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THE TRANSFORMATION OF CORPORATE CRIMINAL LAW

*Leonard Orland**

The formal and quite harsh federal rules of vicarious corporate criminal liability remain relatively unchanged since their elaboration by the Supreme Court in 1909.¹ However, in 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 the United States Department of Justice's (Justice Department) new and different attitudes toward the prosecution of corporate crime.²

The first Justice Department development occurred in 2003, with the promulgation of revised criteria for prosecution of corporations—the Thompson Memorandum (Thompson).³ A second less visible, yet potentially more important, Justice Department development occurred in the years following Thompson. Since 2003 (the year of the conviction and disintegration of Arthur Andersen), every major federal case of corporate misconduct has been resolved without filing an indictment against the corporation.⁴ The Justice Department now routinely disposes of charges of corporate misconduct by entering into deferred prosecution or non-prosecution agreements with putative corporate defendants. Between 1992 and 2006, the Justice Department resolved forty-four criminal cases by either a deferred prosecution or non-prosecution agreement.⁵ These agreements are often complex and not always readily available to the

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1. See *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909). See also 10 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4942 (“[I]t is held today, almost universally, that a corporation may be liable criminally for crimes which its agents are capable of committing on its behalf.”).

2. See, e.g., Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen, U.S. Dep’t of Justice, to All Component Heads and U.S. Attorneys, *Federal Prosecution of Corporations* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> [hereinafter Holder Memo].

3. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep’t of Justice, to All Component Heads and U.S. Attorneys, *Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo]. The Thompson Memo is a revision of the 1999 Holder Memorandum. On the changes that Thompson made to Holder, see Elkan Abramowitz & Barry A. Bohrer, *Principles of Federal Prosecution of Business Organizations*, N.Y.L.J., Mar. 4, 2003; Alan Vinegrad, *Federal Prosecution of Business Organizations: the New Guidelines*, N.Y.L.J., Feb. 27, 2003.

4. The indictment of Milberg Weiss is a conspicuous exception to this trend. See Julia Creswell, *U.S. Indictment for Big Law Firm in Class Actions*, N.Y. TIMES, May 19, 2006, at A1. See also *infra* text accompanying note 193.

5. See *infra* Part VI, summarized in Tables I & II (all agreements in Tables I & II are on file with author).

public.⁶ They constitute a sea change in the way the federal government responds to perceived serious corporate misconduct. This essay explores the contours and implications of these profound changes in the administration of corporate criminal law.

I. TRADITIONAL AMERICAN CORPORATE CRIMINAL LAW

The idea of applying criminal law to corporate entities derives from *New York Central v. United States*, a 1909 Supreme Court opinion.⁷ The Supreme Court explicitly based its ruling on the perceived relationship between corporate criminal responsibility and corporate control of the nation's economy.⁸ The Court recognized that "the great majority of business transactions in modern times are conducted through" corporations, and that to "give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually . . . correcting the abuses aimed at."⁹ The Supreme Court perceived "no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction . . . shall be held punishable."¹⁰

In 1958, the Supreme Court extended the *New York Central* vicarious liability rule to partnerships:

[I]t certainly makes no difference whether the carrier which commits the infraction is organized as a corporation, a joint stock company, a partnership or an individual proprietorship. The mischief is the same, and we think Congress intended to make the consequences of infraction the same. . . . The power of Congress hardly is denied. The constitutionality of the statute against corporations is established, and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability and to personify the company so far as to collect a fine by a proceeding against it by the company name. . . . The policy to be served in this case is the same. The business entity cannot be left free to break the law merely because . . . partners in the present [case] . . . do not personally participate in the infraction.¹¹

In practice, the responsibility for the vicarious criminal liability thrust upon corporations by the *New York Central* rule has been quite harsh.¹² Rarely has a corporation successfully defended itself against a criminal charge if the underlying criminal responsibility of the executive has been

6. See *infra* text accompanying note 144.

7. *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

8. *Id.* at 495.

9. *Id.*

10. *Id.*

11. *United States v. A & P Trucking Co.*, 358 U.S. 121, 123–26 (1958) (citation omitted).

12. See William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1299 (2000).

established.¹³ The collective mens rea of multiple executives has been typically combined and attributed to the corporate entity.¹⁴ American courts have rejected defense claims that the corporation is not responsible because the executive conduct was not authorized or was undertaken in violation of corporate policy.¹⁵

Prior to 1960, prison sentences were rarely imposed on convicted corporate executives. Traditionally the corporate punishment imposed on a corporation was a fine. Probation was rarely imposed on corporations. The traditional strategy of corporate criminal defense lawyers was to persuade the government to indict the corporation, not culpable executives. The proliferation of deferred prosecution and non-prosecution agreements changed the default position of corporate defense lawyers who now appear all too ready to sacrifice senior executives in order to save the corporate entity from indictment.¹⁶

II. TRANSFORMATIVE CHANGE: CONGRESSIONAL RESPONSE TO CORPORATE CRIME

Congress has not altered the substantive law of corporate criminal liability. However, Congress enacted two major statutory schemes affecting a corporation facing criminal prosecution: the Sentencing Reform Act of 1984¹⁷ and, in 2003, the Sarbanes-Oxley Act.¹⁸

13. See *infra* text accompanying notes 14, 15.

14. *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (citing *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1964)).

15. See *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1006–07 (9th Cir. 1972). See also generally James V. Dolan & Richard S. Rebeck, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L.J. 547 (1962) (arguing that there are doubts as to whether public policy requires across-the-board imposition of vicarious liability on the corporation for criminal acts of all agents); Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252, 1253 (1996) (“Traditionally, the federal courts have applied the doctrine of respondeat superior, holding corporations vicariously liable for the criminal actions of their employees. Corporations are held liable even where lower-level employees commit crimes without the knowledge of upper management and contrary to express corporate policy or instructions.”).

16. See, e.g., George Stamboulidis & Anjula Garg, Baker Hostetler LLP, *Alternatives To Indictment: Remedial Measures In An Age of Deferred Prosecution and Non-Prosecution Agreements*, in INTERNAL INVESTIGATIONS: LEGAL, ETHICAL & STRATEGIC ISSUES 2006, at 13, 18–20 (PLI Corp. Law and Practice, Course Handbook Series 2006) (providing examples of corporations choosing to replace or terminate employees as part of a deferred prosecution agreement).

17. Sentencing Reform Act, 18 U.S.C. § 3551 (2000).

18. Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 U.S.C.) [hereinafter Sarbanes-Oxley Act].

A. THE RISE AND FALL OF THE SENTENCING GUIDELINES

The Sentencing Reform Act of 1984 created the United States Sentencing Commission.¹⁹ The Commission promulgated mandatory sentencing guidelines for individuals in 1987²⁰ and the Organizational Guidelines in 1991.²¹

The Organizational Guidelines utilize the individual guidelines offense levels in calculating the initial fine and provide detailed guidelines for imposition of fines (the primary sanction), as well as for the secondary sanctions of restitution, remedial orders, and probation.²² The basic scheme of the Organizational Guidelines is that the defendant can avoid the imposition of a significant fine by qualifying for mitigation credits that reward self-policing programs and cooperation with authorities.²³ Additionally, the Organizational Guidelines contain rules for ancillary sanctions such as restitution, compliance programs, and monitors, all of which have become important features of the deferred prosecution and non-prosecution agreements considered below.²⁴

19. See 28 U.S.C. § 991(a) (Supp. III 2003).

20. U.S. SENTENCING GUIDELINES § 2–7 (1987).

The centerpiece of the [1978 individual] Guidelines is a 258-box grid that the Commission calls the Sentencing Table. . . . The horizontal axis of [the] grid, entitled “Criminal History Category,” adjusts severity on the basis of the offender’s prior conviction record. The vertical axis, entitled “Offense Level,” reflects a base severity score for the crime committed, adjusted for those characteristics of the defendant’s criminal behavior that the Sentencing Commission has deemed relevant to sentencing. The Guidelines, through a complex set of rules requiring significant expertise to apply, instruct the sentencing judge on how to calculate each of these factors.

KATE STITH AND JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 3 (1998).

21. U.S. SENTENCING GUIDELINES § 8 (1991). There is a marked contrast between the individual and the organizational guidelines in terms of underlying purpose. As Federal Judge Jed Rakoff has explained, in the late 1980s, when the Commission turned to devising the organizational guidelines, it found that:

[Because] there had been relatively few federal sentences for organizations . . . the historical data was sparse and ambiguous. For similar reasons, it was unclear what inadequacies, if any, had characterized prior organizational sentencing. As for the Congressional mandate, it was debatable whether Congress had required the Commission to promulgate organizational sentencing guidelines at all. Finally, the Commission, perhaps reflecting the more general absence of consensus regarding the goals of corporate criminal liability, was frank to admit that among its members “there was no consensus as to a single theory of organizational sentencing.”

JED. S. RAKOFF, ET AL., CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION § 1.04[2] (2005).

22. See RAKOFF, *supra* note 21, § 2.04.

23. *Id.* § 1.05.

24. The rules for “organizations” specified in the Organizational Guidelines, as well as in *Thompson*, apply to partnerships as well as corporations. See U.S. SENTENCING GUIDELINES § 8B; see also *Thompson Memo*, *supra* note 3.

Between 1989 and 2002, the Supreme Court, in a series of five cases, rejected multiple constitutional attacks on the guidelines.²⁵ But on January 12, 2005, in *United States v. Booker*, a divided Court ruled that the Federal Sentencing Guidelines for individuals were unconstitutional.²⁶ *Booker* contained two separate majority opinions, one authored by Justice Stevens and a second authored by Justice Breyer.²⁷ The mandatory nature of the guidelines, the Stevens majority concluded, deprived individual defendants of their Sixth Amendment right to a jury trial.²⁸ The Supreme Court, however, has never clearly addressed the question of whether a corporation has a Sixth Amendment right to a jury trial.²⁹ It is possible that the Supreme Court, when faced with the issue of a corporation's right to a jury trial, might well conclude that corporations are not protected by the Sixth Amendment. In that event, the *Booker* infirmity would not extend to the Organizational Guidelines.

However, under the Breyer majority, if *Booker* is applied to corporations, the Organizational Guidelines would simply become advisory rather than mandatory.³⁰ In any event, the Organizational Guidelines will remain of continuing importance. The guidelines have been a major factor in the development of the law and practice of corporate compliance and it is

25. See *Harris v. United States*, 536 U.S. 545, 569 (2002); *United States v. Watts*, 519 U.S. 148, 149 (1997); *Witte v. United States*, 515 U.S. 386 (1995); *United States v. Dunnigan*, 507 U.S. 87, 88–89 (1993); *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

26. *United States v. Booker*, 543 U.S. 220 (2005).

27. The opinion on the question of the constitutionality of the guidelines was written by Justice Stevens and joined by Justices Scalia, Souter, Thomas and Ginsburg. The Stevens majority concluded that the Sixth Amendment prohibits a judge from increasing a sentence beyond the sentence that could have been imposed solely based upon facts found by the jury or admitted by the defendant. The Federal Sentencing Guidelines require judges to sentence criminal defendants based on numerous factors, many of which may not be considered by a jury. The Stevens majority thus held that the Sentencing Guidelines violate the Sixth Amendment's guarantee of a jury trial in criminal cases. See *id.* The second opinion, regarding the appropriate remedy, was delivered by Justice Breyer and joined by Justices O'Connor, Kennedy and Ginsburg and Chief Justice Rehnquist. Justice Ginsburg thus provided the fifth vote on both issues. The Breyer majority concluded that the two provisions of the Sentencing Reform Act must be excised to make the guidelines constitutional—(i) the statutory requirement that sentencing courts must impose a sentence within the applicable guidelines range, absent circumstances justifying a departure; and (ii) the statutory provision which establishes standards of review on appeal, including de novo review of departures from the applicable guidelines range. The Breyer majority held that, despite the unconstitutionality of the mandatory nature of the guidelines, the guidelines should nonetheless remain in place as advisory. With respect to appeals, the Court held that the appropriate standard of review for appeals from sentences rendered under the new system articulated by the Court in *Booker* is review for “unreasonableness.” *Id.* at 259–61.

28. See *id.* at 235–36.

29. See Peter J. Henning, *The Conundrum Of Corporate Criminal Liability: Seeking A Consistent Approach To The Constitutional Rights Of Corporations In Criminal Prosecutions*, 63 TENN. L. REV. 793, 866–75 (1996) (tracing the history of the Supreme Court's decisions bearing on a corporation's right to a jury trial).

30. See *Booker*, 543 U.S. at 220.

likely that they will continue to have an impact on corporate governance.³¹ Moreover, the alternative corporate sanctions embodied in the guidelines appear not as conditions of a criminal sentence imposed by a judge, but as agreed upon provisions of corporate deferred prosecution and non-prosecution agreements negotiated between putative corporate defendants and the Justice Department.³²

B. SARBANES-OXLEY

Extraordinary and unprecedented episodes of corporate wrongdoing burst upon the national scene in 2002. Senior executives of Enron, Arthur Andersen, Tyco, Global Crossing, ImClone, Adelphia, and MCI-WorldCom were charged with serious misconduct.³³ In response, Federal Reserve Chairman, Alan Greenspan condemned a “corporate culture” of “infectious greed.”³⁴

The Sarbanes-Oxley Act (Sarbanes-Oxley), Congress’s response to these corporate scandals, was swift and shows the haste of its drafters.³⁵ The vast bulk of the provisions outlined in Sarbanes-Oxley address SEC enforcement, accounting, and corporate governance, not criminal law.³⁶

31. See, e.g., *In re Caremark Int’l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) (discussing the effects of the Organizational Sentencing Guidelines may have on corporate governance).

