

## Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime

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## NOTE

# DEFERRED/NON PROSECUTION AGREEMENTS: EFFECTIVE TOOLS TO COMBAT CORPORATE CRIME

*Michael Yangming Xiao\**

*As corporations assume a more prominent role in society, government authorities face an increasing challenge to combat the concomitant growth of corporate crime. While formal criminal and civil litigation remain important tactics, authorities also rely on alternative dispute resolution mechanisms, such as cooperation agreements, to remedy corporate delinquency. Amongst the different types of cooperation agreements, prosecutors increasingly utilize deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to bring delinquent corporations to justice. Commentators, however, have alternately criticized DPAs and NPAs as both being too harsh and too lenient on corporate offenders. This Note analyzes the effectiveness of DPAs and NPAs compared to traditional litigation as well as other alternative dispute resolution mechanisms such as pretrial settlement. It will respond to criticisms and highlight why both DPAs and NPAs should continue to be employed with increasing frequency by prosecutors to combat corporate delinquency.*

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## INTRODUCTION

Corporations play an important role in today's world. Often regarded as "the centerpiece of a free-market capitalist economy," their presence and influence reach almost every corner of society.<sup>1</sup> However, an unfortunate byproduct of the rise of corporation is the criminal misconduct associated with these entities. Corporate crimes cost the United States hundreds of billions of dollars annually and inflict great personal, social, environmental, and economic harm.<sup>2</sup>

Governmental authorities, especially prosecutors, often struggle in combating corporate crimes. Indeed, due to the crimes' low visibility,<sup>3</sup> authorities encounter difficulties at every stage of bringing a delinquent corporation to justice, from detecting the crime to specifying charges to collecting evidence for trial. In the face of these challenges, the government often employs alternative methods to levy punishments against corporations, such as cooperation agreements.<sup>4</sup> In these agreements, the defendant pleads guilty to certain charges and agrees to cooperate with the government. In exchange the government dismisses other possible charges or levies a lighter sentence.<sup>5</sup>

Prosecutors often use two types of cooperation agreements: deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).<sup>6</sup> Although DPAs and NPAs were initially created as alternative forms of punishment for juvenile and drug offenders, they are being used increasingly in corporate crime proceedings.<sup>7</sup> In 2007, the number of federal corporate DPAs and NPAs increased seventy percent from the

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<sup>1</sup> David O. Friedrichs, *Trusted Criminals: White Collar Crime in Contemporary Society* 67 (1995).

<sup>2</sup> Victor E. Kappeler & Gary W. Potter, *Corporate Crime and "Higher Immorality,"* in *The Mythology of Crime and Criminal Justice* 149 (Victor E. Kappeler and Gary W. Potter eds., 2005).

<sup>3</sup> Friedrichs, *supra* note 1, at 132.

<sup>4</sup> See Julie R. O'Sullivan, *Federal White Collar Crime: Cases and Materials* 1124 (2012).

<sup>5</sup> See *id.*

<sup>6</sup> The difference between DPAs and NPAs is whether charges were ever filed. See O'Sullivan, *supra* note 4, at 1155. For the purpose of this Note, the distinction between the two cooperation agreements will not be elaborated.

<sup>7</sup> See Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 Colum. L. Rev. 1863, 1863-64 (2005); see also *Corporate Deferred, Non-Prosecution Agreements Up 70 Percent in 2007*, 21 Corp. Crime Rep. 2 (Jan.8, 2008), <http://www.corporatecrimereporter.com/deferred010708.htm>.

previous year.<sup>8</sup> DPAs and NPAs have been identified as “the standard method of settling major federal corporate crime investigations.”<sup>9</sup> Between 2000 and 2010, the number of DPAs and NPAs issued by the Department of Justice for corporate crimes rose by 3200%. In 2009 alone, DPAs and NPAs incorporated over 1.45 billion U.S. dollars in fines and penalties.<sup>10</sup> Today, DPAs and NPAs remain a popular tactic for prosecutors in resolving corporate criminal cases. In a single case in November 2010, the United States Attorney’s Office for the Eastern District of New York (U.S.A.O. E.D.N.Y.) ordered a defendant corporation to pay twenty million dollars for defrauding the federal government under the terms of a non-prosecution agreement.<sup>11</sup>

Commentators have criticized prosecutors’ use of DPAs and NPAs in corporate crime proceedings as alternately too harsh and too lenient. On the one hand, many commentators view DPAs and NPAs—and the justice system in general—as too pro-prosecution. These mechanisms lead to over-enforcement, they argue, because prosecutors can exploit their “virtually unchecked power to extract and coerce ever greater concessions,” which jeopardizes the “very nature of our adversary system.”<sup>12</sup> Indeed, even current Attorney General Eric Holder stated, while in private practice, that prosecutors often abuse their authority by requesting that defense counsel for corporations waive attorney-client privileges in exchange for “cooperation” status.<sup>13</sup> Forcing such waivers raise concerns regarding due process.

On the other hand, some commentators warn that DPAs and NPAs may “allow a corporate criminal to escape without consequences.”<sup>14</sup> They believe that alternative mechanisms such as DPAs and NPAs reflect the Department of Justice’s “soft-on-corporate-crime” approach, which excuses business executives and corporations from serious crimi-

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<sup>8</sup> See *Corporate Deferred, Non Prosecution Agreements Up 70 Percent in 2007*, 21 Corp. Crime Rep. 2, 2 (Jan. 8, 2008), <http://www.corporatecrimereporter.com/deferred010708.htm>.

<sup>9</sup> See *id.*

<sup>10</sup> See *2010 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, GIBSON DUNN & CRUTCHER LLP PUBL’N (Nov. 8, 2012), <http://www.gibsondunn.com/publications/Documents/2010Year-EndUpdate-CorporateDeferredProsecutionAndNon-ProsecutionAgreements.pdf>.

<sup>11</sup> See Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., Schiavone Construction to Pay \$20 Million and Costs of Investigation to Resolve Public Works Hiring Fraud (Nov. 29, 2010), available at <http://www.justice.gov/usao/nye/pr/2010/2010nov29.html>.

<sup>12</sup> 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, 1095 (2006).

<sup>13</sup> See Peter Lattman, *The Holder Memo and Its Progeny*, Wall St. J. Online (Dec. 13, 2006), <http://blogs.wsj.com/2006/12/13/the-holder-memo/>.

