

ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE - 2007

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SUMMARY OF 2007 FINDINGS

This article updates our prior empirical observations set forth in our recent articles: *Devolution of Authority: the Department of Justice's Corporate Charging Policies*¹ and *Third Verse Same as The First*.²

We saw three trends in 2007.

First, the number of corporate pre-trial agreements rose sharply from 2006 to 2007. There were thirty-four corporate pre-trial agreements in 2007, up from twenty in 2006. Despite this increase, we continued to see the prosecution of some significant corporate criminal cases by indictment and criminal information. For instance, in 2007, British Petroleum (BP) agreed to plead guilty to violating the Clean Air Act and pay a \$50 million fine, which will be the largest penalty ever paid in a Clean Air Act case.³

Second, the number of publicly available corporate pre-trial agreements containing attorney client privilege and work-product waivers has declined significantly. Indeed, only three deferred prosecution agreements (DPAs) contained waivers: Vetco, Reliant, and Blue Cross and Blue Shield of Rhode Island. No non-prosecution agreements (NPAs) contained waivers.⁴

This worked out to approximately ten percent of the post-McNulty Memo agreements we were able to review (we could not locate seven of the thirty-four agreements). This was a decline of nearly fifty percent from the post-Thompson Memo (2003–2006) statistics we reviewed where twenty-six out of the total of forty-four agreements (or around sixty percent) contained waivers—we were unable to locate two of the 2003–2006 agreements. A significant amount of ink was spilled this year discussing corporate monitors. We found that the percentage of corporate pre-trial agreements mandating corporate monitors and other business reforms, however, stayed roughly the same from 2003–2007.

Finally, two thirds of all agreements involved violations of either the Foreign Corrupt Practices Act (FCPA) or the federal health care laws.

Out of the thirty-four 2007 agreements, there were eleven that involved violations of the FCPA, a substantial increase over the three agreements we saw in 2006.⁵ In addition, Vetco

agreed to pay the largest criminal fine to date in an FCPA case: \$26 million. As a result, the Vetco DPA climbed into our top ten corporate pre-trial agreement criminal fine list for 2003–2007.

Last year we also saw ten corporate pre-trial agreements implicating the federal health care laws. This amounted to roughly a third of the thirty-four agreements. Before 2007, we had seen only one.⁶ These health care agreements involved conduct ranging from paying illegal kickbacks to felony misbranding and even some plain old fashioned health care fraud.

As reflected in our top ten corporate pre-trial agreement penalty chart appearing at the end of this article, despite the increased number of FCPA and health care agreements, fraud continues to dwarf all other agreements in terms of criminal penalties.

RECENT DEFERRED PROSECUTION AGREEMENTS AND NON-PROSECUTION AGREEMENTS

2003	2004	2005	2006	2007
Banco Popular PNC ICLC Canadian Imperial Bank New York Racing Ass'n Merrill Lynch	Computer Assoc. Am South Bancorp AIG AOL Edward Jones Symbol Technology Whitehall Jewelers Invision Technology	Hilfiger Monsanto Bristol Myers Squibb KPMG Univ. Med & Dentistry NJ AEP Services Micrus Corp. Adelphia MCI Bank of NY Friedman's Inc	Statoil Intermune Schnitzer Steel Medicis Firstenergy Nuclear Williams Power Operations Mgmt. Intl. Roger Williams Med. Cntr. HVB Bank Atlantic Western Geco LLC MRA Holdings AIG Healthsouth BAWAG Boeing Prudential Equity Group Mellon Bank Royal Ahold ABT Associates	Biomet American Express Int'l Bank British Petroleum (BP) NETeller PLC Jazz Pharmaceuticals DePuy Orthopaedics Smith & Nephew PLC Zimmer Inc. Stryker Orthopedics Baker Hughes Chevron Collins & Aikman Corp. Maximus Ingersol Rand Echo Inc. Willbros Express Scripts Inc. Lucent Technologies, Inc. Textron ITT Corp. Jenkins Gilchrist Omega Advisors Pfizer Blue Cross & Blue Shield RI Purdue Pharma Mirant Energy Reliant Energy Services Union Bank of California York International Corp. Holy Spirit Assoc. El Paso Vetco Akzo Nobel United Bank of Africa

