

BETTING THE CORPORATION: COMPLIANCE OR DEFIANCE?

COMPLIANCE PROGRAMS IN THE CONTEXT OF DEFERRED AND NON-PROSECUTION AGREEMENTS

-CORPORATE PRE-TRIAL AGREEMENT UPDATE - 2008-

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I. INTRODUCTION.

In 2008, the U.S. Department of Justice (DOJ) entered into sixteen corporate pre-trial agreements (collectively deferred prosecution agreements (DPA) and non-prosecution agreements (NPA)). This was a sixty percent decline from the forty agreements we saw in 2007. This brings to one hundred and twelve the number of agreements we have found from 1993-2008.¹

Violations of the Foreign Corrupt Practices Act (FCPA) remained the predominant subject matter addressed by corporate pre-trial agreements with seven of the sixteen agreements resolving FCPA violations. In 2007, roughly a third of the agreements involved FCPA violations. In addition, we saw the first corporate pre-trial agreements resolving immigration work-site enforcement investigations into corporate targets. There were three work-site related

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This article represents the views of the authors only, not their respective employers.

¹ For a comprehensive analysis of each agreement since 1992 and an in-depth analysis of the origins of these agreements, see, Lawrence D. Finder and Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS UNIV. L. REV. 1 (2006) [hereafter *Devolution* article] and *Corporate Counsel Review* (Published at South Texas College of Law) and *Annual Corporate Pre-Trial Agreement Update - 2007*; Volume XXVII, No. 2, November 2008 [hereafter the *2007 Update*]. This article does not address prosecutions leading to criminal convictions, such as the recent Siemens plea agreement or plea agreement under consideration in the BP case out of the Southern District of Texas, given that the analysis under the applicable DOJ charging policy in those cases resulted in criminal convictions—which are fundamentally different than corporate pre-trial agreements. For instance, in cases where the entity receives a conviction, it faces supervision from the U.S. Probation Office. BP and Siemens are, however, notable in highlighting that the DOJ continues to seek criminal convictions in the appropriate cases after careful analysis of the charging principles discussed below.

corporate pre-trial agreements in 2008.²

In 2008, every agreement contained some sort of corporate compliance reform provision—continuing a trend we have seen over the last few years. This trend is the focus of this update. Aside from building on prior observations, this piece attempts to draw empirical observations about the types of compliance programs that come out of corporate pre-trial agreements. The authors recognize there is no one-size fits all template for corporate compliance programs. But by examining compliance programs in the context of DPAs and NPAs, the authors strive to provide a picture of what types of compliance measures are negotiated by the DOJ and corporate targets to resolve internal control and other business deficiencies that resulted in criminal wrongdoing. We hope that this will provide some guidance for attorneys and other professionals who deal with compliance issues.

2008 AGREEMENTS	2007 AGREEMENTS		2006 AGREEMENTS
Sigue Corp.	Alabama Contract Sales	Newsday and Hoy	Statoil
Jackson Country Club	Akzo Nobel	American Express Int'l	Intermune
WABTEC	Appalachian Oil Co.	Collins and Aikman	Schnitzer Steel
Flowserve	Vetco	ITT Corp.	Firstenergy Nuclear
AB Volvo	Baker Hughes	Purdue Pharma	Williams Power
Willbros Group	NETeller PLC	Biomet	Operations Mgmt. Intl.
AGA Medical	DePuy Orthopaedics	Smith & Nephew PLC	Roger Williams Med. Cntr.
Faro Technologies	Zimmer Inc.	Stryker Orthopedics	HVB
ESI	British Petroleum	Ingersol Rand	Bank Atlantic
Milberg Weiss	York International	Blue Cross & Blue Shield RI	Western Geco LLC
Lawson Products	Union Bank of California	United Bank of Africa	MRA Holdings
Republic Services	Reliant	Pfizer	AIG
American Italian Pasta Co	Paradigm B.V.	Textron	Healthsouth
Penn Traffic	Omega Advisors	Mirant Energy Trading	BAWAG
IFCO	Lucent	Jenkins Gilchrist	Boeing
Fiat	Jazz Pharmaceuticals	ABT	Prudential Equity Group
	Holy Spirit Association	Express Scripts Inc.	Mellon Bank
	Electronic Clearing House	El Paso	Royal Ahold
	Maximus Inc.	English Construction Co.	Endocare
	NetVersant	Chevron	

DPAs/NPAs for 2006-2008

II. BACKGROUND ON DPAs AND NPAs.

Both DPAs and NPAs are agreements between a particular DOJ component and a corporate entity to conclude a corporate criminal investigation.³ The label affixed depends on whether a charging instrument is filed. In a DPA, the DOJ files a criminal case, yet defers

² See Charts below.

³ In addition to the 93 U.S. Attorney's Offices (any one of which may have venue to investigate and prosecute an offense), the DOJ also has centralized prosecution components in its Criminal Division, Civil Division, Environmental Crimes and Natural Resources Division and the Antitrust Division.

prosecution of the case provided that the corporate entity adheres to the DPA.⁴ With an NPA no charging document is filed, but the investigation remains pending until the entity fulfills the terms of the NPA.⁵ The substantive result of both is the same: no criminal conviction for the company.

NPAs and DPAs look fairly similar—although the DPAs (for the most part) resemble documents that are filed with a court (paragraph numbers, case style, etc.). An NPA usually takes the form of a letter from the particular DOJ component investigating the entity.⁶ Both agreements are signed by both the government and the entity.

Most of the terms found in the agreements are fairly uniform. The company (1) admits to wrongdoing, (2) waives the statute of limitations (sometimes broadly), (3) agrees that the agreement is admissible in court, (4) agrees that the company will no longer violate the law; (5) agrees the company will help the government prosecute any wrongdoers (*e.g.*, make employees available to testify for grand jury or trial and provide documents and other evidence to the DOJ), and (6) agrees that company employees will not contradict the terms of the agreement.

In return, the DOJ agrees to dismiss the case (in the case of a DPA) or not bring one (in the case of an NPA). The agreement also has an expiration date, an appeals process if the DOJ thinks the company violated the agreement and provisions dealing with penalties, restitution, and/or forfeiture. Frequently, the agreements do not address the potential tax consequences of these penalties and usually include an exclusion for tax law violations.⁷

⁴ The Court must approve the period of deferral under 18 U.S.C. Section 3161(h)(2) which provides: “The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence . . . (2) [a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.” Additionally, following its filing of a criminal complaint, the government may demand of the corporate defendant a waiver of preliminary examination. Rule 5.1(d), Federal Rules of Criminal Procedure.

⁵ See Memorandum from Craig Morford, Acting Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, note 2 (March 7, 2008) [hereafter “Morford Memo”], *available at* <http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf>.