<sup>14</sup> Ved P. Nanda, *Corporate Criminal Liability: Corporate Criminal Liability in the United States: Is a New Approach Warranted?* 58, Am. J. Comp. L. 605, 622 (2010).

nal charges in exchange for a fine and a promise to correct their actions.<sup>15</sup> Professor Mary Ramirez stated that these mechanisms create “no disincentives for committing fraud or white-collar crime, in particular in the financial space.”<sup>16</sup> Many commentators also contrast DPAs and NPAs in the corporate sphere with the Department of Justice’s zealous prosecution of low-level street crimes, such as drug offenses.<sup>17</sup> They argue that, while street criminals are often incarcerated for committing theft, robbery, and other common street crimes—though the actual monetary damage may be relatively miniscule—corporations and corporate criminals often avoid prison or other meaningful punishment even when monetary loss is significant.<sup>18</sup>

This Note seeks to examine some benefits of the DPAs and NPAs and balance those benefits against their alleged shortcomings. It will highlight the challenges government authorities face in punishing corporate criminals, and describe how DPAs and NPAs mitigate some of these challenges. It will also outline the benefits of DPAs and NPAs to corporations, such as how these mechanisms help maintain the integrity and financial viability of a punished corporation. Overall, any perceived drawbacks of over-enforcement and under-punishment of DPAs and NPAs against corporations, this Note argues, are outweighed by their benefits. DPAs and NPAs should continue to be relied upon in the future to resolve appropriate types of corporate crimes. In this Note, “appropriate types” of corporate crimes are defined as crimes which (1) result primarily in monetary damage and not environmental, physical, or irreparable damage, (2) are categorized as *mala prohibita* and not *mala in se*, (3) can be relatively easily remedied through monetary penalties and affirmative remedial plans, and (4) involve guilty actors who can be rehabilitated without imprisonment.<sup>19</sup>

Corporate crimes vary greatly in terms of type of delinquency involved and degree of harm caused. As such, analyzing a single type of corporate crime will allow for a simpler and more accurate assessment of the effects of DPAs and NPAs in combating that specific type of corporate crime. DPAs and NPAs resolve a wide range of corporate crimes,

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<sup>15</sup> See e.g., *U.S. Department of Justice Soft on Corporate Crime*, PRISON LEGAL NEWS, [https://www.prisonlegalnews.org/\(S\(xhaead55yc1favvmoyje5x31\)\)/displayArticle.aspx?articleid=24561&AspxAutoDetectCookieSupport=1](https://www.prisonlegalnews.org/(S(xhaead55yc1favvmoyje5x31))/displayArticle.aspx?articleid=24561&AspxAutoDetectCookieSupport=1) (last visited Nov. 20, 2012); *Going Soft on Corporate Crime*, N.Y. Times (Apr. 10, 2008), <http://www.nytimes.com/2008/04/10/opinion/10thu2.html>.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> Indeed, some corporate crimes which cause serious environmental or physical damage, and are not readily compensable through monetary means, may rightly deserve harsher punishment such as the imprisonment of guilty actors. However, these crimes will not be discussed here.

but this Note will focus on cases of Disadvantaged Business Enterprises (DBE) fraud. DBE fraud is a good representation of “appropriate crimes” that can be resolved by DPAs and NPAs. It encompasses many other types of substantive corporate crimes, including mail fraud and wire fraud. As a result, DBE fraud cases demonstrate how DPAs and NPAs advance public interests by striking the right balance between punishing corporate wrongdoers and avoiding the negative consequences of dismantling misbehaving corporations.

## I. BACKGROUND OF DISADVANTAGED BUSINESS ENTERPRISES

The Disadvantaged Business Enterprises (DBE) program was created by the United States Department of Transportation (DOT) as an affirmative action program for businesses owned and operated by traditionally disadvantaged groups.<sup>20</sup> The program’s purpose is to increase both the competitiveness of DBEs and their participation in state and local procurement.<sup>21</sup> DOT defines DBEs to include

for-profit small business concerns where socially and economically disadvantaged individuals own at least a 51% interest and also control management and daily business operations. African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis.<sup>22</sup>

Due to their limited size, resources, and capabilities, DBEs are often not capable of taking on government construction projects as main contractors. Rather than granting the whole project, state and local transportation agencies commonly select a non-DBE main contractor for a project, but require them, as a condition of winning the bid, to allocate certain portions of the contract to DBE subcontractors.<sup>23</sup> The DBE subcontractor must perform “commercially useful functions,” which involves “[being] responsible for the execution of a distinct element of the work of a contract . . . actually performing, managing and supervising the work involved, and [furnishing] all supervision, labor, tools, equipment,

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<sup>20</sup> See *Disadvantaged Business Enterprise (DBE) Program*, U.S. Dep’t of Transp., <http://www.dot.gov/osdbu/disadvantaged-business-enterprise> (last visited Sept. 28, 2013).

<sup>21</sup> See *id.*

<sup>22</sup> See *Definition of a Disadvantaged Business Enterprise*, U.S. Dep’t of Transp., <http://osdbuweb.dot.gov/DBEProgram/definitions.cfm> (last visited Oct. 10, 2012).

<sup>23</sup> See, e.g., Press Release, U.S. Dep’t. of Justice, Two Michigan Construction Firms Agree to Pay U.S. \$11.75 Million for Alleged Disadvantaged Business Enterprise Fraud (Mar. 15, 2007), available at [http://www.justice.gov/opa/pr/2007/March/07\\_civ\\_153.html](http://www.justice.gov/opa/pr/2007/March/07_civ_153.html).

materials and supplies necessary to perform that distinct element of the work of the contract.”<sup>24</sup> In the DPA entered against Ajax Paving Industries Inc. and Dan’s Excavating Inc., for example, the two corporations—which were general contractors to a federally funded airport project—were required to subcontract concrete-supply work to a DBE.<sup>25</sup>

DBE fraud occurs when enterprises, through misrepresentation or other forms of deceit, falsely claim to government agencies that they are fulfilling or have fulfilled DBE requirements in the contract. Examples of DBE fraud include when a non-DBE main contractor claims that they have used DBE subcontractors when they actually performed the work themselves or used non-DBE subcontractors, or used DBEs as mere “pass-through” entities without requiring them to actually perform substantive work.<sup>26</sup> DBE fraud also occurs when the DBE firm “should never have received certification at all, or changes in ownership and management caused the company to lose its qualification while maintaining certification.”<sup>27</sup> In the aforementioned DPAs against Ajax Paving and Dan’s Excavating, for example, the general contractors were punished for falsely reporting that they complied with the airport project’s DBE requirements, when in fact they relegated the DBE subcontractor to performing “little more than minor administrative tasks.”<sup>28</sup>

