

# THE YATES MEMO: DOJ PUBLIC RELATIONS MOVE OR MEANINGFUL REFORM THAT WILL END IMPUNITY FOR CORPORATE CRIMINALS?

**Abstract:** On September 9, 2015, former Deputy Attorney General Sally Yates issued a memorandum (the “Yates Memo”) in an attempt to address the Department of Justice’s (“DOJ”) seeming inability to prosecute the individuals responsible for corporate crime and misconduct. The memo announced new DOJ policy regarding individual accountability for corporate fraud, wrongdoing, and other misconduct. Specifically, it identified six key policies meant to enable DOJ prosecutors to more effectively prosecute the individuals responsible for corporate misconduct. The memo, however, did not address the biggest obstacle to holding individuals accountable for criminal corporate conduct—the DOJ’s overuse of deferred prosecution and non-prosecution agreements. This Note argues that, because the Yates Memo did not specifically curtail the overuse of deferred prosecution and non-prosecution agreements, it will not be able to achieve its stated goal of reducing impunity for the individuals responsible for corporate crime. This Note then provides policy suggestions for how the DOJ could further amend its policies to address the overuse of deferred prosecution and non-prosecution agreements.

## INTRODUCTION

In 2008, systemic corporate wrongdoing led to a global economic recession.<sup>1</sup> Despite industry-wide transgressions and excessive risk taking in the financial sector, only one executive was sent to prison.<sup>2</sup> Kareem Serageldin, a

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<sup>1</sup> See generally MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010) (discussing the consequences of the 2008 global financial crisis as well as the details of the Wall Street financial maneuvering that caused the crisis); ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009) (same); Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), [http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?\\_r=1](http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?_r=1) [<https://perma.cc/HL6V-G72S>] (same); Jed S. Rakoff, *Why Have No High Level Executives Been Prosecuted in Connection with the Financial Crisis?*, CLS BLUE SKY BLOG (Nov. 15, 2013), <http://clsbluesky.law.columbia.edu/2013/11/15/why-have-no-high-level-executives-been-prosecuted-in-connection-with-the-financial-crisis/> [<https://perma.cc/TZ2Y-NJ79>] (same).

<sup>2</sup> See Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 374 (discussing the lack of accountability for those responsible for the economic crisis); Eisinger, *supra* note 1 (reporting on the sole executive who was imprisoned following the financial crisis); Jesse Eisinger, *Why the SEC Won't Hunt Big Dogs*, PROPUBLICA (Oct. 26, 2011), <http://www.propublica.org/thetrade/>

trader at Credit Suisse, was sentenced to thirty months for concealing millions of dollars of losses in the bank's mortgage-backed securities portfolio.<sup>3</sup> As the judge stated as he handed down the verdict, Serageldin's crime was but "a small piece of an overall evil climate within [Credit Suisse] and with many other banks."<sup>4</sup>

The failure of the U.S. Department of Justice ("DOJ") to prosecute the individuals responsible for the crimes that led to the financial collapse is not simply a well-publicized anomaly.<sup>5</sup> Rather, it is part of a trend of declining federal prosecutions of white-collar crime that started at least as early as 2008.<sup>6</sup> Indeed, according to the DOJ's latest figures, federal prosecutors brought fewer white-collar cases in 2016 than in any of the last twenty-one years.<sup>7</sup>

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item/why-the-sec-wont-hunt-big-dogs [https://perma.cc/CTG2-CZFE] (pointing out that no major banker was charged criminally as a result of the financial crisis); Neil Irwin, *This Is a Complete List of Wall Street CEOs Prosecuted for Their Role in the Financial Crisis*, WASH. POST: WONKBLOG (Sept. 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/12/this-is-a-complete-list-of-wall-street-ceos-prosecuted-for-their-role-in-the-financial-crisis/> [https://perma.cc/B9GS-QTKM] (highlighting the fact that not one person who led one of the corporations directly responsible for the financial crisis has seen any jail time); Jason Ryan, *DOJ Will Not Prosecute Goldman Sachs in Financial Crisis Probe*, ABC NEWS (Aug. 9, 2012), <http://abcnews.go.com/blogs/politics/2012/08/doj-will-not-prosecute-goldman-sachs-in-financial-crisis-probe/> [https://perma.cc/DHC8-T9NF] (noting that despite a number of high profile investigations into corporate wrongdoing, the Department of Justice ("DOJ") declined to fully prosecute any responsible parties); Sarah White, *RPT-In Post-Lehman Clean-Up, Top Banker Prosecutions Stumble*, REUTERS (Sept. 14, 2013), <http://www.reuters.com/article/2013/09/14/lehman-five-year-crime-idUSL5N0H929A20130914> [https://perma.cc/NED7-24AF] (explaining that, in the United States, no high level financial executives were criminally convicted in connection with the 2008 financial crisis).

<sup>3</sup> Eisinger, *supra* note 1. Credit Suisse is a financial service provider headquartered in Switzerland with a focus on private banking, wealth management, and investment banking. *About Us, Our Company*, CREDIT SUISSE, <https://www.credit-suisse.com/us/en/about-us/our-company.html> [https://perma.cc/2BJY-6H36].

<sup>4</sup> Eisinger, *supra* note 1. The overall "evil climate" that consumed so many Wall Street banks and financial institutions need not be documented at length here. *See, e.g.*, Irwin, *supra* note 2 (explaining the extensive negative impact of the financial crisis, as well as pointing out the lack of accountability for any of the people who caused it). There has been no shortage of reporting and analysis on the widespread misconduct committed by financial corporations such as Lehman Brothers, American International Group, Citigroup, and Merrill Lynch, among others. *See, e.g.*, LEWIS, *supra* note 1 (providing a detailed analysis of the Wall Street financial manipulation that caused the crisis); SORKIN, *supra* note 1 (same); Eisinger, *supra* note 1 (same).

<sup>5</sup> *See* Eisinger, *supra* note 1 (tracing the recent decline in the prosecution of white collar crime in the United States); Alan Pyke, *Why the U.S. Isn't Prosecuting White Collar Criminals*, THINKPROGRESS (Aug. 4, 2015), <http://thinkprogress.org/economy/2015/08/04/3687846/white-collar-crime-prosecution-failure/> [https://perma.cc/BE67-L8XZ] (same).

<sup>6</sup> *See* Eisinger, *supra* note 1 (discussing the gradual fall of white collar prosecution rates in the United States); Pyke, *supra* note 5 (same).

<sup>7</sup> *See White Collar Crime Prosecutions for December 2016*, SYRACUSE UNIVERSITY'S TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 20, 2017) [http://trac.syr.edu/tracreports/bulletins/white\\_collar\\_crime/monthlydec16/fil/](http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlydec16/fil/) [https://perma.cc/39UD-75SQ] (explaining that DOJ white collar prosecutions in 2016 decreased by 23.9% from 2015); *Federal White Collar Crime Prosecutions at 20-Year Low*, SYRACUSE UNIVERSITY'S TRANSACTIONAL RECORDS AC-

Moreover, there are no signs that this trend of declining white-collar prosecutions will abate soon.<sup>8</sup> On March 11, 2017, the DOJ fired Preet Bharara, U.S. Attorney for the Southern District of New York after he refused to resign his post.<sup>9</sup> Although Bharara was criticized for his failure to prosecute any Wall Street executives for their role in the financial crisis, he was also known for his successful prosecutions of insider trading cases.<sup>10</sup> The Southern District of New York is the epicenter for white-collar prosecutorial efforts in the United States.<sup>11</sup> Bharara's firing thus raises questions about whether white-collar prosecutions will further diminish during the Trump presidency.<sup>12</sup>

This decline in prosecution of white-collar crime is doing more than simply angering ordinary Americans who feel as though the system is fixed in favor of the wealthy and powerful.<sup>13</sup> It is also worrying legal analysts who

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CESS CLEARINGHOUSE (July 29, 2015) <http://trac.syr.edu/tracreports/crim/398/> [<https://perma.cc/2NK9-A39T>] (explaining that DOJ white-collar prosecutions in 2015 were at their lowest point in twenty years); see also *White Collar Crime Convictions Continue to Decline*, SYRACUSE UNIVERSITY'S TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Apr. 7, 2016) <http://trac.syr.edu/whatsnew/email.160407.html> [<https://perma.cc/Z4UA-3BQ9>] (providing statistical analysis of the decades long decline in DOJ white collar prosecutions); Pyke, *supra* note 5 (providing a general overview of the decline in white collar prosecution in the United States). Further, the U.S. government prosecuted 36.8 percent fewer white-collar crimes in 2015 than it did in 1995. *Federal White Collar Crime Prosecutions at 20-Year Low*, *supra*; Pyke, *supra* note 5.

<sup>8</sup> See Press Release, Preet Bharara, U.S. Attorney, Dep't of Justice, U.S. Attorney's Office, S. Dist. of N.Y. (Mar. 11, 2017), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-preet-bharara-0> [<https://perma.cc/264L-E7ST>] (announcing that Preet Bharara was fired from his position as U.S. Attorney for the Southern District of New York); Sheelah Kolhatkar, *Preet Bharara's Complicated Legacy on White-Collar Crime*, NEW YORKER (Mar. 13, 2017), <http://www.newyorker.com/business/currency/preet-bhararas-complicated-legacy-on-white-collar-crime> [<https://perma.cc/4LQW-X6KA>] (questioning whether Bharara's firing will hurt white collar prosecution efforts).

<sup>9</sup> Press Release, Preet Bharara, *supra* note 8.

<sup>10</sup> See, e.g., Peter Lattman & Azam Ahmed, *Hedge Fund Billionaire Is Guilty of Insider Trading*, N.Y. TIMES: DEALBOOK (May 11, 2011), <https://dealbook.nytimes.com/2011/05/11/rajaratnam-found-guilty/> [<https://perma.cc/9VJ2-QDWX>] (detailing one of Bharara's well known insider trading prosecutions); Jeffrey Toobin, *The Showman: How U.S. Attorney Preet Bharara Struck Fear into Wall Street and Albany*, NEW YORKER (May 9, 2016), <http://www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street> [<https://perma.cc/G5XS-A8GD>] (discussing critiques of Bharara's handling of the financial crisis as well as his successes with other white collar prosecutions).

<sup>11</sup> U.S. ATT'Y'S OFF., SOUTHERN DISTRICT OF N.Y., DEP'T OF JUST., <https://www.justice.gov/usao-sdny> [<https://perma.cc/QYB2-KN4A>].

<sup>12</sup> Kolhatkar, *supra* note 8 (discussing Bharara's prosecutorial successes and asking whether white collar prosecutions "will continue with the same vigor" now that Bharara has been fired).

<sup>13</sup> See Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law*, 34 REV. BANKING & FIN. L. 655, 701-12 (2015) (discussing the negative societal consequences of the failure to prosecute high profile white collar crime); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1298-99 (2013) ("There is no better deterrent to corporate crime than the realization that criminal activity could result in incarceration."); Press Release,

believe that the lack of individual prosecution of corporate crime will encourage future abuses.<sup>14</sup> Indeed, for most of American financial history, wide-scale financial criminal scandals immediately preceded prosecutorial crackdowns.<sup>15</sup> After the financial collapse of 1929, the head of the New York Stock Exchange was tried, convicted, and sent to prison.<sup>16</sup> The savings-and-loan crisis of the 1980s was followed by over 1,000 felony convictions, including jail time for many top executives at the largest failed banks.<sup>17</sup> In the 1990s and early 2000s, after the Nasdaq bubble burst and systemic corporate accounting misconduct was brought to light, high-ranking officials from corporations such as WorldCom, Enron, Qwest, and Tyco went to prison.<sup>18</sup> But there was no prosecutorial crackdown after the 2008 financial crisis.<sup>19</sup>

The theories for this discrepancy are broad and varied.<sup>20</sup> Some believe that federal authorities were simply afraid to go after Wall Street bankers due to the risk of losing high profile, public cases.<sup>21</sup> Others posit that federal prosecutors lack the resources to compete with the deep coffers of large cor-

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Senator Sherrod Brown, Sens. Brown, Grassley Press Justice Department on “Too Big to Jail” (Jan. 29, 2013), <https://www.brown.senate.gov/newsroom/press/release/sens-brown-grassley-press-justice-department-on-too-big-to-jail> [<https://perma.cc/C7QK-R5DN>] (“The nature of these settlements has fostered concerns that ‘too big to fail’ Wall Street banks enjoy a favored status, in statute and in enforcement policy. This perception undermines the public’s confidence in our institutions and in the principal that the law is applied equally in all cases.”).

