DEVOLUTION OF AUTHORITY: THE DEPARTMENT OF JUSTICE'S CORPORATE CHARGING POLICIES

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INTRODUCTION

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.[1] 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. From 2002 to 2005, the DOJ has entered into twice as many non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) (collectively, "pre-trial agreements") as it had over the previous ten years (1992–2001).[2] This year, the use of pre-trial agreements continued to grow with the DOJ entering into eight DPAs and

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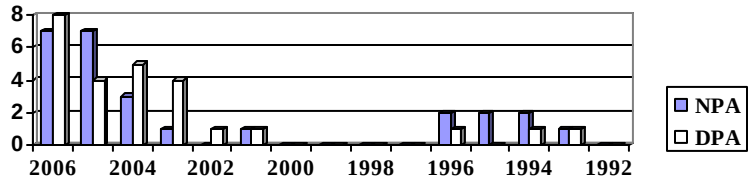
1. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components on Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Oct. 30, 2006) [hereinafter *Thompson Memo*].

2. CORP. CRIME REP., *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, Dec. 28, 2005, http://www.corporatecrimereporter.com/deferred report.htm (last visited Oct. 30, 2006) [hereinafter *CCR Report*]. For more recent statistics, see the authors' compilation of non-prosecution agreements and deferred prosecution agreements located in the Appendix of this paper. Figure 1 tracks the increase in pre-trial agreements since 1992. Unlike the *Corporate Crime Reporter*, the authors did not include the declination of prosecution of Shell Oil in July 2005 because there was no agreement. Figure 1 also includes four non-public NPAs that are not included in the DPA/NPA Matrix: Hilfiger (S.D.N.Y. 2005), Coopers & Lybrand (C.D. Cal. 1996), Sequa (S.D.N.Y. 1996), and Salomon Bros. (S.D.N.Y. 1994).

seven NPAs in the beginning of 2006.[3] Although 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.[4]

Figure 1: Number of Pre-Trial Agreements Since 1992



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.[5] 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. Attorneys' 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. In December 2004, then Assistant Attorney General Christopher A. Wray noted in the Criminal Division's Annual Report that "[i]n certain cases, these flexible and innovative approaches can strike the right balance between diligent enforcement and deterrence on the one hand, and proper incentives for companies to self-report and cooperate on the other."[6] Recent events suggest, however, that the evolution of the DOJ's corporate charging policy may have reached a pinnacle, as pre-trial agreements drafted by

3. *See infra* Publicly Available DOJ Non-Antitrust DPA and NPA Matrix at Appendix [hereinafter DPA/NPA Matrix]; *No More Amnesty*, CORP. CRIME REP., May 1, 2006, at 1 (noting continued rise of pre-trial agreements following a December 2005 *Corporate Crime Reporter* Survey).

4. The data in this paper only includes public non-antitrust NPAs and DPAs entered into with the DOJ before October 2006.

5. *See infra* DPA/NPA Matrix at Appendix.

6. Christopher A. Wray, 2004 ANNUAL REPORT OF DEP'T OF JUSTICE CRIMINAL DIV. 30 (Dec. 23, 2004), *available at* http://www.usdoj.gov/criminal/CRMAnnualReport2004.pdf.

prosecutors may vary depending on 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.[7] Politically and socially, the Arthur Andersen indictment was a disaster.[8] Absent pervasive, endemic criminal activity within the organization, both sides have learned that these agreements serve as a valuable tool that prosecutors may use to avoid the collateral consequences that occurred in Andersen and to focus instead on individual wrongdoers.[9] Accordingly, the DOJ has effectively used these 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 seem clear enough (*e.g.*, Andersen's demise after its indictment, including the loss of 28,000 U.S. jobs),[10] the origins of such agreements are not so transparent.

A. 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

7. *Id*. at 30–31.

8. *See, e.g.*, Editorial, *Arthur Andersen's "Victory"*, WALL ST. J., June 1, 2005, at A20; Jonathan D. Glater, *Enron Trial Stirs Memory of Andersen*, N.Y. TIMES, Feb. 21, 2006, at C1. 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, *S.E.C. Had Sought $500 Million in Failed Talks with Andersen*, N.Y. TIMES, Mar. 20, 2002, at A1. In 1996, Andersen entered into a deferred prosecution agreement with the U.S. Attorney's Office for the District of Connecticut. *See* Letter from Edwin J. Gale, Peter A. Clark & Thomas J. Murphy, U.S. Att'ys for D. Conn., to Eliot Lauer & Shaun S. Sullivan (Apr. 15, 1996), http://www.corporatecrimereporter.com/documents/andersen.pdf (last visited Oct. 30, 2006) [hereinafter *Andersen Agreement*]. 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, 109 (2006) (arguing that the outcome in Andersen was disproportionate to the offense).

9. *See* Jonathan D. Glater & Lynnley Browning, *Deal Likely to Let KPMG Avoid Charge in Tax Case*, N.Y. TIMES, Aug. 11, 2005, at C1.

10. *See id.*; Vanessa Blum, *Justice Deferred*, LEGAL TIMES, Mar. 21, 2005, at 1.

condition for leniency in the sentencing process.[11] 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 criteria 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.[12] Specifically, the Organizational Guidelines provided:

> To 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.[13]

To ensure that full disclosure was made, the new Organizational Guidelines also contemplated that the organization be allowed a reasonable period of time to conduct an internal investigation—now a prelude to many pre-trial agreements.[14] The Organizational Guidelines, however, did not address pre-

11. *See* Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 133 n.2 (2003) (citing the U.S. SENTENCING GUIDELINES MANUAL (2002)). Also, it should be noted that the DOJ's Antitrust Division has had a longstanding prosecution policy for corporate entities, which was made uniform in 1999. *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 are not addressed in this article.

12. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12 (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. *See* Fed. Deposit Ins. Corp. 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, 610–11 (2004) (noting that "[t]he 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.").

13. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12 (1992) (emphasis added).

14. *Id.* at cmt. 10; *see infra* DPA/NPA Matrix at Appendix. 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. *See* Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice to Component Heads and U.S. Attorneys on Bringing Criminal Charges Against Corps.

trial agreements specifically. But because the guidelines focused on the sentencing phase of a criminal prosecution (when presumably the window for a pre-trial agreement would have closed), this omission 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 reviewed for this article. 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.[15] 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 detect violations of law, including a schedule for implementation."[16] The organization was also required to "notify its employees and shareholders of its criminal behavior and its [compliance program]."[17] Furthermore, section 8D1.4(c)(4) stated:

> [T]he organization shall submit to: (A) a reasonable number of regular or unannounced examinations 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.[18]

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.[19] With the addition of this new language and the 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.

B. Pre-1999 Pre-Trial Agreements

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

(June 16, 1999), http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (last visited Oct. 30, 2006) [hereinafter *Holder Memo*].

15. U.S. SENTENCING GUIDELINES MANUAL § 8D1.1(a)(3) (1992); U.S. SENTENCING COMM'N, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION 15–21 (Sept. 1995), *available at* http://www.ussc.gov/sympo/wcsympo.pdf (outlining application of the Organizational Guidelines to corporate defendants).

16. U.S. SENTENCING GUIDELINES MANUAL § 8D1.4(c)(1) (1992).

17. *Id.* § 8D1.4(c)(2).

18. *Id.* § 8D1.4(c)(4).

19. *See infra* Part IV.

draconian) compared to the modern pre-trial agreement, with the exception of the Prudential DPA.[20] The early agreements were simple and often represented a compromise on criminal liability. In fact, many of the early agreements did not contain provisions in which the business admitted or conceded any wrongdoing—an important feature for companies defending themselves in parallel proceedings.[21] 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 Dorr legal advice to Hancock or communications among counsel."[22] Merrill Lynch and Lazard Freres's 1995 NPAs included attorney-client privilege waivers, but did not waive work product protection.[23] 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.[24]

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.[25] 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.[26] The other early agreements had no explicit length.[27] When the later agreements contained definite

20. Letter from Mary Jo White, U.S. Att'y for S.D.N.Y., to Scott W. Muller & Carey R. Dunne, Prudential Counsel (Oct. 27, 1994), http://www.corporatecrimereporter.com/documents/prudential.pdf (last visited Oct. 30, 2006) [hereinafter *Prudential Agreement*].

