

# Devolution of Authority: The Department of Justice's Corporate Charging Policies

By Lawrence D. Finder and Ryan D. McConnell\*

## INTRODUCTION

Both a climate of corporate corruption following the Enron scandal and public backlash over the conviction of the Arthur Andersen accounting firm have transformed the way the Department of Justice ("DOJ") handles the prosecution of business entities. This change is best embodied in the DOJ's Principles of Federal Prosecution of Business Organizations, commonly called the Thompson Memo.<sup>1</sup> After Enron and Andersen, pre-trial diversion has flourished as both corporations and the government have become less willing to roll the dice on a corporate criminal prosecution. In the last four years (2002-2005), the DOJ has entered into twice as many non-prosecution agreements ("NPA") and deferred prosecution agreements ("DPA") (collectively, "pre-trial agreements") as it had over the previous ten years (1992-2001).<sup>2</sup> This year, the use of pre-trial agreements continued to grow with the DOJ entering into six DPAs and

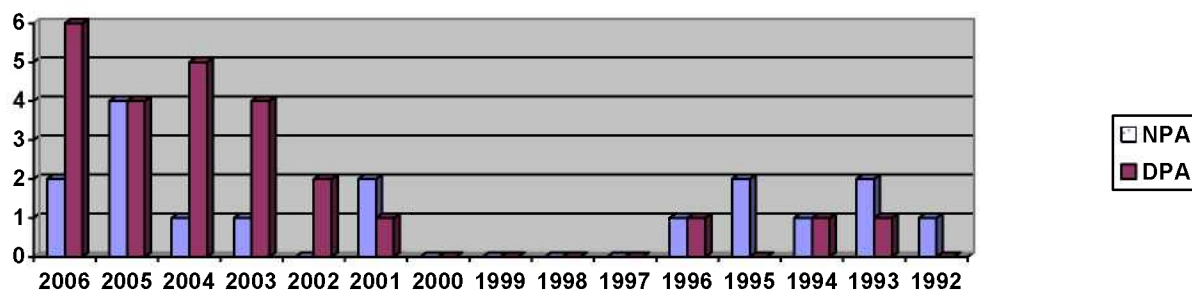
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<sup>1</sup> Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). [hereinafter "Thompson Memo"]

<sup>2</sup> *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, Corp. Crime Rep., (Dec. 28, 2005) available at <http://www.corporatecrimereporter.com>. [hereinafter CCR Report] See *infra* DPA/NPA Matrix at p. 27 highlighting more recent statistics. Unlike the Corporate Crime Reporter, we did not include the declination of prosecution of Shell Oil in July 2005 because there was no agreement. The table below also includes four non-public NPAs that are not included in the DPA/NPA Matrix.

Number of Pre-Trial Agreements Since 1992



two NPAs in the beginning of 2006.<sup>3</sup> While the rise in the number of agreements may not be directly linked to the fall of Enron and Andersen and the rise of the Thompson Memo, the temptation to link the three events is overwhelming. Regardless of the strength of this link, one thing is certain. Post-Thompson Memo, the nature and terms of these pre-trial agreements have changed.

After the Thompson Memo, pre-trial agreements grew in length and became loaded with features that were absent from pre-1999 agreements such as waivers of attorney-client privilege and work product protection, provisions for the appointment of an independent monitor, and admissions of responsibility with promises by the company not to contradict the agreement.<sup>4</sup> The Thompson Memo did not provide a mandate for pre-trial diversion, merely a roadmap—a feat of alchemy loosely based on the U.S. Attorney’s Manual and Chapter Eight of the Federal Sentencing Guidelines (Business Organizations). The DOJ has been able to use the Thompson Memo and its theme of corporate cooperation to ferret out corporate fraud and fundamentally change the way businesses under investigation interact with federal prosecutors. Recent events suggest, however, that we may have reached a pinnacle in terms of the evolution of the DOJ’s corporate charging policy as pre-trial agreements drafted by prosecutors can vary depending by which of the 93 different U.S. Attorney’s Offices handles the prosecution—a devolution of authority.

## **I. The Genesis of Pre-Trial Diversion: One Size Fits All?**

Recently, the use of pre-trial agreements has been on the rise. These agreements—most frequently used in securities and financial fraud cases—offer the government and companies an opportunity to resolve a criminal investigation without unnecessary collateral costs.<sup>5</sup> Politically and socially the Arthur Andersen indictment was a disaster.<sup>6</sup> Absent pervasive, endemic criminal activity within the organization, both sides have learned that these agreements serve as a valuable tool prosecutors use to avoid the collateral consequences that occurred in Andersen and focus instead on individual wrongdoers.<sup>7</sup> Accordingly, the DOJ has effectively used these

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<sup>3</sup> See *infra* DPA/NPA Matrix at p. 27; *No More Amnesty*, 20 *Corporate Crime Reporter* 18(1) (Apr. 25, 2006) (noting continued rise of pre-trial agreements following the December 2005 Corporate Crime Reporter Survey).

<sup>4</sup> See *infra* DPA/NPA Matrix at p. 27.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Jonathan D. Glater, *Enron Trial Stirs Memory of Andersen*, NY TIMES (Feb. 21, 2006), at C1; Editorial, *Arthur Andersen’s “Victory,”* Wall St. J., June 1, 2005, at A20. Not only did the indictment of Andersen destroy the accounting firm, but it sunk a \$500 million settlement that was being negotiated with the SEC that would have returned millions to shareholders. Kurt Eichenwald, *Enron’s Many Strands: The Investigation; SEC Had Sought \$500 Million in Failed Talks With Andersen*, NY TIMES (Mar. 20, 2002) at A1. In 1996, Andersen entered into a deferred prosecution agreement with the United States Attorney’s Office for the District of Connecticut. See *infra* DPA/NPA Matrix at p. 27. One could argue that having already received one deferred prosecution agreement, the DOJ had to prosecute the entity. But see Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006) (arguing that the outcome in Andersen was disproportionate to the offense).

<sup>7</sup> See Jonathan D. Glater, *Deal Likely to Let KPMG Avoid Charge in Tax Case*, NY TIMES (Aug. 11, 2005), at C1.

agreements to focus on individuals within business organizations that had a hand in criminal wrongdoing. While the reasons behind the rise of pre-trial agreements seems clear enough (e.g., Andersen's demise after its indictment including the loss of 28,000 U.S. jobs),<sup>8</sup> the origins of such agreements are not so transparent.

