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REGULATING THE 'NEW REGULATORS': CURRENT TRENDS IN DEFERRED PROSECUTION AGREEMENTS

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ESSAY

REGULATING THE 'NEW REGULATORS': CURRENT TRENDS IN DEFERRED PROSECUTION AGREEMENTS

Peter Spivack & Sujit Raman*

Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are proliferating. In the four years between 2002 and 2005, prosecutors and major corporations entered into twice as many of these agreements (also called pretrial diversion agreements) as in the previous ten years combined.[1] The trend appears to be accelerating. According to one estimate, thirteen DPAs and NPAs were executed in 2006,[2] and another thirty-seven corporate diversion agreements were publicly announced in 2007.[3] Some believe that pretrial diversion has become the "standard" means for concluding corporate criminal investigations.[4] In short, DPAs and NPAs are tools that have transformed the way federal prosecutors and defense counsel interact. The marked increase in their use is arguably the most profound development in corporate white collar criminal practice over the past five years.

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1. *See* CORP. CRIME REP., CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON-PROSECUTION AGREEMENTS (2005), http://www.corporatecrimereporter.com/deferredreport.htm (last visited Feb. 10, 2008) [hereinafter CRIME WITHOUT CONVICTION]. According to this report, prosecutors and companies entered into 23 agreements in the 2002-2005 timeframe, in contrast to the 11 agreements negotiated between 1993 and 2001.

2. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 938-953 (2007) (Appendix A). Definitive numbers are difficult to come by, principally because the Department of Justice does not yet have a policy of publishing all corporate pretrial diversion agreements. Indeed, another source suggests that DOJ actually entered into eighteen corporate diversion agreements in 2006. *See* Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1445 (2007). Yet another source places the correct number at twenty-seven. *See* BNA, Inc., Lawyer Says Variability in DOJ Agreements To Defer Prosecution Makes for Uncertainty, Vol. 2 (20) WHITE COLLAR CRIME REPORT, Oct. 26, 2007 (quoting Lee G. Dunst, Esq.).

3. *See* the Appendix to this Essay, at pages 190-193.

4. *See* Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 315 (2007), http://yalelawjournal.org/images/pdfs/528.pdf; *see also* Russell Mokhiber, *Twenty Things You Should Know About Corporate Crime*, 25 CORP. CRIME REP. 25 (2007), *available at* http://www.corporatecrimereporter.com/twenty061207.htm (last visited Feb. 10, 2008) (stating that "most major corporate crime prosecutions" are concluded through a DPA now). *But see* Scott A. Resnik & Keir N. Dougall, *The Rise of Deferred Prosecution Agreements*, 236 N.Y.L.J. 9 (col. 1) (Dec. 18, 2006) (describing diversion agreements as "not yet the norm in corporate investigations").

In the typical corporate deferral scenario, the prosecutor files a criminal charge against a company, but agrees not to prosecute the claim so long as the entity complies with the terms of a deferral agreement.[5] (In a non-prosecution, or "cooperation" scenario, no charges are filed.)[6] The company avoids the severe collateral consequences of indictment[7] by voluntarily entering a probationary period during which it will (1) enact substantial internal reforms and (2) cooperate with the government, effectively helping prosecutors build a case against individual employees.[8] The company also makes restitution payments, and often submits to federal monitoring. If at the end of the deferral period the prosecutor is satisfied that the company has fulfilled its obligations, he or she dismisses the

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5. *But see* Corporate Crime Reporter, *Interview with Mary Jo White*, 19 CORP. CRIME REP. 48 (11) (2005), *available at* www.corporatecrimereporter.com/maryjowhiteinterview010806.htm (last visited Feb. 10, 2008) (quoting White, a former U.S. Attorney for the Southern District of New York, "a [DPA] . . . doesn't have to involve filing a criminal charge. You can just agree that you are going to withhold the filing of charges assuming the company complies with whatever the terms of your agreement are."); Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1056 (2006) ("The filing of a criminal charge is not a prerequisite to a deferred prosecution agreement . . . ."). The two DPAs negotiated by the USAO of the District of Massachusetts in 2007 appear to conform to this practice.

6. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1105 (2006) ("Nonprosecution agreements . . . can encompass most of the attributes of a deferred prosecution, but they do not involve the formal filing of charges."). Functionally, DPAs and NPAs are very similar. *See* Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, CRIMINAL JUSTICE (Summer 2006) at 36, *available at* http://www.abanet.org/crimjust/cjmag/21-2/corporatedeferred.pdf (last visited Feb. 10, 2008) (stating that "the effect of [an NPA] is often eventually the same" as that of a DPA, and declining to distinguish between them); *cf.* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1592 PLI/Corp 197 (2007) at n.62 (describing the 2006 Prudential Financial Inc. agreement that the company believed was an NPA, but which DOJ publicly characterized as a DPA). One difference between DPAs and NPAs is that the latter gives "a small public relations benefit to the company, which can truthfully assert it was never prosecuted for the misconduct." Henning, *supra* note 4, at 314 n.9; *see also* Paulsen, *supra* note 2, at 1438 ("[T]he absence of the charging instrument often indicates a lower level of culpability.").

7. *See generally* Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14. Companies suffer serious collateral consequences as a result of indictment, separate from the consequences of conviction or sentencing. Adverse publicity alone could destroy a company. *See* Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 352 (1993). For public companies, the share price is usually immediately affected. *See* Corporate Crime Reporter, *Interview with David Pitofsky*, 19 CORP. CRIME REP. 46(8) (2005), *available at* http://www.corporatecrimereporter.com/pitofsky interview010806.htm (last visited Feb. 10, 2008) (observing that the mere announcement of a criminal investigation regularly results in companies "los[ing] half their market value"). Moreover, indictment can lead to the automatic suspension of state and federal licenses under which a company does business. It can also trigger debarment or suspension from eligibility for government contracts or federally funded programs such as health care. *See*, e.g., 48 C.F.R. § 9.406-2(a) (1998) (providing for debarment and suspension from government contracts or subcontracts during criminal prosecution). Thus, indictment is a "virtual death sentence" for business entities. Christopher A. Wray & Robert K. Hur, *The Power of the Corporate Charging Decision Over Corporate Conduct*, 116 YALE L.J. POCKET PART 306, 306 (2007), http://yalelawjournal.org/images/pdfs/529.pdf (last visited Feb. 10, 2008).

8. Prosecutors benefit from pretrial diversion in additional ways. DPAs and NPAs allow prosecutors to impose substantial reforms on a company without having to internalize the considerable costs and risks of investigating and trying their case. Furthermore, because a corporation operating under a diversion agreement normally bears the costs of any ongoing monitoring, the government can shift its resources towards investigating other entities.

charges. If, on the other hand, the prosecutor perceives that the company is failing or has failed to abide by the terms of the agreement, the government reserves the right to declare a breach and to proceed criminally against the corporation.[9]

Corporate pretrial diversion agreements are a byproduct of a relatively recent shift in Department of Justice (DOJ) policy. This shift reflects an evolving view of the purpose and function of the criminal law in the corporate context. In a post-Enron world, DOJ officials appear to believe that the principal role of corporate criminal enforcement is to reform corrupt corporate cultures—that is, to effect widespread structural reform[10]—rather than to indict, to prosecute, and to punish.[11] By focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity's criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America. They have become the New Regulators.

Some have questioned the appropriateness of this new role.[12] Others have questioned the legitimacy of the manner in which it has been achieved.[13] Remarkably, this important policy shift has occurred "from the bottom up": DOJ leadership has issued no public guidance focusing on corporate pretrial diversion,

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9. In the case of a breached DPA, the government resuscitates the already-filed charges and uses against the company the factual admissions it made in the agreement, as well as any other evidence it provided the government—rendering the company's conviction "virtually a foregone conclusion." Christopher A. Wray, Assistant Att'y Gen., Criminal Div., Remarks to the ABA White Collar Crime Luncheon (Feb. 25, 2005), http://www.usdoj.gov/criminal/pr/speeches/2005/02/2005_3853_rmrkCrimLuncheon030205.pdf (last visited Feb. 10, 2008). In the case of a breached NPA, the government simply files charges for the first time. Statute of limitations concerns are addressed in the text of the agreement itself, which typically waives the defendant's rights under the Constitution, the Speedy Trial Act of 1974, and the federal rules of criminal procedure. *See, e.g.*, Zimmer, Inc.'s 2007 DPA, *available at* http://www.zimmer.com/web/enUS/pdf/Zimmer_DPA.pdf, at ¶ 53 (last visited Feb. 10, 2008).

10. Federal prosecutors in New Jersey, for example, recently (and unselfconsciously) declared that the agreements they negotiated with five key entities in the orthopedic device industry had "devis[ed] the new compliance standards for the industry." *See* Press Release, U.S. Attorney's Office, D.N.J., Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring (Sept. 27, 2007), http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf (last visited Feb. 10, 2008) [hereinafter Hip and Knee Replacement Press Release].

11. *See* Garrett, *supra* note 2, at 858 (observing that "structural reform is a new goal for federal criminal law"); Henning, *supra* note 4, at 315 ("The purpose of corporate prosecutions is not to punish but instead to change corporate cultures through agreements that deal directly with internal governance . . . . [T]he focus on how businesses will operate in the future is now a central feature of corporate criminal investigations."); *see also* Hip and Knee Replacement Press Release, *supra* note 10 ("Compliance with the federal law by all of these companies going forward is the key element of these [diversion] agreements.").

12. *See* text accompanying *infra* note 169 & 170; Letter from Congressman Frank Pallone, Jr. to Christopher J. Christie (Nov. 21, 2007), *available at* http://www.corporatecrimereporter.com/documents/PallonelettertoChristie_21nov07.doc (last visited Feb. 10, 2008) ("Where criminal activity has been uncovered . . . it would seem that the appropriate response of [the United States Attorney's Office] would be to prosecute that actor and not simply allow them to continue to operate under [prosecutors'] guidance and supervision.").

13. *See* Orland, *supra* note 6, at 199 ("[I]n the past decade, the operative rules of corporate criminal liability have undergone profound change. This change derives not from new congressional or Supreme Court command, but from [DOJ's] new and different attitudes . . . ."); *id.* at 238 (describing the change as a "quiet legal revolution").

leaving individual United States Attorney's Offices (USAOs) to experiment and, in some cases, to push the envelope of prosecutorial practice. Even more remarkably, this fundamental shift in the goals and functions of the criminal law (and the role that DPAs and NPAs have played in facilitating it) has sparked little discussion in the nation's broader policy discourse—until now.

As this Essay goes to press, Congress is actively considering legislation that would direct DOJ's leadership to issue appropriate guidance regarding corporate pretrial diversion.[14] Current activity in the legislative arena is largely a response to a recent controversy over the selection and payment of DPA-imposed federal monitors[15]—a controversy that spurred DOJ policymakers to announce internal guidelines regarding such monitoring arrangements in early March 2008.[16] Whether Congress takes further action in light of this development remains to be seen; the important point is that DOJ finally has taken the first steps towards confronting the issue of DPAs and constructing a consistent national policy.

Such a policy is sorely in need—and should address considerably more than the selection of federal monitors. In fact, prosecutors' increasing reliance on DPAs and NPAs raises numerous challenges for companies and their counsel, and impacts a range of important legal concepts. These include federal-state relations, the separation of powers, and the basic role of the prosecutor—not to mention the function of the criminal law. One hopes the recent interest this subject has generated will encourage critical scrutiny of *all* the implications of DOJ's recent deferral strategy. This Essay introduces many of the key issues, providing a background history of the rise of corporate pretrial diversion and exploring in depth many of the significant trends that emerged in 2007—a year that, according to one estimate, witnessed a *70%* increase in the number of executed DPAs.[17] Our hope is that DOJ leadership will acknowledge the important policy shift that has quietly taken place; recognize the considerable inconsistencies in current practice; and take appropriate action. Failing that, DPAs and NPAs may be a ripe and necessary area for legislative intervention.

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14. *See* H.R. 5086, 110th Cong. (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h5086ih.txt.pdf (last visited Feb. 10, 2008).

15. *See*, e.g., Letter from Senator Patrick Leahy to Attorney General Michael B. Mukasey (Jan. 10, 2008), *available at* http://leahy.senate.gov/press/200801/011008PJLtoMukaseydojcontracts.pdf (last visited Feb. 10, 2008); Letter from Senator Patrick Leahy and Congressman John Conyers, Jr., to The Honorable David M. Walker (Jan. 16, 2008), *available at* http://leahy.senate.gov/press/200801/011608LeahyConyersToGAO.pdf (last visited Feb. 10, 2008); Letter from Senator Max Baucus to Attorney General Michael B. Mukasey (Jan. 22, 2008), *available at* http://www.senate.gov/finance/press/Bpress/2008press/prb012308.pdf (last visited Feb. 10, 2008).

16. *See* Philip Shenon, *New Guidelines Ahead of Ashcroft Testimony*, N.Y. TIMES, March 11, 2008, at A17 (observing that the new guidelines require federal monitors to be chosen by a committee and approved by the Office of the Deputy Attorney General, whereas previously the choice would have been made by individual prosecutors); the new guidelines are available at http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf (last visited Apr. 15, 2008).

17. *See* LAWRENCE D. FINDER & RYAN D. MCCONNELL, ANNUAL CORPORATE PRE-TRIAL AGREEMENT UPDATE—2007, *available at* http://ssrn.com/abstract=1080263 (last visited Feb. 10, 2008). Messrs. Finder & McConnell are path-breaking scholars of corporate pretrial agreements (as the numerous citations in this Essay to their previous work will attest). We encourage readers to consult their 2007 update, referenced here, for an additional perspective on the past year's trends.