21. *See* Offer of Settlement ¶ 2, U.S.-Aetna Capital Management, Inc., (Aug. 19, 1993), http://www.corporatecrimereporter.com/documents/aetna.pdf (last visited Oct. 30, 2006) [hereinafter *Aetna Agreement*]; *Andersen Agreement*, *supra* note 8, at ¶ 2; Deferred Prosecution Agreement ¶ 4, United States v. Armour of America (C.D. Cal. Dec. 29, 1993), http://pmdtc.org/Consent%20Agreements/1993/Armor%20of%20America,%20Inc/Deferred%20Prosecution%20Agreement.pdf (last visited Oct. 30, 2006) [hereinafter *Armour Agreement*]; Settlement Agreement ¶ 25, U.S.-Lazard Freres & Co. LLC (Oct. 26, 1995), http://www.corporatecrimereporter.com/documents/lazard.pdf (last visited Oct. 30, 2006) [hereinafter *Lazard Agreement*]; Settlement Agreement ¶ 23, U.S.-Merrill Lynch, Pierce, Fenner & Smith Inc. (Oct. 26, 1995), http://www.corporatecrimereporter.com/documents/merrill.pdf (last visited Oct. 30, 2006) [hereinafter *Merrill Lynch Agreement*].

22. Agreement of Settlement ¶ 5, U.S.-John Hancock Mut. Life Ins. Co. Inc., No. 94-10553RGS (D. Mass. Mar. 21, 1994) [hereinafter *Hancock Agreement*] (on file with The Saint Louis University Law Journal).

23. *Lazard Agreement*, *supra* note 21, at 19; *Merrill Lynch Agreement*, *supra* note 21, at 18.

24. *See Aetna Agreement*, *supra* note 21; *Andersen Agreement*, *supra* note 8; *Armour Agreement*, *supra* note 21; *Hancock Agreement*, *supra* note 22.

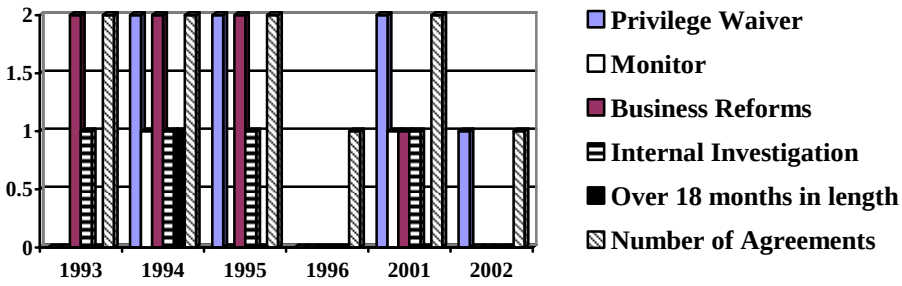
25. *See Prudential Agreement*, *supra* note 20.

26. *See Armour Agreement*, *supra* note 21, at 5.

27. *See Aetna Agreement*, *supra* note 21; *Lazard Agreement*, *supra* note 21.

durations, this was a significant improvement over the early agreements from the standpoint of the corporation.[28] Finally, none of the early pre-trial agreements included independent compliance monitors.[29] Similarly, the business reforms in the early agreements were limited to compliance reforms.[30] Things would change in 1999.[31]

Figure 2: Pre-Trial Agreements From 1991-2002



II. THE HOLDER MEMO: THE NEW DEAL

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. [32] The Holder Memo explicitly relied on the U.S. Sentencing Guidelines and the U.S. Attorneys' Manual as the sources for its directive to prosecutors.[33] 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. Attorneys' 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.[34] These different considerations, Holder pointed out, do not mean that corporations

28. The only specific DOJ policy that sets forth a definite length for pre-trial agreements is found in the U.S. Attorneys' Manual. *See infra* Part II.

29. *See Aetna Agreement*, *supra* note 21; *Andersen Agreement*, *supra* note 8; *Hancock Agreement*, *supra* note 22.

30. *See, e.g.*, *Aetna Agreement*, *supra* note 21, at 5–9; *Andersen Agreement*, *supra* note 21, at 3; *Hancock Agreement*, *supra* note 22, at 4.

31. *See infra* DPA/NPA Matrix at Appendix. Figure 2 shows the general content of pre-trial agreements from 1991 through 2002.

32. *Holder Memo*, *supra* note 14; *see* Finder, *supra* note 11, at 115.

33. *See Holder Memo*, *supra* note 14.

34. *Id.* at Part I(B).

should be granted special treatment.[35] 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.[36]

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 prosecutors could use in deciding how to prosecute a corporate entity.

A. 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:

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,

35. *See id.*

36. Larry D. Thompson, Deputy Att'y Gen., Address to the American Bar Association Criminal Justice Section (Aug. 10, 2002), http://www.usdoj.gov/dag/speech/2002/081002aba criminaljustice.htm (last visited Oct. 30, 2006).

if necessary, the waiver of corporate attorney-client and work product privileges;

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 and employees not proven personally culpable; and

8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.[37]

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 privileges."[38] This provision memorialized the Organizational Guidelines' language suggesting that waiver of attorney-client privilege can be viewed as cooperation. Holder, however, never intended this waiver to be absolute; the

37. *Holder Memo*, *supra* note 14, at Part II (internal citations omitted).

38. *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 the 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, 562-63 (1989). The purpose of attorney-client privilege is to ensure 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. *In re* Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994). The work product protection protects attorney "work product" that is prepared in anticipation of litigation. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947); *In re Grand Jury Proceedings*, 33 F.3d at 348. 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 (5th Cir. 2005) (citation omitted). 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.

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."[39] 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."[40] 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.[41] Most of the waivers we reviewed, however, were limited to communications made during the course of the investigation, and our analysis was limited to publicly available pre-trial agreements.[42]

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.[43]

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

> Prosecutors 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 addition, prosecutors should determine whether the corporation's

39. *Holder Memo*, *supra* note 14, at n.2. In *Upjohn*, the Supreme Court confirmed that attorney-client privilege protection applies to corporate internal investigations. 449 U.S. at 394–95.

40. *Holder Memo*, *supra* note 14, n.2.

41. *See infra* DPA/NPA Matrix at Appendix.

42. *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 Memo or the Thompson Memo.

43. *Holder Memo*, *supra* note 14, at Part VI(B) (internal citation omitted).

> 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.[44]

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.[45] 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.[46]

B. A Hint of Pre-Trial Diversion: U.S. Attorneys' 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. Attorneys' 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 . . . . In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally."[47] 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 pre-trial 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. Attorneys' Manual and its pre-trial diversion provisions.[48]

The U.S. Attorneys' 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. The Manual 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]."[49] It explains that "[t]he decision to terminate *an individual* from continuing to participate in pre-

44. *Holder Memo*, *supra* note 14, at Part VII(B).

45. The Organizational Guidelines were amended in November of 2004, increasing the importance of compliance and ethics programs. *See infra* Part V.

46. *See id.*

47. *Holder Memo*, *supra* note 14, at Part VI(B).

48. U.S. Attorneys' Manual tit. 9 § 27.600-650(A) (2002), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

49. U.S. Attorneys' Manual tit. 9 § 22.010 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm.

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."[50] In its outline of procedures for pre-trial diversion, the U.S. Attorneys' Manual continues, "[a]s part of the background investigation, Pre-trial Services [part of the U.S. Probation Office] will arrange with the United States Marshal's Office to have the divertee fingerprinted and to have such fingerprints submitted to the FBI."[51] 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[52] 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."[53] The Manual notes:

> In 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.[54]

The U.S. Attorneys' 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

50. U.S. Attorneys' Manual (Criminal Resource Manual) § 712 (1997) (emphasis added), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm.

