator Charles Grassley, Grassley: Justice Department's Failure to Prosecute Criminal Behavior in HSBC Scandal is Inexcusable (Dec. 13, 2012), https://www.grassley.senate.gov/news/news-releases/grassley-justice-department's-failure-prosecute-criminal-behavior-hsbc-scandal; Press Release, Senator Jeff Merkley, Merkley Blasts "Too Big to Jail" Policy for Lawbreaking Banks (Dec. 13, 2012), https://www.merkley.senate.gov/news/press-releases/merkley-blasts-too-big-to-jail-policy-for-lawbreaking-banks.

103. For example, HSBC's 2015 Annual Report noted that the Monitor "expressed significant concerns about the pace of that progress, instances of potential financial crime and systems and controls deficiencies." Frances Coppola, *HSBC's Catalogue of Lawsuits*, FORBES (Feb. 28, 2016), https://www.forbes.com/sites/francescoppola/2016/02/28/hsbcs-catalog-of-lawsuits/#6860530457fc. This author wrote an amicus brief unsuccessfully arguing for the public interest in the release of the monitor report in question. Brief for Professor Brandon L. Garrett as Amicus Curiae Supporting Appellee, United States v. HSBC Bank USA, 863 F.3d 125 (2d Cir. 2017) (No. 16-0308-cr(L)).

When the monitorship concluded, the CEO commented that "HSBC is able to combat financial crime much more effectively today as the result of the significant reforms we have implemented over the last five years."[104] But while DOJ concluded that HSBC had "lived up to all of its commitments" under the deferred prosecution agreement,[105] the new $100 million fine was not the last. In October 2018, HSBC paid $765 million in fines to settle another civil agreement regarding pre-crisis mortgage practices.[106] The U.S. Attorney for the District of Colorado explained:

> HSBC chose to use a due diligence process it knew from the start didn't work. It chose to put lots of defective mortgages into its deals. When HSBC saw problems, it chose to rush those deals out the door. When deals went south, investors who trusted HSBC suffered. And when the mortgages failed, communities across the country were blighted by foreclosure. If you make choices like this, beware. You will pay.[107]

Both Citibank and HSBC have been prosecuted many times in serious cases over the last decade. They are recidivists, but they do not receive harsher penalties despite their growing criminal records. This is not new. As bank prosecutions mounted before this more recent decline, the same banks settled multiple criminal cases without any evidence that they were treated as recidivists or found to have breached prior criminal settlements.[108] Individual criminal defendants are not so lucky.

D. *Decline in Corporate Monitorships*

The organizational sentencing guidelines emphasize compliance that is audited or assessed.[109] In February 2017 towards the end of the Obama Administration, the DOJ hired a Compliance Counsel who issued guidance titled "Evaluation of Corporate Compliance Programs."[110] This guidance sought to add more rigor to the scrutiny of corporate compliance.[111] The guidance was not a policy or a

104. Stephen Morris, *HSBC Escapes Prosecution as U.S. Ends 5-Year Deferred Deal*, BLOOMBERG L. (Dec. 11, 2017), https://news.bloomberglaw.com/corporate-law/hsbc-escapes-prosecution-as-us-ends-5-year-deferred-deal.

105. *Id.*

106. Press Release, U.S. Dep't of Justice, HSBC Agrees to Pay $765 Million in Connection with Its Sale of Residential Mortgage-Backed Securities (Oct. 9, 2018), https://www.justice.gov/usao-co/pr/hsbc-agrees-pay-765-million-connection-its-sale-residential-mortgage-backed-securities.

107. *Id.*

108. *See* Garrett, *The Rise of Bank Prosecutions*, *supra* note 6, at 41–43 (describing nine banks that have settled multiple prosecutions, and noting that of those, the only one formally treated as a recidivist, UBS, was credited for its cooperation and received a more lenient outcome than the other banks in the LIBOR settlements).

109. *See* U.S.S.G. § 8B2.1(b) (2004).

110. *Keeping Current: DOJ Released Under-the-Radar Paper on "Evaluation of Corporate Compliance Programs"*, AM. BAR. ASS'N (March 23, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/03/keeping_current/.

111. *Id.*

memorandum, but rather a list of "common questions" and "sample topics" that nevertheless emphasized that prosecutors must make an "individualized determination" about whether a company's compliance deserved credit.[112] The Compliance Counsel left early in the Trump Administration, and has not been replaced.[113] However, the Criminal Division updated its guidance in April 2019, producing a far more detailed document.[114] The document did not mark a new direction, but rather provided a lengthier description of existing criteria for evaluating compliance programs.[115]

In recent years, policy has cemented the already declining use of corporate monitorships to supervise compliance by corporations that settle prosecutions. One way that prosecutors have sought to supervise compliance at firms with particularly dire compliance needs was to appoint corporate monitors.[116] Monitors do not serve as the firm's client, but rather report their findings regarding compliance to both prosecutors and the company, and make recommendations for improvements during their period of oversight.[117] These monitorships typically last two to three years, and occur as part of a plea agreement or special condition of probation for a corporation.[118] But monitorships have never been commonplace.

A study found that only one-quarter of deferred and non-prosecution agreements from 2001 to 2012 called for the appointment of an independent monitor to supervise compliance.[119] These monitorships were more common in certain areas, such as FCPA settlements.[120] They are also commonly used in probation in environmental prosecutions.[121] On the whole, however, monitorships have not always been effectively defined and their role has been largely criticized. Corporations bridle at the expense of retaining monitorship teams, and there is a lack of clarity in the scope and responsibilities of the monitorships.[122] Yet there is a broader question as

112. *Id*.

113. Brian A. Benczkowski, Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance, *supra* note 22.

114. U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

115. *Id*.

116. GARRETT, TOO BIG TO JAIL, *supra* note 1, at Ch.7; *see also* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1714 (2007).

117. GARRETT, TOO BIG TO JAIL, *supra* note 1, at Ch.7.

118. *Id*.

119. *Id*. at 174.

120. *Id*. at 177.

121. *Id*. at 178.

122. Eileen R. Larence, Director Homeland Security & Justice, Gov't Accountability Off., Statement on Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements (June 25, 2009), at 28 (describing criticism concerning monitorship cost and the lack of work plans for monitorships); Vikramaditya Khanna, *Reforming the Corporate Monitor?*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 226, 238–41, 244 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 732–34 (2009).

to why monitors are often not appointed if prosecutors target corporations specifically because their compliance programs are ineffective.[123]

Absent a monitor, prosecutors must depend on the corporation's own representations as to its improved compliance. In other areas, prosecutors have long insisted on routine monitoring in a highly publicized fashion where monitors' reports for consent decrees are introduced in court and made available publicly for review and input by stakeholders.[124] In corporate prosecutions, however, the process is typically not transparent.[125]

The Deputy Attorney General announced in October 2018 that compliance in the form of independent monitor supervision should be used more selectively,[126] issuing a new memorandum that explained this change.[127] The new guidelines include some helpful ground rules and procedures, but suggest that often a monitor "will not be necessary" barring some "demonstrated need."[128] A monitor should only be appointed, the new guidelines state, if there are pervasive compliance problems and a company has not made serious investments in improving its compliance that have been tested and deemed effective.[129] Incentivizing corporate investment in compliance that can prevent serious crimes is desirable.

The prior memorandum on this topic, known as the Morford Memo, had already emphasized two broad factors: the benefits of a monitorship and the costs to a corporation.[130] The new memo states that prosecutors should ask "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future."[131] The addition of this factor is valuable, but *how* compliance is to be tested appears nowhere in the memo. Instead, the memo contains many pages detailing how monitors are to be selected using an internal DOJ Standing Committee on the Selection of Monitors.[132] These can be high-paid positions. The selection process was meant to remediate longstanding cronyism concerns that there was insufficient vetting and that many insider former prosecutors secured lucrative positions as

123. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at 174–75.

124. *See* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1509, 1511 (2017).

125. For a discussion of this problem, see *id*.

126. Brian A. Benczkowski, Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance, *supra* note 22.

127. Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Justice, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.

128. *Id*. at 2.

129. *Id*.

130. *Id*.