I. SOME BACKGROUND HISTORY

Deferral is not a new concept; prosecutors have utilized this tool for decades. Traditionally, however, the government deferred the prosecution of *individuals*—usually juveniles or first offender street criminals—in an effort to reduce docket congestion and to allow these wrongdoers an opportunity to rehabilitate themselves without suffering the stigma of conviction.[18] Federal prosecutors seldom diverted the adjudication of corporate crimes. In an era when the normal punishment for convicted companies was a relatively minor fine,[19] and in which convicted executives rarely went to jail, the "traditional strategy of corporate criminal defense lawyers was to persuade the government to indict the corporation, not culpable executives."[20]

A. Corporate Deferrals in the 1990s

The first notable break with this practice occurred in the early 1990s. In 1992, the government initiated an investigation into Salomon Brothers for securities fraud violations. The company cooperated extensively with prosecutors and regulatory personnel, paid substantial fines and forfeitures, restructured its management, and voluntarily undertook wide-ranging reforms to avoid future misconduct. Salomon's cooperation, as well as its commitment to transforming its corporate culture, convinced the United States Attorney not to indict the company.[21] Though the Salomon case did not involve a formal non-prosecution agreement, it provided

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18. *See* Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005); *see also* James K. Robinson, Philip E. Urofsky, & Christopher R. Pantel, *Deferred Prosecutions and the Independent Monitor*, 2 INT'L. J. OF DISCLOSURE & GOVERNANCE 325, 326-327 (2005), *available at* http://www.cwt.com/assets/article/092805DefProsecutions.pdf (last visited Feb. 10, 2008).

19. Fines levied against corporate criminal wrongdoers were generally low until the federal organizational sentencing guidelines were promulgated in 1991. *See* Garrett, *supra* note 2, at 881 n.120 (citing Cindy R. Alexander, Jennifer Arlen, & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. LAW & ECON. 393, 395, 409 (1999)).

20. Orland, *supra* note 6, at 201; *see also* CORP. CRIME REP., *supra* note 1 (quoting Ted Wells, Esq., "Ten years ago, it was—save the individuals and plead the corporation. Now . . . it's totally reversed."). Note that corporate prosecutions nonetheless remained the exception rather than the rule. *See* Garrett, *supra* note 2, at 854-855 (observing that broad federal statutes and vicarious liability standards have long empowered prosecutors in the corporate context, "[b]ut despite their substantial power, federal prosecutors [traditionally] seldom exercised it, out of concern for the collateral consequences to an organization and also the harm to employees, stockholders, and the public."); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 61 (1997) ("[Considering broad liability standards] one would expect vast numbers of convictions of corporations . . . . Yet prosecutions of corporations are rather infrequent."). Prosecutors in this earlier era, indeed, often "defer[red] to the SEC or other federal and state regulatory agencies to bring administrative and civil enforcement actions, with sanctions ranging from injunctions to fines." Robinson, Urofsky, & Pantel, *supra* note 18, at 326.

21. *See* Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement With Salomon Brothers In Treasury Securities Case (May 20, 1992) (quoting then-United States Attorney for the Southern District of New York, Otto Obermaier, "Salomon's cooperation has been exemplary. Such actions are virtually unprecedented in my experience.").

a clear message to companies that full cooperation, and the sincere willingness to clean house, could lead to favorable results.

Two years later, the United States Attorney for the Southern District of New York agreed to defer prosecution of Prudential Securities for securities fraud for three years, in return for substantial internal reforms. This was the first deferred prosecution agreement involving a major company. In many ways the Prudential Securities DPA's influence continues to be felt.[22] At the time, however, the case was seen as "a very special situation"[23]; few prosecutors availed themselves of the new tool of corporate pretrial diversion. According to one estimate, only eight more corporate DPAs and NPAs were executed in the 1990s.[24] Even the United States Attorney who negotiated the Prudential Securities deferral thought it was not something she "was likely to do again."[25] Most prosecutors saw their corporate charging decision as a choice between binary, black-or-white absolutes: indict the company or decline to prosecute. They believed their expertise lay in determining retrospective questions of criminal liability.[26] The gray, uncertain area of deferrals seemed to invite prosecutors to insinuate themselves into prospective corporate governance issues. This was unappealing, especially considering the absence of formal guidance from DOJ regarding organizational prosecutions.[27]

This guidance finally came in 1999 in the form of a memorandum issued by then-Deputy Attorney General Eric Holder titled "Federal Prosecution of Corporations." Holder's Memorandum outlined various factors that prosecutors could consider in deciding the threshold question of whether to proceed against a company. Despite the examples of Prudential Securities and other recent corporate diversion agreements, however, the Holder Memorandum made no formal mention of deferral. DPAs remained rare into the new century.[28]

B. Challenges of the 21st Century

Then came the corporate fraud scandals of the early 2000s. Congress responded

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22. *See* Orland, *supra* note 6, at 213 ("The Prudential agreement, in many respects, has become the blueprint for subsequent deferred prosecution and non-prosecution agreements.").

23. Interview with Mary Jo White, *supra* note 5.

24. Orland, *supra* note 6, at 210.

25. Interview with Mary Jo White, *supra* note 5.

26. *Id.* (describing interviewer's conversation with Otto Obermaier, who described his function in the Salomon case as "prosecuting or declining—period. I did not view myself as a quasi-probation officer to see that persons/entities were obeying the law. In Salomon's case that was the function of the SEC—who was better equip[ed] to do so.").

27. *See* F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121, 130 (1997) (stating that prosecutors in the 1990s were "left to their own discretion, with few if any applicable standards upon which to rely").

28. *See* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 14 (2006) (observing that there were no pretrial agreements in 1999, and only four between the publication of the Holder Memorandum and of the 2003 publication of the Thompson Memorandum).

by passing the Sarbanes-Oxley Act.[29] President Bush established the Corporate Fraud Task Force in July 2002 "to investigate and prosecute significant financial crimes"[30] in the post-Enron, post-WorldCom, post-Adelphia era. United States Attorneys paid new attention to corporate crime, assigning more lawyers to criminal matters and partnering with agencies like the SEC more often from the inception of an investigation.[31] These were but a few of the responses to increased political pressure from the public, and from shareholders, to root out corporate fraud. In reaction to traditional prosecutorial practice, then, a new competing paradigm was emerging: corporations as a whole had to be held responsible for their actions.[32] Merely fining the company no longer seemed a sufficient deterrent to future wrongdoing.

Against this background, the government moved against accounting giant Arthur Andersen for its role in the Enron affair. Arthur Andersen refused initially to accept responsibility for its misconduct and would not agree to major structural reforms. The company's failure to promptly cooperate triggered its indictment in March 2002. Subsequent discussions over a deferred prosecution collapsed, principally because the company viewed prosecutors' demands for cooperation as too onerous.[33] Three months later, a Texas jury convicted the company. The Arthur Andersen episode proved ultimately to be an unmitigated disaster.[34] The compa-

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29. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Sarbanes-Oxley has profound implications for corporate executives, but its ramifications for corporate entities themselves are limited. *See* Orland, *supra* note 6, at 205 ("[The] new Sarbanes-Oxley prohibitions and penalties appear to apply only to individuals, not corporate entities. Sarbanes-Oxley fails to address rules for determining entity liability and does not establish new or increased entity criminal sanctions."). The Sarbanes-Oxley legislation did direct the United States Sentencing Commission to consider revising its organizational guidelines. *See* Pub. L. No. 107-204, § 805(a)(2)(5). The Sentencing Commission guidelines, issued in November 2004, permit the reduction of a fine against an entity if it adopts an "effective" compliance program as defined within the then newly written Chapter Eight of the Sentencing Commission's Manual. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2004). The commentary to these new guidelines also contained controversial language regarding privilege waiver, which the Commission subsequently removed. *See* text accompanying *infra* note 54 & 55.

30. Exec. Order No. 13271 (July 9, 2002), *available at* www.usdoj.gov/dag/cftf/execorder.htm (last visited Feb. 10, 2008).

31. *See* Christopher Wray, *Prosecuting Corporate Crimes*, EJOURNAL USA: ECONOMIC PERSPECTIVES (February 2005), www.usinfo.state.gov/journals/ites/0205/ijee/wray.htm (last visited Feb. 10, 2008); Press Release, U.S. Dep't of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007), http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html (noting that President's Corporate Fraud Task Force has "increased cooperation among federal agencies") (last visited Feb. 10, 2008).

32. *See, e.g.*, Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys (Jan. 20. 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Feb. 10, 2008) [hereinafter Thompson Memo] at Part I(B) (describing the unique benefits that flow from a charge against the corporate entity).

33. Orland, *supra* note 6, at 216; *see also* Greenblum, *supra* note 18, at 1887-1888. Interestingly, Arthur Andersen had executed a DPA with the U.S. Attorney in Connecticut in 1996 to resolve its endorsement of a misleading financial prospectus by Colonial Realty Company. Under the agreement, Andersen paid $10.3 million, was placed on probation for ninety days, and admitted no wrongdoing.

34. *See generally* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006).

ny's indictment "effectively put the eighty-nine-year-old firm out of business and forced tens of thousands of people to find new jobs. It also had a dramatic effect on the accounting industry, by turning the 'Big 5' into the 'Big 4.'"[35]

The implosion of Arthur Andersen highlighted the challenge facing DOJ at the turn of the twenty-first century: to aggressively root out corporate fraud while remaining sensitive to the considerable collateral consequences of moving criminally against an entire entity. Then-Deputy Attorney General Larry D. Thompson announced DOJ's response to this challenge in a memorandum published in early 2003 entitled "Principles of Federal Prosecution of Business Organizations." This memorandum (the "Thompson Memo") superceded the Holder Memorandum. The two guidance documents actually shared much in common; the Thompson Memo added but a few (admittedly significant) lines.[36] The Thompson Memo emphasized that "[t]he main focus of [its] revisions is increased emphasis on and scrutiny of the *authenticity* of a corporation's cooperation" with government investigations.[37] Most relevant here, the Holder Memorandum had stated that prosecutors could consider rewarding a company's cooperation by, among other things, granting it immunity or amnesty. The Thompson Memo added "pretrial diversion" to these two options,[38] thus formalizing DOJ's recognition of an alternative somewhere in between the "all-or-nothing choice between indicting (and destroying) a company and giving it a complete 'pass.'"[39]

The number of executed DPAs and NPAs has burgeoned since the publication of the Thompson Memo.[40] (Since 2003, some of the most prominent companies in

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35. Wray & Hur, *supra* note 6, at 1097. Reports indicate that over 95% of Arthur Andersen's employees had no involvement with the wrongdoing that led to the company's indictment and eventual collapse. *See* Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea By Another Name?*, INSIDE LITIGATION (Winter 2006), http://www.nacdl.org/__852566CF0070A126.nsf/0/E4A884975D0659FB85257210005BD4D1?Open&Highlight=0,deferred (last visited Feb. 10, 2008). Though the U.S. Supreme Court eventually overturned Andersen's conviction, *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005), by that time the company effectively had ceased to exist. Thus, the company's criminal liability will never be fully determined.

36. *See United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (describing the Thompson Memo as a "modest revision"). Perhaps the greatest change was that the Thompson Memo bound the corporate charging decisions of all federal prosecutors, whereas the Holder Memorandum did not. *See id.* The Thompson Memo made clear, however, that prosecutors still retained "wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law." Thompson Memo, *supra* note 32, at 4. For comparisons of the Holder and Thompson Memos, *see* Finder & McConnell, *supra* note 28, at 15; Orland, *supra* note 6, at 207-208; Wray & Hur, *supra* note 6, at 1102-1107.

37. Thompson Memo, *supra* note 32, at preface. *Emphasis added.*

38. *See* Thompson Memo, *supra* note 32, at Part VI(B) ("In some circumstances, therefore, granting a corporation immunity or amnesty *or pretrial diversion* may be considered in the course of the government's investigation.") (emphasis added).

39. Wray & Hur, *supra* note 6, at 1103.

40. The Thompson Memo did not direct prosecutors to negotiate more pretrial diversion agreements; it simply confirmed the status of DPAs and NPAs as arrows in the government's quiver. Whether the Thompson Memo caused more of these agreements to be executed, or is simply correlated with an uptick in their number (against a background of increased concern for corporate fraud), is beyond the scope of this article. At least one relevant policymaker has attributed to the Thompson Memo a causative role. *See* Wray & Hur, *supra* note 6, at 1138

America, including AIG, America Online, Boeing, Bristol-Myers Squibb, HealthSouth, KPMG, MCI, and Merrill Lynch have entered pretrial diversion agreements. Foreign companies like British Petroleum and Smith & Nephew have entered into deferral agreements, as well.)[41] Equally significant, in that time the government has not filed criminal charges against a single major corporation without also having a DPA in place.[42]

C. The Thompson Memo Courts Controversy

The Thompson Memo spoke of the *authenticity* of the company's cooperation. It also expressly mentioned pretrial diversion as a potential "reward" for sincere cooperation. Federal prosecutors were quick to put the two together, entering (and executing) more deferrals, on the one hand, but also demanding more from companies as tokens of "authentic" cooperation, on the other. Two provisions of the Thompson Memo, each with implications for the company's employees, appeared in particular to influence prosecutors' views on the sincerity of a company's cooperation: the guidance concerning privilege waiver,[43] and the guidance concerning the company's payment of individuals' legal fees.[44] Both provisions, and the manner in which prosecutors implemented them, soon became lightning rods for controversy.

In the privilege waiver context, many believed prosecutors were exerting undue leverage in deferral negotiations to force desperate companies (with Andersen on the mind and wishing at all costs to avoid the death sentence of an indictment)[45] to

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(observation of lead author, a former Assistant Attorney General who served under Thompson, that "[t]he Thompson Memo's new and express suggestion to prosecutors to employ such agreements has led to a dramatic increase in their use . . . . "); *see also* Greenblum, *supra* note 18, at n.84.

41. *Forbes* magazine has referred to these and other companies as members of "Club Fed Deferred." *See* Janet Novack, *Club Fed, Deferred*, FORBES.COM, http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html (last visited Feb. 10, 2008).

42. Arguable exceptions include Milberg Weiss Bershad & Schulman (indicted in May 2006) and Reliant Energy Services (indicted in April 2004). Milberg Weiss viewed prosecutors' demands, particularly with respect to waiver of the attorney-client privilege, to be too onerous, and refused to enter into a pretrial diversion agreement—deciding instead to go to trial. *See* Milberg Weiss LLP, Milberg Weiss Justice, www.milbergweiss justice.com/ourstatements.php (last visited Feb. 10, 2008).

Reliant was deemed "uncooperative" in its response to the federal investigation and to suffer from a "corporate culture [that bred] corruption and disrespect for the law." Press Release, U.S. Dep't of Justice, Reliant Energy Services, Inc. and Four of its Officers Charged with Criminal Manipulation of California Energy Market (Apr. 8, 2004), www.usdoj.gov/opa/pr/2004/April/04_crm_223.htm (last visited Feb. 10, 2008). The company finally entered into a DPA with prosecutors in March 2007, in return for the dismissal of the pending indictment.