⁶ With a DPA, a case number is assigned by the federal court once a charging document is filed and the DPA is often filed into the record. NPAs are not filed with the court, but a company may have a duty to file the agreement as a material definitive agreement under the federal securities laws. See Form 8K (Current Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934), *available at* <http://www.sec.gov/about/forms/form8-k.pdf>.

⁷ See Paul McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, Address Before the Senate Committee on Armed Services Concerning Boeing Company Global Settlement Agreement (Aug. 1, 2006) (discussing DOJ policy addressing tax issues in settlement agreements), *available at* <http://armed-services.senate.gov/statemnt/2006/August/McNulty%2008-01-06.pdf>

Both the DPA and NPA allow the entity to avoid the stigma of criminal conviction and associated collateral consequences, which can vary depending on industry and structure of the organization. For some companies this may mean reputational harm—criminal convictions are not a popular marketing tool. For others it may mean they can no longer do business with the government (*i.e.*, debarment) or continue to exist (*e.g.*, Arthur Andersen).⁸ Until 2008, there was little policy guidance from the DOJ on the form and content of the agreements, including the common components of the agreements (*e.g.*, corporate monitors). A complete analysis of how these pre-trial agreements have evolved and their respective provisions is found in the *Devolution* article.

III. NEW DOJ POLICIES RELEVANT TO CORPORATE PRE-TRIAL AGREEMENTS.

There were three noteworthy changes to DOJ policy in 2008 vis-a-vis DPAs and NPAs.

A. U.S. Attorney's Manual 9-28.000.

First, in 2008, the DOJ implemented a new corporate charging policy, which replaced prior guidance to federal prosecutors on charging corporate entities set forth in the McNulty Memo.⁹ This new policy is no longer associated with a particular Deputy Attorney General and is now found at 9-28.000 of the U.S. Attorney's Manual (USAM).¹⁰

The new guidance leaves unchanged from prior policy guidance the nine factors for charging a corporation: (1) the nature and seriousness of the offense; (2) pervasiveness of wrongdoing; (3) the company's history of similar conduct; (4) the company's timely and voluntary disclosure; (5) the existence and effectiveness of a pre-existing compliance program; (6) the company's remedial actions; (7) the collateral consequences (including harm to shareholders) of a conviction; (8) the adequacy of prosecution of individuals; and (9) the

⁸ See also note 10 *infra*.

⁹ See Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereafter "McNulty Memo"]. This policy is discussed at length in the *2007 Update*.

¹⁰ USAM 9-28.000, Principles of Prosecution of Business Organizations, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. Before the McNulty Memo, the DOJ's Corporate Charging Policy was set forth in the 2003 Thompson Memo and its predecessor, the 1999 Holder Memo. Both of these memos are discussed at length in the *Devolution* article. See also Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; [hereafter "Thompson Memo"]. Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Atty's on Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/chargingcorps.html>.

adequacy of civil or regulatory remedies. An iteration of this policy has been in place since 1999 and has remained in tact until this latest version took shape in 2008.¹¹

“Waiving the attorney-client and work product protections has never been a prerequisite under the DOJ’s prosecution guidelines for a corporation to be viewed as cooperative.”¹² The revised policy makes this position absolutely clear. Under the new policy, “[c]orporations that timely disclose relevant facts may receive due credit for cooperation, regardless of whether they waive attorney-client privilege or work product protection in the process. Corporations that do not disclose relevant facts typically may not receive such credit, just like any other defendant.”¹³ The new policy forbids prosecutors from asking what was under the McNulty Memo termed Category II information or non-factual attorney-client privileged and work product communications.¹⁴

For purposes of this update, the most important feature of the new policy is that it specifically addresses DPAs/NPAs. USAM 9-28.200 of the revised corporate charging policy provides that “[n]on-prosecution and deferred prosecution agreements . . . occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.”

Before this new language, the only language in the McNulty Memo (and Thompson Memo before it) to address DPAs/NPAs provided:

In some circumstances. . . pretrial diversion may be considered in the course of the government’s investigation [and] . . . prosecutors should refer to the principles governing non-prosecution agreements generally [citing to the U.S.A.M. provision governing pre-trial agreements for individuals] . . . [which] permit a non-prosecution agreement in exchange for cooperation when a corporation’s timely cooperation appears to be necessary to the public interest and other means

¹¹ A exhaustive review of the DOJ’s corporate charging policies from the 1999 Holder Memo to the 2003 Thompson Memo can be found in our *Devolution* article 17–27. *See also Devolution* article at 36 (Appendix of DPAs/NPAs). A discussion of the 2006 McNulty Memo may be found in the *2007 Update*.

¹² USAM 9-28.710.

¹³ Remarks delivered by Mark Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, at the American Bar Association Securities Fraud Conference (October 2, 2008), *available at* <http://www.usdoj.gov/dag/speeches/2008/dag-speech-0810022.html>

¹⁴ USAM 9-28.710–720. In September 2008, Federal Rule of Evidence 502 was adopted. The Rule primarily addresses inadvertent disclosures. It does not address selective waiver. *See Devolution* article at 26 (noting that whether selective waiver provisions will be honored varies by jurisdiction); Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE LAW REV. 155 (2006) (providing a thoughtful discussion of selective waiver and the myriad of legal issues raised by the doctrine).

of obtaining the desired cooperation are unavailable or would not be effective.¹⁵

This old language has been removed and replaced with a more exhaustive discussion of DPAs/NPAs in the portion of the corporate charging guideline that discusses the collateral consequences of a criminal conviction to a corporate entity.¹⁶

This new language provides specific guidance to federal prosecutors considering whether to enter into a DPA/NPA. USAM 9-28.1000 provides:

[w]here the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.¹⁷

This revised language confirms that the collateral consequences of a conviction are critical in determining whether to enter into a DPA or NPA.¹⁸ No company wants a criminal conviction. But a conviction may mean more than turning off some customers for some entities. If an entity does business with the government, a criminal conviction may bar the entity from seeking government contracts or a criminal conviction may outright put the company out of

¹⁵ McNulty Memo at VII. For an exhaustive discussion of how this policy evolved and the applicable USAM provisions cited by the McNulty and Thompson Memo, see *Devolution* article at 3–20.

¹⁶ Both the *Devolution* article and the *2007 update* note that before 2008, only limited language in the McNulty (and Thompson Memo before it) specifically addressed DPAs/NPAs.

¹⁷ USAM 9-28.1000.

¹⁸ Peter Spivack and Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. LA. REV. 159, 165–66 (Spring 2008); Christopher Christie and Robert Hanna, *A Push Down the Road of Good Corporate Governance* 43 AM. CRIM. LAW. REV. 1043, 1049 (Summer 2006). See also *More Than Half of Corporate Pre-Trial Agreements Violate U.S. Attorney's Manual 18-Month Limit*, 20 CORPORATE CRIME REPORTER 22(1) (May 23, 2006) (Interview with Ryan D. McConnell & Lawrence D. Finder) (discussing collateral costs of DPAs and NPAs).

business.¹⁹ Significantly, the new language also specifically notes that DPAs/NPAs can be used to promote compliance with applicable law and to prevent recidivism—both important goals of any compliance program as noted below.

