

THE CASE FOR ACCOUNTABILITY & TRANSPARENCY: HOW CORPORATE ASSET FORFEITURE CREATES A CONFLICT OF INTEREST

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ABSTRACT

Asset forfeiture is a tool used by law enforcement to seize property or profits related to criminal activity. Due to the public's growing distain of asset forfeiture, congressional and state reform has attempted to curtail the use of civil asset forfeiture over the past twenty years. However, little attention has been given where asset forfeiture is used against corporations. This Note sheds light as to how asset forfeiture is used against the organizational defendant and makes the following observations: First, asset forfeiture is a powerful tool in corporate criminal proceedings; however, forfeiture lacks the procedural restraints that are placed on other financial penalties. Second, asset forfeiture is predominately used in plea deals and alternative resolution agreements, which allows law enforcement to bypass the limited procedural requirements that would otherwise accompany forfeiture. Third, funds from forfeited property typically goes directly to law enforcement. Thus, the potential for abuse is significant and raises the question of whether there is an inherent conflict of interest in utilizing asset forfeiture, particularly in the organizational context.

This Note argues that the current system creates an incentive structure that, at the very least, appears to be a conflict of interest—resulting from either a perceived or actual incompatibility between law enforcement's private interests—both as individuals and as an institution—and their public duties. The appearance of a conflict of interest stems from a profound lack of oversight as to how the funds

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from asset forfeiture are used by law enforcement. To promote accountability and transparency, this Note suggests implementing independent oversight, which would require accurate reporting of how seized assets are utilized by law enforcement agencies and the creation of a database to house such information. Implementing independent oversight would (1) serve to alleviate law enforcement's conflict of interest and (2) be a positive step toward ensuring that the law is effectively deterring criminal activity.

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INTRODUCTION

Asset forfeiture is a tool used by prosecutors and law enforcement to “disrupt, dismantle, and deter” individuals and organizations that profit from or engage in unlawful activity by seizing the property or proceeds related to that unlawful activity.¹ Despite the crime-fighting narrative of forfeiture, it has a historically notorious reputation because it allows law enforcement to seize property with or without charging or convicting the owner of that property.² Calls to curb the abuse of asset forfeiture have increased, as reforming forfeiture has been a relatively bipartisan issue, creating common ground in the appeal for change.³ In acknowledging the potential for abuse, congressional and state reform has attempted to curtail the use of civil asset forfeiture since the turn of the twentieth century.⁴ However, little attention has been given where asset forfeiture is used against organizations⁵—perhaps because corporations are not necessarily sympathetic entities—and information surrounding asset forfeiture in this

1. *What We Investigate: Asset Forfeiture*, FBI.GOV, <https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture> [<https://perma.cc/P8JC-HXMU>].

2. Technically, criminal forfeiture requires a criminal conviction of the owner; civil forfeiture requires no conviction at all. See discussion *infra* Part I.A.

3. Matthew L. Allison, *To Curb or Not to Curb: Applying Honeycutt to the Judicial Overreach of Money Judgment Forfeitures*, 48 U. BALT. L. REV. 271, 285 (2019). Recently, the U.S. Supreme Court has ruled that the Constitution places limits on the ability of states and localities to seize assets. See *Timbs v. Indiana*, 139 S.Ct. 682, 686 (2019) (holding that the Eighth Amendment, which bars “excessive fines,” limits the ability of the federal government to seize property, and that the clause also applies to the states under the Fourteenth Amendment). For further discussion, see Adam Liptak & Shaila Dewan, *Supreme Court Limits Police Powers to Seize Private Property*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/politics/civil-asset-forfeiture-supreme-court.html> [<https://perma.cc/EC5Y-7459>].

4. The Civil Asset Forfeiture Reform Act of 2000 was an effort to improve aspects of asset forfeiture, but “has only been considered a step in the right direction on a path of reformation.” Allison, *supra* note 3, at 285.

5. This Note uses “organizations” broadly to refer to corporations and financial institutions.

context is sparse.⁶ Given this, asset forfeiture in the organizational context is likely to go unchecked and unnoticed.⁷

This Note sheds light as to how asset forfeiture is used against the organizational defendant (“corporate asset forfeiture”) and makes the following observations. First, asset forfeiture serves as a powerful tool in corporate criminal proceedings, particularly given the limitations of other forms of financial penalties.⁸ However, because asset forfeiture lacks the procedural restraints that are placed on other financial penalties, the potential for abuse is high.

Second, corporate asset forfeiture is predominately used in plea deals and what this Note refers to as “alternative resolution agreements,” which are deferred prosecution agreements, non-prosecution agreements, and declinations.⁹ In alternative resolution agreements, corporations ultimately consent to forfeit assets, among other things, in exchange for avoiding indictment and/or leniency in the sanctions imposed¹⁰—rendering the protections and procedural distinctions between civil, criminal, and administrative forfeiture negligible. Thus, regardless of the type of forfeiture used, assets will be forfeited without resistance from corporations and without justification in a court of law, raising some due process concerns.¹¹

Third, state and federal law enforcement offices can keep all or a portion of the funds collected through forfeiture when they participate in the Department of Justice’s (the “Department” or DOJ) equitable sharing

6. See *infra* Part II.A, B.

7. Presumably, corporations themselves have not contested forfeiture due to the incentives surrounding compliance with corporate investigations and the increased use of resolution agreements to avoid indictment. See discussion *infra* Part II.B.2.

8. See discussion *infra* Part I.B.1.

9. Although declinations technically serve a different function, they are becoming increasingly similar to non-prosecution agreements. See discussion *infra* Part I.B.2.

10. See discussion *infra* Part II.B.2.

11. Asset forfeiture has been described as “an especially wicked distortion of what the general public expects of the justice system” and “a scheme notorious for having become trivialized, often applied using methods and in circumstances that offend the most fundamental notions of fairness and due process.” Arnold I. Burns, Warren L. Dennis & Amybeth García-Bokor, *Curbing Prosecutorial Excess: A Job for the Courts & Congress*, CHAMPION, July 1998, at 12, 14–15. For a full discussion on the due process rights of corporations, see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014).

program.¹² While it is difficult to conclude that the program itself results in an abuse of forfeiture by law enforcement, it reflects the concern that asset forfeiture operates within a system lacking in oversight and transparency regarding how collected funds are allocated.¹³

Thus, the potential for abuse is significant and raises the question as to whether there is an inherent conflict of interest in corporate asset forfeiture. This Note concludes that the current system creates an incentive structure that, at the very least, appears to be a conflict of interest—resulting from either a perceived or actual incompatibility between law enforcement’s private interests—both as individuals and as an institution—and their public duties.¹⁴

Part I of this Note outlines the history of asset forfeiture and the role asset forfeiture plays in relation to corporate punishment, particularly through alternative resolution agreements. Part II analyzes whether corporate asset forfeiture creates an inherent conflict of interest by looking at law enforcement’s incentives to seek assets, as well as prosecutorial leverage and discretion in extracting financial penalties. To promote accountability and transparency, Part III suggests that an independent oversight group should be installed. This would require accurate reporting of how seized assets are utilized by law enforcement agencies and the creation of a database to house such information. Implementing independent oversight would (1) serve to alleviate the conflict of interest for law enforcement and (2) be a positive step toward ensuring that the law is effectively deterring criminal activity.

I. THE ROLE OF ASSET FORFEITURE

Before discussing how asset forfeiture has been used in the corporate context, this section will give a brief overview of the aspects of asset

12. This Note defines “law enforcement” to include prosecutors, police officers, and any other “members of the executive branch of government charged with carrying out and enforcing the criminal law.” *Law Enforcement*, BLACK’S LAW DICTIONARY (11th ed. 2019).

13. This Note focuses on the federal Asset Forfeiture Program run by the DOJ due to inconsistent state laws as to how asset forfeiture is reported, combined with the lack of consolidated information of state organizational prosecutions. States that work with the Department to bring actions against organizational defendants through joint-investigation, adoptive, and equitable sharing programs will be included in this analysis.

14. See discussion *infra* Part II.A.

forfeiture relevant to this Note. It will first describe the background and general purpose of asset forfeiture.

A. ASSET FORFEITURE

Asset forfeiture is commonly understood as the legal process by which property that was used unlawfully—or is the product of criminal activity—is seized and title is vested in the state, local, or federal government.¹⁵ The purpose of asset forfeiture is often cited as deterring criminals by taking the financial profit out of crime.¹⁶

Forfeiture's modern roots are based on the English common law theory that "an offense to the King's peace, should deprive the transgressor of the right to own property."¹⁷ This theory developed under an *in-rem* or "against the thing" concept of property in civil cases.¹⁸ *In-rem* proceedings empowered the government to claim title to property deemed tainted without having to wait until the owner was criminally convicted.¹⁹ Not surprisingly, forfeiture gained a notorious reputation: The Declaration of Independence lists the abrogation of the right to trial by jury in civil forfeiture cases by King George III as "one of the infringements on American liberty justifying this nation's break with Britain."²⁰

15. See Nicholson, *supra* note 17, at 348 (quoting Anthony G. Hall, *Q&A on Recovering the Proceeds of Crime/Forfeiting the Instrumentalities of Crime*, 42 ADVOCATE 16 (Dec. 1999)).

16. See MaryBeth C. Allen, *Take from the Fraudulent and Give to the Defrauded: The Code's Use in Asset Recovery in Criminal Securities Fraud Cases*, 21 AM. BANKR. INST. L. REV. 191, 192 (2013).

17. Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 349 (2007). The origins of forfeiture are often attributed to a Biblical passage in Exodus 21:28, which states, "if an ox gore a man or woman, and they die, he shall be stoned and his flesh shall not be eaten." See Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 578 n.16 (1997).

18. Anthony Martucci, *Advocating for Asset Forfeiture in the Post-Madoff Era: Why the Government, Not A Bankruptcy Trustee, Should Be Responsible for Recovering and Redistributing Assets from Feeder Funds and Net Winners*, 63 CASE W. RES. L. REV. 599, 613 (2012).

19. *Id.*; see also *Bennis v. Michigan*, 516 U.S. 442, 446–47 (1996) (tracing asset forfeiture laws all the way back to 1844).

20. David B. Smith, *A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?* THE HERITAGE FOUNDATION (July 30, 2015), available at http://thf_media.s3.amazonaws.com/

Despite the founding fathers' distaste of forfeiture, "modern developments in asset forfeiture have given the government almost unbridled power to seize nearly any assets related to illegal activity."²¹ Consequently, the expansion of criminal enterprises in the areas of narcotics and drug trafficking, racketeering, securities fraud, and money laundering also led to an expansion of asset forfeiture laws under the Comprehensive Drug Abuse and Control Act, which were enacted to remove incentives to engage in unlawful conduct by stripping suspects of their property.²² Although the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) made some procedural improvements, it also authorized civil forfeiture for new offenses.²³

In the 1990s, the DOJ "responded to Congress' expansion of forfeiture power by increasing its emphasis upon forfeiture as well," which required U.S. Attorney's Offices "to reorganize in order to manage seized assets."²⁴ Thus, what began "as a means to punish criminals" is now a multi-million dollar enterprise used as a means to "recover criminal proceeds, deter future criminal activity, subvert criminal organizations, generate revenue for the Government, and satisfy restitution orders."²⁵

I. Types of Forfeiture & How They Are Used

Prosecutors have turned to asset forfeiture when seeking to deter corporations from wrongdoing because it allows recovery of property that

2015/pdf/LM158.pdf (citing *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 464 (7th Cir. 1980) ("This was 'the most effective, and therefore the most disliked' of all the methods adopted [by the British] to enforce the acts of trade 'because it deprived the defendant of the right to be tried by a jury which was almost certain not to convict him.'")).

