DPA DISCOUNTS

Todd Haugh* and Mason McCartney**

ABSTRACT

There is a longstanding debate over the propriety of corporate deferred and non-prosecution agreements, those semi-private settlements entered into between prosecutors and companies under criminal investigation. That debate is occurring in the shadow of the growing use of these DPAs and NPAs, a trend that recent DOJ policy changes suggest will only increase. Regardless of where one stands on the debate, all agree that the fair, consistent, and transparent awarding and application of these agreements is paramount. Based on an empirical analysis of more than ten years of DPAs and NPAs used in Foreign Corrupt Practices Act cases, we find that the monetary penalties imposed on companies are consistently discounted below the low end of the fine range calculated pursuant to the Organizational Sentencing Guidelines, sometimes even below the monetary benefits companies received from their wrongdoing. Further, the culpability score calculations made pursuant to the Guidelines, which are designed to calibrate a company's ultimate penalty with its level of wrongdoing, are not statistically significant in determining penalties. Instead, it appears a hardened norm has developed at the DOJ of giving an almost uniform 25% discount off the low end of the fine range regardless of a company's culpability. This norm is remarkably consistent despite wide variability in corporate behavior and the likely bargaining positions of prosecutors and corporate defendants. These findings call into question the current oversight of DPAs and NPAs and, ultimately, their use in combatting corporate crime, thereby shedding new empirical light on what has become the primary means of holding our most high-profile corporate wrongdoers accountable.

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* Associate Professor of Business Law and Ethics and Arthur M. Weimer Faculty Fellow in Business Law, Indiana University; Board Member, The Poynter Center for the Study of Ethics and American Institutions; Supreme Court Fellow, Supreme Court of the United States (2011–2012). The authors would like to thank Profs. Suneal Bedi, Matthew Turk, and R. Andrew Butters for helpful comments on early drafts, as well as Hui Chen, Karen Woody, and participants of Duke Law School's 2023 Compliance Roundtable and the Academy of Legal Studies in Business's 2023 Annual Conference, for their valuable insights. © 2024, Todd Haugh & Mason McCartney.

** Indiana University, Kelley School of Business, Class of 2023.

INTRODUCTION

"Non-prosecution and deferred prosecution agreements . . . occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[1] This language, added to the Justice Manual in 2008,[2] is the Department of Justice (DOJ) Criminal Division's official position on the role of corporate pretrial diversion agreements, those semi-private settlements between the government and a company being investigated for wrongdoing.[3]

Over the past fourteen years, the practices and policies surrounding these agreements have evolved, but their use by the DOJ remains quietly consistent. On average, the deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) signed each year account for about one-fifth of the total criminal dispositions of companies prosecuted by the DOJ.[4] At the same time, the penalties imposed on companies pursuant to these agreements routinely dwarf those of companies formally convicted of crimes by a factor of ten.[5] Thus, in a relatively short time, corporate pretrial diversion agreements have become a critical law enforcement tool, imposing outsized financial penalties that diverge from the traditional path of prosecution and conviction.

While the use of these agreements may be quietly consistent, the larger debate over whether they properly effectuate criminal justice goals has been anything but. As one commentator put it, "[t]here is a significant and growing catalog of literature about DPAs and NPAs, much of which is critical[.]"[6] The critics argue that corporate pretrial diversion agreements offer little deterrence and actually encourage recidivism; they are essentially backdoor deals allowing companies to buy their way out of convictions while passing the costs on to shareholders.[7]

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1. U.S. DEP'T OF JUST., JUST. MANUAL § 9-28.200 (2023).

2. Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Just., on Principles of Federal Prosecution to Heads of Dep't Components and U.S. Att'ys (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

3. *Id.* The Justice Manual contains the DOJ's publicly available policies and procedures and provides internal guidance to all federal prosecutors. U.S. DEP'T OF JUST., *supra* note 1, §§ 1-1.100–200.

4. The average number of corporate pretrial diversion agreements from 2012 to 2021 is 38 per year, compared to an average of 136 corporate convictions per year. *See 2021 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements,* GIBSON DUNN 2–3 (Feb. 3, 2022), https://www.gibsondunn.com/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements; U.S. SENT'G COMM'N, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS., Fig. O-2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/FigureO2.pdf.

5. For example, in 2021, the average monetary recovery for DPAs and NPAs was about $142 million, while the average non-DPA/NPA agreement settlement in 2021 was about $11 million. GIBSON DUNN, *supra* note 4, at 3; U.S. SENT'G COMM'N, *supra* note 4, at 165.

6. Fredrick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 COLUM. J. TRANSNAT'L L. 751, 759 (2022).

7. *See, e.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 274 (2014) (arguing that DPAs should be used sparingly, and NPAs should "simply not be used"); JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 197 (2017) (discussing the benefits of companies "writing a gigantic check" and the non-punitive nature of DPAs); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS

Proponents contend that such agreements allow prosecutors to effectuate long-lasting cultural change within companies without imposing collateral consequences that harm corporate stakeholders.[8] According to those proponents, DPAs and NPAs provide an efficient lever to induce companies to police themselves and, when that fails, force cooperation that leads to important structural reform.[9]

Regardless of one's stance on the broader debate, all agree that corporate pretrial diversion agreements should be fairly and consistently awarded and administered. In fact, in the wake of early scandals surrounding DPAs,[10] the DOJ has regularly revised its corporate prosecution policies to include more robust review of these controversial agreements.[11] Recently, the Deputy Attorney General touted new policies on DPAs and NPAs as part of the DOJ's renewed focus on corporate prosecutions.[12] These policies include a revised set of incentives prosecutors may offer companies to induce voluntary disclosure of wrongdoing and "extraordinary cooperation" in Foreign Corrupt Practices Act cases.[13] In many ways, the promise of more consistent and transparent practices has allowed corporate pretrial diversion agreements to continue to thrive despite hefty criticism, to a point where they are now the primary means by which the criminal justice system is imposed on many of our largest and most high-profile corporate wrongdoers.[14]

(Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/; *see also*, Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 40–41 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (arguing against DPAs for a different set of reasons caused by the "grand inversion" these agreements create).

8. *See, e.g.*, Jake A. Nasar, *In Defense of Deferred Prosecution Agreements*, 11 N.Y.U. J.L. & LIBERTY 838, 840 (2017) ("Since their adoption, DPAs have been an effective alternative tool to combat corporate crime by addressing corporate culture and incentives while also holding corporations accountable."); Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 64 (2014) ("In effect, N/DPAs allow corporations to institute new policies and satisfy the demands of prosecutors while addressing concerns about the culpability of their executives.").

9. *See* Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1309–12 (2014); *see also* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 854 (2007).

10. *See* GARRETT, *supra* note 7, at 187–90 (describing the cronyism involved in the DPAs negotiated out of the New Jersey U.S. Attorney's Office in the early 2000s, a particular low spot).

11. *See, e.g.*, Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Just., on Principles of Federal Prosecution of Business Organizations to Heads of Dep't Components and U.S. Att'ys, 7 (July 5, 2007), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

12. *See* Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [hereinafter Monaco Remarks]; Kenneth A. Polite, Jr., Deputy Assistant Att'y Gen., U.S. Dep't of Just., Remarks to the Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.

