Marquette Law Review

Volume 93
Issue 2 *Symposium: Criminal Appeals: Past, Present, and Future*

Article 19

Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements

Rachel Delaney

CONGRESSIONAL LEGISLATION: THE NEXT STEP FOR CORPORATE DEFERRED PROSECUTION AGREEMENTS

I. INTRODUCTION

The tale of Arthur Andersen's demise can still bring chills to many in corporate America. The entity's operational days are a memory, but its story lives on as an infamous example of the stigma and nearly certain ruin a criminal prosecution can bring to a business.[1] The lingering lesson from Arthur Andersen's downfall is that indictment alone is a "death sentence for a large corporation."[2] In contrast, the events leading up to the government bailout of American International Group, Inc. (AIG) during the 2008 financial crisis illustrate how avoiding criminal prosecution with the use of a deferred prosecution agreement (DPA) does not necessarily avoid a negative result.[3] While the Arthur Andersen situation proves corporate DPAs help large entities avoid the negative consequences of criminal prosecution, the result in AIG's case demonstrates that deferred prosecution does not always achieve the ethical reforms it sets out to accomplish. Thus, while deferred prosecution can be a helpful tool for realigning businesses with ethical practices, the current system is not efficient at implementing the necessary changes.

The goal of this Comment is to evaluate the deferred prosecution process in the corporate context and to advocate for the passage of legislation to regulate federal prosecutorial behavior so as to achieve lasting results from corporate DPAs.[4] Similar to bankruptcy reorganization under Chapter 11 of

---

1. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160 (2008) (acknowledging the "severe collateral consequences of indictment").

2. Lynsey Morris Barron, Comment, *Right to Counsel Denied: Corporate Criminal Prosecutions, Attorney Fee Agreements, and the Sixth Amendment*, 58 EMORY L.J. 1265, 1265 (2009).

3. In 2004, AIG Financial Products, led by President and Chief Executive Officer Joseph J. Cassano, entered into a DPA with the Department of Justice (DOJ) to stay prosecution for an alleged securities fraud violation. Deferred Prosecution Agreement Between the United States Department of Justice, Criminal Division, Fraud Section, and AIG-FP Pagic Equity Holding Corp. (Nov. 30, 2004), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/aig.pdf [hereinafter AIG Deferred Prosecution Agreement]. In 2008, AIG Financial Products and Cassano again became the subjects of DOJ scrutiny as a result of the company's risky financial behavior. Jenny Andersen, *A.I.G. Says It Is Subject of Inquiries*, N.Y. TIMES, June 7, 2008, at C3.

4. The fact that this Comment discusses federal prosecutorial reform in the corporate context is not to suggest that businesses are more deserving of legislation that regulates prosecutorial conduct than individual criminal defendants. While reform may or may not be needed in other areas of

the Bankruptcy Code,[5] which allows a corporation to reorganize rather than fold in its attempt to pay off debt, giving a corporation the chance to right ethical wrongs under a DPA in lieu of proceeding with an indictment and prosecution can do a greater good for society.[6] Both Chapter 11 and DPAs help avoid the harsh results of a large corporation folding and leaving thousands unemployed.

This Comment argues that the passage of legislation in the corporate deferred prosecution arena will aid prosecutors in writing DPAs that appropriately punish and deter white collar crime while avoiding collateral consequences to businesses and employees. Legislation can allay the risks inherent in today's deferred prosecution system, such as punishments that do not fit the crime, pressure to waive attorney–client privilege, non-payment of employee legal fees, and conflicts of interest in the appointment of a federal monitor to oversee implementation of the agreement.[7]

The balance of this Comment proceeds as follows. Part II will outline the origins of DPAs in the United States. Part III will detail why legislative oversight of prosecutorial behavior in the corporate deferred prosecution context is necessary. Part IV will track the development of stricter prosecutorial standards in DPAs by analyzing the provisions in three U.S. Department of Justice (DOJ) memos and three corresponding agreements: (1) the 1999 Holder Memorandum[8] and the corresponding 2001 Aurora Foods, Inc. pretrial diversion agreement,[9] (2) the 2003 Thompson Memorandum[10]

---

prosecutorial conduct, this Comment addresses only the corporate context.

5. 11 U.S.C. § 1108 (2006).

6. *See* Richard E. Mendales, *Intensive Care for the Public Corporation: Securities Law, Corporate Governance, and the Reorganization Process*, 91 MARQ. L. REV. 979, 985 (2008). Reorganization, like deferred prosecution, is useful "in situations where . . . more could be recovered by keeping a distressed business in operation than by dismembering its corpse." *Id*.

7. *See* Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecution Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 230 (2009) (explaining that legislation is needed to curb the "ongoing prosecutorial abuse by federal prosecutors directed at corporations and corporate constituents under investigation").

8. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., to All Component Heads and U.S. Att'ys on Federal Prosecution of Corporations (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html [hereinafter Holder Memo].

9. Pretrial Diversion Agreement Between the Office of the United States Attorney for the Southern District of New York and Aurora Foods, Inc. (Jan. 22, 2001), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/aurorafoods.pdf [hereinafter Aurora Foods Pretrial Diversion Agreement].

10. Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

and the corresponding 2005 KPMG DPA,[11] and (3) the 2006 McNulty Memorandum[12] and the corresponding 2008 AGA Medical Corporation DPA.[13] Part V will demonstrate how the 2008 Filip Memorandum,[14] the Attorney–Client Privilege Protection Acts of 2007,[15] 2008,[16] and 2009,[17] and two bills recently presented to Congress[18] evidence a desire in the legal community for tighter regulation. Part V will conclude by urging Congress to recognize the current trend in DPAs towards a more regulated standard for prosecutors. Not only should Congress reintroduce and pass the two above-mentioned bills, H.R. 5086 and the Accountability in Deferred Prosecution Act of 2009, but it should pass additional legislation such as the Attorney–Client Privilege Protection Act to form enforceable rights for businesses and to more closely regulate the conduct of prosecutors in the corporate deferred prosecution process.

II. THE ORIGINS OF DEFERRED PROSECUTION AGREEMENTS IN THE UNITED STATES

A brief overview of the inception of the DPA is necessary to understand the current climate. Recently, while administering the 2005 Bristol-Meyers Squibb DPA for securities fraud violations,[19] federal prosecutors noted that a main goal of the agreement was to "achieve improved corporate governance

11. Deferred Prosecution Agreement Between the Office of the United States Attorney for the Southern District of New York and KPMG, LLP (Aug. 26, 2005), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/kpmg.pdf [hereinafter KPMG Deferred Prosecution Agreement].

12. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations, *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memo].

13. Deferred Prosecution Agreement Between the United States Department of Justice, Criminal Division, Fraud Section, and AGA Medical Corporation (June 3, 2008), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/agamedical.pdf [hereinafter AGA Deferred Prosecution Agreement].

14. Memorandum from Mark R. Filip, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Att'ys on Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf [hereinafter Filip Memo].

15. Attorney–Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).

16. Attorney–Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

17. Attorney–Client Privilege Protection Act of 2009, S. 445, 111th Cong. (2009).

18. The two bills presented to Congress are the Accountability in Deferred Prosecution Act of 2008, H.R. 6492, 110th Cong. (2008) (reintroduced with identical language in the 111th Congress as H.R. 1947, 111th Cong. (2009)) and H.R. 5086, 110th Cong. (2008).

19. Deferred Prosecution Agreement Between the United States Attorney's Office for the District of New Jersey and Bristol-Meyers Squibb Company (June 15, 2005), *available at* http://www.usdoj.gov/usao/nj/press/files/pdffiles/deferredpros.pdf [hereinafter Bristol-Meyers Squibb Deferred Prosecution Agreement].

and renewed market confidence without destroying a corporation and losing American jobs in the process."[20] The Bristol-Meyers Squibb theme resonates in even the earliest diversion agreements, which generally did not involve U.S. Attorneys or business entities.[21] Prosecutors first began deferring prosecutions for individuals, such as juveniles or first-time offenders, with the objective of allowing the individual to rehabilitate and re-enter society free from the stigma of a criminal conviction.[22] Similarly, DPAs permit the federal government to reform a business organization's unethical practices without shutting down the business and thereby putting jobs and the economy in jeopardy.[23]

Pretrial diversion agreements come in two variations: DPAs and non-prosecution agreements (NPAs).[24] In a DPA, "the prosecutor files a criminal charge against a company, but agrees not to prosecute the claim so long as the entity complies with the terms of a deferral agreement."[25] In an NPA, no charges are filed at the outset but may be filed later if the corporation does not fulfill the terms of the agreement.[26] Common terms of reform outlined in both DPAs and NPAs include federal monitoring, "restitution, fines, additional auditing measures, termination of responsible individuals, and probation."[27] Additionally, in both DPAs and NPAs, the government may proceed criminally against the entity if the government believes the entity breached the agreement.[28]

The first unofficial DPA occurred in 1992 and grew out of the government's investigation of Salomon Brothers for a securities fraud violation.[29] The agreement was reached when Salomon Brothers complied so

---

20. P.J. Meitl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 1–2 (2007).

21. *See* Spivack & Raman, *supra* note 1, at 163 (noting that deferred prosecution has existed for decades, beginning with deferred prosecutions for individual defendants).

22. *Id*.

23. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007). One court described the consequences of a federal conviction for a business entity as a "matter of life and death." *Id*. (quoting United States v. Stein, 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006)). Diversion agreements allow organizations to avoid the "collateral consequences of an indictment" while achieving institutional reform. *Id*.