### Organizational Guidelines

The intellectual underpinnings for the Thompson Memo began to take shape in 1991, when the Federal Sentencing Guidelines were supplemented with a new chapter eight entitled "Sentencing of Organizations" ("Organizational Guidelines"), which emphasized corporate cooperation as a condition for leniency in the sentencing process.<sup>9</sup> These guidelines were intended to provide guidance to the government at the sentencing phase of a criminal prosecution. The Organizational Guidelines set forth a variety of watermarks that a court could use in determining what sentence, if any, to give a corporation. A prominent feature of the Organizational Guidelines was their focus on cooperation. The commentary to the new chapter urged the government to require organizations to waive their protections to demonstrate cooperation with the government, and thus to qualify for a more lenient sentence.<sup>10</sup> Specifically, the Organizational Guidelines provided:

[t]o be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. *To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization.* A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.<sup>11</sup>

To ensure that full disclosure was made, the new Organizational Guidelines also contemplate that the organization be allowed a reasonable period of time to conduct an internal

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<sup>8</sup> See *id.*

<sup>9</sup> See Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, S. TEX. L. REV. Vol. 45:111 (2003), at 113-14 (citing the U.S. Sentencing Guidelines Manual ch. 8 (2002)) [hereinafter "Finder Article"]. Also, it should be noted that the DOJ's Antitrust Division has had a long standing prosecution policy for corporate entities. *Id.* at 113 (citing U.S. Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>). Agreements in antitrust cases entered into under the DOJ Antitrust policy will not be addressed in this article.

<sup>10</sup> U.S.S.G. §8C2.5 cmt. (1992). Historically, absent a "common interest" or "joint privilege" exception, privilege was only considered "waived" by the holder voluntarily disclosing the information to a third-party or placing the communication at issue in litigation. *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000); see also Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587- 611 (2004) (noting the "Justice Department's consideration of waiver of the attorney-client privilege and/or work product protection by organizational defendants in evaluating cooperation is based on the definition of cooperation set forth in the Organizational Sentencing Guidelines.")

<sup>11</sup> U.S.S.G. §8C2.5 cmt. 12 (1992) (emphasis added).

investigation—now a prelude to many pre-trial agreements.<sup>12</sup> The Organizational Guidelines, however, did not address pre-trial agreements specifically. But given that the guidelines focused on the sentencing phase of a criminal prosecution (when presumably the window for a pre-trial agreement would have closed), this is unsurprising.

The Organizational Guidelines did, however, lay a foundation for the compliance monitors that would later become a staple of virtually every pre-trial agreement we reviewed. Under the new Organizational Guidelines, “if, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law,” a Court *shall* order probation.<sup>13</sup> In the event of probation for lack of an effective compliance program, Section 8D1.4(c) (1) provided “[t]he organization shall develop and submit to the court a program to prevent and deter violations of law, including a schedule for implementation.”<sup>14</sup> The organization was also required to “notify its employees and shareholders of its criminal behavior and its [compliance program].”<sup>15</sup> Furthermore, Section 8D1.4(c)(4) stated:

[t]he organization shall submit to (A) a reasonable number of regular or unannounced examination of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.<sup>16</sup>

Depending upon the nature of the terms for the compliance program, such a compliance monitor could essentially make the company and the government business partners.<sup>17</sup> With the addition of this new language and a recognition that organizations may require special treatment, the Organizational Guidelines laid the groundwork for the explicit DOJ prosecutorial policy that considered both the impact of cooperation and a compliance monitor in corporate charging decisions. These considerations laid the foundation for explicit DOJ policies that would shape future pre-trial agreements for years to come.

### *Pre-1999 pre-trial agreements*

The pre-trial agreements that followed the implementation of the Organizational Guidelines were relatively primitive (some might say less draconian) compared to the modern

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<sup>12</sup> *Id.*; see *infra* DPA/NPA Matrix at p. 27. The various U.S. Attorney’s Offices may not always choose to allow companies to conduct a thorough internal investigation. The Organizational Guidelines suggest that companies should be allowed to undertake such an investigation, but the U.S. Attorney for each District is under no obligation to permit the corporation to do so.

<sup>13</sup> U.S.S.G. § 8D1.1(a)(3) (1992); *United States Sentencing Commission’s Corporate Crime Symposium* (Sept. 7-8, 1995) at 15-22 (outlining application of the Organizational Guidelines to corporate defendants), Proceedings Book, available at <http://www.uscc.gov/sympo/wcsympo.pdf>.

<sup>14</sup> U.S.S.G. § 8D1.4(b)(1) (1992).

<sup>15</sup> U.S.S.G. § 8D1.4(b)(2) (1992).

<sup>16</sup> U.S.S.G. § 8D1.4(b)(4) (1992).

<sup>17</sup> See *infra* Part VI.

pre-trial agreement—with the exception of the Prudential DPA. The early agreements were simple and often represented a compromise on criminal liability. In fact, many of the early agreements did not contain provisions where the business admitted or conceded any wrongdoing, an important feature for companies defending themselves in parallel proceedings.<sup>18</sup> Additionally, the privilege waivers in these early pre-trial agreements were much more limited in scope than present day agreements. In the 1994 John Hancock Mutual Life NPA, the privilege waiver was limited to work product documents relating to an internal investigation “so long as the materials do not reflect Hale and Door legal advice to Hancock or communications among counsel.”<sup>19</sup> Merrill Lynch and Lazard Freres’s 1995 NPAs included attorney-client privilege waivers, but did not waive work product protection.<sup>20</sup> The 1994 Armour of America DPA, the 1996 Arthur Andersen DPA, the 1993 Aetna NPA, and the 1994 Hancock NPA did not waive any privileges.

The applicable time frame of these early pre-trial agreements was generally unclear. Prudential was the only early agreement to include an explicit date when the agreement would expire. In the Armour DPA, an agreement among the U.S. Attorney’s Office for the Central District of California, Armour of America, and the U.S. State Department, the agreement expired as soon as Armour paid the \$20,000 fine. The other early agreements had no explicit length. When the later agreements contained definite durations, this was a significant improvement over the early agreements from the standpoint of the corporation.<sup>21</sup> Finally, none of the early pre-trial agreements included independent compliance monitors. Similarly, the business reforms in the early agreements were limited to compliance reforms. Things would change in 1999.<sup>22</sup>

## II. The Holder Memo: The New Deal.

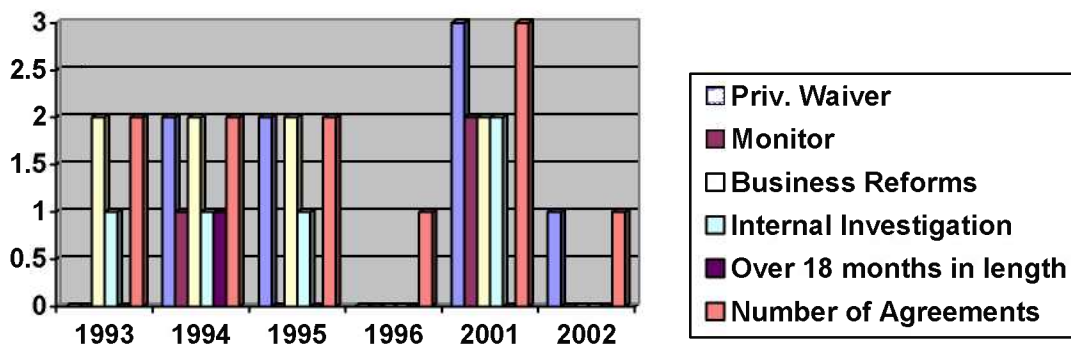
<sup>18</sup> See Aetna NPA p.2; 1995 Merrill NPA p. 24; Lazard NPA p. 25; Andersen DPA ¶2; Armour DPA p.6.