32. See *infra* Tables I & II.

33. See LEONARD ORLAND, CORPORATE CRIMINAL LIABILITY: REGULATION AND COMPLIANCE § 4.01 (2004).

34. See *Fed Chief Rips Corporate Misconduct*, WALL ST. J., July 17, 2002; see also FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS 190 (2003) (“An infectious greed seemed to grip much of our business community.” (quoting Alan Greenspan to the Banking Committee in 2002)). In the aftermath of the dramatic Enron and WorldCom failures, the American Bar Association created a Task Force on Corporate Responsibility to “examine systemic issues relating to corporate responsibility arising out of Enron and Enron-like situations which have shaken investor confidence.” James H. Cheek, III, Chair, The Task Force on Corporate Responsibility, ABA Resolution, Adopted by the House of Delegates 3 (Aug. 11–12, 2003), available at <http://www.abanet.org/leadership/2003/journal/119c.pdf>. See also N.Y.S.E., Corporate Accountability and Listing Standards Committee 1 (June 6, 2002), available at http://www.nyse.com/pdfs/corp_govreport.pdf. “[I]n the aftermath of the ‘meltdown’ of significant companies due to failures of diligence, ethics and controls,” the New York Stock Exchange Corporate Accountability and Listing Standards Committee promulgated rigorous new rules “to raise corporate governance and disclose standards.” *Id.*

35. On July 25, 2002, WorldCom disclosed a \$3.85 billion accounting restatement. The same month, a bill offered by Senator Paul Sarbanes was passed by the Senate by a vote of 97-0. Within ten days, a House-Senate Conference Committee agreed on the bill, and by month’s end, Congress enacted the Sarbanes-Oxley Act, which the President signed on July 30, 2002. See ORLAND, *supra* note 33, § 4.01.

36. The Sarbanes-Oxley Act restructures the regulation of accounting through the creation of a new Public Company Accounting Oversight Board, under the SEC, with broad investigatory and enforcement powers. Sarbanes-Oxley also imposes new restrictions on the practice of accounting and reforms corporate governance and disclosure by mandating prompt corporate disclosure of material changes in corporate financial conditions and sharply limiting corporate loans to executives. The Act also requires the SEC to promulgate rules for professional conduct of accountants and lawyers. The statute reforms the corporate civil litigative process by extending

However, Sarbanes-Oxley also contains a number of important criminal provisions which create new criminal offenses³⁷ and increase the penalties for preexisting and newly created crimes.³⁸ These new Sarbanes-Oxley criminal prohibitions and penalties appear to apply only to individuals, not corporate entities.³⁹ Sarbanes-Oxley fails to address rules for determining entity liability and does not establish new or increased entity criminal sanctions.

Since the enactment of Sarbanes-Oxley, corporate criminal prosecutions and convictions continue to be a major focus of the Justice Department, spearheaded by the Justice Department's Corporate Fraud Task Force.⁴⁰ The Task Force's efforts have resulted in a large number of indictments and convictions of corporate executives including executives of Enron, MCI-WorldCom, Adelphia, Rite-Aid, and HealthSouth, all of which were the focus of sustained public attention.⁴¹

the statute of limitations for securities fraud cases and establishing broad new protection for whistle-blowers. The Act also creates new criminal offenses with substantial penalties, increases maximum penalties for preexisting crimes, broadens the offense of document destruction and doubles the maximum penalties for that offense. The Act requires chief executive and financial officers to certify financial results and imposes substantial penalties for misleading certifications. *See id.* §§ 4.03, 4.06.

37. *See id.* § 4.06[C].

38. *See id.* § 4.06[B].

39. *See* Sarbanes-Oxley Act § 8–11, 15 U.S.C. § 7201 (Supp. II 2002).

40. The Justice Department Corporate Fraud Task Force, created by executive order in 2002, has as its mandate to “investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes.” Exec. Order No. 13271, 67 Fed. Reg. 46,091 (2002) (Establishment of the Corporate Fraud Task Force); *see also* SECOND YEAR REPORT TO THE PRESIDENT: CORPORATE FRAUD TASK FORCE (July 20, 2004), *reprinted in* CORPORATE COUNSEL FORUM 2005: WHAT YOU NEED TO KNOW ABOUT CORPORATE LIABILITY & GOVERNMENT ENFORCEMENT 545 (Michael E. Horowitz & Leonard Orland eds. 2005).

41. Between March 2003 and July 2004, federal prosecutors filed criminal charges relating to nineteen major corporate fraud scandals. . . . The charges were filed in sixty-nine separate but often related prosecutions naming more than a hundred twenty-five defendants During the same time frame, prosecutors successfully concluded cases against two-thirds of the defendants. With the exception of four acquittals and two dismissals, all of the dispositions . . . are either guilty pleas or jury convictions.

Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 246 (2004–2005) (citations omitted). The Chairman of the Corporate Fraud Task Force summarized the results in these terms:

[S]ince the inception of the Task Force through May 31st of this year [2004], Justice Department prosecutors, working hand-in-hand with regulatory Task Force members, and investigators from the Federal Bureau of Investigation, the Internal Revenue Service's Criminal Investigation division, and the U.S. Postal Inspection service have: (1) Obtained over 500 corporate fraud convictions or guilty pleas. (2) Charged over 900 defendants and over 60 corporate CEOs and presidents with some type of corporate fraud crime in connection with over 400 charged cases. . . .

SECOND YEAR REPORT, *supra* note 40, at 549. Many of the prosecutions in the 2004 period arise from major corporate scandals. For example, Adelphi generated several prosecutions, Enron thirty-one prosecutions, HealthSouth nearly twenty prosecutions and WorldCom six prosecutions. Substantively, the major statutes most frequently invoked were conspiracy, securities fraud, wire

The most important post-Sarbanes-Oxley development has been the proliferation of corporate deferred prosecution and non-prosecution agreements, coupled with indictments of senior management, including Chief Executive Officers, Chief Financial Officers, and General Counsels, of the corporations that were the beneficiaries of the corporate agreements.⁴² Consequently, the focus of corporate criminal prosecution shifted from the corporate entity to the corporate executive.

III. TRANSFORMATIVE CHANGE: THE JUSTICE DEPARTMENT AND THE THOMPSON MEMO

A. PROSECUTORIAL DISCRETION

Discretionary decision-making permeates the American system of criminal justice. The discretionary power to prosecute or to decline prosecution “has traditionally been exercised *sub rosa* and on an *ad hoc* basis, and has thus remained largely unstructured.”⁴³ “[P]rosecutors are not held to anything remotely like what due process would require if they were engaged in an acknowledged rather than a hidden system of adjudication.”⁴⁴ Prosecutors enjoy a unique position in the American criminal justice system since their decisions to prosecute, or not to prosecute, are not subject to judicial review. As Judge Richard Posner explains:

A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them. Prosecutorial discretion resides in the executive, not the judicial branch, and that discretion, though subject of course to judicial review to protect constitutional rights, is not reviewable for a simple abuse of discretion.⁴⁵

Repeatedly, the Supreme Court has reinforced this immunity from judicial review:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the [government’s] case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not

fraud, false books and records, false statements, mail fraud, obstruction of justice, insider trading, money laundering and tax fraud. *See id.* at 558–59.

42. *See infra* Tables I & II.

43. Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. 532, 537 (1970).

44. James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1554–55 (1981).

45. *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992).

readily susceptible to the kind of analysis the courts are competent to undertake.⁴⁶

All prosecutors, state and federal, exercise considerable discretion; however, federal prosecutors exercise a much broader discretion than their state counterparts.⁴⁷ Under the theory of respondeat superior, the very nature of corporate crime further enhances federal prosecutorial discretion. That is, if a corporate executive or employee violates the criminal law to benefit the corporation, the vicarious liability of the corporate entity for that conduct is virtually automatic. Moreover, most corporate criminal conduct, in addition to violating the criminal law, also violates administrative and civil regulatory processes. This confluence of criminal and civil regulatory systems thrusts upon the federal prosecutors unusual discretionary powers regarding whether the corporation, as well as corporate individuals, should be prosecuted.⁴⁸ This factor imposes onto the federal prosecutors the special responsibility of carefully weighing the adequacy of available non-penal remedies before deciding whether or not to indict the corporation.⁴⁹

The very threat of corporate indictment enables federal prosecutors to achieve far-reaching and otherwise unattainable comprehensive settlements not only by deciding to prosecute but also by deciding *not* to prosecute, either by declining or deferring prosecution.

B. STRUCTURING PROSECUTORIAL DISCRETION IN CORPORATE CRIME CASES

For some time, the Justice Department has articulated general principles to guide United States Attorneys in the exercise of their discretion.⁵⁰ In 2000, the Justice Department refined its prosecutorial priorities in corporate crime cases with the Holder Memorandum, *Federal Prosecution of Corporations*, designed to “provide[] guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation.”⁵¹ Holder was revised in 2003; its successor was Thompson.⁵² A former United States Attorney explained the crux of the 2003 revision:

Mr. Thompson’s revision of the Holder Memorandum makes clear that a number of changes have been made in direct response to the recent spate of corporate fraud cases. . . . [T]he recent modifications to these guidelines

46. *Wayte v. United States*, 470 U.S. 598, 607 (1985). *See also* *United States v. Batchelder*, 442 U.S. 114, 115 (1979) (“Whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor’s discretion.”).

47. *See* Gerald Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136–37 (1998).

48. *See* ORLAND, *supra* note 33, § 6.02.

49. *See id.*

50. *See* U.S. DEP’T OF JUSTICE, U.S. ATT’Y MANUAL 9-27.000 (2006) [hereinafter U.S.A.M.].

51. Holder Memo, *supra* note 2.

52. *See* Thompson Memo, *supra* note 3.

make clear that a corporation seeking to avoid federal prosecution through cooperation may have a tougher row to hoe.⁵³

Under Thompson, the Justice Department's central focus when deciding whether or not to prosecute a corporation is an appraisal of the extent of the corporation's cooperation with the government.⁵⁴ "Cooperation" is frequently interpreted by the Justice Department to involve waiver of privilege and assistance in prosecuting corporate executives.⁵⁵

Thompson enumerates nine specific factors which "prosecutors should consider . . . in reaching a decision as to the proper treatment of a corporate target."⁵⁶ The factors are:

1. the nature and seriousness of the offense . . .
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management . . .
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions taken against it . . .
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection . . .
5. the existence and adequacy of the corporation's compliance program . . .
6. the corporation's remedial actions, including any efforts to implement an effective compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies . . .
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution . . .
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance . . .
9. the adequacy of remedies such as civil or regulatory enforcement actions.⁵⁷

53. Vinegrad, *supra* note 3.

54. See Thompson Memo, *supra* note 3. The Thompson Memo states:

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of the corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation.

Id.

55. See, e.g., *id.*

56. Thompson Memo, *supra* note 3.

57. *Id.*

Thompson also declares that: “In gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness . . . to waive attorney-client and work product protection.”⁵⁸

Beyond its initial purpose of guiding the decision whether or not to indict the corporation, Thompson, combined with the Organizational Guidelines, has become a blueprint for the restrictions embodied in deferred and non-prosecution agreements.

IV. TRANSFORMATIVE CHANGE: THE JUSTICE DEPARTMENT, DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

A. VARIETIES OF ALTERNATIVES TO PROSECUTION

The Justice Department has a “wide-array of options available” once it concludes that there is sufficient evidence to bring a case against a corporate entity. Christopher J. Christie, the United States Attorney for the District of New Jersey explains the options available to the government in these terms: “Corporate fraud cases present prosecutors with a particularly complex mix of considerations to analyze and ultimately balance in order to appropriately resolve allegations of corporate wrongdoing. The range of options available to prosecutors in the corporate context is broad.”⁵⁹

The charging options available to the Department are:

1. “Proceed with the prosecution by seeking an indictment or entering into a plea agreement with the company;”
2. “Decline to prosecute the company on public-policy grounds (‘declination of prosecution’);”
3. “Enter into a deferred prosecution agreement with the company; or”
4. “Enter into a non-prosecution agreement with the company.”⁶⁰

For the corporation under criminal investigation by the Justice Department, the choice of options is potentially “the difference between life and death for a corporation.”⁶¹ A corporate indictment is a highly publicized event and a corporate plea agreement is subject to public judicial control. In contrast, a declination of prosecution is rarely accompanied by a public announcement from the Justice Department. When the Justice Department

58. *Id.*

59. 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, 1043 (2006).

60. F. Joseph Warin & Peter E. Jaffe, *The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal For Reform*, ANDREWS LITIGATION REPORTER: WHITE COLLAR CRIME, Sept. 2005, at 3.