24. Throughout this Comment the author will refer to DPAs, NPAs, and pretrial diversion agreements interchangeably, as, though slightly different in definition, they are functionally the same for the purposes of this Comment.

25. Spivack & Raman, *supra* note 1, at 160.

26. Meitl, *supra* note 20, at 14.

27. *Id*. at 11.

28. Spivack & Raman, *supra* note 1, at 161.

29. *Id*. at 163. *See generally* Paul Mozer, *Plea Bargain Cited in Salomon Case*, N.Y. TIMES, Dec. 19, 1992, at L39 (noting that Salomon Brothers made substantial reforms pursuant to the government investigation).

substantially with the government's requests for reform that the U.S. Attorney on the case decided not to indict.[30]

In contrast, today's DPAs, although lacking concrete direction from the DOJ or Congress, involve a more formal agreement process at the outset, which can be traced back to a 1994 agreement between the U.S. Attorney for the Southern District of New York and Prudential Securities.[31] In exchange for a deferral of its prosecution for securities fraud for three years, Prudential agreed to the government's request for considerable internal reforms.[32] Unlike today's culture wherein DPAs are very popular,[33] the Prudential agreement was viewed as rare and unusual because it was one of the first of its kind.[34] Similar to today's DPA process, the Prudential agreement was made without much direction from the DOJ. [35]

In 1999, the DOJ issued its first set of guidelines for federal prosecutors engaging in diversion agreements.[36] The guidelines, entitled "Federal Prosecution of Corporations," consisted of a memo issued by then-Deputy Attorney General and current Attorney General Eric Holder.[37] Since the issuance of the "Holder Memo" in 1999, the DOJ has used pretrial diversion agreements to institute internal structural reform in over thirty-five business organizations,[38] and has issued three additional, significant memos containing

30. Spivack & Raman, *supra* note 1, at 163 n.21. *See* Press Release, U.S. Dep't of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992) (on file with author), *available at* http://www.usdoj.gov/atr/public/press_releases/1992/211182.pdf. "Salomon's cooperation has been exemplary. Such actions were virtually unprecedented in my experience." *Id*. (quoting then-United States Attorney for the Southern District of New York Otto Obermaier).

31. Spivack & Raman, *supra* note 1, at 164 (noting that Prudential Securities was the first major company to engage in a deferred prosecution agreement with the DOJ).

32. *See* Deferred Prosecution Agreement Between the United States Attorney's Office for the Southern District of New York and Prudential Securities Incorporated (Oct. 27, 1994), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/prudential.pdf [hereinafter Prudential Deferred Prosecution Agreement].

33. Spivack & Raman, *supra* note 1, at 166. The corporate fraud outrages of the 2000s, such as the Enron Corporation scandal, pushed Congress to pass the Sarbanes-Oxley Act and President George W. Bush to create the Corporate Fraud Task Force to investigate and monitor corporate financial crimes. *Id*. at 164–65. The heightened focus on corporate crime sparked the increase in DPAs. *Id*. at 166.

34. Kurt Eichenwald, *Prudential Agrees to Pay Investors for Fraud Losses*, N.Y. TIMES, Oct. 22, 1993, at A1 (noting that the Prudential settlement is "highly unusual").

35. Meitl, *supra* note 20, at 12. At the time the Prudential Deferred Prosecution Agreement was made no official guidelines for prosecutors existed. *Id*.

36. Spivack & Raman, *supra* note 1, at 164. The guidelines "outlined various factors that prosecutors could consider in deciding the threshold question of whether to proceed against a company." *Id.*

37. *Id*.

38. Garrett, *supra* note 23, at 855. Large organizations with which the DOJ has entered into DPAs since 1999 include American International Group, Inc., America Online LLC, the Boeing

guidelines for prosecutors.[39] Although each memo replaced its predecessor with more stringent guidelines for prosecutors, the broad discretion initially permitted under the Holder Memo has been difficult to retract.[40]

III. THE NEED FOR LEGISLATIVE OVERSIGHT IN THE CORPORATE DEFERRED PROSECUTION PROCESS

A. The Potential for Unfair Outcomes

The existing standards for prosecutors in the DPA process consist of a series of memos issued by the DOJ to direct the prosecution decision. The memos provide guidelines for ethical reforms of businesses but allow broad prosecutorial discretion; therefore, the memos do not adequately address the possibility that prosecutors may abuse their power in issuing DPAs and NPAs.[41]

Unfairness may arise in at least four instances during the DPA process. First, punishments placed on businesses may be unrelated to the crime that precipitated the DPA.[42] For instance, the Bristol-Meyers Squibb DPA, which resulted from an allegation of securities fraud, required the company to endow a chair in business ethics at Seton Hall, the prosecuting U.S. Attorney's law school alma mater.[43] While beneficial to Seton Hall, the windfall did not advance the criminal justice system's goals of punishment and deterrence.[44]

Second, if attorney–client privilege is waived, as it was in the Baker

---

Company, Bristol-Myers Squibb Company, Computer Associates, Inc., HealthSouth Corporation, KPMG LLP, MCI, Inc., Merrill Lynch & Co., Inc., and Monsanto Company, among others. *Id*.

39. The Thompson Memo in 2003, *supra* note 10, the McNulty Memo in 2006, *supra* note 12, and the Filip Memo in 2008, *supra* note 14.

40. *See* Ball & Bolia, *supra* note 7, at 245 (naming the Holder Memo's "abuse-inviting problems" as the reason the Thompson Memo failed to create proper guidelines for U.S. Attorneys).

41. *Id*. at 230 (explaining that legislation is needed to "curb ongoing prosecutorial abuse by federal prosecutors directed at corporations and corporate constituents under investigation"); Spivack & Raman, *supra* note 1, at 162 (advocating for legislation, or any change that would reform and standardize the DPA process).

42. Spivack & Raman, *supra* note 1, at 174.

43. Bristol-Meyers Squibb Deferred Prosecution Agreement, *supra* note 19, at 6.

44. Similar criticism exists regarding distribution of uncollected consumer class action funds to charities. Natalie A. DeJarlais, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 731 (1987) (noting the "policy against conferring windfall benefits on unaggrieved individuals"). Because courts are "free to do almost anything with undistributed [consumer] class [action] funds," the system is "ad hoc, unpredictable, unguided by any normative principle, and open to the possibility of abuse." Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 263 (2008). If left unregulated, the DPA system could grow to mimic the cy pres system and charitable organizations may begin to lobby prosecutors to become the recipients of DPA funds. *See id*. at 265. This process "looks unseemly at best, and opens up the possibility of corruption at worst." *Id*.

Hughes, Inc. DPA,[45] unfairness may result if the government considers privilege-waiver an element of cooperation, thereby giving businesses an incentive to blame employees and "find scapegoats within their ranks."[46] Similarly, the third way unfairness can result from the DPA process is if a business is pressured to cease contractually promised payment of legal fees for specific employees.[47] Such pressure was found unconstitutional in *United States v. Stein*.[48] While former Deputy Attorney General Thompson noted that employees "don't need fancy legal representation if they believe that they did not act with criminal intent,"[49] others have criticized non-payment of legal fees as an attempt to make prosecution easier for U.S. Attorneys and cooperation more difficult for businesses by causing employees to distrust their employers and refuse to share information.[50]

Fourth, because the selection of a federal monitor to watch over a business as it implements its reforms is unregulated, monitor compensation is often expensive for a business, monitors may be inexperienced in the business world, and monitor selection may not always align with the best interest of the business.[51] For instance, U.S. Attorney Christopher J. Christie's appointment of his former boss, past Attorney General John Ashcroft, to the position of monitor for the Zimmer Holdings, Inc. DPA[52] has been highly criticized because General Ashcroft's firm stood to collect $28 million to $52 million during the eighteen-month appointment period.[53]

---

45. Deferred Prosecution Agreement Between the United States Department of Justice, Criminal Division, Fraud Section, and Baker Hughes, Inc., 3 (Apr. 11, 2007), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/bakerhughes.pdf. Baker Hughes was offered a DPA due to an alleged Foreign Corrupt Practices Act (FCPA) violation. *Id*.

46. Inna Dexter, *Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations*, 20 GEO. J. LEGAL ETHICS 515, 526 (2007).

47. Ball & Bolia, *supra* note 7, at 230 (listing the advancement of legal fees as a "key area" of unfairness); Spivack & Raman, *supra* note 1, at 169 (noting Judge Lewis Kaplan's holding in *United States v. Stein*, 435 F. Supp. 2d 330, 367 (S.D.N.Y. 2006), as evidence that prosecutorial pressure to withhold legal fees can result in a constitutional violation).

48. 435 F. Supp. 2d at 356.

49. Ball & Bolia, *supra* note 7, at 247 (citing Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1 (quoting then-Deputy Attorney General Larry Thompson)).

50. *Id*. at 247–48.

51. Spivack & Raman, *supra* note 1, at 185–86.

52. Deferred Prosecution Agreement Between the United States Attorney's Office for the District of New Jersey and Zimmer Holdings, Inc., (Sept. 27, 2007), *available at* http://www.sec.gov/Archives/edgar/data/1136869/000095013707014977/c19011exv10w3.htm.

53. Peggy Aulino, *Deferred Prosecutions: Transparency and Accountability Lacking in Process for Picking Monitors, Dems Say*, 4 White Collar Crime Rep. (BNA) 467 (July 3, 2009). "[M]embers of the Subcommittee on Commercial and Administrative Law called [General Ashcroft's fee] 'outrageous.'" *Id*. In addition, it is questionable whether Zimmer Holdings selected General Ashcroft or was pressured by the government to select him as monitor. *Id*.