B. Morford Memo On Monitor Selection and Duties.

Second, in 2008 the DOJ implemented a new policy dealing with the selection of corporate monitors in DPAs and NPAs—the Morford Memo now found at Section 163 of the DOJ Criminal Resources Manual.²⁰ When substantial business reforms are incorporated into a DPA or an NPA, a monitor can provide oversight that ordinarily the probation office or the court would provide in the event the entity was prosecuted and convicted. Otherwise, busy federal prosecutors would have little or no way to confirm that an entity was keeping its end of the bargain. It is, therefore, unsurprising that as DPAs/NPAs with negotiated business reforms and compliance programs have increased, so have monitors. Indeed, as we note below, forty percent of agreements in 2007 and 2008 involve corporate monitors or outside individuals tasked with ensuring that the company addresses the problems that resulted in the criminal inquiry and otherwise complies with the DPA or NPA. The Morford Memo provides guidance to prosecutors on how to address potential issues that may arise with the selection and appointment of a monitor as well as the monitor’s duties.

The Morford Memo makes clear that a monitor is “an independent third-party, not an employee or agent of the corporation or of the Government.” The Memo notes that a monitor’s “primary responsibility is to assess and monitor a corporation’s compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct, and not to further punitive goals.” The role of the monitor under the Morford Memo is “to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation’s misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.”

The new policy mandates that DOJ components (including U.S. Attorney’s Offices)

¹⁹ See, e.g., 48 C.F.R. § 9.4(a) providing that an agency may debar a contractor for a conviction for a fraud type offense or one that undermines the contractor’s business integrity or honesty. Additionally, employers convicted of violating the federal immigration laws are referred for debarment consideration pursuant to standing executive orders. EO 12989, 13286, and 13465. For entities that practice before the Securities and Exchange Commission (SEC), a conviction may mean the company is barred from appearing before Commission. Indeed, Rule 102(e) of the SEC’s Rules of Practice provides that “[a]ny attorney who has been suspended or disbarred by a court of the United States or of any State; or any person whose license to practice as an accountant, engineer, or other professional or expert has been revoked or suspended in any State; or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission.” Regulation S-X, 210.2-03(a) states that the “[Securities and Exchange] Commission will not recognize any person as a certified public accountant who is not duly registered and in good standing as such under the laws of the place of his residence or principal office.”

²⁰ See note 5 *supra*.

establish a selection committee and review a panel of qualified candidates before selecting a monitor as part of a DPA or NPA. The committee must include: (1) the ethics officer for the applicable DOJ component, (2) the criminal chief or DOJ component chief, and (3) an experienced prosecutor. Ideally, the committee must consider at least three qualified candidates. The amount of DOJ input will vary depending upon the agreed upon selection process.²¹ In every case, the Deputy Attorney General will have the final say on the monitor and the monitor must be impartial and avoid working for the company for at least a year after the monitorship expires.

The Morford Memo notes that the duration of the monitorship varies depending on the agreement. The memo provides a list of non-exhaustive factors: (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences.

The Memo notes that not every case is right for a monitor. "For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary." Consistent with this policy, the monitor chart below in Section VII makes clear that a monitor's responsibilities vary depending upon the type of entity and the type of investigation resolved by the DPA or NPA.

C. Policy Prohibiting Extraordinary Restitution.

Finally, the DOJ implemented a new policy last year prohibiting extraordinary restitution. The new policy provides that,

[p]lea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.²²

²¹ The Morford Memo notes: "there is no one method of selection that should necessarily be used in every instance. For example, the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable. In other cases, the facts may require the Government to play a greater role in selecting the monitor."

²² Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, updating USAM 9-16.325 (2008).

Some corporate pre-trial agreements have incorporated provisions calling for what we previously termed “community benefit-type provisions.”²³ In these provisions, the DPA/NPA has funds paid by the company to resolve a criminal investigation going to a third party unrelated to the criminal conduct. This policy is designed to ensure that money that may be a fine or penalty, is not paid out to an entity that is not a victim of the organization’s conduct.

IV. DATA FROM 2008 COMPARED TO HISTORICAL DATA.

We saw a steep drop off in corporate pre-trial agreements in 2008—sixteen agreements down from forty in 2007 and much closer to the nineteen we saw in 2006.²⁴ Investigations of corporate entities often take years to complete depending on the nature and scope of the conduct, size of the entity, and other variables. We do not know what, if any, significance to give this observation.

FCPA violations continued to make up the lion share of corporate pre-trial agreements with seven focused on FCPA violations this year. This was consistent with our observations in 2007. We also saw three work-site related immigration corporate pre-trial agreements. Immigration violations had not previously been the subject of a DPA or NPA.

There were two privilege waiver provisions in 2008. In the Willbros DPA, which resolved a lengthy FCPA investigation, the agreement provided for a “limited waiver of attorney/client privilege with respect to certain subject matters important to DOJ understanding of the internal investigation.”²⁵ In the Jackson Country Club DPA, which resolved a immigration work-site enforcement investigation, the Country Club “agree[d] not to assert, in relation to any request of the United States, a claim of privilege (such as attorney-client privilege) or immunity from disclosure (such as work product) as to any documents or information request by the United States”²⁶ There were three such privilege waivers in 2007.²⁷ Both years represent significant declines from the post-Thompson Memo 2003-2006 statistics where roughly half of the agreements contained privilege waivers.

One thing that remained constant is the remedial measures that came out of these agreements. Every agreement in 2008 contained some sort of business reform. This was not surprising. Over the past three years there have been seventy-five DPAs and NPAs and over

²³ *Devolution Article* at 20.