13. U.S. DEP'T OF JUST., *supra* note 1, § 9-47.120. *See infra* Part I.

14. *See, e.g.*, Megan Jean Parker & Mary Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime*, 30 J. FIN. CRIME 940, 942 (2023) ("Deferred prosecution agreements … are the tool of choice for federal prosecutors when adjudicating corporate misconduct."); Jennifer Arlen,

But policy statements and press releases do not tell the complete story of these agreements. Our analysis of a large subset of corporate pretrial diversion agreements indicates that many are being administered in a way that follows internal DOJ "rules of thumb" yet deviates from more formal, public-facing policies. Our empirical study shows that in Foreign Corrupt Practices Act (FCPA) cases, corporate wrongdoers receive significant discounts on the monetary penalties suggested by the Organizational Sentencing Guidelines.[15] While some discounts are expected for companies cooperating with the DOJ, the final negotiated penalty amounts, which serve as the most visible aspect of punishment in these cases, are about 25% *less than* the low end of the calculated fine range. Our analysis shows that discounts occur in four out of five cases involving FCPA violations, with a large majority of those receiving around a 25% discount. While our research is ongoing, we believe this discounting is occurring in other categories of cases as well.[16] Because of the uniformity of the practice and based on regression analysis ruling out the documented explanations for penalty discounts—things such as relative culpability, cooperation credit, or size of the company—we conclude that the government has developed a hardened norm of discounting corporate penalties whenever there is an FCPA pretrial diversion agreement, even in cases with the most egregious instances of admitted culpability.[17] We refer to this penalty discount as a "haircut"[18] or, more generally, "the DPA discount."

The practice of giving almost uniform discounts to every corporate offender seems to not only violate the publicly stated policies of the DOJ, but also to weaken the arguments advanced by proponents of corporate pretrial diversion programs. This is occurring at a time when the DOJ is ramping up FCPA prosecutions and the use of DPAs and NPAs, offering more and larger discounts for cooperation.[19] In fact, if past practices hold, as our data suggests they will, it is likely that a

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The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US, 19 (N.Y. Univ. Sch. of L. Pub. L. and Legal Theory Rsch. Working Paper No. 19-30, 2019) (exploring the potential promise and perils of negotiated settlements in corporate crime cases); *see also* Press Release, U.S. Dep't of Just., Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (stating this DPA is "the largest global foreign bribery resolution to date").

15. The discounts fall below amounts that would likely be imposed if there were judicial oversight of DPAs and NPAs. *See, e.g.*, United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013) (recognizing the court's limited supervisory role over DPAs, after expressing reluctance to sign off on what he perceived to be a lenient agreement).

16. *See infra* Part II. This article is part of a larger project analyzing DPA and NPA data and how it may inform corporate and white-collar crime policy.

17. *See infra* Part II.

18. In finance, the term "haircut" can have multiple meanings, but the most apropos here is the practice of a market maker "trimming" a small fee off of proceeds collected for facilitating trades. Cory Mitchell, *Haircut: What It Means in Finance, With Examples*, INVESTOPEDIA (June 27, 2023), https://www.investopedia.com/terms/h/haircut.asp.

19. *See* Dylan Tokar, *More Cases, Policy Changes Are on the Horizon, DOJ's New Fraud Section Chief Says*, WALL ST. J. (Nov. 30, 2022), https://www.wsj.com/articles/more-cases-policy-changes-are-on-the-horizon-dojs-new-fraud-section-chief-says-11669855279?mod=djemRiskCompliance.

new discount norm will emerge and harden, ignoring the publicly announced corporate enforcement policies. There is no better time, then, to take a data-driven look at how penalties are awarded and administered through these increasingly important pretrial diversion agreements.

This article proceeds as follows. In Part I, we provide background on corporate pretrial diversion programs, including what they are and how they operate. This part also explains how federal prosecutors calculate the monetary penalty range applied to a corporate wrongdoer, including in FCPA cases. In Part II, we provide empirical support for our finding that prosecutors in FCPA cases are routinely, and in a largely uniform manner, discounting fines below the low end of the calculated penalty range. Our analysis suggests this is not due to variances in the typical offense-based variables occurring in corporate prosecutions nor the strength of the government's case. Instead, it appears to be the product of a sticky departmental norm. Part III offers a preliminary discussion of why this may be occurring and its implications for the newly announced changes in corporate prosecution policies. It concludes with a call for more research, data analysis, and transparency surrounding corporate pretrial diversion agreements.

I. DPAs, NPAs, and Calculating Penalties: Some Background

When prosecutors have evidence that a company has committed a crime, they are generally faced with two options. One is to decline to prosecute based on their inherent discretion. This is referred to as a declination.[20] The other is to formally charge the company with a crime. If a prosecutor chooses the second option, the government may, with court approval, enter into a plea agreement with the company.[21] In a plea agreement, the company admits its guilt and is convicted but receives a reduced penalty for coming clean and cooperating.[22] If no plea agreement is reached, the case proceeds to trial, where a jury determines the company's guilt. If there is a conviction, the court often hands down a penalty much harsher than the terms of a plea agreement.[23]

These options offer differing degrees of risk to both parties. Declination is most advantageous for the company, of course, but much less so for the prosecutor possessing evidence of wrongdoing. Not surprisingly, declinations rarely occur in corporate crime cases.[24] Charging the company with a crime creates risk for both the

20. Crim. Div., U.S. Dep't of Just. & Enf't Div., U.S. Sec. & Exch. Comm'n, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 76–77 (2d ed. 2020), [hereinafter FCPA Resource Guide], https://www.justice.gov/criminal-fraud/file/1292051/download (describing factors that allow prosecutors to decline to bring an enforcement action).

21. *See* J. Kelly Strader & Todd Haugh, Understanding White Collar Crime § 18.04 (5th ed. 2022); Andrew S. Boutros, T. Markus Funk & James T. O'reilly, The Aba Compliance Officer's Deskbook 217 (2016).

22. *See* Lindsey Devers, U.S. Dep't of Just., Plea and Charge Bargaining 1 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/pleabargainingresearchsummary.pdf.

23. *Id.*

24. Strader, *supra* note 21, § 18.04.

government and the company, but a plea agreement mitigates that risk by avoiding the time, expense, and uncertainty of a trial.[25] Pleas are not without downsides, however. A criminal conviction, regardless of how it comes, creates significant collateral consequences for companies, particularly for those that are highly regulated or contract with the government. Even a mere indictment can seriously impair and even destroy a company, a consequence that falls disproportionally on innocent employees, shareholders, and the public rather than those directly involved in the alleged illegal conduct.[26]

Given these realities, a third option has emerged. Under a corporate pretrial diversion agreement, commonly referred to as a DPA or NPA, the government does not seek a conviction.[27] Instead, the company pays a financial penalty, is often required to meet certain compliance and corporate governance conditions, and may be subject to monitoring for months or years. In exchange, the company is not indicted (and sometimes not even charged) and not subject to trial.[28] In essence, the prosecutor puts their case on hold until the company fulfills agreed-upon terms, usually related to increasing corporate compliance functions—what some call "front-end probation."[29] Assuming the company does so, the case is dismissed or otherwise dropped. While DPAs and NPAs differ somewhat in how they operate, the bottom line is that a semi-private agreement between the prosecutor's office and a company governs how corporate wrongdoing is adjudicated and punished.[30]

Not surprisingly, these agreements are controversial. As mentioned above, since their inception—most notably after their explosion in popularity following the demise of Arthur Andersen due to its criminal conviction[31]—prosecutors have argued that corporate pretrial diversion agreements are necessary to change corporate culture in a sustainable way without unduly hurting innocent stakeholders.[32] The

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25. Almost 96% of organizational offenders formally charged with crimes plead guilty. U.S. SENT'G COMM'N, *supra* note 4, at Table O-3, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/TableO3.pdf.

26. STRADER, *supra* note 21, § 18.04. It famously meant the death of Arthur Andersen, which precipitated the use of corporate deferred prosecution agreements. *See* GARRETT, *supra* note 7, at 147–48.

27. BOUTROS ET AL., *supra* note 21, at 217.

28. *Id.*

29. *Id.*

30. *See, e.g.*, Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 504–05 (2015) (providing background on DPAs and NPAs and performing basic empirical analysis of their use in FCPA cases).

31. The story of Arthur Andersen is well-known, but for those unfamiliar with it, see *id.*, at 500–02, for an explanation of the saga and a discussion of the "Arthur Andersen effect," the perception "that criminal charges alone, and certainly criminal convictions, could be the death sentence of a business organization."

