RECIDIVIST ORGANIZATIONAL OFFENDERS AND THE ORGANIZATIONAL SENTENCING GUIDELINES

KALEB BYARS

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Abstract: Despite congressional hearings and public attention, the question of how to fairly and efficiently punish recidivist organizational offenders remains unresolved. Any discussion regarding the most optimal legal response to recidivist organizational crime is incomplete without a solution accounting for the use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). These tools allow criminal defendants to resolve charges without sustaining convictions that attach to the defendants' criminal records, and they are used often in the organizational context.

This Article recognizes that the federal sentencing scheme fails to promote deterrence and fairness in the context of organizational sentencing and offers a practical solution to this problem. The federal sentencing scheme currently does not require an increase in an organizational defendant's sentence when the defendant previously executed DPAs or NPAs before its subsequent criminal conduct. Yet the federal sentencing guidelines do require an increase in an individual defendant's sentence if the individual previously executed a DPA. Meanwhile, the existence of prior DPAs and NPAs is a hallmark of organizational recidivism that demonstrates an organization is more culpable than other organizational defendants. Accordingly, this Article recommends that the Sentencing Commission amend the federal sentencing guidelines to require sentencing courts to increase organizations' sentences based on prior DPAs and NPAs. This Article offers specific amendments for consideration. Finally, until the sentencing guidelines are amended, sentencing courts can use tools already in place to begin imposing more fair organizational sentences.

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INTRODUCTION

> *Failing to aggressively prosecute [corporate] crimes weakens our democratic institutions by undermining public trust in the rule of law. The essence of the rule of law is that like cases are treated alike; that there is not one rule for the powerful and another for the powerless; one rule for the rich and another for the poor. To fail to aggressively prosecute corporate crime leads citizens to doubt that their government adheres to this principle.*
>
> —Merrick B. Garland[1]

In November 2023, Binance, Inc., the world's largest cryptocurrency exchange, agreed to plead guilty and pay $4 billion to settle criminal charges against it for violations of the Bank Secrecy Act and other offenses.[2] A few months later, in a deferred prosecution agreement, eBay agreed to pay a $3 million fine to settle criminal charges against it for cyberstalking and other offenses.[3] Binance's and eBay's offenses were both serious and drew national attention.[4] Because Binance entered a guilty plea, Binance's offenses may provide a basis to enhance its sentence if Binance is convicted for another offense in the future.[5] The same would be true for almost every individual defendant because nearly all individual defendants resolve their criminal cases with guilty pleas.[6] But if eBay is convicted again in the future, even for another cyberstalking offense, a sentencing court could ignore eBay's prior offenses

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[1] Merrick B. Garland, *Attorney General Merrick Garland Delivers Remarks to the ABA Institute on White Collar Crime*, DEP'T OF JUST., https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime [https://perma.cc/V3R7-B2LF] (Feb. 5, 2025).

[2] Press Release, Off. of Pub. Affs., Dep't of Just., Binance and CEO Plead Guilty to Federal Charges in $4B Resolution (Nov. 21, 2023), https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution [https://perma.cc/3SBT-93CT].

[3] Press Release, U.S. Atty's Off., Dist. of Mass., eBay Inc. to Pay $3 Million in Connection with Corporate Cyberstalking Campaign Targeting Massachusetts Couple (Jan. 11, 2024), https://www.justice.gov/usao-ma/pr/ebay-inc-pay-3-million-connection-corporate-cyberstalking-campaign-targeting [https://perma.cc/SDW8-7MBG].

[4] *See* Allison Morrow, *Binance Founder Is Sentenced to 4 Months in Prison on Money-Laundering Violations*, CNN, https://www.cnn.com/2024/04/30/business/binance-founder-sentenced-money-laundering/index.html [https://perma.cc/KQE7-GWRU] (May 1, 2024) (providing coverage of Binance fines and charges by the federal government); David Streitfeld, *U.S. Criminally Charges EBay in Cyberstalking Case*, N.Y. TIMES (Jan. 11, 2024), https://www.nytimes.com/2024/01/11/technology/ebay-cyberstalking-charges.html [https://perma.cc/KKZ2-KRB8] (providing coverage of federal government charges against eBay in cyberstalking case).

[5] *See infra* Part II.

[6] *See* Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/5ULM-5RAF] (explaining that nearly "98% of criminal cases in the federal courts end with a plea bargain").

simply because eBay executed a deferred prosecution agreement rather than a formal guilty plea.[7]

The question of how to best counter recidivist organizational criminal conduct is a longstanding issue that has received significant public and bipartisan congressional attention.[8] In December 2023, the U.S. Senate Committee on the Judiciary held a hearing to consider the best ways to promote accountability in corporate criminal enforcement.[9] Judiciary Committee Chair Dick Durbin expressed concerns about the lack of transparency of corporate criminal enforcement actions, that such actions are often resolved outside the formal judicial process without oversight, and about the waning use of criminal actions against organizations in recent years under both the Trump and Biden administrations.[10]

The concerns expressed by Senator Durbin are ultimately related to the government's use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in the organizational crime context.[11] In nearly every criminal case, the defendant is an individual, and the case is resolved only after the government secures a conviction (following a guilty plea or a trial) or the defendant secures an acquittal.[12] Nonetheless, organizations may be prosecuted as well. And when organizations are prosecuted, at least for the last few decades, the Department of Justice (DOJ) has regularly used DPAs and NPAs rather than plea agreements.[13] DPAs and NPAs are similar to plea agreements in that they resolve charges against criminal defendants, but importantly, unlike plea agreements, DPAs and NPAs result in no formal convictions.[14]

There will be no end to the use of DPAs in the organizational crime context in the near future. These tools have become a staple in the corporate crim-

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[7] *See infra* Part II.

[8] *See generally Cleaning Up the C-Suite: Ensuring Accountability for Corporate Criminals: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. (2023).

[9] *Id.*

[10] *Id.* at 32:20–35:20 (statement of Sen. Dick Durban, Chairman, S. Comm. on the Judiciary).

[11] *See* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 544 (2015) (examining the increasing prevalence of DPAs and NPAs).

[12] RICK CLAYPOOL, PUB. CITIZEN, SOFT ON CORPORATE CRIME: DOJ REFUSES TO PROSECUTE CORPORATE LAWBREAKERS, FAILS TO DETER REPEAT OFFENDERS 11 (2019) (noting that corporations and other business organizations are rarely prosecuted).

[13] *See* Renae Merle, *Repeat Offenders: Corporate Misdeeds Often Settled with Deferred Prosecution Agreements*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/business/2019/09/26/repeat-offenders-corporate-misdeeds-often-settled-with-deferred-prosecution-agreements/ [https://perma.cc/ATU8-JATU].

[14] *See* GIBSON DUNN, NEGOTIATING CLOSURE OF GOVERNMENT INVESTIGATIONS: NPAS, DPAS, AND BEYOND 9 (2020), https://www.gibsondunn.com/wp-content/uploads/2020/10/WebcastSlides-Negotiating-Closure-of-Government-Investigations-NPAs-DPAs-and-Beyond-01-OCT-2020.pdf [https://perma.cc/C5SD-BGZG] (analyzing the similarities and differences between DPAs and NPAs).

inal environment, and despite their shortcomings, they offer advantages to both the government and the defendants who receive them.[15] But as with many things in life, moderation in offering DPAs and NPAs seems to be key if deterrence and fairness in corporate criminal enforcement are legitimate goals. Organizations often receive the benefit of not only one or even two but numerous DPAs or NPAs before the government finally brings criminal charges to seek formal convictions.[16] The fact that organizations continuously reoffend after receiving multiple DPAs and NPAs suggests that the use of these agreements alone does not promote deterrence.[17]

A significant portion of scholarship addressing corporate crime focuses on the use of DPAs and NPAs in the organizational context.[18] Primarily, this scholarship posits ideas for the optimal ways to deter and punish corporate misconduct in a world where DPAs and NPAs are the norm. Professor Brandon Garrett, for example, has called for greater transparency regarding the process of executing DPAs and NPAs in the organizational crime context.[19] Professor Jennifer Arlen has asserted organizational DPAs and NPAs contravene the rule of law.[20] Professor Peter Reilly has advocated for greater judicial oversight over DPAs and NPAs.[21]

This Article accepts the truisms that the government will continue to offer DPAs and NPAs in the organizational crime context and that organizations will continue to accept the benefit of these agreements. Unlike other scholarship that primarily focuses on the transparency and procedure surrounding DPAs and NPAs, this Article focuses on ensuring that other aspects of our system of criminal procedure fairly account for the use of DPAs and NPAs.[22] And this

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[15] *Id.* at 11 (presenting potential benefits and risks of entering DPAs and NPAs).

[16] *See generally* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 12–13 (D.D.C. 2015).

[17] *See, e.g.*, Dylan Phillips, *JPMorgan Chase's $920 Million Spoofing Settlement: Do DPAs and NPAs Encourage Recidivism?*, FCPA BLOG (Oct. 20, 2020), https://fcpablog.com/2020/10/20/jpmorgan-chases-920-million-spoofing-settlement-do-dpas-and-npas-encourage-recidivism/ [https://perma.cc/6QZ2-WQFC] (arguing that JPMorgan's repetitive illegal conduct begs the question of whether DPAs and NPAs alone promote deterrence).

[18] *See* Peter R. Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1140–45 (2018) (discussing other nations' approaches to corporate criminal settlements).

[19] *See, e.g.*, Brandon Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 139–40 (2020) (advocating for greater transparency regarding the use of DPAs and NPAs).

[20] *See, e.g.*, Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 220 (2016) (questioning the permissibility of organizational DPAs and NPAs to the extent they require corporate governance reform).

[21] *See, e.g.*, Peter R. Reilly, *Corporate Deferred Prosecution as Discretionary Injustice*, 2017 UTAH L. REV. 839, 840 (critiquing recent federal appellate decisions for providing for insufficient judicial review of DPAs); *see also* Brandon Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1490–92 (2017) (advocating for an expanded use of the federal courts' equitable power in assessing corporate settlements).

[22] *See infra* Part III.

Article specifically sets its sights on a court's consideration of (or more appropriately, ambivalence toward) an organization's prior DPAs and NPAs when the court is sentencing that organization for a subsequent offense.[23]

This Article recognizes that the federal sentencing scheme fails to promote deterrence and fairness in the context of organizational sentencing because it fails to adequately account for the use of DPAs and NPAs. By statute, before imposing a sentence, a sentencing court must consider the federal sentencing guidelines, which provide a mathematical framework for calculating an appropriate sentence for the defendant, whether that defendant is an individual or an organization.[24] As the number of prior convictions of the defendant increases, the guidelines generally recommend a more severe sentence.[25] Nonetheless, the organizational sentencing guidelines, unlike the individual sentencing guidelines, do not require sentencing courts to consider an organization's prior DPAs and NPAs.[26]

This incongruity has grave consequences. Because the government frequently uses DPAs and NPAs in the organizational crime context in lieu of plea agreements and uses them to respond to serious offenses, an organizational DPA or NPA is the functional equivalent of a plea agreement.[27] But, as noted, plea agreements result in convictions while DPAs and NPAs do not.[28] Consequently, the failure of the organizational guidelines to account for prior DPAs and NPAs while accounting for prior convictions causes the guidelines to understate a defendant's culpability. The result is that the guidelines ultimately recommend fines for organizations that are less than necessary to deter the organizations from committing future offenses following DPAs or NPAs. Moreover, the failure of the organizational guidelines to account for prior DPAs and NPAs raises fairness concerns because unlike organizational defendants, individual defendants do receive greater sentences based on all of their prior DPAs and criminal convictions. Further, many organizational offenses are as serious and harmful as individual offenses (if not more so).

This Article offers two practical solutions. First, the United States Sentencing Commission (Sentencing Commission) should amend the organizational sentencing guidelines.[29] These amendments must fairly account for organizations' prior DPAs and NPAs at sentencing while not under- or over-penalizing recidivist organizational offenders.[30] Specifically, the Sentenc-

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[23] *See infra* Part III.

[24] *See* 18 U.S.C. § 3553.

[25] CHARLES DOYLE, CONG. RSCH. SERV., R41697, HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN ABRIDGED OVERVIEW 3 (2015).

[26] *See infra* Part II.

[27] *See* Reilly, *supra* note 18, at 1116 (comparing DPAs and NPAs to plea agreements).

[28] *Id.*

[29] *See infra* Part III.

[30] *See infra* Part III.

ing Commission should amend the guidelines to treat DPAs and NPAs as prior criminal convictions in the organizational defendant context.[31] These amendments should require sentencing courts to account for the quantity of prior total criminal convictions, DPAs, and NPAs because organizations that have committed multiple offenses despite prior leniency are generally more culpable.[32] Relatedly, for parity with the individual guidelines and to appropriately conform to norms in corporate governance, amendments should require sentencing courts to account for prior convictions, DPAs, and NPAs of organizations so long as they occurred no longer than fifteen years prior to the instant offense.[33] Although less desirable, as an alternative to these specific amendments, the Sentencing Commission could simply modify the guidelines to recommend an upward departure at sentencing when organizational defendants have prior DPAs or NPAs.[34]

Second, until the Sentencing Commission adopts acceptable amendments (or if it never does so), sentencing courts may begin to ameliorate these issues themselves.[35] Sentencing courts should use their discretion to impose sentences above the guidelines by granting upward "variances" or "departures" to account for the increased culpability of recidivist organizational defendants as represented by their prior DPAs and NPAs.[36] Although amending the guidelines is preferable because it would require all courts to consider organizations' prior DPAs and NPAs, using upward variances or departures will at least allow sentencing courts to fashion fair and effective sentences for some recidivist organizational offenders as well.[37]

This Article proceeds in three Parts. Part I provides background on organizational criminal liability and recidivism.[38] For decades, organizational criminal enforcement has trended toward the use of DPAs and NPAs instead of plea agreements, including in cases involving severe conduct.[39] Consequently, an organizational DPA or NPA is the functional equivalent of a guilty plea in the organizational defendant context. Concerningly, statistics and case studies demonstrate organizations commonly recidivate and receive at least one formal conviction after receiving at least one DPA or NPA.

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[31] *See infra* Part III.
[32] *See infra* Part III.
[33] *See infra* Part III.
[34] *See infra* Part III.
[35] *See infra* Part III.
[36] *See* Ioana Vasiu & Lucian Vasiu, *Riders on the Storm: An Analysis of Credit Card Cases*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 185, 196 (2019) (distinguishing between variances and departures).
[37] *See infra* Part III.
[38] *See infra* Part I.
[39] *See infra* Part I.

Part II provides background on federal sentencing law.[40] The federal sentencing guidelines require sentencing courts to consider a number of important factors when sentencing defendants.[41] Notably, the sentencing guidelines for individual defendants increase an individual defendant's sentence if the defendant has a prior DPA.[42] Yet the organizational sentencing guidelines do not address how sentencing courts should consider organizations' prior DPAs and NPAs.[43]

Part III recognizes that the failure of the organizational guidelines to account for an organizations' prior DPAs and NPAs creates deterrence and fairness concerns and offers two solutions to resolve these concerns.[44] Primarily, the Sentencing Commission should amend the organizational guidelines to require sentencing courts to increase an organizational defendant's sentence based on the organizations' prior DPAs and NPAs.[45] Alternatively, though less desirably, sentencing courts should use their authority to vary or depart from the guidelines and increase organizational defendants' sentences when the organizations have prior DPAs and NPAs.[46]

I. ORGANIZATIONAL CRIMINAL LIABILITY AND RECIDIVISM

This Part provides background on organizational criminal liability and recidivism. First, Section A explores the origins of organizational criminal liability and describes the rise of the use of DPAs and NPAs in the organizational crime context.[47] Second, Section B addresses the advantages and disadvantages of using DPAs and NPAs in this context.[48] Finally, Section C illustrates the problem of organizational recidivism by focusing on data and examples that show organizations commonly reoffend after receiving at least one DPA or NPA.[49]

A. Organizational Criminal Liability

Organizational criminal liability originated in the Supreme Court's 1909 decision in *New York Central & Hudson River Railroad Co. v. United States*.[50] In *New York Central*, the government prosecuted a manager of a railroad company and the railroad company itself for paying illegal rebates on sugar ship-

[40] *See infra* Part II.
[41] *See infra* Part II.
[42] *See infra* Part II.
[43] *See infra* Part III.
[44] *See infra* Part III.
[45] *See infra* Part III.
[46] *See infra* Part III.
[47] *See infra* Part I.A.
[48] *See infra* Part I.B.
[49] *See infra* Part I.C.
[50] 212 U.S. 481, 497 (1909); *see also* Ellen S. Podgor, *Corporations: Stuck with the White Collar Crime Check*, 2 BELMONT CRIM. L.J. 32, 34–35 (2019) (describing the *New York Central* case and the origins of white collar crime generally).

ments.[51] The railroad company defended itself on the ground that Congress lacked the authority to impose criminal liability on a corporation.[52] Relying on the Commerce Clause and principles of vicarious liability, the Court disagreed, holding that a corporation may be held criminally liable.[53]

Of course, unlike an individual, an organization is a legal fiction and thus cannot be imprisoned. Consequently, when organizations commit criminal offenses, criminal sanctions are largely in the form of monetary sanctions, reputational harm, and suspension or loss of government licenses.[54] Ultimately, the goals of corporate criminal enforcement resemble the goals of criminal enforcement generally: to punish, rehabilitate, and deter.[55]

Over one hundred years have passed since *New York Central*, and in the meantime, the public interest in criminal prosecution has intensified. Scholars have called for an increased use of criminal prosecution against organizations, pragmatically reasoning that organizations, unlike individuals, have the capital to pay significant fines and have fewer constitutional and evidentiary protections.[56] Likewise, in 2022, Deputy Attorney General Lisa Monaco issued a memorandum (Monaco Memorandum) emphasizing that corporate criminal enforcement will "always be a core priority for the [DOJ]."[57]

Organizations can be and often are formally convicted for their criminal offenses.[58] Nevertheless, today, a substantial percentage of criminal cases against organizational defendants are resolved with DPAs or NPAs.[59] DPAs and NPAs are creatures of contract law and criminal law, and they are similar to plea agreements in many respects in that all of these tools are criminal set-

[51] *See N.Y. Cent.*, 212 U.S. at 489.