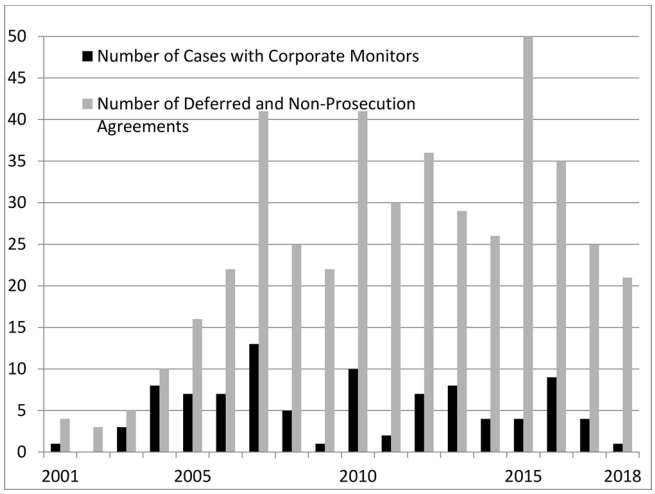
131. *Id*. That concept of testing compliance is not mentioned elsewhere in the memorandum, however, after the factor is briefly set out. Another change was that the memo states that its principles apply not just to deferred and non-prosecution agreements, but also to plea agreements in which monitors are appointed. *Id*. at 3. That change does not comport with the role that a judge plays in selecting and overseeing any monitor appointed as part of corporate probation.

132. *Id*. at 3–8.

monitors.[133] It would be far simpler for a judge to make the final decisions regarding the appointment of monitors by selecting a monitor from candidates suggested by the prosecutor and defendant. Doing so would ensure that a neutral party represents the public interests involved.[134]

Monitorships had already substantially declined by the time these changes to DOJ guidance were formally announced. In 2018, there was just one deferred or non-prosecution agreement that was accompanied by an independent monitorship (the Panasonic deferred prosecution agreement concerning the FCPA).[135] In 2015 and 2017, there were four such monitorships, and in 2016 there were nine. The average number of monitors per year from 2005 through 2016 was 6.5. Thus, the adoption of this new policy may have reflected a previous approach developed more quietly. Figure 3 below displays the number of deferred and non-prosecution agreements with corporate monitors from 2001 to 2018 (with the total number of agreements in 2015, 101, not displayed).

Figure 3. Corporate Monitorships, 2001–2018[136]



133. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at 178–79.

134. *See id*. at 177.

135. Deferred Prosecution Agreement, United States v. Panasonic Avionics Corp. (D.D.C. 2018) (No. 18-CR-00118) (Apr. 30, 2018), https://www.justice.gov/opa/press-release/file/1058466/download.

136. Data depicted here is available on the CORP. PROSECUTION REGISTRY, *supra* note 10.

II. THE DECLINE IN INDIVIDUAL PROSECUTIONS

While Part I described a series of new measures taken by the Trump Administration, this Part focuses on a consistent two decades-long pattern: non-charging of individuals when corporations settle serious criminal matters. The DOJ's Foundational Principles of Corporate Prosecution now emphasize that "[o]ne of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing."[137] Investigations of individual wrongdoers are now supposed to be the initial focus of any corporate matter, in part because doing so helps to "maximize the likelihood that the final resolution will include charges against culpable individuals and not just the corporation."[138] And yet, as this Part describes, the effort to focus more on individual wrongdoing has not resulted in any discernable increase in charges in cases in which corporations settle prosecutions in deferred or non-prosecution agreements. More recently, the DOJ has relaxed its policies regarding individual prosecutions in corporate cases, which makes it all the more likely that the current pattern will persist.

A. *The Yates Memo*

Prior to 2008, the DOJ had long stated that individual accountability should be the focus of corporate prosecution efforts, since for any corporate crime, individual officers or employees committed the relevant offenses. However, after the financial crisis, critics began to raise the concern that as deferred and non-prosecution agreements became more common, so too did large corporate settlements in which no individuals were charged.[139] The pattern was as follows: a settlement agreement would be announced, the company would pay a large fine and agree to improve compliance, and even if individuals were not immunized as part of the settlement, in practice, no individuals would be charged in the years afterwards.[140] And yet, a corporation cannot commit a crime except through its agents. Federal criminal law adopts a *respondeat superior* standard in which a corporation is responsible for criminal acts of employees acting in the scope of their duties to the corporation and to benefit, at least in part, the corporation.[141] If the company admitted a crime occurred and accepted responsibility for it, then which individuals were in fact responsible?

In response to these criticisms, the DOJ changed its organizational charging guidelines in a number of respects to heighten the focus on individual prosecutions. These changes, termed the "Yates Memo" after then-Deputy Attorney General

137. U.S.A.M. § 9-28.010.

138. *Id.*

139. *See, e.g.*, Rakoff, *supra* note 26.

140. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at 96.

141. U.S.A.M. § 9-28.210 ("Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents.").

Sally Yates, were adopted in Fall 2015.[142] They reflected a concern that corporations were being prosecuted for crimes while the individual employees and officers who committed the crimes were not. In announcing the new policy on September 10, 2015, Deputy Attorney General Yates summarized: "The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company."[143]

The Yates Memo changed the ground rules for corporate prosecutions in a number of respects. The Memo stated that both civil and criminal investigations would prioritize inquiry into the responsibility of individual employees and officers.[144] Additionally, a company must identify all responsible individuals involved in the relevant misconduct.[145] The Memo also provided that corporations may not receive credit for cooperation unless they have provided full information concerning individual accountability.[146] Further, the Memo makes clear that a settlement with a corporation is no substitute for separate charging of responsible individuals, particularly senior employees or officers.[147] No corporate settlement can immunize individuals from civil or criminal liability.[148] These changes provided a roadmap for investigating individuals in corporate cases and described a new obligation to pursue individual charges. That said, the change was in part just one of emphasis. The prior 2003 Thompson Memo had already emphasized that individual charging should be a priority, stating that "[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas."[149]

Many predicted that these changes would place enormous pressure on corporations to waive privilege and that individual employees would face more prosecutions in corporate matters.[150] Others were far less sanguine that these changes

142. U.S.A.M. § 9-28.210.

143. Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

144. U.S.A.M. § 9-28.210 ("It is important early in the corporate investigation to identify the responsible individuals and determine the nature and extent of their misconduct. Prosecutors should not allow delays in the corporate investigation to undermine the Department's ability to pursue potentially culpable individuals.").

145. *Id*. § 9-28.700.

146. *Id*. ("In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct.").

147. *Id*. § 9-28.210.

148. *Id*.

149. Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Memorandum to Heads of Department Components and United States Attorneys (Jan. 20, 2003).

150. Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places*, 102 IOWA L. REV. 1897, 1925 (2017) ("[T]he Yates Memo brings back the culture of waiver[.]"); Mark, *supra* note 15, at 1611 ("[T]he Yates Memorandum is likely to result in continued waivers of the attorney-client privilege and attorney work product protection, even if the DOJ does not make express requests."); *see also* Scott R. Grubman & Samuel M. Shapiro, *The "Yates Era" in Full Force: The DOJ Fully Implements Yates Memo*, 31 CRIM. JUST. 17, 19 (2016) ("As a practical matter the Yates Memo and USAM revisions will likely induce many companies to waive attorney-client privilege[.]"); Joseph W. Martini & Robert S. Hoff, *Individuals Face New Challenges Following Yates Memo*, N.Y.L.J. (Apr. 25, 2016) ("[T]he DOJ's pronouncement . . . could cause

would be meaningful, particularly given incentives to settle cases with corporations in deferred and non-prosecution agreements.[151] In addition, empirically measuring whether the Yates Memo was having an effect was difficult because it only applied to prospective investigations. Since corporate investigations can take some time to pursue and the Yates Memo would tend to delay investigations by focusing on individuals before settling with a corporation, it had been too early to study its potential impact.[152] Now that sufficient time has elapsed since the Yates Memo's adoption, we can begin to assess it.

