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Trends In DOJ Nonprosecution, Deferred Prosecution Deals

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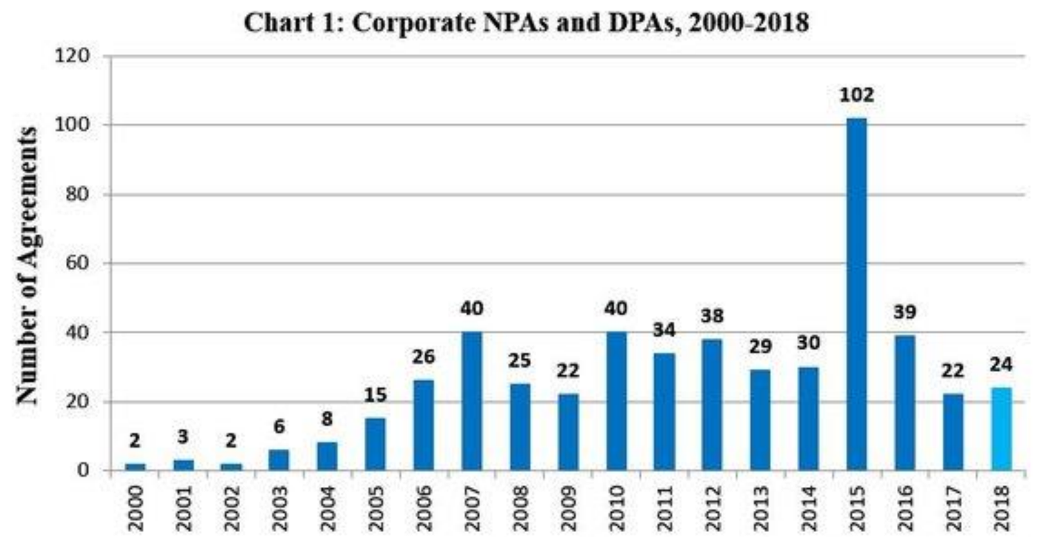
It is tempting to assume that the change in presidential administrations would lead the U.S. Department of Justice to adopt a different, potentially more business-friendly posture and limit its use of available tools for criminal enforcement.[1] A close examination of the DOJ's recent use of corporate nonprosecution agreements and deferred prosecution agreements, however, does not support that conclusion.

Although the overall numbers of DPAs and NPAs have declined since the change in administrations at the beginning of 2017, the statistics and patterns emerging from NPAs and DPAs in 2018 suggest these vehicles remain favorite tools of prosecutors and are being deployed aggressively. Our firm, Gibson Dunn & Crutcher LLP, has tracked corporate NPAs and DPAs since their first use in the 1990s, and there is every indication that they will continue to factor meaningfully in DOJ's enforcement toolbox in 2019.

The DOJ entered into at least 24 agreements in 2018, of which 13 are NPAs and 11 are DPAs. The department also entered into one NPA addendum to address additional conduct without breach of an existing NPA, and three declination letters with disgorgement (an agreement that, as discussed below, adds another resolution vehicle). Because the U.S. Securities and Exchange Commission — for the second year in a row — issued no NPAs or DPAs, there were 24 overall agreements in 2018, in addition to the addendum and declinations. That exceeds the number of 2017 agreements by two, but it represents a decrease from 2016, when, in the waning days of the prior administration, there were 39 agreements.



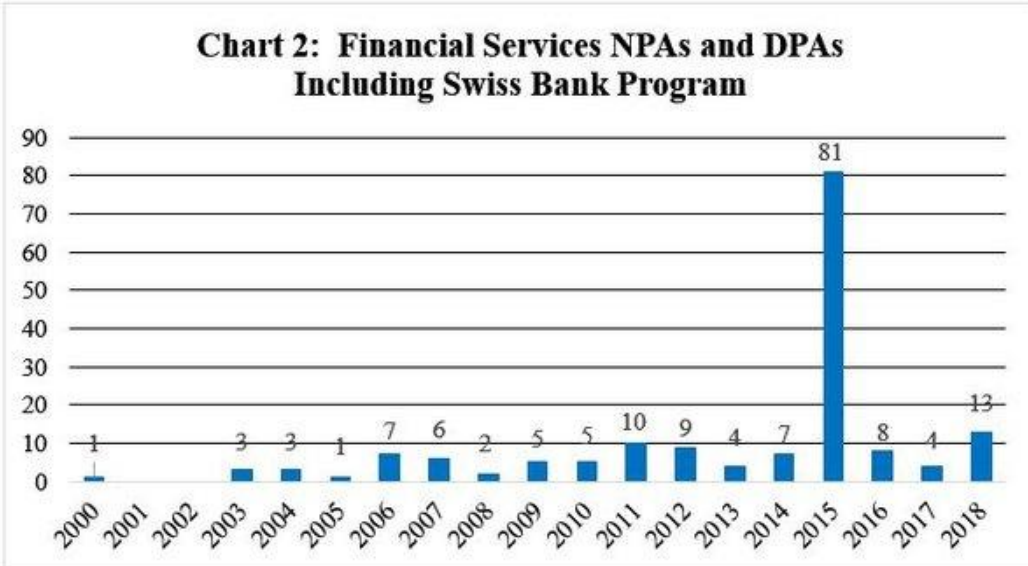
Note: The SEC entered into 10 NPAs and DPAs: 2010 (1), 2011 (3), 2012 (1), 2013 (1), 2014 (1), 2015(1), and 2016 (2).
Note: 2015 is an outlier year because of Swiss Bank Program Category 2 agreements.