<sup>14</sup> See Foster, *supra* note 13, at 700–01 (stating that a failure to prosecute white-collar crime undermines the public’s trust in the legal system); Uhlmann, *supra* note 13, at 1298–99 (explaining that the possibility of jail time serves as the best deterrent to future corporate crime); Letter from Sen. Charles Grassley to Eric H. Holder, Jr., Att’y Gen. (Dec. 13, 2012) (“[F]ail[ure] to prosecute individuals or banks when they have committed crimes will result in perverse incentives and ultimately undermine the integrity of the U.S. financial system and economy.”).

<sup>15</sup> See Eisinger, *supra* note 1 (discussing the prosecutorial response to the savings-and-loan crisis in the 1980s); Rakoff, *supra* note 1 (noting that the 2008 financial crisis was not followed by the type of prosecutorial response that followed prior financial scandals in U.S. history).

<sup>16</sup> Eisinger, *supra* note 1.

<sup>17</sup> Pyke, *supra* note 5; Rakoff, *supra* note 1; see Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53, 53 (stating that in the four years prior to the article there were “over 1000 criminal cases and nearly 2000 civil cases arising from the savings and loan crisis,” which “include[d] more than ninety civil cases brought against lawyers”).

<sup>18</sup> Eisinger, *supra* note 1; Rakoff, *supra* note 1.

<sup>19</sup> Sepinwall, *supra* note 2, at 374; Eisinger, *supra* note 1; Rakoff, *supra* note 1.

<sup>20</sup> See, e.g., Uhlmann, *supra* note 13, at 1320 (providing multiple explanations for this prosecutorial failure); Eisinger, *supra* note 1 (same).

<sup>21</sup> See, e.g., Eisinger, *supra* note 1 (explaining that the DOJ did not aggressively pursue Wall Street executives who caused the crisis because it had a “careerist culture that was fearful of sully[ing] its reputation by losing cases”); Chris Matthews, *Justice Department Is Setting Its Sights on White-Collar Criminals*, FORTUNE (Sept. 10, 2015), <http://fortune.com/2015/09/10/wall-street-crime/> [<https://perma.cc/K49P-8MGB>] (explaining that the lack of prosecutions was a result of “a cultural shift at Justice in the 1980s and 1990s which left the DOJ preferring to go after corporations because they were bigger prizes than lone executives, and because some kind of victory, usually in the form of a settlement or deferred prosecution agreement, was easier to achieve”).

porations able to spend millions of dollars on high powered defense firms.<sup>22</sup> Many argue that after several high profile white-collar prosecutorial losses in the 2000s, the DOJ began to focus on settlements instead of trials and prison sentences, thereby depriving its prosecutors of the experience needed to win in complicated corporate crime cases.<sup>23</sup> Finally, some others explain the lack of prosecution as a result of the revolving door between DOJ leadership and white-collar defense firms.<sup>24</sup> Whatever the case, the fact remains that currently, the DOJ is remarkably ineffective at holding individuals accountable for corporate crimes.<sup>25</sup>

On September 9, 2015, former Deputy Attorney General Sally Yates issued a memorandum (the “Yates Memo”) in an attempt to address the DOJ’s inability and unwillingness to prosecute the individuals responsible for corporate crime and misconduct.<sup>26</sup> This memo announced new DOJ policy regard-

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<sup>22</sup> See, e.g., Editorial Board, *The Case of the Missing White-Collar Criminal*, BLOOMBERG VIEW (June 22, 2014), <https://www.bloomberg.com/view/articles/2014-06-22/the-case-of-the-missing-white-collar-criminal> [<https://perma.cc/9QP4-B7F6>] (“Large corporations have demonstrated a willingness to pay eye-popping sums, at shareholders’ expense, to avoid the uncertainty and embarrassment of extended trials. Prosecutors with limited resources, no matter how dedicated to justice they may be, can’t ignore the attractions of such negotiated settlements.”); David Cay Johnston, Opinion, *New DOJ White-Collar Crime Policy Just Reheated Cabbage*, AL JAZEERA AM. (Sept. 15, 2015), <http://america.aljazeera.com/opinions/2015/9/new-doj-white-collar-crime-policy-just-reheated-cabbage.html> [<https://perma.cc/XR6W-57HE>] (stating that it is well known in large corporations that the DOJ does not have the resources to successfully prosecute complicated corporate criminal activity).

<sup>23</sup> E.g., Eisinger, *supra* note 1; see Sheelah Kolhatkar, *Has It Become Impossible to Prosecute White-Collar Crime?*, BLOOMBERG (Oct. 21, 2015), <https://www.bloomberg.com/news/articles/2015-10-21/has-it-become-impossible-to-prosecute-white-collar-crime-> [<https://perma.cc/GB4P-NW8J>] (“[L]aw enforcement may . . . lack[] the expertise to try [white-collar cases] in a courtroom in a way that makes sense to jurors . . .”).

<sup>24</sup> See, e.g., Scot J. Paltrow, *Insight: Top Justice Officials Connected to Mortgage Banks*, REUTERS (Jan. 20, 2012), <http://www.reuters.com/article/us-usa-holder-mortgage-idUSTRE80JOPH20120120> [<https://perma.cc/M7LT-H6MJ>] (describing the deep connections between top DOJ officials and the law firms that represent mortgage banks involved in the 2008 housing crisis); Ben Protess, *Once More Through the Revolving Door for Justice’s Breuer*, N.Y. TIMES: DEALBOOK (Mar. 28, 2013), <https://dealbook.nytimes.com/2013/03/28/once-more-through-the-revolving-door-for-justices-breuer/> [<https://perma.cc/M7BS-HQVY>] (questioning the efficacy of a federal system of prosecution that relies on “Washington’s revolving door, the symbolic portal connecting government service” and high powered private law firms, as a supply line for new prosecutors). See generally GOV’T ACCOUNTABILITY INST., *Justice Inaction: The Department of Justice’s Unprecedented Failure to Prosecute Big Finance* (2012) (explaining the deep ties between the DOJ and the law firms that represent the corporations that the DOJ is charged with investigating).

<sup>25</sup> See GOV’T ACCOUNTABILITY INST., *supra* note 24, at 4–7; Eisinger, *supra* note 1 (discussing the DOJ’s declining effectiveness in prosecuting white-collar crime).

<sup>26</sup> Memorandum from Sally Quillian Yates, Deputy Att’y Gen., to All Component Heads and United States Attorneys, Individual Accountability for Corporate Wrongdoing, at 1 (Sept. 9, 2015) [hereinafter Yates Memo]; see Sally Quillian Yates, Deputy Att’y Gen., Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [<https://perma.cc/8GKE-VCUZ>] (articu-

ing individual accountability for corporate fraud, wrongdoing, and other misconduct.<sup>27</sup> Specifically, the memo identified six key policies meant to enable DOJ attorneys to more effectively prosecute individuals responsible for corporate misconduct.<sup>28</sup>

This Note explores the effect that these new policies will likely have on DOJ prosecution of individual white collar criminals, and argues that the Yates Memo must be supplemented with measures explicitly limiting DOJ prosecutors' ability to decline prosecution of the individuals responsible for corporate crime.<sup>29</sup> Part I of this Note discusses the history of corporate criminal liability in the United States and traces the development of the DOJ's tactics for prosecuting corporate crime.<sup>30</sup> Part II introduces the Yates Memo guidelines for effective prosecution of corporate criminals, and then details its shortcomings.<sup>31</sup> Finally, Part III argues that the Yates Memo policies will not do enough to further corporate crime prosecution, and provides suggestions for how the DOJ can further amend its policies to truly succeed in prosecuting corporate crime and misconduct.<sup>32</sup>

## I. THE DOJ'S PROSECUTORIAL STRATEGY FOR CORPORATE CRIME: A HISTORICAL ANALYSIS

Corporate criminal liability was first introduced in 1909 in the U.S. Supreme Court case of *New York Central & Hudson River Railroad Co. v. United States*, and is now well established in federal case law.<sup>33</sup> Despite this early

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lating rationale underlying Yates Memo). On January 30, 2017, President Donald Trump fired Sally Yates after she refused to cooperate in the defense of one of President Trump's executive orders that, among other things, halted nationals from seven predominantly Muslim countries from entering the United States. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html> [<https://perma.cc/YE4J-MBJY>].

<sup>27</sup> Yates Memo, *supra* note 26, at 2.

<sup>28</sup> *Id.* at 2–3.

<sup>29</sup> See *infra* notes 164–203 and accompanying text.

<sup>30</sup> See *infra* notes 33–120 and accompanying text.

<sup>31</sup> See *infra* notes 121–163 and accompanying text.

<sup>32</sup> See *infra* notes 164–203 and accompanying text.

<sup>33</sup> See 212 U.S. 481, 494 (1909) (holding that corporations are criminally liable for any act committed by an employee if the act was committed within the scope of the employment, and was committed for the benefit of the corporation); see also *United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir. 1987) (upholding the “collective knowledge” doctrine, which attributes the knowledge of all a corporation’s employees and agents to the corporation as an entity, in the realm of corporate criminal liability); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (noting that the criminal liability of an employer for the acts of its employees within the scope of their employment can be either express or implied); Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 868–70 (explaining that corporate criminal prosecutions are now commonplace). In order to impose liability, the corporation must act with the mental state required by the statute at issue, which usually involves imputing the mental state of individual employees or

development of corporate criminal liability legal theory, the DOJ did not provide any specific guidance regarding prosecutions of corporate crime until the mid-1990s.<sup>34</sup> Section A of this Part describes these original DOJ guidelines for corporate criminal prosecutions, which were established by then-Deputy Attorney General Eric Holder.<sup>35</sup> Section B details the transformation of these guidelines as a result of certain prosecutorial failures.<sup>36</sup> Finally, Section C examines the problems and consequences of the DOJ's pre-Yates Memo corporate crime prosecution strategies.<sup>37</sup>

### A. *The Holder Memo: The First Comprehensive DOJ Guidelines Governing Prosecution of Corporate Crime*

During the 1990s, in recognition that federal prosecutors were increasingly confronting crimes committed by corporations as a whole, then-Deputy Attorney General Eric Holder created a working group directed by the Fraud Section of the Criminal Division with the intention of developing uniform DOJ policy regarding prosecution of corporate crime.<sup>38</sup> In June 1999, Holder issued a policy memorandum titled "Federal Prosecution of Corporations," generally referred to as the "Holder Memo," that provided the first comprehensive guidelines for federal prosecution of corporate crime.<sup>39</sup> The memo

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agents to the corporation. *See Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1963) ("[K]nowledge of employees and agents of the corporation is attributable to the corporation, and that their acts may amount to wilfulness on the part of the corporation."). If no individual employee has the requisite mental state, corporate liability can still be imposed if the corporate employees possess the mental state collectively. *Bank of New Eng.*, 821 F.2d at 855–56. Additionally, corporations cannot assert as a defense that the officers did not authorize the criminal conduct or that the corporation's official policies prohibited the criminal conduct. *Hilton Hotels*, 467 F.2d at 1004, 1007.

<sup>34</sup> Uhlmann, *supra* note 13, at 1309.

<sup>35</sup> *See infra* notes 38–49 and accompanying text.

<sup>36</sup> *See infra* notes 50–72 and accompanying text.

<sup>37</sup> *See infra* notes 73–120 and accompanying text.