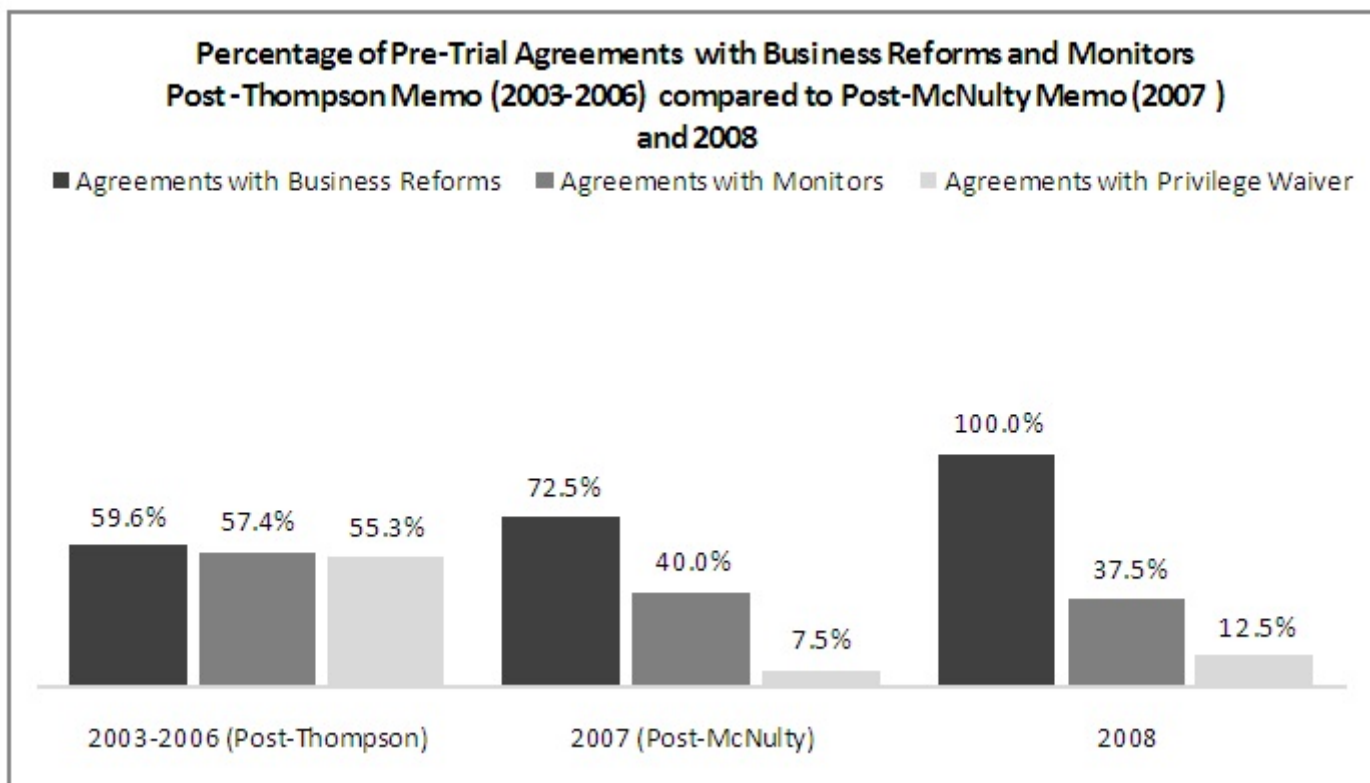
²⁴ *See 2007 Update*.

²⁵ May 2008 Willbros DPA, ¶15e.

²⁶ 2008 Jackson Country Club DPA , ¶12.

²⁷ *See 2007 Update*.

seventy-five percent of these have contained remedial compliance measures—thirteen in 2006, twenty-nine in 2007 and all sixteen agreements in 2008. In the last three years, over forty percent of the agreements have had compliance monitors—ten of the 2006 agreements, sixteen of the 2007 agreements, and six of the 2008 agreements.



STATISTICS FROM 2003 THROUGH 2008:

POST-THOMPSON MEMO STATISTICS (2003-2006).²⁸

Total Number of Post-Thompson Memo Agreements:	47
Number Reviewed:	45
Number of Privilege Waivers:	26 (57%)
Number of Agreements with Compliance Monitors:	27 (60%)
Number of Agreements With Compliance Reforms:	28 (62%)

2007 STATISTICS:²⁹

Total Number of 2007 Agreements:	40
Number Reviewed	38
Number of Privilege Waivers:	3 (7%)
Number of Agreements with Compliance Monitors:	16 (40%)
Number of Agreements With Compliance Reforms:	29 (72%)

2008 STATISTICS:

Total Number of 2007 Agreements:	16
Number Reviewed	16
Number of Privilege Waivers:	2 (13%)
Number of Agreements with Compliance Monitors:	6 (38%)
Number of Agreements With Compliance Reforms:	16 (100%)

²⁸ From 2003-2006 there were forty-seven agreements. Before 2003 there were nine agreements. For the specific agreements see the *Devolution* article at 33 (Appendix of DPAs/NPAs), the tables in this update, and the tables in the *2007 Update*. These figures (not the total number of agreements) exclude information on agreements we could not locate through public sources as noted in the disclaimer in the *Devolution* article and the *2007 Update*, but we have added the statistics from Intermune, Statoil, and Schnitzer, which were all entered into after the final information was culminated for the *Devolution* article in October 2006. In addition, we found one additional 1998 Doyon Drilling DPA that is not reflected in the *Devolution* article. We also located the 2006 Endocare NPA (which we had not previously found). This data is now included in the 2003-2006 statistics.

²⁹ In the 2008 update, we noted that we had found thirty-five agreements for 2007—we omitted six: Alabama Contract Sales, ABT, Appalachian Oil, English Construction Co., NetVersant and Hoy/Newsday and miscounted Willbros (which should be a 2008 agreement). Additionally, for this article we located several additional agreements: Mirant Energy Trading, Maximus, Bank of Africa, Akzo Nobel, and El Paso that we were previously unable to review. The only two 2007 agreements that we could not locate to include in our statistics were the Newsday NPA (ironically) and the Holy Spirit Association NPA. The 2007 statistics and data in this article have been updated to reflect these additional agreements.

V. BACKGROUND ON COMPLIANCE PROGRAMS OUTSIDE OF DPAs AND NPAs.

A. Compliance Framework Set Forth in the Organizational Guidelines.

The *Devolution* article noted that DPAs and NPAs evolved out of Chapter 8 of the United States Sentencing Guidelines, or the “Organizational Guidelines.”³⁰ Given this genesis, it was unsurprising this year when we reviewed the compliance programs set forth in the DPAs/NPAs and found that three agreements specifically cited the Organizational Guidelines in the section of the agreement dealing with compliance reforms.³¹

In November 2004, the Organizational Guidelines in general, and its Section 8B2.1 titled, “Effective Compliance and Ethics Programs specifically, were repackaged by the Sentencing Commission to place greater emphasis on corporate compliance.³² Not only was the *Introductory Commentary* amended in several respects, including language on mitigation of organizational punishment, to include “the existence of an effective compliance and ethics program,” but the prior definition of a compliance program and the seven due diligence elements in the Commentary to §8A1.2, Application Note 3(k), was stricken and replaced by a new guideline at §8B2.1, called “Effective Compliance and Ethics Program.” This amendment strengthened the “criteria an organization must follow in order to establish and maintain an effective program to prevent and detect criminal conduct for purposes of mitigating its sentencing culpability for an offense.”³³

Section 8B2.1 provides that to have an effective compliance and ethics program for sentencing purposes, the organization must exercise due diligence to prevent and detect criminal conduct, and also promote an organizational culture to encourage ethical conduct and commitment to compliance.³⁴ Application Note 3(k) admonishes that “[t]he failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”³⁵

³⁰ See *Devolution* article at 21.