61. Christopher A. Wray, Assistant Attorney Gen., Criminal Div., Prepared Remarks to the Ass’n of Certified Fraud Examiners, Mid-South Chapter (Sept. 2, 2004), available at http://www.justice.gov/criminal/press_room/speeches/2004_2954_rmks2CFC_TN090204.pdf.

goes beyond simple declination and enters into a formal non-prosecution agreement, that agreement is frequently, but not universally, made public. The most formal of federal alternatives to corporate indictment is the deferred prosecution agreement. The indictment or information remains open during the deferral period.

The basic difference between a deferred prosecution agreement and a non-prosecution agreement centers on the contingent threat to the corporation in the event of a perceived violation of the agreement:

In a [non-prosecution agreement], no charge is filed in court, but the government can still file and prosecute a charge later if the company violates the terms of the deal. In a [deferred prosecution agreement], the government files the criminal charge in court but doesn't prosecute the claim. If the company abides by the terms of the DPA, the government dismisses the charge when the agreement expires. If not, the government can prosecute the already-filed charge.⁶²

"In contrast to the far more rigid sentencing process," United States Attorney Christie explains:

[D]eferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us[, the government,] to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools permit remedies beyond the scope of what a court could achieve after a criminal conviction.⁶³

B. THE RISE OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

Since 1993, the Justice Department has resolved corporate criminal investigations not by issuance of an indictment, but by entry into corporate deferred prosecution and non-prosecution agreements.

62. Sue Reisinger, *By Any Other Name . . .*, CORP. COUNS., Sept. 19, 2006. On occasion, it is difficult to determine if an "agreement" is a deferred prosecution or non-prosecution agreement. For example, Prudential Financial, Inc. signed "what it thought was a non-prosecution agreement" ending a three year probe into illegal mutual fund activity committed by its Prudential Equity Group. *Id.* However, Deputy Attorney General Paul McNulty describes the agreement as a deferred prosecution agreement. *See id.*; Deputy Attorney Gen. Paul J. McNulty, Remarks at Press Conference Regarding Prudential Equity Group Securities Fraud Allegations, Washington, D.C. (Aug. 28, 2006), available at http://www.usdoj/dag/speech/2006/dag_speech_060828.htm. In fact, the language of the agreement reflects the harsher penalties typically seen in deferred prosecution agreements, yet, like non-prosecution agreements, no charges were filed or pending against Prudential.

63. Christie & Hanna, *supra* note 59, at 1043.

TABLE A. NUMBER OF FEDERAL NON-PROSECUTION AND DEFERRED PROSECUTION AGREEMENTS FILED

YEAR	NON-PROSECUTIONS	DEFERRED PROSECUTIONS
1993	3	1
1994	1	1
1995	2	0
1996	1	1
2001	1	1
2002	0	1
2003	2	4
2004	1	5
2005	6	4
2006	3	6
TOTALS	20	24

These non-prosecution and deferred prosecution agreements are complex and constitute a sea change in the way the federal government responds to perceived serious corporate misconduct. An understanding of this development requires examination not of statutes, cases, or regulations, but of the negotiated agreements themselves.

Deferred prosecutions, by utilizing statutory or judicially crafted pretrial diversion programs, are commonplace in state judicial decisions.⁶⁴ Deferred prosecution is also explicitly authorized by both a federal statute⁶⁵ and the United States Attorneys' Manual.⁶⁶ Pretrial diversion and deferred prosecution, under these programs, are typically crafted for first offender street criminals, and, historically, have rarely been used for white collar offenders. Indeed, prior to 1993, deferred prosecution had not been used to resolve federal criminal charges against corporations. The genesis of the current proliferation of deferred and non-prosecution agreements in corporate criminal law may be traced to two important settlements in the Southern District of New York in the 1990s involving Salomon Brothers and Prudential Securities.

64. WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, *CRIMINAL PROCEDURE* § 13.1(d) (4th ed. 2004).

65. *See* Speedy Trial Act of 1974, Pub. L. No. 93-619, §§ 3152-3154, 88 Stat. 2076, 2086-88 (1975) (codified as amended at 18 U.S.C. §§ 3152-3154 (2000)).

66. U.S.A.M. 9-22.010 (1997).

C. PROGENITORS: SALOMON BROTHERS AND PRUDENTIAL SECURITIES

1. Salomon Brothers

The government charged Salomon Brothers, a primary dealer in Treasury Notes, with engaging in a conspiracy to coordinate trading activity in Treasury notes in order to affect prices in the secondary and financing markets.⁶⁷ The company submitted false bids and subverted notes to circumvent the Treasury Department's 35% cap for single buyer purchases of notes. The misconduct resulted in the criminal prosecution of one senior executive, the resignation of another senior executive, and civil actions against the entity, which were then settled by the SEC and Antitrust Division consent decrees.

No criminal charges were brought against Salomon Brothers. Despite the absence of a formal agreement by the government not to prosecute, the disposition of the charges against Salomon contained the basic components of future formal agreements, including:

1. The indictment and conviction of a senior manager;⁶⁸
2. The resignation, under pressure, of senior management, including Salomon's President and Chief Executive Officer;⁶⁹
3. Civil settlements with the SEC and the Antitrust Division, which imposed a total of \$290 million in sanctions, forfeitures and restitution, (which include \$122 million in civil penalties, \$50 million in forfeitures, \$18 million in restitution, and \$100 million to fund claims and costs);
4. An appointment of an administrator to direct the restitution compensation fund;
5. Cooperation with the government investigation, including disclosure of the corporation's internal investigation;
6. An obligation to continue cooperation with the government investigations;
7. And the institution of corporate reforms to prevent recurrence of the violation.⁷⁰

67. ORLAND, *supra* note 33, § 6.06[A]. *See also* Press Release, Dep't of Justice, Department of Justice and SEC Enter \$290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), *available at* http://www.usdoj.gov/atr/public/press_releases/1992/211182.htm.

68. Paul Mozer, head of Salomon's government bond trading desk, pled guilty to making false statements to the government and spent four months in prison. Mozer also paid \$1.1 million in civil penalties to the SEC. *See* ORLAND, *supra* note 33, § 6.06[A] (citing Letter from U.S. Attorney's Office, Southern District of New York to Honorable Pierre N. Leval, Dec. 10, 1993).

69. Mozer's superior, John Meriwether, and Salomon's Chief Executive Officer both resigned under pressure. *Id.* (citing Letter from U.S. Attorney's Office, Southern District of New York to Honorable Pierre N. Leval, Dec. 10, 1993).

In a press release, United States Attorney Otto Obermaier stressed Salomon Brothers' undertakings for reform and the sanctions imposed. He explained that:

Salomon had cooperated extensively in the investigation and had taken decisive and extraordinary actions to restructure its management to avoid future misconduct. The cooperation included providing detailed information concerning the firm's own internal investigation, turning over documents and making employees available for interviews and testimony. . . . "Such actions are virtually unprecedented in my experience."⁷¹

2. Prudential Securities

The 1994 deferred prosecution agreement entered into by Mary Jo White, United States Attorney for the Southern District of New York, and Prudential Securities is the nation's first comprehensive formal federal corporate deferred prosecution agreement. The Prudential agreement, in many respects, has become the blueprint for subsequent deferred prosecution and non-prosecution agreements.⁷² The agreement arose from a criminal complaint charging Prudential Securities with a violation of § 10(b) of the 1934 Securities Exchange Act by fraudulently selling \$1.4 billion worth of limited partnerships in oil and gas.⁷³

Notwithstanding the seriousness of the charges, the United States Attorney announced an agreement to defer prosecution for a period of three years. In that agreement, Prudential undertook important corporate restructuring and established extraordinary internal monitoring mechanisms, including the appointment of an experienced former Federal Judge as an outside director and ombudsman with reporting responsibilities not only to the Prudential Board, but also to the United States Attorney. Specifically, under the Deferred Prosecution Agreement, Prudential had the following obligations:

1. Payment of \$330 million into a special fund established by the SEC for investors who purchased the Prudential oil and gas limited partnerships with any fund in excess of investor claims to be paid to the United States and an additional sum of \$330 million to compensate innocent investors.
2. The installation of an independent "ombudsman" to receive allegations of misconduct by any Prudential employee and to file

70. *Id.*

71. Press Release, Dep't of Justice, *supra* note 67 (quoting Otto Obermaier, United States Attorney for the Southern District of New York).

72. See Letter from Mary Jo White, U.S. Attorney for the Southern District of New York, to Scott W. Muller & Carey R. Dunne, Counsel for Prudential Sec. Inc. (Oct. 27, 1994). See also ORLAND *supra* note 34, § 6.06[A], [B].

73. See ORLAND, *supra* note 33, § 6.06[B].

quarterly reports with the United States Attorney of any such allegations. (Former Federal Judge Kenneth Conboy was appointed ombudsman).

3. The retention of an independent law firm acceptable to the government to review Prudential's policies and procedures to determine the adequacy of its regulatory and compliance controls. (Allen Levensen, a senior partner in Fulbright and Jaworski was selected).
4. Full and truthful cooperation in any criminal investigation, including voluntarily providing any requested records and unlimited access to Prudential's facilities, documents, and employees.
5. Undertakings by Prudential's parent groups to take appropriate steps to further Prudential's compliance.
6. Public acknowledgment by Prudential of its wrongdoing.⁷⁴

In announcing the Deferred Prosecution Agreement, Ms. White spoke in terms generally applicable to the scores of deferred prosecution and non-prosecution agreements formed after Prudential:

The public interest is well served by this agreement. Upon conviction, a corporation cannot be sentenced to jail, but only to pay restitution, fines and adopt measures aimed at enhancing internal controls to prevent and detect wrongdoing. This agreement imposes such sanctions. It will insure restitution of over \$660 million to defrauded investors and cause Prudential, through the appointment of an ombudsman and other measures to adhere to the highest ethical and legal standards in its dealings with customers and regulatory authorities. If Prudential fulfills all of its obligations under the agreement, further prosecution will be unnecessary.⁷⁵

D. THE PROLIFERATION OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS

In the past five years, an increasing number of corporations have entered into deferred prosecution and non-prosecution agreements.⁷⁶ These

74. *Id.*; see also Letter from Mary Jo White, *supra* note 72.

75. ORLAND, *supra* note 33, § 6.06[B] (citing Mary Jo White).

76. At the same time, a substantial number of corporate executives have been indicted and convicted of serious corporate crimes and have received lengthy prison sentences. Although there were several acquittals—notably Mark Belnick, former General Counsel of Tyco and Richard Scrushy, former CEO of HealthSouth Senior—executives in the major corporate fraud cases received were convicted and received substantial prison sentences. Bernard Ebbers, former CEO of WorldCom was sentenced to 25 years imprisonment; John Rigas, founder of Adelphia was sentenced to fifteen years incarceration—Judge Leonard Sand said the sentence would have been longer but for the defendant's health and age; Judge Sand sentenced Rigas's son, Timothy Rigas, to twenty years incarceration; Tyco's former CEO, L. Dennis Kozlowski, and CFO Mark Swartz were convicted of state criminal charges; Andrew Fastow, former CFO of Enron, pled guilty to

agreements are modeled, in many respects, after the Prudential Agreement—the entity accepts responsibility for its misconduct, agrees to cooperate with the government, undertakes corporate reforms and agrees to pay substantial fines and restitution.

There is a “growing recognition by corporate management of the risk and the need to settle with the government and the increased perception on the part of the government that corporate indictments and convictions can be overkill.”⁷⁷ From the government’s point of view, deferred prosecutions facilitate corporate cooperation while reducing the uncertainty for employees and investors of a continuing unresolved criminal investigation.⁷⁸ Deferred prosecution allows prosecutors to “send a message that certain corporate conduct won’t be tolerated without risking the viability of the company or the business.”⁷⁹

The message of the increasing use of deferred corporate prosecution agreements, coupled with the disintegration and corporate death of Arthur Andersen is clear: corporations faced with serious wrongdoing by corporate executives must promptly accept full responsibility, discipline wrongdoers, institute serious institutional reform and fully cooperate with the government. Increasingly, corporations must also waive the attorney-client privilege and agree not to contradict a detailed factual statement documenting the entity’s culpability.⁸⁰ If an organization complies, it may escape organizational indictment. If it does not, it faces the risk of indictment, conviction and corporate death.⁸¹

multiple charges and received a ten year sentence (later reduced); Martin Grass, former CEO of Rite-Aid Corp., received an eight year sentence; James Olis, former Vice President and Counsel of Dynegy, received a twenty-four year sentence, which was reduced on appeal; Kirk Shelton, former Vice-Chair of Cendant Corp., received a ten year sentence; Sam Waksal, former CEO of ImClone, received a seven year sentence. *See Guilty, Not-Guilty, Mistrial*, WALL ST. J. ONLINE, July 13, 2005; Erin McClam, *ImClone Founder Wants Sentence Shortened*, LATIMES.COM, Mar. 31, 2005; *Former Executive of Cendant Receives 10-year Sentence*, WALL ST. J., Aug. 4, 2005, at B2. Jeff Skilling, Enron’s former CEO received one of the longest sentences of any corporate executive—24 years. John R. Emshwiller, *Skilling Gets 24 Years in Prison*, WALL ST. J., Oct. 24, 2006, at C1.

77. Kara Scannell, *Firms Are Getting Time to Clean Up Their Acts—If Charge Could be Deadly, Indictment Can be Deferred As Violators Effect Change*, WALL ST. J., June 13, 2005, at C3.