B. *Empirical Analysis of Individual Prosecutions*

An empirical analysis of individual prosecutions accompanying deferred and non-prosecution agreements from 2001 to 2012 found that in 89 of 255 corporate agreements, some number of individual officers or employees were prosecuted.[153] A more detailed follow-up study examining data through 2014, and also describing outcomes in these federal prosecutions, showed that the pattern did not change.[154] Of 306 deferred prosecution and non-prosecution agreements with organizations, 34%, or 104 companies, had officers or employees prosecuted, with 414 total individuals prosecuted.[155] Most were not high-ranking individuals. Of the individuals prosecuted, thirteen were presidents, twenty-six were CEOs, twenty-eight were CFOs, and fifty-nine were vice presidents.[156]

In a new analysis of post-Yates memo individual prosecutions, the pattern has not noticeably changed. In the four years from 2015 to 2018, fifty-nine individuals

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companies to choose to disclose . . . privileged . . . communication and documents."). Both in the Memo itself and in remarks subsequently, the DOJ made clear that waiver would not be requested. Leslie R. Caldwell, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks at the Second Annual Global Investigations Review Conference (Sept. 22, 2015).

151. Garrett, *Metamorphosis of Corporate Criminal Liability*, *supra* note 15; Rena Steinzor, *White-Collar Reset: The DOJ's Yates Memo and Its Potential to Protect Health, Safety, and the Environment*, 7 WAKE FOREST J.L. & POL'Y. 39, 56 (2017) ("Unfortunately, the Yates Memo makes no attempt to deal with DPAs and the damaging perception that their primary usefulness is as a vehicle for implementing decisions that an institution is too big to jail. If the DOJ continues to use them in cases where public scrutiny is intense, it could sacrifice the palliative effects it seeks by re-emphasizing individual prosecutions."); Mark, *supra* note 15, at 1631 ("The failure of the Yates Memorandum to address either DPAs or NPAs, in combination with the revised USAM's continued endorsement of both devices, threatens to undermine the efficacy of the DOJ's new approach to holding individuals accountable.").

152. *See* Garrett, *Corporate Criminal as Scapegoat*, *supra* note 14, at 1853; *see also* Mark, *supra* note 15, at 1670 ("Given the long time lag inherent in most white collar investigations, it is too soon to tell whether the Memorandum is accomplishing its paramount goal of holding executives and other individuals accountable for corporate misconduct.").

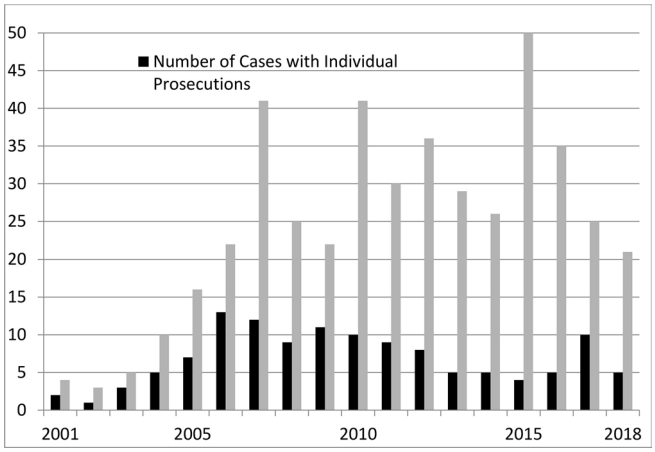
153. GARRETT, TOO BIG TO JAIL, *supra* note 1, at 83 ("In about two-thirds of the cases no individual officers or employees were prosecuted for related crimes, while in about one-third of deferred prosecution or non-prosecution agreements (35%, or 89 of 255) there were prosecutions of such individuals. This trend has not changed over time; as deferred prosecution and non-prosecution agreements gained popularity, the proportion of cases with individuals prosecuted has remained fairly stable[.]").

154. Garrett, *Corporate Criminal as Scapegoat*, *supra* note 14, at 1853.

155. *Id.* at 1791.

156. *Id.*

Figure 4. Individual Prosecutions Accompanying Deferred and Non-Prosecution Agreements, 2001–2018



were charged accompanying deferred prosecution agreements, as Figure 4 displays.

During the entire period from 2001 through 2018, there were individual prosecutions in 134 of 497 deferred and non-prosecution agreements, with 447 total individuals prosecuted. Of those, thirty-four were CEOs (typically former CEOs), thirty were CFOs, and seventeen were presidents. Thus, since the end of 2014, there have been thirty additional corporate deferred and non-prosecution agreements in which individuals were prosecuted alongside the firm. For the entire time period from 2001 to 2018, individuals faced prosecution in 37%, or 134, of the 497 total agreements with organizations. Figure 4 below displays these data by depicting both total agreements and the number of agreements in which individuals were charged for each year.

The decline in individual charging is more apparent when one focuses on 2015–2018 and not just the lower average over the entire time period. While it might seem notable that there have been 178 deferred and non-prosecution agreements during that time, the main reason is the large number of non-prosecution agreements entered in 2015 with Swiss banks as part of a program to offer lenient settlements rewarding self-reporting and cooperation.[157] None of those cases involved individual charges filed, including for practical and jurisdictional reasons, as the banks tended to be small or mid-sized Swiss banks (albeit ones providing tax shelters to U.S. taxpayers).[158]

157. The Department of Justice made available materials from each Swiss Bank Program case available online. *See* U.S. DEP'T OF JUSTICE, SWISS BANK PROGRAM, http://www.justice.gov/tax/swiss-bank-program.

158. *See* Garrett, *The Rise of Bank Prosecutions*, *supra* note 6, at 37–38, Appendix A.

Focusing just on 2017–2018, however, shows that any decline is less stark. There were forty-seven deferred or non-prosecution agreements in 2017–2018, fifteen of which were cases in which individuals were charged, or 32%.[159] That rate would be smaller (28%), though, if it accounted for the eight declinations in which no individuals were charged (in 2019, however, Cognizant received a declination in which individuals were charged).[160] The result is that no meaningful change can be observed in the time period before or after the Yates Memo was adopted. If anything, individual charging has declined in the years since it was adopted.

In addition to examining individual prosecutions accompanying deferred and non-prosecution agreements, the study also examined plea agreements entered with public companies. After all, it is conceivable that individual prosecutions became more common post-Yates Memo in cases involving convictions of corporations. From 2001 to 2012, 25% of public companies prosecuted had individual employees charged.[161] Including cases from 2001 through 2018, 48 of 169 public companies had individuals charged, a negligible difference, or 28% of companies prosecuted.

These data confirm the views of observers who predicted early on that prosecutors would over time "retreat" from any strict or "all-or-nothing" approach towards the Yates Memo.[162] Similarly, some observers, this author included, have argued that in context, the Yates Memo changes were not as dramatic as they appeared and that they were largely aspirational.[163] They could not or would not be strictly enforced due to the practical challenges in pursuing individual charges before settling a case with a corporation.[164] Indeed, in announcing a change to the policy in Fall 2018, Deputy Attorney General Rosenstein noted that the Yates Memo had not been strictly enforced: "we learned that the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources."[165] These data bear out those observations. The Yates Memo also may have never been fully implemented under the strict language of the U.S. Attorney's Manual, the guidebook for all federal prosecutions. DOJ policies are merely guidelines. They are not binding on prosecutors and seek only to inform decision-making. The experience with the Yates Memo suggests that such guidance and policies may not

159. *See* CORP. PROSECUTION REGISTRY, *supra* note 10.

160. U.S. Dep't of Justice Declination Letter, Cognizant Tech. Solutions Corp., Feb. 13, 2019, https://www.justice.gov/criminal-fraud/file/1132666/download.

161. *See* GARRETT, TOO BIG TO JAIL, *supra* note 1, at 84 ("A similar pattern held true for public companies that were convicted. Slightly fewer (25[%], or 31 of 125) convicted public companies or their subsidiaries had officers or employees prosecuted.").

162. *See* Chris Bruce, *U.S. Will Retreat on Yates Memo, Former Justice Official Predicts*, BLOOMBERG (Nov. 23, 2015), http://www.bna.com/us-retreat-yates-n57982063844/.

163. *See* Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, *supra* note 15.

164. *See id.* at 65–67 ("DOJ policy had already emphasized for some time that '[o]nly rarely should provable individual culpability not be pursued[.]'"); Joh & Joo, *supra* note 15, at 58–59.

165. Rod Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, *supra* note 18.

be fully implemented if there are practical and resource-based obstacles to doing so.