43. *See* Thompson Memo, *supra* note 32, at Part VI(A) ("In determining whether to charge a corporation, . . . the prosecutor may consider the corporation's willingness . . . to waive attorney-client and work product protection.").

44. *Id.* at Part VI(B) ("[A] corporation's promise of support to culpable employees and agents, . . . through the advancing of attorneys fees . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.").

45. *See, e.g.*, United States v. Stein, 435 F. Supp. 2d 330, 341 (S.D.N.Y. 2006) (describing initial meeting between prosecutors and defense counsel in the KPMG matter and observing, "In an obvious reference to the fate of Arthur Andersen, [counsel] said that an indictment of KPMG would result in the firm going out of business").

compromise not only their shareholders' interests,[46] but also the interests of individual employees.[47] As one defense lawyer observed at the time, "Practitioners' widespread concern, based on experience, [is] that there is a corrosive culture of waiver among prosecutors that is eroding the privilege . . . ."[48] While critics fingered the Thompson Memo[49] as the source of the problem, the Thompson Memo actually had simply re-stated the Holder Memorandum's language regarding waiver.[50] In fact, a number of the dozen or so pretrial diversion agreements negotiated in the 1990s had contained some type of privilege waiver.[51] The defense bar had (rightly, in our view) protested then.[52] Nonetheless, the chorus grew stronger after 2003.

A year later, the United States Sentencing Commission added fuel to the fire. The federal organizational sentencing guidelines had always provided for a reduction in the culpability score that factors in a company's fine calculation so long as the company reported the offense and "fully cooperate[d] in the investiga-

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46. By waiving their attorney-client privilege and work product protections, companies made sensitive material available to prosecutors—thus rendering this material discoverable to third parties who then could use it against the company in civil lawsuits. (Most deferral agreements contain confidentiality and selective waiver provisions, but the vast majority of circuit courts of appeals do not recognize the doctrine of selective waiver.)

47. Waiver implicated individuals to the extent that the government was essentially using the company's internal materials to build and support its case against the company's employees. Prosecutors, naturally, took a different view, seeing waiver discussions as part of a negotiation (rather than an extortion), and as critical in their efforts to discover the underlying wrongdoing. *See*, e.g., Wray & Hur, *supra* note 6, at 1177 ("The line prosecutor undertakes an investigation with the primary goal of learning the facts relevant to the underlying misconduct. His is a practical approach that emphasizes substance over form; he focuses on getting to the bottom of criminal conduct, not on checking off a box on a form marked 'privilege waived.'").

48. Illovsky, *supra* note 6, at 37; *see also* Peter Lattman, *The Holder Memo and Its Progeny*, WALL ST. J. LAW BLOG, Dec. 13, 2006, http://blogs.wsj.com/law/2006/12/13/the-holder-memo/ (last visited Feb. 10, 2008) (quoting Eric Holder, Esq., as saying, "[I]t's maddening. You'll go into a prosecutor's office . . . and fifteen minutes into our first meeting they say, 'Are you going to waive?'"). *But see* Wray & Hur, *supra* note 6, at 1176 (denying a culture of waiver).

49. *See* Illovsky, *supra* note 6; Epstein, *supra* note 7 (blaming the "odious Thompson memo" for encouraging prosecutorial overzealousness); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 129 (2003) ("DOJ policy on corporate charging has led to an erosion of traditional attorney-client and work product protections for those companies hoping to escape indictment, while adversely affecting the interests of employees."). For a concise summary of critiques of the Thompson Memo's privilege waiver provisions, see Wray & Hur, *supra* note 6, at 1172-1174.

50. *Compare* Thompson Memo, *supra* note 32, at Part II(A) (prosecutors will consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection"), *with* Holder Memorandum at Part II(A)(4) (same).

51. *See* Garrett, *supra* note 2, at 954-957. *But see* Finder & McConnell, *supra* note 28, at 18 (observing that "[f]ew pre-Thompson Memo agreements include privilege waiver provisions" and citing to Aetna [1993], Arthur Andersen [1996], Armour [1993], Lazard [1995], and Merrill Lynch [1995] as examples of agreements with no privilege waiver).

52. *See* Philip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, 50 U.S. ATTORNEYS' BULL. 19, 21-22 (2002) (citing examples), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5002.pdf (last visited Feb. 10, 2008); *see also* Wray & Hur, *supra* note 6, at 1175.

tion."[53] In November 2004 the Sentencing Commission amended the commentary to this provision by inserting language suggesting that "full" cooperation may include, and sometimes *require*, privilege waiver.[54] Reactions were heated, with critics contending that the commentary essentially rewarded governmental bullying and gave prosecutors even more license to extract waivers.[55] Heedful of this criticism, the Sentencing Commission in April 2006 voted unanimously to delete the new language. Though this change did not directly constrain prosecutors' pre-charging behavior,[56] the Commission's turnabout indicated a subtle critique of recent prosecutorial practice with respect to privilege waivers.[57]

Around the same time, Judge Lewis Kaplan expressed a far less subtle critique of post-Thompson Memo prosecutorial conduct. Judge Kaplan's criticism lay, however, in a different area: the apparent practice, in the case before him, of federal prosecutors who conditioned acceptance of a deferral agreement with the company, KPMG, on KPMG's agreement not to pay its former employees' legal fees. In a blistering opinion, Judge Kaplan publicly chastised federal prosecutors for holding the "proverbial gun" to the company's head[58] and ruled that they had violated the former employees' Fifth and Sixth Amendment rights.[59] Additionally, he expressed *sotto voce* a critique of KPMG's DPA.[60] Judge Kaplan did not, however, go so far as to void the agreement.[61]

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53. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(2) (2004) [hereinafter U.S.S.G. MANUAL]. The text of section 8C2.5(g)(2) remains the same in the current 2007 version of the Guidelines. *See* U.S.S.G. MANUAL § 8C2.5(G)(2) (2007).

54. § 8C2.5(g)(2), cmt. 12 (2004) ("Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."). The text of comment 12 in the 2007 version of the Guidelines does not include this reference to such waivers. § 8C2.5(g)(2), cmt. 12 (2007)

55. One study has concluded that the Sentencing Commission's actions presaged an increase in the number of waiver provisions found in reported deferral agreements. *See* Finder & McConnell, *supra* note 28, at 28.

56. The Thompson Memo cited repeatedly to the organizational sentencing guidelines as the basis for its authority. One could argue that a change in the language of the sentencing guidelines could thus influence prosecutors' pre-charging decisions. A ready response would be that the Sentencing Commission simply had restored the language of § 8C2.5(g) that existed at the time of the Thompson Memo's publication.

57. A good overview of recent defense bar-initiated, legislative, and judicial efforts to stem the tide against the erosion of the attorney-client privilege can be found in David M. Zornow & Steven R. Glaser, *Are the Times Really A-Changin'? Recent Developments Regarding Privilege Waivers in Corporate Criminal Investigations*, 24 NYSBA INSIDE 8 (Winter 2006); *see also* Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul*, 44 AM. CRIM. L. REV. 53, 83-84 (2007).

58. United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006).

59. *Id.* at 362, 367.

60. *See id.* at 350 (observing that the DPA's cooperation provisions required KPMG to comply with prosecutors' demands "with little or no regard to cost" and left the company "open to the risk" that the government might unilaterally declare a breach, thus triggering the indictment KPMG "has labored so mightily to avoid.").

61. The U.S. Code provides that courts may approve written deferral agreements—a provision that, by implication, seems to suggest that courts may *void* such agreements. *See* 18 U.S.C. § 3161(h)(2) (2000). To our knowledge, this is the only provision in the Code that mentions pretrial diversion. Section 3161(h)(2) appears never to have been invoked by a company to void an agreement, nor interpreted by a court. Moreover, there seems to be no authority for courts to review non-prosecution agreements. The separation of powers implications of

The events of 2006 evidently caught the attention of senior policymakers at DOJ.[62] In December 2006, then-Deputy Attorney General Paul McNulty issued a directive (the "McNulty Memo") that superceded the Thompson Memo.[63] The McNulty Memo squarely addressed the privilege waiver issue, making clear that attorney-client communications should be sought only in rare cases and that any waiver requests had to be authorized by the prosecutor's supervising United States Attorney, by the Assistant Attorney General in charge of DOJ's Criminal Division, and in some cases by the Deputy Attorney General himself. The new guidance also addressed the question of employees' legal fees. As Mr. McNulty noted in a speech, "The new guidelines now generally prohibit prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment." He observed, however, that in "extremely rare cases, fee advancement can be considered where the totality of the circumstances show that it was intended to impede a government investigation."[64]

The McNulty Memo reproduced verbatim the Thompson Memo's single mention of pretrial diversion.[65] Designed to build "transparency into prosecutors' deliberative process" and to "increase[ ] the fairness, discipline, and consistency"[66] of their corporate charging decisions, the McNulty Memo nonetheless failed to provide any further guidance in an increasingly important area: the negotiation of deferred prosecution and non-prosecution agreements.

II. PRETRIAL DIVERSION AGREEMENTS IN 2007

As 2007 dawned, corporate defense lawyers found themselves asking several questions with respect to pretrial diversion agreements. Would their number keep

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corporate pretrial diversion, and the role that courts should play (if any) in the interpretation and enforcement of diversion agreements, are important issues that we do not address in this Essay. For a thoughtful introduction to these issues, *see* Garrett, *supra* note 2, at 913 *et seq; see generally Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?: Hearing Before the Subcomm. on Commercial and Administrative Law*, 110th Cong. (2008) (statement of Mr. George Terwilliger, Partner with White & Case, LLP).

62. The DOJ appeared to recognize earlier that some abuses were possibly taking place under the banner of the Thompson Memo. In October 2005 Acting Deputy Attorney General Robert McCallum issued guidance directing each U.S. Attorney to adopt a written waiver procedure for his or her office. *See* Memorandum from Robert McCallum, Acting Deputy Att'y Gen., to Heads of Department Components & U.S. Attorneys (October 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf (last visited Feb. 10, 2008). McCallum's memorandum required uniformity of waiver policy only within particular districts; it did not require uniformity of policy across the United States.

63. *See* Memorandum from Paul J. McNulty, Deputy Att'y Gen., on Principles of Business Organizations to the Heads of Dep't Components, U.S. Att'ys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (last visited Feb. 10, 2008) [hereinafter McNulty Memo].

64. *See* Paul J. McNulty, Deputy Att'y Gen., Remarks at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006), *available at* http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm (last visited Feb. 10, 2008).

65. *Compare* McNulty Memo, *supra* note 63, at Part VII(B)(1) ¶ 1 *with* Thompson Memo, *supra* 32, at Part VI(B) ¶ 2 (same).

66. Wray & Hur, *supra* note 7, at 309.

increasing? How would the McNulty Memo affect these agreements, if at all? In the continuing absence of any specific guidance from DOJ, how would these agreements evolve? To help answer these questions, we have analyzed all thirty-seven publicly announced corporate diversion agreements negotiated in 2007 by federal prosecutors.[67] Though our data set is almost certainly not comprehensive,[68] it does reveal certain interesting, underlying trends:

A. Continued Devolution of Authority

A small number of United States Attorney's Offices negotiates the vast majority of corporate pretrial diversion agreements.[69] In 2007 these offices included the Southern District of New York (eight); the District of New Jersey (five); the Western District of Virginia (four); the Northern District of California (three); the District of Massachusetts and the District of Columbia (two each); and the Southern District of California, the Southern District of Florida, the Eastern District of New York, and the District of Rhode Island (each with one).[70] The DOJ Criminal Division's Fraud Section entered into ten agreements.[71]

A large percentage of the white collar crimes that are committed surely occurs in the jurisdictions listed above. But the fact that a handful of offices across the nation is driving DOJ policy in this area indicates a continued willingness on the part of the Department's leadership to abdicate its responsibility to provide uniform guidance—a state of affairs critics have described as a "devolution of authority."[72] The ramifications of Main Justice's inactivity in this area are profound. The differences (some subtle, some significant) that one continues to see in the terms of completed agreements suggest that whether a company is offered a DPA, and what the terms of that agreement are, could very likely turn on the luck of the draw

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67. DOJ does not have a policy of publishing all executed corporate diversion agreements, which complicates practitioners' efforts to track trends in these agreements. To compile our list, we reviewed DOJ's 2007 press releases and conducted independent research.

68. That some agreements contain a provision stating that their terms *may* be made public (*see*, e.g., the 2007 Chevron NPA) suggests that certain diversion agreements have likely *not* been made public. Practitioners have confirmed the existence of nonpublic diversion agreements. *See* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View From the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 107, 111 n.14 (2007), http://www.virginialawreview.org/inbrief/2007/06/18/warin.pdf (last visited Feb. 10, 2008) (observing that the authors have provided legal advice regarding DPAs that have never been publicized).

69. Combining data compiled by Garrett, *supra* note 2, Finder & McConnell, *supra* note 28, and ourselves, we calculate that through December 2007 only twenty-five of the ninety-three USAOs have ever entered into a publicly announced corporate pretrial diversion agreement. Of these, the vast majority has entered into only one or two agreements.

70. Of these USAOs, the following offices in 2007 entered into a corporate diversion agreement for the first time: W.D. Va (which negotiated four), D.C. (two), and S.D. Cal (one).

71. Nine of these concerned violations of the FCPA. *See infra* page 176-177. One of these agreements was entered into jointly with the S.D.N.Y.

72. Finder & McConnell, *supra* note 28, at 3.

regarding which office happens to handle the prosecution.[73]

1. A Tale of Two Districts

A comparison between the two USAOs that executed the highest number of pretrial diversion agreements in 2007 reinforces this point. Indeed, these neighboring offices—the Southern District of New York and the District of New Jersey—exhibit considerably different diversionary practices. S.D.N.Y. prosecutors, for instance, deferred only one corporate prosecution (at least publicly) last year; every other agreement their office signed was a non-prosecution agreement. This suggests a continuing reluctance on the part of federal prosecutors serving in the nation's financial capital to choose the deferral option, for reasons that remain obscure.[74] In contrast, the USAO's office of the District of New Jersey—led by Christopher J. Christie, perhaps the most prominent public face of DOJ's recent deferral strategy[75]—chose deferral in four out of its five cases. (Previous to 2007, that office had never before entered into a corporate non-prosecution agreement.) The contrast between these neighboring districts is highlighted when one considers the types of cases at issue. The S.D.N.Y.'s prosecutors, perhaps unsurprisingly, used their diversionary power in matters involving financial improprieties—in money laundering and securities and tax fraud cases, for example. Mr. Christie's office, on the other hand, utilized corporate pretrial diversion only in the context of health care fraud; and it did so with the articulated goal of reforming an entire industry's practices.