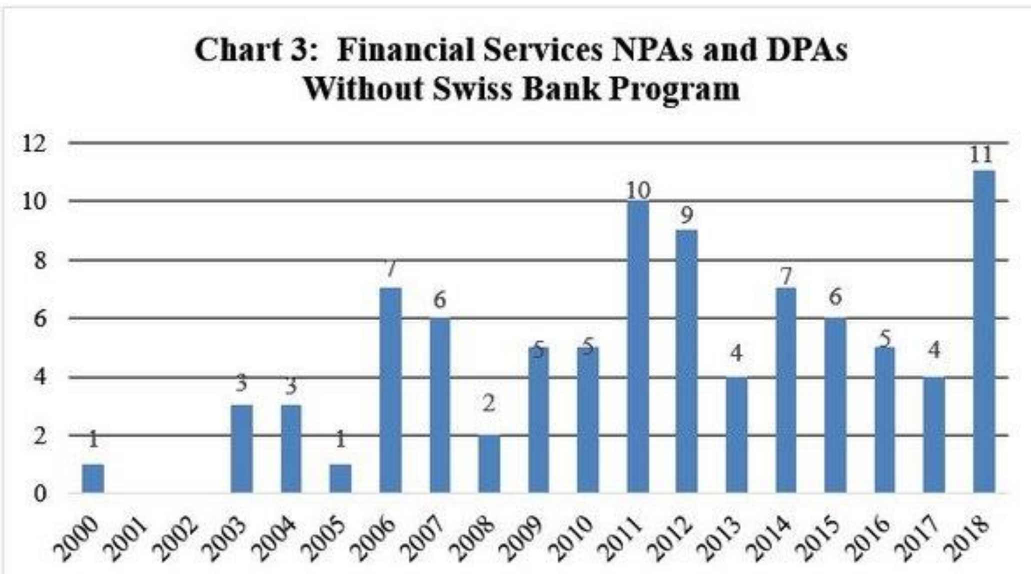
Chart 1 above shows all known corporate NPAs and DPAs from 2000 through 2018. Since there is no central DOJ NPA/DPA database, the statistics have been harvested by our firm. As evident from the chart — particularly since 2006, when the use of NPAs and DPAs became firmly entrenched — there is a natural ebb and flow to prosecutions that makes it difficult to glean meaningful trends from year-over-year numbers alone. On a more granular level, however, certain noteworthy patterns emerge, particularly with respect to prosecution of financial institutions and activity by the DOJ Criminal Division, Fraud Section.

Financial Institutions

Thirteen of last year's 24 agreements (and the addendum) were brought against financial institutions[2] for a variety of alleged conduct, including violations of the Bank Secrecy Act, tax fraud and other tax-related violations, Racketeer Influenced and Corrupt Organizations offenses, and wire fraud.

Although it would be misguided to read too much into a single year's NPA and DPA figures, it is notable that nearly 60 percent of 2018's agreements related to financial institutions. Looking back to 2000, there has only been one other year on record — 2015 — in which more NPAs or DPAs were inked with financial institutions. 2015, however, is anomalous because it is the year that the DOJ Tax Division's Swiss Bank Program, which incentivized Swiss bank self-disclosure of potential U.S. tax violations in exchange for NPAs, hit its apex. When the Swiss Bank Program NPAs are removed, as shown in charts 2 and 3 below, the data shows a clear upward trend from comparatively low numbers of financial institutions prosecutions prior to 2011.





The Southern District of New York loomed large in 2018's financial institutions cases, negotiating six of the 13 overall agreements. By comparison, the DOJ Tax Division brought three (and the NPA addendum), of which one was not part of the Swiss Bank Program; the DOJ Fraud Section brought three, of which two were prosecuted in conjunction with the United States Attorney's Office for the Eastern District of New York; and the EDNY brought one on its own.