BACKGROUND ON CORPORATE PRE-TRIAL AGREEMENTS

In 1909, the Supreme Court settled the constitutionality of corporate criminal liability with *New York Central & Hudson RR Co. v United States* where the court rejected the notion that “to punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law.”⁷

A hundred years later, U.S. Department of Justice (DOJ) corporate charging policy would continue to recognize corporate criminal liability and the myriad of competing interests raised by corporate charging decisions. In December 2006, the newest iteration of this policy, the McNulty Memo, reminded us that:

*Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white-collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white-collar crime.*⁸

Corporate pre-trial agreements have continued to evolve to adhere to the McNulty’s Memo’s mandate.

The McNulty Memo did not change the nine corporate prosecution factors set forth in the Thompson Memo: (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 adequacy of civil or regulatory remedies.⁹

Nor did the McNulty Memo change the language that addresses DPAs and NPAs. While there is no specific DOJ policy that is focused exclusively on corporate pre-trial agreements, restating the language in the Thompson Memo, the McNulty Memo provides:

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government’s investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecutions agreement generally [citing to the U.S. Attorney’s Manual provision governing pre-trial agreements for individuals].

These principles 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 of obtaining the desired cooperation are unavailable or would not be effective.” Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary.
...¹⁰

As we noted in our *Third Verse* article, the McNulty Memo implemented new procedures concerning attorney client and work-product privileges, which now provide a roadmap for federal prosecutors to determine whether a waiver *request* is appropriate.

GENESIS OF CORPORATE PRE-TRIAL AGREEMENTS

In the *Devolution* article, we traced the evolution of corporate pre-trial agreements from the first agreement involving Armour of America for arms export violations in 1993 to the numerous varying and complex agreements that were entered into after the Thompson Memo.¹¹ These DPAs and NPAs are largely rooted in the United States Attorney's Manual (which provides a very basic framework for pre-trial diversion) and the United States Sentencing Guidelines (providing the incentives for companies to cooperate and implement other prophylactic reforms designed to ensure that misconduct does not occur again).

Armour's 1993 agreement was entered into one year after the 1992 Organizational Sentencing Guidelines¹² were implemented. It was rudimentary and resembled the type of pre-trial diversion agreement that would be used where an individual received pre-trial diversion. It expired when Armour paid the U.S. Treasury \$20,000 and did not contain any of the terms such as a corporate monitor, business reforms, or privilege waivers that have been seen in more modern agreements which tend to address the factors set forth in the Organizational Sentencing Guidelines. The next year, in 1994, then U.S. Attorney for the Southern District of New York, Mary Jo White, drafted a DPA between her office and Prudential that required an independent compliance monitor. This was the first corporate pre-trial agreement to adopt the Organizational Sentencing Guidelines' effort to evaluate a corporation's compliance program and business reforms.¹³

It was not until 2003 however, after the Thompson Memo, that the modern DPA and NPA took form.¹⁴ After the Thompson Memo (which made only minor changes to the Holder Memo)¹⁵ and the unintended consequences of indicting Arthur Andersen became clear, the number of DPAs and NPAs increased exponentially.¹⁶

WHAT IS A CORPORATE PRE-TRIAL AGREEMENT?

Corporate pre-trial agreements are commonly labeled either as an NPA or DPA depending on whether a charging instrument is filed. A DPA typically refers to a situation where the United States files a criminal case, yet defers prosecution of the case provided that the corporate entity adheres to the DPA, whereas in an NPA, no charging document is filed. Instead, the investigation remains pending until the entity fulfills the terms of the NPA.