³¹ See 2007 Blue Cross and Blue Shield of Rhode Island NPA, 2007 Maximus DPA and 2008 IFCO NPA.

³² See Organizational Guidelines, Appendix C., amendment 673, at <http://www.ussc.gov/2007guid/appc2007.pdf>.

³³ *Id.*

³⁴ The prior iteration of the Organizational Guidelines did not specifically refer to an “ethics” program.

³⁵ Organizational Guideline §8B2.1(a). The prior version of this language read, “[f]ailure to prevent or detect the instant offense, by itself, does not mean that the program was not effective.” The subtle change in language provides less succor to the organization.

The amended due diligence elements are summarized as follows:³⁶

1. The organization must establish standards and procedures to prevent and detect criminal conduct.³⁷
2. The organization's "governing authority" must not only understand the entity's compliance program, but must also exercise reasonable oversight with its implementation.³⁸ The entity's "high-level personnel" must also ensure the efficacy of the program.³⁹ Specific individuals within the high-level personnel shall be assigned overall responsibility for the compliance/ethics program.⁴⁰ Those with day-to-day compliance duties shall report to the high level personnel (and when appropriate, to the governing authority), and shall be given adequate resources, authority and direct access to the governing authority.
3. The entity must use reasonable efforts not to include within the "substantial authority personnel" of the organization those who have broken the law or otherwise acted inconsistent with a compliance/ethics program.⁴¹
4. The entity must effectively communicate and disseminate its compliance/ethics standards and procedures to its high-level personnel, substantial authority personnel, employees, (and when appropriate, its agents), by conducting effective training programs.
5. The entity must ensure that its compliance/ethics program is followed, monitored and audited to detect criminal conduct; is periodically evaluated for effectiveness; and has a system for whistle blowing potential or actual criminal

³⁶ Organizational Guideline §8B2.1(b).

³⁷ The term "standards and procedures" is defined in §8B2.1, Commentary, Application Notes, Definitions, as "standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct."

³⁸ The term "governing authority" is defined in §8B2.1, Commentary, Application Notes Definitions, as "the Board of Directors; or . . . the highest level governing body of the organization."

³⁹ The term "high level personnel" is defined in §8A 1.2, Commentary, Application Note 3.(b), to include "individuals who have substantial control over the organization or who have a substantial role in making of policy within the organization." This includes directors, executive officers, heads of business or functional units of the entity, and "and an individual with a substantial ownership interest."

⁴⁰ This leaves no doubt that the individual primarily tasked with corporate compliance must be from the milieu of "high level personnel," which is also reflected throughout the agreements with monitor provisions.

⁴¹ The term "substantial authority personnel" is defined in §8A 1.2, Commentary, Application Note 3.(b), to include "individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization," including its high-level personnel and those who exercise substantial supervisory authority.

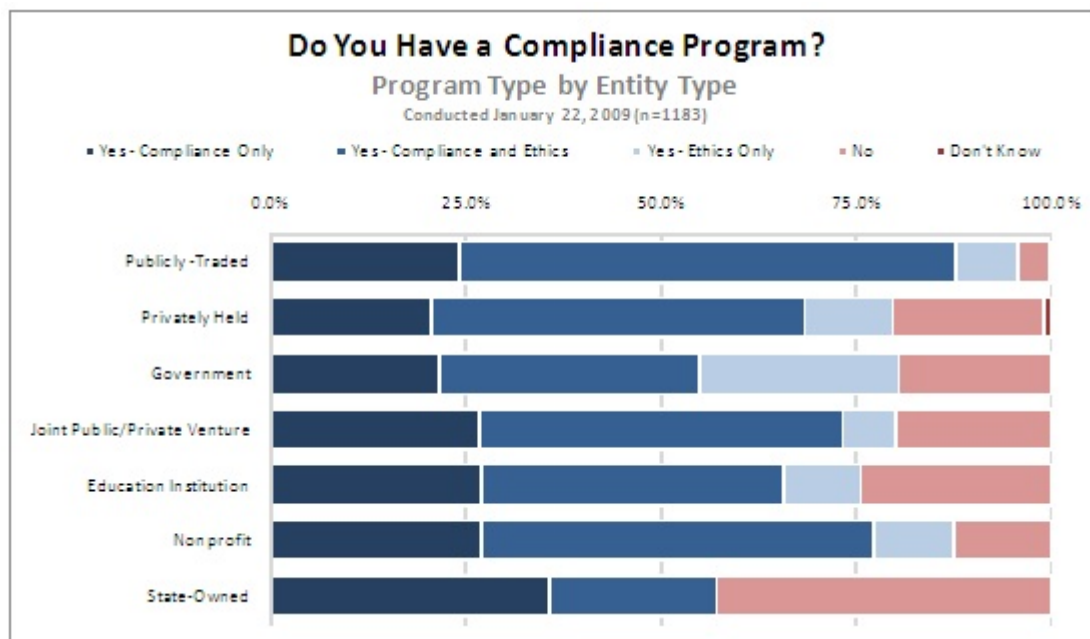
conduct that ensures confidentiality or anonymity without fear of retaliation.

6. The entity's compliance/ethics program must be consistently enforced organization-wide through incentives and discipline.
7. After criminal conduct has been detected, reasonable steps are taken by the entity to appropriately respond, including making modifications to the compliance/ethics program.

As the charts below make clear, we found that the features of the Organizational Guidelines are the foundation for the compliance programs found in DPAs and NPAs. We also found, after consulting compliance data from OCEG (noted below), that programs developed outside the context of DPAs and NPAs echoed the Organizational Guidelines.

B. Voluntary Compliance Programs.

Many organizations, especially publicly traded organizations, proactively adopt compliance programs outside of DPAs and NPAs.⁴²



⁴² An Open Compliance and Ethics Group (OCEG) survey of 1,183 professionals on January 22, 2009 indicated that over 89% of publicly traded companies have a compliance program, 8% have only an ethics program, and 5% have neither an ethics nor compliance program (or do not know). In addition, the survey revealed that 69% of private companies have a compliance program, 12% have only an ethics program, and 29% have neither an ethics nor compliance program (or do not know). In both cases, the majority (70%) of organizations combine compliance and ethics into a single program.

Voluntary programs, however, tend to differ in their scope, structure and level of integration with the business in the following ways:

Scope. DPAs and NPAs tend to focus on the instant issue and failure at an organization (*e.g.*, FCPA). When no such crisis exists, voluntary compliance programs tend to be broader and encompass a number of risk areas.

Structure. DPAs and NPAs tend to require a chief compliance officer that does not report to the general counsel or chief financial officer. Rather, the chief compliance officer must report directly to the Board. In voluntary programs, most chief compliance and ethics officers report into the senior executive suite – either the general counsel or chief executive officer.⁴³

Integration. DPAs and NPAs tend to set up a program that is administered apart from mainline business processes and business units—usually with a chief compliance officer and/or monitor who act as compliance and ethics czars. In voluntary programs, executives that operate lines of business and key processes tend to be responsible and accountable for their related compliance risks. The chief compliance and ethics officer, in this sense, is less of a czar or cop and more of a consultant and coach.