[52] *Id.* at 492.

[53] *Id.* at 493–96; *see also* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 61–63 (2007) (discussing *New York Central* in greater detail).

[54] *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 3–4 (2014) (discussing the primary forms of punishment for corporations).

[55] *See* John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1209 (2020) (stating the general aims of criminal punishment); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1241–42 ("Companies do not want to be labeled corporate criminals and therefore may have more incentives to avoid criminal sanctions than otherwise comparable civil or administrative sanctions.").

[56] *See generally* Daniel L. Cheyette, *Policing the Corporate Citizen: Arguments for Prosecuting Organizations*, 25 ALASKA L. REV. 175 (2008) (arguing for greater corporate criminal liability in Alaska).

[57] Memorandum from Deputy Att'y Gen. Lisa Monaco on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group 1 (Sept. 15, 2022).

[58] *See, e.g.*, Alison Durkee, *Trump Organization Ordered to Pay $1.6 Million for Tax Fraud*, FORBES, https://www.forbes.com/sites/alisondurkee/2023/01/13/trump-organization-ordered-to-pay-16-million-for-tax-fraud/?sh=4366b91f370e [https://perma.cc/7BXF-Q7DV] (Jan. 13, 2023).

[59] *See infra* Part I.B.

tlement mechanisms that prosecutors use to pursue justice.[60] Plea agreements, DPAs, and NPAs all allow the government and defendants to avoid the costs of formal prosecution by resolving cases without trials.[61]

When the government utilizes a DPA, the government agrees to dismiss existing criminal charges against the defendant. When the government utilizes an NPA, the government agrees not to charge the defendant; that is, the parties settle the matter before an indictment or other charging document is filed.[62] Thus, unlike plea agreements that result in formal convictions, DPAs and NPAs do not result in formal convictions and sentences.[63]

Turning to the similarities between DPAs and NPAs, when the government executes either a DPA or an NPA, as noted, the government agrees to temporarily forego seeking a final conviction of the defendant.[64] In exchange, the defendant agrees to comply with a variety of conditions.[65] In the organizational context, these conditions vary based on the context and the goals of the government, but common conditions include that the defendant will cooperate with the government; accept responsibility for a statement of facts setting forth the offense conduct; agree to refrain from committing future criminal offenses; revise its business and compliance programs; reorganize its governance structure; and pay a fine, restitution, and forfeiture.[66] Another condition DPAs and

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[60] *See* Reilly, *supra* note 21, at 839 (describing a DPA as a "negotiated contract between the federal government and [the] defendant").

[61] Alexander & Cohen, *supra* note 11, at 544.

[62] *See* Ellen S. Podgor, *The Challenge of White Collar Sentencing*, J. CRIM. L. & CRIMINOLOGY 731, 751 n.124 (2007); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 413 n.2 (2007). The distinction between DPAs and NPAs is important in some contexts. *See, e.g.*, Mark K. Schonfeld, *2011 Mid-Year Securities Enforcement Update*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 13, 2011), https://corpgov.law.harvard.edu/2011/08/13/2011-mid-year-securities-enforcement-update/ [https://perma.cc/LH58-D4SJ]. But it is largely semantic for purposes of this Article because neither DPAs nor NPAs affect an organizational defendant's culpability score or fine at sentencing. *See infra* Part III.

[63] United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 12–13 (D.D.C. 2015).

[64] DPAs and NPAs ordinarily have a term of between one and five years. *See* Ryan D. McConnell, Jay Martin & Charlotte Simon, *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L L. 509, 558 (2011). *But see* GIBSON DUNN, 2021 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 17–19 (2022) (collecting terms for DPAs and NPAs entered during 2021 that ranged from eighteen to thirty-six months).

[65] *Saena Tech Corp.*, 140 F. Supp. 3d at 13.

[66] Andrea Amulic, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 132 (2017) (offering exemplary DPA conditions); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation through Nonprosecution*, 84 U. CHI. L. REV. 323, 325 (2017) (same); Arlen, *supra* note 20, at 200 (discussing financial sanctions in DPAs); Frederick T. Davis, *Judicial Review of Deferred Prosecution Agreements: A Comparative Study*, 60 COLUM. J. TRANSACTIONAL L. 751, 756–58 (2022); McConnell et al., *supra* note 64, at 558; Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 4 (2007). An organizational

NPAs often include is that the defendant will receive a "monitor," an individual that oversees and advises the organization's compliance efforts.[67]

If the defendant complies with the agreed conditions, the government will permanently dismiss (or never assert) formal charges against the defendant.[68] This benefit is key for the defendant. Because a defendant that receives a DPA or an NPA avoids formal prosecution, the defendant necessarily also avoids any conviction that could result from the dismissed (or never asserted) charges.[69] Without that conviction, the government might be less likely to prosecute the defendant in a future case, and if the defendant is convicted for a different offense in the future, the defendant will necessarily have a lower culpability score at its sentencing,[70] which means the defendant will face a lower potential fine under the sentencing guidelines.[71] As a result, all things equal, a defendant would generally prefer entering a DPA or an NPA rather than a plea agreement. Of course, if the defendant breaches the DPA or NPA, the government remains free to prosecute the defendant.[72] Further, defendants often agree that in the event of their breach, the defendants will not dispute that statements made during settlement discussions are admissible in future proceedings.[73]

The government enters DPAs and NPAs with both individual and organizational defendants for a wide range of offenses.[74] DPAs and NPAs were created to

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plea agreement may include many of the same terms. *See, e.g.*, GARRETT, *supra* note 54, at 11 (discussing Siemens's plea agreement).

[67] *See* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 694–95 (2009) (describing corporate monitorships)*; see also* Lindsey A. Gallo, Kendell V. Lynch & Rimmy E. Tomy, *Out of Site, Out of Mind? The Role of the Government-Appointed Corporate Monitor*, J. ACCT. RSCH. 1633, 1634 (2023). The success of corporate monitors is contested. *See id.* at 1639 (concluding that while the imposition of a corporate monitor somewhat positively correlates with a reduction in violations, the short-term improvements do not persist in the long run).

[68] Amulic, *supra* note 66, at 124–25.

[69] *Saena Tech Corp.*, 140 F. Supp. 3d at 12–13.

[70] *See* Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1299 n.36 (2014); *infra* Part II.C (discussing the organizational sentencing guidelines).

[71] *See infra* Part II.C.

[72] *See generally* 1A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 182 (5th ed. 2023).

[73] *See, e.g.*, Deferred Prosecution Agreement ¶ 22, United States v. Freepoint Commodities LLC, No. 3:23-cr-00224 (D. Conn. Dec. 14, 2023); Deferred Prosecution Agreement ¶ 22, United States v. H.W. Wood Ltd., No. 23-cr-20414 (S.D. Fla. Nov. 20, 2023).

[74] *See, e.g.*, BDG Gotham Residential, LLC v. W. Waterproofing Co., Inc., 631 F. Supp. 3d 76, 79 (S.D.N.Y. 2022) (assault and reckless endangerment); State v. Kaczmarski, 772 N.W.2d 702, 705 (Wisc. Ct. App. 2009) (second-degree sexual assault); Press Release, Off. of Pub. Affs., Dep't of Just., Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations (Dec. 3, 2019), https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolves-related-false-claims-act [https://perma.cc/L25V-TXHW] (conspiracy to fix prices).

convey leniency to first-time, nonviolent individual offenders.[75] Nonetheless, albeit with criticism from scholars and courts,[76] DPAs and NPAs are modernly used most frequently in the organizational crime context.[77] As this Section demonstrates, DPAs and NPAs are the functional equivalent of plea agreements (resulting in criminal convictions) in the organizational defendant context.

Historically, criminal enforcement against organizations resembled criminal enforcement against individuals.[78] That is, corporate prosecution occurred almost unanimously through formal judicial processes that culminated in trials or plea agreements and thus formal convictions or acquittals.[79] Yet, in the 1990s, the government began offering organizations DPAs and NPAs, and these tools quickly became a leading vehicle for corporate criminal enforcement in the 2000s.[80] Within recent years, approximately one hundred organizational criminal cases have proceeded through formal judicial processes and resulted in convictions and sentencings each year.[81] Meanwhile, approximately thirty organizational criminal cases are resolved with DPAs or NPAs annually.[82] By contrast, approximately 0.6% of individual defendants receive DPAs or NPAs.[83]

Between 2022 and 2024, there was a mild decrease in the use of DPAs and NPAs in the organizational defendant context and a decrease in the total

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[75] RICK CLAYPOOL, PUB. CITIZEN, ENFORCEMENT UPTICK: IN 2023, DOJ CORPORATE CRIME PROSECUTIONS INCREASED SLIGHTLY 2 (2024).

[76] *See, e.g.*, United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 45–46 (D.D.C. 2015) ("The Court is . . . extremely dismayed that despite all of the focus on providing tools for prosecutors to reduce over-incarceration, attack the root causes of crime, and mitigate where possible the collateral consequences of criminal convictions, deferred-prosecution agreements for individuals and other similar tools have gone largely unmentioned . . . . The Court is of the opinion that people are no less prone to rehabilitation than corporations."); Paola C. Henry, Note, *Individual Accountability for Corporate Crimes After the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform*, 6 AM. U. BUS. L. REV. 153, 157 (2016) (criticizing the modern use of DPAs in the corporate context as being inconsistent with the purpose of their creation).

[77] *See* Henry, *supra* note 76, at 158 ("DPAs are now widely used for Foreign Corrupt Practices Act . . . violations, product safety and securities violations, environmental crimes, money laundering, fraud, and other corporate crimes.").

[78] *See* Alexander & Cohen, *supra* note 11, at 544 (noting the shift in criminal enforcement strategies against organizations).

[79] *Id.*

[80] *See* Davis, *supra* note 66, at 755; *see also* Alexander & Cohen, *supra* note 11, at 559 (compiling data on corporate plea agreements, DPAs, and NPAs entered between 1997 and 2011). Gibson Dunn's annual report on corporate DPAs and NPAs reflects a preference for the use of DPAs over NPAs. *See, e.g.*, GIBSON DUNN, *supra* note 64, at 1–4; *see also* Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 71–78 (presenting a more detailed historical background on DPAs and NPAs in the corporate context).

[81] U.S. SENT'G COMM'N, QUICK FACTS: ORGANIZATIONAL OFFENDERS 1 (2023).

[82] GIBSON DUNN, *supra* note 64, at 2.

[83] CLAYPOOL, *supra* note 12, at 19.

amount of penalties paid by organizational defendants.[84] Indeed, in 2022, the total number of criminal actions against organizational offenders was the lowest it has been since 1994 when the popularity of using organizational DPAs and NPAs began to accelerate.[85] But during these years, there was also a relative decrease in the number of total criminal enforcement actions filed against organizational defendants.[86] Ultimately, although overall corporate criminal enforcement has waned in recent years, the government still regularly prosecutes organizations and regularly uses DPAs and NPAs to resolve cases.[87]

The prosecutor's discretion in each case determines whether the government will seek a formal conviction against an organization rather than offer a DPA or an NPA.[88] Nonetheless, DOJ guidance tempers that discretion by requiring prosecutors to consider several factors in determining whether to prosecute an organization, including the seriousness of the offense, "the pervasiveness of wrongdoing within" the organization, and the adequacy of any compliance program the organization employed at the time of the offense.[89] Prosecu-

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[84] *See generally* GIBSON DUNN, CORPORATE RESOLUTIONS 2024 YEAR-END UPDATE 4–6 (2025); GIBSON DUNN, CORPORATE RESOLUTIONS UPDATE 1–2 (2023); Chris Prentice, *US DOJ Unit's Penalties Fall in 2023 as Trial Backlog Bites, Data Shows*, REUTERS (Feb. 22, 2024), https://www.reuters.com/world/us/us-justice-dept-corporate-penalties-plunge-2023-trial-backlog-bites-data-shows-2024-02-22/ [https://perma.cc/5RHY-W8SU].

[85] RICK CLAYPOOL, PUB. CITIZEN, CORPORATE PROSECUTION DOLDRUMS: IN 2022 DOJ CORPORATE CRIME PROSECUTIONS REMAIN NEAR RECORD LOW 3–4 (2023).

[86] *Id.* The decrease can be credited in part to an increase in the use of declinations, which are formal guarantees of the government that it will not prosecute defendants. *Id.* at 6. The increase in declinations has resulted from internal DOJ policy changes that encourage using declinations if organizations voluntarily self-disclosed their offense conduct. *See* Kenneth A. Polite, Jr., *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy*, DEP'T OF JUST., https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law [https://perma.cc/HEB7-YE6R] (Feb. 5, 2025); U.S. Dep't of Just., Just. Manual § 9-28.300(A) (2023) (presuming a company suspected of an FCPA violation will receive a declination absent aggravating circumstances if the "company [has] voluntarily self-disclose[d] misconduct, fully cooperate[d], and timely and appropriately remediate[d]"); *see, e.g.*, CLAYPOOL, *supra* note 75, at 4–5 (discussing Safran and Corsa Coal, two companies that received declinations following self-disclosure).

[87] *See* Brandon L. Garrett, *Corporate Crimmigration*, 2021 U. ILL. L. REV. 359, 371–72 [hereinafter Garrett, *Corporate Crimmigration*]. The rise of DPAs and NPAs in the United States has sparked a global interest in them. *See* Liz Campbell, *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*, 43 SYDNEY L. REV. 187, 190–91 (2021) (discussing various nations' approaches to DPAs and NPAs); Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, THE CHAMPION, Sept./Oct. 2016, at 48, 62 [hereinafter Garrett, *The Changing Face of Corporate Prosecutions*] (same). Several nations now either use DPAs and NPAs or are considering doing so. Garrett, *The Changing Face of Corporate Prosecutions*, *supra*, at 62.

[88] *See* Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 378 (2014).

[89] U.S. Dep't of Just., Just. Manual § 9-28.300(A)(2) (2023). A compliance program is a set of internal procedures that an organization employs to prevent and detect violations of law. *See What Is Corporate Compliance and Why It's Important?*, CRI GRP., https://crigroup.com/importance-of-

tors must also consider the organization's prior unlawful conduct represented by its prior criminal convictions, DPAs and NPAs, and civil and regulatory resolutions.[90]

Furthermore, recent guidance makes clear that prosecutors should heavily consider the extent to which the organization disclosed its own misconduct to enforcement authorities.[91] Namely, DOJ corporate enforcement policy revisions promise leniency to organizations that voluntarily disclose their own wrongdoing.[92] Moreover, the Monaco Memorandum directs each DOJ component that prosecutes corporate crime to create a policy on self-disclosure, and prosecutors must consider whether organizations self-disclosed their misconduct.[93] All of these same factors are necessarily relevant when deciding to offer a DPA or an NPA in lieu of formal prosecution.[94]

B. Pros and Cons of Using DPAs and NPAs in the Organizational Crime Context

Although DPAs and NPAs are regularly used in the organizational context, commentators debate the propriety of their use.[95] Proponents of DPAs and NPAs assert they serve many of the purposes of traditional criminal enforce-

corporate-compliance [https://perma.cc/VDJ3-52AG] (explaining the concept and purposes behind corporate compliance). The purpose of a compliance program is to allow an organization to avoid significant losses that may follow violations. *Id.*

[90] U.S. Dep't of Just., Just. Manual § 9-28.600(A) (2023).

[91] *See* Phillip Bantz, *The 3 Biggest White-Collar Enforcement Buzzwords of 2023*, LAW360 (Jan. 1, 2024), https://www.law360.com/articles/1775438/the-3-biggest-white-collar-enforcement-buzzwords-of-2023 [https://perma.cc/9BN2-GUMJ].

[92] *See* Lindsey Collins & Kate Rumsey, *Self-Disclosure Lessons from Exemplary Corp. Resolutions*, LAW360 (Sept. 13, 2023), https://www.law360.com/articles/1719945/self-disclosure-lessons-from-exemplary-corp-resolutions [https://perma.cc/CX4K-B78D] (discussing the revised policy and providing examples of DOJ leniency).