C. *Relaxing the Yates Memo*

In Fall 2018, then-Deputy Attorney General Rod Rosenstein announced that the prior Yates Memo approach would not be ended, but would be amended and relaxed.[166] The new DOJ approach would focus on speedier resolutions and only the most important individuals worth charging. As Deputy Attorney General Rosenstein put it: "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial, and who are not likely to be prosecuted."[167] These changes were incorporated into the U.S. Attorney's Manual, as the Yates Memo and prior revisions to these organizational prosecution principles had been.[168]

On its face, the change might be viewed as simply one of emphasis. It is far more expeditious to settle a case with a company and not wait to investigate all individuals. Moreover, the focus should always be and likely always was on the individuals who had the most substantial involvement in federal crimes. Indeed, as mentioned above, in announcing the Yates Memo, then-Deputy Attorney General Yates emphasized that individual charging should not focus simply on lower-level employees who were simply following the directives of their supervisors. However, to give a corporation full credit for cooperation when investigations into individuals are still pending raises questions about how effective that cooperation will be. That the Yates Memo was not strictly enforced helps to explain why no observable change in individual prosecutions accompanying deferred and non-prosecution agreements occurred. Moreover, that a softened version of the Memo is now DOJ policy suggests there will not be any change in this ingrained pattern in the near future.

The new policy towards formal corporate declinations may also affect the numbers of individual prosecutions in a less visible way. If a company is offered a declination, despite the stated policy, the result may signal that criminal charges are not warranted. Perhaps such an appearance of no wrongdoing makes it difficult to bring criminal charges against employees or officers. And yet, under the new policy, declinations may still be offered when crimes did in fact occur—though the declination rewards corporate cooperation, not non-criminality. Some observers predicted that because of the focus on substantial cooperation, the new declination policy would buttress efforts to target individual wrongdoers.[169] Yet just one of the declinations offered during the Trump Administration so far has been accompanied

166. *Id.*

167. *Id.*

168. U.S.A.M. § 9-28.210.

169. David W. Brown et al., *DOJ Issues New FCPA Corporate Enforcement Policy*, PAUL WEISS (Nov. 30, 2017), at 1 (describing policy as part of the DOJ's "redoubled effort to bring criminal prosecutions against individual offenders").

by any individual charges, as noted. While that may reflect the practical challenges in the FCPA context in which they were negotiated, the lack of individual charging also undermines one of the rationales for offering declinations.

Thus, the Yates memo approach seems not to have fully taken hold and has never produced its intended results. The explanation for this may be practical in that it takes substantial resources to pursue individual investigations in complex corporate settings. Perhaps expecting individual accountability for corporate crimes unless the resources are made available to meaningfully enforce them is unrealistic. To do so expeditiously while settling cases with the corporation before statutes of limitations expire would require far more dedicated corporate prosecution resources. The next Part turns to that urgent need.

III. IMPLICATIONS FOR CORPORATE ACCOUNTABILITY

The tenth anniversary of the 2007–2008 financial crisis sparked reflection concerning what went wrong, whether the responses to that crisis have been adequate, and how the crisis continues to shape politics and policy to this day. Unsurprisingly, some of that analysis turned to the prosecutory response to the crisis. Phil Angelides, the chair of the Financial Crisis Inquiry Commission, said: "I believe it was a seminal failure of the Obama administration not to hold accountable the people responsible for the wrongdoing."[170] If not investing in enhanced corporate accountability immediately after the crisis was a mistake, ten years later, matters have not improved. What changes were made to enhance criminal accountability have been largely rolled back. They have done so in an overlapping and cumulative fashion, as Part I describes, and many changes did not have the intended effect, as Part II describes.

Section A of this Part summarizes each of the policy changes described so far in this Article. Section B describes how these changes have occurred in a setting in which there are important vacancies across the DOJ and other enforcement agencies, and in which there is unusual disarray across federal agencies. Competent enforcement cannot easily occur, particularly in complex cases, in such an environment. Section C asks what lessons this weakening of the corporate prosecution function can teach. To better safeguard accountability, independent actors, like judges, independent administrative actors, or private litigants must be involved in the enforcement process. Section D explores whether legislative solutions are available.

A. *A Corporate Criminal Enforcement Policy Rollback*

The empirical trend in corporate penalties reflects a set of meaningful changes in DOJ policy. One after another, the DOJ has rolled out changes designed to soften its approach to corporations. Six changes to written DOJ policy have been described in Parts I and II:

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170. Lydia DePillis, *10 Years After the Financial Crisis, Have We Learned Anything?*, CNN (Sept. 13, 2018), https://money.cnn.com/2018/09/13/news/economy/financial-crisis-10-years-later-lehman/index.html.

> First, the DOJ has expressed its new practice to not engage in "piling on" financial penalties, in which a company might pay penalties to multiple enforcers. The general suggestion was that fines had been excessive in the past and that they should be reduced.
>
> Second, the DOJ has expanded what was initially a pilot policy in the FCPA context to decline all criminal charges against fully cooperating corporations accused of foreign bribery violations. Under this new policy, if prosecutors deem a company to have sufficiently cooperated and reported their crimes, no charges are filed.
>
> Third, in March 2018, the DOJ began to extend this declination approach to all corporate prosecutions.
>
> Fourth, the Yates Memo was relaxed in Fall 2017, including to permit settlements with corporations when individual investigations are pending, to focus on the more serious individuals and relax discretion in companion civil cases.
>
> Fifth, the DOJ declined to renew the position of compliance counsel, a person with expertise who could evaluate whether a company had good compliance and was making good efforts to repair problems.
>
> Sixth, the DOJ provided new guidelines on corporate compliance and monitors. The new monitorship guidelines include some helpful ground rules and procedures, but suggest that often a monitor "will not be necessary" unless based on some "demonstrated need."

As discussed, these changes should be understood as part of an overall approach towards corporate enforcement. Many, taken individually, are modest alterations on their face. Some are quite reasonable and may reflect prior practice, such as extending the FCPA pilot program or the statement that fines should not "pile on" penalties imposed by other agencies. Together, they represent an approach designed to bring more leniency to corporate prosecutions.

B. *DOJ Transition and Vacancies*

It was striking how at the outset of his tenure in April 2017, then-Attorney General Jeff Sessions emphasized that corporate misconduct would remain a central priority, despite the changed focus on bringing more severe prosecutions for immigration, drug, and violent offenses.[171] That did not come to pass. As described, a series of measures were adopted to relax the DOJ's approach towards

171. Matt Zapotosky, *Sessions: Focus on Violent Crime Doesn't Mean Lax Enforcement for White-Collar Offenses*, WASH. POST (Apr. 24, 2017), https://www.washingtonpost.com/world/national-security/sessions-focus-on-violent-crime-doesnt-mean-lax-enforcement-for-white-collar-offenses/2017/04/24/d36d4034-2906-11e7-be51-b3fc6ff7faee_story.html. Sessions, speaking to an audience of compliance officers, emphasized that the new Administration would "still enforce the laws that protect American consumers and ensure that honest businesses are not placed at a disadvantage to dishonest businesses." *Id*.

corporate prosecutions. Those changes accompanied a severity-oriented approach towards non-corporate prosecutions in individual cases. In May 2017, then-Attorney General Sessions announced a DOJ charging and sentencing policy asking all federal prosecutors to bring the most serious "readily provable" charges and disclose all facts that would support mandatory minimum or other sentences for all federal crimes.[172] That brief policy for federal charging and sentencing makes for a striking contrast to the complex set of guidelines for negotiating corporate charging.

Indeed, the contrast between leniency for corporations and severity for individuals (but perhaps not in corporate cases) was particularly telling when the New York Times reported on the Duke and UVA Criminal Prosecution Registry data in October 2018.[173] DOJ's spokesperson responded, "Attorney General Sessions has set clear goals for this department: reducing violent crime, homicides, opioid prescriptions and drug overdose deaths."[174] The spokesperson added: "Under his leadership, we have begun to achieve all four of these goals by increasing violent crime and firearm prosecutions to all-time highs."[175] Drug, immigration, and firearm prosecutions may have reached all-time highs, in terms of numbers of offenders. In Fall 2018, the DOJ touted a 38% increase in immigration illegal re-entry charges filed, a 86% increase in illegal entry charges, and a 15% increase in violent felony charges filed.[176] Those small offender cases, though, may have crowded out efforts to tackle serious corporate offenders in complex individual and corporate cases. The change in DOJ's focus may explain the data observed here and the change in tone from April 2017 to October 2018.