<sup>19</sup> Hancock DPA p. 5.

<sup>20</sup> Merrill Lynch DPA p. 21, Lazard DPA p. 19.

<sup>21</sup> The only specific DOJ policy that sets forth a definite length for pre-trial agreements is found in the U.S. Attorney’s Manual. See *infra* Part II.

**Pre-Trial Agreements From 1991-2002**



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In 1999, a little-noticed memo drafted by then Deputy Attorney General Eric H. Holder, Jr. (“Holder Memo”), captioned “Bringing Criminal Charges Against Corporations,” memorialized the Organizational Guidelines’ use of cooperation as a factor in charging decisions.<sup>23</sup> The Holder Memo explicitly relied on the U.S. Sentencing Guidelines and the U.S. Attorney’s Manual as the source for its directive to prosecutors.<sup>24</sup> In doing so, it took a set of post-investigation procedures and policies (the Organizational Guidelines) and merged it with a set of pre-trial policies and initiatives (the U.S. Attorney’s Manual), an amalgamation that transformed DOJ corporate charging policy.

The Holder Memo began by acknowledging that corporate charging decisions involve different variables than those involving individuals. These different considerations, Holder pointed out, do not mean that corporations should be granted special treatment.<sup>25</sup> In 2002, then-Deputy Attorney General Larry Thompson explained this stance:

“[C]orporations are economic and cultural facts in our society. Employees act on the corporation’s behalf and take on the corporation’s identity. Large corporations, develop their own methods and culture that guide employees’ thoughts and actions. That culture is a web of attitudes and practices that tends to replicate and perpetuate itself beyond the tenure of any individual manager. That culture may instill respect for the law or breed contempt and malfeasance. The organization itself must be held accountable for the culture and the conduct it promotes. Without this tool, the public would have no adequate deterrent to corporate criminal conduct because the culture that condoned, or at least acquiesced in, that behavior would be beyond the criminal law’s power to correct. Only by prosecuting the corporation itself can we ensure systemic reform.”<sup>26</sup>

In other words, corporations should be held accountable just as individuals are. Like the Organizational Guidelines, the Holder Memo recognized that meting out this responsibility involved special considerations that flow from the corporate form. Because these considerations had previously been nebulous and complex, the Holder Memo explicitly tried to implement a standard that line prosecutors could use in deciding how to prosecute a corporate entity.

### *Holder’s Framework*

In recognition of a corporation’s special status, the Holder Memo identified eight factors that should serve as a general framework for prosecutors to consider in deciding whether to criminally prosecute a corporation:

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<sup>23</sup> Memorandum from Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Justice, to Component Heads and U.S. Att’ys, Federal Prosecution of Corporations (June 16, 1999), *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> [hereinafter “Holder Memo”]; Finder Article at 114.

<sup>24</sup> *See* Finder Article at 114.

<sup>25</sup> *See id.*

<sup>26</sup> Deputy Attorney General Larry D. Thompson, 2002 Speech to the American Bar Association Criminal Justice Section (Aug. 10, 2002), *available at* <http://www.usdoj.gov/dag/speech/2002/081002abacriminaljustice.htm>.

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;
5. the existence and adequacy of the corporation's compliance program;
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution; and
8. the adequacy of remedies such as civil or regulatory enforcement actions.<sup>27</sup>

The most controversial provision of the Holder Memo was number four, “[t]he corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.”<sup>28</sup> This provision memorialized the Organizational Guidelines

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Substantial scholarship has been devoted exclusively to attorney-client privilege and work product protection, so we will only briefly address this area. *See, e.g.*, EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 3 (4th ed. 2001); Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381 (2005). The attorney-client privilege protects the confidentiality of communications between an attorney and client provided the communication was made by the client to procure the attorney’s services with the expectation of privilege. *See, e.g.*, *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000). Efforts enlisting the attorney’s aid to commit a crime are not protected. *See United States v. Zolin*, 491 U.S. 554, 562-563 (1989). The purpose of attorney-client privilege is frank and open communications between the attorney and the client and compliance with the law by the client. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981);). The attorney client privilege may be claimed only by the client. The work product protection protects attorney “work product” that is prepared in anticipation of litigation.

language suggesting that waiver of attorney-client privilege can be viewed as cooperation. Holder, however, never intended this waiver to be absolute. The Holder Memo noted that “[t]his waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue.”<sup>29</sup> Furthermore, “[e]xcept in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government’s criminal investigation.”<sup>30</sup> Unfortunately, many of the waivers seen in post-Holder Memo pre-trial agreements do not adhere to this limitation. To the contrary, our research revealed that companies routinely agreed to waive both work product protection and attorney-client privilege.<sup>31</sup> Most of the waivers, we reviewed, however, were limited to the communications made during the course of the investigation, but our analysis was limited to publicly available pre-trial agreements.<sup>32</sup>

Just as the Holder Memo instructed prosecutors to consider waiver of the attorney-client privilege and work product protection as a sign of cooperation, it noted that prosecutors may consider advancement of attorney’s fees to employee/officer/director defendants as a sign of non-cooperation. The Holder Memo provided:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation.

Another important feature of the Holder Memo was its focus on the corporate compliance program. The Holder Memo provided:

[p]rosecutors should . . . attempt to determine whether a corporation’s compliance program is merely a “paper program” or whether it was designed and implemented 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. In

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*In re Grand Jury Proceedings, Thurs. Special Grand Jury Session Sept. Term, 1991*, 33 F.3d 342, 348 (4th Cir. 1994); *Hickman v. Taylor*, 329 U.S. 495 (1947). It is broader than attorney-client privilege. *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986). The purpose of the work product privilege is to allow attorneys to properly prepare for litigation. *Id.* Either the attorney or the client can assert work product protection. *In re Grand Jury Subpoena*, 419 F.3d 329, 333 n.3 (4th Cir. 2005). Work product protections can be lifted if an opposing party can show substantial hardship or that the facts necessary to the presentation of one’s case are unavailable unless the court lifts the protection. *In re Grand Jury Proceedings*, 33 F.3d at 348.

<sup>29</sup> Holder Memo, *supra* note 23, n.2. In *Upjohn*, the Supreme Court confirmed that attorney-client privilege protection applies to corporate internal investigations. *Upjohn*, 449 U.S. at 394-95.