<sup>38</sup> Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., to All Component Heads and U.S. Attorneys, at 1 (June 16, 1999) [hereinafter Holder Memo] (stating that the memo is meant to provide "guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case" because "[m]ore and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations"). This group included representatives from the U.S. Attorneys' Offices, the Executive Office of U.S. Attorneys, and the litigating divisions of the departments with criminal responsibilities. *Id.*

<sup>39</sup> *See* Holder Memo, *supra* note 38 (listing out the comprehensive guidelines); *see also* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1099 (2006) (explaining that until the issuance of the Holder Memo, the "Justice Department had no uniform policy on corporate prosecution"). Since 1980, the Principles of Federal Prosecution (the "Principles"), a DOJ manual that provides guidelines for all types of federal prosecutions, has also guided federal prosecutors. U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1997), *reprinted in* U.S. ATTORNEY'S MANUAL, tit. 9, ch. 27 (U.S. DEP'T OF JUSTICE 2017). In determining whether to bring criminal charges, prosecutors are instructed by the Principles to consider, *inter alia*:

identified eight factors for prosecutors to consider when making a determination of whether to charge a corporate entity or its employees.<sup>40</sup> In addition, the memo contained extensive language extolling the virtues of corporate criminal prosecutions, stating that these prosecutions allow the government to bring about beneficial changes to corporate culture and deter future corporate criminal activity.<sup>41</sup>

After the issuance of the Holder Memo, federal prosecutions of white-collar crime became consistent and effective for the next three years.<sup>42</sup> The Justice Department brought more than 100 corporate criminal case in 2000,

Federal law enforcement priorities . . . ; the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others . . . ; the probable sentence or other consequences if the person is convicted . . . ; an adequate non-criminal alternative to prosecution . . . ; the sanctions or other measures available under the alternative means of disposition; the likelihood that an effective sanction will be imposed; and the effect of non-criminal disposition on federal law enforcement interests.

U.S. ATTORNEY'S MANUAL § 9-27.200, .230, .250. The Principles also list factors to be considered when deciding whether to enter into plea agreements or non-prosecution agreements in return for cooperation. *See id.* § 9-27.420, .620.

<sup>40</sup> *See* Holder Memo, *supra* note 38, at 3. The eight factors were:

(1) [t]he nature and seriousness of the offense, including the risk of harm to the public . . . ; (2) [t]he pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management; (3) [t]he corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) [t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents including, if necessary, the waiver of the corporate attorney-client and work product privileges; (5) [t]he existence and adequacy of the company's compliance program; (6) [t]he corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; (7) [c]ollateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and (8) [t]he adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.

*Id.*

<sup>41</sup> *See id.* at 1–2 (declaring that corporate criminal prosecutions allow the government to “be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime”).

<sup>42</sup> *See* U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 51 (2001) (reporting 238 prosecutions of organizations resulting in fines or restitution or both in fiscal year 2001); U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 51 (2000) (reporting 296 prosecutions of organizations resulting in fines or restitution or both in fiscal year 2000); U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 51 (1999) (reporting 255 prosecutions of organizations resulting in fines or restitution or both in fiscal year 1999).

and was especially effective in its prosecution of regulatory crime.<sup>43</sup> Importantly, the DOJ rarely utilized deferred prosecution agreements (“DPAs”), non-prosecution agreements (“NPAs”), or other alternatives to criminal prosecution.<sup>44</sup>

The DOJ’s approach to corporate criminal prosecution changed dramatically after the disastrous prosecution of Arthur Andersen LLP, one of the “big five” accounting firms, in 2002.<sup>45</sup> The DOJ decided to indict the firm after the collapse of the Enron corporation, when evidence of a massive accounting fraud by Arthur Anderson came to light.<sup>46</sup> After the indictment, the public quickly lost faith in the firm, it began to rapidly lose clients, and it eventually collapsed under the pressure.<sup>47</sup> Although the DOJ justified its indictment with evidence of Arthur Andersen’s widespread, damaging accounting fraud and destruction of evidence during the pending criminal trial, observers heavily criticized the DOJ for prosecuting the firm and thereby dealing it a death-blow.<sup>48</sup> Critics were especially concerned with the fact that when Arthur An-

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<sup>43</sup> Uhlmann, *supra* note 13, at 1308; see U.S. SENTENCING COMM’N, 2000 SOURCEBOOK, *supra* note 42 (reporting 296 prosecutions of organizations resulting in fines or restitution or both in fiscal year 2000).

<sup>44</sup> Uhlmann, *supra* note 13, at 1308. Deferred prosecution agreements (“DPAs”) normally allow DOJ prosecutors to file criminal charges against a defendant, but these charges are stayed or dismissed after a certain length of time if the company meets certain requirements laid out in the agreement. Wray & Hur, *supra* note 39, at 1104. In contrast, with non-prosecution agreements (“NPAs”), the DOJ does not file any charges at all, and individuals are allowed to completely avoid prosecution in exchange for cooperation as required in the agreement. *Id.* at 1105. In the nine years preceding 2001, which includes both the years leading up to the Holder Memo and the immediate subsequent years, the DOJ only entered into thirteen DPAs. See Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, UNIV. VA. SCH. LAW, [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/home.suhtml](http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suhtml) [<https://perma.cc/N679-C47V>] (maintaining an extensive, and regularly updated, list of Federal Organizational Prosecution Agreements).

<sup>45</sup> Uhlmann, *supra* note 13, at 1310–11. Arthur Andersen was a major U.S. accounting firm. Kurt Eichenwald, *Enron’s Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry*, N.Y. TIMES (Mar. 15, 2002), <http://www.nytimes.com/2002/03/15/business/enron-s-many-strands-investigation-andersen-charged-with-obstruction-enron.html> [<https://perma.cc/P3FU-5LL3>].

<sup>46</sup> Eichenwald, *supra* note 45. Enron was a major U.S. corporation that focused its business on the energy industry. See generally BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003); *The Fall of Enron: Collapse Felt from Workers’ Homes to Halls of Government*, NPR, <http://www.npr.org/news/specials/enron/> [<https://perma.cc/A5A6-7KM2>] (detailing the Enron corporation and its downfall). Enron’s collapse was precipitated by the discovery that it had concealed huge debts and profit losses in an effort to buoy its stock price. *The Fall of Enron*, *supra*. Arthur Andersen was Enron’s accounting firm. Eichenwald, *supra* note 45. It was convicted for its role in the accounting fraud that helped hide Enron’s debts and losses. *Id.*

<sup>47</sup> *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 587–88 (7th Cir. 2005).

<sup>48</sup> See Uhlmann, *supra* note 13, at 1310 (providing examples of this criticism); Carrie Johnson, *Ruling Won’t Deter Prosecution of Fraud*, WASH. POST (June 1, 2005), <http://www.washingtonpost.com>.

dersen went out of business, 28,000 mostly innocent employees lost their jobs and competition in the accounting industry further diminished.<sup>49</sup>

*B. The Thompson Memo: The DOJ Changes Course in an Effort  
to Focus on Cooperation Over Full Prosecution*

The criticism arising from the Arthur Andersen debacle led the DOJ to issue new guidance regarding the criminal prosecution of corporations.<sup>50</sup> In January 2003, Deputy Attorney General Larry Thompson issued a memorandum, the new Principles of Federal Prosecution of Business Organizations, a document very similar in content to the Holder Memo, but with a new section devoted to cooperation.<sup>51</sup> This section introduced the possibility of deferred prosecution for cooperative corporations and stated that cooperation and voluntary disclosure could warrant granting immunity, amnesty, or pretrial diversion.<sup>52</sup>

In 2008, the DOJ again revised its corporate criminal prosecution guidelines with the issuance of the Filip Memo.<sup>53</sup> This memo fully endorsed DPAs and NPAs as central to DOJ prosecution strategy and also explicitly validated the analysis of the potential collateral consequences of full prosecution when considering alternatives.<sup>54</sup> The guidance stated that possible collateral conse-

com/wp-dyn/content/article/2005/05/31/AR2005053101555.html [https://perma.cc/QG55-4KRW] (discussing the harsh collateral consequences of the indictment).

<sup>49</sup> See Jonathan D. Glater, *Last Task at Andersen: Turning Out the Lights*, N.Y. TIMES (Aug. 30, 2002), <http://www.nytimes.com/2002/08/30/business/last-task-at-andersen-turning-out-the-lights.html> [https://perma.cc/X9U8-E5U9] (documenting the negative fallout from the Arthur Andersen prosecution).

<sup>50</sup> See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–22 (2007) (explaining the reasoning behind the issuance of the new guidance). See generally Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo] (listing out the new principles meant to guide criminal prosecutions of corporations).

<sup>51</sup> Thompson Memo, *supra* note 50, at 1.

<sup>52</sup> *Id.* at 6. This new policy guidance, however, further solidified the DOJ’s new focus on alternatives to prosecution, rather than signaling a totally new direction. See Uhlmann, *supra* note 13, at 1311. According to federal prosecution statistics, the DOJ had already begun increasing its use of DPAs and NPAs prior to the issuance of the Thompson Memo. Garrett & Ashley, *supra* note 44. From 1992 through 2000, the DOJ only entered into thirteen DPAs and NPAs. *Id.* In 2001 and 2002, prior to the Thompson Memo, the DOJ entered into eight DPAs and NPAs. *Id.* Then, in 2003 and 2004, post-Thompson Memo, the DOJ greatly expanded the use of these agreements by utilizing them fifteen different times. *Id.* This increased use, however, did not signal a true overhaul of the DOJ’s approach to prosecution. Uhlmann, *supra* note 13, at 1311. Rather, these agreements were primarily used in the context of the department’s overall strategy to increase corporate cooperation. *Id.* at 1312.

<sup>53</sup> Memorandum from Mark Filip, Deputy Att’y Gen., to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008).

<sup>54</sup> *Id.* at 2, 7–8, 17–18.

quences to innocent third parties should influence the DOJ to offer NPAs designed to incentivize compliance with relevant law and to prevent future criminal misconduct.<sup>55</sup> This change in policy fully entrenched the DOJ's use of alternatives to prosecution in their overall corporate crime fighting strategy.<sup>56</sup>

Although the DOJ's Criminal Division continues to bring criminal prosecutions against corporations and individuals for their participation in corporate crime, the overwhelming evidence points to the Criminal Division's preference for DPAs and NPAs over full prosecution.<sup>57</sup> From 2011 through 2013, more than two-thirds of the DOJ's corporate criminal cases have ended in DPAs or NPAs instead of full prosecution.<sup>58</sup> In addition, local U.S. Attorney's Offices have adopted the extensive use of prosecutorial alternatives.<sup>59</sup> Over the past seven or eight years, the U.S. Attorney's Offices for the Southern District of New York, the District of Massachusetts, the District of New Jersey, the Central District of California, and the Eastern District of New York have all begun to increasingly use alternatives to prosecution when investigating corporate crime.<sup>60</sup>

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<sup>55</sup> *Id.* The language of the memo provides:

[W]here 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 with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism . . . . Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct . . . .

*Id.* at 18.

<sup>56</sup> *Id.* Indeed, from 2008 through 2012, the DOJ averaged more than thirty DPAs and NPAs in corporate crime cases every year, with peaks of thirty-eight in 2010 and thirty-seven in 2012. Garrett & Ashley, *supra* note 44. This shift was most pronounced in the DOJ's Criminal Division, where agreements such as these became more frequent than actual criminal prosecutions. *See id.* (recording DPAs and NPAs entered into by the DOJ). From 2010 through 2012, the Criminal Division alone entered into forty-six DPAs and NPAs, a figure more than double the twenty-two plea agreements entered into during the same time frame. *See id.* (listing the DPAs, NPAs, and plea agreements entered into by the DOJ during that timeframe).

<sup>57</sup> Uhlmann, *supra* note 13, at 1318.

<sup>58</sup> Garrett & Ashley, *supra* note 44; *see* Uhlmann, *supra* note 13, at 1318 (discussing the rise in the use of DPAs and NPAs over this time period).

<sup>59</sup> Garrett & Ashley, *supra* note 44.

<sup>60</sup> *Id.* The various U.S. Attorneys offices are within the greater DOJ. *Offices of the United States Attorneys: About*, DOJ, <https://www.justice.gov/usao/about-offices-united-states-attorneys> [<https://perma.cc/33JQ-VC6Q>]. The offices mainly handle prosecution of federal criminal cases related to activities within their assigned judicial districts. *Id.* The DOJ's more general Criminal Division, located in Washington, D.C., prosecutes nationally significant criminal cases and implements criminal enforcement policy binding on all prosecutors working for the DOJ. *About the*

The DOJ justifies the use of these DPAs, NPAs, and other alternatives to prosecution by citing a desire to avoid unnecessary collateral consequences to innocent parties.<sup>61</sup> Commentators, however, have proposed various alternate explanations for the DOJ's recent reliance on alternatives to prosecution.<sup>62</sup> For instance, many have claimed that the DOJ's goal was to obtain more privilege waivers through these agreements.<sup>63</sup> They argue that corporate crime prosecutors strongly wish to ensure that corporations share information regarding possible conspirators or accomplices, information that often times is very difficult to access due to attorney-client privilege.<sup>64</sup> Since waiving the attorney-client privilege is a fairly drastic step, prosecutors need strong leverage, such as NPAs, to ensure acquisition of the highly sought-after waivers.<sup>65</sup>

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*Criminal Division*, DOJ, <https://www.justice.gov/criminal/about-criminal-division> [<https://perma.cc/75ZZ-6A44>].