C. Putting Principles into Practice.

Notwithstanding these differences, voluntary compliance programs typically use the principles set forth in the Organizational Guidelines to set initial direction and drive key program elements. The challenge that organizations face is how to translate these principles into practice. While sound and useful, principles are just that—principles. Practitioners are left to answer key questions about a compliance program such as:

- What is the Board really responsible for? What actions do they need to take? What can they delegate?
- To whom should “high level personnel” report? Can this role be performed by a committee?
- How many standards are enough? What level of detail is required?
- What constitutes effective policy management? What policies should be in place? Is a code of conduct enough? How often should it be updated?

⁴³ Open Compliance and Ethics Group survey of 758 professionals on November 6, 2008 found that 44% of chief compliance and ethics officers reported to the CEO and 30% reported to the general counsel. Very few (less than 1%) indicated that they reported directly to the board. *See* OCEG website *available at* <http://www.oceg.org>.

- What constitutes effective communication and education—whether web-based or in person? Do I need to administer tests?
- What are effective incentives?
- How should the whistle blower hotline function?
- How often should the program be audited and by whom?

Private sector initiatives and nonprofits such as the Open Compliance and Ethics Group⁴⁴ have refined these principles and, through an open and public vetting process, and have defined specific business practices that embody the principles set forth in the Organizational Guidelines. The hope is that, although there are no “formulaic requirements regarding corporate compliance program,” these publically vetted practices can serve to reduce the cost, complexity and uncertainty associated with implementing the Organizational Guidelines principles.

D. Beyond the Organizational Guidelines.

As organizations operate in a global context, it becomes evident that the Organizational Guidelines are not the only paradigm. A number of global guidelines and standards have emerged for compliance, risk and internal control programs as well as fraud and corruption.⁴⁵ When all of these standards are analyzed, a common pattern of a compliance program emerges. A program under this framework:

- (1) is tailored a company’s culture, operating environment, and particular business model,
- (2) evaluates and addresses the business’s risks,
- (3) provides incentives and implements controls designed to reward desirable and prevent undesirable conduct,

⁴⁴ A 501(c) nonprofit called the Open Compliance & Ethics Group organized over 200 practitioners and academics to draft the OCEG “Red Book”, an invaluable resource for compliance professionals. See OCEG website *available at* <http://www.oceg.org/Details/RB2Project>.

⁴⁵ Compliance Frameworks include the Organizational Guidelines (US) and AS3806/AS4269 (Australia). Risk Management Frameworks include the Committee of Sponsoring Organizations Enterprise Risk Management, British Standard 31100 Risk Management (UK), International Standards Organization 31000:2008 Risk Management, and Risk Management Standard from IRM and ALARM (Europe). Internal Control Frameworks include the Committee of Sponsoring Organizations Internal Control, Turnbull/Cadbury Report (UK), Criteria of Control Board from the Canadian Institute of Chartered Accountants. Fraud and Corruption Frameworks include the Organization of American States Inter-American Convention Against Corruption and Organization for Economic Cooperation and Development Convention of Combating Bribery of Foreign Officials in International Business, and United Nations Convention Against Corruption.

- (4) includes internal controls for detecting compliance failures including a hotline, helpline and/or surveys,
- (5) includes mechanisms for responding to and resolving compliance failures such as internal investigations and crisis response,
- (6) includes a system for monitoring and modifying the compliance program on an ongoing basis to ensure effectiveness, and
- (8) implements a system for managing communication associated with the compliance program including proper documentation and employee and shareholder education.

The Organizational Guidelines establish a floor for compliance. The most effective compliance programs are integrated with mainline business processes rather than stand-alone “necessary evil” projects to address a specific legal risk. A compliance program must be a process—not a project.

VI. COMPLIANCE PROGRAMS IN DPAS AND NPAS.

This year we looked at the 2007 and 2008 DPAs and NPAs and analyzed them in terms of the compliance programs reforms and the responsibility of monitors. Our results are set forth in the charts below. We found that typically these agreements incorporate many features of compliance programs found outside of DNAs and NPAs, but vary in terms of scope, structure, and integration as noted above.

Regardless of the conduct, there were a few uniform features of every compliance program:

- (1) a corporate compliance officer with dedicated resources who reports to the Board or the CEO—not the general counsel,
- (2) a code of conduct (ethics) and training program designed to teach employees about the code of conduct, including certification by the employees that they’ve received training,
- (3) a system of internal controls and procedures monitored by the corporate compliance officer, and designed to ensure wrongdoing is discovered, and
- (4) a hotline or email system, monitored by the corporate compliance officer, that ensures accurate and timely reporting of compliance issues without retribution by the employers.

These are by no means exhaustive (neither are the provisions in the chart below), but are merely the basic framework found in virtually every corporate pre-trial agreement compliance program.

The agreements also made clear that paper compliance programs are not worth the paper they are written on. For instance in a January 2008 agreement involving a company suspected of violating U.S. money laundering laws, employees of Sique demonstrated to investigators that they understood U.S. currency transaction reporting requirements and recognized suspicious transactions, but consistently failed to follow the law and report them.⁴⁶ The company filed suspicious activity reports (commonly called SARs) on numerous undercover transactions, but failed to report broader money laundering activity or connect the dots. The DOJ identified nearly \$47 million in transactions where SARs were filed, but the company failed to do anything further. This is consistent with the Organizational Guidelines and the new corporate charging policy, which notes:

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts.⁴⁷

Because the pre-agreement Sique compliance measures had no teeth, the company had to revise its program to ensure that it was consistent with the goals set forth in the Organizational Guidelines.

The compliance reforms are not one size fits all. We generally found that the features varied by conduct and by business type (which sometimes corresponded to conduct). For instance, an oil services company focusing on FCPA compliance does not typically have to worry about the Banking Secrecy Act or health care fraud laws.

Our results are reflected below:

⁴⁶ January 2008 Sique DPA.