<sup>30</sup> Holder Memo, *supra* note 23, n.2.

<sup>31</sup> See *infra* DPA/NPA Matrix at p. 27.

<sup>32</sup> See *id.* Our research did not (and could not) take into account, however, many attorney-client privilege or work product protection waivers—either cajoled out of companies or offered voluntarily—in matters not resulting in pre-trial agreements, but that were offered as “cooperation” under the Holder or Thompson Memo.

addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

This feature followed the path laid by the Organizational Guidelines—it would eventually lead to the independent monitor provisions found in many pre-trial agreements.<sup>33</sup> Also, this language provides support for the provisions that restructure a company's internal controls or compliance program, which both pre-dated and followed the Holder Memo in pre-trial agreements.<sup>34</sup>

### *A Hint of Pretrial Diversion: U.S. Attorney's Manual as a Template?*

While the Holder Memo did not explicitly mention pre-trial diversion (as Thompson would later), Holder did suggest that prosecutors could use the pre-trial diversion procedures found in the U.S. Attorney's Manual to reward a corporation's cooperation. The comment to provision six (cooperation) noted that “[i]n some circumstances . . . granting a corporation immunity or amnesty may be considered . . . [i]n such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally.”<sup>35</sup> No guidance was provided on how to implement the Holder Memo's guidelines using a non-prosecution agreement. No mention was made of the ten pretrial agreements (including seven non-prosecution agreements) that predated the Holder Memo or whether prosecutors should look to these agreements as a template. The only template that was given was the U.S. Attorney's Manual and its pre-trial diversion provisions.<sup>36</sup>

The U.S. Attorney Manual's pre-trial diversion procedures look nothing like the DPAs and NPAs that we see today. The Manual's language appears drafted with a view towards pre-trial diversion of individuals, not businesses. Indeed, the Manual's procedure on pre-trial diversion is framed in terms of DOJ action against *individuals*, not entities. It states that “[t]he U.S. Attorney, in his/her discretion, may divert *any individual* against whom a prosecutable case exists [subject to certain exceptions].” The Manual explains that “[t]he decision to terminate *an individual* from continuing to participate in pre-trial diversion based upon breach of conditions rests exclusively with the U.S. Attorney, with advice from either the Chief Pre-trial Services Officer or the Chief Probation Officer.”<sup>37</sup> In its outline of procedures for pre-trial diversion, the U.S. Attorney's Manual continues “[a]s part of the background investigation, Pre-trial Services

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<sup>33</sup> The Organizational Guidelines were amended in November of 2004, increasing the importance of compliance and ethics program. *See infra* note 122.

<sup>34</sup> *See id.*

<sup>35</sup> Holder Memo, *supra* note 23, Part VI, B cmt.

<sup>36</sup> U.S. Attorney's Manual § 9-27.600-650 (2002), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.600](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.600).

<sup>37</sup> U.S. Attorney's Manual § 9, Criminal Resources Manual at 712 (emphasis added), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00712.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm).

[part of the U.S. Probation Office] will arrange with the United States Marshal's Office to have the diverted fingerprinted and to have such fingerprints submitted to the FBI . . . .” This procedure seems, on its face, completely inapplicable to a corporation facing prosecution.

As ill-suited for businesses as the procedures may seem, the message of cooperation as the goal of pre-trial diversion supports the objective of the Holder Memo. Section 9-27.600 of the Manual provides “[t]he government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person’s<sup>38</sup> cooperation when, in his/her judgment, the person’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.”<sup>39</sup> The Manual notes:

[i]n determining whether, a person’s cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including: (1) [t]he importance of the investigation or prosecution to an effective program of law enforcement; (2) [t]he value of the person’s cooperation to the investigation or prosecution; and (3) [t]he person’s relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.”<sup>40</sup>

The U.S. Attorney’s Manual also sets forth certain procedures that are adaptable to a corporate entity. The Manual emphasizes that “[p]re-trial diversion . . . is an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service.”<sup>41</sup> The objectives of pre-trial diversion are (1) to prevent future criminal activity among certain offenders by using the pre-trial diversion program as opposed to a traditional prosecution, (2) saving prosecutorial and judicial resources, and (3) providing a vehicle for restitution.<sup>42</sup> The Manual provides that the period of supervision for pre-trial diversion “is not to exceed 18 months, but may be reduced.”<sup>43</sup> Participants who successfully complete the pre-trial diversion program are not charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.<sup>44</sup> Varying from several early pre-trial agreements, the Manual notes that “[t]he offender must acknowledge responsibility for his or her

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<sup>38</sup> Under federal law, the term “person” is often defined to include individuals as well as entities such as corporations. *See, e.g.*, 18 U.S.C. § 1961 (3) (Racketeer Influence and Corrupt Organizations); 26 U.S.C. § 7701 (a)(1) (Internal Revenue Code).

<sup>39</sup> U.S. Attorney’s Manual § 9-27.600 (2002), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.600](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.600).

<sup>40</sup> U.S. Attorney’s Manual § 9-27.620 (2002) (emphasis added), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.600](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.600).

<sup>41</sup> U.S. Attorney’s Manual § 9-22.010 (1997) (emphasis added), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/22mcrm.htm#9-22.100](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm#9-22.100), *see also* *Thompson Memo Opens the Door for Pre-Trial Diversion for Corporations*, 17 *Corporate Crime Reporter* 29(1) (July 21, 2003) (arguing that Thompson Memo laid groundwork for pre-trial diversion and noting that it was issued almost simultaneously with the Banco Popular DPA).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

behavior, but is not asked to admit guilt.”<sup>45</sup> Finally, after completion of the pre-trial diversion agreement, the Manual confirms a declination of prosecution—every corporate defendant’s dream. The typical pre-trial agreement is worded far more artfully, but generally accomplishes the same goal.

The Prudential Securities DPA in 1994 highlights the tie between pre-trial agreements and the U.S. Attorney’s Manual. In a letter to then-U.S. Attorney for the Southern District of New York Mary Jo White, counsel for Prudential tracked the language of the Manual in arguing that White should allow Prudential to avoid criminal prosecution.

First, given the amounts that [Prudential] has already paid, and the well-publicized nature of the limited-partnership problems, no “punitive” or “deterrent” purpose would be served. Second, given [Prudential’s] already-unlimited commitment to pay compensation where appropriate, a prosecution would bring no benefit to limited partnership purchasers. Third, given the extensive changes in [Prudential’s] management and compliance procedures, there is no “remedial” need for a prosecution here. Finally, a prosecution would be seriously unfair, given [Prudential’s] cooperation and its demonstrated good faith.<sup>46</sup>

Prudential’s prosecution was deferred for three years<sup>47</sup> in an agreement that included a waiver of attorney-client (but not work product) privilege and appointment of an independent monitor, two features of the Holder Memo, not the U.S. Attorney’s Manual. The shift in corporate charging policy had begun.<sup>48</sup> When the Holder Memo came on the scene in 1999, although it did not receive the widespread attention of the Thompson Memo, it represented a policy that was more in line with prior pre-trial agreements, particularly the 1994 Prudential agreement, than the Sentencing Guidelines or U.S. Attorney’s Manual it cites as providing its foundation. It was not until 2004 that the Sentencing Guidelines would catch up. The U.S. Attorney’s Manual never has.