Finally, in addition to the above-noted concerns, the question still looms of when exactly a deferred prosecution is appropriate.[54]

B. With or Without Deferred Prosecution, Two Corporate Giants Fall

Due to the risks of abuse in the deferred prosecution process, public skepticism surrounding corporate deferred prosecution has arisen in recent years.[55] While acceptance of a DPA may prevent the harsh consequences of prosecution, a DPA may not always prevent a business from committing similar ethical wrongs in the future, which indicates a problem with the DPA process. The trouble becomes apparent after comparing the cases of Arthur Andersen and AIG.

In Arthur Andersen's case, the DOJ offered the eighty-nine-year-old accounting giant an opportunity to offset its criminal prosecution for its role in the Enron Corporation scandal via a deferred prosecution agreement.[56] Arthur Andersen refused to agree to reforms suggested by the DOJ, rejected the DPA, and quickly fell to its demise in the ensuing prosecution.[57] In a matter of months, the company went out of business and 28,000 employees found themselves out of work.[58] The lasting lesson from Arthur Andersen's fall is that indictment alone can ruin a business.[59]

The benefits of deferred prosecution for Arthur Andersen are now clear: if the corporation had complied with internal reforms handed down from the U.S. Attorney's Office, Arthur Andersen not only would have received an ethical makeover, but it would have had an opportunity to right its wrongs

---

54. Meitl, *supra* note 20, at 2 (questioning the legitimacy of prosecutorial discretion in corporate affairs); Spivack & Raman, *supra* note 1, at 188 (calling for additional guidance from the DOJ on when a deferred prosecution is warranted).

55. *See, e.g.*, Editorial, *It's Time to Put More Transparency into Deferred Prosecution Cases*, STAR-LEDGER (Newark, N.J.), June 25, 2009, at 19 (opining that the pretrial diversion process is relatively unregulated and lacks transparency).

56. Spivack & Raman, *supra* note 1, at 165. Arthur Andersen, while auditing Enron in late 2001 pursuant to a Securities and Exchange Commission investigation, became aware of suspect financial practices at Enron. Ball & Bolia, *supra* note 7, at 248–49. In March 2002, after shredding documents related to its representation of Enron, Arthur Andersen was charged with "one count of knowingly and corruptly persuading another person with intent to cause or induce any person to withhold documents from or alter, destroy, or mutilate documents for use in an official proceeding." *Id*. at 249. The conviction was later reversed on the Supreme Court's finding that the jury instructions failed to properly convey the elements of the crime; however, the reversal did not save the business. Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005).

57. Spivack & Raman, *supra* note 1, at 165; Floyd Norris, *Execution Before Trial for Andersen*, N.Y. TIMES, Mar. 15, 2002, at C1. Arthur Andersen was indicted after refusing to plead guilty to obstruction of justice charges and many predicted the prosecution would contribute to the firm's downfall. *Id*.

58. Ball & Bolia, *supra* note 7, at 248; Spivack & Raman, *supra* note 1, at 165–66.

59. *See* Barron, *supra* note 2, at 1265.

without the risk and harsh consequences of an indictment and criminal prosecution.[60] Under the DOJ's offer, Arthur Andersen could have avoided the loss of "billions of dollars in corporate value, thousands of jobs to American employees, investor confidence . . . and the ultimate destruction of [the] corporat[ion]."[61] For Arthur Andersen, deferred prosecution would have been a more graceful alternative by providing "deterrence, restraint, and restoration," while allowing the entity to stay in business, retain employees, and continue with work that required institutional knowledge.[62]

In contrast to Arthur Andersen, AIG accepted a deferred prosecution offer from the DOJ as a result of a 2004 complaint charging AIG with aiding and abetting securities fraud.[63] As part of the agreement, AIG accepted government supervision to rectify improper securities and accounting behavior.[64] Regarding the agreement and the reforms to come under it, then-Assistant Attorney General Christopher Wray said, "'[t]here is no place in our markets for financial transactions that lack economic substance . . . .'"[65]

Despite Assistant Attorney General Wray's commitment and the close government supervision of AIG implemented under the DPA, AIG suffered a severe liquidity crisis in September 2008 due to a rapid decline in the value of its credit default swap contracts that allowed purchasers "to bet on the creditworthiness of debt obligations backed by [subprime] mortgages."[66] The liquidity crisis caused AIG to lose billions of dollars, decreased the company's share price,[67] and contributed significantly to the 2008 worldwide financial crisis.[68] As a result of AIG's suspicious financial practices, in 2008 the DOJ and the Securities and Exchange Commission (SEC) launched an investigation against the same AIG division led by the same person who accepted the DOJ's deferred prosecution offer in 2004 for securities fraud.[69] AIG's situation illustrates the DPA process is problematic when a

60. Meitl, *supra* note 20, at 21–22 (acknowledging that a prosecution can be a "death knell for a corporation").

61. *Id*. at 21.

62. *Id*. at 22.

63. AIG Deferred Prosecution Agreement, *supra* note 3, at 1–2.

64. *Id*. at 2.

65. Press Release, U.S. Dep't of Justice, American International Group, Inc. Enters into Agreements with the U.S. (Nov. 30, 2004) (on file with author), *available at* http://www.usdoj.gov/opa/pr/2004/November/04_crm_764.htm.

66. Mary Williams Walsh & Jonathan D. Glater, *Investors Turn Gaze to A.I.G*, N.Y. TIMES, Sept. 12, 2008, at C1 (explaining that home values fell, thereby forcing AIG to decrease the values of the mortgages on its books).

67. *Id*.

68. Mary Williams Walsh, *A.I.G. Said to Be Stable, But Hurting for Cash*, N.Y. TIMES, Sept. 22, 2009, at B1 (noting that when AIG's credit rating fell in 2008, its trading partners attempted to collect on their contracts, which contributed to the financial crisis).

69. *See supra* note 3.

corporation, such as AIG, can enter into an agreement with the government to clean up its business practices but then continue to operate with questionable practices and cause more serious damage in the future.[70]

In sum, DPAs are controversial because, although they can allow corporations to avoid an Arthur Andersen-like result via an agreement mandating ethical improvement in lieu of prosecution, in the process federal prosecutors have been given too much discretion to manage and rearrange the day-to-day dealings of corporate America, and they do not always do so successfully.[71] There is no legal standard that (1) dictates transparency for the DPA process, (2) answers why diversion agreements are offered for some corporations but not others, (3) determines the appropriate level of punishment, or (4) mandates how government monitors of the offending corporation are to be selected or financially compensated.[72] Thus, while a complete corporate collapse may be avoided with the use of a DPA, the risk of an AIG-like situation exists under the current DPA process.

IV. THE EVOLUTION OF HIGHER STANDARDS FOR PROSECUTORS

DPA critics note that the agreements, while imposing ethical reforms on business entities, create ethical loopholes for prosecutors.[73] The DOJ has tried to close some of the loopholes over the years through the issuance of successive memos, each memo replacing the last with new guidelines.[74] However, as this Part will show, through an analysis of three memos and a diversion agreement under each memo, the memos failed to create enforceable rights for the target businesses and, as a result, were unsuccessful at achieving the necessary check on prosecutorial conduct to ensure transparency and ethical conduct on both sides of the negotiating table. The three DOJ memos analyzed in this Part are the 1999 Holder Memo, the 2003 Thompson Memo, and the 2006 McNulty Memo. The respective diversion agreements analyzed under each memo are the 2001 Aurora Foods, Inc. pretrial diversion agreement, the 2005 KPMG DPA, and the 2008 AGA Medical Corporation DPA.

---

70. *See* Editorial, *supra* note 55, at 19.

71. *See* Meitl, *supra* note 20, at 10.

72. Editorial, *supra* note 55, at 19.

73. Garrett, *supra* note 23, at 857 (noting that unchecked federal prosecutorial power led to a term in the New York Racing Association DPA that required the racing association to install slot machines at its race tracks to provide public school funding).

74. *See* Spivack & Raman, *supra* note 1, at 166 (commenting on the replacement of the Holder Memo with the Thompson Memo in attempt to find a more balanced approach).

A. Analysis of the 1999 Holder Memo and the 2001 Aurora Foods, Inc. Pretrial Diversion Agreement

The Holder Memo aimed to guide prosecutors through the decision of whether to indict a business entity;[75] however, the effect of the Memo was to deny businesses bargaining power over their agreements and allow prosecutors to demand sweeping reforms from businesses so they could avoid prosecution. Although the Memo did not specifically mention deferred prosecution, it set out eight factors for prosecutors to consider in deciding whether to proceed against a business.[76] Deputy Attorney General Holder expressed in his introduction to the Memo that the factors were neither binding nor dispositive.[77] Moreover, Deputy Attorney General Holder acknowledged that the factors may change over time, and stated that "[f]ederal prosecutors are not required to reference [the] factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision."[78] Thus, while the Memo was useful in that it gave prosecutors a starting point for the charging process, the Memo was not specific to the deferred prosecution scenario, it did not provide predictable rules for prosecutorial behavior, and it did not provide protection or enforceable rights for business entities under investigation.

Among the most controversial elements of the Holder Memo was the imprecise definition of "willingness to cooperate" in the fourth factor.[79]

---

75. Holder Memo, *supra* note 8, at intro. Deputy Attorney General Holder offered the Memo to provide "guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case." *Id*.