To be sure, agreements entered into by these neighboring offices did share some similarities, especially in their remedial aspects. The total amount of fines each office extracted from companies was similar.[76] Additionally, neither office appeared to collect even one dollar from a company in the form of criminal penalties in 2007.[77] But even in some remedial aspects, agreements negotiated in

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73. *See* Warin & Boutros, *supra* note 68, at 108-109 (describing vastly disparate treatment by DOJ of two corporations that committed comparable crimes); *cf.* Garrett, *supra* note 2, at 914 (noting that some *non*-prosecution agreements are actually *more* onerous than DPAs, and characterizing the latter as "sweetheart deals"). Of course, prosecutors do keep tabs on developments occurring in districts other than their own. *Cf.* Christie & Hanna, *supra* note 5, at 1049 ("[O]ur office had never before executed a deferred prosecution agreement. We utilized the work of other districts as a starting point . . . .")

74. Despite having negotiated the first major corporate DPA, S.D.N.Y. prosecutors historically have shied away from deferrals. Of the nineteen publicly announced corporate diversion agreements their office entered into from 1992 through 2007, only five were DPAs. Whether the public embarrassment the office sustained in connection with its negotiation of the KPMG DPA, *see supra* note 58, affects these statistics remains to be seen.

75. Christie & Hanna's article, *supra* note 5, is to our knowledge the most comprehensive justification of DOJ's recent deferral strategy by active DOJ officials.

76. Including civil forfeitures and disgorgement, the S.D.N.Y. imposed fines amounting to roughly $250 million. The D.N.J. imposed fines totaling upward of $300 million. Each district also executed one non-prosecution agreement in which the corporate target paid no penalty at all (Collins & Aikman; Stryker Corporation).

77. *See* DPA/NPA matrix, *infra* pages 190-193. This suggests a departure from the recent trend, observed across the nation, of the imposition through deferral agreements of substantial criminal penalties, many of which

Manhattan differed significantly from those negotiated in Newark. Not one agreement executed by the Southern District's prosecutors in 2007 requires the company to hire a federal monitor or to undergo continuing monitoring. In contrast, every agreement that Mr. Christie's office entered into demands ongoing federal monitoring and supervision.

The basic point is that two districts separated merely by a river utilize pretrial diversion in vastly different ways. The resulting variability of practice places immense pressure on corporate counsel who must be prepared to defend clients in any of the nation's jurisdictions.[78] Indeed, our colleagues in the bar "are finding it increasingly difficult to provide cogent advice and a roadmap of next steps to corporations."[79] (If the foregoing comparison does not provide enough grist for an "accident of geography" critique of DOJ's recent deferral strategy, consider this: the policy of the USAO of the Eastern District of Pennsylvania—yet another neighbor—is not to enter into corporate diversion agreements at all.)

2. Unrelated Terms, Federalism, and Other Considerations

There may be something to be said for allowing experimentation among the prosecutors of different districts across the nation. Certain "best practices" could emerge over time. In addition, the types of companies and industries that predominate in particular districts may properly direct prosecutors' priorities, influence the sorts of crimes they pursue, and require the rejection of a "one-size-fits-all" approach in favor of uniquely tailored resolutions. The absence, however, of *any* guidance from DOJ's senior leadership in this area—even on the basic, fundamental question of when prosecutors should employ a guilty plea, a DPA, or a NPA—creates uncertainty and variability, and it imposes substantial costs on companies, shareholders, and employees.[80] Moreover, the lack of guidance from above may encourage individual USAOs to pursue their own local, parochial

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far exceeded what a court would have imposed under the sentencing guidelines. *See* Lawrence D. Finder & Ryan D. McConnell, *Third Verse, Same as the First*, CORPORATE COUNSEL, Mar. 27, 2007, at 2, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1174912590680 (last visited Feb. 10, 2008). Note, however, that the federal sentencing scheme in general prioritizes the payment of full restitution over the imposition of fines and penalties. *See* 18 U.S.C. § 3572(b) (2000). For more discussion, *see* infra Part II.E., at pages 181-184.

78. *Cf.* Interview with David Pitofsky, *supra* note 7 ("From the perspective of business and defense lawyers, it is very aggravating that the result in Boston can be different from the result in New York, which can be different from the result in Washington.").

79. Warin & Boutros, *supra* note 68, at 108; *cf.* Wray & Hur, *supra* note 7, at 307 ("[W]ildly varying and apparently contradictory charging . . . practices may hamper deterrence and reform . . . . Most companies want to figure out, as quickly as possible, how to maximize their profits within the bounds of the law and conform their behavior accordingly; this becomes dangerously difficult when the government sends murky or conflicting messages.").

80. *See* Paulsen, *supra* note 2, at 1460 (observing that "[i]f a corporation has no clear sense of what employee crimes will be imputed to the entity or what punishment those crimes might produce, the corporation will have difficulty properly allocating its resources"); *see also* Robinson, Urofsky, & Pantel, *supra* note 18, at 338 ("The fact that the government has not announced even informal policies that would provide guidance on what would make a company eligible for a deferred prosecution, what the limits [are] on the sanctions that can be imposed

interests at the company's expense—and to the public's detriment.

Indeed, several corporate diversion agreements in recent years have contained unrelated terms, perhaps intended as socially beneficial, but having little to do with the underlying misconduct.[81] Perhaps the most notorious of these was the provision[82] in the June 2005 DPA between the USAO of the District of New Jersey and Bristol-Myers Squibb that required the company to endow a chair in business ethics at the United States Attorney's law school alma mater, Seton Hall.[83] Other notable examples include the December 2003 DPA entered into between federal prosecutors and the New York Racing Association (NYRA), which obliged the horse racing facility operator to install slot machines at its venues in an effort, wholly unrelated to the underlying tax fraud, to raise revenue for court-mandated improvements in public education[84]; and the March 2004 DPA negotiated between Oklahoma state prosecutors and WorldCom, which (without any evident connection to the underlying fraud) required the company to create hundreds of jobs in the state.[85] As our 2007 data set reveals, recent diversion agreements tend not to contain unrelated terms[86]—a positive trend perhaps attributable to the hostile reaction some of the earlier agreements elicited.

The NYRA example does highlight another, little-examined aspect of corporate pretrial diversion agreements: their implications for federalism. In the NYRA case, "prosecutors' insertion of the [slot machines] clause was clearly intended to placate state officials who were concerned that any form of criminal liability for NYRA could complicate efforts to fund court-ordered spending on the public schools."[87] Federal prosecutors, in other words, used the coercive threat of criminal liability under federal law to advance unrelated state public policy goals.

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through a deferred prosecution, and what remains of the promise of non-prosecution offered by the [Thompson Memo], is disturbing.").

81. *See* Garrett, *supra* note 2, at 938-957 (suggesting that six out of the forty-eight agreements negotiated between 1993 and 2007 that he analyzed contained "unrelated" terms); Greenblum, *supra* note 18, at 1893-1894 (providing examples).

82. *See* Bristol-Myers Squibb deferred prosecution agreement at ¶ 20, *available at* http://www.usdoj.gov/usao/nj/press/files/pdffiles/deferredpros.pdf (last visited Feb. 10, 2008).

83. Prosecutors who negotiated the Bristol-Myers DPA claim that "[t]he idea for endowing the chair originated with counsel for Bristol-Myers." Christie & Hanna, *supra* note 5, at 1058 n.29. For criticisms of the provision, *see, e.g.*, Epstein, *supra* note 7 (describing ¶ 20 of the agreement as an "abuse of power"). Others have defended this provision, either from the perspective that the DPA was freely negotiated and could actually bolster Bristol-Myers's standing in the local community (e.g., Finder & McConnell, *supra* note 28, at 21), or from the perspective that the only other law school in New Jersey, Rutgers, already had an endowed business ethics chair. *See* Peter Lattman, *Seton Hall Announces Drugmaker-Funded Health Law Center*, WALL ST. J. LAW BLOG, Apr. 27, 2007, http://blogs.wsj.com/law/2007/04/27/seton-hall-announces-new-drug-company-funded-health-law-center/ (last visited Feb. 10, 2008).

84. *See* Greenblum, *supra* note 18, at 1877-1878.

85. *Id.* at 1894. When WorldCom failed to create jobs in the state, prosecutors fined it. *Id.* To our knowledge the literature does not contain any analyses of state corporate deferral agreements. This is an area ripe for future research and scholarship.

86. *See* DPA/NPA matrix, *infra* pages 190-193.

87. Greenblum, *supra* note 18, at 1893-1894.

One should query whether the integrity of the federal-state system is respected—and, indeed, whether justice is served—when politically unaccountable agents of the federal government pursue (or are asked to pursue) state and local policy by wielding the heavy hammer of potential indictment against companies, their employees, and their shareholders.[88]

The non-prosecution agreement that Chevron Corporation entered into in November 2007 represents an interesting development in this area. That agreement resolved the company and its subsidiaries' criminal and civil regulatory liabilities relating to their procurement of Iraqi oil under the United Nations Oil-for-Food program. The NPA was the result of "an unprecedented, wide-ranging criminal investigation" into the Oil-for-Food program; representatives from the USAO for the S.D.N.Y. and the Office of the New York County District Attorney (DANY) participated in the probe, in association with other state and federal agencies.[89] As a result, state and federal entities were joint parties to the agreement—the first manifestation of such an arrangement in the corporate diversion context in a dozen years.[90] Perhaps to underscore the convergence of state and federal interests in the settlement, the USAO's press release announcing the NPA specifically noted that DANY concurred in the conclusion "that the agreement with Chevron would be in the public interest."[91] The public and transparent nature of DANY's role in the negotiation and execution of the Chevron agreement might serve as a good template for mitigating federalism-based accountability concerns, especially considering the continued lack of guidance from Main Justice in this area. Though one might understandably raise an eyebrow at an agreement—negotiated in the long shadow of possible federal indictments and in the absence of any guiding light from Main Justice—that directs Chevron to pay $5 million to DANY "to be distributed as the Office of the New York District Attorney sees fit,"[92] payments made to that office will apparently be used to reimburse the costs of the investigation—and nothing more.[93]

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88. *See* Daniel Richman, *Institutional Competence and Organizational Prosecutions*, 93 VA. L. REV. IN BRIEF 101, 102 (2007), http://www.virginialawreview.org/inbrief/2007/06/18/richman.pdf (last visited Feb. 10, 2008) (observing that legitimacy and accountability concerns would be raised if "state and local criminal enforcers [were] bringing cases to federal prosecutors as a way around their state constitutions, sentencing limitations, or intentional fiscal constraints . . . .").

89. Press Release, U.S. Attorney's Office, S.D.N.Y., Chevron Corporation Agrees to Pay $30 Million in Oil-For-Food Settlement (Nov. 14, 2007), http://www.usdoj.gov/usao/nys/pressreleases/November07/chevron-agreementpr.pdf (last visited Feb. 10, 2008) [hereinafter Chevron Press Release].

90. The USAO of the District of Massachusetts and the Massachusetts Attorney General's Office entered into joint NPAs with Aetna [1993], Lazard Freres [1995], and Merrill Lynch [1995]. None of these agreements required the company to admit to any facts or to undertake any activities unrelated to the underlying violation. Payments made to the state were intended to reimburse the costs of the investigation.

91. Chevron Press Release, *supra* note 89.

92. Letter from Michael J. Garcia, U.S. Att'y, S.D.N.Y., to Charles M. Carberry, Esq., at 3 (Nov. 6, 2007), available at http://skaddenpractices.skadden.com/fcpa//attach.php?uploadFileID=50 (last visited Feb. 10, 2008).

93. *See* Press Release, N.Y. County District Attorney's Office (Nov. 14, 2007) (stating that the $5 million will be disbursed to New York City, New York State, and to the District Attorney's Office to cover the costs of the

B. Increasing Application in the FCPA and Health Care Fraud Contexts

The Chevron NPA is a good example of another notable trend that emerged in 2007: the increasing use of diversion agreements in areas outside of the accounting and securities fraud context.[94] Nearly thirty percent of the past year's agreements involved violations of the Foreign Corrupt Practices Act (FCPA); this contrasts brightly with the fact that prior to December 2004, prosecutors appear never to have resolved a corporate FCPA case through pretrial diversion. There is a possibility that the magnitude of the uptick in FCPA-related agreements simply reflects the activity surrounding investigations into the Iraq Oil-for-Food program. Of the twelve relevant agreements entered into in 2007, for instance, six related to Oil-for-Food misconduct.[95] Nonetheless, DOJ leadership has made a considered, coordinated decision to channel more resources to combating FCPA violations.[96] Perhaps not coincidentally, FCPA investigations are one of the few areas in which Main Justice must approve a resolution of the investigation. The Department's Fraud section negotiated all but two of the FCPA-related corporate diversion agreements entered into in 2007.[97]

The past year also witnessed a noteworthy increase in the use of pretrial diversion in the health care fraud context. Nearly one-third of the corporate diversion agreements negotiated in 2007 involved violations of the Anti-Kickback Statute,[98] the Health Care Fraud Statute,[99] or the Food, Drug, and Cosmetic Act (FDCA).[100] This is a remarkable trend, considering that prior to last year, pretrial diversion had been utilized in the health care fraud context only twice: in

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investigation), *available at* http://www.manhattanda.org/whatsnew/press/2007-11-14.shtml (last visited Feb. 10, 2008). As such, the Chevron NPA harkens back to the joint non-prosecution agreements negotiated in Massachusetts in the early 1990s, rather than the NYRA agreement. Note, however, that in most other respects (acknowledgment of facts, compliance measures imposed, etc.) the Chevron agreement is closer to corporate diversion agreements negotiated in recent years than it is to its Massachusetts antecedents.

94. Financial frauds (like securities or accounting violations) are different in kind from other types of corporate crimes. These frauds implicate "the basic information relayed by the company about its financial health and prospects—information that various markets rely upon in evaluating the company." Paulsen, *supra* note 2, at 1453-54; *see also* Interview with David Pitofsky, *supra* note 7, at 12 (distinguishing between the implications of accounting or securities fraud, on the one hand, against all other types of corporate misconduct).