### **III. The Thompson Memo: A Perfect Storm.**

Drafted by then Deputy Attorney General Larry Thompson, the Thompson Memo came onto the white-collar scene with a splash. Unlike the Holder Memo, which was drafted in period of unprecedented prosperity, the Thompson Memo was drafted in a climate of corporate

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<sup>45</sup> U.S. Attorney’s Manual, Criminal Resource Manual (part of the Commentary to the U.S. Attorney’s Manual), Title 9 § 712 (1997).

<sup>46</sup> Letter of Scott M. Muller, Davis Polk & Wardwell, to the United States Attorney’s Office for the Southern District of New York, Accompanying Prudential DPA (October 13, 1994), at 9.

<sup>47</sup> The U.S. Attorney’s Office for the Southern District of New York, while including a definite duration—an improvement over many other early pre-trial agreements, did not use the explicit 18-month limitation set forth in the U.S. Attorney’s Manual. See U.S. Attorney’s Manual § 9-22.010 (1997), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/22mcrm.htm#9-22.100](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm#9-22.100).

<sup>48</sup> The next DPA came two years later in April 1996 as an agreement between Arthur Andersen and the U.S. Attorney’s Office for the District of Connecticut for Andersen’s endorsement of a misleading financial prospectus. See *infra* DPA/NPA Matrix at p. 27.

corruption. A perfect storm. Enron and WorldCom (and numerous others) had imploded in the wake of accounting and financial scandals. Indeed, there were no pre-trial agreements in 1999, and only five from the Holder Memo until the Thompson Memo was published in 2003. The Thompson Memo was published after President Bush established the Corporate Fraud Task Force “to investigate and prosecute significant financial crimes,”<sup>49</sup> and after the DOJ indicted Arthur Andersen for its role in the Enron accounting fraud scandal.<sup>50</sup> The indictment had devastating consequences for the firm. With the criminal indictment, Anderson could no longer audit public companies.<sup>51</sup> 28,000 people lost their jobs and Arthur Andersen became a shell of its former self.<sup>52</sup> As a result, the Thompson Memo was (and is) widely seen as changing the DOJ’s landscape for prosecuting entities. Following Thompson, the use of pre-trial agreements exploded.<sup>53</sup>

While substantively Thompson added only a few, albeit very significant, sentences, it was drafted in 2002 when corporate crime was the topic du jour. Nine factors are used in the Thompson Memo to provide guidance to prosecutors determining whether to bring charges and negotiating plea agreements.<sup>54</sup> The factors are virtually identical to those set forth in the Holder Memo, adding only “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”<sup>55</sup> Significantly, the Thompson Memo also stressed that only rarely will individuals not be pursued, even when the entity offers to plead guilty.<sup>56</sup>

Following in the steps of the Organizational Guidelines and the Holder Memo, the central theme in the Thompson Memo is cooperation. Like the Holder Memo, the Thompson Memo cited almost exclusively to the U.S. Attorney’s Manual and the Sentencing Guidelines in formulating its charging policy, despite the fact that neither the Sentencing Guidelines nor the Manual addressed most of the provisions in the Thompson (or Holder) Memo.

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<sup>49</sup> See Executive Order 13271 (July 2002), available at <http://www.usdoj.gov/dag/cftf/execorder.htm>

<sup>50</sup> The Anderson indictment was filed on March 7, 2002. See Indictment of Arthur Anderson, *United States v. Arthur Andersen, LLP*, CR-H-02-121 (Mar 7, 2002), available at <http://www.usdoj.gov/dag/cftf/chargingdocs/andersenllpindictment.pdf>.

<sup>51</sup> 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.” The individual states license certified public accountants and firms that practice within their state. Generally any criminal conviction will result in the loss of the CPA license. 17 C.F.R. § 210.2-01 (2004). See also The SEC Codification of Financial Reporting Policies, Section 602 (B) – Qualification of Accountants – which refers to the Federal Trade Commission Rules and Regulations under the Securities Act of 1933. As a practical matter, the board of directors of any corporation would immediately drop an indicted audit firm.

<sup>52</sup> The Supreme Court ultimately reversed the Andersen conviction on May 31, 2005. See *Arthur Andersen, LLP, v. United States*, 544 U.S. 696 (2005). This was of little succor to Andersen which had effectively been put out of business with the indictment.

<sup>53</sup> See *supra* p. 1.

<sup>54</sup> Thompson Memo, *supra* note 1, Part II.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at Part I.

The cover page, a memo from Larry D. Thompson to the Heads of Department of Justice Components, sent a shot across the bow into or at corporations who made superficial, often subversive, efforts to cooperate in the hope of receiving favorable treatment:

[t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution.<sup>57</sup>

The DOJ made clear that cooperation in name only was not enough. If companies wanted a pre-trial agreement to avoid the stigma of a criminal conviction, full and complete cooperation was necessary. Once a company got on the cooperation bus, they were either on or off, there was no middle ground.

Perhaps in acknowledgement of the fallout after the Andersen conviction, the Thompson Memo *explicitly* acknowledges that pre-trial diversion, like immunity or amnesty, may be an appropriate resolution to a criminal investigation.<sup>58</sup> Citing to the same section of the U.S. Attorney's Manual as Holder,<sup>59</sup> the Thompson Memo provides:

In some circumstances, therefore, 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-prosecution agreements generally.<sup>60</sup>

This reinforced the Holder Memo's suggestion that prosecutors consider pre-trial diversion as a form of non-prosecution to reward cooperation. This is also consistent with the U.S. Attorney's Manual's theme that prosecutors should "attempt to limit his/her agreement to non-prosecution based on the testimony or information provided."<sup>61</sup> The message was now clear, the DOJ could fully reward cooperating companies that agreed to DOJ's terms set forth in a pre-trial agreement with a pass from the stigma of a criminal conviction.<sup>62</sup> After the Thompson Memo, the guidance on cooperation that began with the insertion of the Organizational Guidelines in the Federal Sentencing Guidelines, now (and is today) established DOJ policy. The Thompson Memo set forth a clear mandate that pre-trial diversion was an efficient and proper way to reward corporate defendants who agreed to cooperate in certain circumstances.

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<sup>57</sup> *Id.*

<sup>58</sup> *See infra* DPA/NPA Matrix at p. 27.