76. *Id*. § II(A). The eight factors to be considered when charging a business entity as indicated by the Holder Memo were:

> 1. The nature and seriousness of the offense . . . ;
> 2. The pervasiveness of wrongdoing within the corporation . . . ;
> 3. The corporation's history of similar conduct . . . ;
> 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 the corporate attorney–client and work product privileges . . . ;
> 5. The existence and adequacy of the corporation's compliance program . . . ;
> 6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers . . . ;
> 7. Collateral consequences . . . ;
> 8. The adequacy of non-criminal remedies . . . .

Id.

77. *Id*. at intro.

78. *Id*.

79. *See id*. § II(A)(4).

Cooperation was controversial because the assessment of an entity's willingness to cooperate depended in part on whether the entity waived its attorney–client and work product privileges, whether the entity "appear[ed] to be protecting its culpable employees and agents," such as by advancing culpable employees' legal fees, and whether the entity engaged in sufficient remedial actions.[80]

In addition, it was problematic for business organizations that "willingness to cooperate" was only one factor in the charging decision.[81] Despite significant cooperation, the government could decide to proceed with charging based on evaluation of the other factors in any order and weight, or based on the prosecutor's own preference.[82] Thus, the Holder Memo has been criticized for its failure to address deferred prosecution specifically[83] and for its lack of direction regarding what constitutes an entity's authentic cooperation with the government's investigation.[84]

The 2001 Aurora Foods, Inc. pretrial diversion agreement, issued under the Holder Memo, illustrates the criticisms of the Memo.[85] To begin, the term "deferred prosecution" was not mentioned in the agreement, which was reflective of the term's omission from the Holder Memo and shows how the Holder Memo was not closely tailored to the DPA scenario.[86]

Aurora, in trouble for accounting fraud, agreed to substantial changes in its compliance program, such as hiring new directors at the DOJ's direction and firing employees involved in wrongdoing.[87] Aurora acquiesced to hiring an independent monitor who was "mutually acceptable" to both parties, yet the agreement lacked a definition of "mutually acceptable" and lacked both a

80. *Id*. § VI(B). *See also* Ball & Boila, *supra* note 7, at 240. "[T]he corporation's cooperation may be critical in identifying the individual wrongdoers and locating probative evidence. As such, the prosecutor should consider granting immunity or amnesty to the corporation in exchange for its cooperation with the government." *Id*.

81. *Id*. "Of course, a corporation's cooperation with the government is no guarantee of immunity or amnesty, and specific policies may still warrant prosecution regardless of the corporation's willingness to cooperate." *Id*.

82. Holder Memo, *supra* note 8, at intro.

83. Spivack & Raman, *supra* note 1, at 164 (noting that the "Holder Memorandum made no formal mention of deferral").

84. *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, 1175 (2006) (quoting critics calling the Holder Memo "a requiem marking the death of privilege in corporate criminal investigations," because it allowed prosecutors to demand almost whatever they wanted, including a privilege waiver, as a marker of authentic cooperation) (citing David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147–48 (2000)).

85. *See generally* Aurora Foods Pretrial Diversion Agreement, *supra* note 9.

86. *Id*.

87. *Id*. at 2.

time limit for monitor oversight and a cap on the cost of the monitor.[88] Unchecked appointment of a federal monitor is dangerous for a corporation because the business and the monitor may not have the same business goals or knowledge.[89]

Further, Aurora agreed to waive its attorney–client privilege.[90] The statement of waiver in the agreement limited the government's discovery to information outside of litigation-related information; however, latter portions of the agreement established that cooperation sufficient to avoid a prosecution required Aurora to disclose all documents without hesitation, even those subject to attorney–client privilege.[91] Waiver of attorney–client privilege creates the risk that the business may turn over documentation tending to "'toss [employees] under the bus . . . to protect the company.'"[92]

Finally, the DOJ's unilateral ability to revoke the agreement and prosecute[93] severely limited bargaining power for Aurora. Thus, a business in Aurora's situation did not have predictable standards by which to abide, and much power was left in the hands of U.S. Attorneys to dictate immediate disclosure, voluntary cooperation, termination of employees, a new compliance program, and other terms of corporate governance reform.[94]

The terms of the Aurora agreement, while unbalanced, were not as inequitable as the terms of agreements that were to come. The soft standards in the Holder Memo, such as the failure to address DPAs directly and the failure to define "compliance," left great power in the hands of prosecutors, opening the door to more relaxed standards in the future.[95] Agreements like Aurora's, containing privilege waiver and nearly unlimited internal restructuring, presented an easy way for prosecutors to accomplish corporate ethics reforms while avoiding the hardships of a prosecution.[96] However,

88. *Id*. at 4.

89. Spivack & Raman, *supra* note 1, at 184–86.

90. Aurora Foods Pretrial Diversion Agreement, *supra* note 9, at 4.

91. *Id*. at 3–4.

92. Barron, *supra* note 2, at 1266 n.8 (quoting Katheryn Hayes Tucker, *Ex-Prosecutor Dishes Up Advice to GCs on Government Probes*, DAILY REP. (Fulton County, Ga.), Oct. 17, 2007, at 4–5 (internal quotation marks omitted)).

93. Aurora Foods Pretrial Diversion Agreement, *supra* note 9, at 5.

94. *Id*. at 2–3.

95. *See* Ball & Bolia, *supra* note 7, at 246 (noting that the Thompson Memo "greatly intensified" the flaws of the Holder Memo).

96. Meitl, *supra* note 20, at 22.

> Pretrial diversions then provide an alternative means for achieving prosecutorial ends including deterrence, restraint, and restoration without the imposition of severe collateral consequences on innocent victims. Corporations who agree to a pretrial diversion can continue to do business, can keep on [their] employees, and can carry on work that requires institutional

loose regulations led to poor exercise of prosecutorial discretion.[97] So-called ethics reforms left businesses with little bargaining power so that punishments often did not match the crimes, as is evident in the KPMG DPA issued under the Thompson Memo.

B. Analysis of the 2003 Thompson Memo and the 2005 KPMG DPA

The vague standards of the Holder Memo allowed for broad prosecutorial discretion and paved the way for the abuses that occurred under the DOJ's second advisory memo, "Principles of Federal Prosecution of Business Organizations," known as the "Thompson Memo," issued in 2003 by then-Deputy Attorney General Larry D. Thompson.[98] Unlike the Holder Memo, the Thompson Memo was binding on prosecutors,[99] officially sanctioned the use of DPAs by referring to them specifically,[100] tried to clarify "authentic cooperation," and aimed to standardize the terms of diversion agreements by placing emphasis on evaluating a business's corporate governance program.[101] However, the Thompson Memo read more like an intimidating compliance guide for businesses rather than a prosecutorial guide for government attorneys.[102] The two most significant and controversial features of the Thompson Memo—(1) authentic cooperation and (2) corporate governance and compliance measures[103]—ultimately resulted in further entrenching the Holder Memo's pattern of nonbinding guidelines and expanding prosecutorial discretion, which became an accepted precedent and led to unbalanced DPAs such as the KPMG agreement.[104]

The Thompson Memo increased prosecutorial focus on two main areas: (1) authentic cooperation and (2) corporate governance and compliance

---

knowledge.

Id.

97. Ball & Bolia, *supra* note 7, at 230 (noting that aggressive prosecutorial tactics have led to the need for reform in certain areas such as privilege waiver and advancement of legal fees).

98. *See* Thompson Memo, *supra* note 10.

99. *Id*. at intro. The Memo required that "prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself." *Id.*

100. *See id*. § VI. Unlike the Holder Memo, the Thompson Memo referred to "pretrial diversion." *Id.*

101. *Id*. at intro. (emphasizing that the Thompson Memo focused on: (1) clarifying authenticity of cooperation and (2) ensuring compliance with corporate governance programs).

102. Ball & Bolia, *supra* note 7, at 247 (noting that the factors in the Thompson Memo can be easily stacked against defendants).

103. *See* Thompson Memo, *supra* note 10, at intro.

104. *See generally* Spivack & Raman, *supra* note 1, at 167. When the Thompson Memo gave prosecutors more leeway, prosecutors began to demand confidential information from businesses to stay prosecution. *Id*.

programs.[105] The Thompson Memo presented nine factors similar to the eight factors in the Holder Memo, with the addition of a new factor: "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."[106] The additional factor relates to the Memo's first new emphasis, authentic cooperation, and carries over an abuse permitted under the Holder Memo—that prosecutors are encouraged to consider whether the corporation revealed confidential communications of potentially culpable employees as a marker of authentic cooperation.[107] A significant risk when considering privileged information as a marker of cooperation is that it encourages corporations to implicate employees.[108]

The emphasis on a business entity's cooperation with the government in the Thompson Memo was criticized for further expanding the power given to prosecutors because it seemingly encouraged prosecutors to view waiver of attorney–client privilege and nonpayment of culpable employees' legal fees as markers of authentic cooperation.[109] Surprisingly, the actual language regarding privilege waiver did not differ between the Holder Memo and the Thompson Memo.[110] However, the interpretation under the Thompson Memo led to more aggressive methods for gauging cooperation because the Thompson Memo, unlike the Holder Memo, was binding on prosecutors and therefore required them to always consider all of the Memo's factors, including cooperation, in the charging decision.[111]

Moreover, cooperation became more influential as it was one of the only factors that could be changed after the offense was committed.[112] Many of the other factors for consideration, such as the nature and seriousness of the offense, had already been set once the alleged crime occurred.[113] The strong emphasis on cooperation and the fact that a business's level of cooperation could fluctuate led businesses to voluntarily disclose information before the

105. Thompson Memo, *supra* note 10, at intro.

106. *Id*. § II(A)(8).