[93] Memorandum from Deputy Att'y Gen. Lisa Monaco, *supra* note 57, at 7. Relatedly, the U.S. Attorneys' Office for the Southern District of New York recently implemented a policy allowing individual defendants to receive NPAs in exchange for "early and voluntary self-disclosure of criminal conduct." Joshua A. Naftalis, Anastasia Cembrovska, Brianna Hills Simopoulos & Jingxi Zhai, *SDNY Announces Whistleblower Pilot Program to Incentivize Self-Disclosure of Financial Fraud and Public Corruption*, PROGRAM OF CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF L. (Jan. 23, 2024), https://wp.nyu.edu/compliance_enforcement/2024/01/23/sdny-announces-whistleblower-pilot-program-to-incentivize-self-disclosure-of-financial-fraud-and-public-corruption/ [https://perma.cc/KG5U-VAUH].

[94] *See* Memorandum from the Deputy Att'y Gen. to the Assistant Att'y Gen. et al. on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies 3 (Oct. 28, 2021), https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf [https://perma.cc/Z476-E4Z9] ("[W]hen making determinations about criminal charges *and resolutions* for a corporate target, prosecutors are directed to consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it . . . ." (first emphasis added)).

[95] *See, e.g.*, Arlen, *supra* note 20, at 231 (critiquing the use of DPAs and NPAs).

ment tools, including retribution and deterrence.[96] Advocates also assert DPAs and NPAs permit prosecutors to combat corporate offenses that are serious enough to warrant at least some action of the government but are not severe enough to warrant formal charges.[97] DPAs and NPAs also allow the government to resolve criminal cases more quickly and efficiently than if the government utilized plea agreements or trials, and this result frees judicial and executive resources that may be allocated to other cases.[98]

Another persuasive argument supporting DPAs and NPAs is that they have the flexibility to provide organizational defendants with opportunities and incentives to correct their negative behavior before receiving hefty fines that may cause them to cease operations.[99] When an organization must close its doors due to managerial wrongdoing, shareholders and other nonmanagerial investors suffer the cost.[100] Of course, when an organization closes due to corporate misbehavior, negative economic consequences follow, particularly in highly-concentrated markets where fewer firms operating means less desirable consumer choice, product quality, and innovation, which are characteristics of an economically-efficient market.[101]

While DPAs and NPAs have some advantages, several commentators question whether DPAs and NPAs are used effectively in the organizational context. Professor Peter Reilly avers that using DPAs and NPAs prevents meaningful judicial oversight as they place the charging and adjudicative func-

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[96] *See* Lanny A. Breuer, *Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association*, DEP'T OF JUST., https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/8HK3-8PXZ] (Feb. 5, 2025) ("[W]hen a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPAs are critical for accountability.").

[97] *See id.* ("When the only tool we had to use in cases of corporate misconduct was a criminal indictment, prosecutors sometimes had to use a sledgehammer to crack a nut. More often, they just walked away.").

[98] *See* Kaal & Lacine, *supra* note 80, at 63–64, 70.

[99] *See* Alexander & Cohen, *supra* note 11, at 539 ("DPAs and NPAs are sometimes regarded as enabling some companies to avoid insolvency.").

[100] *See* Patrick R. Baker, Paula Hearn Moore & Kaleb Paul Byars, *Nonprofit College Crash: Enforcing Board Fiduciaries Through Increased Accountability and Transparency in the IRS Form 990 Procedure*, 2019 BYU EDUC. & L.J. 167, 187 (describing how malfeasance of higher education institutions' directors and officers causes the institutions to close); *see also* Patrick Baker, Paula Hearn Moore, Kaleb P. Byars & Christie G. Aden, *Covid Closing Down Colleges: How the Covid-19 Pandemic Accelerated Nonprofit College Closings*, 2020 BYU EDUC. & L.J. 101, 101 (describing how the COVID-19 pandemic exacerbated the closure rate).

[101] *See* Kaleb Byars, *An "Essential" Solution: Reworking the Essential Facilities Doctrine to Address Big Tech's Harm to the Marketplace of Ideas*, 91 MISS. L.J. 263, 267 (2023); *see also id.* at 302 (recognizing that harm to these market characteristics constitutes antitrust harm).

tions of the criminal justice system in the hands of prosecutors alone.[102] Professor Jennifer Arlen asserts DPAs and NPAs are inconsistent with the rule of law to the extent prosecutors use them to impose contractual duties on defendant firms that prosecutors otherwise have no authority to impose.[103] Professor Brandon Garrett and others have criticized the lack of public transparency that surrounds the negotiations and terms of DPAs and NPAs.[104] Others claim using DPAs and NPAs against organizations inadvisably incentivizes prosecutors to ignore the culpable conduct of individual white-collar offenders within the organizations.[105] Some commentators claim DPAs and NPAs falsely portray the message that organizational crime is not serious (or else it would have warranted formal criminal proceedings).[106] Scholars have also asserted that while

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[102] *See* Reilly, *supra* note 18, at 1116–17, 1119–20, 1122–23; Peter Reilly, *U.S. Corporate DPA Program: International Embarrassment?*, CLS BLUE SKY BLOG (Mar. 5, 2019), https://clsbluesky.law.columbia.edu/2019/03/05/the-u-s-corporate-dpa-program-an-international-embarrassment/ [https://perma.cc/M74X-V7GA]; *see also* Reilly, *supra* note 21, at 879–83 (advocating for legislative and judicial change regarding corporate DPAs); Henry, *supra* note 76, at 165–67 (same); *cf.* Gregory M. Gilchrist, *Condemnation Without Basis: An Expressive Failure of Corporate Prosecutions*, 64 HASTINGS L.J. 1121, 1124, 1155 (2013) (explaining that "[c]orporations have strong incentives to avoid indictment," that "some may be willing to settle matters through DPAs and NPAs that they otherwise would have fought through trial," and that an "indictment itself can have a dramatic impact on share price or even the ability of the corporation to continue business as usual" (citation omitted)). *See generally* John Gleeson, *Judicial Scrutiny of DPAs, NPAs, and Monitorships*, GLOB. INVESTIGATIONS REV. (Apr. 25, 2022), https://globalinvestigationsreview.com/guide/the-guide-monitorships/third-edition/article/judicial-scrutiny-of-dpas-npas-and-monitorships [https://perma.cc/L8QU-ZWK2] (providing background information and a brief commentary on the leading cases on this issue).

[103] *See* Arlen, *supra* note 20, at 215–16 (providing several examples of ultra vires duties prosecutors may impose via DPAs and NPAs).

[104] *Cleaning Up the C-Suite: Ensuring Accountability for Corporate Criminals: Before the S. Comm. on the Judiciary*, *supra* note 8 (written statement of Professor Brandon Garrett); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1835 (2015); Garrett, *supra* note 19, at 139–40; *see* Reilly, *supra* note 88, at 399; Mike Scarcella, *DOJ Non-Prosecution Records Are Target of Law Librarian's Suit*, REUTERS, https://www.reuters.com/legal/government/doj-non-prosecution-records-are-target-law-librarians-suit-2021-11-08/ [https://perma.cc/HJ7K-59X9] (Nov. 8, 2021); *see also* Ellen S. Podgor, *Disruptive Innovation in Criminal Defense: Demanding Corporate Criminal Trials*, 69 MERCER L. REV. 825, 829 (2018) ("Because NPAs are entered into directly between the government and the entity, the number and existence of these agreements can be difficult to ascertain.").

[105] *See, e.g.*, Henry, *supra* note 76, at 160–62.

[106] *See, e.g.*, Christopher Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 760–61 (2017); *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("[W]hen society deliberately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless in the eyes of the law."); Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 24, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/RV7A-3XJ4] (criticizing the DOJ's allegedly-insufficient response to particular organizational offense conduct).

using DPAs and NPAs allows for a larger quantity of enforcement actions, the quality of those enforcement actions is diminished.[107]

Another negative consequence of using DPAs and NPAs is that the government may use them to unduly pressure corporations into settling their cases. Professor Ellen Podgor has noted that corporations are quick to resolve cases outside of the formal adjudicatory process for a number of reasons.[108] Irrespective of its guilt, a criminal conviction may lead to the organization's dissolution. Arthur Andersen, LLP, a global accounting firm in the early 2000s, refused to resolve its case with the government.[109] Shortly afterwards, Arthur Anderson was convicted, and although the Supreme Court later reversed its conviction, it was bankrupt by that time.[110] Whatever the merit of the critiques of DPAs and NPAs, they remain prevalent in corporate criminal enforcement actions, and this prevalence is only increasing.

C. Organizational Recidivism

This Article opines that organizational offenders often receive disproportionately-low sentences when they receive formal convictions because the organizations' prior DPAs and NPAs do not receive appropriate consideration under the federal sentencing guidelines.[111] Part III of this Article proposes solutions to this problem.[112] To establish the need for these solutions, this Section demonstrates that organizational offenders commonly reoffend, including after they have executed DPAs and NPAs.[113]

First, Subsection 1 describes statistics and trends regarding organizational recidivism that demonstrate that organizational offenders commonly reoffend after sustaining DPAs and NPAs.[114] Then, Subsections 2 and 3 discuss the cases of JPMorgan Chase & Co. (JPMorgan) and Deutsche Bank AG (Deutsche

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[107] *See, e.g.*, Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 552, 557–58 (2015) (noting that a lack of involvement of the judicial process prevents a neutral, judicial decision maker from facilitating the presentation of evidence and reaching an unbiased resolution after receiving opposing viewpoints and ensuring the elements of the offense have been established).

[108] *See* Podgor, *supra* note 104, at 831–34, 838.

[109] *See* Mark Maurer, *Arthur Andersen's Legacy, 20 Years After Its Demise, Is Complicated*, WALL ST. J. (Aug. 31, 2022), https://www.wsj.com/articles/arthur-andersens-legacy-20-years-after-its-demise-is-complicated-11661938200 [https://perma.cc/A6P9-KKW9].

[110] *See* Podgor, *supra* note 104, at 831 (noting that the Arthur Anderson collapse showcases the risk of corporate criminal conviction); Fred Barbash, *Corporate Crime and "Collateral" Damage*, POLITICO (May 5, 2010), https://www.politico.com/story/2010/05/corporate-crime-and-collateral-damage-036762 [https://perma.cc/P8ME-8JM3] (same).

[111] *See infra* Part III.

[112] *See infra* Part III.

[113] *See infra* Part I.C.

[114] *See infra* Part I.C.I.

Bank).[115] These two organizations, like many organizations, continue to commit new and serious offenses despite having received the benefit of prosecutorial leniency via multiple prior DPAs and NPAs.[116]

1. Organizational Recidivism Following DPAs and NPAs

Although deterrence seems as though it should be a logical consequence of corporate criminal liability, evidence of organizational recidivism demonstrates that deterrence has not been a practical consequence.[117] A 2019 Public Citizen report informs that as of 2019, thirty-eight organizations that had received DPAs or NPAs subsequently faced additional federal criminal enforcement actions.[118] Public Citizen reports from 2023 and 2024 inform that organizational recidivism following DPAs and NPAs continues to persist.[119] Concerningly, many recidivist organizations are well-known Fortune 500 companies whose offenses have had devastating impacts.[120]

It is striking that approximately sixty-three percent of organizations that are subject to federal criminal enforcement actions have already received the benefit of multiple DPAs and NPAs before the new actions.[121] In addition to JPMorgan and Deutsche Bank, which are discussed in more detail below, Pfizer Inc.[122] and Credit Suisse[123] are a few of the numerous globally prominent

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[115] *See infra* Part I.C.II.

[116] *See infra* Part I.C.III.

[117] *See* W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 2 STETSON BUS. L. REV. 1, 17–18 (2022).

[118] *See* CLAYPOOL, *supra* note 12, at 29 (cataloguing firms that previously entered DPAs and NPAs and later faced criminal enforcement actions); *see also* Merle, *supra* note 13 (discussing the report). Thirty-eight may seem like a small number of reoffenders, but since at least 2018, there have been only approximately one hundred organizational offenders sentenced each year. *See generally* U.S. SENT'G COMM'N, THE ORGANIZATIONAL SENTENCING GUIDELINES: THIRTY YEARS OF INNOVATION AND INFLUENCE 13 fig.1 (2022).

[119] CLAYPOOL, *supra* note 85, at 3–5; CLAYPOOL, *supra* note 75, at 4.

[120] *See* CLAYPOOL, *supra* note 12, at 43–44. Smaller organizations are even more likely to be prosecuted. CLAYPOOL, *supra* note 75, at 3.

[121] CLAYPOOL, *supra* note 12, at 31. Professor John Coffee recognizes that causes of corporate recidivism may be that corporate culture is difficult to change or that large companies have the capital to pay fines and simply accept "them as a cost of doing business." JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 132 (2020).

[122] *See Pfizer to Pay $35 Mln in Genotropin Settlements*, REUTERS, https://www.reuters.com/article/idUSWNAS5447/ [https://perma.cc/9FAK-6ZHX] (Aug. 9, 2007) (2007 DPA); Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009), https://www.justice.gov/opa/pr/justice-department-announces-largest-health-care-fraud-settlement-its-history [https://perma.cc/TRP3-QTWD] (2009 guilty plea); Press Release, Off. of Pub. Affs., Dep't of Just., Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), https://www.justice.gov/opa/pr/pfizer-hcp-corp-agrees-pay-15-million-penalty-resolve-foreign-bribery-investigation [https://perma.cc/9AG5-5LWA] (2012 DPA).

[123] Press Release, Off. of Pub. Affs., Dep't of Just., Credit Suisse Agrees to Forfeit $536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York

entities that have received multiple DPAs and NPAs in addition to at least one formal conviction.[124] Boeing provides another example. Boeing executed an NPA in 2006[125] and a DPA in 2021.[126] Further, as of the date of this Article's publication, Boeing is in negotiations to reach an additional agreement to resolve criminal charges.[127] Large companies continue to receive leniency via multiple DPAs and NPAs despite guidance from federal authorities (like the Monaco Memorandum) that suggests a successive DPA or NPA for an organization is "generally disfavored."[128]

In addition to organizations that have executed multiple DPAs and NPAs prior to formal prosecution, several other organizations have received formal criminal convictions after executing a single DPA or NPA.[129] British Petroleum (BP), a global oil and gas company, provides a prime example.[130] In 2007, BP executed a DPA following offense conduct leading to charges for conspiracy to violate the Commodity Exchange Act, mail fraud, and wire fraud.[131] Later, in 2013, BP received a conviction and a then-historic four billion dollar fine after it pled guilty to charges for felony manslaughter, various environmental offenses,

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State Law (Dec. 16, 2009), https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency [https://perma.cc/UC3V-5GJ3] (2009 DPA); Dominic Rushe, *Credit Suisse Pleads Guilty to Criminal Charges in US Tax Evasion Settlement*, THE GUARDIAN (May 19, 2014), https://www.theguardian.com/business/2014/may/19/credit-suisse-plead-guilty-criminal-charges-us-tax-evasion [https://perma.cc/9EWB-ULGY] (2014 guilty plea); Press Release, Off. of Pub. Affs., Dep't of Just., Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme That Violated the FCPA (July 5, 2018), https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt [https://perma.cc/2RKP-PABR] (2018 NPA); Press Release, Off. of Pub. Affs., Dep't of Just., Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 Million Coordinated Global Resolution (Oct. 19, 2021), https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global [https://perma.cc/66MP-PJP2] (2021 DPA).

[124] *See* Armour et al., *supra* note 55, at 1224 (discussing Las Vegas Sands, another large organization that has recidivated and entered into multiple NPAs).

[125] *See generally* Boeing Non-Prosecution Agreement (June 30, 2006) (NPA and civil resolution) (on file with author).

[126] *See generally* Deferred Prosecution Agreement, United States v. The Boeing Co., No. 4:21-cr-00005 (N.D. Tex. Jan. 7, 2021).

[127] Criminal Division, *United States v. the Boeing Company*, DEP'T OF JUST., https://www.justice.gov/criminal/criminal-fraud/case/united-states-v-boeing-company [https://perma.cc/325H-Y4X3] (Dec. 5, 2024); *see also* Mike Volkov, *DOJ and Boeing Propose Criminal Plea Agreement—Boeing to Plead Guilty to Felony and Pay $243 Million Penalty (Part I of III)*, JDSUPRA (July 30, 2024), https://www.jdsupra.com/legalnews/doj-and-boeing-propose-criminal-plea-9608216/ [https://perma.cc/FT42-9ZUK] (noting that Boeing's failed 2024 plea agreement resulted from its breach of its 2021 DPA "by failing to design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws").

[128] Memorandum from Deputy Att'y Gen. Lisa Monaco, *supra* note 57, at 6.

[129] CLAYPOOL, *supra* note 12, at 43–44 tbl.6.

[130] *See id.* at 112–15 (describing the corporate misconduct of BP).