51. *Id*. tit. 9 § 712(D), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm.

52. Under federal law, the term "person" is often defined to include individuals as well as entities such as corporations. *See, e.g.*, Racketeer Influence and Corrupt Organizations Act, 18 U.S.C § 1961(3) (2000); I.R.C. § 7701(a)(1) (2000).

53. U.S. Attorneys' Manual tit. 9 § 27.600(A) (2002), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

54. *Id.* § 27.620(A).

supervision and services administered by the U.S. Probation Service."[55] 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) to save prosecutorial and judicial resources, and (3) to provide a vehicle for restitution.[56] The Manual provides that the period of supervision for pre-trial diversion "is not to exceed 18 months, but may be reduced."[57] "Participants who successfully complete the [pre-trial diversion] program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution."[58] Varying from several early pre-trial agreements, the Manual notes that "[t]he offender must acknowledge responsibility for his or her behavior, but is not asked to admit guilt."[59] 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. Attorneys' 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.[60]

55. U.S. Attorneys' Manual tit. 9 § 22.010 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm; *see also Thompson Memo Opens the Door for Pre-Trial Diversion for Corporations*, CORP. CRIME REP., July 21, 2003, at 1 (arguing that the Thompson Memo laid groundwork for pre-trial diversion, and noting that it was issued almost simultaneously with the Banco Popular DPA).

56. U.S. Attorneys' Manual tit. 9 § 22.010 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm.

57. *Id.*

58. *Id.*

59. U.S. Attorneys' Manual (Criminal Resource Manual) tit. 9 § 712(F) (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm.

60. Letter from Scott M. Muller, Prudential Counsel, to U.S. Attorney's Office for S.D.N.Y. (Oct. 13, 1994) (on file with The Saint Louis University Law Journal).

Prudential's prosecution was deferred for three years[61] 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. Attorneys' Manual. The shift in corporate charging policy had begun.[62] 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. Attorneys' Manual it cites as providing its foundation. It was not until 2004 that the Sentencing Guidelines would catch up. The U.S. Attorneys' 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 a period of unprecedented prosperity, the Thompson Memo was drafted in a climate of corporate 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 four from the time of 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,"[63] and after the DOJ indicted Arthur Andersen for its role in the Enron accounting fraud scandal.[64] The indictment had devastating consequences for the firm. With the criminal indictment, Anderson could no longer audit public companies.[65] Twenty-eight

61. *See Prudential Agreement*, *supra* note 20, at ¶ 1. 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. Attorneys' Manual. *See* U.S. Attorneys' Manual tit. 9 § 22.010 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm.

62. 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 Anderson Agreement*, *supra* note 8; *see also infra* DPA/NPA Matrix at Appendix.

63. Exec. Order No. 13271 (July 9, 2002), *available at* http://www.usdoj.gov/dag/cftf/execorder.htm.

64. 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.

65. Rule 102(e)(2) of the SEC Rules of Practice provides:

> Any 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

thousand people lost their jobs and Arthur Andersen became a shell of its former self.[66] 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.[67]

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 for determining whether to bring charges and for negotiating plea agreements.[68] 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."[69] Significantly, the Thompson Memo also stressed that only rarely will individuals not be pursued, even when the entity offers to plead guilty.[70]

Following in the steps of the Organizational Guidelines and the Holder Memo, the central theme in the Thompson Memo is cooperation.[71] Like the Holder Memo, the Thompson Memo cited almost exclusively to the U.S. Attorneys' 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.

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

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been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission.

17 C.F.R § 201.102 (2004). 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." 17 C.F.R § 210.2–03(a) (2004). The individual states license certified public accountants and firms that practice within the state. *Id.* Generally any criminal conviction will result in the loss of the CPA license. *See also* SEC Codification of Financial Reporting Policies § 602(B), Qualification of Accountants (referring 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.

66. The Supreme Court ultimately reversed the Andersen conviction on May 31, 2005. 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. *See* Blum, *supra* note 10.

67. *See CCR Report*, *supra* note 2.

68. *Thompson Memo*, *supra* note 1, at II(A).

69. *Compare Thompson Memo*, *supra* note 1, at II, *with Holder Memo*, *supra* note 24, at II(A).

70. *Thompson Memo*, *supra* note 1, at I(B).

71. *See Thompson Memo*, *supra* note 1.

> Too 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.[72]

For the DOJ, 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.[73] Citing to the same section of the U.S. Attorneys' Manual as Holder,[74] 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.[75]

This language reinforced the Holder Memo's suggestion that prosecutors consider pre-trial diversion as a form of non-prosecution to reward cooperation. It is also consistent with the U.S. Attorneys' Manual's theme that a prosecutor should "attempt to limit his/her agreement to non-prosecution based on the testimony or information provided."[76] The message was clear: the DOJ could fully reward cooperating companies that agreed to the DOJ's terms set forth in a pre-trial agreement with a pass from the stigma of a criminal conviction.[77] After the Thompson Memo, the guidance on cooperation that began with the insertion of the Organizational Guidelines in the Federal Sentencing Guidelines established DOJ policy (which continues today). The Thompson Memo set forth a clear mandate that pre-trial diversion

72. *Id*.

73. The non-prosecution agreements and deferred prosecution agreements that form the basis of the authors' analysis are listed in the DPA/NPA Matrix in the Appendix.

74. U.S. Attorneys' Manual tit. 9 § 27.600-650 (2002), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

75. *Compare Thompson Memo*, *supra* note 1, at VI(B) (emphasis added), *with Holder Memo*, *supra* note 14, at VI(B).

76. U.S. Attorneys' Manual tit. 9 § 27.630(B) (2002), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm. Note also that while the Manual is a statement of DOJ policy, it does not create enforceable rights. U.S. Attorneys' Manual tit. 1 § 1.100 (1997).

77. Neither Holder nor Thompson provided a perfect prophylactic against prosecution. *See Thompson Memo*, *supra* note 1, at III(A) ("The nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors.").

was an efficient and proper way to reward corporate defendants who agreed to cooperate in certain circumstances.

IV. THE THOMPSON MEMO'S IMPACT ON PRE-TRIAL DIVERSION: ONE SIZE DOES NOT FIT ALL

Since the Thompson Memo, pre-trial agreements have moved well beyond the form pre-trial diversion agreement contemplated by the U.S. Attorneys' Manual and the early pre-1999 pre-trial agreements. The Thompson Memo "permit[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."[78] The Manual's eighteen month limitation was not followed in at least twenty-seven post-Thompson memo pre-trial agreements.[79] 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 twelve months to two 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.[80] Our review of the published pre-trial agreements reveals, however, that NPAs do not necessarily reveal more favorable terms than DPAs.[81] 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

78. *Thompson Memo*, *supra* note 1, at VI(B) (internal quotations omitted); *see infra* DPA/NPA Matrix at Appendix.

79. *See infra* DPA/NPA Matrix at Appendix.

80. *See* Sue Reisinger, *By Any Other Name. . .*, CORP. COUNS., Sept. 19, 2006, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1158656720280 (noting that with a deferred prosecution agreement "[t]he anvil hangs a little closer to the head"). One NPA we reviewed involving Boeing Corporation varied from this paradigm and allowed the DOJ to choose whether to initiate a prosecution against Boeing or fine it $10 million for violating the agreement. *See infra* DPA/NPA Matrix at Appendix. This NPA had a variety of other usual features. *Id.*

81. *See infra* DPA/NPA Matrix at Appendix.

the corporation's illegal conduct.[82] 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.[83]

The DOJ also typically requires a provision that allows it to share information gathered pursuant to the agreement with other government agencies.[84] However, in a nod to the U.S. Attorneys' Manual, agreements are generally not "drawn in terms that will not bind other federal prosecutors or agencies without their consent."[85]

The most controversial features of a pre-trial agreement 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, stipulating to the admissibility of plea or grand jury discussions, significant criminal penalties,[86] and appointing a corporate compliance monitor who reports to the government.[87] 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.[88] Moreover, the agreements nearly universally waive or toll the statute of limitations during the agreement.[89]

82. *See* Blum, *supra* note 10, at 8.