107. *See* Ball & Bolia, *supra* note 7, at 240 (acknowledging cooperation and voluntary disclosure under the Holder Memo was a source of prosecutorial abuse); Wray & Hur, *supra* note 84, at 1181–82 (conceding corporations may more readily offer up employees' misconduct if it will fulfill the authentic cooperation requirement).

108. Barron, *supra* note 2, at 1266 n.7 (quoting Tucker, *supra* note 92, at 4–5).

109. Ball & Bolia, *supra* note 7, at 247–48.

110. Both the Holder Memo and the Thompson Memo require from suspect business entities a "timely and voluntary disclosure of wrongdoing and [their] willingness to cooperate in the investigation of [their] agents, including, if necessary, the waiver of corporate attorney–client and work product [privileges/protection]." Holder Memo, *supra* note 8, § II(A)(4); Thompson Memo, *supra* note 10, § II(A)(4).

111. *Id*. at intro.

112. Wray & Hur, *supra* note 84, at 1171 (noting that aside from cooperation, "most of the Thompson Memo factors are ones the company can do little to change").

113. *Id*.

government requested it in attempts to cooperate to the utmost degree.[114] While advance disclosure could have reduced prosecutorial doubts about the authenticity of an entity's cooperation, it was also risky, as the entity was hedging its bets on the outcome that the government would find authentic cooperation instead of prosecuting based on the heightened disclosure of incriminating activity.[115] Moreover, turning over privileged documents may have seemed like a prerequisite to fulfill the authentic cooperation requirement.[116] Without a standard method to calculate whether a disclosure was too broad or too narrow to fulfill authentic cooperation, businesses were left without a true measure of their progress toward avoiding the collateral consequences of a prosecution, and most bargaining power was left in the hands of the prosecutor.[117]

The Thompson Memo's second significant emphasis was on prosecutorial evaluation of the target business's corporate governance and compliance program to determine whether the program was effective not only on paper, but also in practice.[118] The danger of allowing prosecutors to decide whether to prosecute based on the quality of an entity's compliance program was that not all prosecutors were experts in corporate governance and, thus, may not have had the tools to properly judge whether the compliance program was

---

114. Ball & Bolia, *supra* note 7, at 246. Corporations provided prosecutors with as much information as possible "all in hopes that the government hammer would not swing the way of the corporation itself." *Id*. at 248.

115. Wray & Hur, *supra* note 84, at 1144 (noting that voluntary disclosure is a "calculated risk" for a business). Fear of litigation following voluntary waiver of privilege was a "major concern" for businesses. Ball & Bolia, *supra* note 7, at 246.

116. Wray & Hur, *supra* note 84, at 1173.

117. *Id*.

118. *Id*. at 1106. The Thompson Memo provided prosecutors with the following guidance:

> In evaluating a compliance program, the Government will consider whether the program is designed in a manner that can be reasonably expected to deter, detect and disclose violations of law or regulation. Specifically, prosecutors will ask the following questions:
>
> - Do the corporation's directors exercise independent review over proposed corporate actions, or do they unquestioningly ratify officers' recommendations?
> - Are the directors provided with information sufficient to enable the exercise of independent judgment?
> - Are internal audit functions conducted in a manner that ensures their independence and accuracy?
> - Have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law?

Id. (citing Thompson Memo, *supra* note 10, § VII(B)).

effective.[119] The danger was exacerbated when a prosecutor's decision in one case had potential industry-wide repercussions that could have unintentionally set the standard for corporate governance and compliance programs across the board.[120]

The KPMG DPA[121] resulted from KPMG's $2.5 billion federal tax evasion scheme, for which the DOJ filed a criminal tax case against KPMG.[122] According to then-U.S. Attorney Alberto Gonzales, KPMG was spared an indictment to avoid the collateral consequences of being a convicted large business entity, as were seen in the Arthur Andersen disaster.[123] However, the consequences of the resulting DPA, which followed the Thompson Memo's emphasis on authentic cooperation and corporate governance, were severe and resulted in a lawsuit filed by former KPMG employees in which the court found the practices of the federal prosecutors on the case to be unconstitutional.[124]

The court rightly reasoned that the terms of the KPMG DPA were severe. Under the agreement, KPMG "agreed to shut down its entire private tax practice, to cooperate fully in the investigation of former employees, and to retain an independent monitor . . . for three years, in order to implement an elaborate compliance program."[125] The independent federal monitor was Richard Breeden, a former SEC chairman, and the agreement did not limit the time during which KPMG's cooperation with the DOJ was required.[126] As the monitor, Breeden had expansive powers; for example, he had unlimited access to KPMG information, such as e-mail, and the ability to hire a staff.[127] Breeden and his staff were paid out of KPMG's own pocket.[128] Finally, and most controversially, in an effort to cooperate with the government and implement a viable compliance program, KPMG terminated the employment

119. Wray & Hur, *supra* note 84, at 1185–86. "Business organizations are right to be leery of the potential consequences of well-meaning but unsophisticated advice from criminal prosecutors on how best to ensure legal compliance." *Id*. at 1185.

120. *Id*. at 1185–86.

121. KPMG Deferred Prosecution Agreement, *supra* note 11.

122. Garrett, *supra* note 23, at 862. In *United States v. KPMG LLP*, 316 F. Supp. 2d 30 (D.D.C. 2004), the court enforced the federal government's summons seeking information regarding KPMG's participation in alleged tax shelter transactions. *Id*. at 31–32.

123. Garrett, *supra* note 23, at 863 (noting former U.S. Attorney General Alberto Gonzales's belief that "the reality [is] that the conviction of an organization can affect innocent workers and others associated with the organization, and can even have an impact on the national economy").

124. United States v. Stein, 435 F. Supp. 2d 330, 336, 356 (S.D.N.Y. 2006).

125. Garrett, *supra* note 23, at 855.

126. *Id*. at 864.

127. *Id*. at 865.

128. *Id*.

of culpable upper-level partners.[129]

In response to the terminations, the government requested that, as a measure of authentic compliance, KPMG withhold the legal fees of indicted former employees, which was in contrast to KPMG's policy.[130] The individuals at issue subsequently filed motions alleging that the DOJ pressured KPMG into declining to pay their legal fees in an effort to fulfill the cooperation requirement.[131] The allegations were found to be true, as well as unconstitutional, by Judge Lewis Kaplan of the Southern District of New York.[132] In *United States v. Stein*,[133] Judge Kaplan held that the government violated the KPMG employees' Fifth Amendment right to defend themselves by burdening access to counsel,[134] and also violated their Sixth Amendment right to counsel by conditioning acceptance of the DPA on KPMG's agreement to withhold the legal fees.[135]

Thus, while KPMG, in an effort to comply with government requests to clean up, implemented an ethics program to prevent future wrongdoings and terminated the employment of wrongdoers,[136] the government interpreted the directions in the Thompson Memo broadly and took advantage of its powerful position. This power play was evidenced by the request for nonpayment of legal fees, in violation of the Fifth and Sixth Amendments, the waiver of attorney–client privilege that risked encouraging KPMG to blame innocent employees, the seemingly biased appointment of a former SEC chairman to the role of independent monitor with unlimited power that risked a conflict of interest, the agreement's indefinite duration, and the fact that the expenses for the monitor and investigation all were billed to KPMG.[137]

The unchecked prosecutorial discretion that created room for the questionable provisions of the KPMG DPA and Judge Kaplan's holding in *Stein* directly led to the reforms regarding attorney–client privilege waiver and advancement of legal fees as signs of cooperation found in the McNulty

129. John J. Rehmann, Note, *Paying the Price: Should Corporations' Payment of Their Employees' Legal Fees Be a Factor in Corporate Indictment Decisions?*, 26 WASH. U. J.L. & POL'Y 379, 393 (2008). The KPMG firings were controversial because they illustrated the breadth of prosecutorial power over corporate defendants; the nonpayment of employee legal fees that followed the firings resulted directly from government inquiry into whether KPMG was obligated to pay its employees' legal fees. *See id*.

130. *Id*. at 393–94, 394 n.72.

131. Garrett, *supra* note 23, at 865.

132. *Id*.

133. 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

134. *Id*. at 356, 364–65.

135. *Id*. at 367.

136. Wray & Hur, *supra* note 84, at 1141.

137. *See* Garrett, *supra* note 23, at 863–66.

Memo.[138]

C. Analysis of the 2006 McNulty Memo and the 2008 AGA Medical Corporation DPA

The result in *Stein* was a sign of major judicial backlash against the loose principles of the Thompson Memo.[139] In response to dissatisfaction in the legal community,[140] then-Deputy Attorney General Paul J. McNulty issued a new memo to supersede the Thompson Memo, known as the "McNulty Memo."[141] The McNulty Memo tried to reform diversion agreement policies regarding attorney–client privilege and advancement of employee legal fees;[142] however, as illustrated by the AGA Medical Corporation DPA, the Memo's suggestions were not strong enough to create significant change.[143]

The McNulty Memo retained the nine factors of the Thompson Memo by which prosecutors made a charging decision.[144] In an attempt to clarify how prosecutors evaluated the authenticity of a business entity's cooperation with a government investigation, the McNulty Memo added new language that addressed the issues of waiver and advancement of attorneys' fees for employees.[145] For instance, before a request for privileged information could be made, prosecutors had to determine a "legitimate need" for the information.[146] Legitimate need was based on four factors: (1) the likelihood and degree of benefit the information would provide, (2) alternative means of obtaining the information, (3) voluntary disclosures already provided, and (4) the risk of negative consequences of a waiver to a corporation.[147]

The McNulty Memo's procedure for obtaining a waiver of attorney–client privilege was significant because it not only defined a legitimate need for the

---

138. Rehmann, *supra* note 129, at 395 (acknowledging the *Stein* court's finding that the Thompson Memo did not provide the least restrictive guidelines for the KPMG DPA as evidence of the court's discontent with the broad prosecutorial discretion permitted under the Thompson Memo).