78. *See* 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, 1104–05 (2006).

79. Scannell, *supra* note 77 (quoting Robert Giuffra, partner at Sullivan & Cromwell Partner who negotiated the Computer Associates International Inc. Deferred Prosecution Agreement).

80. *See* Leonard Post, *Deferrals on Rise in Foreign Bribery*, NAT’L L.J., Aug. 15, 2005, at 1; Deborah Solomon & Anne Marie Squeo, *Crackdown Puts Corporations, Executives in New Legal Peril*, WALL ST. J., June 20, 2005, at A1.

81. *See* Indictment, United States v. Milberg Weiss Bershad & Schulman LLP, David Bershad, Steven Schulman, Seymour Lazar, and Paul T. Selzer, CR 05-587 (A) - DDP (C.D.C.A. 2006) (indicting defendants for racketeering conspiracy, mail fraud, money laundering, subscribing to false tax return, obstruction of justice, aiding and abetting and causing an act to be done, and criminal forfeiture). *See also infra* text accompanying note 193.

Arthur Andersen's initial refusal to accept responsibility for its misconduct is a primary reason for its indictment and conviction.⁸² Andersen, with a loosely structured leadership and no one clearly in charge, was simply not prepared to promptly accept responsibility and fully cooperate with the government by agreeing to major institutional reform.⁸³ A corporation, or partnership, cannot obtain the benefit of deferred prosecution without prompt acceptance of responsibility and complete cooperation. As Philip Urofsky, the former Assistant Chief of the fraud section of the Justice Department put it, "The bar has been pressing for more clarity on when prosecution will be deferred."⁸⁴ Urofsky noted that the Justice Department "would consider a deferred prosecution agreement when the company had voluntarily disclosed the conduct, and where it cooperated and undertook to continue cooperating in our investigation."⁸⁵

That "cooperation" could include making witnesses available, providing documents voluntarily, disclosing the results and conclusions of their internal investigation and, if necessary, waiving the privilege with respect to contemporaneous legal advice, where advice of counsel is a potential defense In addition, the company would have to turn over interview and witness statements from its internal investigation, and show that it had already taken remedial steps to put new compliance and financial controls in place. The company would also have to discipline the wrongdoers. "The decision to go the deferred prosecution route . . . may also turn on factors such as the extent in dollars and duration of the misconduct, and the involvement of senior management."⁸⁶

The Justice Department continues to see benefits from the deferred prosecution agreements. "By and large, [deferred prosecution agreements have] worked well. . . . We've been able to recover a lot of money for victims without going through the delay and expense of a trial, and we've seen some positive . . . internal reforms."⁸⁷

E. TWO MAJOR AGREEMENTS: COMPUTER ASSOCIATES AND KPMG

While the Salomon Brothers and Prudential Securities dispositions formed the model for scores of subsequent agreements, two recent settlements—Computer Associates and KPMG—illustrate an increasingly common structure of deferred prosecution agreements. These two

82. See ORLAND, *supra* note 33, § 6.06[C].

83. See *id.*

84. Post, *supra* note 80 (quoting Philip Urofsky).

85. *Id.* (quoting Philip Urofsky).

86. *Id.* (quoting Philip Urofsky).

87. Greg Burns, *Corporations Avoid Criminal Cases: Individuals prosecuted instead, avoiding Andersen effect; policy too easy, critics say*, CHI. TRIB., Mar. 20, 2005, Business Section, at 1 (citing Timothy Coleman, senior counsel at the Justice Department).

agreements are the clearest examples of the Justice Department's ability to achieve sweeping corporate concessions: in both cases, the entity entered into a deferred prosecution agreement that includes cooperating in the prosecution of the entity's culpable corporate executives.

For a corporate executive facing potential criminal indictment, the results of a deferred prosecution agreement can be ominous. Multiple indictments of former senior managers accompanied both the Computer Associates and KPMG deferred prosecution agreements.⁸⁸ Both corporations agreed to cooperate in those prosecutions. Under the terms of the deferred prosecution agreement, Computer Associates discharged its CEO and General Counsel and cooperated with the government in the indictment of those key executives. KPMG currently is cooperating in the criminal trials of its former senior executives.⁸⁹

1. Computer Associates

In September of 2004, Computer Associates, faced with the stark prospect of a corporate indictment for securities fraud and obstruction of justice, entered into a deferred prosecution agreement.⁹⁰ There were parallels between the Computer Associates agreement and its predecessor, the Prudential Securities agreement. Both agreements required the acceptance of responsibility, restitution, internal reform, and substantial compliance undertakings. Furthermore, both agreements included, as an element of cooperation, the discharge of senior management combined with extensive cooperation in the prosecution of those managers.⁹¹ However, the Computer Associates agreement added a new element to the Prudential form—an agreement to a lengthy statement of facts combined with a covenant not to contradict that factual statement.⁹² This provision is an increasingly common element of deferred prosecution agreements and is also an important feature of the KPMG agreement considered below. Specifically, the Computer Associates deferred prosecution agreement enumerated the following undertakings:

88. See Mark Hamblett, *Deferred Prosecution*, N.Y.L.J., Apr. 25, 2006 (discussing the defense motions filed by indicted KPMG partners).

89. See Jonathan D. Glater, *Former Banker Pleads Guilty in Tax Shelter Case*, N.Y. TIMES, Aug. 12, 2005, at C2.

90. United States v. Computer Assoc. Int'l, Inc., No. 04-837 (E.D.N.Y. Sept. 22, 2004) (Deferred Prosecution Agreement), available at [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/DPA-CA.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/DPA-CA.pdf) [hereinafter Computer Associates Agreement].

91. See *Id.* Computer Associate's CEO, Sanjay Kumar, Head of Worldwide Sales, Stephen Richards, General Counsel, Steven Woghin, and Senior Vice President were indicted. Woghin promptly pled guilty. Alex Berenson, *Former Executives of Software Maker Indicted in Fraud*, N.Y. TIMES, Sept. 23, 2004, at A1. On November 2, 2006, Kumar was sentenced to twelve years in prison and fined \$8 million. William M. Bulkeley, *Former CA Chief Is Sentenced to 12-Year Term, Fined*, WALL ST. J., Nov. 3, 2006, at A1.

92. Computer Associates Agreement, *supra* note 90, at 2–3.

1. Acknowledgment of Wrongdoing: In a comprehensive acknowledgment of wrongdoing, a detailed information and an extensive Stipulation of Facts, Computer Associates acknowledged that it and certain executives and officers filed false and misleading financial reports with the SEC and obstructed investigations by a federal grand jury and the SEC.⁹³

2. Payments: The company agreed to substantial payments consisting of \$225 million in restitution, issuance of stock, and cash payments of \$163 million to compensate shareholders in four shareholder class actions.⁹⁴

3. Remedial Actions: Computer Associates agreed to the termination of executives, including terminating culpable officers and employees, officers and employees who refused to cooperate in the internal investigation “or otherwise took steps to obstruct or impede that investigation.” The firm also agreed to appoint new management, including a new Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, Head of Worldwide Sales and a new General Counsel.⁹⁵

4. Continuing Cooperation: The agreement contained provisions for ongoing disclosure to investigators, providing documents and records, and making best efforts to make present and former employees available to investigators. Additionally, the agreement stipulated that Computer Associates would be “providing active assistance” in any “investigation, criminal prosecution, civil trial or other legal proceeding” including proceedings to “obtain disgorgement” of compensation to any current or former employee. Computer Associates also undertook to continue cooperation after the expiration of the agreement.⁹⁶

5. Waiver of Privilege: The entity agreed not to assert, in any government investigation “any claims of attorney-client or attorney work product” privileges.⁹⁷

6. Appointment of an Independent Examiner: The Examiner has broad specified responsibilities for corporate reform. Computer Associates also agreed to the addition of new independent directors;⁹⁸ the establishment of a compliance committee and a new disclosure committee; establishment of “enhanced corporate governance procedures” to improve communications; and the establishment of a comprehensive compliance and ethics program, including the appointment of a “senior-level Chief Compliance Officer”; reorganization of the firms Finance Department, and Internal Audit Department.⁹⁹

93. *See id.* at 2.

94. *See id.* at 2–3. The restitution fund administrator’s cost will be born by the entity, not the restitution fund. *Id.*

95. *Id.* at 4.

96. *Id.* at 6.

97. Computer Associates Agreement, *supra* note 90, at 5.

98. *See id.* at 9. Laura Unger, a former SEC commissioner is a designated outside director; at least two-thirds of the board must be outside directors. *See id.* at 10.

99. *Id.* at 10–11.

2. KPMG

In August 2005, KPMG faced potential criminal charges that it had “participated in a scheme to defraud the IRS by devising, marketing, and implementing fraudulent tax shelters”¹⁰⁰ Moreover, the government charged that a number of KPMG tax partners engaged in conduct that was unlawful and fraudulent, including preparing fraudulent tax returns, drafting fraudulent factual tax recitations, issuing false and fraudulent opinions, actively taking steps to conceal true facts from the IRS, and impeding the IRS by failing to produce relevant documents.¹⁰¹ The Justice Department did not proceed with an indictment against KPMG. Instead, the Department and KPMG entered into a comprehensive deferred prosecution agreement¹⁰² that paralleled, in many respects, the Computer Associates agreement.¹⁰³ Specific provisions of the KPMG agreement include:

1. Payments of \$456 million: The KPMG agreement called for a fine consisting of disgorgement of \$128 million in fees, restitution to the IRS of \$228 million, and an IRS penalty of \$100 million.¹⁰⁴

2. Cooperation and Waiver of Privilege: The agreement required that “cooperation with the criminal investigation” was “an important and material factor” as was “not asserting . . . any claim of privilege (including but not limited to the attorney-client and the work product protection).”¹⁰⁵

3. Permanent Restrictions of and Elevated Standards for KPMG’s Tax Practice Cooperation.

4. Establishment of a New Compliance Program: KPMG must institute a compliance and ethics program “that fully comports with the criteria set forth in Section 8B2.1 of the United States Sentencing Guidelines.”¹⁰⁶ The “maint[enance of] a permanent compliance office and a permanent educational and training program” were also essential to the agreement.¹⁰⁷

100. Information at ¶ 8, *United States v. KPMG* (S.D.N.Y. Aug. 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmginformation.pdf>.

101. *Id.* at ¶ 8–10.

102. See Deferred Prosecution Agreement, Letter from David N. Kelley, U.S. Attorney for the Southern District of New York, to Robert S. Bennett, Esq., Attorney for KPMG (Aug. 26, 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf> [hereinafter KPMG DPA] (requiring KPMG to secure an independent monitor and to turn over other information). See also Jonathon Weil, *KPMG’s Settlement Provides for New Start*, WALL ST. J., Aug. 29, 2005, at C1.

103. For a discussion of the Computer Associates agreement, see Computer Associates Agreement, *supra* note 90.

104. See KPMG DPA, *supra* note 102, at 2–3. KPMG agrees that no portion of this amount is deductible on any tax return and that the government will receive 50% of any reimbursement under any insurance policy. *Id.* at 3–4.

105. *Id.* at 9–11. KPMG secured an exception to the privilege waiver issue to allow protection of some advice given by its counsel as well as in private civil litigation. *Id.*

106. *Id.* at 17.

107. *Id.*

5. Independent Monitor: “KPMG agrees to oversight and monitoring by a government appointed monitor.”¹⁰⁸

6. Agreement not to contradict the Statement of Facts: KPMG agrees that “it shall not, through its attorneys, agents, partners, or employees, make any statement, in litigation or otherwise, contradicting the Statement of Facts or the representations in this agreement.” The agreement also stated that “[a]ny such contradictory statement . . . shall constitute a breach of this Agreement.”¹⁰⁹

More than a dozen former KPMG partners have been indicted.¹¹⁰ Several filed motions to dismiss the indictments against them, or, alternatively, to void portions of the KPMG Deferred Prosecution Agreement. One brief argued that KPMG’s Agreement with the government was for the purpose of intimidating and influencing the firm and those working for it.¹¹¹ A brief by another defendant asserts that “by obligating KPMG and its agents to testify favorably, and only favorably, for the Government, the

108. KPMG DPA, *supra* note 102, at 18. The agreement spells out, in detail, the jurisdiction, powers and oversight authority of the monitor. Compensation for the monitor is the responsibility of KPMG. *See id.* at 19–25.

109. *Id.* at 16. KPMG may “avoid a finding of breach . . . by repudiating such statement” within 48 hours of notice of breach by the government. *Id.* at 17.

110. *See* Unsealed Indictment, *United States v. Stein*, 05 Crim. 0888 (S.D.N.Y. Aug. 29, 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgindividualsind.pdf> (indicting eight former KPMG partners); *see also* Stephen Taub, *Ex-CFO of KPMG among 10 Newly Indicted*, CFO.COM, Oct. 18, 2005, available at <http://www.cfo.com/article.cfm/5051982?f=related> (noting that, at that time, the total number of people “facing counts that include conspiracy to defraud the government, tax evasion, and obstruction of internal revenue laws” was nineteen).