[131] *See generally* Deferred Prosecution Agreement, United States v. BP Am. Inc., No. 1:07-cr-00683 (N.D. Ill. Oct. 25, 2007).

and obstruction of justice.[132] These convictions resulted from BP's conduct that resulted in the Deepwater Horizon oil rig explosion in 2010, which caused eleven deaths and extensive environmental pollution in the Gulf of Mexico.[133]

2. JPMorgan Chase & Co.

One of the most egregious examples of organizational recidivism involves JPMorgan. JPMorgan's recidivism is particularly concerning given that it is one of the highest-revenue-generating companies in the United States and that much of its criminal history involves similar misconduct.[134]

JPMorgan's criminal history began in 2011 when it executed a two-year NPA with the DOJ.[135] The NPA followed JPMorgan's participation in a bid-rigging scheme between 2001 and 2006 in violation of the Sherman Act and other federal statutes.[136] JPMorgan's offense conduct harmed competition, and it agreed to pay $228 million in restitution, sanctions, and disgorgement as a result of its offense.[137]

In 2014, JPMorgan executed a two-year DPA with the DOJ.[138] This DPA resulted from JPMorgan's decades-long negligent oversight of Bernie Madoff's accounts at JPMorgan, which Madoff used to operate one of the largest and most publicized Ponzi schemes in history.[139] In the DPA, JPMorgan admitted to violations of the Bank Secrecy Act for failing to maintain an effective money laundering program and failing to file a suspicious activity report

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[132] *See Summary of Criminal Prosecutions*, U.S. ENV'T PROT. AGENCY, https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2468 [https://perma.cc/7U5Y-AHTU].

[133] *Id.*

[134] *See List of "Fortune 500" Companies*, 50PROS, https://www.50pros.com/fortune500 [https://perma.cc/7MFC-JDNM] (Jan. 22, 2025) (showing JPMorgan as twelfth in overall revenue as of 2025).

[135] *See* Letter from Christine A. Varney, Asst. Att'y Gen., to Thomas Mueller, Wilmer Cutler Pickering Hale and Dorr ¶¶ 3, 6–7 (July 6, 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/07/07/272815a.pdf [https://perma.cc/FTB9-D7AM].

[136] *See id.* ¶ 5(a).

[137] *See generally* Press Release, Off. of Pub. Affs., Dep't of Just., JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies (July 7, 2011), https://www.justice.gov/opa/pr/jpmorgan-chase-admits-anticompetitive-conduct-former-employees-municipal-bond-investments [https://perma.cc/JN4P-DU5N].

[138] *See* Letter from Preet Bharara, U.S. Att'y for the S. Dist. of N.Y., to John F. Savarese, Stephen R. DiParma, Emil A. Kleinhaus & Steven R. Peikin ¶ 12 (Jan. 6, 2014) (on file with author).

[139] *See generally* Press Release, U.S. Atty's Off., S. Dist. of N.Y., Manhattan U.S. Attorney and FBI Assistant Director-in-Charge Announce Filing of Criminal Charges Against and Deferred Prosecution Agreement with JPMorgan Chase Bank, N.A., in Connection with Bernard L. Madoff's Multi-Billion Dollar Ponzi Scheme (Jan. 7, 2014), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-charge-announce-filing-criminal [https://perma.cc/G3A9-65RZ]; *see also* Adam Hayes, *Bernie Madoff: Who He Was, How His Ponzi Scheme Worked*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bernard-madoff.asp [https://perma.cc/E943-H76K] (June 23, 2024) (offering further background information about the Madoff Ponzi scheme).

despite its reason to know of Madoff's conduct.[140] JPMorgan agreed to pay $1.7 billion to the DOJ as a result of the offense.[141]

In 2015, before the 2014 DPA even expired, JPMorgan was convicted for yet another antitrust violation.[142] Between 2010 and 2013, a JPMorgan trader conspired with traders from other banking institutions to influence foreign exchange rates.[143] Consequently, JPMorgan and the other institutions pleaded guilty to violations of the Sherman Act.[144] JPMorgan entered into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement with the government in which JPMorgan agreed to a sentence of a term of probation of three years and a fine of $550 million.[145]

In 2016, through a subsidiary, JPMorgan executed a new, three-year NPA.[146] This time, employees at a JPMorgan subsidiary implemented a hiring scheme favoring children of Chinese executives in violation of the Foreign Corrupt Practices Act (FCPA).[147] JPMorgan received over $100 million in profits from its violations. Though, it paid more than $264 million in monetary sanctions to federal enforcement authorities.[148]

In 2020, JPMorgan executed another three-year DPA with the government.[149] Between 2008 and 2016, traders at JPMorgan engaged in a "spoofing"

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[140] *See* Letter from Preet Bharara, *supra* note 138, at Exhibit B.

[141] *Id.* ¶ 3.

[142] *See generally* Press Release, Off. of Pub. Affs., Dep't of Just., Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas [https://perma.cc/ZTQ2-LP3Z].

[143] Press Release, JP Morgan, JPMorgan Chase Announces Settlements with the U.S. Department of Justice and the Federal Reserve Related to Foreign Exchange Activities (May 20, 2015), https://www.jpmorganchase.com/ir/news/2015/id-914105 [https://perma.cc/Z736-3GZK].

[144] *See* Press Release, Off. of Pub. Affs., Dep't of Just., *supra* note 142.

[145] *See generally* Plea Agreement ¶ 9, United States v. JPMorgan Chase & Co., No. 3:15-cr-00079 (D. Conn. May 20, 2015). In a Rule 11(c)(1)(C) plea agreement, the government agrees to recommend a particular sentence, and, if the court accepts the plea agreement, the court must impose the recommend sentence. FED. R. CRIM. P. 11(c)(1)(C).

[146] *See* Bruce E. Yannett, Andrew M. Levine & Philip Rohlik, *Beyond "Sons and Daughters": JPMorgan Resolves Hiring Practices Probe*, 8 FCPA UPDATE, Nov. 2016, at 1, 1; *see also* Letter from Robert L. Capers, U.S. Att'y for the E. Dist. of N.Y, to Mark F. Mendelsohn (Nov. 17, 2016).

[147] *See* Letter from Robert L. Capers, *supra* note 146, ¶¶ 10–67; *see also* Beverley Earle & Anita Cava, *Examining the JPMorgan "Princeling" Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement*, 17 WASH. U. GLOB. STUD. L. REV. 365, 373–79 (2018) (describing JPMorgan's 2016 DPA and underlying offense conduct in further detail).

[148] *See generally* Thomas Fox, *JPMorgan Sons and Daughters FCPA Enforcement Action: Part I—Venice and Fog*, JDSUPRA (Nov. 21, 2016), https://www.jdsupra.com/legalnews/jpmorgan-sons-and-daughters-fcpa-48004/ [https://perma.cc/3TEY-HALM]; Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), https://www.sec.gov/news/press-release/2016-241 [https://perma.cc/BR3Q-7N4L] (noting that JPMorgan paid $130 million to the Securities and Exchange Commission, $72 million to the DOJ, and $61.9 million to the Federal Reserve Board of Governors as a result of its conduct).

[149] *See generally* Deferred Prosecution Agreement, United States v. JPMorgan Chase & Co, No. 3:20-cr-00175 (D. Conn. Sept. 29, 2020); Press Release, U.S. Sec. & Exch. Comm'n, J.P. Morgan

scheme, simultaneously placing non-bona fide trade orders and bona fide trade orders to manipulate prices in the U.S. Treasury and precious metals futures markets.[150] This scheme led the government to charge JPMorgan with two counts of wire fraud.[151] In the DPA, JPMorgan agreed to pay $920 million in penalties, restitution, and disgorgement to federal enforcement authorities.[152] The individual traders involved were also convicted and incarcerated for their conduct.[153]

In sum, JPMorgan, like many other institutions, has repeatedly engaged in criminal conduct over decades. One would think the repeated criminal enforcement and substantial monetary sanctions JPMorgan has faced would incentivize it to cease its unlawful conduct. Yet JPMorgan has continued to violate the law, often engaging in conduct similar to that which resulted in its prior sanctions.[154] Recent events exemplify JPMorgan's continuing unlawful conduct, including securities law violations resulting in a settlement with the Securities and Exchange Commission (SEC) in January 2024[155] and involvement in processing funds related to Jeffrey Epstein's sex trafficking empire.[156] This

Securities Admits to Manipulative Trading in U.S. Treasuries (Sept. 29, 2020), https://www.sec.gov/news/press-release/2020-233 [https://perma.cc/XR9S-N9J7].

[150] Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 148; Abhishek Manikandan & Michelle Price, *JPMorgan to Pay $920 Million for Manipulating Precious Metals, Treasury Market*, REUTERS (Sept. 29, 2020), https://www.reuters.com/article/idUSKBN26K321/ [https://perma.cc/RJ3K-XHHG].

[151] *See generally* Information, United States v. JPMorgan & Chase Co., No. 3:20-cr-00175 (D. Conn. Sept. 29, 2020).

[152] *See generally* Press Release, Off. of Pub. Affs., Dep't of Just., JPMorgan Chase & Co. Agrees to Pay $920 Million in Connection with Schemes to Defraud Precious Metals and U.S. Treasuries Markets (Sept. 29, 2020), https://www.justice.gov/opa/pr/jpmorgan-chase-co-agrees-pay-920-million-connection-schemes-defraud-precious-metals-and-us [https://perma.cc/E9D2-N592].

[153] *See* Press Release, Off. of Pub. Affs., Dep't of Just., Former J.P. Morgan Precious Metals Traders Sentenced to Prison (Aug. 22, 2023), https://www.justice.gov/opa/pr/former-jp-morgan-precious-metals-traders-sentenced-prison#:~:text=In%20September%202020%2C%20JPMorgan%20admitted,U.S.%20Treasury%20notes%20and%20bonds [https://perma.cc/9J4M-VLWX].

[154] *See, e.g.*, Earle & Cava, *supra* note 147, at 373–79 (describing JPMorgan's 2016 DPA and underlying offense conduct in further detail).

[155] *See* Benjamin Calitri, *SEC Continues to Elevate Its Enforcement of Rule 21F-17(a)*, PROGRAM ON CORP. COMPLIANCE & ENF'T AT N.Y.U. SCH. OF L. (Feb. 11, 2024), https://wp.nyu.edu/compliance_enforcement/2024/02/11/sec-continues-to-elevate-its-enforcement-of-rule-21f-17a/ [https://perma.cc/2YF9-FYWF]; Kanishka Singh, *CFTC Orders Three Major US Banks to Pay Over $50 Million for Swap-Reporting Failures*, REUTERS (Sept. 29, 2023), https://www.reuters.com/business/finance/us-cftc-orders-3-major-us-banks-pay-over-50-mln-swap-reporting-failures-2023-09-30/ [https://perma.cc/46SW-WVLZ].

[156] *See, e.g.*, Elliot Weld, *JPMorgan to Pay $75M to US Virgin Islands Over Epstein Ties*, LAW360 (Sept. 26, 2023), https://www.law360.com/articles/1725729?e_id=b28ee56c-814c-4ae2-ae9e-89c47dc83ce9&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates&detected=1 [https://perma.cc/U24E-X3DG]; Ava Benny-Morrison, *JPMorgan Found $1 Billion in Epstein Activity, USVI Says*, BLOOMBERG L. (Sept. 1, 2023), https://www.bloomberg.com/news/articles/2023-09-01/jpmorgan-found-1-billion-in-suspicious-epstein-activity-usvi [https://perma.cc/4EAS-KTF2]; *see also* Jon Hill, *JPMorgan Fined Nearly $350M Over Trade Surveillance*, LAW360 (Mar. 14,

conduct suggests that it is only a matter of time before JPMorgan faces additional criminal charges.

3. Deutsche Bank AG

Like JPMorgan, Deutsche Bank is a quintessential organizational recidivist, repeatedly committing similar offenses.[157] Deutsche Bank is a German-based bank and one of the largest banks in Europe.[158]

In 2010, Deutsche Bank executed a two-year NPA with the DOJ.[159] Between 1996 and 2002, Deutsche Bank utilized fraudulent tax shelter transactions to assist wealthy U.S. citizens in claiming billions of dollars in false tax benefits and avoiding billions of dollars in tax liability.[160] Deutsche Bank agreed to pay $553 million in penalties as a result of the offense, and the DOJ agreed not to prosecute Deutsche Bank for conspiracy to commit tax evasion and conspiracy to make fraudulent statements on a tax return.[161]

In 2015, through a subsidiary, Deutsche Bank executed a three-year DPA.[162] Between 2003 and 2010, Deutsche Bank traders requested and received false LIBOR and EURIBOR benchmark interest rate submissions to improve their trading positions.[163] Deutsche Bank and the DOJ utilized the

2024), https://www.law360.com/articles/1813794/jpmorgan-fined-nearly-350m-over-trade-surveillance- [https://perma.cc/U2GN-W9MS] (discussing fines JPMorgan agreed to pay to the Federal Reserve and the Office of the Comptroller of the Currency for JPMorgan's failure to "to surveil billions of instances of trading activity on at least 30 global trading venues").

[157] James B. Stewart, *These Are the Deutsche Bank Executives Responsible for Serving Jeffrey Epstein*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/deutsche-bank-jeffrey-epstein.html [https://perma.cc/EQG7-YTZR] ("Deutsche Bank is a symbol of corporate recidivism: It has paid more than $9 billion in fines since 2008 related to a litany of alleged and admitted financial crimes and other transgressions, including manipulating interest rates, failing to prevent money laundering, evading sanctions on Iran and other countries and engaging in fraud in the run-up to the financial crisis.").

[158] *See generally* Meaghan Yuen, *Here Are the Top 50 Biggest European Banks in 2024*, EMARKETER (Nov. 4, 2024), https://www.insiderintelligence.com/insights/largest-banks-europe-list/ [https://perma.cc/VG6M-PFDE].

[159] *See* Letter from Preet Bharara, U.S. Att'y for the S. Dist. of N.Y. to Mark F. Pomerantz 2 (Dec. 21, 2010) (on file with author).

[160] David Bario, *Paul Weiss Steers Deutsche Bank to $554 Million Tax Shelter Settlement with Government*, AM. LAW. (Dec. 21, 2010), https://www.law.com/americanlawyer/almID/1202476577982/ [https://perma.cc/Y6FY-SXWL].

[161] Press Release, U.S. Att'y for the S. Dist. of N.Y., Deutsche Bank to Pay More than $550 Million to Resolve Federal Tax Shelter Fraud Investigation (Dec. 21, 2010), https://www.justice.gov/archive/usao/nys/pressreleases/December10/deutschebankpr.pdf [https://perma.cc/XUD7-A2HK]; *see also* Letter from Preet Bharara, *supra* note 159, at 1.

[162] Jaclyn Jaeger, *Libor Scandal Costs Deutsche Bank $2.5 Billion in Penalties*, COMPLIANCE WEEK (Apr. 23, 2015), https://www.complianceweek.com/libor-scandal-costs-deutsche-bank-25-billion-in-penalties/12333.article [https://perma.cc/HGB5-QBFP].

[163] *See* Deferred Prosecution Agreement at 42, United States v. Deutsche Bank AG, No. 3:15-cr-00061 (D. Conn. Apr. 23, 2015). The LIBOR rate was the benchmark interest rate at which banks issued short-term loans to other banks in the international market. *See* Julia Kagan, *LIBOR: What Was*

DPA to resolve the resulting wire fraud and antitrust charges resulting from this conduct.[164] In exchange, Deutsche Bank agreed to pay approximately $2.5 billion to federal enforcement authorities to resolve the charges.[165]

Also in 2015, only a few months after entering its first DPA, Deutsche executed a second NPA,[166] this time with a four-year term.[167] Through conduct markedly similar to the conduct leading to its 2010 NPA, between 2001 and 2013, Deutsche Bank maintained accounts that allowed its clients to avoid tax liability in the United States.[168] As it did in Deutsche Bank's 2010 NPA, the DOJ agreed not to prosecute Deutsche Bank for any tax-related offenses for its misconduct.[169] Deutsche Bank agreed to pay a $31 million penalty to settle the case.[170]

In 2021, Deutsche Bank executed a three-year DPA.[171] The criminal conduct giving rise to this DPA was two-fold. First, between 2009 and 2016, Deutsche Bank executed contracts with third-party business consultants in foreign countries to make illegal payments to government officials.[172] Second, between 2008 and 2013, Deutsche Bank commodities traders engaged in a spoofing scheme affecting the market for precious metals futures.[173] The for-

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the London Interbank Offered Rate, and How Was It Used?, INVESTOPEDIA, https://www.investopedia.com/terms/l/libor.asp [https://perma.cc/FQ7H-ARE2] (June 21, 2024). EURIBOR rates are interest rates that represent the average interest rate at which European banks issue short-term loans to one another. *See generally* Adam Hayes, *Euro Interbank Offer Rate (Euribor) Definition, Uses, Vs. €STR*, INVESTOPEDIA, https://www.investopedia.com/terms/e/euribor.asp [https://perma.cc/C2YL-RC5P] (Aug. 16, 2024).

[164] Press Release, Off. of Pub. Affs., Dep't of. Just., Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation [https://perma.cc/N9SX-JQXQ].

[165] Ben Rooney, *Deutsche Bank in $2.5 Billion Settlement Over Interest Rate Manipulation*, CNN MONEY, https://www.cnn.com/2015/04/23/news/deutsche-bank-libor-settlement/index.html [https://perma.cc/5FNN-WKNN] (Apr. 23, 2015).