Another feature of the Trump Administration's approach at the DOJ is that positions were extremely slow to fill, with key positions vacant two years into the first term. For example, the DOJ decided to postpone its search for the third-in-command Associate Attorney General position after a departure in early 2018

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172. Jeffrey Sessions, U.S. Att'y General, U.S. Dep't of Justice, Memorandum for All Federal Prosecutors, Department Charging and Sentencing Policy (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download ("[I]t is a core principle that prosecutors should charge and pursue the most serious, readily provable offense."). In doing so, this policy rescinded 2013 and 2014 policies. *Id.* at 2 n.1. Previous policies included: *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (August 12, 2013); and *Guidance Regarding § 851 Enhancements in Plea Negotiations* (September 24, 2014). *Id.*

173. Ben Protess, Robert Gebeloff & Danielle Ivory, *Trump Administration Spares Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html.

174. *Id.*

175. *Id.*

176. Press Release, U.S. Dep't of Justice, Justice Department Smashes Records for Violent Crime, Gun Crime, Illegal Immigration Prosecutions, Increases Drug and White collar Prosecutions (Oct. 17, 2018), https://www.justice.gov/opa/pr/justice-department-smashes-records-violent-crime-gun-crime-illegal-immigration-prosecutions. The DOJ touted a 3% increase from the prior year in white collar filings, but other data suggests that there has been a decline in prosecution of white collar offenses. *Id.* Such offenses are not readily defined and they do not neatly overlap with corporate prosecutions, in which an entity is charged, which are the focus here.

when several candidates declined to be considered.[177] Chiefs of several divisions, including the Criminal Division, remain unfilled as of early 2019. As of mid-2019, there were still two acting chiefs of the Fraud Section at Main Justice, with the Deputy Senior Chief position vacant.[178] The Chief of the Fraud Section was hired in July 2019.[179] In early 2018, affiliated agencies, including the Drug Enforcement Agency and the U.S. Marshals Service also had unfilled leadership positions.[180] Former Inspector General Michael Bromwich commented: "I'm not aware of any precedent for so many key positions in DOJ and its affiliated agencies remaining vacant for so long at the beginning of an administration."[181] Observers have noted that these vacancies may impact corporate enforcement.[182] These problems with staffing are not unique to the DOJ or affiliated agencies either, but rather are common to the White House and other federal agencies under the Trump Administration.[183]

Vacancies are not all that has harmed the ability of federal prosecutors to bring complex cases. At the DOJ itself, President Trump repeatedly attacked the Department, then-Attorney General Sessions, and line prosecutors regarding the investigation of independent counsel Robert Mueller.[184] Anyone willing to fill top positions would become subject to questions regarding their role in that ongoing investigation.[185] The vacancies, surrounding uncertainty, and potential for conflict may impact the ability to negotiate complex matters with the assurance that a permanent head of a division could have during a less tumultuous administration.

That said, as discussed above, the DOJ has made a series of consistent changes to organizational prosecution policies. These changes have all pushed in the direction of bringing fewer charges against corporations and reducing the penalties when charges are brought. As in the past, the process for considering such changes and evaluating them has not been public as a formal regulatory process would be. As the next Part describes, evidence from further policy changes and from recent

177. Sadie Gurman & Aruna Viswanatha, *Trump Administration Puts on Hold Search for Justice Department No. 3*, WALL ST. J. (June 5, 2018), https://www.wsj.com/articles/trump-administration-sidelines-effort-to-appoint-justice-department-no-3-1528208396.

178. U.S. Dep't of Justice, Fraud Section, About the Fraud Section, https://www.justice.gov/criminal-fraud.

179. Kadhim Shubber, *US Justice Department Appoints Robert Zink As Fraud Section Chief*, FIN. TIMES (July 30, 2019), https://www.ft.com/content/76ccaa5e-b2cf-11e9-bec9-fdcab53d6959.

180. Carrie Johnson, *Key Vacancies at Justice Department 'Not A Recipe For Good Government'*, NPR (Jan. 2, 2018), https://www.npr.org/2018/01/03/575123392/key-vacancies-at-justice-department-not-a-recipe-for-good-government.

181. *Id.*

182. John F. Savarese, et al., *White Collar and Regulatory Enforcement: What to Expect in 2018*, NYU COMPLIANCE & ENF'T BLOG (Jan. 29, 2018), https://wp.nyu.edu/compliance_enforcement/2018/01/29/white-collar-and-regulatory-enforcement-what-to-expect-in-2018/.

183. Abigail Tracy, *There's a Good Reason Nobody Wants to Work for Jeff Sessions*, VANITY FAIR (June 6, 2018), https://www.vanityfair.com/news/2018/06/donald-trump-jeff-sessions-justice-department-vacancies.

184. *Id.*

185. *Id.*

settlements suggests that the change in approach goes far beyond just the change in monetary penalties imposed upon corporations.

C. *Implications for Corporate Accountability*

Naively assuming that corporate prosecutions would continue to become more rigorous may be understandable. That was the trend-line in the years following the recent financial crisis. The Obama administration gradually responded to "too big to jail" concerns in a number of meaningful ways. Deputy Attorney General Sally Yates announced new policies designed to focus on targeting individual corporate officers and employees. New policies tightened standards for corporate compliance and cooperation. Banks pleaded guilty in major cases rather than receiving out-of-court deals. Criticizing the prior approach towards corporate crime, presidential nominee Hillary Clinton called for expanding resources for white-collar prosecutions and shifting enforcement priorities.[186] The policy platform on that topic and associated speech did not attract much attention during the 2016 presidential campaign, however. Candidate Trump launched attacks on Wall Street banks, including using an anti-Semitic closing advertisement describing the "trillions of dollars at stake," and showing images of financier George Soros and Goldman Sachs CEO Lloyd Blankfein.[187] Then again, candidate Trump promised to give corporations breaks on taxes and regulations,[188] which the Trump Administration has in part accomplished.[189]

Largely missing is any expressed concern for the public interest in enforcement to prevent and punish corporate crime. Instead, the overall focus has been to consult with industry, reduce the cost of resolving major criminal cases for corporations, and ease the burdens on prosecutors to speedily resolve cases. The changes may be expedient both for prosecutors and corporations, but they neglect the public interest.

D. *Legislating Corporate Criminal Liability*

Congress has occasionally considered, but in recent years rarely adopted, legislation concerning corporate crime. In the past, the author has advocated for legislation that would require judicial review of deferred prosecution agreements, including through revisions to the Speedy Trial Act, revisions to the organizational sentencing guidelines to ensure deterrent fines, and greater transparency in

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186. *See* Hillary for Am., Factsheet, Hillary Clinton: Wall Street Should Work for Main Street, http://www.hillaryclinton.com/p/briefing/factsheets/2015/10/08/wall-street-work-for-main-street.

187. Jonathan D. Salant, *Trump criticized for anti-Semitic memes in closing ad*, NJ.COM (Nov. 7, 2016), https://www.nj.com/politics/2016/11/trump_criticized_for_anti-semitic_memes_in_closing.html.

188. Chris Matthews, *Donald Trump Says He Can Slash Corporate Taxes*, FORTUNE (Aug. 8, 2016), https://fortune.com/2016/08/08/donald-trump-corporate-tax/.