<sup>59</sup> U.S. Attorney's Manual § 9-27.600-650.

<sup>60</sup> Thompson Memo, *supra* note 1, Part VI, B (emphasis added). *Compare with* Holder Memo, *supra* note 21, Part VI, B (emphasis added).

<sup>61</sup> U.S. Attorney's Manual § 9-27.630 cmt. (2002), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.600](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.600). Note also that while the Manual is a statement of DOJ policy, it does not create enforceable rights. U.S. Attorney's Manual § 1-1.100.

<sup>62</sup> Neither Holder nor Thompson provided a perfect prophylactic against prosecution. *See* Thompson Memo *supra* note 1, Part II, B ("The nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors.")

#### IV. The Thompson Memo's Impact on Pre-trial Diversion: One Size Does Not Fit All.

After the Thompson Memo, pre-trial agreements have moved well beyond the form pre-trial diversion agreement contemplated by the U.S. Attorney's Manual and the early pre-1999 pre-trial agreements. The Thompson Memo "[p]ermit[s] 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.'" The Manual's 18-month limitation was not followed in at least 14 pre-trial agreements.<sup>63</sup> The only objective that remains from the Manual's guidance of pre-trial diversion is judicial efficiency.

While every pre-trial agreement is in some way unique, a few features are common. In a DPA, the DOJ will file a criminal complaint but agree to dismiss it after a period of time (typically between 12 months to 2 years), provided that the corporation honored the terms of the agreement. An NPA is an even better deal. In an NPA, the DOJ agrees not to file charges against the company, provided it adheres to the terms of the agreement. Our review of the published pre-trial agreements reveals, however, that NPAs do not necessarily reveal more favorable terms than DPAs.<sup>64</sup> In either case, the corporation escapes serious criminal consequences, but faces concessions arising from cooperation with the government.

Consistent with the Thompson Memo, the central theme of a pre-trial agreement is cooperation with the government. Each pre-trial agreement contains a plaintiff lawyer's dream (and a corporate defendant's nightmare)—some recitation of the illegal acts, an acceptance of responsibility and a promise of past, present, and future cooperation including making employees available to testify before a grand jury, production of documents, and otherwise helping the government in its criminal investigation arising out of the corporation's illegal conduct.<sup>65</sup> If the company does not follow the terms of the agreement to the DOJ's satisfaction, the DOJ has a roadmap to a criminal conviction with the company having admitted to wrongdoing and often having agreed to waive most of its legal protections. Either way, parallel litigants have the keys to the castle, a roadmap to victory.<sup>66</sup> The DOJ also typically requires a provision that allows it to share information gathered pursuant to the agreement with other government agencies.<sup>67</sup> However, in a nod to the U.S. Attorney's Manual, agreements are generally not "drawn in terms that will not bind other federal prosecutors or agencies without their consent."<sup>68</sup>

The most controversial features of a pre-trial agreement typically vary across agreements. These features include: waivers of both attorney-client privilege and work product protection, provisions reforming elements of the business, a waiver of Sixth Amendment speedy trial rights,

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<sup>63</sup> See *infra* DPA/NPA Matrix at p. 27.

<sup>64</sup> *Id.*

<sup>65</sup> See Vanessa Blum, *Justice Deferred*, LEGAL TIMES (Mar. 21, 2005).

<sup>66</sup> The parallel proceedings often include actions by civil regulatory agencies such as the Securities and Exchange Commission. "Nothing in the Constitution forbids contemporaneous civil and criminal proceedings concerning the same subject matter." *Nosik v. Singe*, 40 F.3d 592, 592 (2d. Cir. 1994). See also *U.S. v. Kordel*, 397 U.S. 1, 11 (1970) (government need not "defer civil proceedings pending the ultimate outcome of a criminal trial.")

<sup>67</sup> See, e.g., Prudential DPA p. 3; AOL DPA ¶ 14; InVision DPA ¶ 19.

<sup>68</sup> U.S. Attorney's Manual § 9-27.630 cmt. (2002), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrim.htm#9-27.600](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrim.htm#9-27.600)

stipulating to the admissibility of plea or grand jury discussions, significant criminal penalties,<sup>69</sup> and appointing a corporate compliance monitor who reports to the government.<sup>70</sup> The provisions for attorney-client privilege waiver are ordinarily accompanied by language that attempts to limit the waiver to the parties to the agreement, otherwise known as selective waiver.<sup>71</sup> Moreover, the agreements nearly universally waive or toll the statute of limitations during the agreement.<sup>72</sup> Agreements to not deduct the fines on federal or state income taxes is also a common feature.<sup>73</sup> Few pre-Thompson Memo agreements include privilege waiver provisions.<sup>74</sup> Finally, the modern (post-Holder) agreements uniformly contain a provision providing that the corporation (not individual defendants) cannot contradict any of the statements contained in the DPA in civil litigation or otherwise.<sup>75</sup> Whether statements made by third parties are imputed to the company is ordinarily left to the discretion of the DOJ.<sup>76</sup> There were no pre-Thompson Memo pre-trial agreements which contained such language. In 2003, the Banco Popular DPA and the Merrill Lynch NPA were the first pre-trial agreements to ensure that companies did not contradict the terms of the agreement.<sup>77</sup>

### Community Service

Some of the agreements are drafted with unique community-service type features that seem to arise directly out of the conduct. For instance, in the FirstEnergy DPA involving violations of the environmental laws, the company agreed to pay over \$1 million to protect the environment in the Northern District of Ohio.<sup>78</sup> In a public corruption case, the Roger Williams Medical Center recently agreed to provide \$4 million free, non-tax deductible healthcare over 2 years.<sup>79</sup> In 2001, as part of its DPA, BDO Seidman agreed to pay \$16 million into a victim restitution fund.<sup>80</sup> Claimants were required to sign a claim waiver and any leftover funds went to the Postal Service's Fraud Awareness Program.<sup>81</sup> More tenuous was FirstEnergy's agreement to contribute \$1 million to Habitat for Humanity to build energy efficient homes and a donation to the University of Toledo to be used to develop energy efficient technologies.<sup>82</sup> Bristol Meyers Squibb recently agreed to a similar education-related provision involving the funding of a chair at Seton Hall University law school to teach business ethics after it was investigated by the

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<sup>69</sup> We have found no statutory authority to substantiate these specific penalty amounts, which can be significant and involve substantial government discretion. *See infra* DPA/NPA Matrix at p. 27.

<sup>70</sup> *Id.*

<sup>71</sup> *See infra* note 86.

<sup>72</sup> *See, e.g.*, InVision DPA ¶23; HVB DPA ¶11; CIBC DPA ¶11.

<sup>73</sup> *See, e.g.*, HVB DPA ¶4; Williams DPA ¶14.