32. *See* Nasar, *supra* note 8, at 839 (explaining prosecutors' views). *See also* RICK CLAYPOOL, PUB. CITIZEN, SOFT ON CORPORATE CRIME: DOJ REFUSES TO PROSECUTE CORPORATE LAWBREAKERS, FAILS TO DETER REPEAT OFFENDERS 15 (2019) (explaining that the "Holder Doctrine," named for then-Attorney General Eric Holder, "directed federal prosecutors to consider potential adverse effects on a corporation's shareholders and employees when deciding whether to bring charges against a corporation"). *But see* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013) (challenging the notion of conviction as the corporate death penalty).

counterargument, advanced by a coalition of law professors, progressive lawmakers, and outspoken judges, is that these extrajudicial agreements allow governmental agencies to extract large fines without the risk of trial or the benefits of public adjudication of corporate wrongdoing, while simultaneously inserting prosecutors into the daily operations of corporations.[33] While that debate continues, it does so in the shadow of the regular use of DPAs and NPAs—a practice that has become more prevalent over time.[34] Of particular focus in the debate are the penalty provisions, namely the fines, disgorgement, and restitution amounts, that companies will ultimately pay and the DOJ will tout as evidence that criminal justice goals have been met.[35] The numbers in individual DPAs and NPAs draw the most attention—$3 billion for Wells Fargo, $2.5 billion for Boeing, $3.9 billion for Airbus—but the aggregate penalties are even more noteworthy.[36] From 2011 to 2021, companies paid more than $60 billion under these agreements.[37]

Because there is no conviction under a DPA or NPA, courts and judges do not determine the monetary penalty a company receives. Instead, penalties are set based on agreement, subject to the parties' notions of the harms caused and their relative bargaining positions.[38] While this suggests a freely competitive penalty negotiation, the reality is that bargaining is cabined on both sides by detailed DOJ policies governing when companies will be charged with crimes and how penalties are calculated and imposed. These policies are set forth in various DOJ memos and eventually incorporated into the Justice Manual.[39]

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33. *See, e.g.*, Rakoff, *supra* note 7 ("[P]rosecutors have been increasingly attracted to prosecuting companies, often even without indicting a single person. This shift has often been rationalized as part of an attempt to transform 'corporate cultures,' so as to prevent future such crimes . . . . I suggest, this approach has led to some lax and dubious behavior on the part of prosecutors, with deleterious results."); Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 62 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

34. *See* Gibson Dunn, *supra* note 4, at 2–3 (showing increase in DPAs/NPAs from 2000 to 2021).

35. After all, monetary penalties are the primary means to punish a company, which has no "soul to damn or a body to kick." S.E.C. v. John Adams Trust Corp., 697 F. Supp. 573, 579 (D. Mass. 1988) (quoting John Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 386 n.2 (1981)).

36. *See* Press Release, U.S. Dep't of Just., Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization (Feb. 22, 2022), https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices; Press Release, U.S. Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion; U.S. Dep't of Just., *supra* note 14.

37. *See* Gibson Dunn, *supra* note 4, at 2–3. Much of that amount is paid in disgorgement and may be routed to victims, but a large portion of the fines end up in the U.S. Treasury's general fund. *See, e.g*, Chris Chmura, Christine Roher & Joe Rojas, *Where Do Those Huge Federal Fines Go?*, NBC (Feb. 3, 2017), https://www.nbcbayarea.com/news/local/where-do-those-huge-federal-fines-go/36953/ ("Federal fines in many other consumer-focused agencies are paid to the U.S. Treasury – where Congress controls spending.").

38. *See* Epstein, *supra* note 7, at 39.

39. *See, e.g.*, Memorandum from Lisa Monaco, Deputy Att'y Gen., U.S. Dep't of Just., on Further Revisions to Corporate Criminal Enforcement Policies Following the Discussions with Corporate Crime Advisory Group

To begin, prosecutors must consider a host of factors in their decision to charge a company, which allows them under certain circumstances—mostly related to potential collateral consequences—to seek a DPA or NPA.[40] If the DOJ decides to charge a company or enter into one of these agreements, an additional set of policies kicks in. Prosecutors must conduct "a faithful and honest application of the [Organizational] Sentencing Guidelines[.]"[41] When doing so, "it is appropriate that the attorney for the government consider . . . such factors as the [advisory] sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation."[42] In other words, even though there is no formal conviction under a DPA or NPA, prosecutors must still calculate and consider the penalty range established by the Organizational Guidelines.[43]

This requirement is why most corporate pretrial diversion agreements include a section calculating the monetary penalty range under the Guidelines.[44] This range expresses the "seriousness of the offense and the culpability of the organization" because it is keyed to the gain the company derived from its wrongdoing, as well as four aggravating and two mitigating culpability factors.[45] Thus, the penalty range calculation and its inclusion in pretrial diversion agreements serve two purposes. First, it is a public acknowledgment of the egregiousness of the company's specific wrongdoing. Second, it demonstrates that the penalty agreed upon by the parties was calculated pursuant to established policy aimed at "impos[ing] upon organizations . . . just punishment, adequate deterrence, and incentives . . . to

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13 (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download; U.S. DEP'T OF JUST., *supra* note 1, § 9-28.1700 (incorporating new policies into manual).

40. U.S. DEP'T OF JUST., *supra* note 1, §§ 9-28.300, 9-28.1100 (directing prosecutors to consider 11 factors when "determining whether to bring charges, and negotiating plea or other agreements" and if "the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement").

41. *Id.* § 9-28.1500.

42. *Id.*

43. *See* U.S. SENT'G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT'G COMM'N 2021) ("These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct[.]").

44. Interestingly, not all DPAs include these calculations, likely a product of there being little or no judicial oversight of the agreements. *See, e.g.*, Letter from the U.S. Dep't of Just. to Eric Sitarchuk, Morgan Lewis, on the General Cable Corporation Criminal Investigation (Dec. 22, 2016), https://www.justice.gov/criminal-fraud/file/921801/download. The NPAs in the FCPA cases we analyzed often did not include delineated penalty calculations, but rather did so in summary form. *See infra* Part II.

45. U.S. SENT'G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT'G COMM'N 2021) ("The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.").

maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[46]

While a detailed description of how the Organizational Guidelines operate is beyond the scope of this article, the basics of a penalty range calculation are relatively straightforward. The range (sometimes referred to as the "fine range") is a product of three things: the offense level, the base fine, and the culpability score. Once calculated, they are combined with a set of minimum and maximum multipliers that determine the final penalty range.[47]

For example, the offense level is set primarily by the offense that the company committed. In an FCPA case, the base offense level is twelve, which is adjusted upward by how much money the company gained or caused others to lose because of the violation.[48] This establishes the base fine amount.[49] From there, the company's culpability score is determined using a separate point system, which starts at five and is then increased or decreased according to factors such as the size of the organization, prior history of wrongdoing, cooperation with the government and acceptance of responsibility, and the type of compliance program in place when the offense occurred.[50] These adjustments are intended to finetune the range, consistent with the overarching "principle [when] sentencing organizations . . . that the fine range should be based on the culpability of the organization."[51] The final culpability score creates an upper and lower multiplier that, when applied to the base fine amount, sets the upper and lower bounds of the monetary penalty.[52]

Below is the fine range calculation for the multinational telecommunications company VimpelCom, which entered into a DPA over its role in paying hundreds of millions of dollars in bribes to foreign officials to secure business in the Uzbekistan telecommunications market.[53] This set of calculations was included in VimpelCom's DPA and agreed upon by the parties:

> Offense Level. Based upon USSG § 2C1.1, the total offense level is 48, calculated as follows:

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46. *Id.*

47. U.S. Sent'g Comm'n, Primer: Fines for Organizations 8 (2022), https://www.ussc.gov/sites/default/files/pdf/training/primers/2022_Primer_Organizational_Fines.pdf.

