



# Negotiated Settlements in Corporate Crime: Examining Prosecution, Non-Prosecution, and Deferred Prosecution Agreements

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## Abstract

*This article examines the evolving approaches to addressing white-collar and corporate crime, focusing on the shift from traditional criminal prosecution towards negotiated settlements, specifically Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs). It reviews the historical context, driven partly by concerns over the impact of corporate indictments, and analyzes the characteristics and increasing prevalence of DPAs and NPAs. Drawing upon legal scholarship, government policy statements, and empirical research, the article discusses the perceived benefits of these agreements, such as efficiency and mandated compliance reforms, alongside significant criticisms. Key concerns include the potential for insufficient individual accountability, lack of judicial oversight and transparency, and debated effectiveness in deterring future misconduct. The article synthesizes findings on the outcomes and challenges associated with DPAs and NPAs, highlighting the ongoing debate about balancing corporate accountability with the broader goals of justice and deterrence in the context of complex organizational crime.*

## Keywords

*White-collar crime, Corporate crime, Deferred Prosecution Agreements, Non-Prosecution Agreements, Criminal prosecution, Corporate accountability, Individual accountability, DOJ policy, Compliance, Recidivism, Judicial review.*

## INTRODUCTION

White-collar and corporate crime represent significant challenges to legal systems and public trust worldwide. These offenses, often characterized by deceit and financial manipulation committed within organizational structures, can result in substantial economic damage and erode confidence in institutions [9]. Traditionally, addressing corporate misconduct involved criminal prosecution, leading to indictments, trials, and potentially severe penalties for the corporation and involved individuals. However, over the past few decades, there has been a notable shift in enforcement strategies, particularly in the United States, towards the increased use of negotiated settlements, primarily in the form of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) [2, 11, 29, 43].

DPAs and NPAs are voluntary, extra-judicial agreements between prosecutors and corporations accused of wrongdoing. Under a DPA, the government files a criminal information but agrees to defer prosecution if the corporation meets certain conditions, typically including paying fines, implementing compliance reforms, and cooperating with investigations [2, 11, 36, 43]. If the conditions are met, the charges are dismissed. An NPA is similar but does not involve filing charges; the government simply agrees not to

prosecute if the corporation complies with the terms [2, 11, 43]. These tools have become prevalent in enforcing laws like the Foreign Corrupt Practices Act (FCPA) [25].

The rise of DPAs and NPAs is attributed to various factors, including the complexity of prosecuting large corporations, concerns about the potential economic impact of corporate indictments (as famously illustrated by the Arthur Andersen case) [23], and the perceived efficiency of resolving cases through negotiation [11, 43]. However, their increasing use has also sparked considerable debate and criticism regarding their effectiveness in deterring future misconduct, ensuring individual accountability, and maintaining judicial oversight [3, 6, 18, 19, 27, 28, 42].

This article examines the landscape of addressing white-collar and corporate crime through the lens of prosecution, non-prosecution, and deferred prosecution agreements. It explores the evolution of these enforcement tools, the justifications offered for their use, empirical findings on their impact, and the key criticisms they face, drawing upon legal scholarship, empirical research, and policy discussions.

## METHODS

This article synthesizes existing knowledge regarding the prosecution and resolution of white-collar and corporate crime, with a particular focus on the use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs). The methodology involves a comprehensive review of relevant literature, including:

1. Legal Scholarship and Commentary: Analysis of academic articles, law review notes, and expert commentary discussing the legal basis, policy implications, and ethical considerations of corporate criminal enforcement tools, including traditional prosecution, DPAs, and NPAs [3, 6, 8, 11, 19, 27, 28, 30, 31, 42, 43, 47].
2. Government Documents and Policy Statements: Examination of key memoranda and policy guidelines issued by the U.S. Department of Justice (DOJ) that have shaped corporate prosecution standards and the use of negotiated settlements, such as the Thompson Memo [8, 47], the Filip Memo [13], the Yates Memo [19, 28, 48], and the Monaco Memo [32, 35]. Also, review of reports and statistics from DOJ divisions like the Fraud Section and Antitrust Division [45, 46] and similar bodies internationally [43, 44].
3. Empirical Studies: Review of quantitative and qualitative research that analyzes trends in corporate prosecutions and negotiated settlements, assesses the financial and non-financial impacts of DPAs/NPAs on corporations, examines recidivism rates, and explores perspectives on their effectiveness and fairness [2, 5, 7, 15, 20, 22, 25, 30, 31, 38, 40]. Qualitative research methodologies discussed in general texts on the subject [11, 37, 39] inform the understanding of the approaches taken in some of the reviewed studies.
4. Case Studies and Reports: Consideration of specific high-profile cases resolved through DPAs or NPAs to illustrate the application of these tools and the issues they raise [1, 10, 23]. Data from sources tracking corporate misconduct and enforcement actions are also incorporated [16, 6, 15].

The synthesis aims to identify the historical trajectory of corporate enforcement, the rationales provided for favoring negotiated settlements, the documented outcomes and consequences of using DPAs and NPAs, and the persistent criticisms and areas of debate surrounding these practices. The analysis seeks to

provide a balanced overview of the current state of addressing corporate crime through these diverse mechanisms.