21. Kim, *supra* note 17, at 529.

22. Allen, *supra* note 16, at 192–93. In the 1970s, Congress enacted the Comprehensive Drug Abuse and Control Act, which "authorized the seizure of real property to take the profit out of the drug trade," and the Racketeer Influenced and Corrupt Organizations Act (RICO), which authorized asset forfeiture in money laundering crimes. *Id.* at 193. Because "imprisonment and fines did little to deter drug activity at that time," forfeiture gained momentum, and RICO was used in "to forfeit assets gained through wire and mail fraud in white collar crimes" in the 1980s. *Id.*

23. *Id.*

24. Kim, *supra* note 17, at 534 n.40 ("As the Department of Justice has placed greater emphasis on Asset Forfeiture, the need for an accurate accounting system of the assets being forfeited by the United States Attorney's offices has arisen.").

25. Allen, *supra* note 16, at 193.

was used in, obtained from, or traceable to an unlawful act.²⁶ Additionally, asset forfeiture can be used in criminal, civil, or administrative actions.²⁷

In a criminal forfeiture proceeding, forfeiture is ordered as part of a convicted defendant's sentence,²⁸ and the government must prove a nexus between the property and the underlying crime by a preponderance of the evidence.²⁹ Asset forfeiture is also used by law enforcement agencies in administrative forfeitures,³⁰ where "an agency seizes the asset, provides notice to potential claimants, and processes any claims made to the asset."³¹ Valid claims to the property will be referred to a U.S. Attorney's Office, who must then commence a criminal or civil forfeiture proceeding, reach a settlement, or return the property.³² If the agency receives no claims, "it may complete the forfeiture of the asset without judicial involvement."³³

When a seizure is challenged, "a prosecutor must seek judicial approval to forfeit the property."³⁴ These types of actions are considered civil forfeitures, in which the government bears the burden of proving—by a preponderance of the evidence—that the property is the proceeds of, or was used in, the commission of a crime.³⁵ Civil forfeiture can also proceed by the government filing a complaint *in rem*,³⁶ and providing

26. See Nicholson, *supra* note 17, at 371; see also Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 14 (1994).

27. Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2389 (2018) [hereinafter *How Crime Pays*].

28. Sean Michael Welsh, *Tracing Commingled Funds in Asset Forfeiture*, 88 MISS. L.J. 179, 187 (2019).

29. *How Crime Pays*, *supra* note 27, at 2387.

30. See Neal B. Christiansen & Julia E. Jarrett, *Forfeiting Cryptocurrency: Decrypting the Challenges of a Modern Asset*, 67 DOJ J. FED. L. & PRAC. 155, 161–62 (2019); see also 18 U.S.C. § 983(a)(3) (2012).

31. Christiansen & Jarrett, *supra* note 30, at 161.

32. *Id.*

33. *Id.* at 161–62. In general, "agencies may administratively forfeit all property subject to forfeiture under federal law, except for real property and personal property valued at greater than \$500,000. If the personal property is a "monetary instrument," however, the agency may administratively forfeit it regardless of its value." See 18 U.S.C. § 983(a)(1)-(2); see also 19 U.S.C. § 1602, et seq.

34. *How Crime Pays*, *supra* note 27, at 2389.

35. *Id.* at 2389. Before CAFRA, the standard for civil forfeiture was probable cause. See Christiansen & Jarrett, *supra* note 30, at 164.

36. *Id.*

notice of the complaint.³⁷ Civil forfeiture does not require a criminal conviction, and “the government may file the complaint before, after or in the absence of a related criminal prosecution.”³⁸ Since these proceedings are against the actual property that has been “tainted” with criminal activity, civil forfeiture does not allow for money judgments or substitute property—at least in theory.³⁹

Before the 1993 revisions to the Comprehensive Forfeiture Act of 1984, assets forfeited pursuant to federal law were deposited into the general treasury.⁴⁰ The revisions allocated forfeited funds exclusively for law enforcement purposes.⁴¹ Today, forfeited property is held in two stages:⁴² first, the government seizes property and holds it pending a final order of forfeiture by an agency or judge; second, the forfeited property is disposed.⁴³

The distribution of forfeited property is governed by federal statute,⁴⁴ which provides the federal government with two funds for forfeited proceeds: the Department of Treasury Forfeiture Fund (TFF)⁴⁵ and the Department of Justice Asset Forfeiture Fund (AFF).⁴⁶ The Department of Treasury (the “Treasury”) maintains the TFF, which is the Treasury’s own

37. *Id.*

38. *Id.* (“For example, if the crime at issue is drug trafficking, the applicable civil forfeiture statute allows the government to forfeit a broad variety of assets, including “things of value” furnished in exchange for drugs. A claimant can attempt to refute that the property is actually forfeitable, or otherwise defeat the forfeiture, by demonstrating that he is an innocent owner with no reason to know of the criminal connection (among other defenses to forfeiture)”).

39. *Id.* at 164; *see* discussion at *infra* Part II.B.3.

40. *See* Comprehensive Forfeiture Act, Pub. L. No. 98-473, §§ 301-02, 98 Stat. 1837, 2040-57 (1984) (codified at 28 U.S.C. § 524 (1988 & Supp. V 1993)); *see also* Cheh, *supra* note 26, at 48 n.15.

41. *See* 28 U.S.C. § 524(c); *see also* Cheh, *supra* note 26, at 48 n.15.

42. *See* Cheh, *supra* note 26, at 48 n.15.

43. *Id.*

44. *See* 18 U.S.C. § 982(b)(1) (2012); §1963(g); *see also* 21 U.S.C § 881(e) (2012).

45. The Secretary of the Treasury oversees the Treasury Forfeiture Fund (TFF), established under 31 U.S.C. §§ 9703(a), 9705. *See* Nicholson, *supra* note 17, at 377 n.278.

46. The Comprehensive Crime Control Act of 1984 established the AFF. *See* THE DEPARTMENT OF JUSTICE MANUAL § 9-118.400 (The Assets Forfeiture Fund) (last updated Mar. 2019), <https://www.justice.gov/criminal-fraud/file/838416/download> [hereinafter DEP’T OF JUST. MANUAL].

asset forfeiture fund and program.⁴⁷ The AFF holds assets forfeited in connection the DOJ's asset forfeiture program,⁴⁸ and funds in the AFF may be transferred to any federal, state, or local law enforcement agency that participated in the forfeiture.⁴⁹

B. ASSET FORFEITURE'S ROLE AS A FINANCIAL PENALTY IN CORPORATE PROSECUTIONS AND ALTERNATIVE RESOLUTION AGREEMENTS

The legal profession has struggled with assigning criminal liability to corporations in a legal system grounded in individuals' moral culpability.⁵⁰ However, it is well-established that corporations are responsible for the criminal acts of employees committed within the scope of their employment.⁵¹ This criminal responsibility may be imposed when the criminal activity benefits the corporation, even if such benefit was collateral.⁵² Since most corporate crimes occur when there are inadequate

47. See 31 U.S.C. § 9705 (2012). The TFF receives funds from "participants in the TFF within the Department of the Treasury as well as the Department of Homeland Security." *Id.*

48. See DEP'T OF JUST. MANUAL, *supra* note 46, § 9-118.400 (The Assets Forfeiture Fund); see also 28 U.S.C. § 524(c) (2012). The Asset Forfeiture Office was created in response to the increased emphasis on forfeiture by the DOJ. See discussion *infra* Part I.A.1. The office is responsible for all civil forfeiture proceedings that are assigned to the Criminal Division of the DOJ, and also "advises and assists regional offices in the handling of forfeiture cases and making decisions regarding petitions for remission or mitigation of forfeiture." Kim, *supra* note 17, at 578 n.40.

49. See Cheh, *supra* note 26, at 48 n.15.

50. Bailey Wendzel, Matthew Angelo, Mariana Jantz & Alexis Peterson, *Corporate Criminal Liability*, 56 AM. CRIM. L. REV. 671, 672 (2019).

51. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1299 (2013); see, e.g., *N.Y. Cent. v. United States*, 212 U.S. 481, 493-94 (1909) (holding that the conduct of an employee "while exercising the authority delegated to him" can be attributed to his employer, upon whom penalties can be imposed); *United States v. Hilton Hotels*, 467 F.2d 1000, 1004 (9th Cir. 1972) (noting that the criminal liability of an employer for the acts of its employees within the scope of their employment can be either express or implied).

52. Uhlmann, *supra* note 51, at 1299; see, e.g., *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (finding that an employee acts within the scope of employment if "acts are motivated—at least in part—by the intent to benefit the corporation"); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (affirming a conviction despite claims that the employee acted for his own benefit because the employee acted at least in part to benefit the corporation).

management structures in place to prevent criminal wrongdoing,⁵³ prosecuting a corporation ensures that criminal conduct is punished and deterred, and that corporate lawlessness “receives the societal condemnation it deserves.”⁵⁴

Deterrence is often described as recognizing “that an actor who contemplates committing a crime will be deterred only if the ‘expected punishment cost’ of a proscribed action exceeds the expected gain.”⁵⁵ This concept requires weighing the expected penalty against the likelihood of getting caught.⁵⁶ Individuals may take into account several aspects of getting caught, such as social stigma and loss of social status.⁵⁷ However, unless a corporation operates for the sole purpose of criminal activity, it is difficult to determine what considerations might go into such calculated risks. Thus, what may deter one employee at a firm from committing fraud may not adequately deter another employee at the same firm. These issues raise the question of whether corporations can be effectively deterred from criminal activity, and if so, how to do so effectively.

Since 1999, federal corporate prosecutions have been guided by the U.S. Attorney’s Manual Principles of Federal Prosecution of Business Organizations (the “Manual”), which is issued by the DOJ.⁵⁸ In 2003, the DOJ revised the Manual “in response to Enron and other financial scandals to encourage prosecutors to use deferred and non-prosecution

53. See Uhlmann, *supra* note 51, at 1299.

54. *Id.*; see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 854–59 (2007) (explaining how the prosecution of entire agencies can lead to agreements that include increased corporate compliance with federal regulations); see also Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–22 (1998) (explaining the role of expression of societal condemnation in the criminal prosecution of corporations).

55. John C. Coffee, “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386–87 (1981).

56. See *id.* at 389 (“For example, if the expected gain were \$1 million and the risk of apprehension were 25%, the penalty would have to be raised to \$4 million in order to make the expected punishment cost equal the expected gain”).

57. See *id.*

58. The Principles of Federal Prosecution of Business Organizations is published in the Justice Manual, formerly known as the United States Attorneys’ Manual (USAM). The Manual was revised and renamed in 2018. For a current version, see PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, DEPT’ OF JUST. (last updated July 2019), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

agreements as an alternative to a prosecution.”⁵⁹ These agreements gained popularity over the years, and with the popularity came substantial criticism, leading to several revisions of the Manual over time.⁶⁰

Congress responded to the numerous corporate scandals by passing the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, which imposed heightened criminal liability on corporations—as opposed to individual corporate officers.⁶¹ This focus on corporate punishment, combined with law enforcement’s awareness that innocent investors, creditors, and employees may be harmed by indictment has fundamentally altered the relationship between corporations and the government and has shifted the landscape of corporate prosecution to alternative resolution agreements.⁶²

Despite shifting priorities, “[m]onetary sanctions remain the most common form of corporate punishment.”⁶³ The irony of monetary sanctions is “that the maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth.”⁶⁴ Thus, it has been noted that “a small corporation is no more threatened by a \$5 million fine than by a \$500,000 fine if both are beyond its ability to pay.”⁶⁵ Accordingly, “[the ability] to deter the corporation may be confounded by [the] inability to set an adequate punishment cost which does not exceed the corporation’s resources.”⁶⁶

59. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1796 (2011). Following Enron and Arthur Andersen’s collapse, “federal prosecutors were widely seen as attempting to avoid such dire consequences for employees who played no role in the wrongdoing . . . [and] began to enter early negotiated settlements prior to any indictment.” *Id.*

60. *Id.* (noting that “the Principles were again revised in response to criticism and congressional hearings in 2006 and again in 2008”). The Principles were last updated in November 2015.

61. Wendzel et al., *supra* note 50, at 672.

62. See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in A Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006).