DBE fraud suitably illustrates the effects of DPAs and NPAs for several reasons. First, it is a good representation of the type of corporate crime which is significant primarily in terms of monetary damages, and rather than a sort of harm that is difficult to compensate (such as environmental or physical damage). The main resulting harms of DBE fraud are the deprivation of the federal government of proper allocation of its funds and the undermining of the federal government’s efforts to assist traditionally disadvantaged social groups. There is no serious environmental, physical, or other irreparable harm caused.<sup>29</sup>

One could reasonably argue that there is little practical difference in having a part of a construction project done by a DBE subcontractor or a non-DBE subcontractor, assuming that the quality of the work is similar. Moreover, if DBEs are relegated to act as pass-through entities, these enterprises do not appear to suffer any economic loss since the general

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<sup>24</sup> Indictment at 2, *U.S. v. Tulio*, 06-cr-00133-1 (E.D.Pa. 2006).

<sup>25</sup> See Press Release, U.S. Dep’t. of Justice, *supra* note 23.

<sup>26</sup> See, e.g., Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., *supra* note 11.

<sup>27</sup> Nella M. Bloom, *Disadvantaged Business Enterprise Fraud: New Trends*, CONSTRUCTION LAW SIGNAL (Jan. 20, 2011), <http://www.constructionlawsignal.com/by-state/new-york/disadvantaged-business-enterprise-fraud-new-trends/>.

<sup>28</sup> See Press Release, U.S. Dep’t. of Justice, *supra* note 23.

<sup>29</sup> See, e.g., *id.* (noting that the defendant was guilty only because he had misrepresented the involvement of a DBE in the construction project; there were no concerns regarding any other harm caused).

contractor still pays them.<sup>30</sup> Nonetheless, DBE fraud still warrants attention because of the misallocation of government funds, denying government assistance to traditionally disadvantaged groups—such as women, veterans, and racial minorities—through participation in government projects,<sup>31</sup> further victimizing these groups and hindering the goal of creating equitable opportunities for these groups in society.

Second, DBE fraud is a type of *malum prohibitum* crime (the act is wrongful because it is prohibited by law) and not *malum in se* (the act is bad in itself).<sup>32</sup> In fact, DBE fraud is not even a statutorily-defined crime; rather, DBE fraud occurs when corporations commit other statutorily-defined crimes which defraud government DBE programs. For instance, in a recently decided case that the DOT referred to as the “largest reported DBE fraud in the nation’s history,” a jury convicted defendant Joseph W. Nagle of 26 of the 30 charges he was indicted for.<sup>33</sup> The charges included conspiracy to defraud the DOT, conspiracy to commit wire and mail fraud, wire and mail fraud, conspiracy to commit money laundering, and money laundering.<sup>34</sup>

As a *malum prohibitum* crime, DBE fraud yields criminals that can more likely be rehabilitated without imprisonment than criminals who convict *malum in se* crimes, such as murder or sexual assault. Furthermore, by stringing together otherwise distinct corporate crimes under a common theme, DBE allows for the assessment of the effect of DPAs and NPAs on various crimes in a unified context.

Third, the direct victims of DBE frauds are government entities, while indirect victims include DBEs and competitor non-DBE contractors who unfairly lost their bids on government contracts. This is unlike many corporate crimes where the intended victims are from all kinds of social groups rather than only traditionally disadvantaged ones. Overall, the scope of DBE fraud and the unique impact of DBE fraud makes it particularly worthy of discussion in the context of evaluating DPAs and NPAs.

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<sup>30</sup> See, e.g., Press Release, Dep’t. of Justice Office of Pub. Affairs, Ohio Construction Firm Agrees to Pay \$500,000 to Resolve False Claims Act Allegations (Apr. 23, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-civ-512.html>.

<sup>31</sup> See *Disadvantaged Business Enterprise (DBE) Program*, supra note 20.

<sup>32</sup> Black’s Law Dictionary 588 (9th ed. 2009).

<sup>33</sup> See Press Release, Federal Bureau of Investigations Philadelphia Division, Former President and Owner of Schuylkill Products Convicted in Largest Disadvantaged Business Enterprise Fraud in Nation’s History (Apr. 6, 2012), available at <http://www.fbi.gov/philadelphia/press-releases/2012/former-president-and-owner-of-schuylkill-products-convicted-in-largest-disadvantaged-business-enterprise-fraud-in-nations-history>.

<sup>34</sup> See *id.*



## II. DPAs AND NPAs AND “OVER-ENFORCEMENT” OF CORPORATE CRIME

In 2003, then-United States Deputy Attorney General Larry D. Thompson issued a memorandum to all United States Attorneys titled “Principles of Federal Prosecution of Business Organizations” (hereinafter “Thompson Memo”).<sup>35</sup> The main focus of the memo is “increased emphasis on . . . scrutiny of the authenticity of a corporation’s cooperation.”<sup>36</sup> Among the several factors the Thompson Memo lists for prosecutors to consider when deciding whether to charge a corporation are “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”<sup>37</sup>

The Thompson Memo is sometimes seen as another move in the government’s shift of the judicial process away from courts and juries and into the hands of prosecutors.<sup>38</sup> Such a shift gives a corporation under investigation by United States Attorneys good reason to cooperate with the prosecutors in order to avoid prosecution. Since DPAs and NPAs are forms of cooperation agreements,<sup>39</sup> some corporations would theoretically be more pressured to enter into DPAs and NPAs than they would be if cooperation were not a factor in the prosecutor’s decision to prosecute.

Commentators, such as Richard Janis, express concern that prosecutors’ increased bargaining power and the potential of “forced cooperation” undermines the legal system. He explains:

Prosecutors have exploited their virtually unchecked power to extract and coerce ever greater concessions, jeopardizing the very nature of our adversary system . . . . The net result has been the emasculation of the defense bar and the enforcement of the criminal law in a way that is often wildly out of proportion to the perceived wrongdoing. It can be, and often is, a state-sponsored shakedown scheme in which corporations are extorted to pay penalties grossly out of proportion to any actual misconduct . . . . [P]ayment of tribute to the federal government [is] essentially a cost of doing business.<sup>40</sup>

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<sup>35</sup> Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), available at <http://www.albany.edu/acc/courses/acc695spring2008/thompson%20memo.pdf>.