[166] *See* Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Announces Deutsche Bank (Suisse) SA Reaches Resolution Under Swiss Bank Program (Nov. 24, 2015), https://www.justice.gov/archives/opa/pr/justice-department-announces-deutsche-bank-suisse-sa-reaches-resolution-under-swiss-bank [https://perma.cc/RR6Q-CE6P].

[167] Letter from U.S. Dep't of Just., Tax Div. to Michael N. Levy 5 (Nov. 24, 2015) (NPA).

[168] *Id.* at 9–12.

[169] *Id.* at 1. The government also agreed not to pursue any charges for monetary transaction offenses under 31 U.S.C. §§ 5314 and 5322. *Id.*

[170] Zacks Equity Rsch., *Deutsche Bank Suisse Resolves Tax Case; to Pay $31M*, YAHOO! NEWS, https://finance.yahoo.com/news/deutsche-bank-suisse-resolves-tax-202508310.html [https://perma.cc/7FSV-JYNM] (Nov. 25, 2015).

[171] Deferred Prosecution Agreement at 3, United States v. Deutsche Bank, No. 1:20-cr-00584 (E.D.N.Y. Jan. 7, 2021).

[172] *Deutsche Bank Settles FCPA Investigation*, WILKIE COMPLIANCE (Jan. 8, 2021), https://complianceconcourse.willkie.com/articles/news-alerts-2021-01-january-20210108-deutsche-bank-settles-fcpa-investiga/ [https://perma.cc/WXP6-HGRH].

[173] *See* Press Release, Off. of Pub. Affs., Dep't of Just., Deutsche Bank Agrees to Pay Over $130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case (Jan. 8, 2021), https://www.justice.

mer conduct resulted in charges for violations of the FCPA while the latter conduct resulted in a charge for wire fraud.[174]

In short, like JPMorgan and other institutions, Deutsche Bank has repeatedly committed often-similar criminal offenses and received the benefit of multiple DPAs and NPAs. Prior efforts to deter Deutsche Bank have been unsuccessful. And, like JPMorgan, recent events suggest Deutsche Bank will continue to violate the law. In 2022, for example, Deutsche Bank violated its 2021 DPA by failing to timely report a complaint from a whistleblower who alleged Deutsche Bank overstated its environmental, social, and governance investments by hundreds of billions of dollars.[175]

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Like an individual, an organization is not destined to reoffend simply because it has committed an offense in the past. But as this Section demonstrates, many organizational offenders like JPMorgan and Deutsche Bank do commonly reoffend, particularly after receiving initial prosecutorial leniency via at least one DPA or NPA.[176] The statistics, trends, and case examples discussed in this Section show that the current use of DPAs and NPAs fails to adequately deter organizational defendants from reoffending. Meanwhile, as organizations continue to commit new criminal offenses, victims endure the severe consequences of those offenses[177] and organizational stakeholders pay the price via lay-offs and lost investments due to a decrease in the organizations' stock price.[178] The law surrounding the use of DPAs and NPAs in the organizational

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gov/opa/pr/deutsche-bank-agrees-pay-over-130-million-resolve-foreign-corrupt-practices-act-and-fraud [https://perma.cc/G2E3-WBW4].

[174] *See* Deferred Prosecution Agreement, *supra* note 171, at 1–2.

[175] Brian Monroe, *Deutsche Bank Admits Breach of 2021 DOJ DPA Tied to EST Reporting Failures, Has Current Compliance Monitor Extended to 2023*, ASS'N OF CERTIFIED FIN. CRIME SPECIALISTS (Mar. 14, 2022), https://www.acfcs.org/deutsche-bank-admits-breach-of-2021-doj-dpa-tied-to-esg-reporting-failures-has-current-compliance-monitor-extended-to-2023/ [https://perma.cc/PAM8-8JVQ]. The only recourse for Deutsche Bank's violation was an extension of its corporate monitor. Steven Arons, *Deutsche Bank Violated Deferred Prosecution Deal with U.S.*, BLOOMBERG L. (Mar. 11, 2022), https://www.bloomberglaw.com/bloomberglawnews/banking-law/X5SUPBRC000000?bna_news_filter=banking-law#jcite [https://perma.cc/VDM2-DG8E].

[176] *See infra* Part I.C.

[177] Professor Paul Cassell has written extensively about crime victims' rights, including in the organizational crime context. *See, e.g.*, Paul G. Cassell & Michael Ray Morris, Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 61 AM. CRIM. L. REV. 329, 382–83 (2024) (discussing Boeing's criminal conduct relating to two crashes that killed 346 passengers).

[178] *See* John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 973 (2022) (recognizing reputational loss from a prospective criminal prosecution has a negative effect on a corporation's stock price); James B. Stewart, *SAC: A Textbook Case of Corporate Prosecution*, CNBC (Nov. 5, 2013), https://www.cnbc.com/2013/11/05/sac-a-textbook-case-of-corporate-prosecution.html [https://perma.cc/SDZ9-7R7F] (noting that employees of a charged company "may lose their jobs as the firm winds down").

context must adapt to fairly and adequately deter organizations from reoffending while also preventing these harms.[179] Implementing the proposed solutions discussed in Part III will begin to promote deterrence and ensure fairness in this space.

II. FEDERAL SENTENCING OF INDIVIDUALS AND ORGANIZATIONS

This Section provides background on federal sentencing. First, Section A discusses federal sentencing generally, focusing on the most important federal sentencing regimes.[180] Second, because Part III of this Article references the federal sentencing guidelines provisions for sentencing individuals, Section B provides background on the individual guidelines.[181] Finally, to understand the shortcomings in the current organizational guidelines that prompt the need for the solutions proposed in Part III, Section C provides background on relevant organizational guidelines provisions.[182]

A. Federal Sentencing Generally

Federal sentencing of both individuals and organizations is governed by statute and the U.S. Sentencing Guidelines Manual.[183] The most pertinent statute for federal sentencing is 18 U.S.C. § 3553(a). Section 3553(a) requires a federal district court to consider various factors in imposing "a sentence sufficient, but not greater than necessary" to achieve several sentencing goals.[184] The factors a court must consider include: "the nature and circumstances of the offense[;]" "the history and characteristics of the defendant[;]" the sentencing guidelines; and "the need for the sentence . . . to promote respect for the law[,] . . . provide just punishment[,] . . . protect the public[,] . . . afford adequate deterrence[,]" and provide rehabilitation.[185] After weighing these factors in light of the circumstances, a court may impose a sentence that includes a combination of

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[179] *See infra* Part III.

[180] *See infra* Part II.A.

[181] *See infra* Part II.B.

[182] *See infra* Part II.C.

[183] *See generally* U.S. SENT'G COMM'N, GUIDELINES MANUAL (2024). This Article focuses on the federal sentencing guidelines, but a number of states have also adopted sentencing guidelines. *See* Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 FED. PROB. J. 28, 28 (2017) (analyzing various state sentencing guidelines).

[184] 18 U.S.C. § 3553(a).

[185] *Id.* § 3553(a)(1)–(2); *see also* Pepper v. United States, 562 U.S. 476, 488 (2011) (noting that there is no limitation on the information concerning a defendant's background, character, or conduct a district court may consider at sentencing). Deterrence comes in two forms: specific deterrence and general deterrence. The goal of specific deterrence is to discourage the particular offender from committing future offenses. David Oliwenstein & John Van Son, *The Declining Need for General Deterrence in Insider Trading Sentencing*, WHITE COLLAR CRIME COMM. NEWSL., Summer/Fall 2023. The goal of general deterrence is to discourage other members of the public from committing future offenses. *Id.*

a term of imprisonment[186] or probation,[187] a fine,[188] a term of supervised release following any imprisonment,[189] restitution,[190] and forfeiture.[191]

The federal sentencing guidelines are as important in federal sentencing as § 3553(a) and other sentencing statutes.[192] Congress created the Sentencing Commission as part of the Sentencing Reform Act of 1984.[193] The Sentencing Commission promulgated the first edition of the federal sentencing guidelines in 1987,[194] and the Sentencing Commission is responsible for regularly amending the guidelines.[195] Before amending the guidelines in any given year, the Sentencing Commission considers legal developments, publishes priorities, conducts research, and receives feedback from the public regarding proposed amendments.[196]

Ultimately, the guidelines provide an objective, significantly mathematical framework for computing a defendant's sentence.[197] This framework enables a sentencing court to compute a recommended sentencing range (in months for terms of imprisonment and in dollars for fines) based on factors about the offense conduct and the characteristics of the defendant that are set forth in the guidelines.[198] The purpose of the guidelines is to promote uniformity and proportionality in federal sentencing that would not exist in a strictly indeterminate sentencing regime.[199]

Although § 3553(a) requires a federal judge to consider the guidelines when fashioning an appropriate sentence,[200] the guidelines range calculated is

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[186] 18 U.S.C. § 3581(a).

[187] *Id.* § 3561(a).

[188] *Id.* § 3571(a).

[189] *Id.* § 3583(a).

[190] *Id.* § 3556.

[191] *Id.* § 3554.

[192] *See* Pepper v. United States, 562 U.S. 476, 490 (2011) (explaining that "the Guidelines should be the starting point and the initial benchmark" for federal courts in sentencing (quoting Gall v. United States, 552 U.S. 38, 49–51 (2007))).

[193] *About*, U.S. SENT'G COMM'N, https://www.ussc.gov/about-page [https://perma.cc/9KPN-5UEC].

[194] U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 2 (2020).

[195] *Amendment Process*, U.S. SENT'G COMM'N, https://www.ussc.gov/amendment-process [https://perma.cc/95PD-3S5L]; s*ee also* 28 U.S.C. § 994(p) (providing the Sentencing Commission's statutory authority to issue amendments).

[196] *See Amendment Process*, *supra* note 195.

[197] *See* Matt Zapotosky, *Maureen McDonnell Sentencing Guidelines Call for 5 to 6 1/2 Years in Prison*, WASH. POST (Jan. 20, 2015), https://www.washingtonpost.com/local/virginia-politics/maureen-mcdonnell-sentencing-guidelines-call-for-5-to-6-and-12-years-in-prison/2015/01/20/58a76486-a0bb-11e4-903f-9f2faf7cd9fe_story.html [https://perma.cc/BJB9-FSYD].

[198] *See* DOYLE, *supra* note 25, at 1.

[199] *See* John A. Richter, *Pulling Over the United States Sentencing Guidelines: Defining "Arrest" Under Section 4A1.2(a)(2)*, 101 IOWA L. REV. 435, 442 (2015).

[200] 18 U.S.C. § 3553(a)(4).

not itself binding on federal judges.[201] Rather, a court may vary or depart from the guidelines range to impose a sentence above or below the recommended guidelines range at the court's discretion based on its consideration of the guidelines and weighing of the § 3553(a) factors.[202] Furthermore, a court may refuse to apply any particular guideline based on a policy disagreement with the guideline.[203] For example, in 2007, in *Kimbrough v. United States*, the Supreme Court affirmed a sentencing court's decision to award a downward variance in sentencing a defendant based on the court's view that the then-existing guidelines recommended disproportionately-severe sentences for crack cocaine offenders.[204] Furthermore, regardless of the recommended guidelines range, courts are restrained by statutory sentencing limits.[205] Thus, a sentencing court cannot impose a term of imprisonment or fine that is within the guidelines range if the sentence would violate an applicable statutory maximum or minimum.[206]

B. Individual Sentencing

Most of the federal sentencing guidelines assist in calculating sentences for individual (i.e., not organizational) defendants.[207] Under the individual guidelines, courts must calculate preliminary inputs before arriving at final sentencing range.[208]

First, a court must compute the defendant's "offense level."[209] The offense level is a numerical score from 1 to 43 determined by the defendant's

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[201] *See id.* § 3553(b)(1); *see also* Press Release, Dep't of Just., Fact Sheet: The Impact of *United States v. Booker* on Federal Sentencing (Mar. 15, 2006), https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf [https://perma.cc/MMR9-QL47] (noting that *United States v. Booker*, 543 U.S. 220 (2005), rendered the sentencing guidelines advisory).

[202] *See* U.S. SENT'G COMM'N, DEPARTURES AND VARIANCES 1–2 (2023). A "departure" refers to a deviation from the guidelines range based on a provision within the guidelines. *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C4.5 (recommending a departure "[i]f the offense presented a risk to the integrity or continued existence of a market"). In contrast, a "variance" refers to a deviation from the guidelines range based on the court's consideration of the § 3553(a) factors. *See* Vasiu & Vasiu, *supra* note 36, at 196 (explaining the differences between departures and variances).

[203] *See* Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 877 (2014).

[204] 552 U.S. 85, 111 (2007); *see also* United States v. Wroten, 744 F. App'x 245, 247–49 (6th Cir. 2018) (considering a policy argument against the two-level upward adjustment in child pornography cases for the use of a computer).

[205] *See* 18 U.S.C. § 3551(a) ("[A] defendant . . . shall be sentenced in accordance with the provisions of this chapter . . . .").

[206] *See* THOMAS W. HUTCHINSON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 5G1.2 (2023).

[207] *See* DOYLE, *supra* note 25, at 6 (noting that the guidelines contain a separate chapter for calculating the sentences of organizational defendants).

[208] *Id.* at 1.

[209] *Id.*

statute of conviction and specific offense characteristics.[210] Logically, more severe offense conduct generally results in a greater offense level. For example, a defendant who commits insider trading is assigned an offense level that is proportional to the amount of financial loss the defendant's offense caused.[211]

Second, the court must calculate the defendant's "criminal history category."[212] The criminal history category is a numeral of I to VI derived from the defendant's criminal record.[213] The guidelines recognize that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[214] Therefore, the guidelines increase a defendant's criminal history category if the defendant committed any prior felonies within fifteen years or any misdemeanors within ten years of the instant offense.[215]

The individual guidelines explicitly address how an individual's DPAs are counted. The guidelines provide that in calculating the defendant's criminal history category, "[d]iversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted."[216] On the other hand, a diversionary disposition is counted if it resulted "from a finding . . . of guilt . . . in a judicial proceeding."[217] Stated differently, a defendant's prior DPAs will increase the defendant's criminal history category just as convictions would as long as the DPAs resulted in findings of guilt. The policy behind this treatment of DPAs is the recognition of the guidelines that a defendant who is factually guilty but has received the benefit of a diversionary disposition generally should not be free to reoffend without consequences that attach to other repeat offenders.[218]

Finally, after a sentencing court has calculated the defendant's offense level and criminal history category, the court may then utilize the guidelines "sentencing table."[219] Using these inputs, the sentencing table recommends a tailored sentencing range for a term of imprisonment in months.[220]

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[210] *Id.*

[211] U.S. SENT'G COMM'N, *supra* note 183, §§ 2B1.1, 2B1.4.

[212] DOYLE, *supra* note 25, at 3.

[213] *Id.* at 1.

[214] U.S. SENT'G COMM'N, *supra* note 183, ch. 4, pt. A, introductory cmt.

[215] *Id.* § 4A1.1 & cmts. 1–3.

[216] *Id.* § 4A1.2(f); *see also id.*, ch. 1, pt. A, n.1 (recommending "a sentence other than a sentence of imprisonment" for a "nonviolent first offender," which would include a defendant who has no prior convictions but who has had a deferred disposition not resulting in a finding of guilt).

[217] *Id.* § 4A1.2(f); *see also* United States v. Martinez-Melgar, 591 F.3d 733, 737 (4th Cir. 2010) (noting a diversion disposition is counted only if it resulted in "(i) a finding or an admission of guilt (ii) in a judicial proceeding (iii) in open court").

[218] U.S. SENT'G COMM'N, *supra* note 183, § 4A1.2(f) cmt. 9.

[219] *Id.*, ch. 5, pt. A.

[220] *Id.*

C. Organizational Sentencing

Organizational sentencing shares some common characteristics with individual sentencing, but there are key distinctions. Originally promulgated in 1991,[221] Chapter Eight of the federal sentencing guidelines contains the provisions relevant in determining the appropriate sentence for an organizational defendant.[222] The essential purpose of the organizational guidelines is to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[223] Obviously, an organization is not susceptible to imprisonment like an individual. Thus, Chapter Eight provides for organizational sentences primarily in the form of monetary exactments, including fines,[224] for the purpose of deterring corporate wrongdoing and encouraging organizations to adopt prophylactic compliance programs.[225]

Chapter Eight's provisions provide a mathematical basis for calculating a recommended sentencing fine range, at least with respect to most organizations.[226] First, the court must calculate the defendant's "base fine."[227] The base fine amount is determined by the greatest of: (1) "the pecuniary gain to the organization from the offense"; (2) if the loss was caused "intentionally, knowingly, or recklessly," the pecuniary loss the organization's offense caused; or (3) an amount set forth in the guidelines Offense Level Fine Table, which corresponds to the particular organization's offense level.[228]

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[221] *See* U.S. SENT'G COMM'N, *supra* note 118, at 8 (explaining the origins of the organizational sentencing guidelines chapter).