63. W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 918 (2019).

64. Coffee, *supra* note 55, at 390.

65. *Id.*

66. *Id.*

1. Differences Between Forfeiture, Fines, Restitution, & Disgorgement

Corporations may face fines, restitution, and disgorgement in addition to asset forfeiture. These financial penalties are used to “deter and punish illegal conduct, provide compensation for inflicted harms, and eliminate illegal gain.”⁶⁷ However, each of these penalties are accompanied by procedural limitations.

a. Fines

The DOJ follows certain principles in accordance with the U.S. Sentencing Guidelines (the “Guidelines”) when assessing the appropriate fine or monetary penalty in a federal criminal investigation.⁶⁸ According to the latest version of the Guidelines, if an organization operates primarily for a criminal purpose, fines can be large enough to divest the organization of its net assets.⁶⁹ If not, it is suggested that fines be based on the severity of the offense and the culpability of the organization.⁷⁰ The

67. Wendzel et al., *supra* note 50, at 697–98 (internal quotation marks omitted).

68. See DEVELOPMENTS IN THE DEFENSE OF FINANCIAL INSTITUTIONS—CALCULATING THE FINANCIAL EXPOSURE, GIBSON DUNN (Jan. 17, 2019), <https://www.gibsondunn.com/wp-content/uploads/2019/01/developments-in-defense-of-financial-institutions-jan-2019.pdf> [<https://perma.cc/899C-3UVE>] [hereinafter CALCULATING FINANCIAL EXPOSURE]. Note that the U.S. Sentencing Guidelines are not mandatory. See John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 237 n.6 (2006) (noting that in *U.S. v. Booker*, 543 U.S. 220 (2005), “the Court ‘severed and excised’ the portion of the federal code that made the federal sentencing guidelines mandatory, making the guidelines ‘effectively advisory.’”); see also Steven D. Gordon, Implementation of Effective Compliance and Ethics Programs and the Federal Sentencing Guidelines, in CORPORATE COMPLIANCE ANSWER BOOK 2018 2–3 (Christopher A. Myers & Kwamina Thomas Williford eds., 2018) (“Since 1991, the sentencing of corporations and other business entities convicted of federal criminal offenses has been governed by the . . . Sentencing Guidelines [which] originally were mandatory, but in 2005, the Supreme Court ruled that it is unconstitutional to apply them in mandatory form. The Court left them intact as voluntary guideposts that federal courts should consult but are not bound to follow”).

69. See *U.S. Sentencing Guidelines Manual*, a publication of the United States Sentencing Commission § 8C1.1, at 523 (2018), available at <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf> [<https://perma.cc/3XNA-W9HR>] [hereinafter *Sentencing Guidelines*]. “Criminal purpose” is determined by the “nature and circumstances of the offense and the history and characteristics of the organization.”

70. See *Sentencing Guidelines*, *supra* note 69, § 8, introductory cmt. at 509.

principles governing organizational defendants contain several aggravating and mitigating factors that may considerably affect the total monetary penalty imposed.⁷¹ Thus, an enforcement agency has broad discretion in determining fines.⁷²

Though forfeiture and fines are similar in that they are monetary penalties, their deterrent effect may differ. Fines as punishments for commercial offenses may be viewed as the “cost of doing business.”⁷³ However, the costs of forfeiture cannot be internalized in the same way because forfeiture varies depending on how much offenders have profited from their activities.⁷⁴ Additionally, although fine amounts can vary considerably based on the Guidelines and the discretion of the law enforcement agent, fines give a ballpark range of the penalty.⁷⁵ Determining forfeiture is likely more difficult, but perhaps the fear of the “unknown” may have a deterrent effect. On the other hand, most scholars agree that “the certainty of a sanction is a more important deterrent than is its severity” and a determinate sentencing structure “generates more deterrence than an indeterminate one because the former essentially eliminates the gamble the offender wishes to take.”⁷⁶

While the deterrent effects of fines and forfeitures may be difficult to compare, there is a major difference between the two: where the money goes. Fines go to the U.S. Treasury⁷⁷—not directly to the law enforcement agency instituting the action. Thus, the more significant distinction may not be for the corporation, but rather the enforcement agency.

71. *See id.*

72. *See id.*; CALCULATING FINANCIAL EXPOSURE, *supra* note 68, at 2.

73. Catherine E. McCaw, *Asset Forfeiture as A Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 200 (2011).

74. *Id.* at 184–85, 200.

75. *See* CALCULATING FINANCIAL EXPOSURE, *supra* note 68, at 1–2. Fines are usually determined by the federal statute governing the offense, and most statutes have a maximum fine amount. *See* 18 U.S.C. § 1344; *see also* 18 U.S.C. §§ 1341, 1343.

76. *See* Nicholson, *supra* note 17, at 366–67. *See generally* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME AND JUST. 1, 30 (2006); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).

77. *See* Tracey Samuelson, *Following the money: What happened to a nearly \$17 billion bank settlement?* MARKETPLACE (Sept. 19, 2018), <https://www.marketplace.org/2018/09/19/17-billion-bank-settlement-where-did-money-go/> [https://perma.cc/9LBT-LM4T].

b. Restitution

Restitution is an equitable remedy intended to compensate victims of criminal activity in an amount equal to their loss.⁷⁸ When ordered by a court, restitution may be in the “full amount of each victims’ losses without regard to the defendant’s economic circumstances.”⁷⁹ But restitution statutes provide no mechanism for pretrial restraint on a defendant’s assets, thereby limiting restitution’s reach.⁸⁰ Like fines, where restitution is ordered and not all of the funds are used, the money is deposited into the U.S. Treasury.⁸¹

In federal cases, forfeiture can also be used to compensate victims. The funds from assets that are forfeited and auctioned off can be awarded to victims through a process known as remission.⁸² Unlike restitution, forfeiture statutes “expressly provide[] for the pretrial restraint of assets so that assets may be preserved while the criminal case is pending and remain available for forfeiture and to compensate victims in the event of a conviction.”⁸³ In theory, this gives asset forfeiture the potential to compensate victims more effectively and efficiently than restitution—mainly because forfeiture has few procedural restrictions, which allows the government to locate, restrain, and collect criminal proceeds more effectively than restitution.⁸⁴ The distinction between restitution and forfeiture is more significant where the defendant is awaiting trial and/or sentencing. But given that both restitution and forfeiture may be mandated at the same time in an alternative resolution agreement, the relevance of these distinctions is less apparent.

78. See, e.g., *U.S. v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006) (“[T]he purpose of restitution is essentially compensatory: to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.”). Some federal statutes impose mandatory restitution. See also *Wendzel et al.*, *supra* note 50, at 695; *Sentencing Guidelines*, *supra* note 69, § 8B1.1(a)(1), at 412 (requiring restitution when order for restitution is authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, or 3664).

79. Sharon Cohen Levin, *The Interplay Between Forfeiture and Restitution in Complex Multivictim White-Collar Cases*, 26 FED. SENT. R. 10, 10–11 (2013).

80. *Id.* at 11.

81. See BRANDON GARRETT, *TOO BIG TO JAIL* 140–41 (2014) [hereinafter *TOO BIG TO JAIL*].

82. See *id.*; see also Levin, *supra* note 79, at 14.

83. Levin, *supra* note 79, at 11 (noting that the Government can obtain criminal restraining orders for property as well as civil seizure warrants under 18 U.S.C. § 981).

84. *Id.* at 11–12.

c. Disgorgement

Disgorgement is an equitable remedy usually sought by the Securities and Exchange Commission (SEC) for alleged violations of the Foreign Corrupt Practices Act (FCPA).⁸⁵ The purpose of disgorgement is “to deprive the defendant of its profits” associated with illegal conduct.⁸⁶ Disgorgement is a consequence of violating “public laws,” and thus, “money collected goes to the U.S. Treasury rather than to victims as a restitution payment might.”⁸⁷ Courts occasionally confuse restitution with disgorgement “since both pursue a parallel goal of separating the defendant from the benefit of any ‘ill gotten gains.’”⁸⁸ However, disgorgement is intended only to prevent profit from criminal activity; it may be ordered regardless of whether the amount disgorged is more or less than what would be required to make victims, if any, whole.⁸⁹ In this aspect, “disgorgement functions very similarly to asset forfeiture.”⁹⁰

2. Overview of Alternative Resolution Agreements

Most actions against corporations and financial institutions begin with an investigation into the alleged criminal activity of the corporation. The investigation is an important aspect of the proceeding because a corporation’s compliance with the investigation is often a mitigating factor considered by the law enforcement agency bringing the action.⁹¹ In theory, corporations who comply with the investigation are likely to receive a less harsh penalty.⁹²

85. Jessica S. Mussallem, Matthew J. Jacobs & Erica Connolly, *Keeping Current: Supreme Court Curbs SEC’s Disgorgement Power: Holds That the SEC Can’t Escape the SOL*, ABA BUS. L. TODAY (Jul. 20, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/07/keeping_current/.

86. See CALCULATING FINANCIAL EXPOSURE, *supra* note 68.

87. Mussallem et al., *supra* note 85.

88. See Nicholson, *supra* note 17, at 370.

89. *Id.*

90. Nicholson, *supra* note 17, at 371.

91. The DOJ’s determination of an appropriate fine or monetary penalty in a federal criminal investigation includes a number of aggravating or mitigating factors that can have a significant impact on the final fine amount. See CALCULATING FINANCIAL EXPOSURE, *supra* note 68; see also *Sentencing Guidelines*, *supra* note 69, § 8C2.1, at 523.

92. See CALCULATING FINANCIAL EXPOSURE, *supra* note 68, at 19 n.22.

There are a number of resolution possibilities for corporate criminal proceedings:⁹³ declination, declination with disgorgement, non-prosecution agreement (NPA), deferred prosecution agreement (DPA), plea deal, or of course, trial.⁹⁴ Civil proceedings are typically brought by agencies like the SEC,⁹⁵ and can result in a declination, civil injunction, cease-and-desist order, non-prosecution agreement, deferred prosecution agreement, or trial.⁹⁶ These agreements are types of “voluntary, pre-trial agreements between a corporation and the government”⁹⁷ designed to “avoid the severe consequences, both direct and collateral, that conviction would have on a company, its shareholders, and its employees.”⁹⁸

An NPA is a contract with the DOJ voluntarily entered into by a corporation, whereby the DOJ agrees to forgo indictment and plea in exchange for the corporation’s cooperation.⁹⁹ Charges are not filed with a court.¹⁰⁰ A DPA is a voluntary pre-indictment contract in which the DOJ agrees to suspend prosecution for typically 2–3 years.¹⁰¹ In exchange, the corporation agrees to a statement of facts, complies with certain requirements, and pays monetary penalties. DPAs are filed in federal court,¹⁰² allowing prosecutors to stay or dismiss charges if the corporation follows the terms of the DPA.¹⁰³ A court must approve a waiver of the

93. Panelists Stephanie L. Brooker, Richard W. Grime & Patrick F. Stokes, *Presentation: Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond*, GIBSON DUNN (June 11, 2019), <https://www.gibsondunn.com/wp-content/uploads/2019/06/WebcastSlides-Negotiating-Closure-of-Government-Investigations-NPAs-DPAs-and-Beyond-11-JUN-19.pdf> [<https://perma.cc/A33C-H5GJ>] [hereinafter *Negotiating Closure*].

94. *Id.*

95. Although most frequently used by the DOJ and the SEC, other law enforcement agencies utilize similar “compliance agreements.” *See id.*

96. *Id.*

97. 2018 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS, GIBSON DUNN 24 n.1 (Jan. 10, 2019), <https://www.gibsondunn.com/wp-content/uploads/2019/01/2018-year-end-npa-dpa-update.pdf> [<https://perma.cc/WZM7-A8WS>] [hereinafter 2018 YEAR-END UPDATE].

98. *Id.*

99. *See id.* at 6. Uhlmann, *supra* note 51, at 1300 n.43; *see* Wray & Hur, *supra* note 62, at 1104–05. Increasingly, voluntary disclosure of misconduct is required to have fully cooperated.

100. *See* 2018 YEAR-END UPDATE, *supra* note 97, at 6.

101. *See id.* at 9.

102. *Id.* at 24 n.1.