95. These included the Akzo Nobel (DOJ Fraud), Chevron (S.D.N.Y.), El Paso (S.D.N.Y.), Ingersoll-Rand (D.C.), Textron (DOJ Fraud), and York International (DOJ Fraud) agreements.

96. *See* Wray & Hur, *supra* note 6, at 1161 (observing that "[i]n the three years since the Thompson Memo, the Justice Department and SEC have significantly enhanced their investigation and enforcement of FCPA violations"); *see also* Leonard Post, *Deferred Prosecutions on Rise in Corporate Bribery Cases*, NAT'L L.J. (August 17, 2005), *available at* http://www.law.com/jsp/article.jsp?id=1124183109360 (last visited Feb. 10, 2008).

97. *See* DPA/NPA matrix, *infra* pages 190-193. This is not altogether surprising; all of the FCPA-related diversion agreements publicly announced prior to 2007 involved DOJ's Fraud section. Perhaps more newsworthy was the fact that in 2007 an office *other* than the Fraud section entered into a FCPA-related agreement for the first time: the USAOs of the S.D.N.Y. and D.C., which negotiated three agreements in this area. Of the ten diversion agreements that the DOJ's Fraud section negotiated in 2007, nine concerned violations of the FCPA.

98. 42 U.S.C. § 1320a-7b (2000).

99. 18 U.S.C. § 1347 (2000).

100. 21 U.S.C. §§ 331(a) & 333(a)(2) (2000).

December 2005 (the University of Medicine & Dentistry of New Jersey's DPA with the USAO of the D. N.J.) and in October 2006 (InterMune, Inc.'s DPA negotiated with the USAO of N.D. Cal.).[101] The District of New Jersey continues to lead diversion efforts in the health care fraud area; it negotiated five such agreements (4 DPAs and 1 NPA), all with orthopedic device manufacturers, in 2007. Other offices around the nation seem eager, however, to join in the act. The District of Massachusetts negotiated two health care fraud-related DPAs in 2007 (Express Scripts; Pharmacia), and the Western District of Virginia (Purdue Pharma) and the District of Columbia (Maximus Inc.) entered into one each.

Considering the D.N.J.'s USAO's position as a bellwether in the theoretical elaboration[102] and practical implementation of corporate diversion, the agreements it negotiated with the five orthopedic device companies (Biomet, DePuy, Smith & Nephew, Stryker, and Zimmer) merit analysis. Some notable points:

- Each of the agreements covered conduct prohibited by the Anti-Kickback Statute. These agreements represented the first time corporate diversion has been applied in that context.
- Prosecutions under the Anti-Kickback Statute can lead to an entity's exclusion from participation in federal health care programs. Accordingly, New Jersey prosecutors had considerable leverage to dictate the terms of a compliance agreement that traditionally would have been negotiated by the Department of Health and Human Services—Office of Inspector General (OIG).
- Four of the companies entered into DPAs. Stryker Orthopedics, Inc., the first to cooperate,[103] received a NPA and was spared a fine and an OIG monitoring requirement. Stryker still was required, however, to implement all the other reforms imposed on the other companies, including 18 months of federal monitoring.
- Prosecutors apparently did not inform the other companies in advance about Stryker's differential treatment. According to one news report, "the other firms were shocked that Stryker got no fine, because the firms believed that all were receiving the same deal."[104]
- Stryker's NPA did not require the company to admit to any facts or

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101. *See* Wray & Hur, *supra* note 6, at 1168 (observing that DPAs "have been relatively rare in the health care context"). The Bristol-Myers Squibb DPA of 2005 concerned securities fraud violations. The HealthSouth NPA (N.D. Ala.) and the Roger Williams Medical Center DPA (D.R.I.), both negotiated in 2006, concerned accounting and securities fraud violations, and mail fraud (public corruption) violations, respectively.

102. *See* Christie & Hanna, *supra* note 5.

103. *See* Hip and Knee Replacement Press Release, *supra* note 10. The USAO did not provide any other reason for Stryker's differential treatment.

104. Erik Swain, *Questionable Relations with Surgeons Cost Ortho Firms $310 Million*, MEDICAL DEVICE & DIAGNOSTIC INDUS., (Nov. 2007), *available at* http://www.devicelink.com/mddi/archive/07/11/014.html (last visited Feb. 10, 2008).

acknowledge any responsibility for its behavior.[105] The other four companies did acknowledge responsibility[106] and had criminal complaints filed against them generally outlining some of the relevant facts.[107] In their civil settlements with the government, however, each of the four companies "denie[d] that it engaged in any wrongdoing and specifically denie[d] that any of the payments, services, or remuneration were illegal, improper, or resulted in any false or fraudulent claims."[108] To our knowledge, *these DPAs represent the first diversion agreements in which a company was able to negotiate language specifically and affirmatively denying any wrongdoing.*[109] Prosecutors' willingness to agree to such language could benefit companies immensely by mitigating much of their, and their employees', exposure in subsequent prosecutions and civil lawsuits.[110] There may be public relations benefits, as well.[111] For these reasons alone, the orthopedic device agreements represent a major development in white collar defense practice.[112]

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105. Stryker did not, however, escape the obligation to publish on its website details concerning its physician consultants and their payments. *Compare* Stryker NPA at ¶ 38, *available at* http://www.stryker.com/myhsp/groups/jsp/documents/web_art/030682.pdf (last visited Feb. 10, 2008), *with* Zimmer DPA, *supra* note 9, ¶ 41 (same).

106. *See, e.g.*, Zimmer DPA, *supra* note 9, ¶ 4(b).

107. *See, e.g.*, Complaint, United States v. Zimmer, Inc., Mag. No. 07-8130(MCA) (D.N.J. Sept. 27, 2007), *available at* http://www.usdoj.gov/usao/nj/press/files/pdffiles/ZIMMER.PDF (last visited Feb. 10, 2008).

108. Sue Reisinger, *Companies' Denial of Guilt Is New Twist in Prosecution Deals*, CORP. COUNSEL, Jan. 2, 2008, at 9, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1198836303636 (last visited Feb. 10, 2008) (quoting language from the DPAs) (internal quotation marks removed).

109. *Id.* This language contrasts significantly with the non-contradiction language that appears in some recent diversion agreements. *See, e.g.*, Blue Cross/Blue Shield of Rhode Island's December 2007 DPA at ¶ 37, *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/us_v_bcbsri_deferred_prosecution_agreement_dec_2007.pdf; Finder & McConnell, *supra* note 28, at 19-20 (providing examples).

110. Note that there is authority for federal prosecutors' ability to make such concessions. The United States Attorneys' Criminal Resource Manual states that in order to benefit from pretrial diversion, "the offender *must* acknowledge responsibility for his or her behavior, but is not asked to admit guilt." U.S. Dep't of Justice, CRIM. RESOURCE MANUAL § 712(F) (1997) (emphasis added), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm (last visited Feb. 10, 2008). One could respond that this provision governs *individual* diversion agreements only, and that the McNulty Memo instead points prosecutors contemplating *corporate* diversion to a different provision of the U.S. Attorney's Manual, governing non-prosecution agreements. *See* McNulty Memo, *supra* note 63, Part VII(B)(1). *This* provision, however, does not require the offender even to acknowledge responsibility, or to admit to any facts—something practitioners may find to be of considerable interest and relevance to their negotiation preparations. Of course, as Lawrence Finder & Ryan McConnell have observed, this provision also was crafted with individuals in mind, and in any event fits uncomfortably with DOJ's recent corporate deferral strategy. *See* Finder & McConnell, *supra* note 28, at 11 ("The pre-trial diversion procedures in the U.S. Attorney's Manual look nothing like the DPAs and NPAs that we see today."). Simply stated, the theoretical and doctrinal underpinnings for the recent turn in corporate deferrals remain unclear and poorly defined, creating yet another obstacle for defense counsel.

111. *Cf.* Swain, *supra* note 104 (observing that "the public could come to believe that Stryker did nothing wrong").

112. Another noteworthy aspect of the Stryker NPA is that the government has agreed, even in the case of breach, only to pursue criminal conduct subsequent to October 25, 2005. *See* Stryker NPA, *supra* note 105, at ¶ 46. The other four companies, in contrast, could face prosecution for "any federal crimes of which the [USAO] has knowledge"—including kickback violations committed as early as January 2002. *See, e.g.*, Zimmer DPA, *supra* note 9, at ¶ 50.

In sum, our 2007 data indicates that federal prosecutors increasingly have refashioned corporate pretrial diversion from being a tool used principally to combat financial fraud (in the immediate post-Enron, post-Arthur Andersen environment),[113] into an instrument now used more commonly in the FCPA and health care fraud contexts. Whether this trend persists remains to be seen.[114] Even if it does not, one thing is clear: the current trend has largely been driven by the practice and priorities of individual USAOs and particular divisions of DOJ—not by the Department's senior leadership.

C. Fewer Privilege Waiver Provisions

The impact of the McNulty Memo on prosecutorial practice in at least one respect has been fairly immediate: few corporate diversion agreements entered into in 2007 required an outright waiver of attorney-client privilege or work product protections. The orthopedic device agreements, for example, contain express language stating that the assessment of the company's on-going cooperation will *not* turn on its surrender of privileged communications or attorney work product.[115] To be sure, not all agreements were so generous. The Baker Hughes Inc. DPA, for example, permits the company to withhold privileged or protected materials from the government, but the government may in turn "consider this fact in determining whether Baker Hughes has fully cooperated with [DOJ]."[116] At least one agreement publicly announced in 2007—the Vetco/Aibel Group Ltd. DPA—requires complete waiver.[117] There seems little doubt, however, that this agreement, which was filed with the district court on January 4, 2007[118] (though it

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113. Recall language from the President's Executive Order establishing the Corporate Fraud Task Force: "[T]he Task Force shall . . . provide direction for the investigation and prosecution of cases of securities fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses, and other related financial crimes . . . ." Exec. Order 13271, *supra* note 30.

114. An interesting twist on this trend is the recent attention government investigators have focused on possible FCPA violations committed *by health care entities*. *See* T. Clark Weymouth, et al, *Foreign Corrupt Practices Act and the Healthcare Industry*, HOGAN & HARTSON HEALTH UPDATE, February 6, 2008, *available at* http://www.hhlaw.com/newsstand/pubDetail.aspx?publication=3507 (last visited Feb. 10, 2008). These investigations may well give rise to the next round of industry-reforming corporate diversion agreements.

115. *See*, e.g., Zimmer DPA, *supra* note 9, at ¶ 7 ("[full] cooperation shall not require the Company's waiver of attorney-client and work product protections or any other applicable legal privileges"); *see also id.* at ¶ 49(g). This is very different from the 2005 Bristol-Myers Squibb DPA, negotiated by the same USAO, which "forb[ade] the company from asserting privilege at all." Stephanie Martz, *Trends in Deferred Prosecution Agreements*, 29 THE CHAMPION 43, 45 (2005), *available at* http://www.nacdl.org/public.nsf/0/f17e2308452cfeaf852570de0078fd35?OpenDocument (last visited Feb. 10, 2008).

116. *See* Baker Hughes DPA at ¶ 4(a)(iii), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2007/04/CRM_07-296_baker_hughes_042607_def_pros_agree.pdf (last visited Feb. 10, 2008).

117. *See* Vetco/Aibel Group Ltd. DPA at ¶ 4(a), *available at* http://www.corporatecrimereporter.com/documents/deferred.pdf (last visited Feb. 10, 2008); *cf.* Blue Cross/Blue Shield NPA, *supra* note 109, at ¶ 13 (requiring continuing waiver of privileged documents pre-dating the criminal investigation).

118. *See* Vetco/Aibel DPA, *supra* note 117, at page 26.

was not publicly announced for over another month),[119] was negotiated before Mr. McNulty released his new guidance. In the main, then, our data reveals a marked turn away from waiver as a gauge of a company's full and on-going cooperation with the government. Considering one study found more than two-thirds of the DPAs between 2003 and 2006 required privilege waiver,[120] this noticeable departure in prosecutorial practice is a significant, and welcome, development.

The effect this development will have on companies' behavior remains to be seen. There is evidence that in recent years, as privilege waiver became a "virtual requirement"[121] for companies wishing to avoid indictment, "some corporations . . . limited internal investigations to pare down the amount of potential misconduct and proprietary information that [had to] be revealed to the government."[122] To the extent that prosecutors appear now to be requesting waivers less reflexively, more companies may be willing to conduct internal investigations, or at least to structure these investigations in a way that raises fewer waiver issues. Additionally, employees may now have more incentive to disclose wrongdoing if they believe their communications will remain protected.[123] The net result may be enhanced cooperation—and an even larger increase in the number of executed diversion agreements.

D. Increased accessibility

DOJ does not have a uniform policy of publishing the text of corporate pretrial diversion agreements.[124] Some agreements, we know, have never been made public.[125] Others, in an interesting contrast, not only have been publicly released,

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119. *See* Press Release, Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007), http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html (last visited Feb. 10, 2008).

120. *See* Finder & McConnell, *supra* note 28, at 22.

121. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 347 (2007).

122. *Id.* at 345-346.

123. *See* Paul McNulty, Deputy Att'y Gen., Remarks to 11th Annual Corporate Counsel Institute (Mar. 8, 2007) ("Prior to the [release of the McNulty Memo], a key complaint was that our charging policy discouraged self-regulation by stifling candid and clear communication between corporate attorneys, officers, and employees."); *cf.* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 13 (2007-2008) ("Knowing that the corporations may waive the attorney-client privilege, corporate employees may be less likely to report internal corporate problems, to seek advice in resolving possible legal issues, or offer cooperation to internal and external auditors who may be investigating corporate misconduct.").

124. *See* Sue Reisinger, *Did Tommy Hilfiger Corp. Get Special Treatment from DOJ?*, CORP. COUNSEL, June 28, 2006, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1151399124566 (last visited Feb. 10, 2008) (quoting DOJ spokesperson that publication of agreements "is within the discretion of individual U.S. attorney's offices.").