The principal benefit of these corporate pre-trial agreements is that the entity avoids the stigma of criminal conviction, which can vary depending on industry and structure of organization. A conviction for Andersen meant that effectively it could not work in the public

accounting industry. For a professional services firm, such as a law firm, it may mean that the firm may lose clients—particularly class action law firms vying for lead plaintiff status. For a defense contractor, it may mean that the company could be restricted in terms of its contracts with the government, *i.e.*, debarment. Health care companies may not be able to participate in federal programs with a federal conviction.

What are the incentives for the United States that prompt it to agree to the use of DPAs and NPAs? Christopher Christie, the United States Attorney for the District of New Jersey framed his Office's decision to enter into an agreement with Bristol Myers Squibb this way:

While prepared to seek an indictment, (and securely feeling we had the facts to ask a grand jury to return one) our judgment was that a period of deferred prosecution was the best outcome for all concerned. As the deferred prosecution agreement recites, Bristol-Myers had already undertaken some remedial actions in response to the investigation and it was willing to go a good deal further. Confident that our goals of notice to the corporate community, deterrence, full disclosure to the investing public, calibrated reform of a corrupted corporate culture, and restitution to victim shareholders could be achieved without visiting undue collateral consequences on Bristol-Myers' business, its law-abiding past and present employees and its current shareholders, we engaged in extensive discussions and negotiations over a three-month period with Bristol-Myers management, its board of directors and its counsel, ultimately arriving at the June 15, 2005 deferred prosecution agreement.¹⁷

A company's cooperation, acceptance of responsibility, and remedial measures implemented, are amount the other factors mentioned by various U.S. Attorneys.¹⁸ The central theme, of course, is always cooperation.

WHAT DO THESE CORPORATE PRE-TRIAL AGREEMENTS LOOK LIKE?

The agreements are contracts between the DOJ and the target entity. Most of the terms found in these agreements are uniform, including: (1) an admission of wrongdoing; (2) a waiver of the statute of limitations; (3) an expiration date; (4) a provision agreeing to the admissibility of plea discussions; (5) a provision stating the entity will operate lawfully; (6) a continuing obligation by the entity to cooperate (*e.g.*, ensuring employees are available for testimony); (7) a provision stating that the entity's employees will not contradict statements in the agreement (and occasionally mandating that press releases concerning the agreement undergo prior DOJ review); (8) an acknowledgment that obstruction charges are possible if the entity violates the agreement; (9) upon violation, a period of time where the entity can appeal to the DOJ for reconsideration; (10) a provision contemplating a merger or dissolution of the entity; (11) an exclusion for tax law violations; and (12) provisions for penalties and/or other restitution.

Other provisions such as attorney client and work-product waivers, corporate monitors, and other business reforms or community service type provisions, have varied greatly over the

last twenty years. A complete analysis of how these pre-trial agreements have evolved and their respective provisions is found in the *Devolution* article.¹⁹

DIFFERENCES BETWEEN NPAS AND DPAS?

What significance does the moniker DPA or NPA have on the actual terms or language of the agreement (other than terms indicating a charging instrument will be filed)?

Not much.

Our research revealed that the terms do not necessarily vary depending on whether the agreement is a DPA or NPA. Accordingly, in our view, the labels have become less significant. For example, in a series of five health care fraud corporate pre-trial agreements involving Stryker Inc, DePuy Orthopaedics, Inc. (a subsidiary of Johnson & Johnson), Smith and Newpew, Zimmer Inc., and Biomet Orthopedics that arose out of similar illegal arrangements between the companies and healthcare providers designed to push the companies' products, all five agreements were substantially the same, even though Stryker obtained an NPA and the other four companies obtained DPAs.