103. Uhlmann, *supra* note 51, at 1300 n.43 (citing Wray & Hur, *supra* note 62, at 1104).

Speedy Trial Act, if included in the DPA, but does not review the settlement terms of the DPA itself.¹⁰⁴

A declination is a decision by the enforcing agency to end investigations into possible violations of the FCPA before bringing an enforcement action.¹⁰⁵ Declinations with disgorgement are resolutions that blur the line between traditional declinations and NPAs. This type of declination requires disgorgement, continuing cooperation, implementation of compliance initiatives, and the possibility of reinvestigation if the DOJ determines the corporation has not complied with the terms of the declination.¹⁰⁶ These resolutions have been called “NPAs in disguise” due to the paradoxical quality of requiring cooperation in a decision unilaterally made by the government not to pursue further action.¹⁰⁷

3. Alternative Resolutions’ Relationship to Asset Forfeiture

Until recently, accessing information about corporate prosecutions—let alone assets forfeited in corporate proceedings—was exceptionally difficult. The U.S. Sentencing Commission (the “Commission”) publishes limited data on the federal sentencing of corporations.¹⁰⁸ However, the shortcomings of this data has been long-noted by researchers,¹⁰⁹ who have warned others to “proceed with caution

104. See *Negotiating Closure*, *supra* note 93, at 6.

105. See Karen Woody, “Declinations with Disgorgement” in *FCPA Enforcement*, 51 U. MICH. J.L. REFORM 269, 288 (2018). Before the rise of DPAs and NPAs, the prosecutorial decision-making in FCPA actions was binary: either charge a company or decline to further prosecute. See *id.* at 279–80.

106. See CALCULATING FINANCIAL EXPOSURE, *supra* note 68, at 1, 15. This new resolution method was developed by the FCPA Pilot Program and formalized as the FCPA Corporate Enforcement Policy in November 2017. See DEP’T OF JUST. MANUAL, *supra* note 46, § 9-47.120.

107. See Woody, *supra* note 105, at 291.

108. Garrett, *supra* note 59, at 1804. More detailed underlying data collections are archived at the Interuniversity Consortium for Political and Social Research (“ICPSR”), who have spreadsheets available from 1987-2016. See ICPSR, Organizations Convicted in Federal Criminal Courts Series, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/85> (last visited Dec. 6, 2019).

109. See, e.g., Garrett, *supra* note 59, at 1805 (citing Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393, 402 & n.26 (1999)) (noting that in this “landmark study of the effects of the 1991 adoption of the Organizational

before drawing inferences from the Commission's organizational convictions data, where the Commission itself had acknowledged that its data 'are neither comprehensive nor representative.'"¹¹⁰ The Commission's data has been found to be lacking information on the hefty monetary sanctions paid by large public firms.¹¹¹

In 2017, Professor Garrett at the University of Virginia School of Law launched the Corporate Prosecution Registry (the "Registry"), which provides current and detailed information on every federal organizational prosecution in the United States since 1992.¹¹² The Registry has filled in the substantial gap of information readily available to the public, as well as prosecutors, defense lawyers, judges, and policymakers.¹¹³ Thus far, there are no specific breakdowns of asset forfeiture when utilized against an organizational defendant. This Note breaks down the data in an attempt to reflect the monetary value of assets forfeited by corporations since 2001.¹¹⁴

Sentencing Guidelines on corporate sanctions, they found Commission data highly incomplete").

110. *Id.*

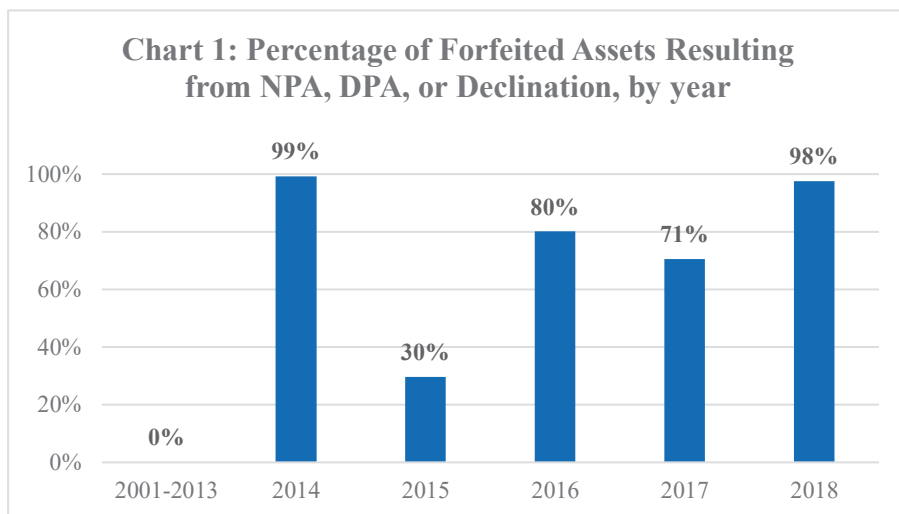
111. *Id.* at 1805–06. Garrett notes, "The Commission collects data on corporations sentenced under Chapter Eight of the Organizational Sentencing Guidelines, but apparently relies on data self-reported by the courts, and therefore does not follow up and obtain data not reported as used to sentence the particular firm."

112. See Rick Paulas, *New Database Examines How the United States Prosecutes Corporate Crime*, PACIFIC STANDARD MAGAZINE (July 14, 2017), <https://psmag.com/economics/new-database-examines-how-the-united-states-prosecutes-corporate-crime> [<https://perma.cc/3MJ6-THP3>]; see also CORPORATE PROSECUTION REGISTRY, available at <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html> [hereinafter CORPORATE PROSECUTION REGISTRY].

113. See Paulas, *supra* note 112 (noting that "[t]his method [DPAs and NPAs] of prosecution has also allowed specifics about fines and probation terms to escape media scrutiny. If there is an extended trial, reporters are sent to court to deliver daily updates. But if there's only a press release about an agreement, it's likely to be buried on a back page and forgotten about by the next day. And while information about the agreements is technically public, the only way to obtain it was through the lengthy process of requests under the Freedom of Information Act."); CORPORATE PROSECUTION REGISTRY, *supra* note 112.

114. The Registry, however, combines forfeiture and disgorgement. This data reflected in the following charts is the combination of both forfeiture and disgorgement. All data reflected in Chart I and II is taken from the CORPORATE PROSECUTION REGISTRY. See *supra* note 112.

Until 2014, asset forfeiture was used exclusively in plea deals, which is reflected in Chart I.



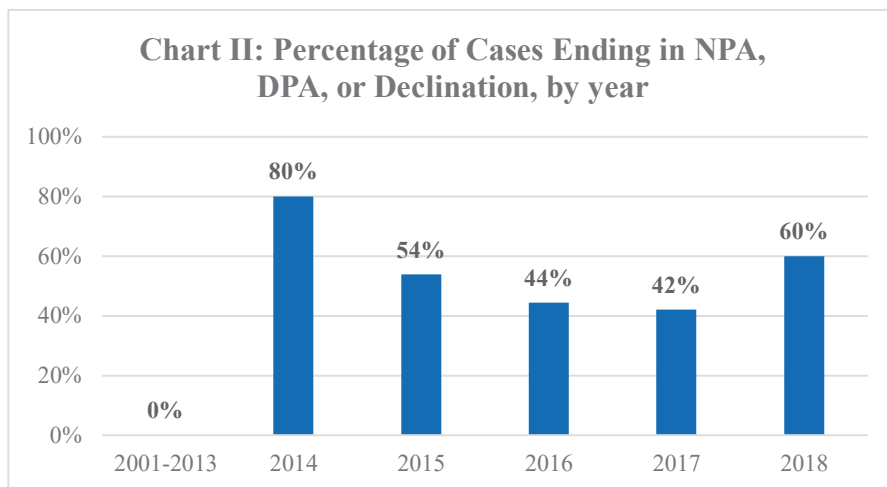
The increase in forfeiture is not consistent year by year. On average, the monetary value of forfeited assets increased by 246.09% from 2001–2013,¹¹⁵ with the median being 32.57%—thus illustrating the drastic changes in forfeited assets with plea deals from year to year.

While the popularity of DPAs and NPAs has increased over time, as illustrated in Chart II, it is difficult to determine whether the use of asset forfeiture has also increased. Frequent changes in DOJ policy cause a lack of consistency in the type of resolution that brings in the most profit from forfeited assets. However, the percentage of assets forfeited in NPAs, DPAs, or declinations is higher than the percentage forfeited in plea deals in almost every year since 2014.¹¹⁶ Thus, while four years is hardly

115. This amount was calculated by: $(\text{NextYear} - \text{CurrentYear}) / \text{CurrentYear} * 100$. This was done for each year. The percentages were added and then divided by the number of years minus one, putting an equal weight on each year, giving a simple average increase. The median is provided because the outliers drag the average up considerably.

116. The exception, as illustrated in Chart I, is 2015. This is due to a plea agreement between BNP Paribas S.A. and Southern District of New York and the DOJ's Asset Forfeiture & Money Laundering Section that resulted in \$3,838,800,000 in asset forfeiture, the highest amount recorded for a single resolution. Yet, over 50% of cases ended in a DPA, NPA, or declination that year, as illustrated in Chart II.

indicative of a trend, it illustrates that ordering asset forfeiture in DPAs, NPAs, and declinations has grown,¹¹⁷ and is unlikely to halt anytime soon.



II. EXAMINING CORPORATE ASSET FORFEITURE: A LACK OF OVERSIGHT & A CONFLICT OF INTEREST

Part I identified the current state of corporate prosecutions, the increased use of alternative resolutions, and how asset forfeiture is used in alternative resolutions. Part II evaluates this interaction within the broader issue of whether asset forfeiture creates a conflict of interest for law enforcement when prosecuting corporations. In order to evaluate such conflicts, a brief summary of the type of conflict of interest at issue is necessary.

117. In 2018, the total amount of asset forfeiture in monetary recovery was \$577,015,276 and the forfeiture recovered in plea deals was \$13,797,384. Thus, of the \$577,015,276 recovered via asset forfeiture in 2018, \$563,217,892 was from forfeited assets from DPA and NPAs, representing the majority of the total recovery in forfeiture in 2018. This trend can again be seen in 2017. The total assets forfeited was \$1,005,086,890. Of that number, \$295,781,927 was recovered in plea deals, while \$709,304,963 came from DPAs, NPAs, and declinations. Again, in 2016, assets recovered from plea deals was \$152,705,097, and assets recovered from DPAs, NPAs, and declination was \$613,387,777. 2015, as noted, is an outlier, but of the assets recovered from plea deals—\$3,845,660,478—all but \$6,860,478 came from the BNP Paribas deal. Assets recovered from DPAs and NPAs was \$1,623,706,752. In 2014, only \$14,000,000 was recovered from pleas, while \$1,711,187,750 came from DPAs and NPAs.

A. ASSET FORFEITURE CREATES AT LEAST THE APPEARANCE OF A
CONFLICT OF INTEREST

A conflict of interest is a “real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.”¹¹⁸ Generally, a conflict of interest can arise where there is a reasonable possibility that an attorney’s work for a client may be compromised.¹¹⁹ Prosecutors do not have traditional clients; rather, they have both “the fiduciary responsibilities of a public official with those of a lawyer-advocate.”¹²⁰ Thus, prosecutors should not allow their professional judgment to be influenced by their personal, financial, political, professional, or institutional pursuits.¹²¹

Prosecutors are required to make numerous discretionary decisions about investigations, charges, and agreements.¹²² This responsibility is accompanied by a “fiduciary obligation to act in the public interest, not in furtherance of private interests, including their own” and a duty to “do justice, which requires, among other things, impartiality, neutrality, and, especially, disinterestedness.”¹²³

For individual prosecutors, private interests that could create a conflict might include professional reputation, personal image, and career

118. *Conflict of Interest*, BLACK’S LAW DICTIONARY (11th ed. 2019).

119. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463, 469 (2017).

120. *See id.* at 470–71; *see also* *People v. Sterling*, 449 N.Y.S.2d 574, 575 (Co. Ct. 1982) (noting that prosecutors are “charged with the duty to see that the laws are faithfully executed and enforced”); ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (4th ed. 2017) (noting that “[t]he prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients.”).

121. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.7 (4th ed. 2017).