48. U.S. Sent'g Guidelines Manual §§ 2C1.1, 8C2.3-2.4 (U.S. Sent'g Comm'n 2021). For a point of comparison, a company committing insider trading violations would start with a base offense level of eight. *Id.* § 2B1.4.

49. As seen in Part II, *infra*, this is the key driver of the agreed upon monetary penalty.

50. U.S. Sent'g Guidelines Manual § 8C2.5(c) (U.S. Sent'g Comm'n 2021).

51. U.S. Sent'g Comm'n, *supra* note 47, at 5.

52. *Id.* at 7. The minimum and maximum multipliers come from a table in § 8C2.6 and correspond to the culpability score. For instance, a culpability score of ten or more results in a minimum multiplier of 2.00 and a maximum multiplier of 4.00, while a culpability score of three results in a minimum multiplier of 0.60 and a maximum multiplier of 1.20. *Id.* at 7–8.

53. Letter from the U.S. Dep't of Just. to Mark Rochon and John E. Davis, Miller & Chevalier Chartered, at A-3–A-5 (Feb. 10, 2016) (https://www.justice.gov/criminal-fraud/file/828301/download) [hereinafter VimpelCom DPA].

Base Offense Level	12
Multiple Bribes	+2
Value of benefit received more than $400,000,000	+30
Public official in a high-level decision-making position	+4
TOTAL	48

Base Fine. Based upon USSG § 8C2.4(a)(2), the base fine is $523,098,180 (as the pecuniary gain exceeds the fine indicated on the Offense Level Fine Table)[.]

Culpability Score. Based upon USSG § 8C2.5, the culpability score is 8, calculated as follows:

Base Culpability Score	5
The organization had 5,000 or more employees and an individual within high-level personnel of the organization participated in . . . the offense	+5
The organization fully cooperated in the investigation and clearly demonstrated . . . responsibility	–2
TOTAL	8

Calculation of Fine Range

Base Fine	$523,098,180
Multipliers [calculated using Culpability Score of 8, per USSG § 8C2.6]	1.60(min)/3.20(max)

Fine Range
$836,957,088/$1,673,914,176[54]

Thus, the fine range—between $837 million and $1.7 billion—incorporates multiple aspects of harm caused by the company, as well as its relative level of culpability.[55] Consequently, one would expect the penalty agreed upon by the government and VimpelCom to fall somewhere within this range, barring unusual circumstances. Further, one would never expect a fine to be below the base fine amount of $523,098,180, as that would suggest a penalty less than the value the company received from committing its crime.[56]

One critical aspect is missing from this analysis, however: cooperation inducements. Even though the Organizational Guidelines factor in whether a company

54. *Id.* at 7–8 (some formatting changes made for readability).

55. *Id.*

56. Here, the actual penalty imposed, $460,326,398.40, was a whopping 45% below the bottom of the applicable range and less than the base fine amount. *Id.* at 8.

fully cooperated and demonstrated its responsibility, prosecutors have always felt the need to induce companies to come forward, self-disclose wrongdoing, and cooperate in their own reformation.[57] In FCPA cases, this historically took the form of offering companies everything from the possibility of declination to significant discounts off the low end of the calculated fine range.[58] Over time, the practice was formalized into the FCPA Pilot Program, which was launched in 2016.[59] Intended to be a one-year test, the program was extended and ultimately adopted as part of the FCPA Corporate Enforcement Policy (CEP) and included in the Justice Manual.[60]

According to the version of the CEP that was in effect for the past seven years, "[d]ue to the unique issues presented in FCPA matters, including their inherently international character," additional benefits to companies were needed as carrots for cooperation.[61] The CEP stated that when a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, the government will honor a presumption of declination so long as there are no aggravating circumstances.[62] Even if a company does not receive a declination because there are aggravators,[63] those companies that self-disclose, cooperate, and reform themselves can still receive a 50% reduction off the low end of the fine range.[64] And companies that fail to voluntarily disclose their misconduct but later fully cooperate may qualify to receive up to a 25% reduction.[65]

In January 2023, the DOJ revised the CEP to provide additional incentives for cooperation, even when a company has one or more aggravators. Under the new

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57. *See* Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components and U.S. Att'ys (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF ("[I]t is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, e.g., voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment."); Polite, *supra* note 12; Andrew K. Jennings, *Follow-Up Enforcement*, 70 DUKE L.J. 1569, 1612 (2021) (explaining how prosecutors negotiate a bottom-line penalty, rather than negotiating a top-line penalty and then pricing individual values for each mitigating factor).

58. FCPA RESOURCE GUIDE, *supra* note 20, at 50–55.

59. Press Release, Leslie R. Caldwell, Assistant Att'y Gen., U.S. Dep't of Just., Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program; *see also* Ryan J. Rohlfsen, Kim B. Nemirow, Dante A. Roldan & Sarah M. Kimmer, *Evaluating the FCPA Pilot Program: The Data, The Trends*, LAW360 (Apr. 13, 2017), https://www.law360.com/articles/912193/evaluating-fcpa-pilot-program-the-data-the-trends.

60. Gönenç Gürkaynak, *DOJ Makes the Pilot Program Permanent and Announces FCPA Corporate Enforcement Policy*, CHAMBERS & PARTNERS (Dec. 7, 2017), https://chambers.com/articles/doj-makes-the-pilot-program-permanent-and-announces-fcpa-corporate-enforcement-policy. This was the case because, "[a]ccording to Deputy Attorney General Rosenstein, the FCPA Unit received 30 voluntary disclosures during the time period that the Pilot Program was in force, as opposed to 18 voluntary disclosures that were received during the previous 18-month period." *Id*.; *see also* U.S. DEP'T OF JUST., *supra* note 1, § 9-47.120.

61. U.S. DEP'T OF JUST., *supra* note 1, § 9-47.120; Rohlfsen et al., *supra* note 59.

62. FCPA RESOURCE GUIDE, *supra* note 20, at 51.

63. Aggravating circumstances include involvement by management in the misconduct, pervasiveness of the misconduct within the company, and recidivism. *Id*.

64. *Id*. at 52. In addition, the imposition of a monitor will be disfavored. *Id*. at 73–74.

65. *Id*. *See also* Sharon Oded, *Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy*, 118 COLUM. L. REV. F. 135, 137–38 (2018) (assessing cooperation provisions of the Pilot Program).

policy, a declination is still possible, particularly if the company offers "extraordinary cooperation."[66] Further, when a criminal resolution like a DPA or NPA is warranted, companies can now receive between 50 and 75% off the low end of the fine range when they disclose, cooperate, and remediate.[67] Even companies that do not self-disclose get a bump under the revised CEP. Instead of a 25% discount, they can now receive 50% off the low end of the fine range.[68]

When Assistant Attorney General Kenneth Polite announced these changes, he stressed the flexible and transparent nature of the new policies:

> This is not a race to the bottom. A reduction of 50% will not be the new norm; it will be reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation. But having a greater range of cooperation and remediation credit available—from 0% to 50%, instead of from 0% to 25%, and using the full spectrum of the Guidelines from which to apply those reductions—will allow our prosecutors to draw greater distinctions among the quality of companies' cooperation and remediation.[69]

He also stressed the value of DPAs and NPAs more generally as part of the DOJ's crime control strategies and how the consistent application of policies surrounding them could help "make the case in the boardroom that voluntary self-disclosure [and full cooperation] is a good business decision."[70] Unsurprisingly, not everyone agreed. Some reacted by calling the policies "a new get out of jail free card" for corporations, adding that "[o]ffering special deals to lawbreakers will not blunt corporate crime."[71] It remains to be seen who is correct, but the debate over the propriety of corporate pretrial diversion agreements and their implementation continues.