125. *See* Warin & Boutros, *supra* note 68; Reisinger, *supra* note 124.

but must be posted prominently on the company's website.[126] DOJ, meanwhile, usually issues a press release detailing the general terms of negotiated agreements; but the Department is under no obligation to do so. While this uneven state of affairs may benefit the particular company that wishes to avoid adverse publicity and to escape the attention of plaintiffs' lawyers,[127] a policy requiring the publication of the text of every corporate diversion agreement would profit the defense bar as a whole. First, in the absence of any DOJ policy governing diversion agreements generally, the only way defense counsel can keep apprised of developing trends is to monitor and to study the negotiated agreements themselves. Second, the publication of agreements permits counsel to answer important questions about "the degree to which deferred prosecutions reduce recidivism, or the extent to which there is favoritism in handing them out."[128] There are, in addition, public interest benefits to making corporate diversion agreements public. In the case of non-prosecution agreements, for example, where charging documents are not filed, there may be no other public record of the company's misdeeds—giving the misleading impression that the company did nothing wrong[129] and making informed public evaluation difficult.[130]

Critics have complained that certain earlier agreements have been difficult to find.[131] As our 2007 data set suggests, however, the text of most agreements publicly announced last year is available somewhere on the Internet, and the text of nearly every "notable" resolution is readily accessible. Nonetheless, we support proposals for the mandatory disclosure by DOJ of the text of every agreement[132] and of the archiving of each agreement on the Department's website.[133]

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126. *See*, e.g., Zimmer DPA, *supra* note 9, at ¶ 3 ("[T]he Company agrees to post the DPA prominently on the Company website for the duration of the DPA.").

127. In some cases prosecutors, too, "don't want certain information made public because it can affect the progress of an investigation." *See* Interview with David Pitofsky, *supra* note 7.

128. *See* Corp. Crime Rep., *Interview with Benjamin M. Greenblum*, 19 CORP. CRIME REP. 47 (Dec. 5, 2005), available at http://www.corporatecrimereporter.com/greenbluminterview010806.htm (last visited Feb. 10, 2008).

129. *See* quotation at *supra* note 111. As the Stryker example reveals, however, the publication of a non-prosecution agreement that does not contain any factual admissions still can leave the impression that the company did nothing wrong.

130. *See* Orland, *supra* note 6, at 230.

131. *See* Reisinger, *supra* note 124 (observing that the 2006 Hilfiger NPA is still not publicly available); Interview with Benjamin M. Greenblum, *supra* note 128; Orland, *supra* note 6, at 230-231.

132. *See, e.g.*, Orland, *supra* note 6, at 230 (citing the Tunney Act as precedent); *cf.* Interview with David Pitofsky, *supra* note 7 ("[I]t would seem to me that [most agreements] should be made public, since companies and defense counsel look to these results to try to figure out Department of Justice principles and priorities."). Congressman Bill Pascrell, Jr. has gone further, proposing that the terms of all DPAs *as well as of any contracts reached between companies and their federal monitor* be publicly disclosed. *See* Bill Pascrell, Jr., Congressman, Statement of Principles on Deferred Prosecution Agreements, Dec. 17, 2007, http://lawprofessors.typepad.com/whitecollarcrime_blog/files/statement_of_principles_on_deferred_prosecution_agreements_dec_17_2007.pdf (last visited Feb. 10, 2008).

133. One of the most noteworthy DPAs negotiated in recent years, the 2005 Bristol-Myers Squibb agreement, is no longer available on the company's website. (The agreement expired in 2007). Archiving past agreements on DOJ's website would allow practitioners permanent access to these important historical materials.

E. Decreased imposition of criminal fines

A standard feature of many corporate deferrals is the company's agreement to pay substantial monetary penalties, in addition to victims' restitution. Some have criticized these penalties, arguing that the company's innocent shareholders and employees were bearing the costs of the wrongdoers' misdeeds.[134] Others have observed that prosecutors' leverage in deferral negotiations empowers them to extract disproportionately large amounts of money—sums that "may be many times larger than what could be statutorily imposed by a court following conviction."[135] Our 2007 data is somewhat ambiguous on this point. While certain companies paid extremely large amounts to the government—indeed, nearly every diversion agreement imposed civil penalties—a considerably smaller number of the agreements we catalogued required the payment of what were publicly characterized as criminal penalties.

This development raises interesting questions. If prosecutors are increasingly likely not to demand and impose criminal penalties on companies at the pre-charging stage—a positive trend, to be sure—one does have to wonder why prosecutors were at the table in the first place. Where the wrongdoing is essentially civil in nature, what "value" do prosecutors add? Government officials have offered a few responses. One is to say that in large, complicated investigations, each partnering entity, including representatives of the DOJ, "bring[s] to the table unique knowledge [and] skills . . ."[136]—a plausible but unhelpfully vague sentiment. Another is to say that even in cases involving complex regulatory issues, activity darkened by the shadow of some criminal statute's proscriptions is likely to have taken place, making these cases "significant and worthy of criminal enforcement actions."[137] But this response has limited relevance to resolutions *not* involving criminal sanctions; and to the extent it lays bare the realities of a legal environment in which poorly written statutes over-criminalize,[138] and in which

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134. *Cf.* Christie & Hanna, *supra* note 5, at 1059 (acknowledging that fines and penalties provide a measure of deterrence, but also "punish [a] company's shareholders and exact a toll on a company trying to get its corporate house in order").

135. Finder & McConnell, *supra* note 77, at 2; *cf.* Henning, *supra* note 4, at 315 (observing that the monetary penalties imposed on corporations now are "more a matter of bargaining before charges are ever filed" than a finely-calibrated analysis of the appropriate punishment); Ellen S. Podgor, *Do Cooperation Agreements Diminish the Right to a Jury Trial in White-Collar Cases?*, LAW.COM, Nov. 1, 2007, http://www.nacdl.org/public.nsf/whitecollar/WCnews056?OpenDocument (last visited Feb. 10, 2008) (criticizing the disparity in outcome between those who cooperate with the government and those who exercise their constitutional right to trial by jury and are convicted). Note, however, that Professor Podgor argues the deferral process generally produces *better* outcomes for targets because she believes the sentencing guidelines are too harsh.

136. *See* Lester Joseph & John Roth, *Criminal Prosecution of Banks Under the Bank Secrecy Act*, 55 U.S. ATTORNEYS' BULL. 54, 68 (September 2007) (describing DOJ's role in anti-money laundering investigations), http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5505.pdf (last visited Feb. 10, 2008).

137. *Id.*

138. Literature propounding the "overcriminalization thesis" is vast. *See, e.g.*, Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1504 (2007) ("[I]t's clear that federal criminal law has

companies are subject to overly broad vicarious liability standards,[139] it is a non-answer.

Clearly, the relationship between prosecutors and regulators in cases resulting in corporate diversion agreements requires more study. As senior DOJ officials have acknowledged, civil and criminal authorities have in recent years begun partnering earlier in investigations.[140] It is encouraging to see experts from the regulatory agencies involved in these investigations and resolutions; they are far more knowledgeable about corporate governance, and related matters, than prosecutors. At the same time, these partnerships do raise concerns. Government officials, after all, are well aware that the threat of indictment and of prosecution exerts tremendous pressure on companies to cooperate with regulators.[141] Considering the scale of the reforms that diversion agreements impose on companies—and, indeed, across industries, if not the entire economy[142]—there is a very real threat that civil regulators could in quiet concert with prosecutors (and freed from the constraints of normal administrative law principles and procedures) use diversion agreements to reshape these industries.[143] For this reason, the relatively small number of agreements negotiated in 2007 involving the formal payment of criminal fines can be read in two ways. On the one hand, prosecutors seem not to be abusing the tool of diversion to extract more out of a company than the entity would owe after conviction and sentencing. On the other hand, the essentially civil nature[144] of the remedies associated with diversion agreements suggests that prosecutors and regulators might be manipulating the criminal justice system to

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expanded to include a plethora of regulatory matters that simply don't belong in the criminal arena."); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

139. *See* Bharara, *supra* note 57, at 57 *et seq.*

140. Wray, *supra* note 31; Wray & Hur, *supra* note 6, at 1133 (noting the "extent to which civil regulatory and criminal authorities now coordinate their enforcement activities").

141. *See*, e.g., Joseph & Roth, *supra* note 136, at 68 ("[T]he threat of criminal prosecutions assists the bank regulators in their job."); *cf.* Wray & Hur, *supra* note 6, at 1134 (suggesting that a company may be more likely to voluntarily disclose to DOJ the same misconduct it might not self-report to a regulatory agency "lack[ing] the criminal 'hammer'").

142. *See*, e.g., Panel Discussion, *Bigger Carrots and Bigger Sticks: Issues and Developments in Corporate Sentencing*, 11 FORDHAM J. CORP. & FIN. L. 161, 167 (2006) (quoting a senior DOJ official's comment that "[p]rosecuting the corporation . . . provides an opportunity to send a very powerful message of deterrence . . . that can resound throughout an industry . . . and can even have effects across the entire economy"). Note that the five orthopedic device companies that entered into diversion agreements with the USAO of the District of New Jersey in 2007 account for nearly 95% of the market in hip and knee surgical implants. *See* Hip and Knee Replacement Press Release, *supra* note 10.

143. *See* Richman, *supra* note 88, at 102 (observing that serious concerns would be raised if "regulatory agencies were using the strong norm of prosecutorial discretion to circumvent political or legal restraints on their own power so as to . . . extract structural concessions that they would not themselves have been able to achieve through rulemaking or adjudication . . . .").

144. *Cf.* Interview with David Pitofsky, *supra* note 7 (observing that "[w]hen you look at deferred prosecution agreements, they read a lot more like civil consent decrees").

achieve, illegitimately, the ends of sweeping civil structural reform.[145]

Any discussion of the penalties that companies agree to pay through diversion agreements must acknowledge, of course, that the characterization of a fine as "criminal" as opposed to "civil" is not always as meaningful as it may appear on first glance.[146] After all, the company's payment can be structured (and characterized) as "a fine, restitution, forfeiture, or some other category,"[147] depending on the preferences of the negotiating parties. The key criterion is the total amount of money paid. And while the total amount of money paid is often substantial, that cost "has little lasting impact on the company compared to the changes in its internal corporate governance required by the agreements."[148] Thus we turn to the traits of diversion agreements that make them most attractive to prosecutors and to regulators: the widespread internal reforms they impose upon a company, often under the supervision of a federal monitor.

F. Continued Insistence on Internal Reforms and Use of Monitors

Most diversion agreements require companies to "clean house," sometimes by firing wrongdoers,[149] more often by instituting structural management reforms and implementing rigorous compliance programs.[150] Unsurprisingly, virtually every agreement that was entered into in 2007 required the company to redouble its compliance efforts.

More controversial is the requirement embodied in many agreements that the company hire, at its own expense, a federal monitor to help ensure compliance and reduce the number of future violations. Of the thirty-seven agreements negotiated in 2007, nearly one-third requires such a monitor. And as diversion agreements have continued to evolve, the powers of the monitors have continued to expand.[151] Indeed, these monitors possess "wide ranging and often very significant pow-

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145. Our 2007 data set suggests that at least twenty-eight of the diversion agreements executed in the last year reflected the combined efforts of prosecutors and regulators. The actual number could be higher, since the regulatory agency's contribution might go unacknowledged in the final text and terms of the agreement, or in DOJ's official press release.

146. To be sure, whether a fine is characterized as "civil" or "criminal" *does* have reputational effects on a company, as well as significant tax implications. There may also be collateral estoppel considerations, depending on the terms of the executed agreement.

147. Wray, *supra* note 9; *see also* Henning, *supra* note 4, at 315 ("The [company's] payment can be styled as a criminal fine, civil money penalty, or even a payment into a fund to settle shareholder litigation."). The flexibility of terminology is conveyed by differing characterizations of payments owed by Bristol-Myers Squibb under its 2005 DPA. *Compare* Christie & Hanna, *supra* note 5, at 1059 (stating that the agreement "[did] not require Bristol-Myers to pay a fine or penalty") *with* Finder & McConnell, *supra* note 28, at 40 (listing a $100 million civil penalty and a $50 million shareholder penalty).

148. Henning, *supra* note 4, at 315.

149. *See, e.g.*, 2005 Bristol-Myers DPA, *supra* note 82, at ¶ 5(d).

150. *See* Garrett, *supra* note 2, at 860 (describing a "consistent remedial approach [that has] emerged" through the agreements negotiated in recent years and providing examples).

151. *See* Vikramaditya Khanna & Timothy L. Dickson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1720 (2007) (suggesting that "the scope of the monitor's powers is increasing").

ers."[152] The orthopedic device agreements negotiated in 2007 exemplify the considerable powers of the contemporary federal monitor. These agreements specify that the monitor "works exclusively for and at the direction of the [United States Attorney's] Office"[153]; that he or she can review, evaluate, and make recommendations on a wide range of company policies;[154] that he or she can hire consultants, accountants, and other professionals (at the company's expense);[155] and that going forward he or she must be involved in virtually every aspect of the company's relationships with consultants.[156]

The presence of a federal monitor might in some respects benefit a company. As Judge Jed Rakoff recently observed in the *WorldCom* case, "[The monitor] now acts not only as financial watchdog (in which capacity he has saved the company tens of millions of dollars) but also as an overseer who has initiated vast improvements in the company's internal controls and corporate governance."[157] At the same time, the considerable costs that monitoring imposes on a company cannot and should not be ignored. One can legitimately query whether monitor-imposed corporate governance reforms actually enhance shareholder value or promote the general welfare.[158] (The prosecutor-imposed changes to a company's board structures and the entity's new compliance, reporting, and disclosure obligations are subject to a similar critique.)[159] In addition, the simple fact of monitoring can alone cost a company, and its shareholders, millions of dollars. The public filings[160] of one of the orthopedic device manufacturers, for instance, recently revealed that its monitor's firm estimates an average monthly fee between $1.5 million and $2.9 million, with the total value of their agreement potentially reaching $52.2 million.[161] That the typical monitor is a former judge or prosecutor[162]—not a person, in other words, with any particular qualifications to make

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152. *Id.* at 1727.

153. *See, e.g.*, Zimmer DPA, *supra* note 9, at ¶ 16. Note that the monitor works "for" prosecutors—he or she is not independent.

154. *E.g.*, *id.* at ¶ 18.

155. *E.g.*, *id.* at ¶ 19(d).

156. *E.g.*, *id.* at ¶ 19(f)-19(r).

157. SEC v. WorldCom, Inc., 273 F. Supp. 2d 431, 432 (S.D.N.Y. 2003); *see also* Khanna & Dickson, *supra* note 151, at 1729 (noting that "monitor sanctions are not simply all cost").

158. *See*, e.g., Khanna & Dickson, *supra* note 151, at 1728 (observing that ongoing supervision of a company "generally carr[ies] higher social costs" than a cash fine).