189. For an overview and reports on implementation of Dodd-Frank, see U.S. Sec. and Exch. Comm'n (SEC), Implementing the Dodd-Frank Wall Street Reform and Accountability Act, https://www.sec.gov/spotlight/dodd-frank.shtml.

corporate settlements.[190] Legislation regarding transparency in corporate settlements passed in the U.S. Senate in 2015, but was largely not enacted.[191] The only measure enacted was to enhance crime victim's rights when deferred prosecution agreements are entered with corporations.[192] In general, Parts I and II discuss the enforcement discretion of prosecutors. Administrative agencies have broad discretion whether and how to seek to enforce regulations and statutes.[193] A decision not to enforce is not reviewable under the doctrine of *Heckler v. Chaney*,[194] and neither are agency guidelines, priorities for enforcement,[195] nor decisions regarding how to allocate enforcement funds.[196]

For those reasons, a better legislative focus would be to create a standing capacity to investigate and enforce corporate offenses. Efforts to detect white-collar crime, like the SEC Office of the Whistleblower,[197] could be expanded. More far-reaching, Senator Elizabeth Warren has proposed the "Accountable Capitalism Act" to federally charter corporations and change corporate governance more fundamentally, requiring 40% of corporate boards to be elected by employees, sharp limits on political spending, and broader public-interest considering-Benefit Corporation obligations of the board.[198] Relevant to corporate crime, the Act would permit charter revocation for a company that engaged in repeat or egregious illegal acts.[199]

More continuity with a separate or even independent corporate prosecution function and the resources to bring both complex individual and corporate matters is possible. A Corporate Prosecution Division could be created at Main Justice with branch offices in key districts for corporate prosecutions, such as Southern District of New York, the Eastern District of Virginia, and the Northern District of California. The Antitrust Division has a long tradition of independent policy and consistency in practice, and it similarly has field offices.[200] Other types of corporate prosecutions that have been most consistent in recent years, such as FCPA prosecutions, in which the Criminal Fraud Division received enhanced resources and

190. For a discussion of possible legislation regarding each of these topics, *see* Garrett, *The Corporate Criminal as Scapegoat*, *supra* note 14, at 1839–46.

191. *See* Truth in Settlements Act of 2015, S. 1109, 114th Cong. (as passed by Senate, Sept. 21, 2015).

192. 18 U.S.C. § 3771(a)(9).

193. *See* Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1129 (2016).

194. 470 U.S. 821, 832–33 (1985).

195. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55, 64, 67 (2004).

196. *See* Lincoln v. Vigil, 508 U.S. 182, 193 (1993).

197. SEC, Office of the Whistleblower, Claim an Award, http://www.sec.gov/about /offices/owb/owb-awards.shtml.

198. *See* Accountable Capitalism Act, S. 3348, 115th Cong. §§ 4(a), 6(b)(1), 8 (2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf.

199. *Id*. §§ 8(c)(2), 9.

200. U.S. Dep't of Justice, Antitrust Division, Sections and Offices, https://www.justice.gov/atr/sections-and-offices.

new positions, have been more insulated from swings in policy.[201] Given the financial penalties involved, the U.S. Treasury would benefit from enhancing this function. Senator Warren introduced Ending Too Big to Jail Act of 2019, which would create a permanent investigative unit along the lines discussed. The bill would proceed by reconstituting the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) as the Special Inspector General for Financial Institution Crime (SIGFIC), expanding its jurisdiction, and making this entity permanent.[202]

To be sure, if the political and policy choice was made at the presidential or Attorney General level, none of those changes would prevent enforcement from declining. Indeed, the tradition of independence and discretion at individual U.S. Attorney's Offices can also protect against policy swings at Main Justice.[203] The Antitrust Division model, with a central office and also branch offices, might best fit the traditions and the model of federal prosecution as a joint national and local enterprise.

Other countries have created a separate corporate crime enforcement agency. For example, after enacting new corporate crime legislation, Ireland created a Corporate Enforcement Authority, which investigates potential corporate crimes and initiates summary proceedings or refers cases to prosecuting authorities.[204] In Fall 2016, France enacted the Sapin II legislation, which created a new French anti-bribery agency to issue regulations for anti-bribery compliance accompanying adoption of specific provisions regarding judicial review and approval of deferred prosecution agreements in criminal cases.[205] Thus, France rejected the proposal to adopt a U.S.-style model in which deferred prosecution agreements with corporations could be entered largely out of court. Instead, Sapin II calls for ongoing regulation by an administrative agency overseeing anti-corruption efforts. Canada adopted a deferred prosecution approach through legislation, which requires that remediation agreements satisfy the public interest and be approved by the judge.[206] The new regime has already resulted in controversy concerning SNC Lavalin's interest in promoting enactment of the legislation to obtain a more lenient settlement;

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201. *See* U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE, *supra* note 19.

202. *See* Ending Too Big to Jail Act, S. 1005, 116th Cong. (2019), https://www.govtrack.us/congress/bills/116/s1005.

203. *See, e.g.*, Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757, 780–81 (1999).

204. General Scheme of the Companies (Corporate Enforcement Authority) Bill of 2018 (Ir.), https://dbei.gov.ie/en/Legislation/General-Scheme-Companies-Corporate-Enforcement-Authority-Bill-2018.html.

205. Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (1), JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, Dec. 10, 2016 ("Sapin II"); *see also* Frederick T. Davis, *A French Court Authorizes the First-Ever "French DPA"*, NYU COMPLIANCE & ENF'T BLOG (Nov. 24, 2017), https://wp.nyu.edu/compliance_enforcement/2017/11/24/a-french-court-authorizes-the-first-ever-french-dpa.

206. Criminal Code, R.S.C., 1985, c. C–46, § 715.37(1) ("When the prosecutor and the organization have agreed to the terms of a remediation agreement, the prosecutor must apply to the court in writing for an order approving the agreement."), https://laws-lois.justice.gc.ca/eng/acts/c-46/page-182.html#docCont.

prosecutors ultimately did not offer a DPA, and the company now faces a criminal trial.[207] Other countries, such as Australia and Singapore, are considering new corporate crime legislation adopting judicially-reviewed settlement approaches.[208]

Some countries that have created such entities may have done so in part because they lack experienced and well-resourced corporate prosecution groups like those the DOJ already has. However, some type of independent agency might ensure more consistent investigations and policymaking over time. Such an agency might be a focus for resources as well. Conversely, it could also be an attractive target for cuts, like enforcement at the IRS and SEC has been over the years. That agency could then coordinate with a Corporate Prosecution Division at the Department of Justice, but it could ensure continuity in policy, regulations, and investigations of corporate conduct. Today, that function is handled ad hoc by a task force (which the DOJ rebadged, having disbanded the Financial Crimes Task Force in 2018).[209]

Other countries have adopted approaches that rely more heavily on statutory guidelines and judicial review. In 2013, the United Kingdom enacted the Crime and Courts Act of 2013, permitting deferred prosecution agreements with corporations.[210] However, the legislation requires judicial oversight and approval. The Crown Prosecution Service and Serious Fraud Office produced additional detailed guidance accompanying the legislation.[211] Once such an agreement is negotiated, it is presented to the Crown Court for approval, and the judge reviews it asking whether the agreement is "fair, reasonable, and proportionate."[212] Only four deferred prosecution agreements have been entered in the U.K. to date.[213]

Our corporate criminal system continues to rely on the discretion of line prosecutors, who decide how they wish to settle the largest criminal cases based on lengthy, complex, non-binding, and constantly-amended organizational prosecution principles. Judicial review is almost entirely absent from deferred prosecution agreements, which are stayed on federal district court dockets, and is entirely absent from declinations and non-prosecution agreements because such agreements are not filed

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207. *SNC-Lavalin posts $2.1 billion loss as assets revalued*, DAILY COM. NEWS (Aug. 1, 2019), https://canada.constructconnect.com/dcn/news/economic/2019/08/snc-lavalin-posts-2-1-billion-loss-assets-revalued.

208. Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) (Austl.), https://www.aph.gov.au/Parliamentary_Business/ Bills_Legislation/Bills_Search_Results/Result?bId=s1108; Singapore Criminal Justice Reform Bill, Bill No. 14/2018, § 149(F), https://sso.agc.gov.sg/Bills-Supp/14-2018.

209. The new task force is the Task Force on Market Integrity and Consumer Fraud. Press Release, U.S. Dep't of Justice, Department of Justice, Bureau of Consumer Financial Protection, U.S. Securities and Exchange Commission, Federal Trade Commission Announce Task Force on Market Integrity and Consumer Fraud (July 11, 2018), https://www.justice.gov/opa/pr/department-justice-bureau-consumer-financial-protection-us-securities-and-exchange-commission.

210. *See* U.K. Serious Fraud Off., *Deferred Prosecution Agreements*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

211. U.K. CROWN PROSECUTION SERVICE & SERIOUS FRAUD OFF., DEFERRED PROSECUTION AGREEMENTS CODE OF PRACTICE (2014), https://www.sfo.gov.uk/?wpdmdl=1447.

212. *Id*. at 17.