II. EMPIRICAL ANALYSIS OF PENALTY DISCOUNTS IN FCPA CORPORATE PRETRIAL DIVERSION AGREEMENTS

We turn now to our empirical analysis. Our review of corporate pretrial diversion agreements draws from the Corporate Prosecution Registry, a database of DPAs, NPAs, and corporate plea agreements created as part of a joint project between Duke University and the University of Virginia School of Law.[72] The

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66. Polite, *supra* note 12. This standard is ill-defined, but Assistant Attorney General Ken Polite said this: "[W]e know 'extraordinary cooperation' when we see it .... To receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary." *Id.*

67. *Id.* Slightly lesser benefits are available to recidivist corporations. *Id.*

68. U.S. DEP'T OF JUST., *supra* note 1, § 9-47.120 (2023).

69. Polite, *supra* note 12.

70. *Id.*

71. Phil Mattera, *DOJ's Polite Approach to Corporate Crime*, DIRT DIGGERS DIGEST (Jan. 19, 2023), https://dirtdiggersdigest.org/archives/7206.

72. *See* Brandon L. Garrett & Jon Ashley, CORPORATE PROSECUTION REGISTRY (2023), https://corporate-prosecution-registry.com/about/.

registry contains 629 DPAs and NPAs and provides links to the agreements and basic information about them.[73]

We chose to focus our initial review on FCPA cases settled since 2011. This was done for two reasons: the primary one is that FCPA cases made up the largest single category of DPAs and NPAs in the database and therefore provided the largest initial sample; an ancillary reason is that FCPA cases have been at the forefront of the debate over corporate pretrial diversion agreements for years.[74] And as discussed above, senior DOJ officials have linked FCPA investigations to the propriety of DPAs and NPAs through statements and recent policy changes indicating that both are a rising priority.[75]

The database contained seventy-five agreements in FCPA cases since 2011. Although they vary in length, most DPAs and NPAs are dozens of pages long and set forth detailed factual allegations supporting the agreement, provisions the company must comply with to fulfill the agreement, and various legal disclosures.[76] We hand-coded each agreement across approximately twenty categories.[77] The categories included company, type of agreement (DPA or NPA), year of agreement, industry type, revenue and operating profit margin at time of agreement, base fine, culpability score, fine range, total agreed upon monetary penalty, law firm representing the company, and numerous fields related to imposed compliance provisions. Although our initial focus was on the compliance provisions contained in the agreements, the data indicated that for many agreements the total agreed upon monetary penalties were often outside the calculated fine ranges. Given that this seemed contradictory to DOJ policies,[78] yet there was almost no discussion of it in academic literature, we reframed our focus.[79]

Of the seventy-five FCPA agreements, there were forty-six DPAs that included sufficient data on total monetary penalty, base fine amount, and culpability score calculation, or otherwise stated the discount received. This allowed us to perform

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73. *Id.* Our review covered all cases contained in the Corporate Prosecution Registry from its inception to December 1, 2022.

74. *See, e.g.*, Veronica R. Martinez, *The Outsized Influence of the FCPA*, 2019 U. Ill. L. Rev. 1205, 1205 (2019).

75. Monaco Remarks, *supra* note 12.

76. *See, e.g.*, VimpelCom DPA, *supra* note 53.

77. A single coder did the initial review, with a second coder spot checking for inconsistencies and errors. We conducted multiple coding phases consistent with Glaser and Strauss's grounded theory method. *See* Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* The Oxford Handbook of Empirical Legal Research 926, 941 (Peter Cane & Herbert Kritzer eds., 2010) (explaining the method as "broadly inductive and thus seeks to draw out concepts from the data, to organize them and to theorize them, but to do so in a structured and considered fashion").

78. *See supra* Part I.

79. Professor Andrew Jennings has touched on penalty discounts recently, highlighting the challenges of agencies giving up-front credit for future corporate remediation efforts. *See* Jennings, *supra* note 57, at 1613 (advocating for a "follow-up" versus "claw back" regime). In a footnote, he describes the process by which discounts are negotiated. *Id.* at 1613 n.183; s*ee also* Rohlfsen et al., *supra* note 59 (charting a limited subset of discounts in FCPA cases).

calculations regarding the penalties imposed and discounts given to corporate offenders. Two of those DPAs were excluded from our analysis because the agreements explicitly stated that the monetary penalty was determined chiefly by the company's ability to pay.[80] Eleven NPAs with sufficient data were added to the remaining forty-four DPAs to create a total pool of fifty-five pretrial diversion agreements to be analyzed. While those eleven NPAs did not explicitly contain a penalty calculation, they did indicate the monetary penalties assessed and how they differed from a calculated fine range.

We found that in forty-four of the fifty-five agreements (80%), the company's total agreed upon monetary penalty was less than the low end of the calculated penalty range. We label these "discounted agreements," or those containing a "haircut." Only eleven of the agreements impose total penalties within the calculated range. No companies faced monetary penalties above the high end of a fine range. In addition, in sixteen of the forty-four agreements (35%) in which the base fine was indicated, the total monetary penalty imposed was lower than the base fine itself—meaning the penalty was less than the likely benefit to the company from engaging in foreign bribery.[81]

We provide a full distribution of the discounts in Figure 1. For ease of reference, the discounts are placed in eight "bands." The highest number of DPAs and NPAs (20) fall within the 20% to 25% discount band, meaning twenty of the fifty-five agreements (36%) were discounted below the calculated fine range between 20% and 25%. The next largest band, with eleven agreements, is 15% to 20%. The other four bands contain only a few agreements each. [82]

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80. For example, in one of the two excluded DPAs, the text of the agreement stated the following: "the fact that a penalty greater than $2 million would substantially jeopardize the continued viability of the Company, and the other considerations outlined in (a) through (h) above, the Fraud Section and the Office have determined that a deferred prosecution agreement and a penalty of $2 million is sufficient." Deferred Prosecution Agreement at 5, United States v. Transport Logistics Int'l, Inc., No. 8:18-cr-00011-TDC (D. Md. filed Mar. 12, 2018). While willingness to pay is always a factor in any DPA and NPA negotiation, ability to pay—i.e., when payment of an in-range penalty would bankrupt or seriously impair the company as a going concern—can radically skew the penalty negotiation and is therefore deemed an outlier.

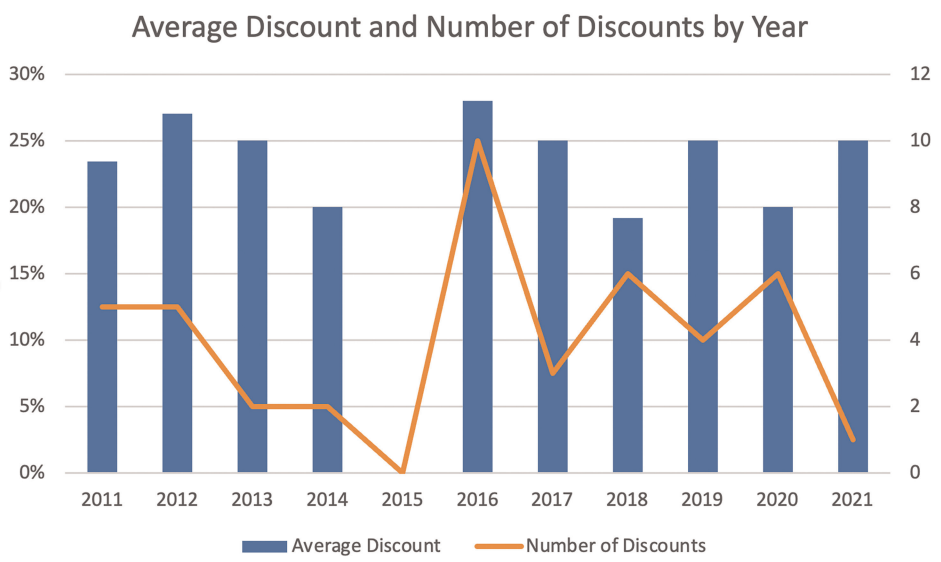
81. This could suggest the agreed upon penalty was lower than the value of the benefit received by the company from committing its offence, a result that would potentially incentivize future wrongdoing. *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834 (1994) ("Crime is deterred efficiently, this view holds, if the corporation is held strictly liable for all its crimes, subject to a fine equal to the social cost of crime divided by the probability of detection (H/p), because this forces the corporation to internalize the social cost of its criminal activity.").