<sup>36</sup> *Id.* at preface.

<sup>37</sup> *Id.* at II(4).

<sup>38</sup> See Wray & Hur, *supra* note 12 at 1095, 1186.

<sup>39</sup> See O’Sullivan, *supra* note 4, at 1142.

<sup>40</sup> N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, Washington Law. (Mar. 2005),

In other words, the worry is that DPAs and NPAs would lead corporations to plead guilty to crimes that they are not guilty of, or accept punishments harsher than what is deserved for their misbehavior, out of fear that not doing so could be seen as non-cooperation and be subject to potentially worse consequences through trial proceedings.

Another criticism is that, should a case ultimately go to trial, prosecutors can use previous DPAs and NPAs as unfair shortcuts to secure a conviction.<sup>41</sup> DPAs and NPAs often require corporations to admit misconduct and implement remedial measures in addition to pay fines and penalties. For example, in an NPA for DBE fraud between New York construction company Schiavone Construction Co. LLC and the United States Attorney's Office for the Eastern District of New York, the company had to admit that some of its employees engaged in fraudulent conduct and promise to undertake various remedial measures to meet the DBE goals outlined in the construction contracts it signed with the New York Metropolitan Transit Authority (an agency that receives DOT funding and thus establishes DBE goals).<sup>42</sup> When a defendant corporation admits guilt, it becomes particularly vulnerable if the case later proceeds to trial. This could occur if, for example, prosecutors determine that the corporation breached the DPAs or NPAs because the corporation failed to perform a promised remedial measure. As Christopher A. Wray and Robert K. Hur observe, "[t]he government . . . [is] armed with the company's admission and all the evidence obtained from its cooperation, making conviction virtually a foregone conclusion."<sup>43</sup>

The critics make valid arguments. However, there are several important counterpoints. First, prosecutors generally do not abuse their power to inflict arbitrary punishment onto otherwise innocent actors.<sup>44</sup> Former Assistant U.S. Attorney N. Richard Janis, in the same article criticizing prosecutors for destroying the adversary system, recognized that "most prosecutors [are] generally fair-minded, conscientious . . . believe strongly in what they are doing and genuinely believe that they are serving the public good."<sup>45</sup> He further expressed that "many companies and individuals who find themselves in the cross[ ]hairs of prosecutors deserve the attention they are getting, and prosecution in many such instances are fully warranted."<sup>46</sup> Furthermore, the large monetary penalties—often millions or even tens of millions of dollars—as well as

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[http://www.debar.org/for\\_lawyers/resources/publications/washington\\_lawyer/march\\_2005/stand.cfm](http://www.debar.org/for_lawyers/resources/publications/washington_lawyer/march_2005/stand.cfm).

<sup>41</sup> See Wray & Hur, *supra* note 12, at 1104-05.

<sup>42</sup> See Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11.

<sup>43</sup> Wray & Hur, *supra* note 12, at 1105.

<sup>44</sup> See Janis, *supra* note 40.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

painstaking remedial measures stipulated by DPAs and NPAs indicate that punished corporations will not accept such harsh punishments unless they are in fact guilty of some misconduct.<sup>47</sup>

Second, prosecuting corporations via trial is often difficult and time consuming, and there is no guarantee that the government will secure a victory against a corporation deserving punishment. Corporate crimes are often low visibility and are thus hard to detect. As such, they are difficult for prosecutors to gather sufficient evidence for a *criminal* conviction, which requires proof beyond a reasonable doubt.<sup>48</sup> Furthermore, corporate criminals' deep pockets means prosecutors are likely to be met with strong resistance from highly skilled defense counsel, which adds to the difficulty of securing a conviction through trial. The "swamped" court system—due, in part, to recent "get-tough-on-crime" policies as well as an influx of immigration cases in the federal courts—also means that it will take a long time for prosecutors to bring a corporate criminal to justice in a full prosecution.<sup>49</sup> In *U.S. v. Tulio*,<sup>50</sup> for example, the prosecution successfully prosecuted the defendant for DBE fraud. However, between the time the alleged fraud occurred (between 1999 and 2001), and the date that the verdict was finalized after a trial and an appeal (2008), over seven years had elapsed.<sup>51</sup> Such lengthy proceedings hinder the efficient administration of justice, and also costs the government significant time, effort, and litigation expenses. With only a limited amount of time and resources, prosecutors involved in such a proceeding may forego charging and prosecuting other corporate crime suspects, which leads to under-enforcement.

DPAs and NPAs, as well as other cooperation agreements, offer an attractive solution to these problems. By closing the case at the pretrial stage and securing a victory, albeit possibly a smaller one than a trial verdict, prosecutors avoid the difficulties and uncertainty in trying a corporate criminal. Indeed, "[g]iven the scanty resources that have been committed to corporate crime enforcement . . . the government's leveraging of its prosecution power from corporations and their lawyers has been critically important."<sup>52</sup> DPAs and NPAs reduce the time, energy, and cost prosecutors need to spend on a case because it allows them to bypass many of the procedural requirements involved in a formal judicial

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<sup>47</sup> See, e.g., Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11.

<sup>48</sup> Friedrichs, *supra* note 1, at 132.

<sup>49</sup> See Anne Gearan, *Judges Say US Courts are Swamped*, BOSTON.COM (Mar. 17, 2004), [http://articles.boston.com/2004-03-17/news/29204279\\_1\\_federal-court-judicial-conference-federal-judges](http://articles.boston.com/2004-03-17/news/29204279_1_federal-court-judicial-conference-federal-judges).

<sup>50</sup> 263 Fed.Appx.258 (3rd Cir. 2008).

<sup>51</sup> See generally *id.*; see also Indictment at 13, *U.S. v. Tulio*, 06-cr-00133-1 (E.D.Pa. 2006).

<sup>52</sup> *U.S. Department of Justice Soft on Corporate Crime*, *supra* note 15.

proceeding, from jury selection and pre-motions to post-trial hearing and appeals. This enables the government to make better use of its efforts and expenses to prosecute more corporate criminals that may otherwise go unnoticed because of procedural or practical challenges.