213. F. Joseph Warin et al., *supra* note 39.

in court.[214] In 2009, the Government Accountability Office criticized the DOJ for lack of criteria for deciding whether a company receives a deferred or non-prosecution agreements, but little has changed.[215] In 2015, federal district judge Richard J. Leon rejected a deferred prosecution agreement with a company for foreign bribery, noting that not only were "no individuals . . . being prosecuted for their conduct at issue here" but also "a number of the employees who were directly involved in the transactions are being allowed to remain with the company."[216] However, the D.C. Circuit Court of Appeals overturned that ruling and held that the district judge abused discretion in rejecting a corporate deferred prosecution agreement.[217] No sound and rational regulator would choose such a system, dependent on prosecutorial discretion with only non-binding guidance, to prevent serious corporate misconduct. More than ten years after the crisis, it is time to formalize corporate enforcement rather than depend on informal task forces and ever-shifting and non-binding guidelines in the U.S. Attorney's Manual.

CONCLUSION

Ten years after the crisis, there is little public pressure to respond to the family of "too big to jail" problems associated with the decline in corporate prosecutions and the weakening of corporate enforcement policy. Federal corporate penalties sharply declined with the change in presidential administrations. Despite stated efforts to charge individuals alongside corporations, such individual prosecutions have remained infrequent and fairly marginal. The DOJ has introduced a series of policies to reduce corporate criminal penalties, relax individual charging priorities, avoid the use of independent corporate monitors, and more. The change in federal corporate prosecutions priorities has been sharp, and it is apparent in outcomes. In practice, the DOJ has in a variety of ways extended new forms and degree of leniency to the largest companies in the most serious criminal cases.

Across the globe, countries have increased their focus on corporate prosecutions in recent years. Several have enacted new corporate crime statutes and created new administrative agencies that focus on corporate criminal enforcement. The U.S. could learn from such approaches, which aim to rely less on prosecutorial discretion and more on judicial and administrative review. Centering corporate prosecution functions in a dedicated expert group within the DOJ would help insulate this work, in the way that the Antitrust Division and the FCPA group has been insulated. The inconstancy of U.S. corporate prosecution policy and practice is a function of our system's reliance first and foremost on nearly unfettered prosecutorial discretion. A growing body of non-binding guidelines accompanies a complex

214. *See* Garrett, *Public Interest in Corporate Settlements*, *supra* note 124.

215. U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-636T, PRELIMINARY OBSERVATIONS ON THE DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS (2009).

216. U.S. v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 166 (D.D.C. 2015).

217. U.S. v. Fokker Servs., B.V., 818 F.3d 733, 742 (D.C. Cir. 2016).

system for corporate prosecutions that ultimately hinges on the policies and attitudes of prosecutors. The U.S. system of negotiated outcomes does not deliver certainty for corporations and does not serve the public interest well. Prosecutors were widely seen as not having responded adequately to the financial crisis. However, the U.S. continues to rely on the discretion of varied groups of prosecutors, with their political and resource constraints, to handle the most serious corporate crimes. Ten years later, if we still have not learned the lessons of the last financial crisis, the next one cannot be far ahead.

APPENDIX A. CORPORATE PROSECUTIONS IN THE LAST 20 MONTHS OF THE OBAMA ADMINISTRATION, TOTAL PENALTIES OVER $5 MILLION

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Volkswagen AG	plea	Fraud - General	2017-04-21	2,800,000,000	No	Yes
Takata Corp.	plea	Fraud - General	2017-03-07	1,000,000,000	No	No
Citicorp	plea	Antitrust	2017-01-10	925,000,000	Yes	Yes
General Motors	DP	Fraud - General	2015-09-17	900,000,000	No	Yes
Barclays PLC	plea	Fraud - General	2017-01-10	710,000,000	Yes	Yes
Olympus Corporation of the Americas	DP	Kickbacks	2016-02-29	612,000,000		No
The Western Union Co.	DP	Bank Secrecy Act	2017-01-19	586,000,000	Yes	Yes
JP Morgan Chase & Co	plea	Antitrust	2017-01-10	550,000,000	Yes	Yes
Bank Julius Baer & Co. Ltd.	DP	Fraud - Tax	2016-02-04	542,000,000	Yes	No
Braskem S.A.	plea	Fraud - General	2017-01-26	537,731,535	No	Yes
Tenet Healthcare	NP	Fraud - General	2016-09-30	512,788,345		Yes
Teva Pharmaceuti-cal Industries LTD	DP	FCPA	2016-12-22	497,773,518	No	Yes

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Royal Bank of Scotland (RBS)	plea	Fraud - General	2017-01-10	395,000,000	Yes	Yes
VimpelCom Ltd.	DP	FCPA	2016-02-10	230,326,398	No	Yes
Och-Ziff Capital Management Group, LLC	DP	FCPA	2016-09-28	213,055,689	No	Yes
UBS	plea	Fraud - General	2017-01-10	203,000,000	Yes	Yes
Union Bancaire Privee, UBP SA	NP	Fraud - Tax	2016-01-01	187,767,000	Yes	No
Rolls-Royce plc	DP	FCPA	2017-01-17	169,917,710	No	No
Credit Agricole Corporate & Investment Bank	DP	Import / Export	2015-10-20	156,000,000	Yes	No
Nishikawa Rubber Co., LTD.	plea	Antitrust	2016-09-01	130,000,000	No	No
Torneos y Competenci-as S.A.	DP	Fraud - General	2016-12-13	112,822,616	No	No
Embraer S.A.	DP	FCPA	2016-10-24	107,285,090	No	No
Bank Lombard Odier & Co. Ltd.	NP	Fraud - Tax	2015-12-01	99,809,000	Yes	No

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Credit Agricole (Suisse) SA	NP	Fraud - Tax	2015-12-08	99,211,000	Yes	No
Odebrecht S.A.	plea	Fraud - General	2017-04-17	96,000,000	No	Yes
Bank J. Safra Sarasin SA	NP	Fraud - Tax	2015-12-22	85,809,000	Yes	No
Atlanta Medical Center, Inc.	plea	Fraud - General	2016-10-21	84,696,727	No	No
Coutts & Co. Ltd.	NP	Fraud - Tax	2015-12-19	78,484,000	Yes	No
JPMorgan Securities (Asia Pacific) Limited	NP	FCPA	2016-11-17	72,000,000	Yes	Yes
General Cable Corp.	NP	FCPA	2016-12-22	71,643,932	No	Yes
NGK Insulators, Ltd.	plea	Antitrust	2015-11-16	65,300,000	No	No
Corning International Kabushiki Kaisha	plea	Antitrust	2016-05-16	65,000,000	No	No
Kayaba Industry Co. Ltd.	plea	Antitrust	2015-11-02	62,000,000	No	No
Kayaba Industry Co., Ltd.	plea	Antitrust	2015-11-02	62,000,000		No

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
North Fulton Medical Center Inc.	plea	Fraud - General	2016-10-21	61,091,618	No	No
BNP-Paribas (Suisse) SA	NP	Fraud - Tax	2015-11-10	59,783,000	Yes	No
HSZH Verwaltungs AG	NP	Fraud - Tax	2015-12-30	49,757,000	Yes	No
Las Vegas Sands Corp.	NP	FCPA	2017-01-17	47,400,300	No	Yes
Banque Privee Edmond de Rothschild (Suisse) SA & Banca Privata Edmond de Rothschild (Lugano) S	NP	Fraud - Tax	2015-12-10	45,245,000	Yes	No
Banque Cantonale du Vaudoise	NP	Fraud - Tax	2015-12-21	41,677,000	Yes	No
Genzyme Corp.	DP	FDCA / Pharma	2015-08-31	32,587,439	No	No
Deutsche Bank (Suisse) SA	NP	Fraud - Tax	2015-11-24	31,026,000	Yes	No
EFG Bank European Financial Group SA, Geneva (EFG Group) & EFG Bank AG (EFG Bank)	NP	Fraud - Tax	2015-11-20	29,988,000	Yes	No