111. Defendant David Rivkin’s Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment or Alternatively Void Portions of the KPMG Deferred Prosecution Agreement, to Disclose Grand Jury Transcripts and Instructions to Grand Jury Regarding Venue, and to Join Motions of Codefendants at 4, *United States v. Stein*, 05 Crim. 0888 (Jan. 12, 2006). The brief argues:

The appropriate sanction for this violation [of due process] is dismissal of the indictment. At a minimum, this court should void the deferred prosecution agreement and compel KPMG to advise all of its employees in writing of this fact. Further, KPMG should be ordered to admonish all of its employees to be completely truthful in any statements they make, without regard to the Statement of Facts attached to the deferred prosecution agreement.

Id. at 5. Judge Kaplan denied the motions to dismiss the indictment or to invalidate the KPMG deferred prosecution agreement but expressed concern about KPMG’s refusal to pay legal costs of former partners. *See* Lynnley Browning, *A Single Trial For 18 Named in Tax Shelters*, N.Y. TIMES, Mar. 31, 2006, at C3; *see also* Lynnley Browning, *Judge Questions Clarity of Prosecution’s Tax-Shelter Case*, N.Y. TIMES, Mar. 31, 2006, at C4. Judge Kaplan concluded that “the government has a legitimate interest in seeing to it that KPMG not gain the benefit of deferred prosecution, only to undermine its formal acceptance of guilt by making statements inconsistent with it.” Hamblett, *supra* note 88.

Department of Justice has irreparably distorted the fact-finding process and ensured that the prosecution of this matter will result in a mock trial.”¹¹²

V. RECENT DEVELOPMENTS: STOLT-NIELSEN AND BOEING

Two recent developments in the Justice Department’s handling of corporate misconduct reflect a somewhat inconsistent approach to the most basic elements of deferred and non-prosecution agreements—cooperation and compliance.

A. STOLT-NIELSEN

In February 2003, shipping giant, Stolt-Nielsen (Stolt) entered into an Amnesty Agreement with the Justice Department’s Antitrust Division to avoid prosecution of charges stemming from a customer allocation conspiracy with other shipping corporations.¹¹³ “Using the information provided by Stolt and its executives . . . the Government secured guilty pleas from Stolt’s co-conspirators, resulting in prison sentences for individual executives at those companies and fines totaling \$62 million.”¹¹⁴

The Justice Department’s quite formal amnesty program shares common attributes with deferred and non-prosecution agreements. In both, the entity avoids prosecution in exchange for cooperation and compliance with the terms of the agreement.¹¹⁵ Indeed, the Justice Department characterizes its agreement with Stolt as a “conditional leniency or non-prosecution agreement.”¹¹⁶

The Stolt Amnesty Agreement, which granted amnesty for criminal customer and territorial allocations in violation of the Sherman Act, had two core requirements. First, Stolt represented to the Justice Department that it was making complete and accurate disclosure to the government.¹¹⁷ Stolt also represented that it had taken “prompt and effective action to terminate its part in the anti-competitive activity being reported upon

112. Memorandum of Law in Support of Defendant Jeffrey Eischeid’s Motion to Dismiss the Indictment, at 2, *United States v. Stein*, 05 Crim. 0888 (Jan. 12, 2005). The brief also asserts that the government’s “oppressive tactics violate long-established notions of ethical prosecutorial conduct, and constitute plain violations of Eischeid’s rights under the Fifth and Sixth Amendments.” *Id.* See also *infra* text accompanying note 189 (discussing Judge Kaplan’s response to defense claims that KPMG, in cooperation with the government, had unconstitutionally violated defendants’ Sixth Amendment right to counsel by refusing to advance legal fees).

113. See Press Release, Stolt-Nielsen Transp. Group, Stolt-Nielsen Transp. Group Granted Conditional Amnesty in Parcel Tanker and Inland Barge Investigations (Feb. 25, 2003), available at http://www.sntg.com/news/pressreleases.asp?url=/PR/200302/893240_5.html.

114. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 180 (3d Cir. 2006).

115. *Id.*

116. Answer of the U.S. to Petitions for Reh’g en Banc at 1, *Stolt-Nielsen, S.A. v. United States*, No. 05-1480 (3d Cir. June 9, 2006) [hereinafter U.S. response to Stolt].

117. *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 558 (E.D. Pa. 2005).

discovery of the activity.”¹¹⁸ In addition, Stolt agreed to cooperate fully and completely with the Justice Department’s investigation and prosecution of employees involved in illegal activities. This cooperation provision required the company to give all information known to Stolt relating to the anti-competitive activity being reported on.¹¹⁹

Less than two months later, the Justice Department revoked amnesty and declared that it would proceed to indict Stolt.¹²⁰ The basis for the amnesty revocation was the Justice Department’s assertion that the Company had misrepresented the date when it had ceased engaging in unlawful activities.¹²¹ The Justice Department concluded that while Stolt represented that it had ended its collusive activities upon learning of them in March of 2002, in fact, Stolt’s criminal collusive conduct continued well into the last half of 2002—well beyond the terminated date represented by Stolt.¹²² The government declared:

[The Justice Department Antitrust] Division received evidence that [Stolt] . . . had continued to meet with its competitors and participate in the conspiracy for months after discovering it, and that [Stolt] had withheld information about the true extent of the conspiracy.¹²³

Stolt, in response to the renewed threat of indictment, sought to enjoin the Justice Department from revoking the agreement and indicting the corporation. The District Court granted injunctive relief.¹²⁴ However, the Third Circuit reversed¹²⁵ and the Supreme Court denied certiorari.¹²⁶

118. *Id.* (citing Agreement between the Department of Justice and Stolt).

119. *See id.* (referring to Agreement between the Department of Justice and Stolt).

120. Stolt-Nielsen S.A. Press Release, Stolt-Nielsen S.A. Reports Withdrawal of Amnesty by Department of Justice (March 22, 2004).

121. *See Stolt-Nielsen*, 352 F.Supp.2d at 559.

122. *See id.*; *see also* James Bandler & John McKinnon, *Stolt-Nielsen is Probed for Traffic with Iran*, WALL ST. J., Nov. 22, 2002, at A3. The events became public fact in an article published in the Wall Street Journal covering a lawsuit filed against Stolt by the company’s former general counsel, who resigned after the company refused to take corrective action to correct misconduct uncovered by the General Counsel. *Id.*

123. U.S. Response to Stolt, *supra* note 116, at 2.

124. *Stolt-Nielsen*, 352 F. Supp. 2d at 553–55.

125. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 178 (3d Cir. 2006). The Third Circuit held:

This case raises a significant constitutional question of first impression in this Circuit: whether federal courts have authority, consistent with the separation of powers, to enjoin the executive branch from filing an indictment. Although federal courts have this authority in narrow circumstances, we conclude that this is not such a case and therefore reverse the District Court’s judgment to the contrary.

Id. Then Judge Samuel Alito heard oral argument but was elevated to the Supreme Court and the decision was filed by quorum of the panel. *See id.*

126. *Stolt-Nielsen, S.A. v. United States*, 75 U.S.L.W. 3235, 2006 U.S. LEXIS 8342 (U.S. Oct. 30, 2006) (No. 06-97).

On September 6, 2006, Stolt was indicted on conspiracy charges stemming from violations from the Sherman Act.¹²⁷ The Third Circuit's decision to uphold the Justice Department's power to revoke amnesty and seek an indictment affirms that the Justice Department has full and complete control over defining compliance, cooperation and violation of a non-prosecution agreement which can trigger indictment.¹²⁸ The Stolt amnesty revocation constitutes clear evidence that the Justice Department is fully prepared to indict entities who fail to meet the government's criteria for complete cooperation.¹²⁹ The Third Circuit's opinion in *Stolt-Nielsen v. United States* makes clear that federal courts will not intervene in a Justice Department decision to revoke a non-prosecution agreement and seek indictment, noting:

[S]eparation-of-power concerns thus counsel against using the extraordinary remedy of enjoining the Government from filing the indictments . . . [W]e are guided by other cases from the Supreme Court and the Courts of Appeals that lead us to conclude that non-prosecution agreements may not form the basis for enjoining indictments before they issue.¹³⁰

B. BOEING

A second recent development, the Boeing Non-Prosecution Agreement, takes a strikingly different turn. On June 29, 2006, Boeing entered into a non-prosecution agreement and an accompanying civil settlement with the Justice Department to resolve the charges that Boeing had unlawfully violated conflict of interest laws and had unlawfully handled its competitors' sensitive and trade secret information.¹³¹ More specifically:

Boeing has agreed to pay a total of \$615 million dollars to resolve the government's investigations and claims relating to the company's hiring of the former Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, Darleen A. Druyun, by its then Chief Financial Officer, Michael Sears, and its handling of competitors information in connection with the Evolved Expendable Launch Vehicle (EELV) Program and certain NASA launch services contracts.¹³²

127. Indictment, *United States v. Stolt-Nielsen*, No. 06-466 (E.D.P.A. Sept. 6, 2006), available at <http://www.usdoj.gov/atr/cases/f218200/218212.htm> [hereinafter *Stolt-Nielsen Indictment*].

128. See *Stolt-Nielsen*, 442 F.3d at 187 (noting both the government's right to indict Stolt and Stolt's post indictment remedies).

129. See *id.*

130. *Id.* See also *supra* text accompanying note 46.

131. See Non-Prosecution Agreement between The Boeing Company and the United States Attorney's Offices for the Central District of California and the Eastern District of Virginia 1 (June 30, 2006), available at <http://www.corporatecrimereporter.com/documents/boeing2.pdf> [hereinafter *Boeing Non-Prosecution Agreement*].

132. Press Release, Dep't of Justice, Boeing to Pay United States Record \$615 Million to Resolve Fraud Allegations, http://www.usdoj.gov/opa/pr/2006/June/06_civ_412.html (announcing

At first glance, the Non-Prosecution Agreement between Boeing and the Justice Department appears standard enough; it includes with the requisite provisions dealing with financial penalties, compliance programs, hotlines, reporting, cooperation and disclosures.¹³³ However, on the crucial issue of compliance and potential violations of the agreement, Boeing is the beneficiary of provisions absent from other deferred prosecution and non-prosecution agreements.¹³⁴

In a curious turn of events, functionally, one of the most interesting provisions states that Boeing gets a pass on employee misconduct if that conduct is not committed by a high level executive, as defined by Boeing. Specifically, the agreement provides:

For purposes of determining compliance with this Agreement (as opposed to legal responsibility), the commission of a Defined Offense by a Boeing employee classified at a level below Executive Management as defined by Boeing's internal classification structure in place at the time of the execution of this Agreement shall not be deemed to constitute the commission of a Defined Offense by Boeing¹³⁵

Hence, even if the misconduct of a non-designated Boeing employee who is not designated by Boeing constitutes a crime, it nonetheless will not constitute a violation of the Non-Prosecution Agreement.

John Coffee, a professor at Columbia University School of Law, was quite right in concluding that “[d]rawing the line between executives and other employees is a little crude.”¹³⁶ Professor Coffee also correctly asserts: “[Y]ou [do not] want to tell non-executive employees they are legally immune and can't get the company in trouble.”¹³⁷ He further states that in order for Boeing to successfully comply with the agreement, “[y]ou want the company monitoring all employees.”¹³⁸

Most surprisingly, in another provision of the Boeing Non-Prosecution Agreement, the Justice Department gave Boeing an additional license to violate both the law and the agreement. Regardless of classification of executive level employee, as long as Boeing reports the violation to the Justice Department, it remains in good standing under the Agreement.¹³⁹

the civil settlement with Boeing). *See also* Boeing Non-Prosecution Agreement, *supra* note 131, at 2–3 (providing the terms of the Boeing agreement with the Government).

133. *See* Boeing Non-Prosecution Agreement, *supra* note 131, at 2, 3, 5–8.

134. *See id.* at 9.

135. *Id.* at 3.

136. Russell Mokhiber & Robert Weissman, *Boeing Criminal Agreement: Odd and Unusual*, July 10, 2006, available at <http://www.commondreams.org/views06/0710-31.htm> (quoting John Coffee, Columbia University Law Professor).

137. *Id.* (quoting John Coffee, Columbia University Law Professor).

138. *Id.* (quoting John Coffee, Columbia University Law Professor).

139. Boeing Non-Prosecution Agreement, *supra* note 131, at 3, 5–8 (“[T]he commission of a Defined Offense by a Boeing employee shall not be deemed to constitute the commission of a

Moreover, the agreement grants Boeing procedural rights in the event of notice of violation of the agreement—rights not present, or less favorable to the company, in other non-prosecution or deferred prosecution agreements.¹⁴⁰ Specifically, upon written notice of violation, Boeing has forty-five days to make a presentation that no breach has occurred.¹⁴¹ Boeing can appeal an adverse decision to a higher authority within the Justice Department, but not a District Court, and if Boeing is found in breach, the company must immediately pay any balances on fines due, and the Justice Department, at its option, can either indict or impose a \$10 million penalty.¹⁴²

The Boeing agreement constitutes a significant change from the Justice Department's traditional approach to the resolution of corporate misconduct by deferred or non-prosecution agreement. Normally, those agreements call for sweeping corporate wide changes, compliance, and enforcement with the ultimate goal of creating a culture of honesty and law abiding corporate performance.¹⁴³

VI. FORTY-FOUR AGREEMENTS: PATTERNS, ACHIEVEMENTS AND COMMENTS

A. THE AGREEMENTS

Between 1994, when the Prudential Securities agreement was executed, and June 2006, twenty-four major corporations entered into federal deferred prosecution agreements (DPAs): Armour, Prudential Securities, Arthur Andersen, Sears, BDO Seidman, PNC Financial, NY Racing Association, Canadian Imperial Bank, Banco Popular, Computer Associates, Invision Technologies, American International Group, America Online, AmSouth Bancorp, KPMG, Bristol Myers Squibb, Monsanto, University of Medicine and Dentistry of New Jersey, Operations Management International, FirstEnergy Nuclear, Williams Power, Roger Williams Medical Center, HVB, and BankAtlantic.