82. The brackets are inclusive of the number while the parentheses are not. For example, 15% is included in the [10%, 15%] band but not the (15%, 20%] band. A 15.01% discount would fall within the (15%, 20%] band.

Figure 1.

Across all agreements, the average discount was 24%, with a standard deviation of 8%. The median discount was 25%. Figure 2 shows the number of agreements per year and the average discounts of each year's agreements.[83]

Figure 2.



83. There were two total agreements in 2015. One agreement did not include the information to calculate the discount, and the other agreement stated the company paid the minimum recommended fine amount; therefore, it did not receive a discount.

Once we determined that a large percentage of pretrial diversion agreements in these FCPA cases contained monetary penalties below the low end of the calculated fine range, we wanted to know what factors were contributing to these discounts. We first ran a preliminary multivariate regression of base fine and culpability score on total monetary penalty to determine which variables were driving the agreed upon penalty amounts.[84] These two variables were chosen because, as indicated above, DOJ policy indicates that corporate penalties should incorporate the calculated base fine and culpability score.[85] The question was how much.

The preliminary regression we ran is as follows:

$$\widehat{Total\ Monetary\ Payment} = \hat{\beta}_0 + \hat{\beta}_1 BaseFine + \hat{\beta}_2 Culpability\ Score + \varepsilon$$

This regression explains 97.32% of the variation in total monetary penalty,[86] and the base fine is statistically significant.[87] However, the model reveals that culpability score is not statistically significant. After removing this variable, the revised model explains 97.34% of the variation in the total monetary penalty.

Put another way, the culpability score calculation, which DOJ policies require prosecutors to consider and is included in almost every FCPA pretrial diversion agreement, has *no statistical significance* in predicting the monetary penalty a company will ultimately pay. The only variable of consequence is the base fine amount, which is a product primarily of the base offense level and the value of the benefit the company received from its wrongdoing. While this makes some sense, base fine amount is a much cruder determinant of an appropriate penalty than one including a true culpability calculation.

Accordingly, the revised regression model is:

$$\widehat{Total\ Monetary\ Payment} = \widehat{-7{,}983{,}877} + \widehat{1.30365}\ Base\ Fine + \varepsilon$$

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84. Multivariate regression is a statistical technique to measure to what degree independent variables are linearly related to dependent variables. *See Multivariate Regression Analysis: Stata Data Analysis Examples*, UCLA: STATISTICAL CONSULTING GROUP (2021), https://stats.oarc.ucla.edu/stata/dae/multivariate-regression-analysis/; *see also* ABDELMONEM AFIFI, SUSANNE MAY & VIRGINIA CLARK, COMPUTER-AIDED MULTIVARIATE ANALYSIS 3 (4th ed. 2004). In this case, base fine and culpability score are the independent variables and total monetary penalty is the dependent variable. β_0 is the constant and ε is the error term.

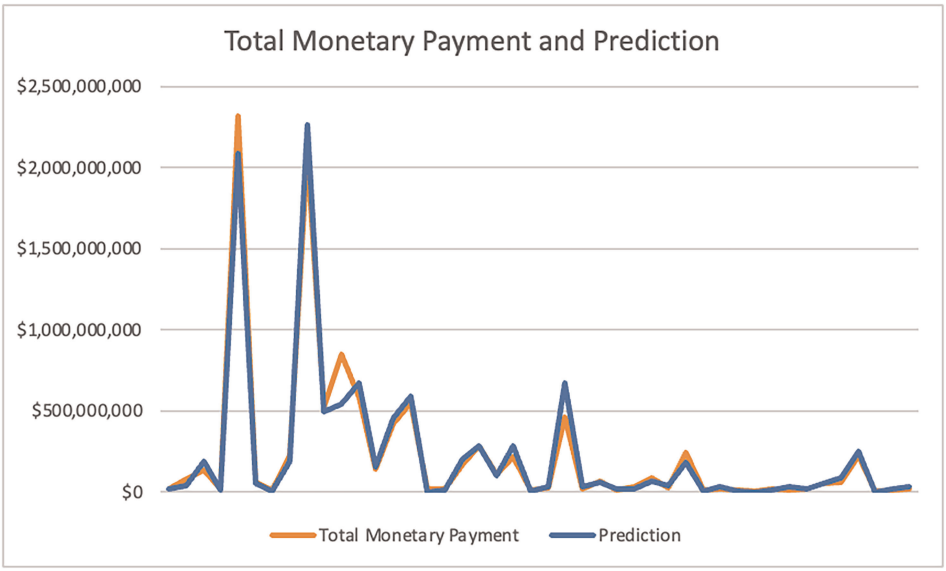
85. *See supra* Part I.

86. Adjusted r-squared is the measure we used to support this claim. Adjusted r-squared is the amount of variation in the dependent variable(s) that can be explained by the independent variables. *See* Aniruddha Bhandari, *Key Difference Between R-squared and Adjusted R-squared for Regression Analysis*, AnalyticsVidhya (July 7, 2020), https://www.analyticsvidhya.com/blog/2020/07/difference-between-r-squared-and-adjusted-r-squared/.

87. p-value of 0.000. This indicates there is statistically significant evidence that the estimated value is the true value. *See* Amy Gallo, *A Refresher on Statistical Significance*, 16 HARV. BUS. REV. 1, 1 (2016).

Using this model, we created predictions for the expected total monetary penalty and compared our predictions to the final penalty amount contained in the DPAs and NPAs.[88] Figure 3 shows the high accuracy of the model.[89]

Figure 3.



In sum, our analysis of FCPA pretrial diversion agreements over approximately ten years provides two main findings. First, corporate offenders are receiving a significant "haircut" off the low end of the calculated fine range—approximately 25% on average. This is occurring in the overwhelming majority of cases and is largely consistent in size. Moreover, in a significant percentage of cases, the monetary penalty is lower than even the calculated base fine, which suggests offender companies may receive penalties less than the benefits they receive from committing their crimes.[90] Second, these discounts cannot be explained by variations in the

88. Because the constant is a negative number, the model should not be used for agreements with small base fines. For example, the model would predict an impossible fine of -$1.5 million with a base fine of $5 million.

89. Using a similar approach, we attempted to predict the penalty discount a company would receive based only on the base fine amount and culpability score. Contrary to the previous regression, our model only predicted 4.6% of the variation in discounts. We theorize that other variables such as corporate revenues, operating profit margin, and law firm representation could affect the analysis and increase the variability explained by the model. Further analysis is needed to test this claim, which we are currently undertaking.

90. It is possible that other penalties imposed on a company (i.e., disgorgement, restitution, civil fines paid to other agencies, etc.), when added to the penalty amount, would increase the total penalties above the base fine amount.

culpability score calculations required by DOJ policy and contained in the text of most DPAs and NPAs. That score includes variables such as the size of the company, prior history of wrongdoing, the existence of an effective compliance and ethics program, and self-reporting and cooperation. In fact, the only variable that appears to drive the agreed-upon monetary penalty is the base fine amount, which is a rough indicator of culpability at best.

III. IMPLICATIONS AND CONCLUSIONS

While the debate over the propriety of corporate pretrial diversion agreements continues to fulminate, there is no denying that the use of DPAs and NPAs to address many of our largest and most public corporate failings is here to stay. Based on recent indications, their use may even be on an upswing as part of a larger "surge [in] resources for corporate enforcement."[91] That makes their fair and transparent negotiation and administration all the more critical.