We found one distinction without much of a difference. Because a charging instrument is typically filed in cases involving a DPA and a case number is assigned by a federal court, it is generally much easier to locate a copy of the actual agreement and review its terms than with an NPA which is not always publicly available. While NPAs are not filed with a court, a public company arguably has a duty to file the agreement as a material definitive agreement under the federal securities laws—or, at a minimum, to recite its essential terms.²⁰ Our research revealed that this does not always happen. For example, in the March 2007 Collins and Aikman NPA, the agreement specifically provided that it could be made public, yet it was not filed as an exhibit to the company's March 30, 2007 Form 8K that only generally noted the existence of the agreement.²¹

Regardless of the label, both types of corporate pre-trial agreements are designed to avoid criminal conviction in exchange for a promise by the entity of future cooperation and (ordinarily) the implementation of other remedial measures designed to prevent future misconduct.

STATISTICS FROM *DEVOLUTION* ARTICLE AND NEW 2007 DATA

In 2007, we saw a sharp increase in the number of corporate pre-trial agreements. There were thirty-four agreements, up from twenty in 2006.

We also saw the number of attorney client privilege and work-product waivers contained in the agreements drop off significantly. There were only three corporate pre-trial agreements that contained attorney client privilege and work-product waivers, although many noted that such waivers could be requested by the DOJ under the appropriate circumstances (as contemplated by

the McNulty Memo). This was a drop of roughly 50%. The three agreements containing waivers were: the Vetco DPA, the Reliant DPA, and the Blue Cross and Blue Shield of Rhode Island DPA.

As noted below, we did not see many other significant changes with respect to the terms of the agreements. Because we were unable to review seven of the 2007 agreements, we do not view the other variations (number of compliance monitors, business reforms, and exceeding eighteen months in duration) as statistically significant. As we noted in our *Devolution* article, we use the eighteen month benchmark because that is the maximum length for pre-trial diversion provided in the U.S. Attorney’s Manual.²² We found that roughly half of the thirty-four agreements we reviewed contained criminal fine or penalty provisions. Three agreements (BP, ITT, and Vetco) climbed into list of top ten criminal penalty corporate pre-trial agreements provided below.

We also discovered that nearly a third of all 2007 corporate pre-trial agreements involved violations of the FCPA. This year, Vetco entered into a DPA which contained the most significant criminal fine in an FCPA case to date: \$26 million. The uptick in FCPA cases, however, did not seem to impact the overall percentage of business reforms or corporate monitors for 2007.

In addition to a significant increase in the number of FCPA agreements, we also observed ten corporate pre-trial agreements involving health care violations with conduct ranging from violations of the anti-kickback laws to Food Drug and Cosmetics Act violations (such as misbranding). This worked out to approximately a third of the agreements. Before last year, we had only seen one corporate pre-trial agreement involving violations of the federal health care laws.

Although we observed that some of the 2007 agreements had new wrinkles (and others revisited older ones), the (1) increase in the number of agreements, (2) the absence of waiver provisions, and (3) the number of agreements involving violations of the FCPA and health care laws were the most significant developments in 2007.