159. Resnik & Dougall, *supra* note 4; *see also* John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?* NAT'L L.J., July 25, 2005, at 13 (arguing that because shareholders should have the right to select their own directors, interference by prosecutors in their selections is improper).

160. *See* Zimmer, Inc., Form 8-K filed with the SEC (October 31, 2007), http://files.shareholder.com/downloads/ZMH/200104423x0xS950137%2D07%2D16322/1136869/filing.pdf (last visited Feb. 10, 2008).

161. *See* Tom Hester, Jr., *Report: Ashcroft Firm in Big Money Deal*, BOSTON.COM (Nov. 20, 2007), available at http://www.boston.com/news/nation/articles/2007/11/20/report_ashcroft_firm_in_big_money_deal/ (last visited Feb. 10, 2008).

162. *See* Khanna & Dickson, *supra* note 151, at 1722; Peter Lattman, *Bart Schwartz: Monitor of the Moment*, WALL ST. J. LAW BLOG, Oct. 26, 2007, http://blogs.wsj.com/law/2007/10/26/bart-schwartz-monitor-of-the-

business or corporate governance decisions[163]—simply highlights the magnitude of the problem.[164] Prosecutors, moreover, select most monitors with limited, if any, input from the company;[165] and until March 2008, they did so unconstrained by any DOJ guidelines. As one congressman observed, this was a state of affairs that "invites . . . favoritism, political interference, and back room dealing."[166] Finally, the costs of oversight appear to be potentially limitless: as the example of the 2007 Baker Hughes DPA indicates, prosecutors can demand that companies be subject to continuing monitoring even *after* their agreement has expired.[167]

The costs of federal monitoring are simply one aspect of the substantial overall costs associated with prosecutors' excessive interference in a company's internal governance.[168] Former United States Attorney (and current defense lawyer) Mary Jo White's observation that prosecutors these days are "fashioning themselves as the new corporate governance experts"[169]—positions for which they are singularly unqualified[170]—seems apt. While government officials have acknowledged their unsuitability to "ride herd over a mammoth corporation,"[171] they (and the monitors they appoint) continue to insinuate themselves to an alarming degree into the operations of the companies under their supervision.[172] The orthopedic device agreements, for instance, contemplate that each company will meet with the

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moment/ (last visited Feb. 10, 2008) (observing that "[f]ormer federal judges and prosecutors are in hot demand [to] . . . serve as corporate monitors . . . .").

163. This fact seems to belie the usual justification for hiring a federal monitor: that the monitor is better qualified to assess a company's compliance initiatives and corporate governance reforms than prosecutors are. *See, e.g.*, Interview with David Pitofsky, *supra* note 7 ("One of the reasons why the deferred prosecution agreements require a monitor to be put in place is that the prosecutor's office has no experience or skills to analyze whether a company is reforming its internal governance practices."). *See also* Christie & Hanna, *supra* note 5, at 1055 (same).

164. *See* Martz, *supra* note 115, at 46 (observing that monitoring requirements "essentially put the corporation in receivership with the prosecutor—not even the regulatory [agency] who knows the most about the industry and the entity—acting as receiver").

165. *See* Khanna & Dickson, *supra* note 151, at 1723 ("It is perhaps not a stretch to say that the [government], in effect, chooses the monitor, even though it is the [company] that pays for the monitor's services.").

166. *See* Letter from Congressman Frank Pallone, Jr. to Christopher J. Christie, *supra* note 12.

167. *See* Baker Hughes DPA, *supra* note 116, at ¶ 8 (requiring engagement of a monitor for three years, while the DPA itself contains only a two-year term). It is an open question how this provision could be enforced after the expiration of the DPA.

168. Professor Griffin describes well the nature of these costs. *See* Griffin, *supra* note 121, at 323-325, 334-340.

169. Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 818 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517) (2005).

170. *See* Henning, *supra* note 4, at 315 ("[I]t is questionable whether the government has the expertise to tell corporations how best to govern themselves . . . ."); Interview with David Pitofsky, *supra* note 7 ("[P]rosecutors do two things well—investigate crimes and . . . prosecute crimes. They are not regulatory bodies . . . . Generally, it seems the better practice that regulators should regulate and prosecutors should prosecute.").

171. Christie & Hanna, *supra* note 5, at 1055.

172. In those cases where a federal monitor is not appointed, the direct supervisory role of prosecutors could be that much larger—though some of these cases might involve monitoring by a regulatory agency or some other entity.

USAO for the District of New Jersey every three months to discuss the monitor's compliance reports.[173] The head of that office, moreover, participated in a meeting of independent members of the Bristol-Myers Squibb board in September 2006, just one day before the company's CEO was ousted.[174] That meeting had been called to discuss allegations that the company, which already was undergoing monitoring under the terms of a June 2005 DPA with Mr. Christie's office for "channel stuffing" and other SEC violations, had engaged in unrelated, anti-competitive behavior. The monitor appears to have recommended a change in Bristol-Myers's leadership, and the United States Attorney expressed his support for this view.[175] With the government essentially in its boardroom, and rendered otherwise defenseless, the company acquiesced, jettisoning not only its CEO but also its general counsel.

III. LOOKING AHEAD

The corporate diversion agreements negotiated in the last year illuminate some of the key trends with which defense counsel should be familiar before entering into negotiations with prosecutors. In the coming years, these agreements will continue to evolve, providing practitioners and their clients further insight into the desirability of entering into a DPA or a NPA. Indeed, as more companies emerge from their probationary period, the long-term costs and benefits of prosecutor-imposed changes can be better assessed, and the question of whether the deferral process "works" can be better answered. The passage of time, of course, will also present new challenges. The year 2007, for example, witnessed the first case of a merger between two entities operating under a diversion agreement and supervised by a federal monitor—a situation that has raised a number of novel questions.[176]

Several of the most pressing issues relating to corporate diversion agreements could doubtlessly be resolved by more adequate guidance from DOJ. Adequate guidance would address the range of issues discussed above. It would also address the following specific questions:

- *The place that DPAs and NPAs occupy in the overall spectrum of federal charging policy*—. Some criticize the deferral option for being too lenient on companies. These critics believe deferral is a means for wealthy corporations to evade the accountability and deterrence mechanisms of

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173. *See*, e.g., Zimmer DPA, *supra* note 9, at ¶ 11.

174. *See* Brooke A. Masters, *Bristol-Myers Ousts Its Chief at Monitor's Urging*, WASH. POST, Sept. 13, 2006, at D1.

175. For an in-depth backgrounder on Bristol-Myers Squibb's travails, see Sue Reisinger, *Bristol-Myers Takes Its Medicine*, CORP. COUNSEL, Sept. 20, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1190192572598 (last visited Feb. 10, 2008).

176. *See* Sue Reisinger, *Bank Merger Involving Two Nonprosecution Deals Creates Monitoring Questions*, CORP. COUNSEL, Feb. 1, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1170151364853 (last visited Feb. 10, 2008). The merging banks were the Bank of New York Co., Inc. and Mellon Financial Corp.

criminal conviction.[177] Most observers, however, take the opposite view. They contend that diversion agreements actually have replaced declinations, providing prosecutors with an opportunity to extract a pound of flesh when previously they would have had to settle for nothing.[178] If true, this state of affairs would be deeply troubling. Adequate guidance from DOJ would provide prosecutors with clear directions on when to indict; when to pursue a guilty plea; when to defer; and when to decline prosecution. Such guidance would not only provide much-needed clarity and consistency in this area but also increase public confidence in the deferral process.

- *The interplay between individual liability and entity liability*—. Companies, of course, are subject to broad vicarious liability standards in the criminal context. These liability standards are what bring the company to the negotiating table in the first place. Some critics of DOJ's recent deferral strategy—which, in essence, compels the company's cooperation in order to build a case against individual employees—argue that this tactic amounts to an "inver[sion] of the concept of respondeat superior," resulting in "select midlevel employees [being held] accountable for widespread practices within the institution."[179] This may well be true, and it is a serious concern.[180]

DOJ's deferral tactics, however, can uniquely disadvantage companies, as well. We have heard from colleagues in the defense bar of prosecutors who, in their haste to compel the company's cooperation in pursuit of individuals, have pressed the entity to enter into a diversion agreement before any particular individual's guilt could definitively be established. In such cases, the company is essentially forced to accept the filing of criminal charges

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177. *See, e.g.*, Russell Mokhiber & Robert Weissman, *Defending the Double Standard for Corporate Criminals* (Feb. 2, 2006), *available at* http://www.organicconsumers.org/Politics/criminals060203.cfm (last visited Feb. 10, 2008) (arguing that "it could very well be that the rise of these deferred and non-prosecution agreement deals represents a victory for the forces of big business that for decades have been seeking to weaken or eliminate corporate criminal liability").

178. *See*, e.g., Interview with Mary Jo White, *supra* note 5; Greenblum, *supra* note 18, at 1883 (suggesting that "deferral of corporate offenders is replacing declination, not prosecution . . . ."); Illovsky, *supra* note 6, at 37 (observing that as DPAs become more prevalent, many are questioning whether the government is deferring in cases it otherwise would decline); Robinson, Urofsky, & Pantel, *supra* note 18, at 332 ("[D]eferred prosecution appears to have largely replaced non-prosecution as an option."); Peter Lattman, *Deferred Prosecution Agreements On Trial*, WALL ST. J. LAW BLOG, Aug. 24, 2006 (quoting Gary Naftalis, Esq., that "[t]he government hardly ever declines prosecution of corporations anymore, choosing instead to defer them."), http://blogs.wsj.com/law/2006/08/24/deferred-prosecution-agreements-on-trial/ (last visited Feb. 10, 2008). *But see* Wray & Hur, *supra* note 6, at 1137 (citing recent examples of declinations); *cf.* Resnik & Dougall, *supra* note 4 (suggesting that defense counsel must persuade prosecutors to accept the deferral option); Finder & McConnell, *supra* note 17, at 1 (observing that prosecutors still demand guilty pleas and fines from companies, and citing British Petroleum's 2007 resolution with the government of violations of the Clean Air Act.)

179. Griffin, *supra* note 121, at 333. Of course, even in a case where the company provides the prosecutor with much of his or her ammunition, the prosecutor's burden remains unchanged, i.e., no individual can be held criminally liable unless the government can prove each element of its claim beyond a reasonable doubt.

180. This concern may, however, be less pressing in light of the major reforms initiated by the McNulty Memo concerning privilege waiver and payment of employee legal fees, each of which has positive implications for the investigation and prosecution of individuals.

> (and all the related consequences, including negative publicity); to waive a host of its defenses; to admit to certain facts; to undertake costly remedial measures; and perhaps even to pay serious "criminal" penalties, all *before* the elements of the claim(s) against it can be proven beyond a reasonable doubt. This is a separate and distinct inversion of legal principles, which might implicate the company's rights not only under the due process clause but arguably even under the Sixth Amendment.[181] We believe this aggressive style of "negotiation" to be improper, dovetailing with the concern that prosecutors might improperly be pursuing deferrals in place of declinations. Such tactics appear, moreover, to be a downward departure from usual prosecutorial practice[182]—which, in the diversionary context, is already far from perfect. DOJ leadership should specify the circumstances under which prosecutors can seek corporate pretrial diversion, with particular attention paid to the complex dynamics linking entity liability to individual liability in the criminal context.

These are but two additional areas in which DOJ should provide guidance; no doubt there are others.

The reality is that Main Justice's continuing inaction may already have tipped the balance. While news reports indicate that DOJ quietly initiated an internal policy review regarding diversion agreements in late 2007,[183] the issue already has taken an irreversibly public turn; a congressman from New Jersey recently called for formal hearings in the House Judiciary Committee "on the issue of deferred prosecution agreements . . . and whether there is a need for further [Congressional] oversight of [them]."[184] These hearings were scheduled to take place on March 11, 2008, the day after this Essay was finalized for printing.[185] Additionally, another New Jersey congressman has proposed legislation "[t]o require the Attorney General to issue guidelines delineating when to enter into deferred prosecution agreements, to require judicial sanction of deferred prosecution agreements, and to

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181. *Cf.* Podgor, *supra* note 135 ("[W]hen the risk of a conviction after trial is so distinct from that received for cooperating with the government, it diminishes the right to a trial by jury, an essential part of our constitutional democracy."). Note again that Professor Podgor is writing from the perspective that pretrial diversion generally *benefits* the targets of criminal investigations.

182. *See* Interview with David Pitofsky, *supra* note 7 (observing that normally "[w]hen you start any sort of deferred prosecution conversation, there is no longer any question as to whether the company can be criminally convicted").

183. *See* Philip Shenon, *Ashcroft Deal Brings Scrutiny In Justice Dept.*, N.Y. TIMES, Jan. 10, 2008, at A1; Carrie Johnson, *Mukasey Had Been Overseer Finalist*, WASH. POST., Jan. 30, 2008, at D01.

184. *See* Juan Melli, *Pascrell Urges Conyers to Investigate Christie-style No-Bid Contracts*, BLUE JERSEY (Nov. 26, 2007), http://www.bluejersey.com/showDiary.do?diaryId=6265 (last visited Feb. 10, 2008) (providing full text of November 26, 2006 Letter from Congressman Bill Pascrell, Jr., to Congressman John Conyers, Jr. and Congresswoman Linda Sanchez).

185. *See* http://judiciary.house.gov/oversight.aspx?ID=425 (providing witness list and other information regarding March 11, 2008 "Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?", before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law) (last visited March 10, 2008).

provide for Federal monitors to oversee deferred prosecution agreements."[186] It will be interesting to see how these and related developments unfold.

In light of all these uncertainties, will the diversion option become even more popular in the years to come? Events from 2007 suggest that DPAs are very much on the rise, with prosecutors keen to flex their muscles as the New Regulators. However, increased regulation, whether through internal DOJ guidelines or through congressional oversight, appears to be on the horizon and may well dampen their enthusiasm.[187] Only time will tell.