139. Spivack & Raman, *supra* note 1, at 169 (noting that Judge Lewis Kaplan found that the KPMG DPA, created under the Thompson Memo, resulted in a constitutional violation).

140. Lynnley Browning, *U.S. Moves to Restrain Prosecutors*, N.Y. TIMES, Dec. 13, 2006, at C1. "'I don't know if there are going to be more or less prosecutions,' said Stephen J. Bronis, [former] executive director of the white-collar crime committee of the American Bar Association, 'but there are hopefully going to be less abusive ones.'" *Id*.

141. McNulty Memo, *supra* note 12.

142. The Memo noted that the DOJ did not intend for its corporate charging principles to discourage candid communication between employees and counsel. *Id*. at intro.

143. *See* AGA Deferred Prosecution Agreement, *supra* note 13.

144. McNulty Memo, *supra* note 12, at § III(A).

145. *Id*. § VII(B)(2)–(B)(3). The new language was meant to make it easier for corporations to refuse to reveal privileged communications without the fear that doing so would lead to a prosecution. Browning, *supra* note 140.

146. McNulty Memo, *supra* note 12, § VII(B)(2).

147. *Id*.

information, but it broke information requests into two tiers: Category I and Category II.[148] Category I information consisted of "purely factual information, which may or may not [have been] privileged, relating to the underlying misconduct."[149] Examples were copies of documents, witness statements, and factual summaries.[150] To acquire Category I information, the requesting prosecutor was required to "obtain written authorization from the United States Attorney who, prior to authorizing the request, [had to] provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division."[151] If authorized, the request had to be communicated to the business in writing.[152] Although the McNulty Memo created more oversight of privilege waivers by involving additional DOJ actors in the process, U.S. Attorneys could still consider the business's response to a request for Category I information in evaluating the business's overall cooperation with the government.[153]

Category II information consisted of "attorney–client communications or non-factual attorney work product," such as "legal advice given to the corporation before, during, and after the underlying misconduct occurred."[154] Category II information could be requested only in the "rare circumstances" that Category I information did not yield a satisfactory result.[155] To acquire Category II information, the prosecutor had to "obtain written authorization from the Deputy Attorney General."[156] In addition, and importantly, a business's refusal to divulge Category II information could not factor into a prosecutor's decision regarding whether the business substantially complied with the government's requests.[157]

The addition of Category I and Category II information to the DOJ guidelines was noteworthy because it acknowledged what was already happening—prosecutors, while supposedly restricted to requests for factual

148. *Id*. Then-Attorney General Alberto Gonzales supported creation of the two categories, asserting that "[p]rivilege waivers will not be sought without internal process within the department, and will not be sought without need." Lynnley Browning, *Some Lawyers Urge More Safeguards on Rights in Corporate Fraud Cases*, N.Y. TIMES, Mar. 8, 2007, at C3. However, critics called the approach a "multitiered procedure for requesting business entities to disclose protected materials." *Id*. (quoting William M. Sullivan, Jr., a criminal defense lawyer at Winston & Strawn LLP).

149. McNulty Memo, *supra* note 12, § VII(B)(2).

150. *Id*.

151. William M. Sullivan, Jr., *The McNulty Memorandum: New DOJ Policies on Attorney–Client Privilege and Attorney Work Product Protections*, 15 METROPOLITAN. CORP. COUNS. 34 col. 3.

152. McNulty Memo, *supra* note 12, § VII(B)(2).

153. *Id*.

154. *Id*.

155. *Id*.

156. *Id*.

157. *Id*.

information under the Thompson Memo, were actually requesting Category II information before the information was labeled as such.[158]

The McNulty Memo took another bold step in the direction of DPA process reform; it instructed prosecutors to disregard whether a corporation was paying the legal fees for employees accused of wrongdoing as a lack of cooperation.[159] The Memo made an exception, however, for cases where "the totality of the circumstances show[ed] that [advancement of attorney's fees] was intended to impede a criminal investigation."[160] Thus, the McNulty Memo was a stark shift away from the practices regarding legal fees under the Thompson Memo, where payment of legal fees for employees accused of wrongdoing was generally viewed as noncompliance with government requests for reform.[161]

Overall, the McNulty Memo supported more reasonable practices, starting with the statements in its first paragraph. The first opening lines of the McNulty Memo reminded both prosecutors and corporate leaders of their duties, cautioning that "[d]irectors and officers owe . . . duties of honest dealing to the investing public,"[162] and stating that federal prosecutors should "recognize that they must maintain public confidence in the way in which they exercise their charging discretion [as] professionalism and civility have always played an important part in putting [the DOJ's] principles into action."[163]

In the DOJ's search for ethics, the McNulty Memo helped revise two areas of prosecutorial abuse of discretion in the DPA process: (1) attorney–client privilege and (2) advancement of attorney's fees.[164] Although the McNulty Memo neglected to address selection of federal corporate monitors, the need for judicial oversight, ensuring punishments fit the crime, and a host of other issues that arise in the DPA process, the McNulty Memo was a step in the right direction toward increased transparency on both ends of the bargaining process.[165] The progress was evident, but slow, as demonstrated

158. *See, e.g.*, Aurora Foods Pretrial Diversion Agreement, *supra* note 9, at 5. The full disclosure required in the Aurora Pretrial Diversion Agreement is an example of a request for Category II information before considering whether the request is satisfied by Category I information.

159. McNulty Memo, *supra* note 12, § VII(B)(3).

160. *Id*. n.3.

161. *See* Spivack & Raman, *supra* note 1, at 167. When the Thompson Memo gave prosecutors more leeway, prosecutors began to demand confidential information from businesses to stay prosecution. *Id*.

162. McNulty Memo, *supra* note 12, § I.

163. *Id*.

164. Ball & Bolia, *supra* note 7, at 254–55.

165. *Id*. at 256 (noting the mixed reaction to the McNulty Memo). *See also* Browning, *supra* note 140, at C4 (quoting New York City attorneys who were skeptical that the McNulty Memo

through the terms of the 2008 AGA Medical Corporation DPA.[166]

The AGA Medical Corporation DPA, resulting from AGA's alleged violation of the Foreign Corrupt Practices Act (FCPA),[167] followed the McNulty Memo's prerogative that the government achieve its reforms in the "least intrusive" manner because the DPA contained terms that were more equitable than the terms in past agreements.[168] First, unlike the KPMG DPA, the AGA Medical Corporation DPA contained a set end date for both the agreement and for monitor oversight—three years and seven days from the date on which the agreement was signed by all parties, subject to a one-year extension at the government's discretion.[169] Second, the agreement established a process for selection of the independent federal monitor,[170] as opposed to allowing a blanket appointment of the federal monitor by the government. Under the AGA Medical Corporation DPA, the company would propose a monitor that matched criteria set by the government, such as the ability to be objective and experience in the applicable area of fraud and compliance policies, and then the government would approve or deny the choice.[171] Compared to the Aurora agreement, which had no set end date clarification on the process of monitor selection or monitor qualification,[172] the AGA agreement was more evenhanded because it involved AGA in the bargaining process.

Furthermore, unlike the KPMG agreement, the terms of the AGA agreement were more proportional to the crime. Because AGA was accused of violating the FCPA, the agreement mandated that AGA implement a compliance program aimed at preventing and detecting future FCPA violations and other anti-corruption laws.[173] The focus on a revised compliance program was a remnant from the Thompson Memo's emphasis on compliance programs, and here, the compliance program was appropriately linked to the crime.

Although the AGA Medical Corporation DPA evidenced progress, it was not cured of imbalances, especially regarding attorney–client privileged information. AGA's limited bargaining ability was seen in an express clause permitting AGA to refuse to disclose privileged information upon "a valid claim of attorney–client privilege or application of the attorney work-product

would be able to achieve the desired reforms without the force of law).

166. *See* AGA Deferred Prosecution Agreement, *supra* note 13.

167. *Id*. at 1.

168. McNulty Memo, *supra* note 12, § VII(B)(2). *See generally* AGA Deferred Prosecution Agreement, *supra* note 13.

169. AGA Deferred Prosecution Agreement, *supra* note 13, at 2.

170. *Id*. at 8–9.

171. *Id*.

172. *See* Aurora Foods Pretrial Diversion Agreement, *supra* note 9.

173. AGA Deferred Prosecution Agreement, *supra* note 13, at 7.

doctrine."[174] However, in direct opposition to the requirements of the McNulty Memo, the agreement permitted the government to take nondisclosure into account when determining substantial compliance.[175] Furthermore, there was no mention of how advancement of attorneys fees would be handled or viewed by the government, which was one of the key reforms the McNulty Memo intended to make.[176] Thus, the AGA Medical Corporation DPA illustrates that, although each successive DOJ memo has made progress toward more equitable bargaining, the memos do not provide enforceable causes of action for business entities and thus cannot go as far as congressional legislation can to create equity in the DPA process.[177]

The 2008 Filip Memo created slightly more bargaining room for business entities; however, the real shift should come from Congress with the passage of the Attorney–Client Privilege Protection Act, the Accountability in Deferred Prosecution Act, and H.R. 5086.