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Parametric Technology (Shanghai) Software Co. Ltd. and Parametric Technology (Hong Kong) Limited	NP	FCPA	2016-02-16	28,162,000	No	No
The Tulving Co., Inc.	plea	Fraud - General	2016-03-11	26,561,433		No
National Oilwell Varco, Inc.	NP	Import / Export	2016-11-01	25,000,000	No	No
Dreyfus Sons & Co. Ltd. Banquiers	NP	Fraud - Tax	2015-12-10	24,161,000	Yes	No
Maerki Baumann & Co., AG	NP	Fraud - Tax	2015-11-04	23,920,000	Yes	No
Olympus Latin America, Inc.	DP	FCPA	2016-03-01	22,800,000		No
Cantor Gaming / CG Technology	NP	Bank Secrecy Act	2016-10-03	22,500,000	No	No
LATAM Airlines Group S.A.	DP	FCPA	2016-07-25	22,187,788	No	Yes (ADR)
Warner Chilcott Sales (US) LLC	plea	Fraud - Health Care	2016-10-15	20,940,000		No
Tishman Construction Corp.	DP	Fraud - General	2015-12-10	20,230,918	No	No

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
KBL (Switzerland) Ltd.	NP	Fraud - Tax	2015-11-10	18,792,000	Yes	No
Societe Generale Private Banking (Suisse) SA	NP	Fraud - Tax	2015-06-02	17,807,000	Yes	No
Zimmer Biomet Holdings, Inc.	DP	FCPA	2017-01-13	17,400,000	No	Yes
Baxter Healthcare Corp.	DP	FDCA / Pharma	2017-01-12	16,000,000	No	No
Sociedad Quimica y Minera de Chile (SQM)	DP	FCPA	2017-01-13	15,487,500	No	Yes
Piguet Galland & Cie SA	NP	Fraud - Tax	2015-10-02	15,365,000	Yes	No
Rubycon Corp.	plea	Antitrust	2017-03-03	12,000,000	No	No
Rothschild Bank AG	NP	Fraud - Tax	2015-06-03	11,510,000	Yes	No
Gonet & Cie	NP	Fraud - Tax	2015-12-18	11,454,000	Yes	No
Luzerner Kantonalbank AG	NP	Fraud - Tax	2015-10-27	11,031,000	Yes	No
Discovery Sales, Inc.	plea	Fraud - General	2016-12-26	11,000,000	No	No

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
BBVA (Suiza) SA	NP	Fraud - Tax	2015-10-09	10,390,000	Yes	No
Schroder & Co. Bank AG	NP	Fraud - Tax	2015-09-02	10,354,000	Yes	No
Banque Internationale a Luxembourg (Suisse) SA	NP	Fraud - Tax	2015-11-06	9,710,000	Yes	No
St. Galler Kantonalbank AG	NP	Fraud - Tax	2015-08-31	9,481,000	Yes	No
Habib Bank AG Zurich	NP	Fraud - Tax	2015-10-15	9,400,000	Yes	No
Bank La Roche & Co. AG	NP	Fraud - Tax	2015-09-03	9,296,000	Yes	No
Alpha Corp.	plea	Antitrust	2016-12-14	9,000,000	No	No
Biocompatib-les Inc.	plea	FDCA / Pharma	2016-11-22	8,751,673	No	No
Plaza Construction, LLC	DP	Fraud - General	2016-10-14	7,845,539	No	No
Bordier & CIE	NP	Fraud - Tax	2015-12-04	7,827,000	Yes	No
B. Braun Medical, Inc.	NP	FDCA / Pharma	2016-05-13	7,800,000	No	No
Lumber Liquidators, Inc.	plea	Import / Export	2016-02-03	7,800,000	No	No
Baumann & Cie, Banquiers	NP	Fraud - Tax	2015-12-03	7,700,000	Yes	No

Appendix A, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Privatbank IHAG Zurich AG	NP	Fraud - Tax	2015-11-09	7,453,000	Yes	No
IAP Worldwide Services, Inc.	NP	FCPA	2015-06-16	7,100,000	No	No
Airgas Doral, Inc.	plea	Environment-al	2016-05-27	7,000,000	No	No
Wood Group P S N Inc	plea	False Statements	2017-03-08	7,000,000	No	No
Standard Chartered Bank (Switzerland) SA	NP	Fraud - Tax	2015-11-12	6,337,000	Yes	No
PKB Privatbank AG	NP	Fraud - Tax	2015-07-29	6,328,000	Yes	No
PBZ Verwaltungs AG	NP	Fraud - Tax	2015-12-08	5,570,000	Yes	No
Corner Banca SA	NP	Fraud - Tax	2015-11-30	5,068,000	Yes	No
Geo Specialty Chemicals, Inc.	plea	Antitrust	2016-06-21	5,000,000	No	No

APPENDIX B. CORPORATE PROSECUTIONS IN THE FIRST 20 MONTHS OF THE TRUMP ADMINISTRATION, TOTAL PENALTIES OVER $5 MILLION

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Societe Generale S.A.	DP	FCPA	2018-06-05	860,552,888	No	No
Telia Company AB	DP	FCPA	2017-09-21	548,603,972	No	No
U.S. Bancorp	DP	Bank Secrecy Act	2018-02-12	453,000,000	Yes	Yes
ZTE Corp.	plea	Import / Export	2017-03-22	430,488,798	No	No
Amerisource-Bergen Specialty Group	plea	FDCA / Pharma	2017-09-28	260,000,000	No	Yes
Panasonic Avionics Corp.	DP	FCPA	2018-04-30	137,400,000	No	Yes
HSBC Holdings Plc	DP	Fraud - General	2018-01-18	109,579,000	Yes	Yes
Keppel Offshore & Marine Ltd.	DP	FCPA	2017-12-22	105,554,245	No	No
Zurcher Kantonalbank	DP	Fraud - Tax	2018-08-07	98,533,560	Yes	No
Banamex USA	NP	Bank Secrecy Act	2017-05-18	90,000,000	Yes	Yes
BNP Paribas USA, Inc.	plea	Antitrust	2018-06-04	90,000,000	Yes	No
Petroleo Brasileiro S.A.	NP	FCPA	2018-09-26	85,320,000	No	No

Appendix B, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Asplundh Tree Experts, Co.	plea	Immigration	2017-09-28	80,000,000	No	No
Legg Mason Inc.	NP	FCPA	2018-06-04	64,242,892	No	Yes
Basler Kantonalbank	DP	Fraud - Tax	2018-08-28	60,400,000	Yes	No
Nichicon Corp.	plea	Antitrust	2018-04-24	54,600,000	No	No
Credit Suisse (Hong Kong) Ltd.	NP	FCPA	2018-05-24	47,029,916	Yes	No
Georgeson, LLC	DP	Fraud - General	2017-11-30	45,000,000	No	No
RBS Securities, Inc.	NP	Fraud - General	2017-10-25	43,091,317	Yes	Yes
Health Management Associates, LLC	NP	Fraud - Health Care		35,007,846	No	No
Bumble Bee Foods LLC	plea	Antitrust	2017-08-07	25,000,000	No	No
US Imagina, LLC	plea	FCPA	2018-07-10	24,812,320	No	No
Hoegh Autoliners AS	plea	Antitrust	2017-12-14	21,000,000	No	No
Barclays, PLC	declination	Fraud - Securities	2018-02-28	12,896,011	Yes	Yes

Appendix B, contd.

Company	Disposition Type	Primary Crime	Date	Total Payment	Financial Inst.	Public Company
Marayusu Industries Co. Ltd.	plea	Antitrust	2018-05-31	12,000,000	No	No
Linde North America, Inc. & Linde Gas North America LLC	declination	FCPA	2017-06-16	11,235,000	No	No
Mirelis Holding S.A.	NP	Fraud - Tax		10,245,000	Yes	No
Aegerion Pharmaceuti-cals, Inc.	DP	Fraud - Health Care	2017-09-22	7,200,000	No	No
Kiekert AG	plea	Antitrust	2017-06-14	6,159,040	No	No
Bank Lombard Odier & Co., Ltd.	NP	Fraud - Tax	2018-07-31	5,300,000	Yes	No
Terminix International USVI, LLC	trial conviction	Environment-al	2017-11-20	5,242,449	No	No
DAXC, LLC	DP	Other	2017-03-20	5,212,825	No	No
Southern Glazer's Wine & Spirits of Pennsylvania	NP	Bribery	2017-06-29	5,000,000	No	No
NPB Neue Privat Bank	NP	Fraud - Tax		5,000,000	Yes	No