

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

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## 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

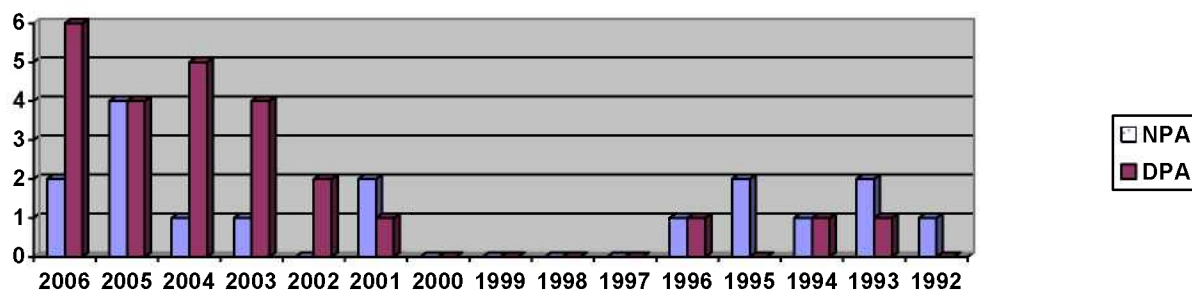
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<sup>1</sup> Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_gu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