V. THE SHIFT TO INCREASED REGULATION OF CORPORATE DEFERRED PROSECUTION PROCEDURES

The 2008 Filip Memo, the Attorney–Client Privilege Protection Act of 2009, the Accountability in Deferred Prosecution Act, and H.R. 5086 demonstrate the desire in the legal community to tighten the regulation on the prosecutorial side of the DPA process in order to achieve greater fairness in DPAs through increased predictability and heightened ethical rules for prosecutors.[178] This Part will address the progression of heightened prosecutorial standards and will advocate that the stricter standards in the Filip Memo are a good start, but true improvements to the DPA process will come from Congress's passage of the Attorney–Client Privilege Protection Act, the Accountability in Deferred Prosecution Act, and H.R. 5086.

A. The 2008 Filip Memorandum

In response to criticism that the McNulty Memo did not sufficiently solve

174. *Id*. at 4.

175. *Id*.

176. Ball & Bolia, *supra* note 7, at 254–55 (noting that the McNulty Memo offered new guidance in regard to advancement of legal fees).

177. Letter from Former United States Attorneys to Senator Patrick Leahy, Chairman, S. Judiciary Comm., (June 20, 2008) (on file with author), *available at* http://federalevidence.com/pdf/2008/06-June/USAtty_LeahyLttr6-23-2008.pdf [hereinafter U.S. Attorneys' Letter]. Thirty-three former U.S. Attorneys signed a letter addressed to Senator Leahy and his colleagues on the Senate Judiciary Committee to urge the senators to support the Attorney–Client Privilege Protection Act of 2007 because the former prosecutors believed the McNulty Memo, without the force of law, was insufficient to achieve privilege reforms.

178. The June 2008 U.S. Attorneys' Letter from thirty-three former prosecutors also supports the trend toward tighter regulation. *See id*.

the problems with prosecutorial requests for waiver of attorney–client privilege,[179] the Filip Memo, issued by former Deputy Attorney General Mark R. Filip in 2008 to replace the McNulty Memo, contributes to the trend toward stricter regulations for prosecutors entering the DPA process by prohibiting attorney–client privilege waiver as a component of the prosecutor's evaluation of a business entity's authentic cooperation.[180] Instead, the Filip Memo requires prosecutors to measure cooperation by the extent to which the entity timely and voluntarily discloses the "relevant facts" concerning the misconduct.[181] In addition, the Filip Memo is incorporated into the United States Attorneys' Manual, an internal DOJ document that guides the work of DOJ employees but does not have the force of law.[182]

Although the Filip Memo is a step towards greater fairness in the DPA process because it limits prosecutorial requests for attorney–client privileged information, it does not altogether do away with prosecutors doling out mitigating credits for cooperation.[183] Therefore, it leaves potential for confusion in the definition of authentic cooperation, which was the difficulty under the Thompson Memo.[184]

Further, it is likely that any agreement to come under a DOJ memo would risk ethical abuses. DOJ directives, while supposedly binding on prosecutors,

---

179. Robert J. Kipnees & Khizar A. Sheikh, *The Investigation and Prosecution of Business Organizations*, 16 METROPOLITAN CORP. COUNS. 49 (2008). *See, e.g.*, U.S. Attorneys' Letter, *supra* note 177, at 3.

> The 2006 McNulty Memorandum, which was heralded as a much-needed fix to the 2003 Thompson Memorandum, is inadequate . . . . [T]he Memo provides oversight of privilege waiver requests by the U.S. Attorney or Main Justice. However, a report written by the Honorable E. Norman Veasey, former Chief Justice of the state of Delaware, found that prosecutors in the field are still requesting or demanding privilege waivers without the supervision required by the McNulty Memorandum.

Id. The danger of privilege waiver is that it may encourage businesses to seek out employee scapegoats. Barron, *supra* note 2, at 1266 nn.7–8 (citing Tucker, *supra* note 92, at 4–5).

180. Filip Memo, *supra* note 14, § 9-28.710

181. *Id*. § 9-28.720.

182. United States Attorneys' Manual, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ (last visited Apr. 6, 2010). The Filip Memo is incorporated as §§ 9-28.000–9-28.1300.

183. Former Deputy Attorney General McNulty criticized the Filip Memo saying, "there is still a pressure to waive attorney–client privilege if you have 'relevant factual information' covered by attorney–client privilege that the government wants to get. And quite a bit of 'relevant factual information' is subject to privilege claims." Brian Baxter, *With Thompson Trashed and McNulty Moot, Filip Memo's Time Has Come*, AM LAW DAILY, Aug. 28, 2008, http://amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html.

184. *See* Kipnees & Sheikh, *supra* note 179, at 49; Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y.L.J., Sept. 10, 2008, at 4, 9. The problem with the Filip Memo's definition of authentic cooperation is that "relevant facts" may also be privileged information, or may be work product. Stein & Levine, *supra*. Thus, businesses may often end up waiving privilege to provide the government the relevant information it requires. *Id*.

do not create rights for business entities and do not have the force of law behind them.[185] In addition, the memos do not apply to all federal agencies; they apply only to the DOJ.[186] Thus, when prosecutors disregard memo provisions, business entities have no legal recourse, unless, as seen in the KPMG scenario, in violating memo provisions, prosecutors also violate law.

Despite the DOJ's reforms under each successive memo, the reforms have not implemented sufficient improvement in the areas of attorney–client privilege waivers, punishments that may be unrelated to the alleged crime, non-payment of employee legal fees, and problems with monitor selection such as a conflict of interest or lack of business experience. Thus, congressional action is needed to create enforceable rights for business entities in DPA negotiations.[187]

B. Attorney–Client Privilege Protection Acts of 2007, 2008, and 2009

Attorney–client privilege is an esteemed principle of the U.S. justice system, and it plays a prominent role in corporate criminal liability.[188] Without attorney–client privilege, corporate compliance programs would be less effective as employees may fear disclosure of protected information and be reluctant to report problems and seek advice; ultimately, the necessary lucidity between a business entity's legal department and the entity's employees would disappear.[189]

---

185. U.S. Attorneys' Letter, *supra* note 177, at 3. "The time has come to pass legislation that protects the existing rights of individual employees and business organizations." *Id*.

186. *Id*. Agencies such as the Securities and Exchange Commission, the United States Department of Housing and Development, the Federal Communications Commission, and the Environmental Protection Agency all have policies similar to the DOJ's policy of requiring privilege waiver as a method of cooperation. *Id*. Because DOJ memos do not protect business entities from interactions with any of these agencies, legislation that would apply to all agencies is a more effective route to accomplishing more equitable DPAs. *Id*.

187. *Id*. (advocating that because the DOJ has not made changes to ensure protection of business entities and employees, it is up to Congress to pass a law that provides the necessary protection).

188. *See* Upjohn v. United States, 449 U.S. 383, 389 (1981) (noting that the purpose of attorney–client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); Candace Zierdt & Ellen S. Podgor, *Back Against the Wall: Corporate Deferred Prosecution Through the Lens of Contract "Policing"*, 23 CRIM. JUST. 34, 36 (2008) (conceding that attorney–client privilege is a "principle[] with strong constitutional, evidentiary, and/or ethical roots").

189. *Id*.; U.S. Attorneys' Letter, *supra* note 177, at 2–3, 3 n.1. (suggesting that the breakdown in communication between an employee and the employer's counsel is already happening). *See* Transcript of Testimony of Susan Hackett, General Counsel, Association of Corporate Counsel, Before the United States Sentencing Commission (Mar. 15, 2006) (on file with author), *available at* http://www.ussc.gov/hearings/03_15_06/Hackett-Testimony.pdf (describing the results of a survey that found privilege erosion occurring in the majority of requests for privilege waiver from U.S. Attorneys).

Congressional legislation is paramount to protecting attorney–client privilege because it will create legally enforceable ethical standards for prosecutors.[190] Congress is the appropriate body to build concrete standards for prosecutors as it is "endowed with the constitutional authority to . . . regulate federal officers . . . . As a national entity, its regulations would preclude the possibility of disuniformity and lack of guidance."[191] Furthermore, Congress can form neutral groups to study and advise on the matter and has lobbies on both sides of the issue, thus giving Congress the least biased and most complete view of the situation.[192]

Objections to the DOJ's minimalist regulation of prosecutorial conduct through memos became evident with Senator Arlen Specter's introduction of the Attorney–Client Privilege Protection Act in 2007 (2007 Act),[193] and reintroduction of the Act in 2008 (2008 Act)[194] and in 2009 (2009 Act).[195] The 2007 Act, passed by the House of Representatives, would protect attorney–client privilege to preserve the effectiveness of compliance programs, internal investigations,[196] the workings of the adversarial system of justice,[197] and ultimately "place on each agency clear and practical limits designed to preserve the attorney–client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization."[198] The 2007 Act supports its suggested reforms by noting that "officers or employees of Government agencies have been able to, and can continue to, conduct their work while respecting attorney–client and work product protections and the rights of individuals, including seeking and discovering facts crucial to the investigation and prosecution of organizations."[199] The 2008 and 2009 Acts have substantially similar goals to the 2007 Act.[200] The 2008 Act clarifies certain provisions,[201] as does the 2009 Act.[202]

---

190. U.S. Attorneys' Letter, *supra* note 177, at 3.

191. Ryan E. Mick, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1291 (2001).

192. *Id*.