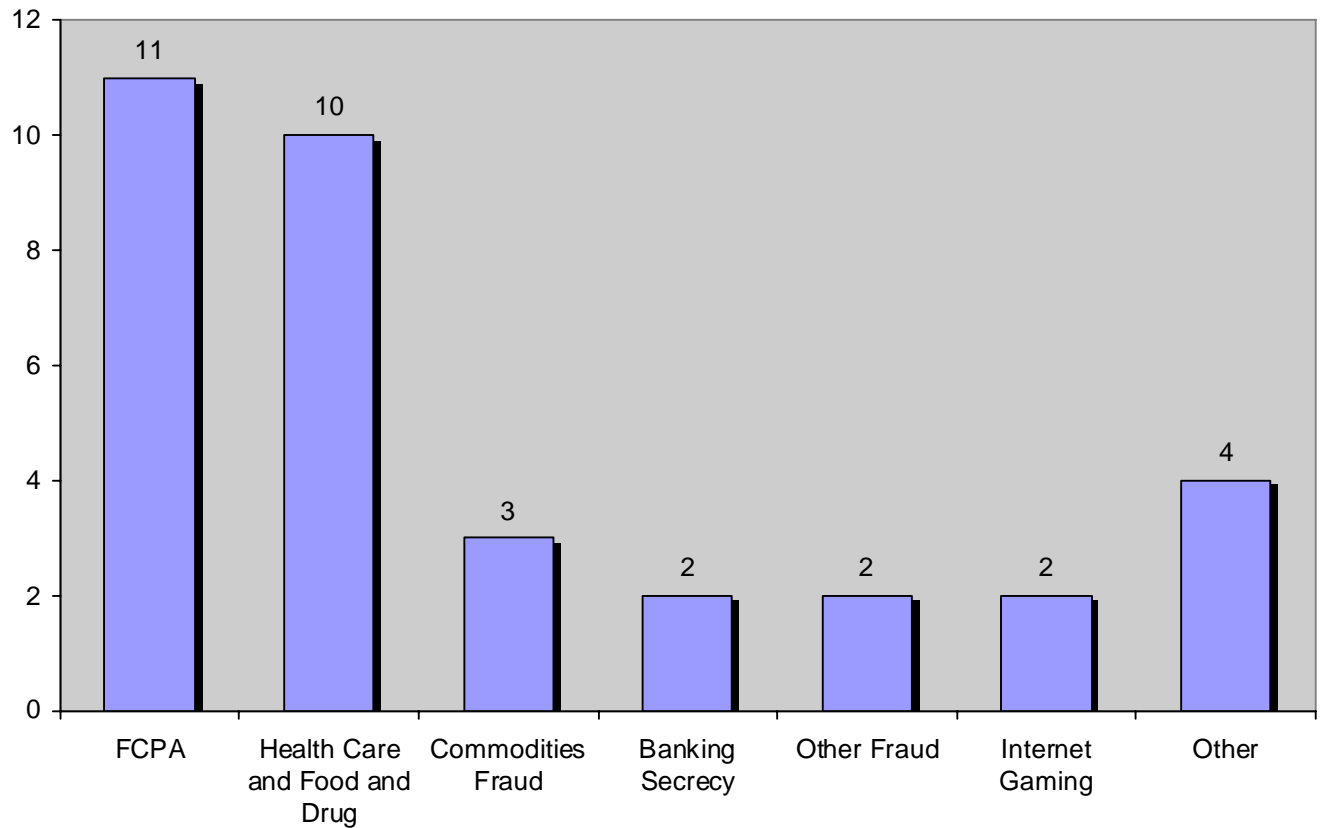
POST-THOMPSON MEMO STATISTICS (2003-2006)²³

Total Number of Post-Thompson Memo Agreements:	46
Number of Post-Thompson Memo Agreements Reviewed	44
Number of Privilege Waivers:	26 or 59%
Number of Agreements with Compliance Monitors:	27 or 61%
Number of Agreements Mandating Business Reforms:	27 or 61%
Number of Agreements Longer Than 18 Months	27 or 61%