2018 was an unusually active year for the SDNY in negotiating NPAs and DPAs (the next-closest year was 2007, when it negotiated eight), but its focus on financial institutions is not surprising; the SDNY has issued at least 16 other NPAs and DPAs with financial institutions since 2000, making 22 (approximately 51 percent) of its 43 public agreements in that period related to financial institutions.

It is too soon to know whether 2018 is the continuation of a trend or simply a challenging year for financial institutions. Two data points, however, deserve mention.

First, Deputy Attorney General Rod Rosenstein, who assumed office in April 2017, focused in his early speeches on “stop[ping] the illegal flow of money” to “violent criminals and terrorists.”[3] To do so, he stated, the DOJ “is pursuing institutions that violate the anti-money laundering laws, the tax laws, the securities laws, the Foreign Corrupt Practices Act, and the Bank Secrecy Act with renewed vigor — and increased sophistication.”[4] He added that prosecutors are investigating whether “the criminals were just lucky,” or “a financial institution fail[ed] to implement an effective money-laundering program.”[5]

Complex white collar investigations typically take years to bring to conclusion. This speech could signal a heightened focus of the department on moving financial institutions cases through its elite units dedicated to fraud, money laundering, foreign corruption, and bank integrity.

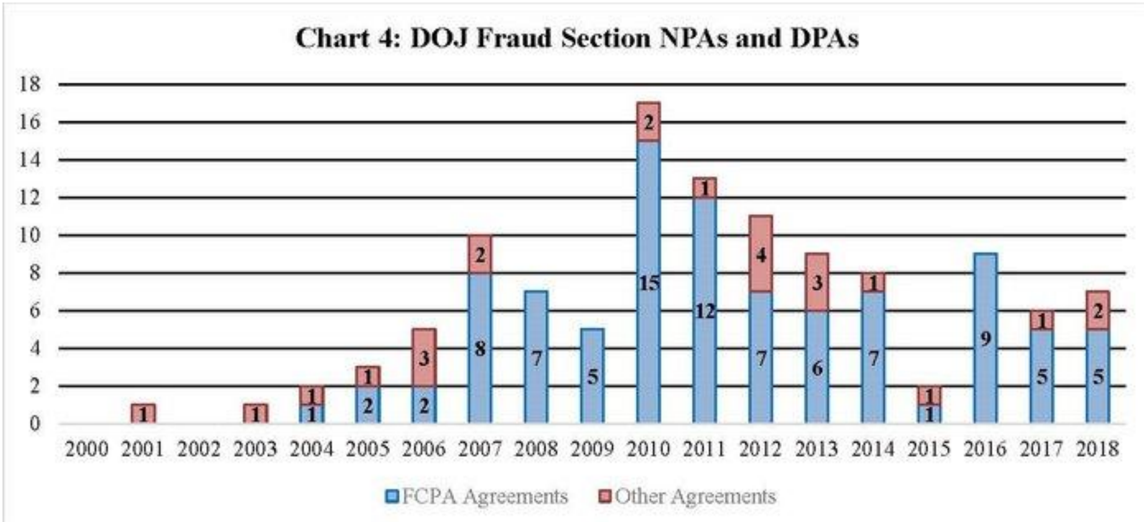
Second, late 2018 and early 2019 brought a slew of charges against individual bankers and lawyers for their alleged roles in financial crimes ranging from alleged tax evasion tied to the Panama Papers, to alleged theft from the Malaysian Sovereign Wealth Fund 1MDB, to alleged fraud tied to loans for Mozambique state-owned enterprises. Whether these individual prosecutions signal a focus on the affiliated financial institutions remains to be seen.

DOJ Fraud and the Foreign Corrupt Practices Act

By allegation, the largest cluster of cases resulting in an NPA or DPA in 2018 related to the Foreign Corrupt Practices Act. Seven of last year’s 24 agreements (nearly 30 percent) resolved allegations arising under the FCPA. FCPA cases are brought by Main Justice through the DOJ Fraud Section, often with substantial assistance from U.S. attorneys' offices, and all seven last year were brought by that office. The Fraud Section also issued three additional declination letters with disgorgement in 2018, which have many elements in common with NPAs, among them a recitation of factors resulting in the DOJ’s decision, a disgorgement requirement (recently, in amounts upward of $30 million), and revocability.