193. H.R. 3013, 110th Cong. (2007).

194. S. 3217, 110th Cong. (2008).

195. S. 445, 111th Cong. (2009).

196. H.R. 3013, 110th Cong. § (2)(a)(4).

197. *Id*. § (2)(a)(6).

198. *Id*. § (2)(b).

199. *Id*. § (2)(a)(5).

200. *See* S. 3217, 110th Cong. (2008); S. 445, 111th Cong. (2009).

201. Andrew Gilman, *The Attorney–Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy*, 35 FORDHAM URB. L.J. 1075, 1100–01 (2008) (explaining that the 2008 Act is more detailed, allows prosecutors greater flexibility in requesting information from businesses, and clarifies that the

Passage of the Attorney–Client Privilege Protection Act is a necessary step toward a more balanced negotiating process for corporate diversion agreements. The legislation would reduce the dangers inherent in the current DPA process, such as coerced privilege waiver, the DOJ's unilateral ability to modify the memos, continually changing DOJ policy, and potential disregard of employees' right to counsel under the Sixth Amendment. Without congressional legislation of this nature, business entities will have to wait for a scenario, such as the circumstances attending the KPMG DPA where prosecutors break already enacted law, before the entity can obtain a legal remedy.

C. The Accountability in Deferred Prosecution Act and H.R. 5086

In December 2007, Congressman Bill Pascrell, Jr. of New Jersey issued a "Statement of Principles on Deferred Prosecution Agreements" (Statement).[203] The Statement is further evidence of the push from those involved in the DPA process for more concrete DPA guidelines for prosecutors. In light of prosecutorial wrongs,[204] Congressman Pascrell called for written guidelines on DPAs to hold federal prosecutors accountable for their actions and for judicial oversight to introduce a neutral party into the DPA process.[205] Pascrell also implored Congress to relieve federal prosecutors of the responsibility of selecting the monitor to avoid appearing biased toward the U.S. Attorney's Office.[206] Finally, Pascrell asked for full disclosure of DPAs so that the agreements may be held to public scrutiny.[207]

Subsequent to the Statement, Pascrell introduced the Accountability in Deferred Prosecution Act of 2008 (Accountability Act).[208] The 2008 version

government is prohibited from considering privilege waiver in its charging decision).

202. 154 CONG. REC. S2331–32 (daily ed. Feb. 13, 2009) (statement of Sen. Specter) (explaining subtle changes in the 2009 Act include definition of the term "organization" and other ambiguities).

203. Office of Congressman Bill Pascrell, Jr., Statement of Principles on Deferred Prosecution Agreements (Dec. 17, 2007), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/statement_of_principles_on_deferred_prosecution_agreements_dec_17_2007.pdf.

204. *Id*. The Statement cites the terms of the 2005 Bristol-Meyers Squibb Deferred Prosecution Agreement as an example of a prosecutorial wrong because the terms did not relate to the alleged violation. For instance, Bristol-Meyers Squibb removed its chief executive officer and general counsel at the suggestion of its federal monitor, although the chief executive officer and general counsel's actions were unrelated to the securities fraud allegations that led to Bristol-Meyer Squibb's DPA. *Id.* The Statement also cites the Zimmer Holdings, Inc. DPA wherein former Attorney General John Ashcroft was appointed as federal monitor while his former employee was overseeing the case. *Id*. Ashcroft earned over $52 million in eighteen months, giving the impression of "impropriety and political favoritism" in selection of the federal monitor. *Id*.

205. *Id*.

206. *Id*.

207. *Id*.

208. H.R. 6492, 110th Cong. (2008).

was not passed, but an identical version was reintroduced in 2009.[209] The focus of the Accountability Act is "to promote uniformity and to assist prosecutors and organizations as they negotiate and implement" DPAs, and it requires the Attorney General to "issue public written guidelines" for DPAs.[210] The Accountability Act requests reforms similar to those suggested in Congressman Pascrell's 2007 Statement and elaborates on specific details, such as circumstances when an independent monitor is warranted, terms and conditions that may be appropriate for an agreement, a process for determining authentic cooperation, duration of the agreement, selection and compensation of the federal monitor, restrictions relating to agreements, the need for judicial oversight, and public disclosure of agreement terms.[211]

Independent of the Accountability Act, Congressman Frank Pallone introduced H.R. 5086 in 2008, a bill that asks Congress "[t]o require the Attorney General to issue guidelines delineating when to enter into deferred prosecution agreements, to require judicial sanction of deferred prosecution agreements, and to provide for [f]ederal monitors to oversee deferred prosecution agreements."[212] The provisions of H.R. 5086 are similar to the provisions of the Accountability Act in that they offer guidelines for when to enter a DPA, provide a definition of cooperation, request judicial oversight of the DPA process, and present suggestions for monitor selection.[213]

Both the Accountability Act and H.R. 5086 demonstrate the growing sentiment among members of Congress that legislative action is needed to create stronger guidelines for prosecutors in the DPA process. If passed, these bills would supplement the Attorney–Client Privilege Protection Act by reducing prosecutorial abuses outside of the privilege issue. As with privilege, enforceable remedies for businesses are needed regarding the topics the Accountability Act and H.R. 5086 address, such as circumstances when an independent monitor is warranted, how agreement terms are to be established, identifying breach of an agreement, what constitutes cooperation, and standards for appropriate punishment.

VI. CONGRESS SHOULD REGULATE THE CORPORATE DEFERRED PROSECUTION PROCESS

As seen through recent judgments, proposed legislation, and memos issued by the DOJ, there is increasing desire from participants in the DPA process for regulation of prosecutorial behavior in the DPA context. This

209. H.R. 1947, 111th Cong. (2009).
210. *Id*. § 4(a).
211. *See generally id*.
212. H.R. 5086, 110th Cong. (2008).
213. *See generally id*.

concern has been followed by a push to create more stringent guidelines for prosecutors in corporate DPA procedures.

The evolution of the DPA process, which began with loose regulations under the Holder Memo and, under the Thompson Memo, permitted questionable prosecutorial practices that the McNulty Memo subsequently attempted to remedy, is evidence of the importance of developing enforceable legal standards for federal prosecutors to follow in DPA negotiations. Each subsequent DOJ memo brought new reforms and tried to slightly narrow the scope of prosecutorial power. The DOJ's most recent memo, the Filip Memo, is a step toward tighter regulation of prosecutorial behavior, as it requests more equitable corporate cooperation standards.[214]

However, not only is it important that the DOJ attempt to reform prosecutorial behavior through memo provisions, action also is needed from Congress to recognize and enforce the current trend toward a regulated standard for prosecutors. Without congressional oversight, such as the reforms suggested by the proposed Attorney–Client Privilege Protection Act and the provisions of the Accountability in Deferred Prosecution Act and H.R. 5086, business entities generally will not have legal remedies to counter a prosecutor's violation of memo provisions, unless a KPMG-like abrogation of rights occurs.

For instance, despite the McNulty Memo's direction to disregard nondisclosure of attorney–client privileged information when determining substantial compliance, the AGA Medical Corporation DPA still allowed for this consideration, as well as disregarded other significant McNulty Memo directives such as providing clarification in the agreement of how advancement of legal fees would factor into the substantial compliance analysis. Thus, while each successive DOJ memo has made ethical advancements, the advancements are of no worth without a legal mechanism for enforcement. DOJ memos do not have the requisite strength that enacted legislation would have to implement legal rights for business entities to ensure that punishments are related to the alleged crimes, waiver of attorney–client privilege does not encourage corporations to create employee scapegoats, nonpayment of employee legal fees does not rise to unconstitutional levels, and the federal monitor is not inexperienced or faced with a conflict of interest.

The Attorney–Client Privilege Protection Act, if passed, will provide a good remedy because it would allow businesses to validly assert their rights to

214. Kipnees & Sheikh, *supra* note 179, at 49 (noting that the Filip Memo brings the DPA process to a higher ethical standard by discouraging privilege waivers and nonpayment of employees' legal fees as signs of compliance with government investigations, instead looking to the corporation's voluntary disclosure of "relevant facts and evidence").

attorney–client privilege without fear that this would result in a judgment of noncooperation.[215] However, attorney–client privilege waiver is not the only abuse occurring in the DPA process. The only way to truly cure the problems inherent in today's system of deferred prosecutions is for Congress to create enforceable rights for business entities through direct legislation outlining the prosecutorial "do's" and "do not's" of pretrial diversion agreements. Without regulations from Congress, such as the suggestions in the Accountability in Deferred Prosecution Act and H.R. 5086 regarding judicial oversight, definitions of authentic cooperation, and public disclosure of DPA terms, federal prosecutors still will be permitted to implement or avoid implementing memo provisions at their discretion, as was the case for Aurora, KPMG, and AGA.

Just as U.S. Attorneys provide an ethics check on business entities, so too should congressional regulations provide a check on prosecutorial performance. Congressional legislation of DPAs will acknowledge that the agreements are necessary to avoid an Arthur Andersen-like demise when a DPA is not implemented, as well as to avoid an unsuccessful DPA such as AIG's agreement, wherein change is not realized effectively. Transparency in prosecutorial conduct will better accomplish the criminal justice system's goals of punishment and deterrence while affecting ethical reform on both sides of the negotiating table.

RACHEL DELANEY*

215. *See id.*

* J.D. 2010, Marquette University Law School. Many thanks to those who helped me along the way as I wrote this Comment: my husband, Luke, for being my rock as I undertook law school, my parents and brother for their constant support, Rebecca Mitich and Professor Chad M. Oldfather for reviewing my drafts, and the staff of the *Marquette Law Review* for their excellent editing and cite-checking.