⁴⁷ USAM 9-28.800

Conduct	Features of DPA/NPA Compliance Program
Money Laundering/ Banking Secrecy Act⁴⁸	<ul style="list-style-type: none"> • Employ chief compliance officer with experience in anti-money laundering programs who (1) is delegated day-to-day authority, (2) reports to Board annually, and (3) is given adequate staff and resources • Implement money laundering program that provides (1) internal policies/procedures/controls against money laundering, (2) provides individuals to coordinate day-to-day monitoring of compliance, (3) provides ongoing employee training programs, and (4) provides independent testing for compliance • Ensure suspicious activity reports (SARs) are filed for any transaction (1) conducted/attempted involving at least \$5,000 in funds, (2) known or suspected to be derived from illegal transactions, or (3) intended or conducted in order to hide funds, evade reporting requirements, had no business or lawful purpose, or not ordinary for the customer • Implement know your customer program—applying enhanced due diligence requirements for high risk accounts (particularly in the context of high-risk foreign money service businesses) • Implement advanced anti-money laundering software which identifies and screens high risk transactions and retain experienced personnel familiar with money laundering risks specific to business. • Conduct formal and comprehensive risk assessment to identify all high risk customers and transactions with audit testing • Know customer program must (1) determine the identity of all customers, (2) source of funds, (3) customer’s expected transactions, (4) monitor customer’s transaction to determine if consistent with normal and expected transactions, (5) identify transactions that are inconsistent or suspicious and report transaction. • Retain competent risk management consulting firm to conduct annual independent review • Conduct background check on business partners who have propensity to violate money laundering laws
Foreign Corrupt Practices Act⁴⁹	<ul style="list-style-type: none"> • Adopt internal accounting, control system, and record retention system, and “help-line” • Adopt a new corporate policy against bribery and establish compliance committee on Board • Appoint one or more senior corporate officials who shall report directly to the Board to oversee compliance • Retain new senior management with understanding of FCPA requirements • Communicate the new procedures to officers and employees through a revised training program and periodic certifications • Adopt new disciplinary procedures for employees who violate the FCPA • Allow an independent audit of the new compliance program and procedures by outside counsel and auditors at three year intervals • Implement procedures designed to ensure that the corporation will not do business with partners likely to violate the FCPA • Provisions in contracts designed to prevent FCPA violations including the right to conduct audit of partners and right to terminate agents/partner for FCPA issues

⁴⁸ This information includes provisions drawn from the following corporate pre-trial agreements: September 2007 Union Bank of California DPA and January 2008 Sigue Corp. DPA.

⁴⁹ This information includes provisions drawn from the following corporate pre-trial agreements (many of which were duplicative): April 2007 Baker Hughes DPA, October 2007 Ingersol Rand DPA, November 2007 Lucent Technologies, Inc. NPA, October 2007 York International Corp., February 2007 Vetco DPA, December 2007 Akzo Nobel NPA, September 2007 Paradigm BV DPA, February 2008 Westinghouse Air Brake Technologies Corp. NPA, February 2008 Flowserve DPA, March 2008 Volvo AB DPA, May 2008 Willbros DPA, July 2008 Faro Technologies NPA, July 2008 AGA Medical DPA, and December 2008 Fiat DPA.

Conduct	Features of DPA/NPA Compliance Program
Public Corruption ⁵⁰	<ul style="list-style-type: none"> • Appoint full time compliance officer and establish Compliance and Ethics Committee to oversee compliance program • Establish organization-wide codes of conduct governing conduct of directors, officers, and employees which includes reinforcing an ethical enforcement in the work place • Establish training programs to educate all employees about compliance program including potential risk areas and specific laws • Allow periodic audits and reviews to monitor compliance with applicable federal and state laws and compliance program • Additional scrutiny and review of compliance in specific countries with known bribery issues • Establish a new process for reporting suspected illegal, inappropriate, or unethical conduct and for seeking answers to compliance related questions, including hotline and investigation process • Establish a system for tracking complaints and inquires with a quarterly reporting system to the Corporate Compliance and Ethics Committee and an appropriate disciplinary system • Establish a strict non-retaliation policy for employees who report suspected compliance violations in good faith • Obtain ethical opinion from state attorney general and Board approval before entering into business relationship with state employees (current or formal)
Immigration Work-Site Enforcement ⁵¹	<ul style="list-style-type: none"> • Appoint compliance officer • Terminate responsible employees • Become a member of the IMAGE program (submit to Form I-9 audit by ICE, verify SSNs of workers) • Use Basic Pilot Verification System • Establish ICE internal training program (to be updated semi-annually) conducted by knowledgeable individuals to teach employees how to fill out I-9s, implement supervisory review, comply with training, and teach the employees how to detect fraud. • Arrange I-9 review by outside audit form. • Establish a self-reporting system to report violations to ICE • Establish a protocol for responding to “No Match” letters from the Social Security Administration (SSA) that state that the social security numbers for employees reported by the employer do not match SSA’s records • Require contractors to state whether or not the company uses ICE’s Basic Pilot Employment Verification program and whether they’ve received “No Match” letters • Report results of compliance program to ICE

⁵⁰ This information includes provisions drawn from the following corporate pre-trial agreement: December 2007 Blue Cross & Blue Shield of Rhode Island NPA.

⁵¹ This information includes provisions drawn from the following corporate pre-trial agreements: October 2008 Republic Services, Inc. NPA, February 2008 Jackson Country Club DPA, and December 2008 IFCO NPA.

Conduct	Features of DPA/NPA Compliance Program
Health Care Fraud⁵²	<ul style="list-style-type: none"> • Compliance officer who reports directly to CEO (not general counsel or CFO) and makes periodic reports to the Board • Compliance officer to review consulting arrangements and approve consulting budget • Expanded compliance department • A hotline and email address to report suspicious conduct • Enhanced training and education program • Implement policies and procedures to ensure misconduct is not rewarded financially • Ensure new code of conduct has examples of misconduct and sanctions • Budget for anticipated gifts, donations, and other payments to consultants where no services are provided
Export Control Act⁵³	<ul style="list-style-type: none"> • Establish executive position designed to ensure compliance with U.S. Export laws and restructure management of all employees charged with export compliance • Annual training for employees with export control responsibility or access to classified material; records of training maintained for at least five years • Report losses of classified material to monitor within 24 hours of discovery • Conduct an export compliance audit of each business unit with access to export controlled materials including certification by managers of the business unit
Other Fraud⁵⁴	<ul style="list-style-type: none"> • Corporate compliance officer reports directly to Audit committee of Board and is responsible for training with staff of compliance assistants • Maintain an internal system of monitoring and audits, including specific steps to be taken if bid, proposal, or contract is not in line with the corporate compliance plan - corporate compliance officer responsible for monitoring and responding to complaints • Implement and promote a telephone and email hotline in which all employees are encouraged to report misconduct – compliance officer publicizes program, maintains detailed records (including anonymous calls); program must emphasize non-retribution/retaliation • Provide quarterly reports, certified by the corporate compliance officer, to the CEO and Board (DOJ can obtain upon request) regarding compliance activities including summary of the number, type, general description of complaints and the type of investigation undertaken in response and the results of the investigation • Provide annual education to employees on specific laws and examples of violations of law and require employees to certify they've received training • Annual outside review of compliance program • Terminate employees responsible for fraud • Spot cash reward system to encourage employees to uncover fraud

⁵² This information includes provisions drawn from the following corporate pre-trial agreements: September 2007 Biomet, DePuy Orthopaedics, Smith and Nephew PLC, Zimmer Inc. DPAs, September 2007 Stryker Orthopedics NPA, March 2007 Pfizer DPA, and the July 2007 Jazz Pharmaceuticals NPA.

