



MANHATTAN INSTITUTE FOR POLICY RESEARCH

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New Report Shows:

**Seven Fortune 100 Companies under
Justice Department Supervision**

New York, NY: Sunday, May 6, 2012, marks the ten-year anniversary of the indictment of Arthur Anderson, once the nation's largest accounting firm, which collapsed in the wake of criminal investigation by the Justice Department. Since that time, the Justice Department has ensnared hundreds of companies in "deferred prosecution" and "non-prosecution" agreements (DPAs and NPAs), seemingly sparing them from criminal investigation only to inflict fines and penalties, as well as pressuring companies to implement changes outside normal business practices. In a new report, *The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements*, James R. Copland, director of the Manhattan Institute's Center for Legal Policy, deems the Justice Department a "shadow business regulator" implementing onerous terms upon companies without transparency or judicial oversight.

Copland is not the only one critical of the Justice Department's handling of DPAs and NPAs. The U.S. Government Accountability Office (GAO) has noted that the department "lacks performance measures to assess how DPAs and NPAs contribute to its efforts to combat corporate crime." The GAO also noted under DPA and NPA agreements companies face excessive compliance and monitoring fees, sometimes as high as \$38.7 million. Copland argues that the broad sweep of such arrangements imposes a serious regulatory burden on companies and has real economic consequences.

Impact of NPAs and DPAs on the Fortune 100

- Fines and penalties under DPA/NPA exceeded \$7.7 billion over the last three years
- 207 DPA and NPA agreements enforced since 2004
- CVS Caremark, Google, Johnson & Johnson, JPMorgan Chase, Merck, MetLife Insurance, and Tyson Foods currently under the supervision of federal prosecutors
- Breach of agreements under sole determination of U.S. Attorney's Office, without judicial oversight
- Companies must waive statute-of-limitations and client-attorney privileges and also violate joint employee-company defense agreements

Copland's Recommendations for DPAs and NPAs: Limit Scope and Use

- Narrow corporate law's scope to serious predicate offenses by all major officials and allow corporations good-faith compliance defenses.

- Reduce statutory collateral consequences, both in severity and in the preconviction phase of prosecution.
- Increase judicial oversight of DPAs and NPAs, particularly concerning whether a company has violated terms of an agreement.
- Judges should hold hearings to determine the benefits of agreements' proposed terms, as well as potential costs and risks.
- Agreements should carefully and openly consider preexisting corporate compliance programs as a mitigating factor to encourage better business self-policing.

“Federal prosecutors are thus assuming the role of judge and of legislature, substantially eroding the separation of powers. That such discretion is often delegated to private contractors with sweeping powers makes the denial of justice even graver.” – James R. Copland, The Shadow Regulatory State

James R. Copland is the director of the Manhattan Institute's Center for Legal Policy, which develops and communicates thoughtful ideas on how to improve the civil and criminal justice system. Copland serves as managing editor of the Institute's PointofLaw.com, a web magazine that brings together information and opinion on the U.S. litigation system; and project manager for the Institute's *Trial Lawyers, Inc.* series of publications examining the size, scope, and inner workings of America's lawsuit industry.

The report is available at http://www.manhattan-institute.org/html/cjr_14.htm

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