Additionally, between 1993, when the Salomon Brothers agreement was executed, and June 2006, nineteen corporations have entered into twenty federal non-prosecution agreements (NPAs): Salomon Brothers, Aetna, Sequa, John Hancock, Lazard Freres, Merrill Lynch (1995), Coopers & Lybrand, Aurora Foods, Merrill Lynch (2003), Symbol Technologies, MCI-Worldcom, Micrus, Shell Oil, Adelphia, Hilfiger, American Electric

Defined Offense by Boeing so long as the underlying allegation or conduct is reported by Boeing . . .”).

140. *Id.* at 9. See, e.g., Computer Associates Agreement, *supra* note 90, at 20 (providing Computer Associates a two-week period after notification of breach).

141. Boeing Non-Prosecution Agreement, *supra* note 131, at 9.

142. *Id.* at 9–11.

143. Thompson Memo, *supra* note 3.

Power, Bank of New York, American International Group, HealthSouth, and BAWAG.

These agreements, and a tabulation of the major provisions in the agreements, are specified in Tables I and II. The Tables identify the corporation, year of agreement, duration of the agreement, offenses charged, whether individuals were charged, financial penalties imposed (fines, forfeiture, restitution and civil penalties), and whether an agency settlement was also reached. The Tables also identify undertakings of the corporations, including, acceptance of responsibility, appointment of an outside monitor or examiner, an obligation not to make public statements that contradict a factual narrative in the agreement, cooperation with government investigations, discharge of culpable employees, establishment of a hotline, establishment of a new or improved compliance program, new internal controls, waiver of attorney-client and work product privileges, waiver of statute of limitations and speedy trial rights, creation of new management or board positions, and creating a new training program.

It is important to note that the Justice Department has not made public all of these agreements.¹⁴⁴ The publicly available press releases in these cases do not specify all provisions of the agreements. But the information from the releases is included in the Tables for informational purposes.

B. ACHIEVEMENTS

The deferred prosecution agreements spawned by Prudential Securities and the non-prosecution agreements which followed Salomon Brothers have, in many respects, advanced important public interest objectives.

The Justice Department has succeeded in uncovering and dealing with a dismal pattern of corporate misconduct. Since 1993, forty-three American corporations have acknowledged serious wrongdoing in violation of a broad array of federal criminal statutes, including securities fraud, tax fraud, foreign corrupt practices, tax evasion, conspiracy, environmental offenses, wire fraud and defense procurement fraud.¹⁴⁵

These agreements resulted in the imposition of criminal fines totaling in excess of three quarters of a billion dollars.¹⁴⁶ Restitution settlements total in excess of \$3 billion, and civil penalties exceed one billion dollars.¹⁴⁷

In several important instances, the agreements facilitated the indictment and conviction of high ranking corporate executives.¹⁴⁸ These indictments

144. The Justice Department has declared that "publication of agreements 'is within the discretion of individual U.S. attorney's offices.'" Sue Reisinger, *Did Hilfiger Corp. Get Special Treatment From DOJ?*, LAW.COM, June 28, 2006, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1151399124566>. See also *infra* Tables I & II. In Tables I & II, agreements that have not been made public are italicized. Of the twenty-four DPAs in Table I, only one is not public. Of the twenty NPAs in Table II, six are not publicly available.

145. See *infra* Tables I & II.

146. *Id.*

147. *Id.*

spurred important changes in corporate governance, including replacement of senior management, restructuring of corporate boards, and the creation of hotlines for reporting corporate misconduct. Furthermore, in a number of important instances, outside monitors or examiners have been created to ensure requirements with the agreements and also with the requirements of law have been met.¹⁴⁹ In addition, many corporations have been required to create or improve comprehensive compliance programs.¹⁵⁰

Christopher J. Christie, in an analysis of the Bristol Myers deferred prosecution agreement, applauded the ability of deferred prosecution agreements to “achieve the goals of improved corporate governance and renewed market confidence without destroying corporations and losing American jobs in the process.”¹⁵¹ With considerable justification, Christie concludes that the “deferred prosecution agreement between Bristol-Myers and the United States Attorney’s Office for the District of New Jersey has all of the elements necessary to achieve these goals.”¹⁵²

Wrongdoing was identified and admitted to by the company. Specific failures of governance were identified and remedies were suggested by both parties and agreed to by the company. A respected federal monitor was appointed to insure adherence to the agreement. Major steps were taken to change the corporate culture through educational programs for employees and directors and a new approach to the corporate budgeting process. Restitution was made to those shareholders who were harmed by the corporate crimes.¹⁵³

Christie’s positive appraisal could well be applied to many of the agreements considered in this essay.

C. COMMENTS

While the details of the forty-four agreements may be gleaned from Tables I and II, several issues merit individual comment.

148. *Id.*; see also, e.g., *Guilty, Not-Guilty*, *supra* note 76 (noting several former executives who were found guilty).

149. See *infra* Tables I & II; see, e.g., Non-Prosecution Agreement, Letter from U. S. Attorney’s Office, Southern District of New York, to John T. Montgomery, Esq., Attorney for Aurora Foods, Inc. 3 (Jan. 22, 2001); Non-Prosecution Agreement Between Symbol Technologies, Inc. and the U. S. Attorney’s Office for the Eastern District of New York 7 (June 3, 2004).

150. See *infra* Tables I & II; see, e.g., KPMG DPA, *supra* note 102; Deferred Prosecution Agreement between U.S. Dep’t of Justice, Criminal Div., Fraud Section and InVision Technologies, Inc. (Dec. 3, 2004); *United States v. The New York Racing Association, Inc.* Cr. 03-1295 (E.D.N.Y. Dec. 10, 2003) (Deferred Prosecution Agreement).

151. Christie & Hanna, *supra* note 59, at 1061.

152. *Id.*

153. *Id.*

1. Monitors

The Prudential, KPMG, and Computer Associates agreements required appointment of outside monitors, and 11 of the 24 DPAs have a monitor requirement. External monitors, once the exclusive subject of criminal RICO convictions, have now become an accepted reality in corporate reform.¹⁵⁴ However, the duties and responsibilities of these extra-judicial officials vary markedly and have become an important topic (and source of concern) in the corporate governance literature.

Corporate monitors have had, in some instances, a substantial impact on corporate governance. In a striking example of the power of federal corporate monitors, former Federal Judge Frederick B. Lacey, the corporate monitor for Bristol-Myers Squibb, recommended the removal of the company's Chief Executive Officer, Peter R. Dolan; the Board accepted Monitor Lacey's recommendation.¹⁵⁵ "[T]he episode has set off a debate whether Mr. Lacey represents a tougher-style monitor who may put new teeth into that role in corporate America—as some admirers hope—or whether, in the view of some critics, he has overstepped his authority at Bristol-Myers."¹⁵⁶

2. Public Statements

A new and important requirement appearing with increasing frequency is an undertaking that the corporations not contradict representations and factual statements in the agreement or a statement of facts appended to the agreement. This occurs in 17 of the 24 DPAs. The impact of these detailed admissions of culpability has generated litigation by indicted corporate executives (KPMG)¹⁵⁷ and raises concerns over the impact of these statements in subsequent civil litigation against the corporation.

3. Waiver of Attorney-Client and Work Product Privileges

With increasing frequency, the agreements require the corporation to waive attorney-client and work-product privileges. A waiver of these privileges is present, overall, in 16 of the 24 DPAs and 9 of the 20 NPAs. The issue of governmental pressure to induce corporations to waive attorney-client and work product protection has received increased critical attention and is explored in Section VII, *infra*.

154. See *infra* Tables I & II.

155. Avery Johnson & John Carreyrou, *Bristol-Myers Faces More Scrutiny*, WALL ST. J., Oct. 27, 2006, at A10; see also Frederick Lacey: An Independent Monitor With Teeth, Posting of Peter Lattman to Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2006/09/19/frederick-lacey-an-independent-monitor-with-teeth/> (Sept. 19, 2006, 8:32 EST).

156. Stephanie Saul, *A Corporate Nanny Turns Assertive*, N.Y. TIMES, Sept. 19, 2006 at C1.

157. See *supra* note 111 and accompanying text. See also Tables I & II.

4. Financial Penalties

At least one form of financial penalties exists in virtually every DPA and NPA. Fines as well as civil penalties are required in 10 of the 24 DPAs. Restitution is required in 9 of the 24 DPAs. Every DPA required some sort of financial penalty, but the allocation of these financial penalties between fines, civil penalties and restitution appears to be a matter of ad hoc negotiation.

5. Prosecution of Individuals

A common justification for resolving criminal investigations of corporations is that these modes of disposition enable the government to identify, prosecute and convict the “real wrongdoer.” But the majority of DPAs and NPAs do not reflect the indictment of individual executives. Indictment of executives is only reflected in 9 of the 20 NPAs and 8 of the 24 DPAs.

6. Governance Changes

Requirements that the corporation change corporate governance organization and responsibility appear with increasing frequency in both DPAs and NPAs. Tables I and II reveal a corporate governance change requirement in 12 of the 20 NPAs and 13 of the 24 DPAs. Seven of the 24 DPAs require new management. In cases where senior executives have been indicted, new management boards have been required in 2 of the 8 DPAs and only 2 of the 9 NPAs. The appropriateness of instituting far-reaching corporate governance change by threat of criminal indictment remains a lively topic in the corporate governance literature.

7. Cooperation and Acceptance of Responsibility

Cooperation is nearly a universal requirement (found in 21 of the 24 DPAs) coupled with explicit acceptance of responsibility (found in 18 of the 24 DPAs). Cooperation is also a universal requirement of publicly available NPAs (found in 14 of the 20 agreements), however, explicit acceptance of responsibility only appears in 8 out of the 20 NPAs. Notably, all of the NPAs and DPAs entered into after Thompson require full cooperation. But the question of how the government perceives genuine cooperation, and whether that cooperation must include waivers and non-assistance to non-cooperative and indicted executives remains a subject of continuing controversy as explained below in Section VII.¹⁵⁸

158. See also Edward Iwata, *Debate Heats up on Justice's Deferred-prosecution Deals*, USATODAY.COM, June 1, 2006.

VII. CONCERNS AND SUGGESTIONS FOR REFORM

A. MISSING EXPLANATIONS

Deferred prosecution and non-prosecution agreements, even when public, are not easily available for public inspection and criticism. The decision to make an agreement public is left to the sole discretion of the United States Attorney's Office.¹⁵⁹ Furthermore, the Justice Department does not issue formal statements of policy as to why it selects a non-prosecution agreement over a deferred prosecution agreement. The absence of Justice Department explanation makes informed public evaluation quite difficult and raises concern because many of the non-prosecution agreements reflect serious violations of the law. Moreover, there are instances where a corporation has been the beneficiary of more than one agreement and the Justice Department is not forthcoming with a public statement as to why this approach is in the public interest.¹⁶⁰

There is a potential solution to this lack of public disclosure. Congress could create a statutory requirement that the Justice Department publicly announce its acceptance of a non-prosecution or deferred prosecution agreement accompanied by a brief statement of why this resolution is in the public interest. As it happens, there is a statutory precedent for this approach.

The Tunney Act (Tunney)¹⁶¹ was enacted in response to criticism during the Watergate era of the way the Antitrust Division of the Justice Department entered into consent decrees to terminate antitrust cases.¹⁶² Tunney requires the Justice Department, when it has achieved agreement with a defendant on an antitrust consent decree, to file the proposed decree publicly along with an impact statement.¹⁶³ The impact statement details what the government sought to achieve by the litigation, what the decree

159. See *supra* note 144 and accompanying text.

160. AIG entered into a deferred prosecution agreement in 2004 resulting from charges of aiding and abetting and securities fraud. See *Deferred Prosecution Agreement between AIG-FP PAGIC Equity Holding Corp. and U.S. Dep't of Justice, Criminal Division, Fraud Section, Western District of Pennsylvania* (Nov. 30, 2004). In 2006, AIG, charged with filing false SEC statements, entered into a non-prosecution agreement with the Justice Department's Fraud section. See *Non-Prosecution Agreement, Letter from Paul E. Pelletier, Acting Chief, Fraud Section, Criminal Div., U. S. Dep't of Justice, to Martin Flumenbaum, Esq., Attorney for American International Group, Inc.* (Feb. 7, 2006). Additionally, Merrill Lynch entered into two non-prosecution agreements in eight years for charges of fraud. See *infra* Tables I & II; *Letter from U.S. Dept. of Justice, Enron Task Force, to Robert S Morvillo, Esq. & Charles Stillman, Esq. Attorneys for Merrill Lynch & Co., Inc.* (Sept. 17, 2003); *Settlement Agreement between Merrill Lynch, Pierce, Fenner & Smith, Inc. and Karen F. Green, Acting U.S. Attorney for the District of Massachusetts* (Oct. 26, 1995).