[222] *See generally* U.S. SENT'G COMM'N, FINES UNDER THE ORGANIZATIONAL GUIDELINES 1 (2020); U.S. SENT'G COMM'N, *supra* note 183, ch. 8. An "organization" is any association that is not an individual and includes a corporation and a partnership. *See* U.S. SENT'G COMM'N, *supra* note 183, § 8A1.1 cmt. 1.

[223] U.S. SENT'G COMM'N, *supra* note 118, at 8.

[224] *See* Timothy A. Johnson, *Sentencing Organizations After* Booker, 116 YALE L.J. 632, 643 (2006) (documenting the use of fines to punish and deter corporate crime); *see also* Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 265 (1993) (noting the guidelines encourage including restitution orders in organizational sentences to remedy the harms caused). *But see* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 919–22 (2019) (discussing nonmonetary sanctions, including probationary measures, available under the guidelines).

[225] *See* Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIA. L. REV. 321, 323–24, 324 n.8 (2012) (arguing that a critical goal of corporate punishment is to "reward firms that adopt an effective compliance program, self-report, and cooperate").

[226] U.S. SENT'G COMM'N, *supra* note 183, § 8C1.1 (providing that an organization operated for a criminal purpose or by criminal means shall incur a fine "sufficient to divest the organization of all its net assets").

[227] *Id.* § 8C2.4.

[228] *See id.* § 8C2.4(a).

Second, the court must calculate the defendant's culpability score, which is the criterium most important for this Article's proposals.[229] Like an individual defendant's criminal history category, an organizational defendant's culpability score serves as a proxy for the organization's criminal blameworthiness.[230] By default, an organization's culpability score is 5;[231] however, the guidelines provide criteria that can decrease the culpability score to as low as 0 or increase it beyond 10. Each culpability score from 0 to "10 or more" corresponds to a particular "multiplier range."[232] Although the culpability score may exceed 10, any culpability score at or above 10 will result in a multiplier range from 2.00 to 4.00.[233]

Factors that will decrease the organization's culpability score include that the organization had an effective compliance program "in place at the time of the offense"[234] and that the organization self-reported its criminal conduct, cooperated with the government's investigation, or accepted responsibility for its conduct.[235] Conversely, factors that will increase the organization's culpability score include a corporate officer's participation in the offense,[236] that the organization's offense violated an already-existing probation condition,[237] and that the organization obstructed justice.[238]

Most importantly, under sentencing guideline § 8C2.5(c), an organization's prior adjudications for "similar misconduct" is a factor that can increase its culpability score.[239] Stated generally, the more recent the organization's prior misconduct, the greater the increase in its culpability score. Thus, more specifically, if the organization committed the instant offense within ten years after receiving a prior criminal conviction based on "similar misconduct" or two prior civil adjudications based on "similar misconduct," the court must increase the organization's culpability score by one point.[240] And if the organiza-

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[229] *See id.* § 8C2.5–6.

[230] *See* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thought About Their Future*, 71 WASH. U. L.Q. 205, 239 (1993) ("[R]ecidivism can indicate an ambivalent corporate attitude toward violations of the law under certain circumstances . . . .").

[231] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(a).

[232] *See id.* § 8C2.6.

[233] *See id.* §§ 8C2.6, 8C2.8(a)(8). An upward departure, however, may be appropriate if the organization's culpability score exceeds 10. *Id.* § 8C4.11.

[234] *Id.* § 8C2.5(f); *see also* McConnell et al., *supra* note 64, at 530–31, 553–54 (discussing the elements of an effective compliance program).

[235] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(g).

[236] *Id.* § 8C2.5(b).

[237] *Id.* § 8C2.5(d).

[238] *Id.* § 8C2.5(e).

[239] *Id.* § 8C2.5(c). In determining whether an organization's prior history will increase its culpability score, a court must consider the organization's conduct in business and not the organization's formal business association structure. *See id.* § 8C2.5 cmts. 5–6.

[240] *Id.* § 8C2.5(c)(1).

tion committed the instant offense within five years of such criminal or civil adjudications, the court must increase the organization's culpability score by two points.[241] No increase in the organization's culpability score will occur if the organization's criminal or civil adjudications occurred more than ten years before the instant offense.[242]

Finally, to arrive at the appropriate fine range, the court must multiply the organization's base fine by its multiplier range.[243] The product of these inputs determines the organization's guidelines fine range.[244] It is important to note that because culpability scores range from 0 to "10 or more" for purposes of determining the applicable multiplier range, even a one- or two-point increase in an organization's culpability score can impact the ultimate fine range.[245]

After the court has computed the applicable fine range, the court must determine the actual fine to impose. The guidelines require that a court consider several factors in determining the fine.[246] Importantly, the court must consider "any prior civil or criminal misconduct by the organization other than that counted under § 8C2.5(c)."[247] Other factors the court must consider include whether the offense "involved a vulnerable victim" and whether the organization had an effective compliance program when it committed the offense.[248]

Aside from the guidelines, the court must consider the various sentencing purposes under § 3553(a) in imposing a fine, including the need to promote respect for the law and provide deterrence.[249] The court must also consider other statutory factors, such as the defendant's income, financial resources, any pecuniary loss the offense caused, and the organization's size.[250]

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[241] *Id.* § 8C2.5(c)(2).

[242] *Id.* § 8C2.5 cmt. 7.

[243] *See id.* §§ 8C2.6–7.

[244] *Id.*

[245] For example, an organization with a culpability score of 2 with no prior history would have a multiplier range of 0.40 to 0.80. *Id.* § 8C2.6. But the same organization with a two-point increase for recent criminal or civil adjudications would have a multiplier range of 0.80 to 1.60. *Id.* Thus, under such facts, the organization's fine would double based on the existence of prior history.

[246] *Id.* § 8C2.8(a).

[247] *Id.* § 8C2.8(a)(7).

[248] *Id.* § 8C2.8(a)(1), (5), (11).

[249] *See* 18 U.S.C. § 3553(a)(2); *see, e.g.*, United States v. Credit Suisse Sec. (Eur.) Ltd., No. 21-cr-00520, 2022 WL 2906202, at *2 (E.D.N.Y. July 22, 2022).

[250] 18 U.S.C. § 3572. The quantitative formula described above for calculating an organization's fine applies in most but not all cases. *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.1 (listing the offenses to which the formula applies). For example, the guidelines do not apply in calculating sentences for environmental offenses. *See, e.g.*, United States v. Evridiki Navigation Inc., No. 22-2032, 2023 WL 3734961, at *1–2 (3d Cir. May 31, 2023) (declining to apply the formula to violations of federal law implementing treaties governing ocean pollution). Where the formula does not apply, a court has broad discretion under 18 U.S.C. §§ 3553 and 3572 in fashioning an appropriate fine within the statutory sentencing range. *See, e.g.*, United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 200 (4th Cir. 2018) (affirming district court's sentence that was determined without regard to formula for calculating fine); United States v. Comprehensive Env't Sols., Inc., No. 7-20037-1, 2009 WL 1856228,

After considering all of these factors, the court has discretion in determining the amount of a fine within the applicable fine range as well as in deciding whether to vary or depart from the fine range.[251] Chapter Eight provides over a dozen grounds for departure that are unique to organizational defendants.[252] For example, a downward departure may be appropriate if the organization provided substantial assistance to law enforcement in investigating an offense, if the organization is a public entity, or if the victims of the offense are stakeholders of the organization.[253] On the other hand, an upward departure may be appropriate if the offense involved a "risk of death or bodily injury"; public corruption; or a threat to national security, the environment, or the market.[254] Furthermore, an upward departure may be appropriate if the organization's culpability score exceeds 10,[255] which makes sense given that a multiplier of 2.00 to 4.00 applies for any culpability score at or above 10.[256]

The grounds for a departure listed in Chapter Eight are not exhaustive. The guidelines clarify that certain grounds for departure contained in Chapter Five (which addresses grounds for departure for individual defendants) may also support a departure in the organizational defendant context.[257] For example, an upward departure may be warranted if the offense involved "a significant disruption of a governmental function"[258] or if the organization committed the offense to conceal another offense.[259] Chapter Five also includes a broad, residual ground for departure, permitting a court to depart based on circumstances not identified in the guidelines that are relevant in sentencing.[260] Of course, even if a court finds that a departure ground exists, the court still may impose a fine within the applicable fine range.[261]

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at *4 (E.D. Mich. June 29, 2009) ("[S]ince the Guidelines do not apply, there is no offense level computation, base fine calculation, culpability score assessment, or fine range."). *See generally* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.10.

[251] *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C3.3 (recommending a downward departure if the court finds the organization is financially unable to pay the fine without "jeopardizing the continued viability of the organization").

[252] *See id.* ch. 8, pt. 4.

[253] *Id.* §§ 8C4.1, 8C4.7–8.

[254] *Id.* §§ 8C4.2–8C4.6.

[255] *Id.* § 8C4.11.

[256] *Id.* § 8C2.6.

[257] *Id.* ch. 8, pt. 4.

[258] *Id.* § 5K2.7.

[259] *Id.* § 5K2.9.

[260] *Id.* § 5K2.0(a)(1)(A), (a)(2)(B). Chapter Five prohibits departures based on several grounds, including a defendant's acceptance of responsibility (which is taken into account under § 3E1.1) or decision to plead guilty. *Id.* § 5K2.0(d). None of the prohibited grounds for departure in Chapter Five would prevent a court from imposing a departure as recommended in Part III of this Article.

[261] *See* 18 U.S.C. § 3571(c) (providing statutory maximum fines for organizations).

This Part has provided background on federal sentencing law necessary to understand the need for reform proposed in Part III. Most importantly, while the organizational guidelines require a sentencing court to consider an organizational defendant's prior adjudications that occurred within ten years of the instant offense, the organizational guidelines (unlike the individual guidelines) do not inform sentencing courts whether or how to account for an organization's prior DPAs and NPAs. A sentencing court may consider an organizational defendant's prior DPAs and NPAs in considering the organization's history and characteristics under § 3553(a). Nevertheless, the guidelines do not explicitly require or preclude consideration of prior DPAs and NPAs when computing the defendant's culpability score.

III. Proposed Solutions: Amending the Guidelines and Using Upward Variances or Departures

Organizational recidivism is a serious and ongoing problem. Despite multiple DPAs and NPAs, organizations like JPMorgan, Deutsche Bank, and others continue to commit serious criminal offenses with no real consequences.[262] Recidivist organizational offenders like recidivist individual offenders must be held accountable for repetitive criminal behavior if deterrence and fairness are serious goals of enforcement authorities.[263]

Of course, a prosecutor considering whether to charge an organization with a subsequent offense may consider the organization's prior DPAs and NPAs just as it may consider prior convictions. Indeed, Justice Department guidance for prosecuting corporations recommends that prosecutors consider whether seeking a successive DPA or NPA instead of a formal conviction would be appropriate.[264] Further, the Monaco Memorandum informs prosecutors that when making a charging decision, prosecutors should consider a corporation's past criminal resolutions, including "non-trial resolutions, such as plea agreements, non-prosecution agreements [and] deferred prosecution agreements."[265] But while prosecutors may consider prior dispositions, prosecutors also have discretion to afford little weight to prior resolutions when making their charging decisions.

Importantly, no legal mechanism ensures that an organization's prior DPAs and NPAs receive appropriate consideration when the organization is sentenced for a subsequent offense. The sentencing statutes and the guidelines allow a court to consider an organization's prior DPAs and NPAs in the court's

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[262] *See supra* Part I.

[263] *See* Merle, *supra* note 13 (quoting Professor Ellen Podgor for the proposition that repeat organizational offenders should face increasing fines).

[264] U.S. Dep't of Just., Just. Manual § 9-28.600(A) (2023).

[265] Memorandum from Deputy Att'y Gen. Lisa Monaco, *supra* note 57, at 5 n.4.

consideration of the defendant's history and characteristics.[266] Nonetheless, nothing requires a court to uniformly consider and weigh the organization's prior DPAs and NPAs in imposing a fine.[267] To date, commentators and the Sentencing Commission have been silent on the appropriate consideration that prior DPAs and NPAs should receive at sentencing. This Part fills in that gap in the literature.

First, Section A asserts that the current sentencing guidelines do not account for prior DPAs and NPAs, addresses a counterargument to this assertion, and avers the failure of the guidelines to specifically respond to organizational DPAs and NPAs raises issues of deterrence and fairness.[268] Second, Section B asserts the Sentencing Commission may resolve these issues by adopting a number of amendments to the guidelines to account for an organization's prior DPAs and NPAs.[269] Third, Section C notes that alternatively, the courts may resolve these issues by using their discretion to vary or depart from the guidelines.[270] Finally, Section D addresses anticipated critiques to the proposed solutions.[271]

A. The Failure of the Guidelines to Address DPAs and NPAs

As suggested in Part II, the organizational guidelines, unlike the individual guidelines, do not address how a sentencing court should weigh an organization's prior DPAs and NPAs at sentencing.[272] Before accepting this point and moving forward, it is necessary to address an ambiguity in the guidelines that may lead some readers to believe the guidelines actually already address this issue. Specifically, under § 8C2.8(a)(7) of the guidelines, in determining the appropriate fine within the calculated fine range, a district court should consider "any prior civil or criminal misconduct by the organization other than that" already counted.[273]

Research demonstrates that this guideline does not require a sentencing court to appropriately consider an organization's prior DPAs and NPAs. First, the text of the guideline supports this interpretation. Section 8C2.8(a)(7) allows a sentencing court to consider only misconduct that resulted in a formal proceeding against the organization, and misconduct resulting in a DPA or an NPA does not meet this requirement.[274] As noted, § 8C2.8(a)(7) specifically allows a sentencing court to consider "civil or criminal misconduct" in select-

[266] 18 U.S.C. § 3553(a)(1)–(2).
[267] *See supra* Part I.
[268] *See infra* Part III.A.
[269] *See infra* Part III.B.
[270] *See infra* Part III.C.
[271] *See infra* Part III.D.
[272] *See supra* Part II.
[273] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.8(a)(7).
[274] *Id.*

ing a fine within the fine range.[275] Meanwhile, § 8C2.8(a)(7) indicates that the type of "misconduct" that may be considered is "other than" the type referred to in § 8C2.5(c).[276] The latter guideline allows a sentencing court to increase a defendant's culpability score if the defendant previously engaged in prior misconduct that resulted in "criminal," "civil," and "administrative" proceedings.[277] Because words used in the same textual scheme generally have the same meaning, by using the same words (i.e., "civil," "criminal," and "misconduct,") in multiple sections of the guidelines, it appears the Sentencing Commission intended for § 8C2.8(a)(7) to allow a sentencing court to increase a defendant's culpability score only based on prior misconduct that resulted in a formal proceeding.[278]

Importantly, as noted, § 8C2.5(c) itself allows for consideration of certain "misconduct" resulting in proceedings.[279] But § 8C2.5(c) limits the misconduct a court may consider by the age of the misconduct.[280] Thus, in sum, it seems the Sentencing Commission likely intended § 8C2.8(a)(7) to allow a sentencing court deciding on the fine to impose to consider misconduct that cannot be considered under § 8C2.5(c) because the attendant conviction is too old. The fact that organizations facing proceedings due to white-collar crimes often face parallel civil and criminal proceedings supports the interpretation that § 8C2.8(a)(7) allows a sentencing court to consider misconduct resulting in a proceeding but not a DPA or an NPA.[281]

Even if uncharged misconduct underlying prior DPAs and NPAs constituted "civil or criminal misconduct" under § 8C2.8(a)(7) such that either the parties or the court could consider prior DPAs and NPAs in the guidelines cal-

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[275] *Id.*

[276] *Id.*

[277] *Id.* § 8C2.5(c).

[278] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012) (explaining the textual canon of presumption of consistent usage); GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING: WITH ELEMENTS AND CLAUSES FOR CONSIDERATION 36 (5th ed. 2020) ("Use the same words for the same meanings every time." (emphasis omitted)); *see, e.g.*, United States v. Jones, 60 F.4th 230, 234–35 (4th Cir. 2023), *judgment vacated* 144 S. Ct. 1091 (2024) (mem.) (applying the presumption of consistent usage to 18 U.S.C. § 3553 and explaining that the canon "provides that '[i]dentical words used in different parts of the same statute are generally presumed to have the same meaning'" (quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005))).

[279] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(c).

[280] *Id.*

[281] *See* Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1068 (2021) (noting the prevalence of parallel civil and criminal proceedings); *see also* Press Release, Off. of Pub. Affs., Dep't of Just., Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts Without Customer Authorization (Feb. 21, 2020), https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices [https://perma.cc/M3BA-EUHZ].

culation, prior DPAs and NPAs still would not receive appropriate consideration under the guidelines. This is because § 8C2.8(a)(7) only allows other "civil or criminal misconduct" to be considered in determining an organization's fine within an already-calculated fine range, not in calculating the fine range itself.[282] Because an organization with multiple DPAs and NPAs is significantly more culpable than an organization without these prior resolutions, the prior resolutions (just like prior convictions) should have an impact on the organization's culpability score and the applicable fine range itself.