83. 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, 596 (2d. Cir. 1994) (citing United States v. Kordel, 397 U.S. 1, 11 (1970) (government need not "defer civil proceedings pending the ultimate outcome of a criminal trial")).

84. *See, e.g.*, Deferred Prosecution Agreement ¶ 14, United States v. Am. Online, Inc., No. 1:04M 1133 (E.D. Va. Dec. 15, 2004), http://www.corporatecrimereporter.com/documents/aol.pdf (last visited Oct. 30, 2006) [hereinafter *AOL Agreement*]; Agreement, U.S.-InVision Techs., Inc. (Dec. 3, 2004), http://www.corporatecrimereporter.com/documents/invision1.pdf (last visited Oct. 30, 2006) [hereinafter *IVT Agreement*]; Appendix A, U.S.-InVision Techs., Inc. (Dec. 2004), http://www.corporatecrimereporter.com/documents/invision2.pdf (last visited Oct. 30, 2006) [hereinafter *IVT Appendix*]; *Prudential Agreement*, *supra* note 20, at 3.

85. U.S. Attorneys' Manual tit. 9 § 27.630(B) (2002), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

86. We have found no statutory authority to substantiate these specific penalty amounts, which can be significant and involve substantial government discretion.

87. *See infra* DPA/NPA Matrix at Appendix.

88. *Id*.

89. *See, e.g.*, Letter from Michael J. Garcia, U.S. Att'y for S.D.N.Y., to Christopher S. Rizek, HVB Counsel (Feb. 13, 2006), http://www.corporatecrimereporter.com/documents/HVBDeferredProsecutionAgreement.pdf (last visited Oct. 30, 2006) [hereinafter *HVB Agreement*]; *IVT Agreement*, *supra* note 84, at ¶ 23; Letter from Leslie R. Caldwell, Director, Enron Task Force, to Gary Naftalis, Counsel for Canadian Imperial Bank of Commerce (Dec. 22, 2003), http://www.usdoj.gov/dag/cftf/chargingdocs/cibcagreement.pdf (last visited Oct. 30, 2006).

Rarely will a pre-trial agreement include a provision providing that the entity will not deduct the fines on federal or state income taxes.[90] Few pre-Thompson Memo agreements include privilege waiver provisions.[91] 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.[92] Whether statements made by third parties are imputed to the company is ordinarily left to the discretion of the DOJ.[93] There were no pre-Thompson Memo pre-trial agreements which contained such language. In 2003, the Banco Popular DPA

90. *See, e.g.*, *HVB Agreement*, *supra* note 89, at ¶ 4. Typically, the DOJ takes a "tax neutral" approach in criminal cases to ensure that the "IRS retains sufficient latitude to evaluate the taxpayer's obligation in its role as taxing authority and final arbiter of its rules and regulations." Paul McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Address Before the Senate Committee on Armed Services Concerning Boeing Company Global Settlement Agreement (Aug. 1, 2006), *available at* http://armed-services.senate.gov/statemnt/2006/August/McNulty%2008-01-06.pdf. "The [DOJ's] current tax neutral policy encourages greater consistency of the tax treatment of settlements, since it avoids a tax treatment that may vary among federal districts in which such settlements occur." *Id*. Moreover, the "offers of settlement that the [DOJ] receives from defendants . . . are colored by the defendant's own assessment of the subsequent tax treatment. It seems likely that a defendant's settlement offer to the Government will be less generous if it also had to agree that the full amount was nondeductible." *Id*. Finally, "if . . . tax treatment were required as part of the settlement process, the Government would be at a distinct disadvantage [because] its is impossible to know the intricacies of . . . defendants' financial affairs to such a degree that we can comfortably predict the bottom-line impact a certain deduction will have on a defendant's tax bill." *Id*.

91. There were no privilege waivers in the following early pre-trial agreements: *Aetna Agreement*, *supra* note 21; *Andersen Agreement*, *supra* note 8; *Armour Agreement*, *supra* note 21; *Lazard Agreement*, *supra* note 21; *Merrill Lynch Agreement*, *supra* note 21.

92. *See, e.g.*, Deferred Prosecution Agreement ¶¶ 3–4, U.S.-AIG-FP Pagic Equity Holding Corp. (W.D. Penn. Nov. 2004), http://www.corporatecrimereporter.com/documents/aig.pdf (last visited Oct. 30, 2006) [hereinafter *AIG Agreement*]; *AOL Agreement*, *supra* note 84, at ¶ 12; Letter from David N. Kelley, U.S. Att'y for S.D.N.Y., to Robert S. Bennett, KPMG Counsel (Aug. 26, 2005), http://www.corporatecrimereporter.com/documents/kpmgdeferred.pdf (last visited Oct. 30, 2006) [hereinafter *KPMG Agreement*]; Nonprosecution Agreement ¶ 3, U.S.-Am. Elec. Power Co., Inc. (S.D. Ohio Jan. 2005), http://www.corporatecrimereporter.com/documents/aep.pdf (last visited Oct. 30, 2006).

93. *See, e.g.*, *AIG Agreement*, *supra* note 92, at ¶ 4; Nonprosecution Agreement ¶ 16, U.S.-Bank of N.Y. (May 27, 2003), http://www.corporatecrimereporter.com/documents/bankofnewyork.pdf (last visited Oct. 30, 2006) [hereinafter *BNY Agreement*]; Letter from Leslie R. Caldwell, Director, Enron Task Force, to Robert S. Morvillo & Charles Stillman, Counsel for Merrill Lynch (Sept. 17, 2003), http://www.corporatecrimereporter.com/documents/merill2003.pdf (last visited Oct. 30, 2006) [hereinafter *2003 Merrill Lynch Agreement*]; Nonprosecution Agreement ¶ 13, U.S.-Symbol Techs., Inc. (Jun. 3, 2004), http://www.corporatecrimereporter.com/documents/SymbolAgreement.FINALwpd.pdf (last visited Oct. 30, 2006) [hereinafter *Symbol Agreement*].

and the Merrill Lynch NPA were the first pre-trial agreements to ensure that companies did not contradict the terms of the agreement.[94]

A. 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 environmental law, the company agreed to pay over $1 million to protect the environment in the Northern District of Ohio.[95] In a public corruption case, the Roger Williams Medical Center recently agreed to provide $4 million free, non-tax deductible healthcare over two years.[96] In 2001, as part of its DPA, BDO Seidman agreed to pay $16 million into a victim restitution fund.[97] Claimants were required to sign a claim waiver and any leftover funds went to the Postal Service's Fraud Awareness Program.[98] 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.[99] 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 District of New Jersey for securities fraud.[100] Although commentators have accused the DOJ of overreaching in these cases,[101] it is likely that the company

94. *See infra* DPA/NPA Matrix at Appendix.

95. Deferred Prosecution Agreement, U.S.-FirstEnergy Nuclear Operating Co. (N.D. Ohio Jan. 19, 2006), http://www.corporatecrimereporter.com/documents/FENCO.pdf (last visited Oct. 30, 2006) [hereinafter *FirstEnergy Agreement*].

96. Deferred Prosecution Agreement ¶ 12, United States v. Roger Williams Medical Center, No. 06-02T (D. R.I. Feb. 2006), http://lawprofessors.typepad.com/whitecollarcrime_blog/files/roger_williams_deferred_sentence_agreement.pdf (last visited Oct. 30, 2006) [hereinafter *Roger Williams Agreement*].

97. Pretrial Diversion Agreement ¶ 5, U.S.-BDO Seidman, LLP (S.D. Ill. Apr. 12, 2002) (on file with The Saint Louis University Law Journal).

98. *Id*.

99. *FirstEnergy Agreement*, *supra* note 95, at Attachment B.