<sup>61</sup> U.S. ATTORNEY'S MANUAL, PRINCIPLE OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.1100(B) (U.S. Dep't of Justice 2017). As previously mentioned, the 2008 revision to the Principles of Federal Prosecution for Business Organizations, the most recent DOJ corporate prosecution guidance document, recommends these alternatives to prosecution in order to avoid collateral consequences. *Id.* Further, in a September 2012 speech meant to promote the use of DPAs and NPAs, the Assistant Attorney General for the Criminal Division affirmed that these agreements are necessary in order to avoid undesirable collateral harm to employees and shareholders. Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice Criminal Div., Address at the N.Y.C. Bar Association: The Role of Deferred Prosecution Agreements in White Collar Criminal Law Enforcement (Sept. 13, 2012).

<sup>62</sup> See, e.g., Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 351–54 (2008) (suggesting that during the Bush era, the Thompson Memo and corporate crime prosecution reform were made in response to the “financial debacles” that followed the collapse of Enron); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855–56 (2007) (suggesting that prosecutors use NPAs and DPAs to enact structural reform within corporations); Uhlmann, *supra* note 13, at 1312–13 (discussing the different theories).

<sup>63</sup> Uhlmann, *supra* note 13, at 1312–13; see also Griffin, *supra* note 50, at 323 (explaining that most current DPAs require privilege waivers). Attorney-client privilege normally prevents federal prosecutors from accessing communications between defense attorneys and their corporate clients. Alexander C. Black, Annotation, *What Corporate Communications Are Entitled to Attorney-Client Privilege—Modern Cases*, 27 A.L.R.5th Art. 76 (1995). In cases of corporate crime, corporations often have their attorneys conduct internal investigations to assess whether their employees committed criminal acts. *Id.* Privilege normally covers such communications. *Id.* Because these protected internal communications can be very useful to federal prosecutors, commentators argue that corporate crime prosecutors have strong incentive to request waivers of the privilege. Uhlmann, *supra* note 13, at 1312–13. See generally Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations, 8–9 (Dec. 12, 2006) [hereinafter McNulty Memo] (discussing the benefits to federal prosecutors from obtainer of a waiver of the attorney-client privilege during an investigation into corporate crime).

<sup>64</sup> Uhlmann, *supra* note 13, at 1312–13; see also McNulty Memo, *supra* note 63, at 8–9 (discussing the difficulties in obtaining important information during corporate crime investigations due to the attorney-client privilege).

<sup>65</sup> Uhlmann, *supra* note 13, at 1312–13; see also Wray & Hur, *supra* note 39, at 1104–05 (explaining that the DOJ uses DPAs and NPAs to obtain cooperation from corporations); Thomp-

More cynical commentators have argued that the pro-business Bush administration wanted to promote a business friendly political climate by encouraging the use of DPAs and NPAs.<sup>66</sup> The facts, however, do not support this political narrative.<sup>67</sup> As previously stated, DPAs actually increased under the Obama administration.<sup>68</sup> Under most evaluations, the Bush administration was much tougher on corporate crime than the Obama administration.<sup>69</sup>

Finally, other legal analysts contend that the DOJ's preference for prosecutorial alternatives is the result of a straightforward cost-benefit analysis; the Department can obtain strong financial sanctions, admissions of wrongdoing, corporate cooperation, and structural compliance programs through DPAs and NPAs, all without expending the resources necessary to fully complete a corporate prosecution.<sup>70</sup> For prosecutors, there is simply not much of an advantage to full prosecution, which leads to collateral consequences, excess resource expenditure, and ultimately, the risk of losing at trial.<sup>71</sup> In contrast, through alternative prosecution agreements, prosecutors can efficiently achieve fairly attractive settlement terms without the risks that full trials pose.<sup>72</sup>

### *C. Problems with Pre-Yates Memo DOJ Prosecution Policy*

Irrespective of the DOJ's pre-Yates Memo justification for the overwhelming use of DPAs and NPAs, this strategy has many negative consequences.<sup>73</sup> The five principle consequences are explained in detail below.<sup>74</sup>

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son Memo, *supra* note 50, at 6 (instructing DOJ prosecutors to use NPAs, under certain circumstances, in exchange for cooperation from a corporation).

<sup>66</sup> Uhlmann, *supra* note 13, at 1323.

<sup>67</sup> See Duggin, *supra* note 62, at 351–54 (suggesting that during the Bush era, the Thompson Memo and corporate crime prosecution reform were made in response to the “financial debacles” that followed the collapse of Enron rather than as part of a political agenda).

<sup>68</sup> Garrett & Ashley, *supra* note 44.

<sup>69</sup> See Uhlmann, *supra* note 13, at 1323 (discussing the use of prosecution agreements during both the Bush administration and Obama administration); Eisinger, *supra* note 1 (comparing the Bush administration's aggressive prosecution of corporate crime to the Obama administration's failure to successfully prosecute such crime); Garrett & Ashley, *supra* note 44 (providing statistical analysis on the increase in DPAs and NPAs under the Obama administration).

<sup>70</sup> Uhlmann, *supra* note 13, at 1324.

<sup>71</sup> *Id.*; Christopher A. Wray, Assistant Att'y Gen., Criminal Div., Remarks to the Association of Certified Fraud Examiners, Mid-South Chapter, Memphis, Tenn. (Sept. 2, 2004).

<sup>72</sup> Uhlmann, *supra* note 13, at 1324.

<sup>73</sup> See Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1810–11 (2011) (noting that foreign firms are more likely to receive a high penalty and less likely to reach a DPA or NPA than domestic firms); Peter R. Reilly, *Justice Deferred Is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions*, 2015 BYU L. REV. 307, 339–346 (explaining the many negative attributes of DPAs and NPAs); Uhlmann, *supra* note 13, at 1326–44 (same).

<sup>74</sup> See Reilly, *supra* note 73, at 339–346 (discussing these negative consequences); Uhlmann, *supra* note 13, at 1326–44 (same); John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13 (same).

First, the DOJ has a fundamental commitment to enforce the law in a fair and even-handed manner, but evidence shows that the DOJ pursues non-criminal alternatives to prosecution more often with large, influential companies than it does with smaller, private corporations.<sup>75</sup> Further, beyond a failure to affect impartial enforcement of the laws, this tendency has negative utilitarian consequences.<sup>76</sup> Favorable treatment of large corporations creates a lack of public trust in the legal system, which can have a negative economic impact.<sup>77</sup> Thus, commentators argue that, at the very least, enforcement should be equally focused on large and small corporations alike.<sup>78</sup>

Second, the use of deferred and non-prosecution agreements require DOJ prosecutors to implement corporate structural reforms, but implementation of such reforms lies outside prosecutors' realm of expertise and authority.<sup>79</sup> Voluminous research exposes the fact that federal prosecutors are steadily abandoning their traditional role in prosecuting and punishing corporate criminal activity in favor of attempts to reform corporate structure through DPAs and NPAs.<sup>80</sup> As many analysts have pointed out, prosecutors are

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<sup>75</sup> Uhlmann, *supra* note 13, at 1326–27. Scholars have identified a number of troubling trends in the use of deferred prosecution and non-prosecution agreements. See Garrett, *supra* note 73, at 1811 (analyzing impact of DPAs and NPAs on foreign and domestic firms). Deferred prosecution and non-prosecution occur most often during investigations of large, publicly owned corporations. *Id.* Smaller, privately held corporations more often face criminal prosecution. *Id.*

<sup>76</sup> Foster, *supra* note 13, at 700–06.

<sup>77</sup> See *id.* (discussing the negative consequences resulting from disparate treatment of large and small corporations).

<sup>78</sup> *Id.*

<sup>79</sup> Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York, CORP. CRIME REPORTER, Dec. 12, 2005, at 48, <http://www.corporatecrimereporter.com/maryjo-whiteinterview010806.htm> [<https://perma.cc/PCJ8-3QZZ>]. See generally Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009) (discussing prosecutors' ineffectiveness in attempting to enact corporate governance reforms). Mary Jo White, former U.S. Attorney for the Southern District of New York and former Chair of the SEC, stated that “[f]or a prosecutor to get into the business of changing corporate culture is skating on fairly thin ice.” *Id.* Professor John C. Coffee, Jr. similarly stated, “I don’t think prosecutors are particularly skilled in corporate governance.” Janet Novack, *Club Fed, Deferred*, FORBES (Aug. 24, 2005), [http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz\\_jn\\_0824beltway.html](http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html) [[https://web.archive.org/web/20130815005133/http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz\\_jn\\_0824beltway.html](https://web.archive.org/web/20130815005133/http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html)].

<sup>80</sup> See Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008) (explaining that DOJ prosecutors, based on reliance on DPAs and NPAs, appear to believe that the primary role of corporate criminal enforcement is to improve corporate cultural practices and institute systemic structural reform); see also Garrett, *supra* note 62, at 886–87 (arguing that the DOJ has purposefully adopted a reform-minded enforcement strategy in the aftermath of repeated corporate scandals, a strategy which is different from the normal role of prosecutors—to prioritize successful convictions). These corporate reform DPAs often include provisions that require companies to (1) change employee payment structures, (2) modify contractual agreements with outside third parties, (3) change the structure of their board of directors, (4) replace executives or other employees,

trained to be effective litigators and enforcers of the laws; they are not experts on structural corporate governance reformation.<sup>81</sup> Therefore, it is unclear whether federal prosecutors have the necessary competence to implement effective deferred prosecution agreements, which require complicated structural reforms.<sup>82</sup>

Additionally, it remains unclear whether federal prosecutors actually have the statutory authority to implement corporate reform through NPAs and DPAs.<sup>83</sup> These agreements are only mentioned once in the United States federal code, in a section solely covering statute of limitations waivers.<sup>84</sup> Further, even if they do have this authority, it appears that it is being exercised in contradiction with the DOJ's policies.<sup>85</sup> Certain experts have posited that federal law does not authorize corporate reform and that federal prosecutors are implementing corporate law policies that Congress has not approved.<sup>86</sup> Even if prosecutors do have this authority, however, their seemingly indiscriminate

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(5) establish new ethics programs, and (6) terminate certain business relationships. Reilly, *supra* note 73, at 343–44.

<sup>81</sup> See Garrett, *supra* note 62, at 936 (observing that Federal prosecutors have abandoned their traditional role of obtaining convictions, and, in doing so, have attempted to reshape the governance structure of large corporate bodies); Paul E. McGreal, *Corporate Compliance Survey*, 64 BUS. LAW. 253, 260–61 (2008) (discussing how DPAs force governance reforms upon corporations, including requiring complete reformations of boards of directors); P.J. Meidl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 12–13 (2007) (describing how DPAs require changes at the core of corporate governance structures, changes normally made by board directors, with examples such as requiring a company to add an independent board member, to cease private client compensation and benefits practices, to change the management of the company, and to add new seats on the board); Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 475–76 (2008) (describing the DOJ's DPA with the accounting firm KPMG resulting from a multi-billion dollar criminal tax fraud investigation, as one which required the firm to cease certain tax consulting practices, cease its sale of pre-packaged tax products, and restrict its tax preparation services); Coffee, *supra* note 74, at 13 (discussing the dangers of prosecutors pursuing corporate governance reform through the use of DPAs and NPAs).

<sup>82</sup> See Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 69–70 (2014) (explaining that prosecutors do not have the financial training or wherewithal necessary to implement DPAs that will effectively change a corporation's structure for the better); Coffee, *supra* note 74, at 13 (arguing that DPAs have deeply encroached into matters of corporate governance and that the mandated reforms equal experimentation in corporate governance by prosecutors lacking the experience necessary to believe that such reforms will result in effective deterrence).

<sup>83</sup> See Uhlmann, *supra* note 13, at 1329 (questioning whether this authority exists).