Moreover, DPAs and NPAs also increase the efficiency of justice by fostering cooperative relationships between prosecutors and delinquent corporations, and decrease the turnaround time of cases. In the NPA between Schiavone and the U.S.A.O. of E.D.N.Y., for example, the alleged DBE fraud occurred from 2002 until 2007.<sup>53</sup> Several government agencies began investigating Schiavone's conduct in early 2006.<sup>54</sup> Schiavone cooperated with the investigations, and began complying with government requests as early as September 2008, when they established an Ethics and Compliance Officer to ensure that the corporation fulfilled its DBE requirements.<sup>55</sup> A full NPA, final and non-appealable, was reached between Schiavone and the U.S.A.O. E.D.N.Y. in November 2010, approximately four years and nine months after investigations began.<sup>56</sup> This was a much more efficient—and arguably preferable—result than a full judicial proceeding such as in *Tulio*, where the prosecutor and the defendant maintained an adversarial relationship for over seven years from when investigations started to when the final verdict was affirmed.<sup>57</sup> Therefore, as long as DPAs and NPAs do not significantly under-punish corporate criminals, it should continue as a mechanism in combating corporate crime.

### III. DPAs AND NPAs AND “UNDER-PUNISHMENT” OF CORPORATE CRIME

The new emphasis on DPAs and NPAs in the prosecution of corporations is documented in “Principles of Federal Prosecution of Business Organizations,” a memorandum written in 2008 by then Deputy Attorney General Mark Filip.<sup>58</sup> This memo has since then been incorporated into

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<sup>53</sup> See Non-Prosecution Agreement Between Schiavone Construction CO. LLC and the U.S. Attorney's Office for the E. Dist. of N.Y. at 1, available at <http://www.gibsondunn.com/publications/Documents/SchiavoneNPA.pdf> (last visited Nov. 20, 2012).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 2-4.

<sup>56</sup> See, Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11.

<sup>57</sup> See Indictment at 13, U.S. v. Tulio, 06-cr-00133-1 (E.D.Pa. 2006); see also Judgment, U.S. v. Tulio, 06-cr-00133-58 (E.D.Pa. 2006).

<sup>58</sup> U.S. Dep't of Justice, Memorandum from Mark Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), available at <http://www.justice.gov/dag/read/ingroom/dag-memo-08282008.pdf>.

the United States Attorneys' Manual (USAM) as Section 9-28.<sup>59</sup> Section 9-28.1000, "Collateral Consequences," states that "[p]rosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining . . . how to resolve corporate criminal cases."<sup>60</sup> The section goes on to explain,

[P]rosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may . . . have played no role in the criminal conduct . . . . [W]here the collateral consequence of a corporation conviction for innocent third parties would be significant it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism.<sup>61</sup>

Many commentators and members of the public believe that cooperation agreements such as DPAs and NPAs reflect a "soft-on-corporate-crime" approach which allows corporations to escape "deserved punishment" such as public shaming<sup>62</sup> or prison sentences for officers.<sup>63</sup> While it is physically impossible place a corporation in prison, corporate executives and business owners—who otherwise could receive prison terms—often do avoid spending time in penitentiaries as a result of DPAs and NPAs.<sup>64</sup> Some commentators also note that DPAs and NPAs allow corporations—perhaps unfairly—to avoid the negative media scrutiny common in a formal criminal proceeding.<sup>65</sup>

Such arguments, however, overlook the reason for the recent popularity of DPAs and NPAs within the realm of corporate crime. DPAs and NPAs became especially popular after the demise of Arthur Andersen

<sup>59</sup> United States Attorneys' Manual Section 9-28: Principles of Federal Prosecution of Business Organization (2008), available at [http://www.justice.gov/usam/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usam/eousa/foia_reading_room/usam/title9/28mcrm.htm).

<sup>60</sup> See *id.* at §9-28.1000.

<sup>61</sup> *Id.*

<sup>62</sup> See *U.S. Department of Justice Soft on Corporate Crime*, *supra* note 15.

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11 (defendant in DBE fraud case resolved through an NPA ordered to pay monetary penalties and implement remedial measures, but not subject to a prison term); compare *U.S. v. Tulio*, 263 Fed. Appx. 258 (3rd Cir. 2008) (defendant in DBE fraud case convicted at trial subject to monetary fines and a fifteen-month prison term).

<sup>65</sup> See *U.S. Department of Justice Soft on Corporate Crime*, *supra* note 15 (contrasting how companies such as Enron and WorldCom are widely known to the public because of formal criminal prosecutions, while AIG slipped under the radar when they paid \$126 million in 2004 as part of a DPA for allowing clients to falsify financial statements).

LLP following the infamous Enron incident in 2002.<sup>66</sup> DPAs and NPAs avoid the significant negative impact on the economy and otherwise innocent civilians brought on resulting from the so-called “deserving punishments” of formal criminal proceedings and vast negative media exposure. On the one hand, corporations are more eager to enter into DPAs and NPAs to avoid Arthur Andersen’s fate.<sup>67</sup> On the other hand, the Department of Justice does not want to pay such a high price again to bring “justice”: the conviction of Arthur Andersen dramatically affected the accounting industry by reducing the “Big 5” to the “Big 4” and forced tens of thousands of people out of their jobs.<sup>68</sup> Although DPAs and NPAs may not always avoid negative results,<sup>69</sup> the fact that corporations subject to DPAs and NPAs can continue to exist and operate indicate that such alternative mechanisms alleviate some of the harshness resulting from formal criminal proceedings such as the case of Arthur Andersen.

#### A. *A Comparison of DPAs and NPAs to Settlements*

Similar to other cooperation agreements, such as pre-trial settlements, DPAs and NPAs provide corporations and the government an opportunity to work together and reform the corporation. This avoids significant harm to innocent third parties such as employees and customers.<sup>70</sup> In other words, these mechanisms “enable[ ] prosecutors to reform corporations by purging them of wrongdoers and institute[ing] compliance mechanisms while sparing companies’ stakeholders from some of the collateral consequences of a criminal record.”<sup>71</sup>

DPAs and NPAs are superior mechanisms compared to other cooperation agreements in several aspects; these aspects are perhaps why Mark Filip specifically mentioned them in his memo.<sup>72</sup> First, unlike pre-trial settlements, DPAs and NPAs often require the defendant corporation to admit a certain degree of guilt in exchange for a lighter punishment, thus better achieving the retributive purposes of legal punishment. For example, in the NPA for DBE fraud between Schiavone and the U.S.A.O. E.D.N.Y, the construction corporation was discovered to have

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<sup>66</sup> See O’Sullivan, *supra* note 4, at 1155.