Our analysis of all pretrial diversion agreements entered into in FCPA cases since 2011 indicates that, contrary to publicly stated policies, objective measures of culpability have little to do with the agreed-upon monetary penalties imposed on corporate offenders. Instead, the vast majority of companies entering into DPAs and NPAs in FCPA cases pay fines and penalties far below the low end of the fine range calculated under the Organizational Guidelines. Some corporate offenders are even penalized in amounts less than their calculated base fine, suggesting they face penalties below the gains they may have received from committing wrongdoing in the first place. Viewing these agreements as a whole, and in light of the history of the FCPA Pilot Program, there appears to be a hardened norm of offering leniency to any company that agrees to enter into a DPA or NPA. This averages out to be an approximately 25% discount below the low end of the fine range. Such "haircuts" appear to be almost uniform across FCPA pretrial diversion agreements and may be an even more widespread practice across other DOJ divisions.

A series of implications follow from our findings. First and foremost, companies committing FCPA violations and entering into DPAs and NPAs seem to be underpenalized for their wrongdoing. That is not a political or policy argument but an empirical one. DOJ guidelines direct prosecutors to calculate a fine range according to the processes laid out in the Organizational Guidelines.[92] The reason for doing so is the reason the Guidelines themselves were developed: they provide a disciplined way to make charging and penalty decisions when faced with numerous aggravating and mitigating factors.[93] That is why the calculations are included on the face of most DPA agreements; they are intended to show that the parties

91. John Carlin, Principal Associate Deputy Att'y Gen., U.S. Dep't of Just., Keynote Address at the Global Investigations Review Conference on Stepping up DOJ Corporate Enforcement (Oct. 11, 2021).

92. *See supra* Part I.

93. The overarching purpose of the Guidelines was to provide certainty and transparency in federal sentencing. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20 (2003).

have worked through the various factors and have arrived at a reasoned penalty amount governed by more than just intuition or raw negotiating power.

Yet prosecutors seem to be ignoring their own calculations and the policies that require them in an effort to induce cooperation and foster corporate reforms. This is not an isolated practice reserved for special cases. There appears to be an almost *default* discount of 25% off the low end of the fine range for all FCPA violators entering into DPAs and NPAs. And in many cases, the total penalty ends up lower than the base fine amount. This is a particularly concerning result because it may mean that DPAs and NPAs, contrary to the claims of their proponents, are not adequately disincentivizing corporate wrongdoing.

While it is obvious why companies would readily agree to these discounts, why would prosecutors? Our first inclination was that these penalty haircuts are a product of normal bargaining. In a typical criminal case, a prosecutor with a weaker hand will have to offer more concessions to get an individual defendant to strike a deal.[94] The same would be true for inducing a company to accept settlement and cooperate rather than fighting it out in court. That was the motivating notion behind the Pilot Program, and it likewise animates the increased discounts offered as part of the revised FCPA Corporate Enforcement Program.[95]

However, this rationale may not hold in the context of deferred prosecution agreements given an indictment's harsh collateral consequences for a company.[96] In other words, the government holds most of the cards in a DPA or NPA negotiation and therefore largely determines if the final penalty is within or below the calculated range.[97] This fuels the critique of these agreements referenced above: companies committing crimes "should have to beg for lighter penalties and be offered them only in extraordinary circumstances" because doing otherwise creates negative incentives for wrongdoing.[98]

Moreover, even if prosecutors needed to offer penalty discounts to induce companies to enter into agreements and cooperate, one would expect those discounts to be highly variable. Some companies would receive large discounts because of prosecutors' particularly weak cases, but most would receive small or no discounts. That variation would be reflected in the data. But our analysis shows something different: an almost *uniform* discount in scope and size. That is why the 15% to 20% and 20% to 25% discount bands are so "full" compared to the others, and the

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94. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1, 33 (1979).

95. FCPA Resource Guide, *supra* note 20, at 51–54.

96. *See* Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 Am. Crim. L. Rev. 1481, 1481 (2007); Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law*, 34 Rev. Banking & Fin. L. 655, 673 (2014).

97. *See* Parker & Dodge, *supra* note 14, at 946 (discussing "high vulnerability" of corporate offenders at the negotiation table because of "destructive collateral consequences and negative publicity"); Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 Colum. L. Rev. 1863, 1884–89 (2005) (exploring corporate offenders' incentives to enter into DPAs).

98. Mattera, *supra* note 71.

distribution skews so far to the left in Figure 1. This is also demonstrated by the lack of variation in average discount per year, as shown in Figure 2. It suggests that even in the most egregious cases, offering sizable discounts and imposing fines at the low end of the range is the norm. Again, there appears to be a *default* policy of discounting penalties for companies that simply enter into DPAs or NPAs.

The most likely explanation for this is that the practices the Pilot Program fostered—granting discounts of 25% for non-disclosing but fully cooperating companies—have hardened into a norm that operates regardless of the nuances of particular cases. This may have occurred due to a phenomenon seen in other aspects of sentencing: prosecutors may become anchored to penalty provisions, making them highly sticky.[99] Without more data, it is difficult to know if this is indeed occurring at the DOJ and how widespread the practice may be, but there is some supporting qualitative evidence.

For one, prosecutors speak in terms of these types of rules of thumb in FCPA cases—estimating relative culpability as a function of simple-to-quantify discounts. The authors spoke to a former senior DOJ Fraud Section prosecutor explicitly about this, and the prosecutor's response was essentially that in FCPA DPA negotiations, everyone evaluates the discounts by general rules of thumb and what "feels right."[100] That response is buttressed by other former prosecutors describing DPA negotiations:

> For any case . . . the government either wants to kill you or give you something you could live with, either way you're not going to be happy. If you haven't cooperated, self-reported, remediated, there is not much of an incentive for the government to give you anything you could live with . . . . If you cooperated and remediated, then you end up at 400 [million dollar fine] rather than 500 . . . . It is very hard to quantify. When you're negotiating from a position where you've cooperated and remediated, there is a softer landing, a basis for doing that: okay, we'll give you another 10% or 20% off.[101]

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99. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 504 (2014) (explaining anchoring bias and how it operates in sentencing). Anchoring can be described this way: "The anchoring effect is a cognitive bias that describes the common human tendency to rely too heavily on the first piece of information offered (the 'anchor') when making decisions. During decision-making, anchoring occurs when individuals use an initial piece of information to make subsequent judgments. Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor. For example, the initial price offered for a used car sets the standard for the rest of the negotiations, so that prices lower than the initial price seem more reasonable even if they are still higher than what the car is really worth." *The Anchoring Effect and How it Can Impact Your Negotiation*, HARVARD LAW SCHOOL: PROGRAM ON NEGOTIATION (Aug. 8, 2023), https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/.

100. Interview with former DOJ official (Jan. 2023) (on file with author). Jennings calls this a "pricing heuristic." Jennings, *supra* note 57, at 1613 n.183.

101. Jennings, *supra* note 57, at 1613 n.183; *see also* Parker & Dodge, *supra* note 14, at 949 (recounting interviews of legal practitioners, government officials, and academics debating whether DPAs are simply "political creatures that are awarded as political favors to the largest corporations that our economy relies upon").