<sup>84</sup> 18 U.S.C. § 3161(h) (2012).

<sup>85</sup> See Uhlmann, *supra* note 13, at 1337 (arguing that the DOJ's increased use of DPAs and NPAs contravenes DOJ policy).

<sup>86</sup> See, e.g., John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 312–13 (2004) (proposing that Federal criminal law does not address corporate reform and that Congress's delegation of criminal enforcement power has allowed the DOJ to implement policies unapproved by Congress).

use of DPAs and NPAs in an attempt to reform corporate culture contradicts mandates outlined in the United States Attorney's Manual ("USAM").<sup>87</sup>

The USAM states that DPAs or NPAs can be used in exchange for cooperation, but should only be used if that same cooperation cannot be obtained through a plea agreement or alternative agreement that preserves the DOJ's ability to pursue criminal charges.<sup>88</sup> Indeed, the USAM expresses a strong preference for obtaining cooperation through plea agreements that reduce charges or involve sentencing considerations.<sup>89</sup> According to the USAM, obtaining a plea agreement is vastly superior to allowing a wrongdoer to escape liability though a NPA or DPA.<sup>90</sup> Of course, it is difficult to ascertain the lengths that the DOJ normally goes in order to secure cooperation before using DPAs or NPAs.<sup>91</sup> Nevertheless, given the overwhelming use of DPAs and NPAs since the release of the Thompson Memo in 2003, it seems unlikely that the DOJ is only using these agreements where it cannot otherwise obtain cooperation.<sup>92</sup>

Further, according to the USAM, even where prosecutors establish that a NPA or DPA is the only available avenue for successfully obtaining cooperation, they still must conduct a balancing test to determine whether foregoing prosecution is in the public interest.<sup>93</sup> In addition to this test, the manual also provides that, because the primary function of a federal prosecutor is to enforce the criminal law, DPAs and NPAs should be used only under very lim-

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<sup>87</sup> See U.S. ATTORNEY'S MANUAL § 9-27.600 (providing limitations on the use of DPAs and NPAs); Uhlmann, *supra* note 13, at 1338-39 (discussing the *U.S. Attorney's Manual's* ("USAM") mandates).

<sup>88</sup> U.S. ATTORNEY'S MANUAL § 9-27.600; see Thompson Memo, *supra* note 50, at 6 ("[A] non prosecution agreement in exchange for cooperation when a corporation's 'timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.'") (citation omitted).

<sup>89</sup> U.S. ATTORNEY'S MANUAL § 9-27.600.

<sup>90</sup> *Id.* § 9-27.600(B)(2) (stating that a plea agreement is "clearly preferable to permitting an offender to avoid any liability for [its] conduct" and that "the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance"). The USAM also strongly favors guilty plea agreements over the use of *nolo contendere* pleas. *Id.* § 9-27.500 (stating that DOJ attorneys should reject a *nolo contendere* plea unless the supervising Assistant Attorney General "concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest"). With a *nolo contendere* plea, the defendant does not contest her guilt or innocence, waives her right to trial, is formally convicted of the crime, and accepts punishment as if she had pled guilty. Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2, 10-14 (2004). The biggest difference between this plea and a guilty plea is that with a *nolo contendere* plea, the defendant does not admit her guilt. *Id.*

<sup>91</sup> See Uhlmann, *supra* note 13, at 1339 (suggesting that the DOJ's frequent use of DPAs and NPAs is not limited to situations where cooperation cannot be obtained through other avenues).

<sup>92</sup> *Id.*

<sup>93</sup> U.S. ATTORNEY'S MANUAL § 9-27.600-.620. This public interest balancing test requires weighing (1) the importance of the case, (2) the value of the cooperation, and (3) the relative culpability and criminal history of the defendant. *Id.* § 9-27.620(A).

ited circumstances.<sup>94</sup> As the manual points out, DPAs and NPAs are agreements to avoid enforcing the law when certain conditions are present.<sup>95</sup> Again, even without full knowledge of individual federal prosecutors conducting these balancing tests, the explosion in the use of NPAs and DPAs, including with serious, repeat corporate offenders, suggests that these agreements are being used as a primary prosecutorial tool without full consideration of potential damage to the public.<sup>96</sup>

Third, as many commentators have explained, there is a distinct lack of judicial monitoring of DPAs and NPAs, leading to a lack of accountability, neutrality, and effectiveness of the agreements.<sup>97</sup> With DPAs, there is some limited oversight—deferred prosecution depends on a court approving a waiver of the relevant statute of limitations—but this oversight is mechanical at best.<sup>98</sup> It is exceedingly rare that a court rejects a DPA, allowing federal prosecutors and corporate actors to freely enter into agreements regardless of potential harm to the public.<sup>99</sup> With NPAs, there is no judicial oversight at all because charges are never filed.<sup>100</sup> The agreements are simply contracts between the government and the defendant.<sup>101</sup> For both DPAs and NPAs, the

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<sup>94</sup> *Id.* § 9-27.620(B)(1).

<sup>95</sup> *Id.* (“[S]ince the primary function of a federal prosecution . . . is to enforce the criminal law, a federal prosecutor should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions.”).

<sup>96</sup> See *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at \*7–9 (E.D.N.Y. July 1, 2013) (noting that, in spite of criticism for avoiding criminal liability, the district judge deferred to the Executive Branch in upholding the use of the DPA); Peter J. Henning, *Many Messages in the G.M. Settlement*, N.Y. TIMES: DEALBOOK (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/business/dealbook/many-messages-in-the-gm-settlement.html> [<https://perma.cc/RJM6-4UC9>] (explaining that the DOJ used a DPA in the GM fraud case in hopes of deterring future corporate misconduct but also explaining that this DPA was relatively weak compared to other corporate fraud cases); Shane Strowmatt et al., *Deutsche Bank to Pay \$2.5 Billion to End LIBOR Probe*, BLOOMBERG (Apr. 23, 2015), <http://www.bloomberg.com/news/articles/2015-04-23/deutsche-bank-to-pay-record-2-5-billion-to-resolve-libor-probes> [<https://perma.cc/8TKH-G994>] (reporting on DPA used in Deutsche Bank settlement); *Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR*, DEP'T OF JUSTICE (Apr. 23, 2015), <http://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation> [<https://perma.cc/CEG8-9XF7>] (discussing DPA used to resolve Deutsche Bank's fraud charges).

<sup>97</sup> Uhlmann, *supra* note 13, at 1328. *But see HSBC Bank USA, N.A.*, 2013 WL 3306161, at \*4–5 (holding that courts have authority to reject deferred prosecution agreements pursuant to their power to uphold the integrity of judicial proceedings).

<sup>98</sup> 18 U.S.C. § 3161(h) (2012); Uhlmann, *supra* note 13, at 1328.

<sup>99</sup> Garrett, *supra* note 62, at 893.

<sup>100</sup> See *id.* at 924 (noting that there is no statutorily required review for NPAs); Wray & Hur, *supra* note 39, at 1105 (explaining that with NPAs, the DOJ does not file any charges at all, and individuals are allowed to completely avoid prosecution in exchange for cooperation as required in the agreement).

<sup>101</sup> Garrett, *supra* note 62, at 928–29. Although there is some judicial oversight in that the agreement is judicially enforceable and the government maintains the right to prosecute the corpo-

judiciary does not monitor compliance with the agreements, and often, companies are left to self-regulate their compliance.<sup>102</sup>

Fourth, research suggests that DPAs and NPAs simply do not provide the same deterrent effect on corporate misconduct as criminal prosecutions.<sup>103</sup> Allowing corporations to escape prosecution with monetary fines and agreements to reform their business practices creates less incentive to abstain from further criminal conduct.<sup>104</sup> DPAs and NPAs make it possible for corporations to calculate the monetary risk of criminal business practices and decide to bear the risk due to the potential financial gains of the practices.<sup>105</sup> Commentators explain that this lack of a possible criminal indictment fails to deter corporate officers from engaging in such criminal practices.<sup>106</sup>

Additionally, and perhaps most importantly, full criminal prosecution expresses societal condemnation of an act that cannot be replicated with DPAs and NPAs.<sup>107</sup> Criminal prosecution and conviction stigmatizes defend-

ration if the corporation breaks the agreement, there is still no judicial oversight over the entry into the initial agreement. Wray & Hur, *supra* note 39, at 1105.

<sup>102</sup> Ellis W. Martin, *Deferred Prosecution Agreements: 'Too Big to Jail' and the Potential of Judicial Oversight Combined with Congressional Legislation*, 18 N.C. BANKING INST. 457, 468 (2014).

<sup>103</sup> See Reilly, *supra* note 73, at 345 (discussing the Organization for Economic Cooperation and Development's study that found that DPAs' deterrent effect was unknown).

<sup>104</sup> See Martin, *supra* note 102, at 468 (stating that allowing corporations to escape criminal sanctions with fines and unmonitored commitments to pursue internal reforms fails to deter future criminal misconduct).

<sup>105</sup> See Randall D. Eliason, *We Need to Indict Them: Deferred Prosecution Agreements Won't Deter Enough Corporate Crime*, LEGAL TIMES, Sept. 22, 2008, at 54 (indicating that without the threat of criminal liability, corporate executives will be more willing to push their conduct to the limits of legality as engaging in criminal activity becomes a simple cost-benefit analysis).

<sup>106</sup> See Martin, *supra* note 102, at 469 ("DPAs may make it financially viable for corporations to bear the risk of criminal business practices due to financial gains made from such practices without the threat of an indictment."); see also Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, N.Y. TIMES (Apr. 9, 2008), <http://www.nytimes.com/2008/04/09/washington/09justice.html> [<https://perma.cc/HP7D-VCK2>] (questioning the deterrent effect of DPAs). Recent studies into the effectiveness of DPAs and NPAs confirm suspicions regarding their lack of deterrence. Reilly, *supra* note 73, at 345. For example, the U.S. Government Accountability Office ("GAO") has come to the conclusion that the DOJ is not able to evaluate DPA and NPA effectiveness in combatting corporate crime. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 1 (2009). The GAO concluded that the "DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs . . . contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness," and "[t]herefore, it could be difficult for DOJ to justify its increasing use of these tools." *Id.* at 20. A similar report that the Organization for Economic Co-operation and Development issued, in addressing Foreign Corrupt Practices Act enforcement, stated that any deterrence effect of DPAs or NPAs has not been quantified. OECD WORKING GRP. ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 20 (2010).

<sup>107</sup> Uhlmann, *supra* note 13, at 1336.

ants in a manner that fines, penalties, and corporate reform agreements do not.<sup>108</sup> When conduct is criminalized, prosecutors send a message to the rest of society that such conduct will not be tolerated and will be discouraged by society.<sup>109</sup> This stigmatization harms an individual's reputation above and beyond the financial consequences of NPAs and DPAs that can be accounted for merely as the cost of doing business.<sup>110</sup>

Finally, the use of NPAs and DPAs for repeat, serious offenders cannot be reconciled with any conception of criminal law enforcement and conflicts with the DOJ's own criminal prosecution regulations.<sup>111</sup> As Part I of this Note stated, DPAs and NPAs became more commonplace after the Thompson Memo was issued in 2003.<sup>112</sup> Specifically, they were utilized in conjunction with the Thompson Memo's emphasis on pretrial diversion and cooperation with corporate wrongdoers.<sup>113</sup> The DOJ, however, has traditionally limited pretrial diversion to less serious crimes and to individuals with little or no criminal history.<sup>114</sup> Yet after 2003, the DOJ increasingly utilized DPAs and NPAs, forms of pretrial diversion, with corporations that had serious criminal histories.<sup>115</sup> Allowing egregious criminal misconduct to escape criminal prosecution undermines deterrence of corporate misconduct and contorts the traditional pretrial diversion model that originally spawned the use of DPAs and NPAs.<sup>116</sup>

Ultimately, the overarching problem with the DOJ's pre-Yates Memo corporate prosecution policy is that, by using DPAs and NPAs as a substitute

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<sup>108</sup> *Id.*; see John L. Diamond, *The Crisis in the Ideology of Crime*, 31 IND. L. REV. 291, 311 (1998) (arguing that criminal law diverges from civil law because criminal law censures wrongdoers); Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (observing that government abstention from criminal enforcement could be viewed as approval of the wrongdoing).