100. Deferred Prosecution Agreement ¶ 20, U.S.-Bristol-Myers Squibb Co. (D. N.J. June 13, 2005), http://www.corporatecrimereporter.com/documents/bsm.pdf (last visited Oct. 30, 2006) [hereinafter *BMS Agreement*]. The agreement stated:

> 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.

Id.

101. Lisa Brennan, *Deferred White Collar Prosecutions: New Terrain, Few Signposts*, N.J. L. J. (Apr. 11, 2006), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1144330167949

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. Making light of the connection between the U.S. Attorney's law school alma mater and an entity's DPA endowment ignores the fact that 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.

B. 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,[102] or as one commentator noted, an inability to do business with the government.[103] 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.[104]

(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* John C. Coffee, *Deferred Prosecution: Has it Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13; Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1893–94 (2005) (discussing the imposition of unrelated obligations).

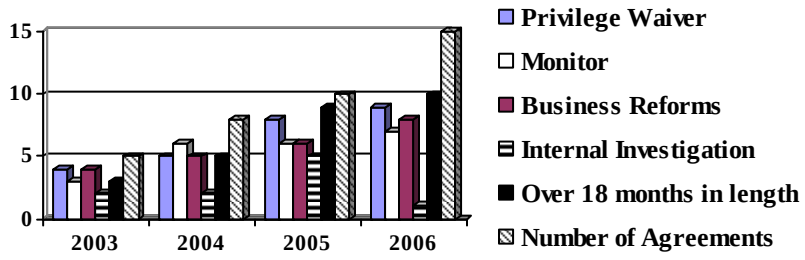
102. *See supra* note 8 and accompanying text.

103. Stephanie Martz, *Trends in Deferred Prosecution Agreements*, 29 THE CHAMPION 45, 45 (2005) ("[F]or 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 form government contracting. Moreover 'flow-down' provisions can prevent other government contractors from doing business with a debarred entity."). 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.

104. *See, e.g.*, *AOL Agreement*, *supra* note 84, at ¶ 9 (attorney's fees); Deferred Prosecution Agreement ¶ 9, United States v. Computer Assoc. Int'l, Inc., No. 04-837 (ILG) (E.D.N.Y. Sept. 22, 2004), http://www.usdoj.gov/dag/cftf/chargingdocs/compassocagreement.pdf (last visited on Oct. 30, 2006) (insurance); *KPMG Agreement*, *supra* note 92, at ¶¶ 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 $600,000,000); *Symbol Agreement*, *supra* note 93, at ¶ 7 (attorney's fees).

The downside will vary depending on how the agreement is drafted. Our review of the agreements perfected 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 DOJ.[105] After the Thompson Memo, however, these features are far more common. Of the thirty-eight post-Thompson Memo pre-trial agreements, twenty-two required a compliance monitor, twenty-six included privilege waivers, twenty-seven agreements exceeded the eighteen month limitation set forth in the U.S. Attorneys' Manual, and twenty-three required the company to implement some sort of business reform.[106] Only ten post-Thompson agreements noted the existence of an internal investigation.

Figure 3: Post-Thompson Memo Pre-Trial Agreements



Agreeing to a privilege waiver can pose a serious dilemma for a corporation. Once the corporation becomes aware of possible wrongdoing through a whistleblower or some other means, it has a duty to its shareholders to fully investigate the allegations.[107] To do this, companies will ordinarily

105. *See infra* DPA/NPA Matrix at Appendix.

106. The table below, like our DPA/NPA Matrix, only includes agreements where the agreement was publicly available. *See* Disclaimer *infra* note 193. There have been thirty-nine post-Thompson memo pre-trial agreements, including the Hilfiger NPA. Figure 3 shows the general content of post-Thompson Memo pre-trial agreements.

107. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C.A. §§ 7201–7266 (2006)), commonly known as "SOX," was enacted on July 30, 2002 in response to the successive implosions of Enron and WorldCom. HAROLD S. BLOOMENTHAL, SARBANES-OXLEY ACT IN PERSPECTIVE 1 (2002). A central feature of SOX was strengthening the internal controls of public companies. *See* 15 U.S.C.A. §§ 7201–7266. 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 (2000). The section also provides civil remedies for such aggrieved employee, including reinstatement, back pay, and compensatory damages. *Id.* In a Floor Statement, Senator Patrick Leahy noted that this provision was designed to protect

conduct an internal investigation.[108] 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 resulting from this investigation may eventually fall into the hands of plaintiffs and other government regulators.[109] The company could essentially end up paying for the government's investigation and building a case against itself (and for civil plaintiffs).[110]

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.[111] 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, however. 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.[112] 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.[113] 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.

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 (daily ed. July 26, 2002).

108. *See* Finder, *supra* note 11, at 111.

109. *See id.* at 112.

110. *See id*. at 113; Colin P. Marks, *Corporate Investigations, Attorney-Client Priviledge, and Selective Waiver: Is a Half-Privilege Worth Having At All*?, SEATTLE U. L. REV. (forthcoming Fall 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909005 (manuscript at 21–28) (discussing the many problems associated with privilege waivers).

111. *See, e.g.*, *AOL Agreement*, *supra* note 84, at ¶ 13; *BMS Agreement*, *supra* note 100, at ¶¶ 11–12; *BNY Agreement*, *supra* note 93, at ¶ 12; *IVT Agreement*, *supra* note 84, at ¶¶ 12–16; *IVT Appendix*, *supra* note 84; *Symbol Agreement*, *supra* note 93, at ¶¶ 11–12.

112. *See BMS Agreement*, *supra* note 100, at ¶ 12; *see also Symbol Agreement*, *supra* note 93, at ¶ 11.

113. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2005); *see also* Martz, *supra* note 103, at 46 ("One 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.").

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.[114] This date has varied from twelve months to three years.[115] It is questionable whether any agreement should extend beyond the eighteen month range set forth in the U.S. Attorneys' Manual given that the Manual and the Organizational Guidelines are explicitly cited as providing the legal framework for the Thompson Memo.[116] Undying cooperation is something that should be carefully scrutinized, lest the cure be worse than the disease.

C. 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 the DOJ to mount a defense.[117] 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.[118] 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."[119] 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.[120] The DOJ has made a policy choice that it only wants to prosecute an entity when there is a legitimate reason for

114. *See infra* DPA/NPA Matrix at Appendix.

115. *See id.*

116. *See Thompson Memo*, *supra* note 1, at VI.

117. *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").

118. *See Thompson Memo*, *supra* note 1, at VII(B).

119. *Id.* at Part VI.

120. *See, e.g.*, Vanessa Blum, *Justice Deferred: The Feds' New Weapon of Choice Makes Companies Turn Snitch to Save Themselves*, LEGAL TIMES, Mar. 21, 2005, at 1, 8 (discussing deferred prosecution and its usefulness as a weapon against individual wrongdoers within a corporation).

doing so.[121] The Thompson Memo provides that two factors guide the DOJ's prosecution of an entity; "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."[122] 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.

D. 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 materials 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 that provides that these protections are waived only for purposes of the agreement, not for any other purpose, including litigation with a third party.[123]

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.[124] Currently, the federal courts provide no coherent answer to whether a selective privilege waiver only to the government will also waive the privilege to third-parties.[125] Three different views have emerged: (1) selective waiver is permissible; (2) selective waiver is never permissible; and (3) selective waiver is permissible only in situations where the government has, prior to the disclosure, signed a binding confidentiality agreement with the corporation.[126] Only the Eighth Circuit has explicitly approved selective waiver to the government for attorney-client privilege.[127] While selective waiver "encourages corporations to conduct internal investigations and to cooperate

121. *See Thompson Memo*, *supra* note 1, at I.

122. *Thompson Memo*, *supra* note 1, at II.

123. *See, e.g.*, *Roger Williams Agreement*, *supra* note 96, at ¶ 8(d).

124. Zach Dostart, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 734 (2006).

125. *Id.*; Finder, *supra* note 11, at 123–36.