## RESULTS

The landscape of corporate criminal enforcement has evolved significantly, moving from a primary reliance on traditional prosecution towards a system heavily influenced by negotiated settlements [11, 33, 43]. The potential collateral consequences of indicting large corporations, particularly following the Enron scandal and the demise of Arthur Andersen [23], spurred a search for alternative resolutions [8, 47]. This led to the formalization and increased use of DPAs and NPAs as tools for resolving corporate investigations [2, 11, 43].

Empirical data indicates a substantial increase in the number of DPAs and NPAs since the early 2000s [2, 15, 25]. These agreements often involve significant financial penalties, including fines, disgorgement, and restitution [2, 15, 16]. Corporations entering into DPAs or NPAs are typically required to admit to a statement of facts detailing their misconduct, implement enhanced compliance programs, and cooperate with government investigations, including identifying culpable individuals [8, 13, 19, 32, 48]. The appointment of independent monitors to oversee compliance with the terms of the agreement has also been a common feature, though this practice has faced scrutiny and reform efforts [36, 32].

Research on the effectiveness of DPAs and NPAs in deterring future corporate misconduct yields mixed results. Some studies suggest that these agreements can lead to improvements in corporate governance and compliance structures [22]. However, concerns persist about recidivism, with some data indicating that corporations that enter into DPAs or NPAs may engage in subsequent misconduct [38, 40]. The effectiveness may depend on the specific terms of the agreement, the nature of the offense, and the commitment of corporate leadership to fostering an ethical culture [10].

A major point of contention is the perceived lack of individual accountability in cases resolved through corporate settlements [3, 19, 27, 28]. Critics argue that DPAs and NPAs often allow corporations to pay fines without sufficient focus on prosecuting the individuals responsible for the wrongdoing [3, 6, 27]. While DOJ policy statements, such as the Yates Memo [19, 48] and the Monaco Memo [32, 35], have emphasized the importance of pursuing individuals, the actual rate of individual prosecutions alongside corporate settlements remains a subject of debate and empirical investigation [15, 19]. Data from sources tracking corporate prosecutions suggest that while corporate enforcement actions (including settlements) have increased, the rate of traditional corporate criminal indictments and individual white-collar prosecutions has seen declines in recent years [16, 41].

Furthermore, the extra-judicial nature of DPAs and NPAs raises concerns about transparency and judicial oversight [6, 27, 28, 42]. Unlike traditional plea agreements, DPAs and NPAs are not subject to the same level of judicial review, leading some to characterize them as operating outside the traditional criminal justice system [27]. This lack of oversight can make it difficult to assess the fairness and appropriateness of the terms of the agreements [42].

The use of DPAs has also expanded internationally, with countries like the UK adopting similar mechanisms [4, 18, 43, 44]. This global trend suggests that negotiated settlements are becoming a standard tool in

addressing corporate crime, though their implementation and effectiveness vary across jurisdictions [4].

## DISCUSSION

The increased reliance on Deferred Prosecution Agreements and Non-Prosecution Agreements marks a significant evolution in how white-collar and corporate crime is addressed. These tools offer perceived advantages in terms of efficiency and avoiding the potentially devastating consequences of corporate indictments [11, 43]. They also provide a mechanism for imposing substantial financial penalties and mandating compliance reforms, which can theoretically improve corporate behavior and prevent future offenses [2, 22].

However, the widespread adoption of DPAs and NPAs is accompanied by substantial criticisms that challenge their legitimacy and effectiveness. A central concern is the potential for these agreements to become a form of "justice for the wealthy," where corporations can essentially buy their way out of criminal prosecution without sufficient accountability for culpable individuals [3, 6, 27]. While recent DOJ policies aim to re-emphasize individual accountability [32, 35, 48], the perception and reality of a potential imbalance persist [19, 21, 35].

The lack of robust judicial review over DPAs and NPAs is another critical point [6, 27, 28, 42]. Unlike plea bargains that require court approval, these agreements are largely negotiated and enforced outside of direct judicial oversight, raising questions about transparency, consistency, and the potential for abuse of prosecutorial discretion [27, 42]. Some argue that this creates a parallel system of justice for corporations [27].

Furthermore, the long-term deterrent effect of DPAs and NPAs remains debated [20, 38, 40]. While some corporations may improve compliance, the financial penalties, however large, may be viewed by some as merely a cost of doing business, particularly if the underlying profitability of the misconduct was substantial [10, 25]. The focus on corporate entities rather than the individuals who orchestrated the crimes may also dilute the deterrent message [3, 19].

The empirical evidence on recidivism following DPAs and NPAs is complex and requires further investigation [38, 40]. Measuring true recidivism in the corporate context is challenging, given the complexity of detecting and proving corporate crime [9, 17]. However, instances of companies entering into multiple agreements or engaging in subsequent misconduct raise questions about the transformative impact of these settlements [10, 38].

## CONCLUSION

Moving forward, the debate surrounding DPAs and NPAs is likely to continue. Potential reforms could include increasing judicial review of these agreements, enhancing transparency, and ensuring a more consistent and rigorous pursuit of individual wrongdoers [6, 27, 32]. The international spread of DPAs also necessitates comparative analysis to understand best practices and potential pitfalls [4, 18]. Ultimately, the goal of addressing white-collar and corporate crime should be to employ enforcement tools that not only penalize past misconduct but also effectively deter future offenses and ensure accountability at both the corporate and individual levels. The current reliance on negotiated settlements requires ongoing scrutiny

and refinement to ensure it serves the interests of justice and public trust.

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