⁵³ This information includes provisions drawn from the following corporate pre-trial agreement: March 2007 ITT Corp DPA.

⁵⁴ This information includes provisions drawn from the following corporate pre-trial agreements: March 2007 Reliant DPA, January 2007 ABT DPA, and January 2007 Appalachian Oil Co. DPA.

VII. MONITOR PROVISIONS IN DPAs/NPAs.

Not every agreement contained monitor provisions—only forty percent of the agreements in the last three years. The role of the monitors set forth in the agreements with such provisions, however, were generally very similar as reflected in the chart below. Every monitor was ordinarily tasked with the following responsibilities:

- (1) review documents and interview company employees and officers,
- (2) monitor implementation of revised business reforms and internal controls and make appropriate suggestions,
- (3) undertake internal investigations as necessary,
- (4) make periodic reports which are certified by the monitor on company's efforts under the DPA or NPA to the DOJ, and
- (5) report additional company wrongdoing to the DOJ.

Additionally, every agreement with monitor provisions makes clear that the monitors do not work for the company or the DOJ. They are independent third parties—mirroring the policy in the Morford Memo. Most of these agreements make clear that no attorney-client privilege is formed between the company and the monitor. With those that do not make this explicitly clear, this is implied because the monitor makes reports to the DOJ. Notwithstanding this independence, some agreements contain provisions with protections for information shared by the company with the monitor that deserve mention.

For instance, in the Milberg Weiss DPA, the agreement makes clear that a confidential relationship exists between the firm and the monitor.⁵⁵ Although the DOJ could use information provided by the company to enforce the agreement, the agreement provides that the DOJ shall treat all submissions by the firm to the compliance monitor as confidential and only disclose these reports as required by law or for other purposes, and only after consulting with the firm.⁵⁶ Significantly, Milberg hired its monitor before entering into the DPA.⁵⁷

Similarly, in the ITT DPA, which resolved violations by the company of U.S. export laws, the agreement provides that the monitor would not disclose proprietary information without the company's consent (except to the DOJ).⁵⁸ So while independence is the rule and

⁵⁵ June 2008 Milberg DPA.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ March 2007 ITT DPA.

the policy, some agreements have provisions which provide protections for information provided by the entity and utilized by the monitor. Additional roles and responsibilities organized by type of illegal conduct are set forth in the chart below:

Conduct	Responsibilities of Monitor
Foreign Corrupt Practices Act	<ul style="list-style-type: none"> • No attorney-client relationship exists • Monitor must have expertise with (1) FCPA counseling issues; (2) designing/reviewing corporate compliance policies/internal controls; (3) ability to assess/deploy resources as necessary; and (4) sufficient independence from the company • Draft written work plan • Initial report after 120 days of beginning work; followed by two followup reviews • Review new FCPA compliance program and recommend appropriate changes • Notify DOJ regarding materials withheld from the monitor on the basis of privilege • Company can complain about costly monitor proposals and submit alternatives, but monitor gets final say • Recommend international investigations be conducted as necessary and make necessary disclosures to the DOJ • Certify that the anti-bribery program is appropriately designed and transmit report to DOJ. • Report non-cooperative activity to DOJ • Company cannot hire a monitor for at least one year after monitorship is completed
Public Corruption	<ul style="list-style-type: none"> • Not an officer, agent, or employee, of company • Review and evaluate compliance program and recommend changes • Access to all non-privileged documents • Authority to meet with any officer or agent and retain consultants; hourly rates capped at \$250/hr • Take appropriate steps to maintain confidentiality of non-public information and share information with DOJ and other designed agencies • Keep records of activities and correspondence • Submit a written report to the DOJ every 4 months setting forth monitor's actions and whether company is complying with agreement and any changes necessary; DOJ can share report with other agencies (Monitor can react report as necessary) • Company will provide monitor with indemnification agreement and provide logistical support and other staff as necessary
Immigration / Work-Site Enforcement	<ul style="list-style-type: none"> • Monitor must review compliance program
Health Care Fraud	<ul style="list-style-type: none"> • Access to all non-privileged documents • Authority to meet with any officer or agent and retain consultants • Review and evaluate company policies and make recommendations on: (1) consultant payment structure; (2) effectiveness of procedures/internal controls; and (3) effectiveness of training programs • Quarterly reports to the DOJ • Recommendations of monitor must be adopted
Export Control Act	<ul style="list-style-type: none"> • No limitation on information sharing, but Monitor will not disclose proprietary information without company consent • Authority to meet with any officer or agent and retain consultants • Report on a semi-annual basis to DOJ • Work with the Department of State when requested to do so

VIII. CONCLUSION.

The revised corporate charging policy, USAM 9-28.000, makes clear that “[t]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees.”⁵⁹ The company must evaluate “whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.”⁶⁰

In designing a compliance program that accomplishes this objective, at a minimum, the company should have a compliance program overseen by a responsible corporate compliance individual with dedicated resources who has the *ability* to speak directly and openly to the Board, its audit committee, or other senior management members. The Board and senior management should be knowledgeable about the program structure and strategy and receive regular assurance that the program is effective. Resources for the program should be allocated to priority areas based on risk assessments and sound business judgement.

At a minimum, good practice may require that a program contain: (1) a Code of Conduct and training program designed to educate employees about the Code of Conduct, including certification by the employees that they have received training, (2) a system of internal controls and procedures monitored by the corporate compliance individual, designed to ensure wrongdoing is discovered; and (3) an anonymous hotline or email system monitored by the corporate compliance individual that ensures accurate and timely reporting of compliance issues without retribution by the employers. The program not only should be overseen by the corporate compliance officer, but should be audited periodically by an outside audit firm. The frequency of these audits will depend on the nature and scope of the business, but they should be conducted with enough regularity that the audits have a reasonable chance of catching problems with the compliance program.

USAM 9-28.000 instructs federal prosecutors evaluating a compliance program to ask:

Is the corporation’s compliance program well designed?

Is the program being applied earnestly and in good faith?

Does the corporation’s compliance program work?⁶¹

These are the same questions that a company should ask itself. Compliance programs vary

⁵⁹ See USAM 9-28.800

⁶⁰ See *id.*

⁶¹ *Id.*

by the type and structure of an organization and the industry in which it operates. To address corporate compliance, entities should consult data and guidance put together by organizations focused on compliance and the framework set forth the Organizational Guidelines and other benchmarks. A review of the compliance measures set forth in the DPAs and NPAs should supplement this review through the lens of corrective measures adopted by companies to address specific criminal conduct. With these tools, an organization should be able to answer the three questions posed by the revised charging policy affirmatively.