126. *See In re* Columbia/HCA Healthcare Corp., 293 F.3d 289, 295 (6th Cir. 2002).

127. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978).

with federal investigative agencies,"[128] courts nonetheless continue to challenge the notion that privilege can be waived to select parties.[129] Although some courts have allowed selective waiver protections in limited circumstances,[130] others hold that once the privilege door has been opened, it cannot be closed.[131] Recently, in *Quest Communications International, Inc.*,[132] the United States Court of Appeals for the Tenth Circuit joined the majority of courts when it rejected a mandamus request seeking to reverse an order that compelled production (and rejected selective waiver) issued by the United States District Court for the District of Colorado.[133] Despite this uncertainty, virtually every pre-trial agreement which waived attorney-client privilege or work product protection contained selective waiver provisions.[134] Only the John Hancock DPA and the Merrill Lynch and Lazard NPAs contained no selective waiver provision.[135]

Recently, the Advisory Committee on the Federal Rules of Evidence proposed a new rule that would preserve selective waiver.[136] Specifically, Proposed Rule 502(b)(3) provides that "[a] voluntary disclosure does not operate as a waiver if . . . the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation."[137] The Committee Note provides that a primary purpose of the rule is to "resolve[] some longstanding disputes in the

128. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991).

129. *In re Columbia*, 293 F.3d at 302–03; United States v. Mass. Inst. of Tech., 129 F.3d 681, 685 (1st Cir. 1997); *Westinghouse*, 951 F.2d at 1428–30; Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981) (citing *In re* Weiss, 596 F.2d 1185 (4th Cir. 1979)); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993).

130. *In re Columbia*, 293 F.3d at 302–03 (citing various district courts that have adopted selective waiver); Cobell v. Norton, 213 F.R.D. 69, 75 (D.D.C. 2003) (noting that waiver to independent monitor was court ordered and therefore did not waive privilege); Teachers Ins. & Annuity Ass'n of America v. Shamrock Broad. Co., 521 F.Supp. 638, 644–45 (S.D.N.Y. 1981) (holding selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency).

131. *See* cases cited *supra* note 129.

132. 450 F.3d 1179 (10th Cir. 2006).

133. *Id*. at 1201.

134. *See infra* DPA/NPA Matrix at Appendix.

135. *See Hancock Agreement*, *supra* note 22; *Lazard Agreement*, *supra* note 21; *Merrill Lynch Agreement*, *supra* note 21; *see also infra* DPA/NPA Matrix at Appendix. The 2003 Merrill Lynch NPA could be construed as waiving privilege ("disclose all information") and contained no selective waiver protection, but it is unclear whether DOJ and Merrill meant to waive privilege in the agreement. Because every other agreement that waives privilege includes specific waiver language, this language was probably not intended to waive privilege. *See Merrill Lynch Agreement*, *supra* note 21.

136. PROPOSED FED. R. EVID. 502, *available at* http://www.uscourts.gov/rules/newrules1.html.

137. *Id*.

courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine . . . involving . . . selective waiver." [138] The Committee Note also highlights that under the proposed rule, selective waiver would apply whether or not there was a confidentiality agreement, suggesting that should the Committee adopt Proposed Rule 502(b), future pre-trial agreements may not need to address selective waiver.[139] In April 2006, the Committee approved for publication proposed new Evidence Rule 502.[140] The Committee's recommendation to publish the Rule was considered by the Committee on Rules of Practice and Procedure at its June 22–23, 2006 meeting.[141]

Because *currently* there is no way to know whether the selective waiver provision will be enforced in the forum in which private litigation is filed, depending on the particular venue, it is possible that any materials turned over to the DOJ during the course of its investigation will fall into the hands of private plaintiffs (or other government regulators). Given this potential, it is difficult to reconcile attorney-client privilege waiver with the Thompson Memo's consideration of the "collateral consequences, including disproportionate harm to shareholders [and] pension holders."[142] The fallout from civil litigation—particularly plaintiffs armed with a pre-trial agreement and a privilege waiver—can have dire consequences for shareholders when a corporation is forced to defend or settle class action or other complex litigation.

V. POST-THOMPSON MEMO DOJ POLICY DEVELOPMENTS: A STEP FORWARD?

In November 2004, the U.S. Sentencing Commission reconciled the Sentencing Guidelines with the Thompson Memo by revising the language in Comment 12 to Section 8C2.5 to include explicit reference to privilege waiver.[143] The new commentary provided:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government] . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.[144]

138. Federal Rulemaking, Evidence Rule 502, Committee Note, *available at* http://www.uscourts.gov/rules/newrules1.html.

139. *Id*.

140. Federal Rulemaking, *available at* http://www.uscourts.gov/rules/#advisoryspring06.

141. *Id*.

142. *Thompson Memo*, *supra* note 1, at II.

143. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. n.12 (2004).

144. *Id.* § 8C2.5 cmt. n.12 (2004). While a recent Supreme Court decision, United States v. Booker, 543 U.S. 220 (2005), held that the Federal Sentencing Guidelines are no longer mandatory, they are still relevant and must be considered. 543 U.S. at 259–60. Accordingly, the Organizational Guidelines are still an important anchor to the Thompson Memo and DOJ

This highly controversial amendment (now withdrawn pending Congressional approval) was opposed by many organizations including the American Bar Association because it was perceived to grant more authority to the DOJ to seek privilege waivers in criminal investigations targeting cooperation.[145] The next year, in August 2005, the American Bar Association adopted a resolution strongly supporting the attorney-client privilege and criticizing government efforts to seek privilege waiver.[146] After the Commission amended the Guidelines, many reported DPAs included a waiver of attorney-client privilege and work product protection.[147]

In response to the Sarbanes-Oxley Act of 2002, the Sentencing Commission also added Section 8B2.1 to clarify what the Guidelines considered an effective compliance program for the purposes of an organization's culpability score.[148] Section 805 of the Act directed the United States Sentencing Commission to review and amend federal sentencing guidelines to ensure that offense levels, existing enhancements, and/or offense characteristics are sufficient to deter and punish violations involving: (1) obstruction of justice; (2) record and evidence destruction; (3) fraud when the number of victims adversely involved is significantly greater than 50[149] or when it endangers the solvency or financial security of a substantial number of victims; and (4) organizational criminal misconduct.[150] In a Floor Statement, Senator Patrick Leahy noted that:

> New Subsection 5 requires a comprehensive review of Chapter 8 guidelines relating to sentencing organizations. It is specifically intended that the Commission's review of Section 8 be comprehensive, and cover areas in addition to monetary penalties, additional punishments such as supervision, compliance programs, probation and administrative action, which are often extremely important in deterring corporate misconduct.[151]

corporate charging policy. *See* Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 666 (2006) (making empirical observation on post-Booker sentencing decisions and characterizing two post-Booker views of the guidelines as either (1) Booker minimalism—Booker changed little in terms of practical effect, or (2) Booker maximalism where the Guidelines are now more of a "Pirate Code in the movie *Pirates of the Caribbean*: more what you call guidelines than actual rules.").

145. Resolution Adopted by the House of Delegates of the American Bar Association, August 2004, at 1, *available at* http://www.abanet.org/poladv/report303.pdf.

146. Resolution Adopted by the House of Delegates of the American Bar Association, August 9, 2005, at 1, *available at* http://www.abanet.org/poladv/report111.pdf.

147. *See infra* DPA/NPA Matrix at Appendix.

148. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. background (2004).

149. *Id.* § 2B1.1 (2004).

150. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 805 (2002).

151. 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy); *see also* 148 CONG. REC. S1787 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy).