APPENDIX
2007 CORPORATE DIVERSION AGREEMENTS

Company (U.S Attorney's Office)	Date	NP or DP	Crime	Independent Monitor Req.	Fines	Length	Reg. Agency	DOJ Press Release?	Text of Agreement Available?
Akzo Nobel N.V. (DOJ Criminal Fraud Section)	December 20, 2007	NP	FCPA	No	No criminal fine if settlement reached with Dutch government; $750,000 civil penalty and $2.2 million disgorgement	Unknown	SEC	Yes; http://www.usdoj.gov/opa/pr/2007/December/07_crm_1024.html	No
American Express Bank Int'l. (S.D. Fla)	August 3, 2007	DP	Bank Secrecy Act	No	$55 million civil forfeiture	1 yr	DEA	Yes; http://www.usdoj.gov/criminal/pr/press_releases/2007/08/08-06-07amex-charge.pdf	Yes; http://www.usdoj.gov/dea/pubs/states/newsrel/wdo080607_attachment.pdf
Appalachian Oil Company Inc. (W.D. Va)	January 31, 2007	DP	Conspiracy to commit wire fraud	No	$2.5 million restitution to R. J. Reynolds Tobacco Co.; $255,000 forfeiture	3 yrs	ATF	Yes; http://www.usdoj.gov/usao/vaw/press_releases/appalachianoil_31jan2007.html	No
Baker Hughes Inc. (DOJ Criminal Fraud Section)	April 11, 2007	DP	FCPA	Yes (3 year commitment)	$11 million criminal fine; $10 million civil penalty and $24 million disgorgement	2 yrs	SEC	Yes; http://www.usdoj.gov/opa/pr/2007/April/07_crm_296.html	Yes; http://www.usdoj.gov/criminal/pr/press_releases/2007/04/CRM_07-296_baker_hughes_042607_def_pros_agree.pdf
Biomet, Inc. (D. N.J.)	September 27, 2007	DP	Anti-Kickback Statute (42 U.S.C. § 1320a-7b)	Yes	$26.9 million civil penalty	18 months	HHS; USPIS	Yes; http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf	Yes; http://www.biomet.com/ci/deferred_prosecution_agreement.pdf
Blue Cross & Blue Shield of Rhode Island (D. R.I.; DOJ Criminal Public Integrity Section)	December 13, 2007	NP	Mail Fraud (18 U.S.C. §§ 1341 & 1346))	Yes	$20 million civil penalty	At least 2 yrs	None	Yes; http://www.usdoj.gov/opa/pr/2007/December/07_crm_998.html	Yes; http://lawprofessors.typepad.com/whitecollarcrime_blog/files/us_v_bcbsri_deferred_prosecution_agreement_dec_2007.pdf

186. H.R. 5086, 110th Cong. (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h5086ih.txt.pdf (last visited Feb. 10, 2008).

187. *See also* Richman, *supra* note 88, at 104 (noting evidence that "the Justice Department's commitment to white collar enforcement has been flagging in recent days"); Daphne Eviatar, *What's Behind the Drop in Corporate Fraud Indictments?*, AM. LAWYER (November 1, 2007), *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1193821429242 (last visited Feb. 10, 2008).

Company (U.S Attorney's Office)	Date	NP or DP	Crime	Independent Monitor Req.	Fines	Length	Reg. Agency	DOJ Press Release?	Text of Agreement Available?
British Petroleum (DOJ Criminal Fraud Section)	October 25, 2007	DP	Clean Air Act; Clean Water Act; Commodity Exchange Act; separate guilty plea	Yes	$373 million total ($219 million in criminal fines and restitution + $154 million in civil penalties)	3 yrs	CFTC; USPIS	Yes; http://www.usdoj.gov/opa/pr/2007/October/07_ag_850.html	Yes; http://www.corporatecrimereporter.com/documents/fraud.bp.dpa.pdf
Chevron Corp. (S.D. N.Y.; New York County District Attorney)	November 8, 2007	NP	FCPA	No	$20 million civil forfeiture; $5 million to New York District Attorney; $2 million civil penalty	No limit	OFAC; SEC	Yes; http://www.usdoj.gov/usao/nys/pressreleases/November07/chevronagreementpr.pdf	Yes; http://skaddenpractices.skadden.com/fcpa/attach.php?uploadFileID=50
Collins & Aikman Corp. (S.D. N.Y.)	March 23, 2007	NP	Securities fraud	No	None	Min. 2 yrs	SEC; USPIS	Yes; http://www.usdoj.gov/usao/nys/pressreleases/March07/stockmanetalindictmentpr.pdf	Yes; http://www.corporatecrimereporter.com/documents/nonpros.pdf
DePuy Orthopaedics, Inc. (D. N.J.)	September 27, 2007	DP	Anti-Kickback Statute (42 U.S.C. § 1320a-7b)	Yes	$84.7 million civil penalty	18 months	HHS; USPIS	Yes; http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf	Yes; http://www.depuyorthopaedics.com/content/backgrounders/www.depuyorthopaedics.com/www.depuyorthopaedics.com/pdf/Deferred_pros_agreement_DePuyfinal.pdf
El Paso Corporation (S.D. N.Y)	February 7, 2007	NP	FCPA	No	$5.4 million civil forfeiture; separate $2.25 million SEC penalty	Unknown	OFAC; SEC	Yes; http://www.usdoj.gov/usao/nys/pressreleases/February07/elpasoagreementpr.pdf	No
Electronic Clearing House, Inc. (S.D. N.Y.)	March 27, 2007	NP	Money laundering	No	$2.3 million disgorgement	At least 1 year	None	Yes; http://www.usdoj.gov/usao/nys/pressreleases/March07/echonpapr.pdf	Yes; http://www.secinfo.com/d12Pt6.u9By.c.htm
English Construction Co. (W.D. Va)	March 5, 2007	DP	False Statement	No	$2.5 million civil forfeiture	Unknown	DOT	Yes; http://www.usdoj.gov/usao/vaw/press_releases/english_05mar2007.html	No
Express Scripts, Inc. (D. Mass)	August 21, 2007	DP	Food, Drug, and Cosmetic Act	No	$10.5 million penalty	3 yrs	HHS	No longer available	Yes; http://www.corporatecrimereporter.com/documents/express.pdf
Holy Spirit Assoc. for Unification of World Christianity (N.D. Cal.)	February 12, 2007	NP	Animal Poaching	No	$500,000	Unknown	U.S. Fish & Wildlife Service; others	Yes; http://www.usdoj.gov/usao/can/press/2007/2007_02_12_leopardsharks.sentencing.press.html	No
Ingersoll-Rand Co. (D.C.)	October 31, 2007	DP	Conspiracy to commit wire fraud and violate FCPA	Yes	$2.5 million civil penalty; separate agreement with SEC ($1.95 million civil penalty + $2.27 disgorgement)	3 yrs	SEC	Yes; http://www.usdoj.gov/criminal/pr/press_releases/2007/10/10-31-07_fraud-ingersoll-dpa.pdf	Yes; http://www.usdoj.gov/criminal/pr/press_releases/2007/10/10-31-07_fraud-iri-dpa.pdf

Company (U.S Attorney's Office)	Date	NP or DP	Crime	Independent Monitor Req.	Fines	Length	Reg. Agency	DOJ Press Release?	Text of Agreement Available?
ITT Corporation (W.D. Va)	March 27, 2007	DP	Guilty plea for export and false statement violations; deferral for Arms Export Control Act violation	No	$100 million ($2 million criminal ; $50 million deferred prosecution penalty [suspended for five years]; $28 forfeiture; $20 million penalty to State Dept.)	5 yrs	DoD	Yes; http://www.usdoj.gov/usao/vaw/press_releases/itt_27mar2007.html	No; remedial compliance plan available at http://www.usdoj.gov/nsd/pdf/itt_remedial_action_plan.pdf
Jazz Pharmaceuticals, Inc. (E.D. N.Y.)	July 13, 2007	NP	Food, Drug, and Cosmetic Act; False Claims	No	$12.2 million restitution; $5 million criminal fine; $3.75 million civil False Claims settlement; subsidiary (Orphan Medical) guilty plea	No limit	FDA; HHS	Yes; http://www.usdoj.gov/usao/nye/pr/2007/2007jul13a.html	Yes; http://www.secinfo.com/d14D5a.u4XU3.c.htm#1stPage
Jenkens & Gilchrist (S.D. N.Y.)	March 29, 2007	NP	Tax Fraud	No	$76 million civil penalty	N/A (law firm closed)	IRS	Yes; http://www.usdoj.gov/usao/nys/pressreleases/March07/jenkins&gilchristnppr.pdf	Yes; http://online.wsj.com/public/resources/documents/jenkens0329.pdf
Lucent Technologies, Inc. (DOJ Criminal Fraud Section)	December 21, 2007	NP	FCPA	No	$1 million penalty; related $1.5 million SEC civil penalty	2 yrs	SEC	Yes; http://www.usdoj.gov/opa/pr/2007/December/07_crm_1028.html	
Maximus Inc. (D.C.)	July 23, 2007	DP	Health Care Fraud (18 U.S.C. § 1347)	No	$30.5 million civil penalty	2 yrs	HHS	Yes; http://www.usdoj.gov/opa/pr/2007/July/07_civ_535.html	Yes; http://www.corporatecrimereporter.com/documents/maximusdpa.pdf
Mirant Energy Trading LLC (N.D. Cal)	July 12, 2007	DP	Inaccurate commodities reports	No	$11 million penalty	15 months	CFTC	Yes; http://www.usdoj.gov/usao/can/press/2007/2007_07_12_mirant.agreement.press.html	No
NETeller PLC (S.D. N.Y.)	July 18, 2007	DP	Wire Fraud	No	$136 million disgorgement	2 yrs	None		Yes; http://content.neteller.com/file/NETELLER_DPA.pdf
Omega Advisors, Inc. (S.D. N.Y.; DOJ Criminal Fraud Section)	July 6, 2007	NP	FCPA	No	$500,000 civil forfeiture	Unknown	None	Yes; archived at: http://skaddenpractices.skadden.com/fcpa/index.php?documentID=97&sectionID=42	No
Paradigm B.V. (DOJ Criminal Fraud Section)	September 21, 2007	NP	FCPA	No (retention of outside compliance counsel)	$1 million penalty	18 months	None	Yes; http://www.usdoj.gov/opa/pr/2007/September/07_crm_751.html	Yes; http://skaddenpractices.skadden.com/fcpa//attach.php?uploadFileID=37
Pfizer/ Pharmacia & Upjohn Company, LLC (D. Mass)	March 27, 2007	DP	Health Care Fraud	No	$19.7 million criminal fine; $15 million penalty + 5 yr CIA; separate plea agreement by sister entity	3 yrs	HHS	No longer available; archived at http://media-newswire.com/release_1047476.html	Yes; http://www.corporatecrimereporter.com/documents/pfizernonpros.pdf

Company (U.S Attorney's Office)	Date	NP or DP	Crime	Independent Monitor Req.	Fines	Length	Reg. Agency	DOJ Press Release?	Text of Agreement Available?
Purdue Pharma L.P. (W.D. Va)	May 4, 2007	NP	Food, Drug, and Cosmetic Act	No	$276 million forfeiture; $315 million in other payments; $500,000 criminal fine; subsidiary guilty plea	No limit	HHS; IRS; DoL	Yes; http://www.usdoj.gov/usao/vaw/press_releases/purdue_frederick_10may2007.html	Yes; http://www.vawd.uscourts.gov/PurdueFrederickCo/Exhibit-C.pdf
Reliant Energy Services (N.D. Cal.)	March 6, 2007	DP	Conspiracy to commit Wire Fraud and Commodities Manipulation	No	$22.2 million penalty	2 yrs	N/A		No; basic terms available at: http://yahoo.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFiling HTML1?SessionID=7W80CNVjuQ9_J8Q&ID=5026855
Smith & Nephew, Inc. (D. N.J.)	September 27, 2007	DP	Anti-Kickback Statute (42 U.S.C. § 1320a-7b)	Yes	$28.9 million civil penalty	18 months	HHS; USPIS	Yes; http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf	Yes; http://www.smith-nephew.com/investors/DOJ/Deferred_pros_agreementSNfinal.pdf
Stryker Orthopedics, Inc. (D. N.J.)	September 27, 2007	NP	Anti-Kickback Statute (42 U.S.C. § 1320a-7b)	Yes	None	18 months	HHS; USPIS	Yes; http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf	Yes; http://www.stryker.com/myhsp/groups/jsp/documents/web_art/030682.pdf
Textron Inc. (DOJ Criminal Fraud Section)	August 23, 2007	NP	FCPA	No	$1.15 million fine; $3.5 million in disgorgement and civil penalties in related SEC action	Min. 3 yrs	SEC	Yes; http://skaddenpractices.skadden.com/fcpa//attach.php?upload FileID=32	Yes; http://skaddenpractices.skadden.com/fcpa//attach.php?upload FileID=33
United Bank of Africa (S.D. N.Y.)	July 6, 2007	NP	Obstruction; Money laundering	No	$5.3 million forfeiture	Unknown	None	Yes; http://www.usdoj.gov/usao/nys/pressreleases/July07/unitedbankforafrica agreementpr.pdf	No
Union Bank of California, N.A. (S.D. Cal)	September 18, 2007	DP	Money laundering	No	$10 million fine; $21.6 million civil forfeiture	1 yr	DEA	Yes; http://www.usdoj.gov/opa/pr/2007/September/07_crm_726.html	No; agencies' enforcement actions available at http://www.fincen.gov/union_bank.html
Vetco/Aibel Group Ltd. (DOJ Criminal Fraud Section)	February 6, 2007	DP	FCPA	Yes	$26 million criminal fine	3 yrs	None	Yes; http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html	Yes; http://www.corporatecrimereporter.com/documents/deferred.pdf
Willbros Group, Inc. (DOJ Criminal Fraud Section)		DP	FCPA	Yes	$32.3 million in penalties and disgorgement	3 yrs	N/A	No	No
York International Corp. (DOJ Criminal Fraud Section)	October 1, 2007	DP	FCPA	Yes	$10 million penalty; separate $2 million SEC civil penalty and $10 million disgorgement	3 yrs	SEC	Yes; http://www.usdoj.gov/opa/pr/2007/October/07_crm_783.html	Yes; http://lawprofessors.typepad.com/whitecollarcrime_blog/files/us_v_york_international_deferred_prosecution_agreement_oct_2007.pdf
Zimmer, Inc. (D. N.J)	September 27, 2007	DP	Anti-Kickback Statute (42 U.S.C. § 1320a-7b)	Yes	$169.5 million civil penalty	18 months	HHS; USPIS	Yes; http://www.usdoj.gov/usao/nj/press/files/pdffiles/hips0927.rel.pdf	Yes; http://www.zimmer.com/web/enUS/pdf/Zimmer_DPA.pdf