<sup>67</sup> See *id.*

<sup>68</sup> Wray & Hur, *supra* note 12, at 1097 (“Because indictment often amounts to a virtual death sentences for business entities . . . corporate prosecutions must be handled with care.”).

<sup>69</sup> See Rachel Delaney, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, 83 MARQ. L. REV. 875, 877 (2009).

<sup>70</sup> See Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 Am. Crim. L. Rev. 1043, 1043 (2006).

<sup>71</sup> Wray & Hur, *supra* note 12 at 1105.

<sup>72</sup> *Id.*

falsely reported DBE participation percentages to the government.<sup>73</sup> Instead of making good faith efforts to subcontract specific percentages of work to qualified DBEs, a condition of winning the bid, Schiavone used non-DBE entities to complete the work and lied about DBE participation.<sup>74</sup> The NPA required Schiavone—in addition to paying a \$20 million dollar fine, over \$1.5 million in reimbursements for government investigation, and implementing remedial measures—to acknowledge the misconduct that led to the NPA.<sup>75</sup> Specifically, Schiavone was required to acknowledge that some of its employees engaged in a scheme to defraud the New York Metropolitan Transit Authority by falsely representing that some of the work was being performed by DBE subcontractors as required by the contract, when the work was in fact done by non-DBE companies.<sup>76</sup>

In contrast, the DBE fraud pre-trial settlement agreement between the United States Attorney's Office for the Northern District of Ohio and Anthony Allega Cement Contractor Inc. ("Allega"), required the accused to only pay a penalty, but not to admit any wrongdoing.<sup>77</sup> The facts of the Allega case are almost identical the Schiavone situation: Allega was a prime contractor for a government airport construction project, and, in winning the bid, was required to allocate a certain percentage of the work to qualified DBEs.<sup>78</sup> Instead of complying, Allega lied to the government about DBE participation, and relegated the DBE subcontractor to the role of pass-through entity.<sup>79</sup> A pre-trial settlement agreement, rather than a DPA or NPA, resolved the charges against Allega. The press release regarding the settlement agreement, unlike the NPA for Schiavone, explicitly stated that "[t]he claims settled by this agreement are allegations only, and there has been no determination of liability."<sup>80</sup>

Compared to pre-trial settlements DPAs and NPAs better serve the retributive purpose of criminal punishment. Retributive theorists often emphasize that persons may be punished only if they have voluntarily done something wrong, and that the punishment "must match, or be equivalent to the wickedness of the offense."<sup>81</sup> As discussed above, many commentators are concerned that governments are under-punishing corporate crime by administering—in the eyes of the commentators—

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<sup>73</sup> See Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See Press Release, Press Release, Dep't. of Justice Office of Pub. Affairs, *supra* note 30.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHILOSOPHY 601, 602 (1978).

sanctions that are disproportionately lenient compared to the “wickedness” of the offense.<sup>82</sup> Pre-trial settlement agreements, by allowing corporations to evade admitting to any wrongdoing in exchange for monetary fines, exacerbate this problem. In contrast, as illustrated in by the Schiavone case, NPAs and DPAs, while not a complete solution, are at least a step in the right direction because they allow prosecutors to require the accused to acknowledge their wrongdoing.<sup>83</sup> The acknowledgement, although not as harshly as a criminal record, indicates to the public that the guilty corporate actor engaged in misconduct and is accepting responsibility for that misconduct, thus making the punishment appear more proportional to the crime committed than it would be without such acknowledgement.

Furthermore, DPAs and NPAs require defendants to undertake reformatory and remedial measures as nonmonetary remedies for the damage caused. This serves the utilitarian purposes of legal punishment. For instance, in the DPA between Lend Lease (US) Construction LMB Inc. and the U.S.A.O. of E.D.N.Y., the defendant was charged with various crimes related to DBE fraud.<sup>84</sup> As part of the DPA, Lend Lease agreed to pay up to fifty-six million dollars in penalties to the federal government, in restitution to victims, and to “institute far-reaching corporate reforms designed to eliminate future problems and enforce best industry practices.”<sup>85</sup> These actions included establishing an Ethics and Compliance Officer, creating a Minority Business Enterprise Liaison position, and revising policies to accurately report DBE participation.<sup>86</sup> Similarly, in the NPA between the U.S.A.O. of E.D.N.Y. and Schiavone, the corporation was required to undertake—and indeed did undertake—various reform measures to ensure current and future compliance with DBE programs, including

- (i) Establishing a position for an Ethics and Compliance Officer at Schiavone; (ii) creating contractor minority compliance manuals, a code of ethics and business conduct, and mandatory compliance courses for its employees; (iii) removing the Schiavone employees directly involved with the scheme; and (iv) continuing to assist

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<sup>82</sup> See *U.S. Department of Justice Soft on Corporate Crime*, *supra* note 15.

<sup>83</sup> See Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., *supra* note 11.

<sup>84</sup> See Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., Construction Giant Lend Lease (f/k/a Bovis) Charged with Defrauding Clients in Three Separate Schemes—Will Pay Over \$50 Million and Institute Comprehensive Reforms (Apr. 24, 2012), available at <http://www.justice.gov/usao/nye/pr/2012/2012apr24.html>.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*



law enforcement in its ongoing investigation of the fraud.<sup>87</sup>

In contrast, settlement agreements often demand only monetary remedies and do not require reformatory or remedial measures.<sup>88</sup> In order to compel delinquent corporations to undertake such measures, the government must enter into separate agreements in addition to the settlement agreement.<sup>89</sup> This was the case in the settlement between Williams Brothers Construction Company (“Williams Brothers”) and the U.S.A.O. for the Southern District of Texas.<sup>90</sup> The U.S.A.O was investigating Williams Brothers, a prime contractor for numerous federally funded highway construction projects in Texas, for numerous DBE frauds, including the failure to accurately report DBE involvement in the projects.<sup>91</sup> The two parties decided to settle the case before any formal judicial proceedings were initiated.<sup>92</sup> However, the settlement agreement only stipulated that the defendant pay the government three million dollars to resolve alleged DBE fraud. As a result, the Department of Transportation (DOT) had to enter into a separate administrative agreement with Williams Brothers to ensure further compliance with DBE requirements.<sup>93</sup> Entering into multiple agreements, instead of a single agreement such as a DPA or NPA, likely requires additional time, effort, and administrative costs and is therefore not as efficient as those two mechanisms.