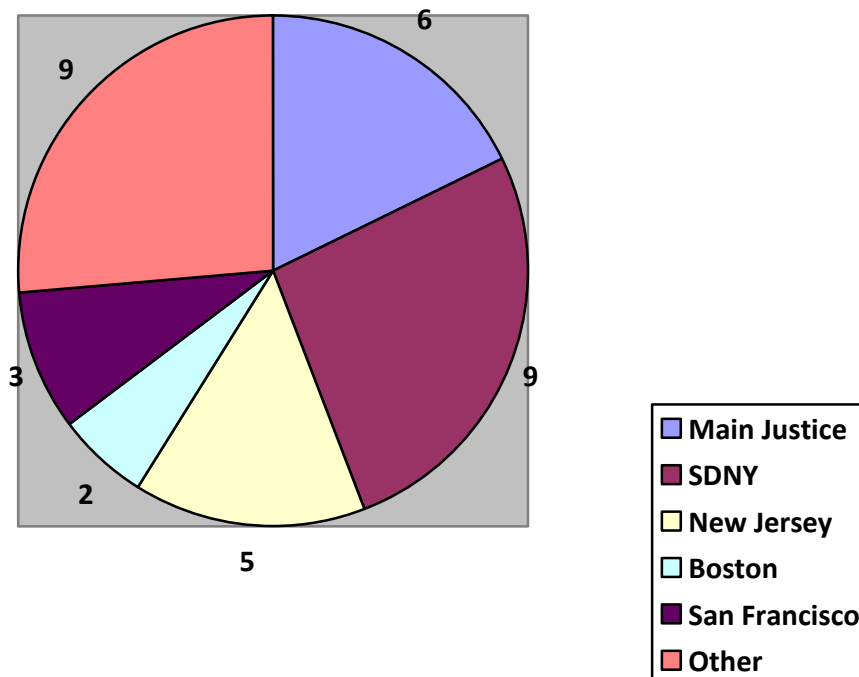
POST-MCNULTY MEMO STATISTICS (2007)²⁴

Total Number of 2007 Agreements:	34
Number of 2007 Agreements Reviewed	27
Number of Privilege Waivers:	3 or 11%
Number of Agreements with Compliance Monitors:	14 or 51%
Number of Agreements Mandating Business Reforms:	20 or 74%
Number of Agreements Longer Than 18 Months	17 or 62%

Corporate Pre-Trial Agreement Conduct



Number of Agreements by DOJ Component



TOP 10 DPA AND NPA CRIMINAL FINES (2004-2007)

Entity	Settlement Total	Criminal Fine/Penalty Portion of Settlement Payment	Violation
Prudential (8/06)	\$600 million	\$325 million	Securities Fraud
KPMG (8/05)	\$425 million	\$128 million	Tax Fraud
British Petroleum (10/07)	\$303 million	\$100 million	Commodities Fraud
AOL (12/04)	\$210 million	\$60 million	Securities Fraud
Bristol Myers Squibb (6/05)	\$839 million	\$50 million	Securities Fraud
Williams Power (2/06)	\$50 million	\$50 million	Commodities Fraud
Boeing (6/06)	\$615 million	\$50 million	Procurement Fraud
ITT Corp. (3/07)	\$100 million	\$52 million (but \$50 million can be offset over 5 yrs by developments in military technology)	Arms Export Control Act
AEP (1/05)	\$60 million	\$30 million	Commodities Fraud
AIG (2/06)	\$800 million	\$25 million	Securities Fraud
Vetco (2/07)	\$26 million	\$26 million	FCPA

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This article represents the views of the authors only; particularly to the extent it is insightful or otherwise helpful.

As we note in our *Devolution* article, any collection of corporate pre-trial agreements is necessarily imperfect because not all of the agreements are made public. This article and *Devolution* reflect the best efforts by the authors to obtain all publicly available corporate pre-trial agreements. We were unable to obtain nine agreements for 2007: Akzo Nobel NPA, El Paso NPA, United Bank of Africa NPA, Holy Spirit Assoc. DPA, Omega Advisors NPA, Willibros DPA, and Mirant Energy NPA.

All source material for this article (and the other two) was obtained through public sources such as SEC filings, web searches, and Russell Mokhiber's website, Corporate Crime Reporter, www.corporatecrimereporter.com. The authors are also grateful to Sue Reisinger, a writer for Corporate Counsel magazine, who has significantly added to the scholarship on corporate pre-

trial agreements with her writings and independent empirical research. *See, e.g.*, Sue Reisinger, *Someone to Watch Over You* (CORP. COUNSEL Oct. 2007) (examining role of monitor and individuals serving as monitor in corporate pre-trial agreements since 1994).

¹ 51 ST. LOUIS UNIV. L. REV. 1 (2006) [hereafter *Devolution* article].

² (CORP. COUNSEL, June 2007) [hereafter *Third Verse* article].