161. H.R. REP. NO. 1463, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6536-37.

162. See *id.*

163. 15 U.S.C. § 16(b) (Supp. IV 2004).

actually achieves, and why the proposed decree is in the public interest.¹⁶⁴ Thereafter, public comment is invited and the court holds a limited hearing to determine if the decree is in the public interest.¹⁶⁵

Tunney is an attractive model to contemplate in thinking about ways to improve public understanding and confidence in the deferred and non-prosecution process. The Boeing Non-Prosecution Agreement provides a clear example of the need for a Tunney-like provision. If such a statute were in place, the Justice Department would have been required to publicly disclose what they sought to achieve by the criminal case, and why this settlement of charges is in the public's best interest. Surely, the public is entitled to know why it is in its best interest that compliance is redefined for Boeing and why Boeing, unlike any other entity entering into a deferred or non-prosecution agreement, may be immune from liability for misconduct committed by Boeing employees who are not part of senior management.

Admittedly, some Tunney provisions may be inappropriate in the sphere of criminal enforcement, given the traditional judicial concern that judges should not review exercises of prosecutorial discretion.¹⁶⁶ But the core Tunney concept of requiring the government to announce its decision to dispose of a criminal case by a deferred prosecution or non-prosecution agreement would advance the public interest. The public is entitled to know that serious instances of corporate misconduct have been adequately dealt with by the Justice Department by measures short of corporate indictment and conviction. Public confidence would improve if the government were required to offer a brief statement of why it believes a given settlement is in the public interest.¹⁶⁷ This modest proposal could also assist federal judges in discharging their judicial responsibilities when presented with deferred and non-prosecution agreements needing judicial approval. Most importantly, this kind of statutory requirement assures the public that corporate misconduct is effectively addressed, thereby increasing public confidence in the criminal justice process.

164. *See id.*

165. *See id.* § 16(d), (e)(1).

166. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[T]he decision to prosecute is particularly ill-suited to judicial review.”).

167. Indeed, the statements accompanying the Salomon and Prudential agreements could form models of the kind of statement and explanation that should be statutorily required in all cases. *See supra* note 71 and accompanying text.

B. OVER-AGGRESSIVE PROSECUTORS?

Despite the positive achievements and success of deferred and non-prosecution agreements in addressing corporate misconduct, the frequency of their use and the emphasis of government defined cooperation has recently garnered sharp criticism. The expressed concern is that corporations are being pushed too hard by overly aggressive prosecutors who insist on cooperation, waiver of privilege, acknowledgment of culpability, substantial corporate reform, and financial penalties, even in cases where indictments might not ensue.¹⁶⁸ As one former Justice Department official explained:

[P]rosecutors have the unbridled discretionary power to insist that in order to avoid ‘death,’ a corporation under investigation waive its privileges and disclose otherwise protected information and advi[s]e and assist the government in its investigation. Any corporation that tries to protect its interests in the intensely adversarial setting of a criminal investigation, as is its right, is likely to be punished.¹⁶⁹

The recent comments regarding the Justice Department’s current policy by Mary Jo White, the distinguished former United States Attorney for the Southern District of New York (who crafted the Prudential agreement), reflect a carefully weighted evaluation of these concerns.¹⁷⁰ Ms. White suggests that the automatic reaction to corporate misconduct should not be an indictment or a deferred prosecution agreement.¹⁷¹ She notes instead that “the Thompson memo, which governs federal prosecutors in deciding what to do about a company, says it will be the rare case where a company should be indicted.”¹⁷² Ms. White believes that “it should also be the rare case where the government seeks a deferred prosecution agreement from the company.”¹⁷³

Far harsher criticisms regarding prosecutorial power accuse Justice Department officials of exercising “unchecked power”—the equivalent of a “state-sponsored shakedown scheme in which corporations are exhorted to pay penalties grossly out of proportion to any actual misconduct.”¹⁷⁴ Former United States Attorney for the Southern District of New York, James B.

168. Earl J. Silbert & Demme Doufekias, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1228–29 (2006).

169. *Id.* at 1229.

170. See Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, N.Y. (Dec. 1, 2005), in 19 CORP. CRIME REP. 48(11) (Dec. 12, 2005).

171. *Id.*

172. *Id.*

173. *Id.*

174. Wray & Hur, *supra* note 78, at 1095 (citing N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, WASH. LAW., Mar. 2005).

Comey, in an interview distributed to all United States Attorneys, defends Departmental policy: “[F]or a corporation to get credit for cooperation, it must help the government catch the crooks.”¹⁷⁵ “In sum, the Department now contends that ‘there is nothing wrong’ with the Government using the waiver of the privilege ‘to piggy-back on the investigation conducted by the corporation.’”¹⁷⁶ If the corporation seeks lenience, “it will have to figure out a way to tell the Government what it knows about the misconduct and to help us to catch the wrongdoers.”¹⁷⁷

Defenders of current Justice Department policies attribute the problem, in part, to a Rashômon-like difference of perception.¹⁷⁸ Christopher A. Wray, former Assistant Attorney General of the Criminal Division and Principal Associate Deputy Attorney General, uses this idea of an “apparent disconnect” to explain why the controversy over the government’s consistent request for waiver of attorney-client privilege is really a simple “mutual misunderstanding.”¹⁷⁹

Ask a prosecutor and a defense attorney who have just concluded a negotiation session whether a waiver request was made, and you may well have different answers from each. Mutual misunderstandings between the two groups can help explain the chasm between the Justice Department’s accounts of the rarity of waiver requests and the defense bar’s vehement insistence that they occur routinely.¹⁸⁰

Regardless of the differing perceptions between prosecutors and defense lawyers, Tables I and II, *infra*, reveal that nearly 80% of the deferred prosecution agreements contain a waiver of privilege. It is unlikely that corporate counsel would waive the privilege unless they believed that waiver was required by the government.¹⁸¹ This empirical data reinforces

175. Silbert & Doufekias, *supra* note 168, at 1227 (quoting *Interview with United States Attorney General James B. Comey Regarding Department of Justice Policy on Requesting Corporations Under Criminal Investigation to Waive The Attorney-Client Privilege and Work Product Protection*, U. S. ATT’YS BULL., Nov. 2003, at 1 [hereinafter *Comey Interview*]).

176. *Id.* at 1228 (quoting *Comey Interview*).

177. *Id.* (quoting *Comey Interview*).

178. RASHÔMON (Daiei Motion Picture Co. Ltd. 1951). Rashômon is a Japanese film about a murder mystery. The three main characters, the husband, the wife, and the bandit are called upon to testify against the murder of the husband, and each testimony is different. One may say that the underlying question presented in the film is “What is the truth?” For a description of the movie, see Bosley Crowther, *Roshômon*, N.Y. TIMES, Dec. 27, 1951.

179. Wray & Hur, *supra* note 78, at 1177.

180. *Id.* “[R]epresentatives of the Department dispute the underlying premise that prosecutors are routinely requiring waiver in the course of government investigations.” *Id.* at 1176. The Justice Department position on waiver is ably elaborated in Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 588 (2004).

181. See, e.g., Stephen W. Graffman & Jeffrey L. Bornstein, *New Memo Won’t Help*, NAT’L L. J., Nov. 14, 2005 (“In reality today, a corporation that does not waive these valuable privilege rights effectively is considered a noncooperator.”). See also Tamara Loomis, *Justice Encourages Waiving Attorney-Client Privilege*, N.Y.L.J., Feb. 20, 2003, at 1 (citing Roberto J. Anello, partner

the conclusion of the American Corporate Counsel Association that it is “the regular practice of U.S. Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with prosecutors’ investigations.”¹⁸²

A related claim of overreaching by federal prosecutors in negotiating deferred prosecution agreements centers on the issue of whether a corporation should agree not to advance or reimburse legal fees for indicted executives after the corporation has entered into a deferred prosecution agreement. This issue has received substantial public attention in the upcoming criminal trial of former KPMG executives.¹⁸³ The indicted executives of KPMG have charged that the government’s agreement with KPMG violated their Sixth Amendment right to counsel.¹⁸⁴ The basis for the claim centers on conversations between United States Attorneys and KPMG regarding the payment of indicted employees legal fees and what constitutes government cooperation.¹⁸⁵ The government asserted that KPMG’s decisions not to reimburse indicted executives was not due to government pressure, but a mutual misunderstanding.¹⁸⁶ Judge Lewis Kaplan rejected the government’s position:

The government was economical with the truth in its early responses to this motion. It is difficult to defend even the literal truth of the position it took in its first memorandum of law. KPMG’s decision on payment of attorneys’ fees was influenced by its interaction with the USAO and thus cannot fairly to be said to have been a decision “made by KPMG alone,” as the government represented.¹⁸⁷

Judge Kaplan went on to state, “Every court is entitled to complete candor from every attorney, and most of all from those who represent the United States. These actions by the USAO are disappointing. There should be no recurrence.”¹⁸⁸

at Morvillo Abramowitz Grand Iason & Silberberg). In describing the prosecutor’s promise of cooperation and thus no indictment as a means to get a business organization to waive the attorney-client privilege, Mr. Anello states, “It’s phrased as a carrot, but it’s really a stick.” *Id.*

182. Wray & Hur, *supra* note 78, at 1175–76 (quoting Letter from the American Corporate Counsel Association to U.S. Dep’t of Justice (May 12, 2000)).

183. See, e.g., Lynnley Browning, *Ex-Officials of Justice Dept. Oppose Prosecutors’ Tactic in Corporate Criminal Cases*, N.Y. TIMES, Sept. 7, 2006, at C4; Stephanie Kirchgaessner, *Hardline Justice Department Starts to Feel the Heat*, FIN. TIMES, Aug. 2, 2006, at 2; Lynnley Browning, *U.S. Tactic on KPMG Questioned*, N.Y. TIMES, June 28, 2006, at C1; Stephanie Kirchgaessner & Patti Waldmeir, *Judge Rebukes Prosecutors on KPMG Case*, FIN. TIMES, June 28, 2006, at 5.

184. See *United States v. Stein*, 435 F. Supp. 2d 330, 365–66 (S.D.N.Y. 2006).

185. See *id.* at 351–52.

186. See *id.*

187. *Id.* at 381.

188. *Id.*

Judge Kaplan concluded that aspects of Thompson violated the Sixth Amendment constitutional right to legal representation.¹⁸⁹

[S]o much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution.¹⁹⁰

On November 15, 2006, Judge Kaplan, expressing concern that “there is a real and growing possibility that some and perhaps all [of the KPMG defendants] lack funds necessary to their defense[,]” indefinitely postponed the trial of the KPMG defendants.¹⁹¹ Judge Kaplan observed:

“This court found, after a full evidentiary hearing, that the government violated the rights of the KPMG defendants by inducing KPMG—which otherwise would have advanced defense costs—to cut off payments upon indictment. . . . If KPMG is obliged to pay, payment could greatly mitigate the impact of the government’s improper actions. This in turn could diminish the advisability of dismissal or other potentially serious sanctions. If KPMG is not obliged to pay, or if a prompt determination is not feasible, the issue of sanctions could be considered after exhaustion of that possibility.”¹⁹²

VIII. THE RENEWAL OF ORGANIZATIONAL INDICTMENT AND THE CONTINUING CONTROVERSY OVER PRIVILEGE WAIVER

The issue of governmental demands for privilege waiver was a central factor in the indictment of the law firm of Milberg Weiss Bershad & Schulman and two of its named partners.¹⁹³ The indictment of the law firm

189. See Lynnley Browning, *Judge Questions*, *supra* note 111. Judge Kaplan granted limited discovery and an evidentiary hearing on defendant’s claim “that the government, through the Thompson Memo . . . has violated defendants’ [Sixth Amendment] right to counsel by improperly interfering with KPMG’s ability to choose to advance to defendants legal fees and other defense costs” *United States v. Stein*, 2006 WL 1063298, at *1 (S.D.N.Y. Apr. 12, 2006) (No. 05 Crim. 0888).

190. *United States v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006).

191. Lynnley Browning, *Judge Delays KPMG Tax Trial Over Legal Fees Dispute*, N.Y. TIMES, Nov. 15, 2006, at C1 (quoting Judge Lewis A. Kaplan).

192. *Id.* (quoting Judge Lewis A. Kaplan).