122. Green & Roiphe, *supra* note 119, at 471, 513 (“Prosecutors are public officials who independently exercise their knowledge, expertise and judgment in the interest of the public. This often involves ignoring the general public sentiment or preference in order to carry out a complex set of duties that include protecting defendants’ rights, avoiding racial and class bias, and promoting proportional punishment. As professionals, prosecutors are supposed to serve to check the power of a public inflamed by a particular issue or out to get an unpopular defendant.”).

123. *Id.* at 471.

advancement.¹²⁴ Institutional conflicts can arise from a prosecutor's connection to and identification with the prosecutorial office.¹²⁵ Both individual and institutional conflicts become problematic when "prosecutors are motivated, consciously or unconsciously, to serve self-interests rather than the public interest."¹²⁶

Personal and institutional conflicts are inherent in the enforcement of asset forfeiture laws.¹²⁷ As discussed *infra* Section B.4, Congress has enacted numerous statutes that authorize asset forfeiture and many federal and state laws permit prosecutors' offices to keep all or a portion of assets forfeited.¹²⁸ Thus, even though prosecutors cannot simply take forfeited assets for themselves, an individual conflict of interest may be present where individual prosecutors identify with their offices' goals in seizing assets.¹²⁹

Further, the DOJ's promulgation of asset forfeiture creates an institutional conflict because prosecutors may be incentivized to pursue organizations holding a substantial amount of forfeitable assets, as opposed to organizations that do not.¹³⁰ The DOJ's Asset Forfeiture Program (the "Program") sets the national policies and procedures that guide federal asset forfeiture.¹³¹ The several purposes of asset forfeiture include punishing, deterring future illegality, shrinking the economic power of criminal enterprises, compensating victims, and supporting law enforcement activities.¹³² Despite the numerous purposes the Program lists, DOJ openly states that they view revenue generation as a substantial

124. *Id.* at 479.

125. *Id.* at 473.

126. *Id.* at 479–80.

127. *See generally id.* at 477–78.

128. *Id.* at 477.

129. *Id.*

130. *Id.* at 477–78; *see also* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 70 (1998) ("For prosecutors as well [as police], funding exigencies have preempted other considerations . . . [P]rosecution may be contingent on the presence of forfeitable assets, rather than forfeiture being an incident of prosecution.").

131. Owen Sucoff, *From the Courthouse to the Police Station: Combating the Dual Biases That Surround Federal Money-Laundering Asset Forfeiture*, 46 NEW ENG. L. REV. 93, 109 (2011).

132. Curt Bohling, *Asset Forfeiture and Corporate Offenders*, 66 DOJ J. FED. L. & PRAC. 139, 139 (2018).

goal of forfeiture,¹³³ well-evidenced by the forfeiture programs that allow prosecutors' offices to share in proceeds of forfeited assets.¹³⁴

Prosecutors may also be incentivized "to offer leniency to defendants in exchange for asset forfeiture in situations where similarly situated defendants without forfeitable assets might be treated more harshly."¹³⁵ In these situations, the institutional interest in either conserving or gaining resources may compromise a prosecutor's judgment.¹³⁶

Ultimately, these types of conflicts may influence the prosecutorial office as an institution and motivate prosecutors who identify with the goals and interests of that institution.¹³⁷ This, at the very least, creates the appearance of a conflict of interest.

B. A LACK OF OVERSIGHT IN ALTERNATIVE RESOLUTION AGREEMENTS AMPLIFIES THE APPEARANCE OF A CONFLICT

As DPAs and NPAs become more popular—particularly in the DOJ's Criminal Division, which handles the DOJ's "most high-profile prosecutions"¹³⁸—procedural safeguards become more important. Yet, judicial discussion of corporate asset forfeiture has been limited to reviewing plea deals and DPAs. As discussed *supra* at Part I.B.3, the data posted by the U.S. Sentencing Commission differs from the data collected by researchers. The Commission does not collect data on DPAs, which often include orders of forfeiture.¹³⁹ Because forfeiture usually occurs in a separate civil proceeding, it is not reported to the Commission or included in data on criminal proceedings.¹⁴⁰ Additionally, there is no standard template for DPAs or NPAs, and substantial variety can be seen "across agreements signed by different divisions of DOJ and the ninety-three Offices of the U.S. Attorneys—core terms may vary depending on

133. See MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 18 (2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

134. Green & Roiphe, *supra* note 119, at 477–78.

135. *Id.*

136. *Id.* at 478–79.

137. *Id.* at 477–78.

138. Uhlmann, *supra* note 51, at 1316.

139. GARRETT, *TOO BIG TO JAIL*, *supra* note 81, at 125–26.

140. *Id.*

which prosecutor's office drafts the resolution."¹⁴¹ Further, the latest official report conducted by the DOJ's Office of the Inspector General (OIG) notes that the DOJ does not sufficiently evaluate the consequences of their asset forfeiture program:

We found that the Department and its investigative components do not use aggregate data to evaluate fully and oversee their seizure operations, or to determine whether seizures benefit criminal investigations or the extent to which they may pose potential risks to civil liberties. The Department and its components can determine how often seizure and forfeiture advance or relate to criminal investigations only through a manual, case-by-case review of component case management systems.¹⁴²

Given the above, if abuse of forfeiture exists, it would be difficult to observe. Thus, this section will address four ways that an appearance of a conflict of interest is created in corporate asset forfeiture by looking at (1) the diminished distinctions between criminal, civil, and administrative procedural requirements and legal protections in alternative resolution agreements, (2) the bargaining power of the prosecutor in extracting forfeiture, (3) the way forfeiture is calculated, and (4) how forfeited assets are used by law enforcement.

1. Criminal and Civil Forfeiture's Procedural Requirements are Easily Avoided

When pursuing corporate criminal charges, DOJ attorneys are encouraged to coordinate with federal agencies, as well as state, local, or foreign enforcement authorities¹⁴³ to pursue all the possible avenues for

141. Benjamin M. Greenblum, *What Happens to A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1897 (2005).

142. DEP'T OF JUST., REVIEW OF THE DEPARTMENT'S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES OFFICE OF THE INSPECTOR GENERAL (Mar. 2017), <https://oig.justice.gov/reports/2017/e1702.pdf> [https://perma.cc/5XTV-6MRW] [hereinafter *OIG FORFEITURE REVIEW*].

143. Bohling, *supra* note 132, at 141; DEP'T OF JUST. MANUAL, *supra* note 46, § 1-12.100. *United States v. Kordel*, 397 U.S. 1, 11 (1970); *see also* *Securities & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) ("Effective enforcement of the securities laws requires that the SEC and [the Department of] Justice be able to investigate possible violations simultaneously.").

seizing assets and assessing fines and penalties.¹⁴⁴ Coordination of parallel proceedings or joint investigations can result in a “global settlement” where the DOJ and any law enforcement agency involved resolve their actions against a corporate entity at once.¹⁴⁵ Thus, it has been noted that asset forfeiture “occupies a unique niche within the guidelines articulated by the Principles. On the one hand, asset forfeiture, either criminal or civil, may occur in conjunction with a criminal prosecution. On the other hand, civil asset forfeiture may be used as a freestanding remedy for the recovery of criminally derived assets, thereby serving as a civil alternative to criminal prosecution in an appropriate case.”¹⁴⁶

Joint investigations, parallel proceedings, and global settlements make the distinction between criminal, civil, and administrative forfeiture less apparent in the corporate context. Thus, application of criminal, administrative, or civil forfeiture statutes varies; some alternative resolution agreements never mention a forfeiture statute at all, despite ordering forfeiture of assets.¹⁴⁷ Regardless of whether forfeiture is pursued civilly or criminally, companies are typically required to agree to numerous provisions that waive all rights to contest forfeiture.¹⁴⁸

144. Bohling, *supra* note 132, at 141–42.

145. *Id.*; DEP’T OF JUST. MANUAL, *supra* note 46, § 1-12.100 (Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct).

146. Bohling, *supra* note 132, at 140–41.

147. See, e.g., Deferred Prosecution Agreement, United States v. Olympus Medical Systems Corp., No. 2:18-cr-00727-SRC (D. NJ. Nov. 28, 2018) (criminal forfeiture); Deferred-Prosecution Agreement, United States v. DACX, LLC, Case No. 17-20171-CR-UU (S. Dist. Fl. Feb. 20, 2017) (criminal forfeiture); Non-Prosecution Agreement, United States v. Banamex USA (DOJ May 18, 2017) (unclear); Deferred Prosecution Agreement, United States v. Basler-Kantonalbank, No. 0:18-cr-60228-BB (S. Dist. Fl. Aug. 29, 2018) (civil forfeiture); Non-Prosecution Agreement, United States v. Prime Partners SA, (S. Dist. NY. Aug. 14, 2017) (civil forfeiture); Deferred Prosecution Agreement, United States v. Mobile TeleSystems PJSC, No. 1:19-cr-00167-JPO (S. Dist. NY Feb. 22, 2019) (unclear).

148. These include provisions such that the corporation must withdraw any existing claims and/or agree not to file any claims, execute all documents necessary to pass clear title to the United States, testify on behalf of the United States in any legal action necessary to perfect the United States’ property interest, freely and knowingly waive all constitutional and statutory challenges to any forfeiture carried out in accordance with the agreement, including that the forfeiture constitutes an excessive fine or punishment pursuant to the Eighth Amendment, and if applicable, where funds are not directly traceable to or involved in the unlawful activity, the monies used to pay the forfeiture amount shall be considered substitute res and the company releases any and all claims it

Since the adoption of CAFRA, the government's burden of proof in both federal civil and criminal forfeiture cases has been by a preponderance of the evidence.¹⁴⁹ Theoretically, the government must allege one or more statutory theories of asset forfeiture that subject the property to forfeiture and prove, by a preponderance of the evidence, that there is a nexus between the property at issue and the underlying criminal activity—based on whether the property was involved in the commission of a crime or was gained from the proceeds of a crime.¹⁵⁰

For property involved in the commission of a crime, the government can assert that the property at issue should be forfeited pursuant to the general criminal or civil forfeiture statute.¹⁵¹ In a traditional setting, the government must charge and convict a defendant of the criminal activity to use this theory in a criminal case.¹⁵² In a civil case, the government must have facts to support the assertion that the property at issue was involved in criminal activity, but the government does not need to “trace” the property back to the underlying offense and may “forfeit clean funds ‘involved in’” the crime.¹⁵³

Forfeiture of proceeds is usually allowed if the proceeds are derived from the offense or are traceable to it.¹⁵⁴ To seize funds that are “traceable” to an underlying offense, the government must prove that the property is traceable “to the proceeds of a crime by a preponderance of the evidence to directly forfeit the property.”¹⁵⁵ Even if proceeds have changed form—e.g., from cash to securities—or have been exchanged, moved, or transferred, the government must trace the proceeds back to the

may have to such funds. *See e.g.*, Non-Prosecution Agreement, *United States v. Banamex USA* (DOJ May 18, 2017), Plea Agreement, *United States of America v. Bean Bros. Holding Co.*, Case No. 5:17 CR 7 (W. Dist. of Va. May 16, 2017).

149. Christiansen & Jarrett, *supra* note 30, at 160–61.

150. Welsh, *supra* note 28, at 183.

151. 18 U.S.C. § 981(a)(1)(A) (civil forfeiture); 18 U.S.C. § 982(a)(1) (criminal forfeiture).

152. Christiansen & Jarrett, *supra* note 30, at 160–61.

153. Welsh, *supra* note 28, at 193.

154. *Id.* at 188; *see* 18 U.S.C. § 981(a)(1)(C). Relevant statutes include wire and mail fraud, which allows the forfeiture of “proceeds” of the crime, and money laundering, which allows the forfeiture of all property “involved in” the crime. *See* Christiansen & Jarrett, *supra* note 30, at 160–61. *But see* Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 BUFF. CRIM. L. REV. 583, 464 n.39 (2004) (noting some proceeds statutes do not require tracing and have been specifically written to avoid this requirement).