To have an effective compliance program under the post-amendment Organizational Guidelines, an organization shall "exercise due diligence to prevent and detect criminal conduct . . . [and] otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[152] The section sets forth a laundry list of due diligence features designed to ensure that a corporation identifies and prevents future wrongdoing.[153] Also, Section D1.4(c)(1) was revised to acknowledge revisions to Section 8B2.1.[154] Interestingly, in the recent August 2006 NPA that Mellon Bank entered into with the U.S. Attorney's Office for the Western District of Pennsylvania, Mellon agreed to ensure that its ethics and compliance program "fully meet the standards of § 8B2.1(b) of the United States Sentencing Guidelines."[155] While the Holder Memo could trace its roots to the Sentencing Guidelines, the Sentencing Guidelines have not circled back to conform to the Thompson Memo.

A. McCallum Memo: Uniformity at Last (But Only Within Each District)

On October 21, 2005, Acting Deputy Attorney General Robert McCallum issued a Memorandum (McCallum Memo) addressing the issue of Waiver of Corporate Attorney-Client and Work Product Protection.[156] The McCallum Memo stated that

> [t]o ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*, some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client or work-product protection.[157]

The McCallum Memo then directed each U.S. Attorney's Office to adopt a "written waiver review process for your district or component."[158] While this written review process is not posted on each U.S. Attorney Office's website, it was meant, presumably, to provide some consistent framework within each office to determine when a waiver request is appropriate. The policy was

152. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2004).

153. *Id*.

154. *Id.* at § 8D1.4.

155. Letter from Mary Beth Buchanan, U.S. Att'y for W.D. Penn., to W. Thomas McGough, Jr. & Michael Bleier, Counsel for Mellon-Bank, N.A. (Aug. 14, 2006), http://www.sec.gov/Archives/edgar/data/64782/000119312506175748/dex991.htm (last visited Oct. 30, 2006).

156. Memorandum from Robert McCallum, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components & U.S. Attorneys (Oct. 21, 2005), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm (last visited Oct. 30, 2006).

157. *Id.*

158. *Id.*

intended to provide some flexibility and autonomy across different offices, but aimed for uniformity within each office. The McCallum Memo notes, "[s]uch waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations."[159] The McCallum Memo was not intended to provide uniformity for DPAs or NPAs or otherwise provide a single template for pre-trial agreements.

B. Judge Lewis Kaplan and the U.S. Sentencing Commission

Recently, there have been two significant events that suggest the evolution of the DOJ's corporate charging policy has reached its pinnacle, at least for the time being.[160] First, on March 30, 2006, Judge Lewis Kaplan, a respected District Judge in the United States District Court for the Southern District of New York, provided a critical look at the Thompson Memo.[161] Kaplan stated that he was "very bothered by [the Thompson Memo]" because it "puts the government's thumb on the scales" and raised questions in his mind "about the Sixth Amendment constitutional right to legal representation."[162] Kaplan's criticism was in response to KPMG ending its longstanding practice, presumably at the DOJ's urging, of advancing legal fees for employees to use in their defense around the same time that it entered into a DPA.[163] Kaplan found "it shameful that the fees haven't been advanced."[164] He noted that "[t]he reality is that you are depriving people of counsel, or at least interfering or impairing."[165] In an April 12 order, Judge Kaplan set a hearing for May 8, to consider whether "the government, through the Thompson memorandum or otherwise, affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees with respect to the investigation and prosecution of [the KPMG case]."[166] On June 26, 2006, Judge Kaplan issued an 52 page ruling (complete with table of contents) that not only criticized the U.S. Attorney's Office in Manhattan for attempting to ensure that KPMG did not advance legal fees to

159. *Id*.

160. *See Burn the Thompson Memo*, CORP. CRIME REP., May 1, 2006, at 3.

161. Lynnley Browning, *Judge Questions Clarity of Prosecution's Tax-Shelter Case*, N.Y. TIMES, Mar. 31, 2006, at C4.

162. *Id*.

163. *Id.*

164. *Id.*

165. *Id*.

166. United States v. Stein, No. S1 05 Crim. 0888 LAK, 2006 WL 1063298, at *1 (S.D.N.Y. Apr. 12, 2006).

its former partners, but held the provisions of the Thompson Memo pertaining to fee advancement were unconstitutional.[167]

Because Kaplan did not exclude any evidence (and it is unclear that the constitutionality of the Thompson Memo was properly before him), it is unclear what impact his ruling will have on future DPAs and NPAs.[168] Indeed, Judge Kaplan did not agree with the defendants that the language of the KPMG DPA itself was problematic. Former KPMG partner Jeffrey Eischeid moved to dismiss his indictment on the grounds that the DPA provisions prohibiting KPMG and its employees from contradicting the DPA and the provision waiving the attorney client privilege—two provisions that are in virtually every pre-trial agreement—constituted prosecutorial misconduct.[169] Judge Kaplan disagreed with Eisheid, finding that "the government has a legitimate interest in seeing to it that KPMG not gain the benefit of deferred prosecution, only to undermine its formal acceptance of guilt by making statements inconsistent with it."[170] Importantly, Kaplan noted, the KPMG DPA (like every pre-trial agreement we reviewed) "does not purport to control the actions of individuals."[171] What bothered Kaplan was not necessarily any particular feature of the KPMG DPA, but instead, it was the government's alleged request or suggestion that KPMG not pay individual defendants' attorney's fees contemporaneously with entering into the DPA.[172] Kaplan correctly recognized the DPA is a valuable tool that can fairly and efficiently resolve a criminal investigation. Only the conduct outside of the DPA bothered him. It is difficult to evaluate what impact Judge Kaplan's June 26, 2006 ruling attacking the Thompson Memo will have on future pre-trial agreements. If the July 2006 Boeing NPA— which is rife with pro-defendant provisions— is any indication, the waiver of attorney-client privilege and other feared provisions may become extinct.[173]

167. United States v. Stein, 435 F. Supp. 2d 330, 381–82 (S.D.N.Y. 2006). It is unclear how a policy, standing alone, can be unconstitutional as opposed to the implementation of a particular policy.

168. *See id.* In August 2006, the ABA adopted a policy opposing the government considering as indicia of cooperation a company's fee advancement to employees, joint defense agreement with employees, sharing documents with employees, or failure to terminate an employee who invoked the Fifth Amendment in response to a government request for information. ABA Task Froce on the Attorney-Client Privilege, Report of the American Bar Association Task Force on Attorney-Client Privilege (August 2006), *available at* http://www.nylawyer.com/adgifs/decisions/081506resolution.pdf.

169. Mark Hamblett, *Deferred Prosecution: Judge Rejects Motions to Dismiss in Tax Evasion Case*, N.Y. L.J., Apr. 13, 2006, at 5.

170. *Id*. at 9.

171. *Id*.

172. *See id.*

173. *See infra* DPA/NPA Matrix at Appendix (including details about the July 2006 Boeing NPA).

Second, on April 5, 2006 the U.S. Sentencing Commission voted to delete the 2004 privilege waiver commentary language during a full commission meeting.[174] Those amendments will take effect on November 1, 2006, unless Congress acts affirmatively to modify or reject them.[175] Because the Guidelines are cited as a primary source for the Thompson Memo, the Commission's retreat raises some questions as to the propriety of requesting a privilege waiver as part of the pre-trial agreement.[176] Indeed, a recent survey of outside counsel stated that the waiver language in the Organizational Guidelines was one of the top three reasons given by the DOJ for waiver demands.[177]

C. Milberg Weiss and Attorney-Client Privilege

On May 18, 2006, the United States Attorney's Office in Los Angeles indicted the well-known class action firm Milberg Weiss Bershad & Schulman (Milberg) "alleging a 20-year conspiracy to funnel kickbacks to plaintiffs in [various] securities class-action cases."[178] Milberg alleged that the reason the government and the firm could not agree on a deferred prosecution was that the government "insisted that the firm make unfounded statements accusing its own partners of crimes and otherwise become an agent for the government."[179] This statement highlights the wedge that a pre-trial agreement can drive between employees (or in this case partners) and a firm or company when the company agrees not to contradict statements in the pre-trial agreement—a staple of a post-Thompson pre-trial agreement. This is one of the issues that the former KPMG partners have complained about to Judge Kaplan in the KPMG case.[180] Reportedly, the government and the firm were also unable to agree on the "government's demand of a waiver of attorney-client privilege

174. News Release, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids (Apr. 11, 2006) [hereinafter U.S.S.C. News Release], *available at* http://www.ussc.gov/PRESS/rel0406.htm; *see* Terry Carter, *Privilege Waiver Policy Dumped: But Federal Prosecutors May Still Seek Waivers From Corporations*, 5 A.B.A. J. E-REPORT 15, Apr. 14, 2006, http://www.abanet.org/journal/ereport/a14privil.html.