<sup>74</sup> There were no privilege waivers in the following early pre-trial agreements: Aetna DPA; 1995 Merrill NPA; Lazard NPA; Andersen DPA; and Armour DPA.

<sup>75</sup> *See, e.g.*, KPMG DPA ¶15; AEP DPA ¶3; AOL DPA ¶12; AIG DPA ¶¶3-4.

<sup>76</sup> *See, e.g.*, Symbol DPA ¶13; AIG DPA ¶4; BNY NPA ¶16; 2003 Merrill DPA ¶12.

<sup>77</sup> *See infra* DPA/NPA Matrix at p. 27.

<sup>78</sup> FirstEnergy DPA Attachment B.

<sup>79</sup> RWMC DPA ¶9.

<sup>80</sup> BDO Seidman DPA ¶5

<sup>81</sup> *Id.*

<sup>82</sup> FirstEnergy DPA Attachment B.

District of New Jersey for securities fraud.<sup>83</sup> Although commentators have accused the DOJ of overreaching in these cases,<sup>84</sup> it is likely that the company had a hand in these provisions. For the company, a provision such as free medical service, educational contributions, or other similar provisions, casts the company in a positive light at a time when it has been accused of criminal wrongdoing. The DOJ could avoid the perception of government overreaching. Drawing connections between the U.S. Attorney's law school and an endowment are fun, but these provisions are jointly negotiated. Quick judgments or conspiracy theories that charitable features are serving the U.S. Attorney's pet charity are likely inaccurate because the company has a tremendous reputational and public relations incentive to release positive news along with news of the results of DOJ's criminal investigation. The U.S. Attorney has no similar incentive.

### *Impact on the Entity*

The impact on the company of a DPA or NPA is at first glance, tremendously beneficial. The company avoids prosecution (in the case of an NPA) or avoids conviction (in the case of a DPA) and the negative consequences that can flow from a conviction such as reputational harm, a professional practice bar similar to the one that doomed Andersen,<sup>85</sup> or as one commentator noted, an inability to do business with the government.<sup>86</sup> DPAs are also sometimes crafted to ensure that fines or penalties are not deductible, paid by insurance companies, or paid to satisfy plaintiffs' attorney's fees.<sup>87</sup> The downside will vary depending on how the agreement is drafted. Our review of the agreements entered into within the last decade highlight that many corporations have been able to escape some of the more dreaded provisions: waiver of attorney client privilege, appointment of a compliance monitor, and business reforms directed by the

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<sup>83</sup> The BMS DPA ¶20 provides: "BMS shall endow a chair at Seton Hall University School of Law dedicated to the teaching of business ethics and corporate governance, which position shall include conducting one or more seminars per year on business ethics and corporate governance at Seton Hall University School of Law that members of BMS' executive and management staff, along representatives of the executives and management staffs of other companies in New Jersey area, may attend."

<sup>84</sup> Lisa Brennan, *Deferred White Collar Prosecutions: New Terrain, Few Signposts*, New Jersey Law Journal (April 11, 2006) quoting Wayne State University Law Professor Peter Henning (author of the widely read White Collar Criminal Professor's Blog) as stating that the agreements "ha[ve] to remain narrow and address the underlying business misconduct and not try to reform an entire business organization . . . [the agreements] can't change a corporation's culture— [t]he U.S. Attorney can't run the business for them."); see also Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1893 (2005) (discussing the imposition of unrelated obligations); John C. Coffee, *Deferred Prosecution: Has it gone too far?*, NATIONAL LAW JOURNAL (July 25, 2005), at 13.

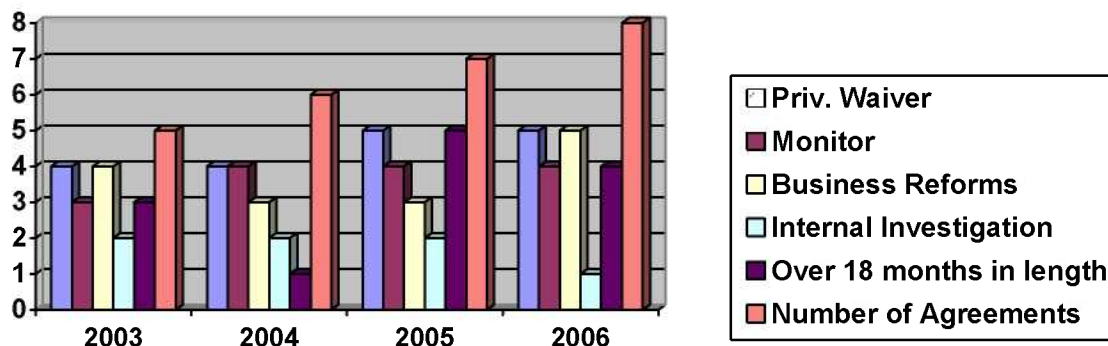
<sup>85</sup> See *supra* note 6.

<sup>86</sup> While the agreements shield a company from DOJ prosecution, they do not protect it from the consequences that flow from the company's admissions with respect to other government agencies and departments, including debarment. See Stephanie Martz, *Trends in Deferred Prosecution Agreements*, 29-NOV. CHAMPION 45 (Nov. 2005) (noting that "for companies accused of fraud that is related to government procurement—[Bristol Meyers Squib's] channel-stuffing charges are a prime example—the Federal Acquisition Regulations state that only adequate evidence of fraud need be present to result in a suspension from government contracting. Moreover "flow-down provisions can prevent other government contractors from doing business with a debarred entity.")

<sup>87</sup> See, e.g., KPMG DPA ¶¶4-5 (if any of the KPMG penalty is covered by insurance, the U.S. also receives 50% of those funds up to a total of \$600,000); Computer Assoc. DPA ¶9 (insurance); Symbol DPA ¶7 (attorney's fees); AOL DPA ¶9 (attorney's fees).

DOJ.<sup>88</sup> After the Thompson Memo, however, these features are far more common. Of the 25 post-Thompson Memo pretrial agreements, 14 required a compliance monitor, 18 included privilege waivers, 12 agreements exceeded the 18-month limitation set forth in the U.S. Attorney’s Manual, and fourteen required the company to implement some sort of business reform.<sup>89</sup> Only seven post-Thompson agreements noted the existence of an internal investigation.

Post-Thompson Memo Pre-Trial Agreements



Agreeing to a privilege waiver can pose a serious dilemma for the corporation. Once the corporation becomes aware of possible wrongdoing through a whistleblower or some other means, it has to duty to its shareholders to fully investigate the allegations.<sup>90</sup> To do this, companies will ordinarily conduct an internal investigation. Because a corporation may have to agree to a privilege waiver depending on the severity and nature of the conduct, the notes and work product from the result of this investigation may eventually fall into the hands of plaintiffs

<sup>88</sup> See *infra* DPA/NPA Matrix at p. 27.