155. Welsh, *supra* note 28, at 189–90.

alleged activity since the unlawful taint follows the property, and the property is still traceable regardless of form.¹⁵⁶

In a criminal case, the government has a particular interest in proving funds are traceable to an underlying offense because “[t]he property interest of the United States in the proceeds of crime vests at the time the proceeds are generated under what is known as the “relation-back doctrine.”¹⁵⁷ This doctrine is relevant when the title of the property at issue is vested in a third-party, such as a shell corporation. Thus, if the government can show that the property is traceable to the proceeds of a crime by a preponderance of the evidence, it would have immediate superior interest to that property over the shell corporation, even though the shell corporation may not have been charged with or investigated for criminal conduct.¹⁵⁸

However, proving funds are traceable to a crime can become more difficult where proceeds are “commingled”—i.e., where criminally derived funds are mixed with legitimately derived funds.¹⁵⁹ Theoretically, since the government bears the burden of proof in proving assets were derived from a crime, it should “legally distinguish dirty funds from clean funds when they are mixed in the same account or even within the same tangible asset.”¹⁶⁰ But there are ways for the government to avoid this burdensome tracing requirement. One such way is to pursue civil forfeiture instead. Congress relaxed the tracing requirement in civil forfeiture cases involving bank accounts, provided that the civil action is brought within one year of the underlying offense.¹⁶¹ As long as the action is within this timeframe, “it is immaterial that the criminal proceeds which entered an account were removed and replaced by untainted funds The Government must prove the proceeds entered the account, but it does not need to prove that those exact funds remained there.”¹⁶²

Another way to avoid tracing is by accepting substitute assets, which “are available when directly forfeitable property cannot be located upon the exercise of due diligence, has been transferred to a third party, is

156. *Id.*

157. *Id.* Under this doctrine, third parties, except bona fide purchasers for value, never acquire title to proceeds of a crime since title immediately vests in the United States at the time the proceeds generated, giving the United States the superior interest.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 191; 18 U.S.C. § 984.

162. Welsh, *supra* note 28, at 192; 18 U.S.C. § 984.

placed beyond the jurisdiction of the court, is substantially diminished in value, or is commingled with other property which cannot be divided without difficulty.”¹⁶³ When any of these factors are present, assets can be forfeited without tracing and without proof of a connection to a crime.¹⁶⁴ Some courts have approved substitute assets even where none of the factors are present and no attempts to trace have been made, treating substitute assets as an alternative to tracing, as opposed to a “last-ditch effort.”¹⁶⁵

Because many alternative resolutions are the result of combined civil and criminal proceedings, the government can assess the difficulty of obtaining the assets in question before deciding whether to pursue criminal or civil forfeiture. And if tracing funds proves too difficult under criminal forfeiture, the government can easily avoid tracing by pursuing civil forfeiture or substitute assets instead.¹⁶⁶

2. The Bargaining Power of the Prosecutor

Criminal prosecution of a corporate entity is rare, but typically fatal. Consequences of indictment can include license suspension, loss of government contracts, reputational harm, shareholder lawsuits, and typically substantial financial loss resulting in dissolution.¹⁶⁷ Thus, “many companies under investigation have elected to maximize their chances of survival by providing prompt and authentic cooperation.”¹⁶⁸ Corporations facing the possibility of criminal charges may accept any agreement that evades indictment,¹⁶⁹ even if the agreement is only a deferral of prosecution.

163. Welsh, *supra* note 28, at 192; see 21 U.S.C. § 853(p).

164. Welsh, *supra* note 28, at 192.

165. There is currently a circuit split over the issue of commingled funds and substitute assets. For an in-depth discussion, see Welsh, *supra* note 28, at 192.

166. Another way to avoid tracing involves “correspondent bank accounts” or “interbank accounts”—i.e., bank accounts used by foreign banks to offer services to their customers in jurisdictions where the banks have no physical presence. See *United States v. Union Bank for Sav. & Inv.*, 487 F.3d 8, 15–16 (1st Cir. 2007) (“The funds in the interbank account are forfeitable even if those funds have no connection to the forfeitable funds deposited in the foreign account.”); see 18 U.S.C. § 981(k)(2); Welsh, *supra* note 28, at 193.

167. See *Negotiating Closure*, *supra* note 93.

168. Wray & Hur, *supra* note 62, at 1137.

169. See *id.* at 1136 (“[A] company’s cooperation with the government will be one of the prosecutor’s primary considerations when deciding whether to charge the company

DPA's and NPA's have the potential to mitigate these consequences because press coverage can be negotiated. Additionally, an agreement might reduce the impact indictment would have on corporate stakeholders, including employees, pensioners, shareholders, creditors, and customers.¹⁷⁰ The ability of a prosecutor to "tailor remediation and compliance measures to fit the nature of misconduct" is, however, a double-edged sword.¹⁷¹ DPAs are unique in the way that they punish "offenders outside the purview of the court."¹⁷² The problematic aspect of deferred prosecutions, which is evident in the context of individual offenders, is that the defendants "have not been found guilty and have none of the protections a court adjudication can provide."¹⁷³

Additionally, in traditional civil asset forfeiture against an individual, the Government must make an initial showing, by a preponderance of the evidence, that the property is subject to forfeiture.¹⁷⁴ Though it can be difficult to bring a proceeding against the government to reclaim that property, a claimant opposing forfeiture may challenge the government through the "innocent owner defense" by showing "by a preponderance of evidence that either the property was not used for an illegal purpose or that any the illegal use was without the knowledge or consent of the claimant."¹⁷⁵ Thus, even though this is a low burden for the government, a prosecutor must still make their case before a judge if the forfeiture is challenged. Alternatively, in the corporate context, where alternative resolutions are increasingly becoming the default, there is a

itself."); *see also* section 9-47.120 of the FCPA Corporate Enforcement Policy; 2018 Year-End Update, *supra* note 97. ("This phenomenon looms large in the FCPA Pilot Program, which was adopted as the FCPA Corporate Enforcement Policy in November 2017. The policy explicitly aims to incentivize companies' behavior 'once they learn of misconduct' by offering declinations or penalty reductions to those companies that self-disclose, cooperate, and remediate.").

An example of prosecutors using their leverage can be seen in the now-defunct attorney-client privilege waivers. After the Enron scandal, DOJ's Corporate Fund Task Force ushered in the practice of including waivers of attorney-client privilege and the work product doctrine in alternative resolution agreements since corporations promised cooperation. Uhlmann, *supra* note 51, at 1303. Waivers of privilege were scrutinized over time and were eventually eliminated in 2008. Wray & Hur, *supra* note 62, at 1137, 1329.

170. *Id.*

171. *Id.*

172. Greenblum, *supra* note 141, at 1896.

173. *Id.*

174. Kim, *supra* note 17, at 539.

175. *Id.* at 540–41.

minimal burden on the prosecutor since judicial scrutiny over the terms of a DPA has been “essentially nonexistent.”¹⁷⁶

3. How Forfeited Funds are Determined

Given the above, prosecutors are in a position to “exact legal obligations from corporate offenders,” particularly when it comes to monetary sanctions.¹⁷⁷ As discussed *supra* at Part I.B.1, the Guidelines recommend calculating restitution based on the loss incurred by victims, and fines by a base amount related to the offense and the culpability of the defendants. However, “given that the guidelines do not bind prosecutors in setting the terms of a corporate deferral, prosecutors could potentially impose excessive monetary sanctions against corporate deferees.”¹⁷⁸

Further, the Guidelines provide no range or calculations for determining the appropriate disgorgement or forfeiture amount. Disgorgement can be “any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures.”¹⁷⁹ Forfeiture rarely appears in the Guidelines, and under the organizational forfeiture section, it simply states “[a]pply § 5E1.4 (Forfeiture).”¹⁸⁰ But section 5E1.4 does not provides much guidance other than “[f]orfeiture is to be imposed upon a convicted defendant as provided by statute.”¹⁸¹ Thus, the guidelines are vague as to how forfeited funds should be determined.

Despite this, asset forfeiture and disgorgement “account for nearly 61 percent of the dollars [the] DOJ has assessed in penalties to financial institutions in the past decade, nearly twice as much as through fines alone,” likely due in part to forfeiture being the predominant monetary

176. Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC DAVIS L. REV. 497, 505 (2015); *see also* Greenblum, *supra* note 141, at 1897.

177. Greenblum, *supra* note 141, at 1889.

178. *Id.*; *see also* discussion at *supra* note 68.

179. *Sentencing Guidelines*, *supra* note 69, § 8C2.9 (Disgorgement).

180. *Id.* § 8E1.2 (Forfeiture—Organizations).

181. *Id.* § 5E1.4 (Forfeiture—Organizations). In 1997, an analysis on the early days of DPAs found that the monetary sanctions imposed on organizational defendants within the agreements matched the sanctions they would have received had they been convicted. More recent DPAs have not been analyzed in this way, and given the prolonged and almost exclusive use, such analysis would likely be difficult. *See* Greenblum, *supra* note 141, at 1889–90, 1904.

sanction in many of the largest resolutions between the DOJ and financial institutions since 2014.¹⁸² Further, the predominant monetary sanction in seven of the largest resolutions with the DOJ was disgorgement or forfeiture.¹⁸³ In an action involving BNP Paribas, the amount of assets forfeited was not only notable for its high amount, but also for the unusual way the DOJ calculated this penalty.

BNP Paribas violated U.S. sanctions laws and agreed to pay over \$8.9 billion in financial penalties.¹⁸⁴ Forfeiture comprised \$8,833,600,000 of the \$8,973,600,000 penalty.¹⁸⁵ The DOJ arrived at the forfeiture amount in two steps: “First, the forfeiture amount represented ‘the amount of proceeds traceable to the violations’ set forth in the charging document.”¹⁸⁶ Thus, even though BNP Paribas received an insignificant commission for the dollars it cleared, it was required to forfeit one dollar for every dollar that it cleared in transactions that violated U.S. sanction laws.¹⁸⁷ The second unusual aspect of the calculation was that “the \$140 million fine that DOJ assessed against BNP Paribas represented ‘twice the amount of pecuniary gain to [BNP Paribas] as a result of the offense conduct.’ Thus, BNP Paribas’ fine was two times the amount of profits it received from this activity.”¹⁸⁸ While these circumstances are unusual, BNP Paribas is illustrative of how prosecutors can obtain a higher amount of assets by calculating forfeiture in different ways—a consequence of

182. CALCULATING FINANCIAL EXPOSURE, *supra* note 68.

183. *Id.* (“[F]orfeiture comprised \$8,833,600,000 of the \$8,973,600,000 penalty in BNP Paribas’ 2014 sanctions resolution, and the entire penalty in HSBC’s 2012 \$1.256 billion sanctions resolution, JP Morgan’s 2014 \$1.7 billion BSA resolution, and Société Générale S.A.’s 2018 \$717 million sanctions resolution.”).

184. *Id.* The forfeiture amount here is different than discussed in *supra* Part I.B.3. This is because while the total forfeiture amount specified in Consent Order of Forfeiture/Money Judgment totals \$8,833,600,000, the Judgment credited “Related Settlements” the company paid, totaling \$508,000,000, leaving a remainder of \$3,838,800,000, which was paid to the Government. See Consent Preliminary Order of Forfeiture/Money Judgment, United States v. BNP Paribas S.A., No. 1:14-cr-00460 (2014), <https://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/consent-preliminary-forfeiture-money-judgment.pdf> [<https://perma.cc/ZEJ3-KAL3>]. The last sum was used in *The Corporate Registry*, *supra* note 112, which is the amount reflected in Charts I, II in Part I.B.3. The inconsistency in dates is due to the plea date (July 10, 2014) being much earlier than the judgment date (May 1, 2015).

185. CALCULATING FINANCIAL EXPOSURE, *supra* note 68.

186. *Id.*

187. *Id.*

188. *Id.*

having no specific guidelines on how forfeited funds should be determined.