### B. *DPA and NPA Agreements Compared to Criminal Trials*

Having established that DPAs and NPAs are superior to other alternative resolution mechanisms in corporate crime proceedings such as settlement agreements, the remaining question is whether they fail to achieve the intended results of a formal criminal proceeding. This will be examined under both the retributive theory of punishment, particularly whether the punishment is proportionate to the crimes committed, and the utilitarian theory of punishment, particularly whether punishment sufficiently deters criminal conduct.<sup>94</sup>

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<sup>87</sup> Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., *supra* note 11.

<sup>88</sup> *See, e.g., id.*

<sup>89</sup> *See, e.g.* Press Release, U.S. Dep’t. of Justice, *supra* note 23.

<sup>90</sup> *See* Press release, U.S. Dep’t. of Justice, Houston-Based Company to Pay United States \$3 Million for Fraud Related to Minority Business Enterprise Program (Dec. 14, 2005), available at [http://www.justice.gov/opa/pr/2005/December/05\\_civ\\_655.html](http://www.justice.gov/opa/pr/2005/December/05_civ_655.html).

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> Efficiency is also an issue often considered under utilitarian theories of punishment; since the issue has already been discussed earlier in this Note, see notes 54-58 and accompanying text, *supra*, it will not be discussed again here. Instead I simply reiterate that DPAs and NPAs are more efficient than full criminal prosecutions.

Whether punishment accomplishes retributive effects boils down to whether the punishment is appropriate in relation to the seriousness of the crime.<sup>95</sup> A comparison of DBE fraud resolved through NPAs and DPAs versus DBE fraud resolved through formal prosecution reveals that, prison terms aside, there is little difference between the end results in relation to the seriousness of the fraud committed. For instance, in *U.S. v. Tulio*, the defendant was a construction contractor that won a federally funded construction project to replace storm drain pipes along a railroad line in Pennsylvania.<sup>96</sup> As a condition to winning the contract, Tulio certified that a certain percentage of the work would be subcontracted to a DBE.<sup>97</sup> However, Tulio never used the DBE and submitted fraudulent business utilization reports, invoices, and proof of payments to the government to make it appear that he had fulfilled the DBE requirements.<sup>98</sup> The amount of funds fraudulently misused was approximately \$67,995.<sup>99</sup> Tulio was convicted of DBE fraud by the jury through one count of conspiracy to commit mail fraud, and two counts of mail fraud.<sup>100</sup> He was sentenced to fifteen months imprisonment, two years of supervised release, and ordered to pay \$40,300 in fines and fees.<sup>101</sup> Nothing in the record indicated any mandatory remedial plans in addition to the fines regarding Tulio's construction business.

In comparison, in the Schiavone case, discussed above,<sup>102</sup> the amount of misallocated funds—that is, compensation that was supposed to be paid to DBEs but was not—aggregated to be approximately twenty million dollars.<sup>103</sup> The NPA ordered Schiavone to repay the government the full 20 million dollars, plus over 1.5 million dollars in investigation costs.<sup>104</sup> In addition, Schiavone was required to implement extensive remedial plans to ensure the company complies with current and future DBE programs.<sup>105</sup> In exchange for their cooperation, the corporation and its officers averted criminal conviction and imprisonment.<sup>106</sup>

Looking at *Tulio* and *Schiavone* side-by-side, one would be hard-pressed to say that the punishment in the fully prosecuted case is significantly harsher than that agreed to in the NPA. First, when considered as a percentage of the misallocated funds, the fine was harsher in the NPA

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<sup>95</sup> See Bedau, *supra* note 81, at 602.

<sup>96</sup> See 263 Fed. Appx. 258, 260 (3rd Cir. 2008).

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 261.

<sup>99</sup> See Sentencing at 1, *U.S. v. Tulio*, 06-cr-00133-48 (E.D.Pa. 2006).

<sup>100</sup> See *U.S. v. Tulio*, 263 Fed. Appx. 258, 261 (3rd Cir. 2008).

<sup>101</sup> See Judgment at 2-4, *U.S. v. Tulio*, 06-cr-00133-50 (E.D.Pa. 2006).

<sup>102</sup> See notes 54-57 and accompanying text, *supra*, for facts of the case.

<sup>103</sup> See Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

than the prosecuted case. In *Tulio*, the judge only required the defendant to pay the government approximately 60% of the total misallocated funds.<sup>107</sup> In *Schiavone*, the defendant was required to pay 100% of the total misallocated funds.<sup>108</sup> Furthermore, Schiavone paid for the investigation costs that the government incurred – a cost that was not awarded in *Tulio*, and is seldom awarded by a jury in a criminal prosecution.<sup>109</sup>

With regard to the prison term and supervised release in *Tulio* versus the mandatory remedial plan in *Schiavone*, opinions may differ on which is a more appropriate punishment in DBE fraud and similar corporate crimes. In light of the characteristics of DBE, however, remedial plans better serve the public. By forcing guilty corporations and corporate actors to correct their behavior and ensure current and future compliance with DBE programs, the government can further achieve the purpose of the program and assist traditionally disadvantaged social groups in the participation of government-sponsored programs. A prison term without any follow-up plan may not be as effective in achieving this purpose. Furthermore, considering that the misallocation of funds in both cases did not result in any actual loss or damage—the contracted work was still completed, although by non-DBE personnel—the deprivation of freedom seems to be an overly harsh penalty.

Of course there may be cases, even of DBE fraud, in which consequences are severe and therefore a prison term may be appropriate. In those rare cases, it may be more appropriate to resort to formal trials than a DPA or NPA. Such was the situation in *U.S. v. Nagle*.<sup>110</sup> In what the U.S.A.O. for the Middle District of Pennsylvania described as the “largest DBE fraud in nation’s history,” Nagle was convicted of 26 counts of various crimes, including conspiracy to defraud, wire fraud, mail fraud, and money laundering.<sup>111</sup> According to DOT, the scheme lasted over fifteen years, and involved over \$136 million in government contracts.<sup>112</sup> Although sentencing has not yet occurred, Nagle faces fines of up to \$250,000 on each of the convictions, and up to twenty years of imprisonment.<sup>113</sup> As *Nagle* attests, NPAs and DPAs may not be appropriate for all kinds of corporate crimes. Corporate crimes involving irreparable damages, for example, may be better resolved in the courtroom.