In addition, one of the DPAs we reviewed, the VimpelCom agreement referenced above, contained the following language immediately after the Guidelines penalty calculation:

> The Company agrees to pay total monetary penalties in the amount of $460,326,398.40 (the "Total Criminal Penalty"), $40,000,000 of which will be paid as forfeiture . . . . This Total Criminal Penalty is 45% below the bottom of the applicable Sentencing Guidelines fine range, which reflects a reduction of 25% for the Company's full cooperation as permitted by relevant foreign data privacy and national security laws and regulations and a reduction of 20% for the Company's prompt acknowledgement of wrongdoing and willingness to resolve its criminal liability on an expedited basis.[102]

This paragraph is notable for two reasons. One, it shows a 25% discount below the bottom end of the calculated Guidelines range applied simply based on VimpelCom's cooperation. That discount is in addition to the cooperation benefit the company already received (-2 off the culpability score), which established a lower penalty range.[103] Essentially, prosecutors agreed to double-count the company's cooperation, and they did so consistent with the 25% discount norm we found in these cases. This provides some evidence of a wider practice of discounting at the DOJ.[104] Two, there is a second 20% applied for arguably the same thing: VimpelCom taking responsibility and cooperating to resolve the investigation. While the VimpelCom investigation was particularly complex, the company's conduct was also particularly egregious, leading to the "second largest global FCPA resolution to date" based on a "magnitude" of wrongdoing.[105] One might question whether a 45% discount was warranted here.

The terms of the VimpelCom DPA highlight the second implication of our research: that there appears to be little oversight of how corporate pretrial diversion agreements are negotiated and administered, particularly whether they conform to the DOJ's policies. The question of whether corporate penalties, particularly in FCPA cases, are just "number[s] taken out of the sky that [are] going to be cut in

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102. VimpelCom DPA, *supra* note 53, at 8 (emphasis added).

103. *Id.*

104. *See also* Michael E. Gertzman & Mark F. Mendelsohn, *VimpelCom Agrees to Landmark $795 Million FCPA Resolution*, Paul Weiss 1, 6 (Feb. 26, 2016), https://www.paulweiss.com/media/3367479/26feb16fcpaalert.pdf (discussing the discounts and speculating that "the DOJ will continue to provide more insight into its calculation of fines in settlement documents, consistent with the Assistant Attorney General['s] recent statement"). In addition, FCPA cases are prosecuted out of a single unit at the DOJ's Fraud Section. *See Supervisory Trial Attorney (Principal Assistant Deputy Chief, FCPA Unit)*, U.S. Dep't of Just. (Dec. 23, 2022), https://www.justice.gov/legal-careers/job/supervisory-trial-attorney-principal-assistant-deputy-chief-fcpa-unit. It would be much easier for a default policy to emerge in this type of insular unit, as opposed to if FCPA cases were independently brought across all the districts' individual U.S. Attorney's Offices.

105. Gertzman & Mendelsohn, *supra* note 104, at 6.

half two or three times just to get to an easy resolution," has been raised before.[106] The DOJ's response has always been that penalties are determined based on the Organizational Sentencing Guidelines and objective evaluations of each case.[107] That is the DOJ's consistent line, but our empirical analysis suggests otherwise.

While some outspoken judges have attempted (and failed) to intervene in DPAs,[108] we are unaware of any legal or policy arguments for intervention based on the government's misapplication of its own procedures. It is unclear whether such claims would be successful, but the notion puts into stark relief just how removed from judicial oversight these agreements are. If judges lack oversight at the charging, negotiating, and even penalty-determination phases, where they have historically been instrumental, it becomes even more incumbent upon the DOJ itself to ensure its procedures are being faithfully followed.

Accordingly, our research may support the arguments of those advocating for reforms of the DPA and NPA process, particularly regarding transparency. It is notable that we drew our data from a university-based registry, not a government repository. Most of the empirical work on corporate pretrial diversion agreements has been done by academics and legal practitioners. There is no DOJ database to consult.[109] This was also true for individual sentencing until 1984, when the United States Sentencing Commission was formed.[110] Part of the Commission's mandate is analyzing and disseminating sentencing information to create a feedback loop between judges, the Commission, and Congress.[111] The Commission regularly publishes reports showing statistical breakdowns of what percentage of individual sentences fall above, within, or below the Guidelines ranges and why.[112] However,

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106. Dylan Tokar, *Justice Department Looks To Streamline Penalty Negotiations in Corporate Cases*, WALL ST. J. (Dec. 4, 2019), https://www.wsj.com/articles/justice-department-looks-to-streamline-penalty-negotiations-in-corporate-cases-11575500347.

107. *See id.* (relating question-and-answer session with Assistant Attorney General Brian Benczkowski at an FCPA conference).

108. *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 33061661, at *1, 6–7 (E.D.N.Y. July 1, 2013), *rev'd* 863 F.3d 125 (2d Cir. 2017) (Judge Gleeson, who was subsequently overturned, citing his supervisory powers over a DPA in requiring HSBC's monitor to report to the court); United States v. Fokker Servs. B.V., 818 F.3d 733, 740 (D.C. Cir. 2016) (rejecting a district court's attempt to scrutinize a DPA); *see also* Nate Raymond, *State Street Judge Says She's No 'Rubber Stamp,' Wants to Know Monitor's Findings*, REUTERS (June 10, 2021), https://www.reuters.com/legal/transactional/state-street-judge-says-shes-no-rubber-stamp-wants-know-monitors-findings-2021-06-10/ (Judge Saris saying she is no "rubber stamp" and asking "where's the public scrutiny of all this if you don't at least get the monitor's report?" pursuant to a DPA).

109. *See, e.g.*, Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 540 (2015); Brandon L. Garett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483 (2017); GIBSON DUNN, *supra* note 4. The government does make available an incomplete list of declinations in FCPA cases.

110. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2021) (describing data collection and analysis of Sentencing Commission).

111. *Id.*; *see* Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005).

112. *See, e.g.*, U.S. SENT'G COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING: FEDERAL SENTENCING OUTCOMES, 2005-2017 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf.

this is not done for organizational offenders. And, of course, the Commission has no purview over DPAs and NPAs because there is no formal conviction. Therefore, it is incumbent upon the DOJ to provide this information so that all parties, including its own prosecutors, can see what penalties are being imposed on what offenders—over time and according to what trends and norms. It would seem difficult to meet the Department's own goal of "increasing transparency regarding charging decisions in corporate prosecutions" without this data.[113]

Finally, and relatedly, our findings call for more empirical research regarding corporate pretrial diversion agreements and corporate crime more generally. Most empirical studies looking at DPAs and NPAs consist of what is essentially case counting.[114] While that is incredibly useful, and we rely on it to some degree in our own analysis, it merely scratches the surface of what is possible with sophisticated econometric analysis and other methodologies.[115] We hope to use these tools in future projects focused on corporate crime, and we also hope this article will spur others to do the same. The reality is that we know little about the largely opaque world of corporate wrongdoing—why it occurs, how it occurs, the best means of identifying it in real-time, and the most efficient and fair ways to disincentivize it. Determining the answers to these questions requires an ambitious research agenda that will only be achieved by cooperation amongst corporate crime practitioners, the judiciary, the business community, and an interdisciplinary group of data-minded academics.

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113. Gertzman & Mendelsohn, *supra* note 104, at 7 (citing Leslie Caldwell, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at American Conference Institute's 32nd Annual International Conference on FCPA (Nov. 17, 2015)); *see also* Parker & Dodge, *supra* note 14, at 951 (reporting academics supporting the idea of the government establishing a centralized database of corporate pretrial diversion agreements). *But see* Jennings, *supra* note 57, at 1613–14 (highlighting potential tradeoffs of settlement process transparency).

114. *See, e.g.*, Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 Bus. Law. 61, 84–114 (2014); Garrett & Ashley, *supra* note 72; Gibson Dunn, *supra* note 4, at 2–4.

115. *See, e.g.*, Tomáš Diviák & Nicholas Lord, *Tainted Ties: The Structure and Dynamics of Corruption Networks Extracted from Deferred Prosecution Agreements*, 11 EPJ Data Sci. 7 (2022) (using network analysis and analytical criminology methodologies to analyze DPAs); Parker & Dodge, *supra* note 14, at 948 (conducting structured qualitative interviews of two dozen legal professionals and white collar crime scholars about the adjudication of DPAs).