4. How Forfeited Assets Used by Law Enforcement

In 2012, Manhattan District Attorney Cyrus R. Vance, Jr. and the DOJ announced the resolution of a joint investigation into the criminal conduct of ING Bank, NV (ING), resulting in a DPA where \$619 million of ING's assets would be forfeited.¹⁸⁹ Half of that forfeiture amount, \$309.5 million, was paid to the District Attorney's Office in Manhattan.¹⁹⁰ The other half went to the United States.¹⁹¹ The division of assets in this agreement was made possible by the DOJ's disbursement system, which is designed to give state and federal agencies the proceeds from forfeited asset sales.¹⁹²

The Comprehensive Crime Control Act created the equitable sharing program, which allows the "value of assets seized by federal agents to be shared with any state or local agencies that participate in the arrest, provided that the shared funds are used for law enforcement purposes only."¹⁹³ In ING's DPA, the agreement is the result of a joint investigation, which is one of several ways state or local agencies participate in equitable sharing. Participating in joint investigations makes states eligible to receive a percentage of assets' value, proportionate to the number of hours contributed to the investigation.¹⁹⁴

State and local agencies can also participate in equitable sharing through adoption, which allows local law enforcement to seize property and then have federal authorities pursue the forfeiture under federal law.¹⁹⁵ Under adoptive forfeiture, a state agency can turn the case and the seized assets over to federal agency, who can transfer up to 80 percent of the assets' value back over to the state agency.¹⁹⁶ This program allows the

189. *District Attorney Vance Announces \$619 Million Settlement with ING Bank, MANHATTAN DA* (June 12, 2012), <https://www.manhattanda.org/district-attorney-vance-announces-619-million-settlement-ing-bank/44/> [<https://perma.cc/33LW-JWED>].

190. *Id.*

191. *Id.*

192. *See* ASSET FORFEITURE AND MONEY LAUNDERING SECTION, U.S. DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL 127 (2019); Sucoff, *supra* note 131, at 95.

193. *Id.* at 111.

194. *See* Williams et al., *supra* note 133, at 25.

195. *See id.*

196. *Id.*

DOJ to receive a 20 percent share or more while expending minimal resources,¹⁹⁷ and allows state law enforcement agencies to “evade state legislative and constitutional requirements to pay forfeited amounts into the state treasury.”¹⁹⁸ Under adoptive forfeiture, revenue is for law enforcement use only.¹⁹⁹

Equitable sharing has been criticized for creating incentives that allow prosecutors and law enforcement to abuse the system.²⁰⁰ But evidence of how much the funds from asset forfeiture affect law enforcement and how much of it is actually “excess” is inconclusive. Some reports indicate that many law enforcement agencies use civil asset forfeiture to make a profit.²⁰¹ The Institute for Justice released a report in 2010 that studied the abuse of asset forfeiture by police departments.²⁰² Because assets gained through civil forfeiture can be kept by the government, the report found that “[t]his incentive has led to [the] concern that civil forfeiture encourages policing for profit, as agencies pursue forfeitures to boost their budgets at the expense of other policing priorities.”²⁰³ This type of “budget evaluation” crime-solving is reflected in a DOJ publication that notes “law enforcement needs to figure out whether it is more lucrative ‘to target major dealers or numerous smaller ones.’”²⁰⁴

197. Sucoff, *supra* note 131, at 112.

198. See also Cheh, *supra* note 26, at 43 n.200 (“The federal program allows local agencies to turn over their forfeiture cases to the federal government. Once the federal government ‘adopts’ a local seizure, the federal government subtracts minimal expenses and returns about 85% of the amount to the local law enforcement department.”).

199. *Id.*

200. Allison, *supra* note 3, at 283.

201. *Id.*; Williams et al., *supra* note 133, at 6; but see Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL’Y, 315, 335 (2017). Despite federal guidelines that forfeiture funds should only “increase and not replace,” some law enforcement agencies use forfeiture funds to meet their annual budget. Similarly, “federal guidelines forbid law enforcement budgets from supplanting governmental appropriations, yet law enforcement budget allocations are often based upon the amount of forfeiture revenue the law enforcement agency collects.”

202. See Williams et al., *supra* note 133.

203. Allison, *supra* note 3, at 283–84; Williams et al., *supra* note 133, at 6.

204. Crepelle, *supra* note 201, at 338; U.S. DEP’T OF JUSTICE, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE YEAR REVIEW 1988–1992, at 23 (1993), <https://www.ncjrs.gov/pdffiles1/Digitization/146395NCJRS.pdf> [<https://perma.cc/Y56H-R2S3>].

However, as other studies have pointed out, some local governments offset seizures by reducing other allocations to policing—thereby undermining the statutory incentive created by the equitable sharing laws.²⁰⁵ Although the DOJ’s equitable sharing program requires most of the assets recovered from civil forfeiture to go directly to law enforcement, “there is nothing in federal law that prevents the local government from then cutting the police budget . . . in response.”²⁰⁶ Thus, forfeitures may increase police budgets, “but not necessarily in a way that strongly skews police behavior.”²⁰⁷

Despite inconclusive studies on whether funds from forfeiture actually benefit law enforcement offices, law enforcement “has ardently opposed reforms that make collecting forfeiture revenue more difficult.”²⁰⁸ When CAFRA was pending in Congress, discussions around placing forfeiture funds in a neutral account were opposed by law enforcement.²⁰⁹ This may be due in part to the flexibility that law enforcement—or at least, the state legislature—has when deciding how forfeited money is used.

Each district attorney office files yearly spending reports to the federal government.²¹⁰ But even with these reports and audits, there is no

205. See generally KATHERINE BAICKER & MIREILLE JACOBSON, FINDERS KEEPERS: FORFEITURE LAWS, POLICING, AND LOCAL BUDGETS (NAT’L BUREAU OF ECON. RESEARCH, WORKING PAPER 10484, 2004), available at <https://www.nber.org/digest/oct04/w10484.html> (finding that local governments offset the seizures that police make by reducing their other allocations to policing, undermining the statutory incentive created by the laws).

206. JOHN F. PFAFF, SENTENCING LAW & POLICY 614 (Robert C. Clark et al. eds., 2016) (referencing an imperial study on the effect of forfeiture on police budgets, Katherine Baicker & Mirelle Johnson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113 (2007)).

207. *Id.* at 615.

208. Crepelle, *supra* note 201, at 332; (quoting Blumenson & Nilsen, *supra* note 130, at 107 (“noting law enforcement stopped efforts that would have placed forfeiture proceeds in a neutral account”); Jefferson Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 275 (2011) (“noting law enforcement has consistently opposed state and federal level forfeiture reforms to civil asset forfeiture”)).

209. Crepelle, *supra* note 201, at 332 (quoting Blumenson & Nilsen, *supra* note 130, at 107).

210. Reuven Blau, *High-Flying Cy: How Manhattan Da Vance Spent \$250k On Travel and Food*, THE CITY NYC (Apr. 3, 2019), <https://thecity.nyc/2019/04/high-flying-cy-vance-spent-forfeited-funds-on-travel-and-food.html> [https://perma.cc/9ETL-QXU6].

“line-by-line breakdown of how the money is spent, only generic categories.”²¹¹ Thus, despite the requirement that “[e]xpenditures must cover ‘law enforcement’ issues . . . [but] few other rules exist.”²¹²

For federal agencies, the AFF plays a large role in facilitating the ability to use asset forfeiture.²¹³ The AFF is a self-funded resource, which “makes the multibillion dollar Asset Forfeiture Program possible.”²¹⁴ However, before the AFF existed, “many agencies were reluctant to commit scarce appropriated monies to an expensive and often uncertain forfeiture process, where achieving success in seizing assets also meant increased costs for storing, maintaining, and perfecting the Government’s interest in the seized property.”²¹⁵

Representative Henry Hyde, the sponsor of CAFRA, was concerned that a fund exclusively for forfeitures would turn the “crime-fighting weapon” into “a money-making machine for law enforcement agencies,” noting that “[t]here is no reason why all funds flowing from federal forfeitures should not be subjected to annual authorization and appropriations bills passed by the Congress.”²¹⁶ Hyde’s concerns were well-founded: the creation of the AFF and TFF “gives federal agencies a tremendous financial incentive to increase forfeitures and, in the opinion of many, undermines the integrity of the justice system by creating a conflict of interest.”²¹⁷

211. *Id.* This issue is further confounded in states not working with the federal government: “[o]nly 29 states clearly require law enforcement to collect and report forfeiture data.” Thus, for several states, “we know nothing or next-to-nothing about the use of civil forfeiture or its proceeds.”

212. *Id.*

213. THE DEP’T OF JUST., ASSET FORFEITURE PROGRAM FY 2019 PERFORMANCE BUDGET CONGRESSIONAL JUSTIFICATION 1 (2019), <https://www.justice.gov/jmd/page/file/1034336/download> [<https://perma.cc/8TUG-YTCL>] [hereinafter *2019 Performance Budget*]; see *supra* at Part I.A.1.

214. *2019 Performance Budget*, *supra* note 213, at 1. The amount of money collected through asset forfeiture and deposited into the AFF is audited yearly by a private company. THE DEP’T OF JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2018, 1 (2018), <https://oig.justice.gov/reports/2018/a1905.pdf#page=1> [<https://perma.cc/JZ4Y-WH7L>].

215. *2019 Performance Budget*, *supra* note 213, at 1.

216. See STEVEN MARK LEVY, CIVIL FORFEITURE ABUSE, FED. MONEY LAUNDERING REGULATION: BANKING, CORP. AND SECURITIES COMPLIANCE § 25.06 (2d ed. 2019).

217. *Id.* (“One court quoted with alarm a 1990 memorandum from the Attorney General urging United States Attorneys to more aggressively pursue forfeitures in order

While hard evidence to support abuse in the imposition of financial sanctions—particularly forfeiture—does not yet exist, alternative resolution agreements, the bargaining advantage of the prosecutor, and the minimal need for evidence or proof of wrong-doing certainly create the perception of a conflict of interest for law enforcement. If forfeited funds are used properly, law enforcement should be taking every step possible to ensure the integrity of their office via transparency.

III. MODIFYING THE USE OF CORPORATE ASSET FORFEITURE

Forfeiture is a powerful tool for deterring corporate criminal behavior, as other financial penalties have limitations that render them less effective.²¹⁸ As illustrated in Part II.B.1, asset forfeiture laws allow recovery of property that was used in, obtained from, or traceable to an unlawful act. By focusing on economic incentives, forfeiture can help deter crimes that typically involve financial gain by seizing the property necessary to commit those crimes or by seizing the profits gained from those crimes. Furthermore, as addressed in Part I.B.1, forfeiture has the potential to compensate victims of these crimes more effectively than restitution.

However, this Note has shown there are conflicts of interest inherent in corporate asset forfeiture that remain unaddressed. As discussed *supra* at Part II.A, these institutional conflicts may directly and indirectly motivate prosecutors and law enforcement to initiate cases where forfeitable assets exist. Additionally, law enforcement will face little difficulty seizing corporate assets due to the lack of protections surrounding asset forfeiture in the corporate context. Due to the growing use of alternative resolution agreements, law enforcement will face minimal resistance to asset forfeiture provisions in these agreements, leaving the determination and calculation of forfeitable assets entirely up to the prosecuting agency. Equally troubling is the fact that the assets seized typically go directly to law enforcement, which creates an undeniable conflict of interest.²¹⁹ To combat this conflict and ensure assets seized are not used profligately, more oversight is needed.

to forestall a serious budget shortfall at the Department of Justice”) (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56, n.2 (1993)).

218. See discussion *supra* at Part I.B.1.

219. See *supra* discussion at Part II.B.4, for a discussion on whether law enforcement actually benefits from this system.

There are several possible solutions to combat conflicts of interest in corporate asset forfeiture. This Note first addresses why additional judicial involvement will not fix the underlying issues, nor will the Department's recent measures taken to appear more responsible. Section C then proposes a model of governmental oversight that should be implemented.