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<sup>107</sup> See Judgment at 2-4, *U.S. v. Tulio*, 06-cr-00133-50.

<sup>108</sup> See Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., *supra* note 11.

<sup>109</sup> See *id.*

<sup>110</sup> 441 Fed. Appx. 963 (2011).

<sup>111</sup> See Press Release, U.S. Attorney’s Office for the Mid Dist. of P.A., Former President and Owner of Schuylkill Products Convicted in Largest Disadvantaged Business Enterprise Fraud in Nation’s History (Apr. 6, 2012), available at [http://www.justice.gov/usao/pam/news/2012/Nagle\\_04\\_06\\_2012.htm](http://www.justice.gov/usao/pam/news/2012/Nagle_04_06_2012.htm).

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

However, not all cases of DBE fraud, and certainly not all corporate crimes, are as severe as those in *Nagle*. Many, like *Tulio*, involve damages that are under a million dollars. In such cases, a NPA or DPA seems to deliver the appropriate level of punishment.<sup>114</sup> Even in larger cases (but not as severe as *Nagle*), in which millions of dollars of misallocated funds are involved, as *Schiavone* exemplifies, NPAs can effectively deliver appropriate punishment to a misbehaving corporation. Therefore, from a retributive point of view, NPAs and DPAs deliver the appropriate punishment to offenders in cases of DBE fraud and other similar corporate crimes.

To compare DPAs and NPAs with full criminal prosecutions under the utilitarian theory of punishment, specifically the effect of these resolution mechanisms in deterring future crime, a distinction between general deterrence and specific deterrence must be drawn. General deterrence refers to “deterrence concerned with trying to persuade others who might be inclined to offend not to do so,” while specific deterrence refers to “attempts to persuade the individual before the court not to commit further offense.”<sup>115</sup> Comparing *Schiavone* and *Tulio*, it appears that DPAs and NPAs are as effective as fully prosecuted cases with regard to DBE fraud and similar corporate crimes. DPAs and NPAs achieve specific deterrence in three ways. First, the often-hefty fine is a significant deterrent for defendants who are businesses or business people trying to make a profit in their operations.<sup>116</sup> Second, comprehensive remedial plans involving government supervision are often, if not always, part of DPAs and NPAs for cases of DBE fraud, thus reducing the opportunity and incentive for punished corporations or individuals to commit future frauds.<sup>117</sup> Third, if delinquent corporations breach the DPA or NPA, they are subject to full prosecution.<sup>118</sup> Should such a case proceed to trial, the government, “armed with the company’s admission and all the evidence obtained from its corporation [from the DPA or NPA], mak[es] conviction virtually a foregone conclusion.”<sup>119</sup> Thus, in terms of specific deterrence, corporations or individuals under a DPA or NPA have numerous reasons not to reoffend, perhaps even more incentive than upon completion of a prison term.

In terms of general deterrence, DPAs and NPAs, through their hefty fines, likely achieve similar results as full prosecutions, even when the latter adds the risk of a prison term. As illustrated above in the compari-

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<sup>114</sup> It is also more efficient from a utilitarian point of view; see notes 54-58 and accompanying text, *supra*.

<sup>115</sup> T.W. Ferris, *Sentencing: Practical Approaches* 367 (2005).

<sup>116</sup> See Press Release, U.S. Attorney’s Office for the E. Dist. of N.Y., *supra* note 11.

<sup>117</sup> See *id.*

<sup>118</sup> See Wray & Hur, *supra* note 12 at 1104-06.

<sup>119</sup> *Id.* at 1105.

son between *Tulio* and *Schiavone*, the NPA required the delinquent corporation to pay a fine equivalent to 100% of the misallocated funds, while the judge in the litigated case required a fine of only 60%.<sup>120</sup> Though difficult to quantify, the significant increase in fine percentage may lead to similar deterrence results than threatened prison terms, especially for corporate entities, which cannot be detained because they are not natural persons. Furthermore, NPAs and DPAs are regularly published in the form of press releases by the responsible United States Attorney's Office, similar to cases which are fully litigated.<sup>121</sup> These publications bring a degree of public shame to the delinquent corporations, which may dissuade the punished corporation from reoffending, as well as competitor corporations from offending.<sup>122</sup> Therefore, NPAs and DPAs likely achieve the same general deterrence as fully litigated cases.

### CONCLUSION

In the appropriate circumstances and for appropriate corporate crimes, DPAs and NPAs can effectively preserve the financial viability and integrity of a corporation, while still enabling the government to punish it for its misconduct and achieve various goals. The hefty fines associated with DPAs and NPAs levy appropriate punishments and offer sufficient retributive value. What DPAs and NPAs lack in prison terms may be compensated by the relatively heavier fines charged as seen in the *Schiavone* and *Tulio* comparison. The mandatory remedial measures required by DPAs and NPAs and the threat of full prosecution upon breach deter corporations from committing such crimes in the future. In the case of DBEs, the misused funds of the government are repaid, while delinquent corporations—and the employees that depend on them for a living—get a second chance under government supervision. Compared to other alternative resolution mechanisms like settlements, NPAs and DPAs offer more retributive value in requiring corporations to acknowledge wrongdoings. Compared to fully prosecuted trials, DPAs and NPAs are more efficient, achieving similar resolutions in a shorter time span. Furthermore, compared to both settlements and trials, DPAs and NPAs may achieve greater good for the public and they require

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<sup>120</sup> See notes 107-08 and accompanying text, *supra*.

<sup>121</sup> See, e.g., Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 11; compare Press Release, U.S. Attorney's Office for the W. Dist. of N.Y., Buffalo Man Sentenced for Defrauding Disadvantaged Business Enterprise Program (Sept. 8, 2011), available at [http://www.justice.gov/usao/nyw/press/press\\_releases/Rayford.pdf](http://www.justice.gov/usao/nyw/press/press_releases/Rayford.pdf).

<sup>122</sup> I merely assert that some form of public shaming will have general and specific deterrence effects. Whether these press releases achieve the same degree of public shaming—and consequently same amount of deterrence—as media scrutiny in high profile criminal trials is a topic for another day.

mandatory remedial measures from misbehaving corporations. As such, DPAs and NPAs are effective tools to combat certain kinds of corporate crimes and should continue to be utilized in the future.