<sup>109</sup> See Diamond, *supra* note 108, at 311 (explaining that a society's ideology is reflected in the acts that it chooses to criminalize).

<sup>110</sup> Uhlmann, *supra* note 13, at 1335.

<sup>111</sup> *Id.* at 1337.

<sup>112</sup> Uhlmann, *supra* note 13, at 1337; see Thompson Memo, *supra* note 50, at 6 (introducing, for the first time, NPAs and DPAs as a tool for gaining cooperation from corporations); *supra* notes 55–57 (explaining the rise of the DOJ's use of DPAs and NPAs in the wake of the Thompson Memo's release in 2003).

<sup>113</sup> Uhlmann, *supra* note 13, at 1337.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* One particularly enlightening example of the DOJ's misuse of NPAs and DPAs on serious offenders is the HSBC case. See *HSBC Bank USA, N.A.*, 2013 WL 3306161, at \*7. After a lengthy investigation, the global bank, HSBC, was found to have laundered nearly a billion dollars for clients such as drug traffickers and international terrorist organizations, yet such stunning criminal misconduct was met with a DPA. *Id.* at \*8–9; Uhlmann, *supra* note 13, at 1337. Incredibly, not one individual employee of HSBC was criminally prosecuted. See Uhlmann, *supra* note 13, at 1338.

<sup>116</sup> See Uhlmann, *supra* note 13, at 1338 (discussing how historical use of DPAs and NPAs fails to address the criminality of corporate misconduct).

for criminal prosecution, the DOJ eroded the entire idea of corporate actor criminality.<sup>117</sup> If, after investigating a case of corporate wrongdoing, a prosecutor decides the conduct involved is too egregious to avoid criminal charges, then the prosecutor should pursue criminal charges.<sup>118</sup> By deciding that the criminal conduct can be addressed through a non-criminal alternative such as a DPA, the prosecutor betrays her own determination about the egregiousness of the conduct.<sup>119</sup> In the end, an agreement such as a DPA signals that a corporate defendant can undo the criminal acts of its individual employees if it agrees to an attractive enough deal with the prosecutor.<sup>120</sup>

## II. THE YATES MEMO: WILL THIS CHANGE IN POLICY SOLVE THE PROBLEMS ASSOCIATED WITH THE DOJ'S PROSECUTION STRATEGY FOR CORPORATE CRIME?

On September 9, 2015, Deputy Attorney General Sally Yates issued a memorandum (the "Yates Memo") in response to consistent criticism that the DOJ was failing in its efforts to hold individuals accountable for their role in corporate criminal scandals.<sup>121</sup> Specifically, the memo announced new DOJ policy to increasingly target individuals involved in corporate crimes and provided guidelines for how this goal of individual accountability would be met.<sup>122</sup> Nevertheless, two examples of post-Yates Memo prosecutorial failures in particular call into question the effect that the memo's guidelines will have on holding individuals accountable for corporate crime.<sup>123</sup> Section A of

<sup>117</sup> *Id.* at 1341.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* (noting that prosecutors should apply sound discretion when considering prosecuting crimes).

<sup>120</sup> *See id.* at 1302 (arguing that the use of DPAs and NPAs erodes deterrence of corporate criminal activity, undermines the rule of law, and eradicates reputation harm that coincides with criminal prosecution).

<sup>121</sup> Yates Memo, *supra* note 26; Johnston, *supra* note 22. Indeed, the Memo's first paragraphs attempt to assuage critics by reassuring them that fighting corporate crime and holding individuals accountable is a "top priority of the Department of Justice." Yates Memo, *supra* note 26.

<sup>122</sup> *See* Yates Memo, *supra* note 26, at 2 ("[T]he Department [must] fully leverage its resources to identify culpable individuals . . . in corporate cases. To address these challenges . . . [the Memo] identify[es] areas . . . [to] amend its policies . . . to most effectively pursue the individuals responsible for corporate wrongs.").

<sup>123</sup> *See Critics Rip GM Deferred Prosecution Agreement in Engine Switch Case*, CORP. CRIME REP. (Sept. 17, 2015), <http://www.corporatecrimereporter.com/news/200/critics-rip-gm-deferred-prosecution-in-switch-case/> [<https://perma.cc/W3AN-Y7WG>] (discussing the DOJ's settlement for GM ignition switch fraud); *For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud, and Other Violations*, DEP'T OF JUSTICE (Nov. 16, 2015), <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and> [<https://perma.cc/4L63-CSEU>] (reporting on the Education Management Corp. settlement). *See* OFFICE OF SEN. ELIZABETH WARREN, RIGGED JUSTICE: 2016: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (2016) [hereinafter RIGGED JUSTICE].

this Part examines the Yates Memo in detail and discusses the manner in which the announced change in policy attempts to address the failure to effectively prosecute the individuals responsible for corporate crime.<sup>124</sup> Section B then discusses specific post-Yates Memo examples of the DOJ's continued failure to hold individuals accountable for corporate crime.<sup>125</sup>

### *A. The Yates Memo: The DOJ Shifts Its Focus Away from Cooperation*

The Yates Memo identified six key prosecutorial principles that are meant to strengthen the DOJ's ability to prosecute individual corporate wrongdoing.<sup>126</sup> The principles focused on predicating credit for corporate cooperation on identification of responsible individuals and ensuring a prosecutorial emphasis on individual liability throughout corporate criminal investigations.<sup>127</sup>

The first policy principle dictates that to receive cooperation credit, corporations must disclose relevant facts about individual responsibility for misconduct.<sup>128</sup> Further, despite this emphasis on cooperation, the memo makes clear that DOJ investigators must not rely solely on cooperation to identify responsible individuals.<sup>129</sup> Investigators are instructed to vigorously investigate any potentially culpable individuals, closely review any information pro-

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<sup>124</sup> See *infra* notes 126–146 and accompanying text.

<sup>125</sup> See *infra* notes 147–163 and accompanying text.

<sup>126</sup> Yates Memo, *supra* note 26, at 2 (“The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing . . .”).

<sup>127</sup> *Id.* at 2–3. The six specific principles are as follows: (1) in order for a corporation to acquire cooperation credit, it must provide the DOJ with all relevant facts relating to individuals responsible for the corporate misconduct; (2) individual responsibility should be the focus of criminal and civil corporate investigations from the beginning of an investigation; (3) civil and criminal attorneys conducting corporate investigations should maintain regular communication with each other regarding potential individual liability; (4) absent extraordinary circumstances, the DOJ will not provide immunity to culpable individuals when resolving a corporate investigation; (5) corporate investigations should not be resolved without a clear plan to hold related individuals accountable; and (6) civil attorneys should focus on bringing suit against individuals as well as corporations, taking into account deterrence and accountability in addition to ability to pay. *Id.*

<sup>128</sup> *Id.* at 3 (stating that, in order for a corporation to receive any consideration for cooperation, the corporation must completely disclose all relevant facts related to individual wrongdoing). The memo even goes so far as to state that if a corporation seeking cooperation credit fails to proactively learn of individual wrongdoing, its cooperation will not be considered a mitigating factor:

[T]o be eligible for any credit for cooperation, the [company] must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700.

*Id.*

<sup>129</sup> *Id.* at 4.

vided by the corporation, and compare disclosed information with internal DOJ investigative materials to ensure that the disclosed information does not omit any evidence of individual responsibility.<sup>130</sup>

The second principle mandates a focus on individual responsibility from the inception of corporate criminal investigations.<sup>131</sup> The memo emphasizes that this focus will help prosecutors discover the full extent of corporate wrongdoing, as corporate criminal activity can only occur through the conduct of individuals.<sup>132</sup> It will also help prosecutors identify lower level individuals with knowledge of criminal conduct at the executive level.<sup>133</sup> Ultimately, the memo stresses that this focus on individuals from the beginning will maximize the possibility that, upon resolution of the investigation, individuals will be held criminally liable.<sup>134</sup>

The third principle requires parallel development of civil and criminal proceedings.<sup>135</sup> DOJ attorneys are instructed to consider every possible potential remedy (e.g., jail time, financial penalties, damages, or suspension) when considering how to best hold an individual accountable.<sup>136</sup> If the DOJ is pursuing criminal sanctions against an individual, but there exists an issue with burden of proof or *mens rea* under the criminal statute, then the criminal attorneys should consult with the civil attorneys in order to assess possible civil remedies and vice versa.<sup>137</sup> Overall, the memo stresses coordination with the civil attorneys as a means to ensure that all avenues of potential liability are pursued.<sup>138</sup>

The fourth guideline provides that no corporate deal will provide culpable individuals with immunity from criminal or civil liability.<sup>139</sup> The memo states that absent approved departmental policy, DOJ lawyers will not release claims of individual criminal liability without written approval from the relevant Assistant Attorney General or U.S. Attorney.<sup>140</sup>

In a similar vein, the fifth principle states that investigations into corporate wrongdoing should not be closed without a clear plan to pursue related

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<sup>130</sup> *Id.* (explaining that the DOJ should not rely on corporations to voluntarily cooperate regarding culpable individuals, and additionally, that the DOJ should not accept information regarding culpable individuals without conducting its own independent investigation into the information).

<sup>131</sup> *Id.* at 4.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 4–5.

<sup>136</sup> *Id.* at 5.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 4–5.

<sup>139</sup> *Id.* at 5 (providing that, even if the DOJ reaches a deal with a corporation before investigating any culpable individuals, the deal should never prohibit future prosecution of culpable individuals within the corporation).

<sup>140</sup> *Id.*

individual cases in a timely and effective manner.<sup>141</sup> The memo states that a memorandum should be prepared at the close of the investigation which includes a discussion of potentially culpable individuals, a description of the current investigations into liable individuals, and a plan to bring the individual matters to a close before the end of any statute of limitations period.<sup>142</sup> If DOJ attorneys eventually decide not to bring charges against identified culpable individuals, the appropriate U.S. Attorney or Assistant Attorney General must approve the memorialized reasons for this determination.<sup>143</sup>

Finally, the sixth guideline states that civil attorneys should vigorously pursue liable individuals as well as corporate bodies, despite the fact that the corporate bodies will have a significantly greater ability to pay high judgments.<sup>144</sup> The Memo reminds DOJ attorneys that civil enforcement is not only about recovering as much money as possible from corporate wrongdoers, but also about holding individual wrongdoers accountable and deterring future individual wrongdoing.<sup>145</sup> Although cases against individuals may not return as much monetarily compared to cases against corporations, the memo makes clear that findings of individual civil liability will have a long-term deterrent effect.<sup>146</sup>

### *B. Two Examples of the Yates Memo's Practical Ineffectiveness*

Although the Yates Memo's six prosecutorial guidelines are a step in the right direction, many commentators have pointed out that they are simply a restatement of the DOJ's already longstanding policy of targeting individuals.<sup>147</sup> Indeed, some have even gone so far as to state that the new rules are

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<sup>141</sup> *Id.* at 6.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 6–7. The Memo provides:

[C]ivil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing . . . . In certain circumstances, though, these dual goals can be in apparent tension with one another, for example . . . whether to pursue civil actions against individual[s] . . . who may not have the necessary financial resources to pay a significant judgment.

*Id.* at 6.

<sup>146</sup> *Id.* at 6–7.

<sup>147</sup> *E.g.*, Richard Cullen & George Terwilliger III, *Unpacking the Yates Memo: What the "New" DOJ Policy Really Means*, JD SUPRA BUS. ADVISOR (Sept. 14, 2015), <http://www.jdsupra.com/legalnews/unpacking-the-yates-memo-what-the-new-23021> [<https://perma.cc/L89H-4J8S>]; Priya Cherian Huskins, *The Yates Memo: What Is It and What You Need to Know*, WOODRUFF SAWYER & COMPANY: D&O NOTEBOOK (Oct. 6, 2015), <https://wsandco.com/do-notebook/yates-memo/> [<https://perma.cc/GTP9-W4VX>].

merely symbolic public messaging.<sup>148</sup> The following two examples of post-Yates Memo prosecutorial failures reinforce this sentiment and highlight the fact that the memo's guidelines did not go quite far enough in the effort to end impunity for individual corporate criminals.<sup>149</sup>

The first example of the DOJ's post-Yates Memo continuing failure to hold individuals accountable for corporate crime is the Department's case against Education Management Corporation ("EDMC").<sup>150</sup> In November 2015, the DOJ settled its civil case with EDMC, the second largest for-profit education company in the country.<sup>151</sup> EDMC unlawfully recruited students by employing high-pressure recruiters who used misleading and deceptive recruitment tactics and whose payment was based exclusively on the number of students they were able to enroll.<sup>152</sup> This conduct plainly violated multiple federal statutes meant to protect students from deceitful recruitment schemes.<sup>153</sup>

Despite these extensive scam recruiting tactics, which harmed countless students and taxpayers alike, the DOJ settled its claims against EDMC for only \$95 million in fines, did not sanction even one executive, did not restrict the flow of future federal funds to EDMC, and did not force EDMC to admit to any wrongdoing.<sup>154</sup> By the DOJ's own admission, EDMC's conduct was an "egregious abuse" that allowed corporate officers to get rich to the detriment of dedicated students who were left saddled with outrageous levels of

<sup>148</sup> E.g., Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> [<https://perma.cc/72AF-GN94>].