175. U.S.S.C. News Release, *supra* note 174; Carter, *supra* note 174.

176. *See Thompson Memo*, *supra* note 1, at n.6

177. Susan Hackett, Senior V.P., Association of Corporate Counsel, The Decline of the Attorney-Client Privilege in the Corporate Context, Address Before the U.S. Sentencing Commission (Mar. 15, 2006), *available at* http://www.acca.com/public/attyclntprvlg/coalitionussctestimony031506.pdf.

178. John R. Wilke, Nathan Koppel & Peter Sanders, *Milberg Indicted on Charges Firm Paid Kickbacks: Class-Action Giant Accused of Spending Over $11 Million to Secure Lead Plaintiffs*, WALL ST. J., May 19, 2006, at A1. The article notes that in 2004 and 2005 Milberg settled an estimated 90 securities class actions, winning more than $1.5 billion in settlements. *Id*.

179. *Id*.

180. *See supra* note 166 and accompanying text.

and access to privileged internal records."[181] Interestingly, two of the more recent DPAs involving HVB (February 2006) and BankAtlantic (April 2006) did not include privilege waivers.[182] Similarly, two recent NPAs involving BAWAG (an Austrian bank that allegedly played a role in the Refco fraud) and HealthSouth did not include privilege waivers.[183] In July 2006, the U.S. Attorney's Office in Los Angeles (the same office that indicted Milberg Weiss) along with the U.S. Attorney's Office in Alexandria, Virginia, entered into an NPA that preserved Boeing's attorney-client and work product protections.[184]

Whatever the reasons for the inability of Milberg and the government to enter into a pre-trial agreement, this indictment may pose a serious challenge to the firm's ability to continue to represent class action plaintiffs as lead counsel, its bread and butter.[185] In fact, immediately after the indictment, New York's Common Retirement Fund announced it would replace Milberg as lead class action counsel in the Bayer AG class action litigation.[186] As was the case following Anderson, this indictment may also have a chilling effect on other entities pondering whether to follow the Thompson Memo and cooperate with the government.[187] The indictment of Milberg, like Andersen before it, further illustrates that the government is willing to indict entities when it perceives, as the Thompson Memo provides, that the conduct of the entity warrants criminal prosecution.[188] Whether another U.S. Attorney's Office would have chosen the same path by taking a hard line on privilege waiver is an open question.

181. Wilke, Koppel, & Sanders, *supra* note 178.

182. *See infra* DPA/NPA Matrix at Appendix; *HVB Agreement*, *supra* note 89; Deferred Prosecution Agreement, U.S.-BankAtlantic (S.D. Fla. April 24, 2006), http://www.usdoj.gov/criminal/press_room/press_releases/2006_4567_2_CRM_06-248_bankatlantic_DPA.pdf (last visited Oct. 30, 2006).

183. Letter from Michael J. Garcia, U.S. Att'y for S.D.N.Y., to Andrew Levander, BAWAG Counsel (June 2, 2006) (on file with The Saint Louis University Law Journal); Nonprosecution Agreement, U.S.-HealthSouth Corp. (May 2006), http://www.corporatecrimereporter.com/documents/healthsouth.pdf (last visited Oct. 30, 2006); *see infra* DPA/NPA Matrix at Appendix.

184. *See infra* DPA/NPA Matrix at Appendix.

185. *See* Justin Scheck, *Top Milberg Weiss Partners Head for the Exits*, THE RECORDER, May 30, 2006 (noting that top Milberg Weiss partners had begun to leave the firm).

186. Press Release, New York State Comptroller, Hevesi to Replace Milberg Weiss as Lead Counsel in Bayer AG Class Action (June 1, 2006).

187. *See CCR Report supra* note 2 (noting the rise in pre-trial agreements post-Andersen); *see also infra* DPA/NPA Matrix at Appendix.

188. The Thompson Memo provides:

> 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.

CONCLUSION

An anchor in negotiating a pre-trial agreement with the DOJ should be the U.S. Attorneys' Manual, which is official DOJ policy.[189] Companies should advocate that the eighteen month duration set forth in the U.S. Attorneys' Manual should serve as a ceiling for the duration of the pre-trial agreement.[190] The pre-trial diversion procedures in the Manual provide the framework for the Thompson Memo, and companies can argue that the U.S. Attorney's Office should not extend a pre-trial agreement beyond the explicit maximum set forth in the Manual. While the best outcome for a company that is the target of a criminal probe is a declination of prosecution, the worst outcome is a never-ending agreement to cooperate with the government. Three years after agreeing to cooperate, the company may still be required to help prosecutors build a case against an individual or another company. Indeed, in the DPA that Edward Jones entered into with the U.S. Attorney's Office for the Eastern District of Missouri, it agreed to continue assisting the government even after its two-year agreement ended.[191] While eighteen months *should be* the maximum period of cooperation under a pre-trial agreement, a company should insist on some agreement with a definite end date before agreeing to provide cooperation for an extended period of time.

To reduce the number of adverse provisions of a pre-trial agreement after fully cooperating and promising future cooperation, companies may request that the pre-trial agreement not include provisions waiving privilege, changes in the company's business, or independent monitors. To this end, companies may argue that the Organizational Guidelines, which provided the legal groundwork for the Thompson Memo, will soon be revised and the 2004 waiver language removed. Accordingly, the DOJ should not request a privilege waiver as a condition of cooperation. As Judge Kaplan noted, the DOJ should be comfortable enough with its case and the evidence it has of criminal activity that it does not need to destroy this important protection.[192]

Thompson Memo, *supra* note 1, at I(A):

189. U.S. Attorneys' Manual § 1-1.100 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/1mdoj.htm. "The United States Attorneys' Manual . . . contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice." *Id.*

190. U.S. Attorneys' Manual § 9-22.010 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm#9-22. *But cf.* F. Joseph Warin & Peter E. Jaffe, *The Deferred Prosecution Jigsaw Puzzle: A Modest Proposal For Reform*, 13 No. 7 ANDREWS ANTITRUST LITIG. REP. 16 (Oct. 2005) (suggesting that eighteen months is not a long enough period of time and arguing instead for a period of three years as the necessary length for an NPA or DPA).

191. Deferred Consideration Agreement ¶ 6, U.S.-Edward D. Jones & Co. (E.D. Mo. Dec. 27, 2004), http://www.secinfo.com/d1zJxf.1n6.a.htm (last visited Oct. 30, 2006).

192. Editorial, *Corporate Injustice*, WALL ST. J., Apr. 6, 2006, at A14.

The collateral consequences of such a waiver should be identified and quantified for the U.S. Attorney's Office.

In the end, because pre-trial agreements have not caught on across the ninety-three U.S. Attorney's Offices throughout the country, it seems like the policies and procedures of a few offices have been laying the groundwork for other offices. The DOJ should be cognizant of the Thompson Memo's legal foundation, however, and ensure that all offices remember the origins of the Thompson Memo and how pre-trial agreements have evolved to their present day form. In doing so the DOJ should use cooperation as a means to quickly and efficiently ferret out criminal wrongdoing to punish responsible parties, keeping in mind the collateral consequences of casting a criminal indictment too broadly. No one wants another Andersen. But no one wants corporate fraud to go undetected either. The less related to the wrongful conduct the particular pre-trial agreement provision is, the more it should be scrutinized. Taking a balanced approach will allow the DOJ to ensure that both goals are met.