A. THE MISPLACED PROSPECT OF JUDICIAL INVOLVEMENT OR CONGRESSIONAL REFORM

Increased judicial involvement of DPAs, NPAs, or declinations with disgorgement could potentially increase oversight to corporate asset forfeiture. But these agreements bestow prosecutors with unrestrained leverage to impose deferral, non-prosecution, and declination preconditions, which can—and do—remove any possibility of judicial review. Thus, judicial review would have to be specific and include provisions for evaluating the forfeiture amount and ensuring that the government can actually find or obtain those proceeds, rather than simply taking substitute assets. But one aspect of these agreements is to keep defendants out of the court system, thus it would be somewhat counterproductive to require judicial review of decisions not to prosecute. Furthermore, even within the limited judicial review that currently exists, most courts refuse to override prosecutorial decisions in this context.²²⁰

Most meaningful congressional reform of asset forfeiture proffered focuses on burdens of proof, right to counsel, and defenses,²²¹ and thus, concentrate on procedural protections after assets have been seized or after notice has been given. But organizational defendants have not been able to benefit from the previous reforms in civil forfeiture law, as they consent to waiving their rights to raise legal challenges. This indicates that reform to forfeiture statutes would have to be revolutionary in nature; the authority and discretion to seize would have to be accompanied by a high suspicion such that the legal protection could not be waived or avoided.

220. See Greenblum, *supra* note 141, at 1898.

221. See *supra* discussion of CAFRA at note 38.

B. THE SHORTCOMINGS OF DOJ MANAGEMENT

As discussed *supra* at Part II, the OIG conducts yearly audits of the AFF. In 2017, the OIG published an evaluation of the Department's oversight of cash seizure and forfeiture activities, which recommended that the Department "[d]evelop ways to collect relevant data related to seizure and forfeiture activities sufficient to identify and evaluate whether seizures advance or are related to federal investigations," and "[r]eview seizure practices to determine whether more-specific policy guidance and/or training is needed to ensure consistency in seizure operations."²²²

Thus far, there have been no reported efforts made to implement procedures in compliance with these recommendations. In fact, departments within the DOJ reacted negatively to the OIG's evaluation. In a footnote, the report responded to the Criminal Division's response to an earlier draft:

[t]he Criminal Division's response . . . suggests that the OIG does not fully appreciate the importance of asset seizure and forfeiture in addressing our nation's crime and illegal drug problems . . . [W]e believe the Criminal Division's comments indicate that it has missed a key point—that regardless of the importance of the law enforcement tool, it must be used appropriately, with effective oversight, and in a way that does not place undue risks on civil liberties.²²³

In addition, the Department's records of its forfeiture spending are lacking. In a continuously updated "Report Card" study, the Justice Institute evaluates each state and each agency that participates in asset forfeiture and gives them a grade based on pre-determined factors.²²⁴ In the category "accounting for forfeiture fund spending," the study considered whether "the Department account[s] for how it spends revenue generated through forfeiture," and whether "the purpose of forfeiture fund expenditures promotes legislative oversight and responsible management of public funds."²²⁵ The DOJ received an A- for tracking seizures and a C

222. OIG FORFEITURE REVIEW, *supra* note 142, at 40.

223. *Id.*

224. ANGELA C. ERICKSON, JENNIFER McDONALD & MINDY MENJOU, FORFEITURE TRANSPARENCY & ACCOUNTABILITY STATE-BY-STATE AND FEDERAL REPORT CARDS, THE INST. FOR JUST. (last updated May 3, 2019), <https://ij.org/report/forfeiture-transparency-accountability/?state=DOJ>.

225. *Id.*

for accounting for forfeiture fund spending.²²⁶ This outcome is fairly predictable given the priorities of the Asset Forfeiture Program. The Report Card also notes that there is no mechanism in place to ensure transparency or accountability for noncompliance—i.e., Congress does not hold the Department accountable for failing to file required forfeiture reports.²²⁷

In 2017, Attorney General Jeff Sessions hired Corey Ellis, a U.S. Attorney, to fill a new Director of Asset Forfeiture Accountability position to “review and coordinate all aspects of the Department’s Asset Forfeiture Program, and work with appropriate Department of Justice components to ensure compliance, review complaints, and advance the integrity, efficiency, and effectiveness of the program.”²²⁸ Although this announcement appeared to be a step in the right direction, the position was likely created due to the heavy criticism the Department received when it revived adoptive equitable sharing earlier that year.²²⁹ Few have been satisfied with this solution, calling this simply an attempt by the DOJ to appeal to the critics of their asset forfeiture program without making any real change.²³⁰

C. THE POTENTIAL FOR EFFECTIVE THIRD-PARTY OVERSIGHT

This Note proposes managed third-party oversight to resolve the accountability and conflicts of interest that exist in corporate asset forfeiture. The OIG currently performs this function on a macro level, but the Office is tasked with many oversight responsibilities,²³¹ and forfeiture

226. *Id.*

227. *Id.*

228. *Press Release: Attorney General Sessions Announces Director of Asset Forfeiture Accountability*, DEP’T OF JUST. (Oct. 17, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-director-asset-forfeiture-accountability> [<https://perma.cc/V3TG-XP AE>].

229. Sarah N. Lynch, *U.S. Justice Department Taps Prosecutor to Oversee Asset Forfeiture Program*, REUTERS (Dec. 7, 2017), <https://www.reuters.com/article/us-usa-justice-forfeiture/u-s-justice-department-taps-prosecutor-to-oversee-asset-forfeiture-program-idUSKBN1E12UV> [<https://perma.cc/EW23-J9CJ>] (referring to adoptive forfeiture).

230. *Id.* (citing Robert Johnson, an attorney with the Institute for Justice).

231. The Offices’ challenges for 2019 include managing a safe, secure, and humane prison system, safeguarding national security and countering domestic and international terrorism, and protecting the nation and the department against cyber-related threats, among others. *Top Management Challenges*, OFFICE OF THE INSPECTOR GENERAL, DEP’T

likely falls to the backburner. Thus, this Note suggests that third-party management could be achieved by implementing an inspector general specifically for asset forfeiture, either within the DOJ OIG or separate from it.

An example of comprehensive third-party oversight can be seen in the Troubled Asset Relief Program (TARP), which was established by the Emergency Economic Stabilization Act of 2008 (EESA) “as the nation’s financial system was on the verge of collapse and economists feared another Great Depression.”²³² TARP allowed the Treasury to purchase toxic assets and equity from financial institutions to strengthen the financial markets.²³³ Likely due to the controversial nature of the Program, EESA also established an Office of the Special Inspector General for TARP, which “conducts internal and external audits of the purchase, management and sale of financial institution assets by the Secretary of the Treasury under TARP.”²³⁴ Among the Special Inspector General’s duties are collecting and summarizing information relating to a description of the categories of troubled assets, explaining why the Secretary deemed it necessary to purchase each such troubled asset, and estimating the total amount of troubled assets purchased pursuant to any program.²³⁵ TARP keeps an extensive collection on reports, audits, and status updates of the program on its website. In addition, the use of

OF JUST., (last visited Dec. 14, 2019) <https://oig.justice.gov/challenges/> [<https://perma.cc/K9MQ-D4KN>].

232. Chris Isidore, *U.S. Ends TARP with \$15.3 Billion Profit*, CNN MONEY (Dec. 19, 2014), <http://money.cnn.com/2014/12/19/news/companies/government-bailouts-end/> [<https://perma.cc/BP5M-C5SV>].

233. For further information about TARP, see *About TARP*, U.S. DEP’T OF THE TREASURY, <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/default.aspx#> [<https://perma.cc/4PPC-EV58>].

234. *Financial institution regulation by Department of Justice*, 2 WEST’S FED. ADMIN. PRAC. § 1915. While the Inspector General’s duties represent very specific, specialized instructions to ensure accurate reporting and accountability, this was only one of four ways Congress ensured that TARP would be closely supervised. TARP’s website notes that “TARP has been subjected to unprecedented oversight since its inception. The EESA gave oversight authority to four separate entities: the Financial Stability Oversight Board; the Government Accountability Office; the Special Inspector General for TARP; and the Congressional Oversight Panel.” Operations were ceased on April 3, 2011, as required by EESA. See *About TARP*, U.S. DEPT’S OF THE TREASURY, <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/Oversight-and-Accountability.aspx> [<https://perma.cc/2TJ8-X4FV>].

235. 12 U.S.C. § 5231 (2012).

recovered funds is transparent: “[a]ll recovered funds are deposited in the U.S. Treasury and go to reducing the national debt.”²³⁶

Regardless of whether TARP was a successful program, it illustrates the level of oversight that *can* be accomplished. Thus, a Special Inspector General for Asset Forfeiture could go a long way in restoring the integrity of the asset forfeiture program.

Provisions relating to organizational defendants could be:

(A) A description of the categories of proceedings assets were seized in through the Department’s Asset Forfeiture Program, including:

(1) Whether the forfeited assets were part of a DPA, NPA declination with disgorgement, a plea deal, or trial;

(a) If DPA, NPA, or declination with disgorgement: whether the assets were forfeited pursuant to a criminal or civil statute or administrative rule;

(b) If DPA, or plea deal: whether asset forfeiture provisions were reviewed by a judge in a court of law, including whether a separate civil proceeding occurred.

(B) The theory of forfeiture the assets were forfeited under, including an explanation of the reasons the Department deemed it necessary to use forfeited asset, including whether another financial penalty was determined to be less effective.

(C) A detailed and accurate reporting of how the Department spends revenue generated through asset forfeiture, including those seized under:

(1) Joint-investigation efforts and equitable sharing programs with state law enforcement;

(2) Parallel proceedings with various federal and/or state agencies.

(D) Periodical reporting on whether the asset forfeiture program’s expenditure of forfeiture funds promotes the responsible management of public funds.

236. *Where Did the Money Go?*, U.S. DEPT’S OF THE TREASURY, <https://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/where-did-the-money-go.aspx> [https://perma.cc/QD4Y-UTM7].

(E) Collect relevant data related to corporate asset forfeiture sufficient to evaluate whether seizures advance or are related to federal investigations, particularly there where are joint investigations or parallel proceedings.

(F) Determine whether more-specific policy guidance and training is needed by both Department attorneys and other law enforcement agencies to ensure consistency in asset forfeiture operations, including more robust guidelines on how to use asset forfeiture.

(G) The creation of a collective database to house such information so that it is available and accessible to the public.

These provisions would create accountability for the asset forfeiture program by requiring accurate reporting of forfeited assets and transparency in how those assets are used by law enforcement agencies. Accountability and transparency would help alleviate the appearance of a prosecutorial conflict of interest by ensuring that the lines are less blurry between criminal, civil, and administrative forfeiture in the corporate context, requiring an explanation of why asset forfeiture was necessary under the circumstances, implementing more policy guidance on how to use asset forfeiture, and reporting on how forfeited funds are used. Creating a collective database to house this information would allow judges to recognize abuse in prosecutorial discretion, lawyers to build more robust defense efforts, and policy makers to explore the deterrence effect of asset forfeiture.

With that said, the provisions described above would only be a start to alleviate some of the conflicts of interest that currently plague the asset forfeiture program. But provisions requiring accurate reporting of how asset forfeiture is used would go a long way towards ensuring that corporate asset forfeiture does not remain a tool that allows prosecutors to abuse their leverage with zero accountability. As alternative resolution agreements grow more popular, transparency becomes even more necessary.

CONCLUSION

Asset forfeiture is inherently incompatible with law enforcement's private interests—both personal and institutional—and their public duties. Over the past two decades, policy makers have worked to reform criminal and civil asset forfeiture and alleviate these conflicts by creating procedural limitations. But as shown throughout this Note, little attention

has been given to asset forfeiture when used in the corporate context, resulting in a problematic incentive structure. When asset forfeiture is used in alternative resolution agreements with corporations, the few procedural limitations on asset forfeiture become essentially non-existent. Due to the growing use of alternative resolution agreements, law enforcement faces minimal resistance to asset forfeiture provisions in these agreements, leaving the determination, calculation, and tracking of forfeitable assets entirely up to the prosecuting agency. Additionally, as many assets seized typically go directly to law enforcement, prosecutors may be directly and indirectly motivated to initiate cases where forfeitable assets remain.

Thus, implementing oversight would help alleviate these conflicts by promoting accountability and transparency through accurate reporting on what assets were seized and how the funds are used by law enforcement and the implementation of more policy guidance on how to use asset forfeiture. Implementing effective oversight would be one step in the right direction to improve the integrity of asset forfeiture when used the corporate context.