Second, the government's own practice in executing DPAs and NPAs supports this interpretation. In more recent DPAs and NPAs, the government and the defendants have agreed to the specific guidelines calculations and fine ranges that would apply if the organizations were sentenced for the offenses being settled. Although the sample size is small and the data is difficult to analyze because it is impossible to know the parties' bases for conducting their calculations, a review of several recent DPAs and NPAs executed by organizations that had at least one prior DPA or NPA suggests that the parties do not believe prior DPAs and NPAs are counted in the guidelines calculation.

A few examples illustrate the point. In 2018, Credit Suisse, a Swiss financial institution, executed an NPA following violations of the FCPA deriving from its conduct in hiring persons with connections to foreign officials to create business opportunities.[283] Nonetheless, when Credit Suisse executed a DPA in 2021 for committing wire fraud also to influence foreign government officials to generate business, the 2021 DPA did not account for the 2018 NPA.[284] Similarly, in 2015, Société Générale, another Swiss banking institution, executed an NPA to resolve charges following Société Générale's deceptive conduct in aiding U.S. taxpayers in avoiding tax liability.[285] Yet when Société Générale executed a subsequent DPA in 2018 for deceptive conduct leading to charges for violations of the FCPA and for delivering false reports concerning market information, the 2018 DPA's calculation of the fine range added no increase to the culpability score or fine range based on Société Générale's 2015 DPA.[286] Again, the fact that the government and defendants have not account-

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[282] *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.8 cmt. 5 ("The civil and criminal misconduct counted under § 8C2.5(c) increases the guideline fine range.").

[283] Press Release, Off. of Pub. Affs., Dep't of Just., *supra* note 123.

[284] *See* Deferred Prosecution Agreement at 1, 8–9, United States v. Credit Suisse Grp., AG, No. 21-cr-00521 (E.D.N.Y. Oct. 19, 2021) (ignoring Credit Suisse's 2015 NPA).

[285] Press Release, Off. of Pub. Affs., Dep't of Just., Two More Banks Reach Resolutions Under Justice Department's Swiss Bank Program (June 9, 2015), https://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program-0 [https://perma.cc/B9PR-384W].

[286] *See* Deferred Prosecution Agreement at 1–2, 12–13, United States v. Société Générale, No. 18-cr-000252 (E.D.N.Y. June 6, 2018) (not accounting for Société Générale's 2015 NPA). One might assert the 2018 DPA does not account for the 2015 NPA because the conduct involved in each offense was not "similar misconduct" under § 8C2.5(c). But a court would almost certainly find these offenses

ed (or at least have not consistently accounted) for prior DPAs and NPAs when conducting formal guidelines calculations supports the proposition that the guidelines do not require courts to consider them.

It is possible the government and the defendant could simply account for an organization's prior DPAs and NPAs by treating them as prior adjudications, which would result in a one- or two-point increase under the guidelines.[287] But relying on the parties to do so is not an optimal solution. Without clear guidelines setting forth in detail exactly how prior DPAs and NPAs should affect the fine range or fine, courts are unlikely to treat prior DPAs and NPAs consistently. Furthermore, every organizational defendant facing potential or actual charges is under pressure to settle its case and avoid the risk of prosecution if it does not comply with the prosecutor's proffered calculation. Every organizational defendant, then, for no reason other than duress, might assent to an erroneous calculation.

In short, the current organizational guidelines do not require courts to consider prior DPAs and NPAs. And even if an argument can be made that they do, amendments are warranted to clarify exactly how prior DPAs and NPAs should weigh in the sentencing determination. Without these amendments, courts at sentencing and the government in negotiating DPAs and NPAs will diverge in their treatment of similar offenders, which undermines the primary purpose of the guidelines: promoting uniformity in sentencing.[288]

The failure of the guidelines to require consideration of organizations' prior DPAs and NPAs is ill-advised for two main reasons: (1) it undermines deterrence in organizational criminal enforcement; and (2) it creates perceptions of unfairness. First, as Part I's discussion of recidivist organizational offenders demonstrates, using DPAs and NPAs alone does not deter organizational offenders from reoffending.[289] JPMorgan and Deutsche Bank, for example, have repeatedly violated the law over the last decades despite having already executed multiple prior DPAs and NPAs.[290] More reform is needed if deterrence is a legitimate goal and if the Sentencing Commission desires to force recidivist companies to view criminal fines as more than a small cost of doing business. This Article's proposals in the following Sections provide a concrete way for the Sentencing Commission or the courts to deter organiza-

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involved "similar misconduct" because they both involved intentional deceptive conduct affecting or relating to financial markets.

[287] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.6.

[288] *See* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 CIN. L. REV. 749, 749 (2006) (noting that all nine justices agreed that uniformity was a primary goal of Congress in adopting the sentencing guidelines).

[289] *See Do NPAs and DPAs Deter?*, FCPA PROFESSOR (Mar. 12, 2023), https://fcpaprofessor.com/do-npas-and-dpas-deter/ [https://perma.cc/GZ9E-9MX8] ("[T]he 'actual deterrent effect [of NPAs and DPAs have] not been quantified.'" (alteration in original)).

[290] *See supra* Part I.C.

tional offenders from reoffending following DPAs or NPAs.[291] The threat of not only criminal proceedings following a repeat offense but also enhanced penalties resulting from those proceedings will contribute toward general and specific deterrence.

Second, the current regime raises fairness concerns and undermines the public's perception of the judiciary and justice system, important factors to consider when creating sentencing policy. As noted, individual defendants' prior DPAs and NPAs are considered at sentencing when calculating the defendants' criminal history scores.[292] But the same is not true of organizational defendants.[293] Of course, there are many differences between individual offenders and organizational offenders that may justify different treatment of individual and organizational defendants in various contexts. But commentators regularly consider the law's treatment of individuals when postulating regime changes in the corporate enforcement realm,[294] and it is reasonable to do so here. In brief, it is inherently and optically unfair that defendants who each share the same types of prior diversionary dispositions receive different treatment under the law, particularly when the organizational defendants that receive better treatment are often large organizations with wealth and close ties to the government. The policy reason the guidelines offer for permitting consideration of an individual's prior DPAs is that a defendant who was guilty but received the benefit of a diversionary disposition should not be free to reoffend without consequences that attach to other repeat offenders who were convicted.[295] That same logic applies to organizational defendants.

B. Amending the Guidelines

The Sentencing Commission can easily address the concerns of deterrence and fairness described above by amending the guidelines to require courts to fairly and consistently consider an organization's prior DPAs and NPAs at sentencing. However, the Sentencing Commission's recent amendments to the guidelines have not addressed these concerns, and there seems to be no plan for the Sentencing Commission to resolve these concerns anytime soon.[296] This Section proposes practical amendments that the Sentencing

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[291] *See infra* Part III.B.

[292] *See* U.S. SENT'G COMM'N, *supra* note 183, § 4A1.2(f) ("Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted.").

[293] *See* Kaleb Byars, Bostock*: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L. REV. 483, 515 (2022) ("[T]he law should be consistent where possible as such promotes confidence and trust in the judicial system.").

[294] *See, e.g.*, Garrett, *Corporate Crimmigration*, *supra* note 87, at 388–89.

[295] *See* U.S. SENT'G COMM'N, *supra* note 183, § 4A1.2(f) cmt. 9 ("[D]efendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.").

[296] *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 134–35 (2023).

Commission may adopt to achieve these goals, and it describes the rationale underlying each proposed amendment.

First, the Sentencing Commission should amend the guidelines to allow for an increase in an organizational defendant's culpability score if the defendant has executed prior DPAs and NPAs. Currently, the guidelines increase a defendant's culpability score by two points for prior misconduct that occurred within five years of the instant offense and resulted in an adjudication.[297] Alternatively, a modest one-point increase applies if the prior misconduct occurred between five and ten years before the instant offense and resulted in an adjudication.[298] Again, these guidelines do not require an increase in the culpability score based on prior DPAs and NPAs because no formal proceedings correspond with DPAs and NPAs.[299]

The Sentencing Commission must recognize that, as a practical matter, in the organizational context, a DPA or an NPA is the functional equivalent of a prior conviction. Individual defendants in federal court only rarely receive DPAs and NPAs while organizational defendants commonly receive DPAs and NPAs. Because the government disproportionately uses DPAs and NPAs in the organizational context, they (in addition to formal convictions) are the best indicators of an organization's culpability, at least insofar as the organization's prior wrongdoing is concerned.

Moreover, the government uses DPAs and NPAs to address extremely serious organizational misconduct that has extremely serious consequences.[300] Consider, for example, Boeing's 2021 DPA that resulted from Boeing's fraud that led to two plane crashes and 346 deaths.[301] Consider also General Motors's 2015 DPA that resulted from General Motors's fraud that led to vehicle accidents and 174 deaths.[302] There is no question the government would seek formal prosecution and not diversions in the same cases in the individual context. Consequently, the Sentencing Commission should amend the guidelines to require courts to increase an organization's culpability score (and consequently its fine range) if the organization has prior DPAs or NPAs.

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[297] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(c)(2).

[298] *Id.*

[299] *See supra* Part II.

[300] *See, e.g.*, Cassell & Morris, Jr., *supra* note 177, at 382–83. *But see generally* Peter R. Reilly, *Outlawing Corporate Prosecution Deals When People Have Died*, 55 ARIZ. ST. L.J. 1351 (2023) (arguing that Congress should prohibit the government from offering DPAs and NPAs when corporate crime causes death).

[301] Press Release, Off. of Pub. Affs., Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion [https://perma.cc/5RY3-VYY3].

[302] *See* Peter R. Reilly, *When Corporate Misconduct Leads to Death, Deferred Prosecution Should Not Be Permitted*, CLS BLUE SKY BLOG (Oct. 2, 2023), https://clsbluesky.law.columbia.edu/2023/10/02/when-corporate-misconduct-leads-to-death-deferred-prosecution-should-not-be-permitted/ [https://perma.cc/QX9Q-28FW].

Second, and relatedly, the Sentencing Commission should amend the guidelines to require a progressive increase in a defendant's culpability score when the defendant has multiple prior criminal settlements. This increase must be sufficient to adequately punish and deter recidivist organizational defendants. The current guidelines offer a mere one or two-point increase for prior misconduct resulting from an adjudication, depending on the age of the prior misconduct.[303] However, the guidelines do not account for the quantity of adjudications. Thus, absent a variance, an organization cannot receive an increased fine based on the existence of multiple prior adjudications.[304]

This framework is untenable given the existence of recidivist organizational defendants that continue to reoffend despite having already received multiple DPAs and NPAs. Just as an individual defendant is generally more culpable (and thus is placed in a higher criminal history category) if he or she has numerous prior convictions,[305] an organizational defendant is more culpable when it has repeatedly violated the law despite receiving leniency via multiple DPAs and NPAs. Amending the guidelines to account for the quantity of prior resolutions rather than just the age of the most recent adjudication would encourage courts to associate greater culpability with and impose greater penalties on organizational defendants that have repeatedly disregarded the law despite prior leniency.

Third, the Sentencing Commission should adjust the appropriate age cutoff for prior resolutions that may be considered. Currently, the guidelines do not allow for an increase in the culpability score based on misconduct that occurred more than ten years before the instant offense.[306] For parity with the individual guidelines treatment of a defendant's prior felony convictions, this Article proposes that only a DPA, an NPA, or a conviction of an organization that occurred more than fifteen years before the organization's instant offense should not increase the organization's culpability score.[307]

The proffered fifteen-year cutoff is not arbitrary; it is the same cutoff used for individual defendants. After a fifteen-year period, an organization, like an individual, is likely to be different in character. Given the frequency with which an organization's board of directors, members, partners, or other man-

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[303] U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5.

[304] *See id.* § 8C2.5(c) ("If more than one applies use the greater . . . .").

[305] *See* United States v. Rivera, 494 F. App'x 707, 712 (8th Cir. 2012) (explaining that a sentencing disparity between codefendants is not unwarranted when one defendant has a greater criminal history than the other); *see also* U.S. SENT'G COMM'N, *supra* note 183, ch. 4, pt. A, introductory cmt. ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment . . . . Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.").

[306] *See* U.S. SENT'G COMM'N, *supra* note 183, § 8C2.5(c).

[307] *See id.* § 4A1.2(e)(1) (indicating that individual defendants' felony convictions within the prior fifteen years are counted).

agers may change, an offense the organization committed over fifteen years before the instant offense is less indicative of the defendant's culpability than a more recent offense would be. Indeed, almost eighty-five percent of a corporation's board members will be different fifteen years after a given point in time.[308] Further, just as an individual defendant's recidivism decreases with age because of education earned in prison, physical disabilities, maturation, or any other reasons, an organizational defendant's risk of recidivism naturally decreases as organizational culture changes, which occurs as members of the organization's decision-making body are terminated and replaced.[309]

Rather than a specified cutoff age, an alternative approach could be to implement amendments directly requiring courts to consider whether a substantial change in the organizational culture has occurred since any given prior DPA, NPA, or conviction. But such an approach would require sentencing courts to receive evidence on and conduct factfinding into the quantitative and qualitative change in the organization's directors and officers since the prior adjudication or disposition. Sentencing courts are certainly capable of conducting this type of factfinding, but judicial efficiency favors a cutoff-based approach instead. A factfinding-based approach would require sentencing courts to take significant time to receive relevant evidence and make findings as to whether a change of control has occurred since each and every prior adjudication or disposition. The resources to take these steps would be substantial when, like JPMorgan, the prior entity has numerous prior adjudications.

What is more, under a factfinding approach, courts would be troubled with making the difficult determination of whether a "real" change in organizational leadership has occurred since the prior resolutions and is a significant enough change to conclude that the organization should not receive a heightened penalty for its prior conduct. For example, consider if half of the members of a corporate defendant's board of directors have changed since the prior disposition. Should the court conclude this change is significant enough? Should the court receive evidence from the remaining directors to determine

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[308] *See* Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 18, 2020), https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/ [https://perma.cc/S2K2-B4UW] (noting that the average tenure of seated directors of the United States's largest corporations is roughly ten years, that only one third of seated directors had served for at least twelve years, and that only 15.9% of seated directors had served for at least sixteen years).

[309] *See* MATTHEW R. DUROSE & LEONARDO ANTENANGELI, DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017), at 5 (2021) (cataloguing rates and demographics of recidivist offenders); German Lopez, *Why Prisoners May Be Less Likely to Reoffend Than You Think*, VOX (Oct. 28, 2015), https://www.vox.com/2015/10/28/9631218/recidivism-rate-prison [https://perma.cc/947X-7TAS] (recognizing research demonstrating that recidivism decreases with age). *See generally* U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017) (collecting and summarizing statistics on the relationship between recidivism rates and age).

whether the attitude of the board as a whole has changed? Although theoretically answerable, these and other questions illustrate the need for a cut-off-based standard. These same concerns are likely the reason that the individual defendant guidelines also impose a hard cutoff date rather than requiring factfinding into whether the defendant has had a change of character since his or her prior fifteen-year-old offenses.

Assuming the Sentencing Commission accepts that these three changes are needed,[310] the next task is to decide exactly how much each qualifying prior resolution should increase a defendant's culpability score. This is a normative inquiry to some degree, and the Sentencing Commission will need to conduct research to determine the answer to this question. Ultimately, the amount of the increase must be sufficient to afford specific deterrence.

After the Sentencing Commission makes this determination, however, the final task is determining how to amend the guidelines from a procedural perspective. The Sentencing Commission can rely on its incorporation of specific offense characteristics tables from the individual guidelines in adopting the proposed amendments. By way of background, several guidelines for individual defendants utilize tables that incrementally increase the defendant's total offense level depending on specific characteristics of the offense that make the offense objectively more serious.[311] Similarly, the organizational guidelines should include a table that incrementally increases an organizational defendant's culpability score based on the number of the organization's qualifying prior convictions, DPAs, or NPAs. Thus, for example, the guidelines could provide that: (1) an organization with one to two prior convictions, DPAs, or NPAs will receive a one-point increase to its culpability score; (2) an organization with three or four prior convictions, DPAs, or NPAs will receive a two-point increase to its culpability score; and (3) an organization with five or more prior convictions, DPAs, or NPAs will receive a three-point increase to its culpability score.[312]

If these amendments are adopted, separate amendments will need to address how courts should consider prior misconduct that resulted in civil or ad-

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[310] By no means are these three amendments the only amendments that are needed. Consider, for example, that an individual defendant may face an increased criminal history category based on dissimilar prior offenses. *See generally* U.S. SENT'G COMM'N, *supra* note 183, §§ 4A1.1–1.2. By contrast, organizations may face an increased culpability score only based on "similar" prior misconduct. *Id.* § 8C2.5(c). Amendments addressing this incongruity are beyond the scope of this Article; though, a future article may explore the topic.

[311] *See, e.g.*, *id.* § 2B1.1(b)(1) (increasing a defendant's offense level based on the amount of the loss resulting from the theft); *id.* § 2K1.3(b)(1) (increasing a defendant's offense level based on the amount of explosive materials involved in the offense); *id.* § 2K2.1(b)(1) (increasing a defendant's offense level based on the number of firearms involved in the offense).