<sup>149</sup> See RIGGED JUSTICE, *supra* note 123 (highlighting the DOJ's settlement with EDMC and the DPA with GM as examples of the DOJ's continuing failure to effectively prosecute individuals involved in corporate wrongdoing); *Critics Rip GM Deferred Prosecution Agreement*, *supra* note 123 (reporting on the DOJ's DPA with GM regarding GM's fraudulent cover up of a faulty ignition switch problem in its vehicles); *For-Profit College Company to Pay \$95.5 Million*, *supra* note 123 (discussing the DOJ's civil settlement with EDMC stemming from EDMC's unlawful student recruitment tactics).

<sup>150</sup> *For-Profit College Company to Pay \$95.5 Million*, *supra* note 123.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ("EDMC unlawfully recruited students, in contravention of the [Higher Education Act's] Incentive Compensation Ban . . . , by running a high pressure boiler room where admissions personnel were paid based purely on the number of students they enrolled.")

<sup>153</sup> See *id.* Specifically, EDMC's actions violated Title IV of the Higher Education Act's (HEA) Incentive Compensation Ban (ICB), which prohibits schools from paying recruiters based purely on their recruitment success. *Id.* EDMC also violated the False Claims Act by falsely certifying that it was in compliance with the HEA. *Id.* In total, EDMC received approximately \$11 billion in payments, ninety percent through federal student grants and loans, due to these fraudulent recruitment tactics. Letter from Sens. Elizabeth Warren, Richard Durbin, and Richard Blumenthal to the Honorable Loretta Lynch, Att'y Gen. of the United States, and the Honorable Arne Duncan, U.S. Sec'y of Educ. (Nov. 30, 2015).

<sup>154</sup> *For-Profit College Company to Pay \$95.5 Million*, *supra* note 123. The \$95 million fine equaled less than one percent of the \$11 billion that EDMC received through its fraudulent tactics. Letter from Sens. Elizabeth Warren, Richard Durbin, and Richard Blumenthal, *supra* note 153.

student debt and no discernible employment qualifications.<sup>155</sup> As Senator Elizabeth Warren noted in her letter to the DOJ following the conclusion of the case, this settlement was unfathomable and in direct contradiction to the Yates Memo's announced strategy to hold individuals accountable for corporate criminality.<sup>156</sup>

The second example of the Yates Memo's ineffectiveness in holding individuals accountable for corporate criminality is the September 2015 General Motors ("GM") DPA.<sup>157</sup> Over the course of several years, GM fraudulently covered up ignition switch problems in its vehicles, resulting in at least 124 deaths and 275 injuries.<sup>158</sup> Despite this extensive death toll, GM was only fined \$900 million and entered into a three-year DPA regarding relevant criminal charges.<sup>159</sup> Significantly, no individuals were held civilly accountable for the fraudulent cover up, nor was a single criminal charge filed against any individuals.<sup>160</sup>

These above examples suggest that the commentators questioning the real impact of the Yates Memo were not completely off base; the Memo did not do enough to truly reform DOJ practices and is acting mostly as a symbolic gesture.<sup>161</sup> The DOJ has always publicly stated that it will focus on prosecuting individuals, and the Yates Memo reinforcement of this principle seemingly does not add much to the equation.<sup>162</sup> The DOJ is still utilizing

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<sup>155</sup> *For-Profit College Company to Pay \$95.5 Million*, *supra* note 123 (stating that EDMC "enrich[ed] their corporate coffers at the expense of students seeking a quality education" and caused "the enrollment of students in programs for which they lacked the necessary skills and qualifications, unsustainable student debt and default rates and [placed] schools' pursuit of profits ahead of a legitimate education mission").

<sup>156</sup> Letter from Sens. Elizabeth Warren, Richard Durbin, and Richard Blumenthal, *supra* note 123 (declaring that the EDMC settlement was "inexplicable and [ran] counter to a highly-touted new DOJ policy on 'Individual Accountability for Corporate Wrongdoing' that was announced on September 16, 2015").

<sup>157</sup> RIGGED JUSTICE, *supra* note 123, at 3. University of Maryland Law Professor Rena Steinzor expressed dismay at the settlement, stating: "This settlement is shamefully weak . . . Much harsher penalties and individual prosecutions are warranted. The deferred prosecution is a toothless way of approaching a very serious problem." *Critics Rip GM Deferred Prosecution Agreement*, *supra* note 123. She went on to state, "So much for the Justice Department's new strong policy on individual prosecution." *Id.* University of Virginia Law Professor Brandon Garrett echoed these sentiments, stating: "It is deeply disturbing if GM settles this case in a deferred prosecution, out of court, and with no individuals charged." *Id.*

<sup>158</sup> RIGGED JUSTICE, *supra* note 123, at 3; Henning, *supra* note 96.

<sup>159</sup> RIGGED JUSTICE, *supra* note 123, at 3.

<sup>160</sup> *Id.*

<sup>161</sup> Apuzzo & Protess, *supra* note 148.

<sup>162</sup> Thomas Gorman & Nick Akerman, *The Yates Memo: A New DOJ Investigative Approach*, DORSEY (Sept. 21, 2015), <https://www.dorsey.com/newsresources/publications/client-alerts/2015/09/the-yates-memo-a-new-doj-investigative-approach>.

DPA's over full prosecution and individuals involved in corporate crime are still avoiding accountability.<sup>163</sup>

### III. THE YATES MEMO DOES NOT GO FAR ENOUGH: WHAT THE DOJ CAN DO TO ENSURE MORE EFFECTIVE PROSECUTION OF THE INDIVIDUALS RESPONSIBLE FOR CORPORATE CRIME

No matter the DOJ's justification for its overwhelming use of DPAs and NPAs in place of individual prosecution, the DOJ's failure to effectively punish culpable corporate executives who violate the law is undermining the United States' legal foundations.<sup>164</sup> Although the Yates Memo's six prosecutorial guidelines are a step in the right direction towards accountability for corporate criminals, the memo does not address the biggest obstacle to holding individuals accountable for criminal corporate conduct—the DOJ's overuse of DPAs and NPAs.<sup>165</sup>

By not explicitly limiting the use of DPAs and NPAs, the Yates Memo fails to ensure effective prosecution of the individuals responsible for corporate crime, fails to deter corporate actors from breaking the law, denies victims of corporate crime a fair chance at any semblance of justice, and calls into question the United States' promise of equal justice to all citizens regardless of wealth, status, or influence.<sup>166</sup> This final Part offers suggestions to improve

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<sup>163</sup> See generally RIGGED JUSTICE, *supra* note 123 (detailing the DOJ's continuing failure to hold individuals responsible for corporate crime).

<sup>164</sup> *Id.* at 1; see also *Deferred Prosecution Agreements: A Better Option Than Indictment?*, METROPOLITAN CORP. COUNS., May 2008 (demonstrating, through an interview with U.S. Attorney Bryan Blaney, that DPAs are most often used by prosecutors to prevent criminal charges against individuals when the government seeks financial penalties and future restrictions on conduct, but does not believe imprisonment is a necessary penalty); Reilly, *supra* note 73, at 350–51 (detailing the negative consequences of the DOJ's reliance on DPAs and NPAs in the corporate crime context); Jesse Eisinger, *Seeking Tough Justice, but Settling for Empty Promises*, N.Y. TIMES: DEALBOOK (May 7, 2014), <http://dealbook.nytimes.com/2014/05/07/seeking-tough-justice-but-settling-for-empty-promises/> [<https://perma.cc/8DLZ-96FX>] (pointing out that charges were not brought against individuals in either of two highly-publicized cases involving HSBC and Toyota, both of which involved significant levels of individual criminal conduct but were still resolved through DPAs); Ben Protes & Jessica Silver-Greenberg, *BNP Paribas Admits Guilt and Agrees to Pay \$8.9 Billion Fine to U.S.*, N.Y. TIMES: DEALBOOK (June 30, 2014), <http://dealbook.nytimes.com/2014/06/30/bnp-paribas-pleads-guilty-in-sanctions-case> [<https://perma.cc/SE9U-CNBX>] (explaining that, although BNP pled guilty to various crimes and paid an \$8.9 billion penalty, no individual BNP employees were criminally charged); Rakoff, *supra* note 1 (stating that in the most recent decade, federal prosecutors have been reluctant to indict, charge, or fully prosecute any individuals responsible for corporate crime).

<sup>165</sup> See Uhlmann, *supra* note 13, at 1302 (explaining the negative consequences stemming from the DOJ's overuse of DPAs and NPAs); *supra* notes 50–60 and accompanying text (explaining the rise in the DOJ's use of DPAs and NPAs from 2001 through the present, to the point where they have come to dominate the DOJ's corporate prosecution strategy).

<sup>166</sup> See RIGGED JUSTICE, *supra* note 123, at 1 (“The Obama Administration has made repeated promises to strengthen enforcement and hold corporate criminals accountable, and the DOJ

DOJ policies in order to ensure that the promises of the Yates Memo—successful prosecution of the individuals responsible for corporate misconduct—are brought to fruition.<sup>167</sup> Section A offers the most drastic proposal: the DOJ's full elimination of NPAs and DPAs.<sup>168</sup> Section B then provides more modest amendments to the USAM meant to significantly curtail the use of NPAs and DPAs.<sup>169</sup>

### *A. Fully Eliminate the Use of NPAs and DPAs*

The first proposal is radical: fully eradicate the use of NPAs and DPAs for individuals responsible for corporate crime.<sup>170</sup> The DOJ could release a memo, which would amend the USAM, to outlaw the use of DPAs or NPAs, and prosecutors would be left with the two options that were available before the introduction of NPAs and DPAs: prosecution or declination.<sup>171</sup> If the applicable law and facts at hand call for full prosecution, then federal prosecutors would be forced to bring charges.<sup>172</sup> On the other hand, if the prosecutor feels as though the conduct at hand does not warrant criminal prosecution, then charges would be declined.<sup>173</sup> This policy provision would force prosecutors to engage in their primary function—to enforce the law—and prevent them from engaging in DPA-type agreements, which, by their own admission, are “agreements not to enforce the law under particular conditions.”<sup>174</sup>

Further, after forcing corporate defendants to face full criminal charges, defendants would then have to decide to challenge the charges at trial or opt for a plea bargain, where many of the advantages of DPAs and NPAs would then be available.<sup>175</sup> Plea bargains can guarantee (1) restitution payments to

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announced in September that it would place greater emphasis on charging individuals responsible for corporate crimes. Nonetheless, both before and after this DOJ announcement, accountability for corporate crimes is shockingly weak.”); Reilly, *supra* note 73, at 357 (explaining the unjust and unfair use of DPAs as methods of enforcing corporate criminal law); Uhlmann, *supra* note 13, at 1344 (discussing the negative impacts of NPAs and DPAs).

<sup>167</sup> See *infra* notes 170–203 and accompanying text.

<sup>168</sup> See *infra* notes 170–189 and accompanying text.

<sup>169</sup> See *infra* notes 192–203 and accompanying text.

<sup>170</sup> See U.S. ATTORNEY'S MANUAL § 9-28.200–210 (explaining that, in spite of directives to focus investigations on individual wrongdoers, NPAs and DPAs still “occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation”); Reilly, *supra* note 73, at 351 (“DPAs serve as a disturbing wellspring of unfairness, double standards, and potential abuse of power.”).