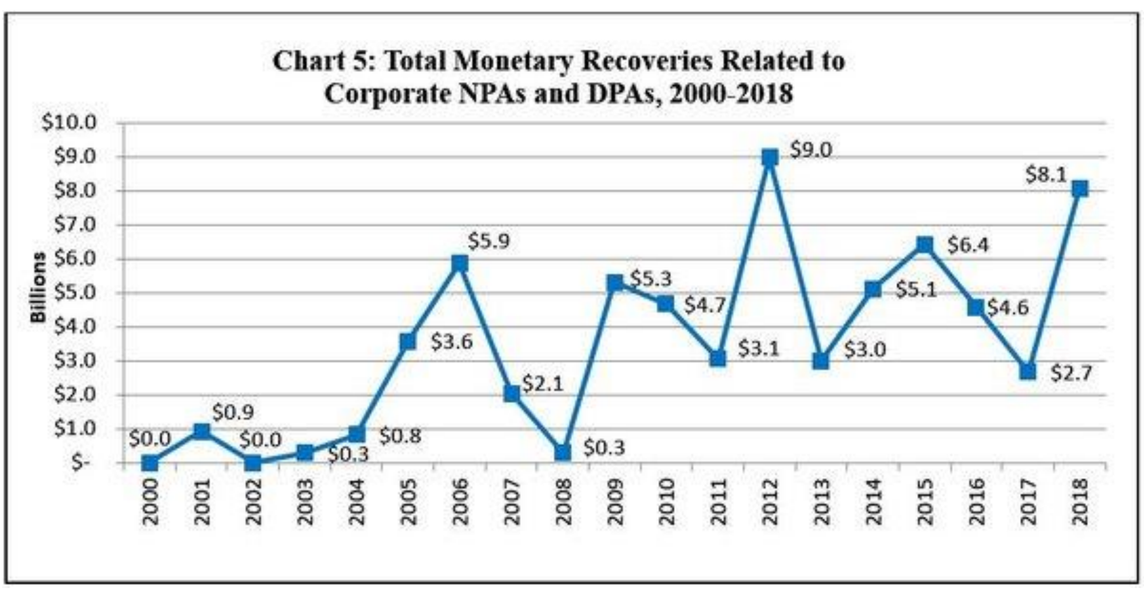
The Fraud Section routinely employs NPAs and DPAs, having brought more than 20 percent of all cases involving an NPA or DPA identified by our firm between 2000 and 2018. Within the Fraud Section, the FCPA Unit is by far the most active employer of NPAs and DPAs, with FCPA agreements comprising most — and occasionally all — of the Fraud Section’s NPAs and DPAs year over year. This may in part be a product of the particular nature of FCPA investigations and fact patterns, which often involve far-flung regions posing unique jurisdictional challenges, alleged breakdowns in systems and controls, and the work of low-level employees. The DOJ argues that factors such as these can affect the balance of prosecutorial considerations in a range of resolution options.

As illustrated by Chart 4 below, with the exception of 2015 — when FCPA prosecutions overall were at a relative low point but followed by big-dollar resolutions — the Fraud Section’s NPA and DPA resolution numbers recently have remained steady, varying by only two or three agreements since 2013.



Thus, even as the numbers of agreements executed by the 93 U.S. attorneys' offices have fluctuated in recent years, the Fraud Section — and the FCPA Unit in particular — has consistently used NPAs and DPAs to resolve complex white collar investigations. With well over 100 investigations in inventory, we fully expect this trend will continue in 2019: The government will persist in zealously investigating allegations of corruption, and the same alternative resolution structures — declination with disgorgement, NPAs, DPAs, and pleas of guilty — that attend these cases will remain in the new year.

Finally, we expect that NPAs and DPAs will continue to be viewed favorably by the government. Chart 5 below shows the total monetary recoveries associated with corporate NPAs and DPAs in 2018.



Last year, payouts associated with global resolutions involving NPAs and DPAs — including payments to other agencies and third parties — topped $8.1 billion. Criminal penalties alone exceeded $2.1 billion. Even at their lowest point in the past decade, in 2017, overall recoveries associated with NPA and DPA cases far exceeded $2 billion.

Thus, overall numbers will continue to rise and fall with the natural prosecutorial cycle of investigations and resolutions. Recent policy announcements, the methodical activities of DOJ Fraud's FCPA Unit, and the overall monetary recoveries that NPAs and DPAs permit likely will secure them a continuing role in resolving allegations of corporate crime in the years ahead.

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[1] See, e.g., C. Ryan Barber, DOJ's New Compliance Monitor Guidance Accounts for 'Burdens' on Companies, THE NATIONAL LAW JOURNAL (Oct. 12, 2018), https://www.law.com/nationallawjournal/2018/10/12/dojs-new-compliance-monitor-guidance-accounts-for-burdens-on-companies/.

[2] The term "financial institution" is used here as it is defined in the Bank Secrecy Act. "Financial institution" refers to banks, credit unions, registered stock brokers or dealers, currency exchanges, insurance companies, casinos, and other financial and banking-related entities. See 31 U.S.C. § 5312(a)(2) (2012).

[3] DOJ, "Deputy Attorney General Rosenstein Delivers Remarks at the Clearing House's 2017 Annual Conference" (Nov. 8, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-clearing-house-s-2017-annual.

[4] Id.

[5] Id.