³ The BP environmental case is illustrative of the fact that significant penalties and other reforms can result when an entity pleads guilty. Indeed, as noted in our *Third Verse* article, the most significant criminal penalty in a corporate pre-trial agreement involving violations of the environmental laws was First Energy Nuclear, which agreed to pay a criminal penalty of \$23 million in January 2006 as part of a DPA. This is only half of what BP has agreed to pay pursuant to a plea agreement.

⁴ As noted above Note 1, not all NPAs (or DPAs) were publically available.

⁵ The three 2006 agreements involving FCPA violations were Statoil ASA, Schnitzer Steel, and Health South.

⁶ 2006 Intermune NPA involving misbranding.

⁷ 212 U.S. 481, 492–94 (1909).

⁸ 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].

⁹ *See* McNulty Memo at III.

¹⁰ McNulty Memo at VII.

¹¹ *Devolution* Article at 17–27.

¹² *See* Chapter 8 of the United States Sentencing Guidelines.

¹³ U.S.S.G. §8C2.5 cmt. (1992); *Devolution* article at 5.

¹⁴ 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].

¹⁵ 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>.

¹⁶ *Devolution* article at 36.

¹⁷ Christopher Christie and Robert Hanna, *A Push Down the Road of Good Corporate Governance* 43 AM. CRIM. LAW. REV. 1043, 1049 (Summer 2006).

¹⁸ *See, e.g.*, Press Release on Westerngeco Agreement (U.S. Attorney’s Office for the Southern District of Texas, Donald J. DeGabrielle, Jr.) (June 16, 2003), *available at* <http://houston.fbi.gov/dojpressrel/pressrel06/ho061606.htm>; Press Release on Williams Power Agreement (U.S. Attorney’s Office for the Northern District of California, Former U.S. Attorney Kevin Ryan) (Feb. 22, 2006), *available at* <http://sanfrancisco.fbi.gov/dojpressrel/2006/sf022206.htm>; Press Release on Tommy Hilfiger Agreement (U.S. Attorney’s Office for the Southern District of New York, David Kelly) (Aug. 10, 2005), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/August05/hilfigeragreementpr.pdf>; Press Release

on Royal Ahold Agreement (U.S. Attorney's Office for the Southern District of New York, Michael Garcia) (Sept. 28, 2006), available at <http://www.usdoj.gov/usao/nys/pressreleases/September06/aholdnon-prospr.pdf>.

¹⁹ *Devolution* article at 36. 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).

²⁰ See Item 1.01(Entry into a Material Definitive Agreement) of the Instructions to Form 8K, available at <http://www.sec.gov/about/forms/form8-k.pdf>. Item 1.01 provides that disclosure of the following information is required: (1) date on which the agreement was entered into, (2) identity of the parties and relationships, and (3) a *brief description of the material terms*.

²¹ Collins and Aikman NPA, available at <http://www.corporatecrimereporter.com/documents/nonpros.pdf>. The company's press release accompanying its March 30, 2007 Form 8K is available at <http://www.sec.gov/Archives/edgar/data/846815/000095012407001908/k13807exv99w1.txt>.

²² *Devolution* article at 13, 34.

²³ *Devolution* article at 36 (Appendix of DPAs/NPAs). 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, but we have added the statistics from ABT Associates DPA, Intermune DPA, Statoil ASA DPA, and Schnitzer Steel DPA, which were all entered into after the final information was culminated for the *Devolution* article in September 2006. While we added the October 2006 Medicis NPA to the total number of agreements (44), we were unable to locate this non-prosecution agreement, so the terms of this agreement are not incorporated into these statistics. For 2003–2006, this only resulted in the exclusion of two agreements, the Hilfiger and Medicis NPAs.

²⁴ As noted above Note 1 (which echoes the disclaimer in *Devolution* regarding the difficulty in locating corporate pre-trial agreements generally), we could not locate the following specific agreements based on searches of public information: Akzo Nobel NPA, El Paso NPA, United Bank of Africa NPA, Holy Spirit Assoc. DPA, Omega Advisors NPA, Willibros DPA, and Mirant Energy NPA.