[312] The precise number of prior adjudications, DPAs, or NPAs that should result in any particular increase from a normative perspective is beyond the scope of this Article.

ministrative adjudications but not criminal convictions, DPAs, or NPAs. Conduct giving rise to civil or administrative adjudications is presumably less culpable than conduct giving rise to criminal charges, a DPA, or an NPA.[313] Thus, the current guidelines effectively require two civil or administrative adjudications for every criminal conviction to increase the organization's culpability score.[314] Retaining this view, the guidelines should specify that if an organization has no criminal adjudications or diversionary dispositions but civil or administrative adjudications during the relevant time period, then the organization may receive an increased culpability score as follows: (1) a one-point increase if the organization has two to four prior civil or administrative adjudications; (2) a two-point increase if the organization has five to eight prior civil or administrative adjudications; and (3) a three-point increase if the organization has more than eight civil or administrative adjudications.

From a formatting perspective, the Sentencing Commission should adopt the proposed amendments in § 8C2.5. Section 8C2.5 makes pragmatic sense to host these amendments because it provides the current guidance for calculating an organizational defendant's culpability score.[315] Furthermore, the amendments logically fit within § 8C2.5(c) because that subsection currently provides for an increase in a defendant's culpability score based on its prior misconduct resulting in criminal, civil, or administrative adjudications[316] and because organizational DPAs and NPAs are the practical equivalent of organizational criminal convictions.

The Sentencing Commission may consider specifically amending § 8C2.5(c) to read as follows:

> § 8C2.5. Culpability Score

* * * * *

> (c) PRIOR HISTORY.
>
> (1) If the organization (or separately managed line of business) committed any part of the instant offense less than 15 years after at least one criminal adjudication, diversionary disposition, or non-prosecution agreement based on similar misconduct, increase the organization's culpability score as follows:

[313] *See supra* Part II.
[314] *See generally* U.S. SENT'G COMM'N, *supra* note 183, § 2B1.1(b)(1).
[315] *See generally id.* § 8C2.5.
[316] *Id.* § 8C2.5(c).

Number of Prior Criminal Adjudications, Diversionary Dispositions, or Non-Prosecution Agreements	Increase in Culpability Score
(A) 1–2	add 1
(B) 3–4	add 2
(C) 5 or more	add 3

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 15 years after at least one civil or administrative adjudication based on similar misconduct but the organization has no prior criminal adjudication, diversionary disposition, or non-prosecution agreement under subparagraph (1), increase the organization's culpability score as follows:

Number of Prior Civil or Administrative Adjudications	Increase in Culpability Score
(A) 2–4	add 1
(B) 5–8	add 2
(C) 9 or more	add 3

These amendments are preferred for the reasons explained, but the Sentencing Commission has a simpler (albeit less desirable) amendment option to achieve some of the same purposes. That is, the Sentencing Commission may simply amend the organizational guidelines provisions on departures to provide that a court may grant an upward departure if the organization has prior DPAs or NPAs. If the Sentencing Commission were to adopt this amendment, it could incorporate the amendment in Chapter Eight, Part C, Subpart 4 of the guidelines, where the other grounds for departures for organizational defendants currently reside. Such an amendment could read as follows:

§ 8C4.11. Prior Diversionary Dispositions

If the organization committed the instant offense after entering into at least one diversionary disposition or non-prosecution agreement with a governmental entity based on similar misconduct, an upward departure may be appropriate.

One benefit of a departure-based solution is that it would allow sentencing judges greater discretion to increase the applicable fine depending on all of the circumstances, such as the number of prior DPAs and NPAs and the severity of the underlying conduct. Another benefit is its relative simplicity. Unfortunately, the primary drawback of this solution necessarily follows from its main benefit. Different sentencing judges are likely to use their discretion to

weigh the circumstances in different ways in different cases, causing sentencing disparities.

If the Sentencing Commission adopts either of the amendments proposed above, it should also clarify potential ambiguities of some of the terms used. For example, the Sentencing Commission may define the term "misconduct" to clarify the current ambiguity surrounding that term described in Part III.A. The Sentencing Commission should also define the terms "diversionary disposition" and "non-prosecution agreement" to ensure that courts may consider DPAs and NPAs as they are commonly understood in the organizational context. Additionally, given that courts often rely on the commentary to the guidelines in interpreting their meaning,[317] the Sentencing Commission should adopt commentary reflecting the reasons for the amendments, and the policy discussions in this Article may be used for this purpose.

In closing, it should be reemphasized that even under the current regime, courts may consider a defendant's prior DPAs and NPAs, especially considering the non-binding nature of the guidelines.[318] A sentencing court has free rein to consider any relevant information regarding a defendant's background, which certainly includes an organization's prior DPAs or NPAs.[319] But without clear guidelines delineating how DPAs and NPAs should be considered, judges and the parties will be free to weigh them heavily, lightly, or not at all in calculating sentences. If the primary purpose of the guidelines is to promote uniformity in federal sentencing (and it is),[320] allowing for differential treatment of prior DPAs or NPAs is not a just result.

C. Using Upward Variances or Departures

Amending the sentencing guidelines as proposed is the most effective way to promote deterrence and fairness in organizational sentencing. Nonetheless, until the Sentencing Commission adopts these amendments (or if it never does), courts may act to achieve the same goals.

Because the federal sentencing guidelines are not binding, district courts have authority to vary or depart from the guidelines to impose above-guidelines

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[317] Some courts treat commentary as "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of," the guideline at issue. United States v. Fields, 608 F. App'x 806, 812 (11th Cir. 2015) (quoting United States v. Contreras, 739 F.3d 592, 594 (11th Cir. 2014)).

[318] *See supra* Part II.

[319] *See* Pepper v. United States, 562 U.S. 476, 488 (2011) (noting that there is no limitation on the information concerning a defendant's background, character, or conduct a district court may consider at sentencing).

[320] *See* Richter, *supra* note 199, at 442; *see also* O'Hear, *supra* note 288, at 749 (stating that the Supreme Court characterized uniformity in sentencing to be "'Congress' basic goal' in adopting the guidelines").

sentences.[321] Nevertheless, rather than considering whether to grant a variance or departure based on prior DPAs and NPAs, sentencing courts routinely just adopt the parties' sentencing recommendations, even when the instant misconduct is similar to the misconduct that led to prior DPAs and NPAs.[322] District courts should begin using their authority to vary or depart when an organization being sentenced has prior DPAs and NPAs.

First, a court may impose an upward variance when an organizational defendant has prior DPAs and NPAs based on the defendant's unique history and characteristics.[323] An organizational defendant's prior DPAs and NPAs are relevant to its history and characteristics because they reflect an unusual disregard for the law and a greater need for specific deterrence. Alternatively, a court may impose an upward variance based on the sentencing court's policy disagreement with the guidelines. For the reasons stated in this Part, the failure of the guidelines to account for an organization's prior DPAs and NPAs causes the guidelines fine range to understate the organizational defendant's culpability. A sentencing court may rely on that fact in expressing a policy disagreement with the guidelines to support an upward variance.

Second, a sentencing court may impose an upward departure when an organizational defendant has prior DPAs and NPAs. Ideally, at minimum, the Sentencing Commission should amend the guidelines to create an upward departure based on an organization's prior DPAs and NPAs. If the Sentencing Commission makes that amendment, a court may use the new departure ground to impose an above-guidelines sentence. If the Sentencing Commission refuses to make this change, however, a sentencing court may still grant an upward departure based on a departure ground already contained in the guidelines. As noted, § 5K2.0 (contained in Chapter Five, Part K, which is explicitly referenced in the organizational guidelines) permits a court to depart based on circumstances not identified in the guidelines but that are relevant to sentencing.[324] An organization's prior DPAs and NPAs are relevant to its sentencing because they are the functional equivalent of prior convictions, which are indicative of the organization's culpability and recidivism risk. Thus, a court

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[321] *See supra* Part II.A.

[322] *See* Sentencing Transcript at 27, United States v. Royal Bank of Scot., No. 3:15-cr-00080 (D. Conn. Jan. 5, 2017) (considering the guidelines calculation in a summary fashion when adopting the parties' recommendations from a Rule 11(c)(1)(C) plea agreement deriving from antitrust law violations); Deferred Prosecution Agreement, United States v. Royal Bank of Scot. PLC, No. 3:13-cr-00074 (D. Conn. Feb. 5, 2013) (prior DPA also partially based on antitrust law violations).

[323] *See supra* Part II.A.

[324] U.S. SENT'G COMM'N, *supra* note 183, § 5K2.0(a)(1)(A), (a)(2)(B), (b)(1). None of Chapter Five's prohibited grounds for departure would prevent a court from imposing a departure as recommended in this Article. *See supra* note 260.

may use § 5K2.0 to issue an above-guidelines sentence to account for the failure of the guidelines to address organizational DPAs and NPAs.[325]

D. Addressing Critiques

This Section addresses a few potential critiques to this Article's solutions. First, one may question how the proposed amendments will provide any benefit when, in practice, the DOJ rarely seeks formal convictions against organizational defendants and thus sentencing courts would only rarely apply the proposed amendments. There is some merit to this counterargument. After all, if the government only occasionally seeks formal convictions, it is true the proposed guidelines will only occasionally be used by sentencing courts.

There are two responses to this counterargument. In the first place, if the DOJ genuinely wishes to deter organizational crime, it must seek formal criminal convictions more often.[326] If the DOJ seeks more convictions, the proposed amendments will apply more often. In the second place, even without formal criminal proceedings, as discussed, when the government and an organization negotiate the fine to be imposed in a DPA or an NPA, the parties consider the fine range that would apply to the organization if formally prosecuted.[327] Thus, even if the proposed amendments would only rarely apply at formal sentencings, they will frequently be considered and applied by the parties to the numerous DPAs and NPAs executed each year.

Second, one may question whether adopting this Article's solutions would deter organizations from entering into DPAs and NPAs. Indeed, a primary benefit of DPAs and NPAs to organizations is that they do not result in convictions. But it must be remembered that DPAs and NPAs provide several other benefits to organizations, such as avoiding the risk and expense that would accompany proceeding to trial.[328] Moreover, treating DPAs and NPAs like convictions for purposes of sentencing would not require them to be treated as convictions for all purposes. Thus, for example, there is no reason to believe

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[325] Neither of the proposed solutions will present any constitutional issues associated with using a defendant's prior relevant conduct to increase its sentence so long as the increased sentence does not exceed the authorized statutory maximum sentence. *See generally* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

[326] *See* CLAYPOOL, *supra* note 85, at 5–6 (arguing that deterrence requires more frequent criminal charges against corporations). *See generally* Peter T. Edelman, *Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporation and Its Officers*, 92 DICK. L. REV. 193 (1987) (arguing corporate criminal prosecution deters future corporate crime).

[327] *See, e.g.*, Deferred Prosecution Agreement at 5–6, United States v. Recology S.F., No. 3:21-cr-00356 (N.D. Cal. Sept. 9, 2021); Deferred Prosecution Agreement at 7–8, United States v. Samsung Heavy Indus. Co., Ltd., No. 1:19-cr-00328 (E.D. Va. Nov. 22, 2019).

[328] *See supra* Part I.

that adopting the proposed solutions would cause organizations to suffer collateral consequences such as reputational harm, debarment, or delicensing that apply to convicted organizations.[329]

Third, a critic may note that DPAs and NPAs, unlike convictions following plea agreements, do not result from a court finding that the defendants committed the offense beyond a reasonable doubt. Thus, the critic may argue that DPAs and NPAs are less evident of true guilt than convictions and thus are not really the functional equivalent of guilty pleas. However, this criticism ignores that this concern applies to all criminal resolutions, including plea agreements. True, organizational defendants are under pressure to settle their cases to avoid negative publicity and consequences. And this Article does not dispute that wrongful DPAs or NPAs can occur. This Article simply suggests that the lack of a judicial finding of guilt is not a sufficient reason to distinguish DPAs and NPAs from convictions under the guidelines. As a practical matter, if DPAs and NPAs were subject to judicial review like plea agreements, the courts would routinely find the facts support the convictions.[330] Even if this is a legitimate concern, the Sentencing Commission could alleviate it by requiring the government to prove the truth of the conduct underlying prior DPAs or NPAs at sentencing before using the DPAs or NPAs to enhance the sentencing range.

Finally, some may question whether allowing courts to use uncharged conduct to enhance a subsequent sentence creates unfairness or due process concerns. The response is two-fold. In the first place, the guidelines already require courts to use individual defendants' DPAs to enhance their sentences. There is nothing unfair about holding organizations to the same standard. If due process concerns exist, they should be resolved as to both individual and organizational defendants. In the second place, one may argue that in some cases, the government uses DPAs or NPAs in lieu of formal prosecution because the organizational defendants' conduct is less blameworthy. Thus, the critic may argue the prior agreement should not be used to enhance a subsequent sentence. As explained, though, the government regularly uses DPAs and NPAs based on prudential concerns aside from the severity of the defendant's conduct.[331] Because organizational DPAs and NPAs are often used when plea

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[329] *See* Arlen & Kahan, *supra* note 66, at 333 (noting that DPAs and NPAs allow organizations to avoid the collateral consequences of criminal convictions).

[330] *See generally* Kaleb Byars, *A Concrete Standard of Judicial Review for Corporate Deferred Prosecution Agreements*, 78 FLA. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5139547 [https://perma.cc/7ZN8-8WHZ] (arguing for a standard of judicial review of DPAs that would require courts to make specific findings, including that the charges are adequately supported by the facts).

[331] *See supra* Part I.

agreements would be used in the individual defendant context, it is appropriate to treat DPAs and NPAs as prior convictions for sentencing purposes.[332]

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Adopting either of the proposed solutions—amending the guidelines or relying on variances or departures—will contribute to resolving the issues of deterrence and fairness that revolve around organizational sentencing. Yet adopting either solution, while necessary, is not sufficient to resolve these issues. In addition, the DOJ and other federal agencies must start diligently prosecuting organizations that reoffend, particularly after first receiving the benefit of DPAs and NPAs.[333] If the government continues to utilize successive DPAs and NPAs rather than seeking formal criminal convictions, adopting this Article's proposals will have a more minimal effect.[334] Federal charging authorities should closely consider the disadvantages of offering multiple DPAs and NPAs, and enforcement agencies should consider implementing a one-and-done or similar rule for DPAs and NPAs with organizational defendants.[335]

Nevertheless, implementing either of the proposed solutions will be a step toward achieving deterrence and fairness in organizational criminal enforcement. Prosecutors consider the organizational sentencing guidelines in deciding whether to prosecute an organization, and the government and defendants consider the guidelines in executing DPAs and NPAs.[336] Moreover, diligent companies must consider their potential exposure when deciding how to respond to government investigations. If an organization's agents are aware the organization might receive a higher sentence because of its prior DPAs and

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[332] Other potential criticisms include that reform should focus on issues other than improving the sentencing regime. Some critics might argue the focus should be on preventing corporate misconduct by improving compliance requirements or greater private enforcement through fiduciary duty or other civil liability. Others might assert the focus should be on ensuring that individual wrongdoers within organizations are held accountable because they (and not intangible organizations) actually commit violations. This Article does not dispute that reform in other areas is needed to optimally reduce corporate recidivism broadly. This Article simply posits that sentencing law might be one avenue through which to improve our system of organizational criminal justice. At minimum, in a system where DPAs and NPAs are used as frequently as they are, the guidelines should fairly respond to their use.

[333] *See* GARRETT, *supra* note 54, at 17 ("Corporate criminal prosecutions serve a distinct purpose—to punish serious violations and grossly deficient compliance—and this purpose is not served if companies obtain kid-glove non-prosecution deals in exchange for cosmetic reforms. Corporate convictions should be the norm, and in special cases in which prosecutors defer prosecution, they should impose deterrent fines and stringent compliance requirements.").

[334] *See* Phillips, *supra* note 17 (arguing that JPMorgan's repetitive illegal conduct begs the question of whether DPAs and NPAs alone promote deference).

[335] *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1302 (2013) (arguing that the government should avoid using DPAs and NPAs unless criminal prosecution would harm third parties aside from the organization or the offense conduct is less serious and there are no alternative civil or administrative remedies).

[336] *See supra* Part I.

NPAs because of amended guidelines or the possibility of an upward variance or departure, then the government will have settlement leverage. At minimum, the government may use this leverage to seek a resolution against a recidivist organization on more just terms.

Conclusion

Organizations, like individuals, commit criminal offenses. Indeed, organizations, like individuals, commit multiple criminal offenses. But organizations, unlike individuals, regularly receive the benefit of DPAs or NPAs instead of criminal convictions following their offenses. As a result, organizations, unlike individuals, fail to have their criminal history appropriately considered under the sentencing guidelines. It is axiomatically unfair when two similarly-situated entities receive differential treatment. The current sentencing guidelines perpetuate unfairness by failing to require courts to uniformly consider organizations' prior DPAs and NPAs.

The DOJ and Congress have already made substantial strides toward corporate criminal enforcement reform. Nevertheless, further reform is needed to tackle the problem of corporate crime economically and fairly. Amending the sentencing guidelines to require appropriate consideration of organizations' prior DPAs and NPAs would be meaningful reform. As the Sentencing Commission is developing and implementing acceptable amendments, courts may use their discretion to impose upward variances and departures for organizations that have significant criminal history. These steps will lead to greater deterrence and fairness in corporate criminal enforcement.