<sup>171</sup> Reilly, *supra* note 73, at 357.

<sup>172</sup> *Id.*

<sup>173</sup> Uhlmann, *supra* note 13, at 1344.

<sup>174</sup> U.S. ATTORNEY'S MANUAL § 9-27.620(B)(1) (“Since the primary function of a federal prosecution . . . is to enforce the criminal law, a federal prosecutor should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions.”).

<sup>175</sup> Reilly, *supra* note 73, at 357.

victims, (2) cooperation in naming additional responsible individuals, (3) corporate reform agreements, and (4) guidance to other individuals and corporate bodies regarding compliance with relevant criminal statutes.<sup>176</sup> And although plea bargains are also subject to abuse, they at least require actual prosecution of culpable individuals and an admission of guilt, which results in criminal stigmatization absent from a DPA or NPA.<sup>177</sup>

Importantly, this proposal does not ignore the lessons learned from the disastrous Arthur Andersen prosecution.<sup>178</sup> As explained earlier, the DOJ was heavily criticized for the vast collateral consequences to innocent third parties that the Arthur Andersen indictment caused.<sup>179</sup> This criticism paved the way to the DOJ's adoption of DPAs and NPAs as primary prosecutorial tools.<sup>180</sup> This proposal, however, realizes and fully accepts that full prosecution of entire corporations, in light of the concerns over the Arthur Andersen prosecution, is ill advised.<sup>181</sup> For this reason, this proposal focuses on prosecution of the individuals rather than corporate entities as a whole.<sup>182</sup> Although full prosecution of individuals within corporations who are responsible for the corporate criminal activity may conceivably have some collateral consequences for some innocent third parties, it is much less likely than with prosecutions of corporate entities.<sup>183</sup>

Accordingly, DPAs and NPAs need to be eliminated because they have not been utilized solely in an effort to avoid collateral consequences—instead, they have become the DOJ's primary prosecutorial tool in place of full prose-

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<sup>176</sup> *Id.*

<sup>177</sup> See U.S. ATTORNEY'S MANUAL § 9-27.600(B)(2) (explaining that because a plea agreement is "clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance"); *supra* notes 103–110 and accompanying text (discussing the expressive and deterrent functions of criminal prosecutions, including those that end in a plea agreement, that are lacking from NPAs and DPAs).

<sup>178</sup> See Uhlmann, *supra* note 13, at 1310–11 (discussing the negative consequences of the Arthur Andersen prosecution); Eichenwald, *supra* note 45 (same); *supra* notes 45–50 and accompanying text (explaining that, following the DOJ's indictment for committing extensive accounting fraud, the major accounting firm Arthur Andersen quickly collapsed due to relentless public scrutiny and a rapid loss of clients).

<sup>179</sup> Uhlmann, *supra* note 13, at 1310; Johnson, *supra* note 48.

<sup>180</sup> See Thompson Memo, *supra* note 50, at 6 (adopting NPAs and DPAs as part of official DOJ policy); *supra* notes 50–60 and accompanying text (detailing the rise in the DOJ's use of NPAs and DPAs).

<sup>181</sup> See Uhlmann, *supra* note 8, at 1310–11 (highlighting the negative collateral consequences that occurred after the DOJ prosecuted Arthur Andersen); Johnson, *supra* note 48 (same).

<sup>182</sup> See Uhlmann, *supra* note 8, at 1310–11 (explaining that prosecutions of entire corporate entities can cause dramatic collateral consequences to innocent third parties).

<sup>183</sup> See Glater, *supra* note 49 (discussing the Arthur Anderson collapse as an example of the collateral consequences that can result from prosecutions of entire corporations).

cutions of corporations and individuals.<sup>184</sup> Even after issuance of the Yates Memo, the DOJ still chose to use a DPA to resolve the General Motors faulty ignition switch cover up.<sup>185</sup> The implementation of this agreement allowed every culpable General Motors employee to escape accountability.<sup>186</sup> They were simply forced to pay a fine, reassuring every corporate executive in the United States that engaging in criminal conduct is worth it if you continue to make money.<sup>187</sup> Allowing culpable individuals to avoid accountability through payments from the corporate coffers serves no theory of collateral consequence avoidance.<sup>188</sup> Indeed, the only innocent third party now forced to face collateral consequences is the American public who continually tries to recover from the effects of unpunished corporate criminal activity.<sup>189</sup>

### B. Amend the USAM

Nevertheless, full eradication of DPAs and NPAs may not be entirely feasible.<sup>190</sup> With that in mind, the DOJ should, at the very least, amend the USAM to specifically address DPAs and NPAs, and make it clear when they may be considered, and for which categories of criminal conduct they may be used.<sup>191</sup>

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<sup>184</sup> See Garrett & Ashley, *supra* note 44 (detailing the DOJ's increased usage of DPAs and NPAs). From 1992 through 2000, the DOJ only entered into thirteen DPAs and NPAs. *Id.* In 2001 and 2002, prior to the Thompson Memo, the DOJ entered into eight DPAs and NPAs. *Id.* Then, in 2003 and 2004, post-Thompson Memo, the DOJ greatly expanded the use of these agreements by utilizing them fifteen different times. *Id.* Then, from 2008 through 2012, the DOJ averaged more than thirty DPAs and NPAs in corporate cases every year, with peaks of thirty-eight in 2010 and thirty-seven in 2012. *Id.* This shift was most pronounced in the DOJ's Criminal Division, where agreements such as these became more frequent than actual criminal prosecutions. *Id.* From 2010 through 2012, the Criminal Division alone entered into forty-six DPAs and NPAs, a figure more than double the twenty-two plea agreements entered into during the same time frame. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 106, at 14–15 (2009).

<sup>185</sup> See RIGGED JUSTICE, *supra* note 123, at 3 (noting the DOJ's failure to prosecute any individual General Motors employees as an example of the DOJ's failure to effectively prosecute corporate crime); *Critics Rip GM Deferred Prosecution Agreement*, *supra* note 123 (same); *supra* notes 157–160 (explaining the DOJ's failure to prosecute any individual General Motors employees).

<sup>186</sup> *Critics Rip GM Deferred Prosecution Agreement*, *supra* note 123; Henning, *supra* note 96.

<sup>187</sup> Henning, *supra* note 96.

<sup>188</sup> See Reilly, *supra* note 73, at 344–45 (explaining that monetary fines and corporate self-monitoring, in the absence of criminal sanctions, do not work to deter corporate actors from future criminal misconduct); Martin, *supra* note 102, at 468 (same).

<sup>189</sup> See Eisinger, *supra* note 1 (discussing the DOJ's failure to prosecute any significant individuals responsible for the 2008 financial crisis and the consequences this has for the American public); Rakoff, *supra* note 1 (same).

<sup>190</sup> See Uhlmann, *supra* note 13, at 1344 (arguing for specific limitations on DPAs and NPAs rather than total elimination).

<sup>191</sup> *Id.*

First and foremost, the DOJ should amend the USAM to clarify that DPAs and NPAs can never be used in place of prosecution of culpable individuals where the evidence overwhelmingly points to guilt.<sup>192</sup> This proposal concedes that DPAs and NPAs may have a place when there are truly no culpable individuals involved in corporate criminality, and the DOJ wishes to avoid dealing a corporation a deathblow.<sup>193</sup> The USAM, however, could still be amended to parallel the Yates Memo's fourth and fifth guidelines, which provide that the DOJ will not provide immunity to culpable individuals when resolving corporate investigations and that corporate investigations should not end without a clear plan to pursue culpable individuals.<sup>194</sup> The problem with these principles in their current form is that they do not address how culpable individuals are treated under DPAs and NPAs.<sup>195</sup> The USAM could more explicitly state that DPAs and NPAs, specifically, can never be used to release culpable individuals from liability, and that they should never serve as the final piece of an investigation into individual wrongdoing.<sup>196</sup>

Further, the DOJ should amend the USAM to make it clear that DPAs and NPAs are to be limited to cases involving relatively minor conduct from first time offenders and where civil or administrative enforcement is not available.<sup>197</sup> DPAs and NPAs should never be permitted to allow individuals to escape prosecution in egregious cases, such as the HSBC money laundering case or the General Motors faulty ignition switch cover up.<sup>198</sup> Steps should also be taken to ensure that eligibility for these agreements does not depend upon the size or financial resources of the corporation in question.<sup>199</sup>

In addition to these guidelines regarding the type of offenses and offenders for which DPAs and NPAs may be used, the DOJ should also require more stringent approval standards for DPAs and NPAs.<sup>200</sup> DOJ regulations

<sup>192</sup> See Martin, *supra* note 125, at 469 (“DPAs may make it financially viable for corporations to bear the risk of criminal business practices due to financial gains made from such practices without the threat of an indictment.”); see also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 106, at 20 (explaining that the DOJ is unable to demonstrate the effectiveness of DPAs and NPAs and thus is unlikely to be able to justify an increase in their usage).

<sup>193</sup> See Uhlmann, *supra* note 13, at 1311 (detailing the potential consequences of prosecuting a corporate entity); Johnson, *supra* note 48 (same).

<sup>194</sup> Yates Memo, *supra* note 26, at 5–6.

<sup>195</sup> See *id.* (detailing principles for prosecuting culpable individuals but failing to mention the use of DPAs or NPAs). DPAs and NPAs do not explicitly provide immunity, and investigations into corporate wrongdoing are ended with the introduction of a DPA or NPA. Wray & Hur, *supra* note 39, at 1104 (explaining the general provisions of both NPAs and DPAs).

<sup>196</sup> See Yates Memo, *supra* note 26, at 5–6 (noting that, because enforcement of corporate crime is a “top priority” for the DOJ, individuals must be held accountable for their wrongdoing).

<sup>197</sup> Uhlmann, *supra* note 13, at 1344.

<sup>198</sup> *Id.*

<sup>199</sup> Garrett, *supra* note 73, at 1811.

<sup>200</sup> See Uhlmann, *supra* note 13, at 1344 (arguing that DPAs and NPAs should have the same strict approval standards as *nolo contendere* pleas).

should require that prosecutors reject DPAs and NPAs unless the Assistant Attorney General concludes that the case is so extraordinary that acceptance of the plea would serve the public interest.<sup>201</sup> This requirement would exceed the current NPA approval requirements and the approval requirements for providing immunity to culpable individuals outlined in the Yates Memo.<sup>202</sup> It would thus provide greater curtailment of DPAs and NPAs in cases where individuals were responsible for corporate criminality.<sup>203</sup>

## CONCLUSION

The DOJ's overreliance on DPAs and NPAs in their prosecution of corporate crime needs to end if the Department hopes to better hold individuals accountable for corporate criminality. Although the Yates Memo took important steps in the right direction, development of the above guidelines, which would more strictly curtail the use of DPAs and NPAs, would ensure a principled and consistent approach to the prosecution of corporate criminality. This approach would work to effectively deter future corporate criminal ac-

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<sup>201</sup> *Id.* This approval requirement would reflect the current DOJ approval requirements for acceptance of *nolo contendere* pleas. See U.S. ATTORNEY'S MANUAL § 9-27.500 (discussing the strict prosecutorial policies on *nolo contendere*); *supra* note 90 (defining *nolo contendere* pleas). According to former Attorney General Herbert Brownwell, Jr.,

One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of *nolo contendere*. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty . . . .

United States v. Jones, 119 F. Supp. 288, 289 n.1 (S.D. Cal. 1954). It seems that these concerns regarding the use of no contest pleas to avoid the collateral consequences of pleading guilty would apply equally or with greater force to the use of DPAs or NPAs. See Uhlmann, *supra* note 13, at 1340.

<sup>202</sup> See U.S. ATTORNEY'S MANUAL § 9-27.600 (providing that a DOJ attorney may enter into a NPA in exchange for cooperation if the cooperation "appears to be necessary to the public interest"); Yates Memo, *supra* note 26. While this current NPA approval standard sounds similar to the proposed standard, it is notably lacking the "so extraordinary" language, and only applies to NPAs, not DPAs. U.S. ATTORNEY'S MANUAL § 9-27.600.

<sup>203</sup> See Yates Memo, *supra* note 26.

Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees . . . . If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

tivity, uphold the rule of law, and restore confidence in the DOJ's ability to prosecute corporate criminal misconduct.

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