<sup>89</sup> This table, like our DPA/NPA Matrix, only includes agreements where the agreement was publicly available. See Disclaimer on p. 27.

<sup>90</sup> The Sarbanes-Oxley Act of 2002, commonly known as “SOX”, was enacted on July 30, 2002 in response to the successive implosions of Enron and WorldCom. A central feature of SOX was strengthening the internal controls of public companies. Title VIII, the Corporate and Criminal Fraud Accountability Act of 2002, prohibits issuers from discharging or otherwise discriminating against an employee because of any lawful act by the employee to: (1) assist in an investigation of prohibited conduct by federal regulators, Congress, or the employee’s supervisors; or (2) file or participate in a proceeding relating to fraud against shareholders. 18 U.S.C. § 1514A. The section also provides civil remedies for such aggrieved employee, including reinstatement, back pay, and compensatory damages. *Id.* In a Floor Statement, Senator Leahy noted that this provision was designed to protect employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. 148 Cong. Rec. S7418 (July 26, 2002).

and other government regulators. The company could essentially end up paying for the government's investigation and building its (and private plaintiff's) case for it.<sup>91</sup>

One of the more difficult provisions from a business perspective is the incorporation of an independent monitor into the agreement. An independent compliance monitor takes this one step further—essentially giving the DOJ a seat in the boardroom with a compliance monitor who reports directly to the government.<sup>92</sup> This can pose a problem for a company in terms of confidentiality and may make the working environment for executives and other senior employees difficult. No company wants the government as its business partner. The use of a compliance monitor has benefits to the company as well. A compliance monitor can allow the DOJ to ensure that companies are not shirking their responsibility under the agreement or otherwise continuing to engage in wrongful conduct. For a company that is accused of significant wrongdoing, giving the DOJ a seat at the table for a couple of years may seem like a small concession. Moreover, a compliance monitor, albeit not necessarily independent of the company, is specifically contemplated by the Organizational Guidelines as one way for a company to reduce its culpability score and lower its sentence.<sup>93</sup> Whether a compliance monitor is necessary to ensure that the company adheres to the terms of the agreement will likely depend on the nature and severity of the conduct under investigation.

One feature that is nearly uniformly inconsistent is the date on which the pre-trial agreement expires. For many NPAs, because the DOJ is not filing charges, no date is provided. Presumably, the agreement then lasts the duration of the statute of limitations including any tolling provision the NPA might contain. This can be a significant period of time depending on the offense. DPAs, on the other hand, nearly uniformly include an end date.<sup>94</sup> This date has varied from 12 months to 3 years.<sup>95</sup> It is questionable whether any agreement should extend beyond the 18 month range set forth in the U.S. Attorney's Manual given that the Manual and the Organizational Guidelines are explicitly cited as providing the legal framework for the Thompson Memo.<sup>96</sup> Undying cooperation is something that should be carefully scrutinized, lest the cure be worse than the disease.

### *Impact on the Employees of the Entity*

Once a company has waived attorney-client privilege and work product protection in its attempt at cooperation, it can be extraordinarily difficult for employees under investigation by

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<sup>91</sup> See Finder Article *supra* note 1.

<sup>92</sup> See, e.g., InVision DPA ¶¶12-16; AOL DPA ¶13; BNY NPA ¶12; Symbol NPA ¶11-12; BMS DPA ¶11-12.

<sup>93</sup> U.S.S.G. § 8B2.1 (2005); see also Stephanie Martz, *Trends in Deferred Prosecution Agreements*, 29 NOV. CHAMPION 45 (Nov. 2005) (“[O]ne can argue that the Organizational Sentencing Guidelines set the precedent for this degree of prosecutorial involvement in corporate governance. In fact, the KPMG agreement specifically refers to the compliance program set forth in the Guidelines”).

<sup>94</sup> See *infra* DPA/NPA Matrix at p. 27.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

the DOJ to mount a defense.<sup>97</sup> Employees are often faced with the difficult decision of similarly cooperating or losing their job. Regardless of whether they chose to cooperate, not only does the DOJ have access to all of the confidential materials that were once protected by privilege, the company is required under the pre-trial agreement to help the DOJ ferret out wrongdoing. The Thompson Memo notes “[i]n gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.”<sup>98</sup> This is the point. One of the purposes of the pre-trial agreement is to elicit the company’s cooperation in prosecuting individuals responsible for wrongdoing.<sup>99</sup> The DOJ has made a policy choice that it only wants to prosecute an entity when there is a legitimate reason for doing so. Thompson Memo provides that two factors in guiding the DOJ’s prosecution of an entity are “the pervasiveness of wrongdoing within the corporation” and “[the] collateral consequences, including disproportionate harm to . . . employees not proven personally culpable and impact on the public arising from the prosecution.”<sup>100</sup> If the illegal activity within a company is confined to a few individuals and is not pervasive, it makes little sense to prosecute the entire company, risking the punishment of innocent employees unconnected with the wrongdoing.

#### *Impact on Civil Litigation Against the Entity*

Almost invariably some sort of civil lawsuit will follow any criminal investigation, often in the form of a class action against the company. Because pre-trial agreements preclude a company from contradicting statements within the DPA or NPA, the agreement provides a nice template for a civil complaint. In addition to statements of misconduct that the company cannot deny, plaintiffs will also have access to the materials that have been turned over to the government as part of the investigation, including privileged materials. The provision waiving the attorney-client privilege and work product protection usually includes a selective waiver, or confidentiality, provision which provides that these protections are waived only for purposes of the agreement, not for any other purpose, including litigation with a third party.

The benefit of the selective waiver protection, however, is questionable. Indeed, Courts are sharply divided on whether attorney-client or work product protection can be protected by selective waiver or confidentiality provisions. Currently, the federal courts provide no coherent answer to whether a selective privilege waiver to only the government will also waive the privilege to third-parties.<sup>101</sup> Three different views have emerged: (1) selective waiver is

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<sup>97</sup> See Carmen Couden, *The Thompson Memorandum: A Revised Solution of Just A Problem*, 30 J. CORP. L. 405, 422 (2005) (arguing that the “Thompson Memorandum serves to inhibit employee honesty and corporate cooperation because employees will still be at risk for prosecution in spite of their effort to assist the government.”)

<sup>98</sup> Thompson Memo, *supra* note 1, Part VI.

<sup>99</sup> See, e.g., Vanessa Blum, *Justice Deferred: DOJ Gets Companies to Turn Snitch*, LEGAL TIMES (Mar. 25, 2005) (discussing deferred prosecution and its usefulness as a weapon against individual wrongdoers within a corporation).

<sup>100</sup> Thompson Memo, *supra* note 1, Part II.

<sup>101</sup> Zach Dostart, *The Abrogation of the Attorney-Client Privilege*, 33 PEPP. L. REV. 723, 734 (2006); Finder Article at 123-136.