193. See First Superseding Indictment, *United States v. Milberg Weiss Bershad & Schulman LLP, David J. Bershad, Steven G. Schulman, Seymour Lazar, and Paul T. Selzer*, CR 05-587(A)-DDP (C.D.C.A. 2006). See also, Press Release, U.S. Attorney, Central District of California, Milberg Weiss Law Firm, Two Senior Partners Indicted in Secret Kickback Scheme Involving Named Plaintiffs in Class Action Lawsuits (May 18, 2006) (describing the indictment); John R. Wilke, Nathan Koppel & Peter Sanders, *Milberg Indicted on Charges Firm Paid Kickbacks*, WALL ST. J., May 19, 2006, at A1.

comes after negotiations failed between the firm and the government for a deferred prosecution agreement.¹⁹⁴ The underlying charge is that the firm and two named partners engaged in secret rebates to lead plaintiffs in class action cases.¹⁹⁵ This indictment “represents the most prominent confrontation between the government and a law firm in years.”¹⁹⁶ A statement from Milberg Weiss reveals that the negotiations failed because of “[t]he government’s insistence that the firm waive attorney-client privileges as a condition to avoiding indictment.”¹⁹⁷ Milberg Weiss asserts this condition “is in derogation of one of the bedrock principles of American law.”¹⁹⁸ The statement added: “The prosecutors also insisted that the firm make unfounded statements accusing its own partners of crimes and otherwise become an agent for the government. Unfortunately, the prosecutors insisted on indicting the firm unless it made these impossible concessions.”¹⁹⁹

A similar concern over the government’s policy on privilege waiver has been voiced in a Federalist Society paper:

[Government enforcement policies] have put companies on notice that any refusal to waive such [attorney-client and work-product] privileges and protections could be viewed as a failure to cooperate with a government investigation and be held against the company when determining whether to charge or how to sentence a company for its alleged wrongdoing. . . . Current DOJ policy thus forces businesses to choose between cooperation that may include privilege waiver, potentially providing other litigation adversaries with privileged material that they would otherwise not be entitled to receive, and facing the consequences of

194. See, e.g., Milberg Weiss Statement (May 18, 2006), <http://www.milbergweissjustice.com/ourstatements.php>. On the firm’s website, the provided statements made by Mel Weiss regarding the indictment:

The firm has held intense negotiations with government officials in Los Angeles and Washington over the past six months in an effort to avoid this unjust result. The government’s insistence that the firm waive attorney-client privileges as a condition to avoiding indictment is in derogation of one of the bedrock principles of American law and extended to parties the firm did not control. . . . Unfortunately, the prosecutors insisted on indicting the firm unless it made these concessions.

Id.

195. See, e.g., Milberg Weiss Justice, Unsubstantiated Allegations, http://www.milbergweissjustice.com/thecase_allegations.php (last visited Nov. 10, 2006) (“The Justice Department alleges that Milberg Weiss knowingly paid lead plaintiffs in a small number of its cases.”); see also Milberg Weiss Statement, *supra* note 194.

196. *Law Firm Indicted in Kickback Case*, ORLANDO SENTINEL, May 19, 2006, at C3.

197. Milberg Weiss Statement, *supra* note 194.

198. *Id.*

199. *Id.*

being deemed to have failed to cooperate in the government investigation.²⁰⁰

The American Bar Association has asked the House Judiciary committee to encourage the Justice Department to end the “culture of waiver.”²⁰¹ Responding to concerns about the waiver requirement, the U.S. Sentencing Commission voted on April 5, 2006 to submit to Congress a revision of the waiver of attorney-client privilege provision.²⁰²

The controversy over the Justice Department policy on the waiver issue in negotiating the deferred prosecution agreements led to a Senate Judiciary Hearing in September 2006.

A coalition of business and legal organizations, including the U.S. Chamber of Commerce, American Bar Association, Association of Corporate Counsel and National Association of Criminal Lawyers, contends that the Thompson memo has created a “culture of waiver” in which federal prosecutors now routinely demand waiver of attorney-client and work product protections even where there are less intrusive means of getting information.²⁰³

Former Attorney General Edwin Meese III urged that Thompson eliminate all references to waiver in making a charging decision.²⁰⁴ In response to a statement by Deputy Attorney General Paul McNulty defending current Department policy, Senator Arlen Specter countered: “As I read this policy, I think it is coercive and may even rise to the level of being a bludgeon. I would ask you to reconsider the policy.”²⁰⁵ At the

200. George Terwilliger III & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations* 3, 7 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 25, 26–27, available at <http://www.fed-soc.org/Publications/Engage/March%202006.pdf> (citations omitted).

201. Press Release, ABA Urges Congress to Stem Culture of Waiver of Attorney-Client Privilege in Probes of Corporations (March 6, 2006). See also R. William Ide III et al., *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1050–55 (2005) (proposing solutions opposing the government's practice of seeking waiver of the attorney-client privilege or work product doctrine).

202. Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids (Apr. 11, 2006), available at <http://www.ussc.gov/PRESS/rel0406.htm>. The Commission voted at that session to promulgate an amendment “deleting the 2004 commentary to the organizational sentencing guidelines stating that waiver of attorney-client privileges and work product protections is a not a pre-requisite for an organization to receive credit for cooperation at sentencing.” *Id.* See also Patti Waldmeir, *Companies Fight Over Waivers*, FIN. TIMES, Nov. 16, 2005 (“Responding to pressure from business and lawyers' groups, the commission held hearings this week on whether to amend the guidelines to discourage compelled waivers.”).

203. Marcia Coyle, *DOJ Reviewing Guidelines for Corporate Investigations*, NAT'L L. J., Sept. 14, 2006.

204. *Id.* (quoting Former Reagan Attorney General Edwin Meese III).

205. *Id.* (quoting Arlen Specter, R-Pa.).

present time, it is difficult to predict whether the Justice Department will change its basic approach to the waiver issue.²⁰⁶

IX. CONCLUDING OBSERVATIONS

Decades ago, legal realists taught that the state of the law should be gleaned not simply from formal substantive legislative and judicial pronouncements but from the law as applied by enforcers, civil, criminal, and private. This perspective helps in understanding the American “law” of corporate criminal liability in the twenty first century.

The substantive law governing corporate criminal liability is derived from congressional enactments and Supreme Court pronouncements and has remained unchanged for more than a century. However, the operative rules of corporate criminal liability and their application have undergone profound change. That change derives from the actions of a unique federal “agency,” the United States Sentencing Commission, combined with the enforcement arm of our federal constitutional system, the United States Department of Justice and those who carry out Justice Department policy, the nation’s United States Attorneys. Together, these efforts resulted in a quiet legal revolution that made corporate indictment and conviction an extreme rarity, and the prosecution of culpable corporate executives commonplace.

The corporation is now typically seen by the federal government not as the culprit in need of punishment, but as the facilitator/cooperator in the task of indicting and convicting culpable executives. To discharge its newly created law enforcement partnership with the federal government, the corporation routinely abandons attorney-client privilege and agrees not to contradict a detailed statement of culpability that often becomes the blueprint for prosecution of indicted executives.

At the same time, in an era where the penal policy goal of rehabilitation has been abandoned in the prosecution of individuals,²⁰⁷ rehabilitation has

206. It is noteworthy that two recent agreements did not contain any provisions requiring the waiver of attorney-client or work product privileges. The first is a non-prosecution agreement entered into with Royal Ahold, a Dutch food conglomerate on September 25, 2006 with the USAO of the Southern District of Florida. See Letter from Michael J. Garcia, U.S. Attorney for the Southern District of New York, to Lawrence Byrne, Esq., White & Case LLP, Royal Ahold N.V. and U.S. Foodservice, Inc. (Sept. 25, 2006), available at <http://www.corporatecrime-reporter.com/documents/ahold.pdf>. The second is a deferred prosecution agreement entered into by the USAO of the Northern District of Florida with Mantra Films and MRA Holding, LLC for charges stemming from the exploitation of minors on September 12, 2006. See Press Release, U.S. Attorney’s Office for the Northern District of Florida, ‘Girls Gone Wild’ Pleads Guilty in Sexual Exploitation Case (Sept. 12, 2006), available at <http://www.usdoj.gov/usao/fln/press%20releases/2006/sept/mantrapressrelease.htm>.

207. See Leonard Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 29 (1978).

been rehabilitated, sub silento, as a goal in corporate prosecution.²⁰⁸ The rehabilitated corporation adopts codes of ethics and compliance programs, reports to and may be managed by outside monitors, files detailed reports to the government, and cooperates with the Justice Department in the prosecution of former senior executives. In short, it demonstrates, on pain of prosecution for failure to do so, that it is indeed a “good corporate citizen.”²⁰⁹

Whether or not this approach will be an enduring feature of the American criminal justice system remains to be seen.

208. In explaining and defending the Bristol Myers Squibb deferred prosecution agreement, the United States Attorney declared: “The action by the government was firm, decisive and geared toward rehabilitating a damaged corporation.” Christie & Hannah, *supra* note 59, at 1061.

209. Reflecting the widely held view in the Justice Department, United States Attorney Christie recently declared that “deferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship.” *Id.* at 1043.

Table 1
CORPORATE FEDERAL DEFERRED PROSECUTION AGREEMENTS
Prof. Leonard Orland

Year	Venue	Duration	Offenses	Individuals Charged	Fine	Restitution	Civil Penalty	Agency Settlement	Acceptance of Responsibility	Monitor / Examiner	Contradictory Public Statements	Discharge Employees	Cooperation	Factual Statement	Hotline	Compliance Program	New Internal Controls	Waiver of Privilege	Waiver of Statute of Limitations / 6th Amendment	New Management / Board	Training Program	Self-Reporting
1	Armour of America	1993	C.D. Cal.	Violation of Arms Export Control Act			\$20,000									Yes			Yes			
2	Prudential Securities	1994	S.D.N.Y.	Unlawful sale of interests		Any in arrears Re: \$330M		\$320M SEC		Yes			Yes			Yes		Yes		Yes		
3	Arthur Anderson	1999	D. Conn.				\$10.3M	Yes														
4	Seans	2001	S.D. Ill.	Mail fraud		\$47.6M		\$1.9M USPS					Yes	Yes				Partial				
5	BDO Seidman	2002	S.D. Ill.	Securities fraud		\$19M	Yes					Yes	Yes	Yes				Yes	Yes	Yes		
6	PNC Financial	2003	W.D. Pa.	Conspiracy, securities fraud			\$59M	\$25M	Yes		Yes		Yes	Yes				Yes	Yes			
7	NY Racing Association	2003	E.D.N.Y.	Aiding and abetting: false tax returns		\$3M			Yes	Yes			Yes	Yes				Yes	Yes	Yes		
8	Canadian Imperial Bank	2003	Enron Task Force	Enron activity: increased financing				\$90M SEC	Yes	Yes			Yes	Yes				Yes	Yes			
9	Banco Popular	2003	D. P.R.	Failing to file suspicious activity reports, money laundering	Yes		\$20M	\$21.6M (civil claims)	Yes		Yes		Yes	Yes				Yes	Yes			
10	CompuLink Associates	2004	E.D.N.Y.	Securities fraud	CEO, GC, Sr. Execs	\$235M		\$163M (civil claims)	Yes	Yes		Yes	Yes	Yes				Yes	Yes	Yes	Yes	
11	Invision Technologies	2004	DOJ Criminal Division, Fraud Section	Foreign corrupt practices			\$306K	SEC	Yes	Yes		Yes	Yes	Yes				Yes	Yes			
12	American International Group (AIG)	2004	W.D. Pa.	Aiding and abetting: securities fraud		\$93M		\$49M	Yes		Yes		Yes	Yes								
13	America Online	2004	E.D. Va.	Aiding and abetting: securities fraud	Yes	\$150M	\$60M	\$4M (civil forfeiture actions)	Yes	Yes			Yes	Yes				Yes	Yes			
14	Amsouth Bancorp	2004	S.D. Miss.	Failing to file suspicious activity reports	7 & 10 year sentences				Yes		Yes		Yes	Yes				Yes	Yes			
15	KPMG	2005	S.D.N.Y.	Conspiracy; tax evasion	Many partners	\$128M	\$100M	Yes	Yes	Yes		Yes	Yes	Yes				Yes	Yes	Yes	Yes	
16	Bristol Myers Squibb	2005	D. N.J.	Conspiracy, securities fraud	2 officers	\$350M	\$100M	\$150M SEC	Yes	Yes		Yes	Yes	Yes				Yes	Yes	Yes	Yes	
17	Monsanto	2005	D.D.C.	Foreign corrupt practices; false entries in books			\$1M	\$10.5 M SEC	Yes	Yes			Yes	Yes				Yes	Yes			
18	University of Medicine and Dentistry of New Jersey	2005	D. N.J.	Health care fraud		\$4.3M			Yes	Yes			Yes	Yes				Yes	Yes			
19	Operational Management International	2005	D. Conn.	Clean Water Act reporting violations		\$2M			Yes		Yes		Yes	Yes				Yes	Yes	Yes	Yes	
20	FirstEnergy Nuclear Operating	2009	N.D. Ohio	Making False Statements to Nuclear Regulatory Commission	Yes	\$23M	\$4.2M		Yes		Yes		Yes	Yes				Yes	Yes			
21	Williams Power Company	2006	N.D. Cal.	Fraudulent filing of reports for securities market	Yes	\$50K			Yes				Yes									
22	Roger Williams Medical Center	2005	D. R.I.	Public Corruption	Yes	\$4M			Yes	Yes		Yes	Yes	Yes				Yes	Yes			
23	INV	2009	S.D.N.Y.	IRS Fraud (stemming from KPMG involvement)		\$23M		\$6.5M IRS	Yes		Yes		Yes	Yes				Yes	Yes			
24	BankAtlantic	2009	S.D. Fla.	Failure to maintain anti-money laundering program		\$10M			Yes		Yes		Yes	Yes				Yes	Yes			

