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The Devil They Know: The DOJ’s Flawed Antitrust Leniency Program and Its Curious Pursuit of Stolt-Nielsen

INTRODUCTION

The corporate scandals that marred the beginning of this decade taught certain sectors of American business several valuable lessons. Interestingly, however, these scandals may have reserved their most important teachings for federal law enforcement. Prosecutors at the United States Department of Justice ("DOJ"), following traditional principles of prosecution drafted with individuals rather than corporations in mind, quickly indicted executives, as well as the corporate entities they worked for, once the depth of the corporate

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frauds became clear. In a few instances, the decision to prosecute the corporation had far-reaching collateral consequences, most notably corporate dissolution and the loss of thousands of American jobs and pensions.

Weary of these consequences, prosecutors recently turned to the extensive use of deferred prosecution agreements that allow offending corporations to take certain steps—typically the adoption of a compliance program, admissions of guilt, and civil fines—in exchange for the DOJ’s promise not to indict once the corporation’s compliance is verified. While these agreements have recently allowed prosecutors in several divisions of the DOJ to correct corporate behavior without imposing large collateral harm, the Corporate Leniency Program ("the Program") designed and used by the Antitrust Division ("the Division") of the DOJ deters criminal behavior while also enhancing enforcement by enticing offending corporations to come to them.

Antitrust laws are designed to "prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for inferior products and services." Price fixing is a common form of antitrust activity where competing

2. See, e.g., Kurt Eichenwald, Ex-Accounting Chief at Enron Is Indicted on Six Felony Charges, N.Y. TIMES, Jan. 23, 2004, at C1 (describing the former chief executive's indictment for helping disguise Enron's financial collapse); Enron Unit Indicted over Tax Appraisals, N.Y. TIMES, Dec. 17, 2002, at C4 (describing the indictment of Enron's broadband unit for "fail[ing] to identify millions of dollars" in equipment for property tax purposes); Monty Phan et al., Industry-by-Industry Review: For Many, The Road to Resurgence Is Rocky, NEWSDAY, Jan. 3, 2005, at A26 ("Symbol Technologies Inc. and Computer Associates International Inc., which had been under investigation for accounting improprieties for the past several years, both reached settlements with federal authorities that avoided the harshest penalty of a corporate indictment."); Terry Savage, Decision Too Late To Do Justice to Former Employees, CHI. SUN-TIMES, June 1, 2005, at 43 ("More than 30,000 employees and partners of the giant Arthur Andersen accounting firm were affected by the government's decision to indicted the firm in the wake of the Enron scandal.").

3. See Vanessa Blum, Government Takes New Approach to Corporate Fraud, LEGAL INTELLIGENCER, Mar. 23, 2005, at 4 ("Indictment and conviction helped push accounting firm [Arthur Andersen] into ruin, putting 28,000 people out of work."); see also Jonathan Weil, Nine Are Charged in KPMG Case on Tax Shelters, WALL ST. J., Aug. 30, 2005, at C1 (noting Attorney General Alberto Gonzales's statement that the DOJ's agreement with KPMG "reflects the reality 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.").

4. See John C. Coffee, Jr., Deferred Prosecution: Has It Gone Too Far?, NAT’L L.J., July 25, 2005, at 13 (discussing federal law enforcement's increased use of deferred prosecution agreements and terms usually included as part of them).

companies secretly agree to charge the same amount for a certain good or service, allowing that price to remain artificially high. At least one estimate indicates that price fixing "can raise the price of a product or service by more than 10 percent, sometimes much more, and that American consumers and taxpayers pour billions of dollars each year into the pockets" of antitrust violators. This is why the Corporate Leniency Program is such an important tool for law enforcement.

The Program operates rather simply. The Antitrust Division grants automatic and complete amnesty to the first corporation engaging in anticompetitive activity that comes forward with information incriminating the corporation's co-conspirators. The Division then uses this information to indict and prosecute antitrust cartels whose members lose the race for amnesty. This process provides the Division with information and evidence its resources might not otherwise permit it to obtain, simultaneously deterring anticompetitive activity and cooperation among corporations who know it only takes one conspirator running to the Division to bring down all of the companies involved. The trick, of course, is getting that first corporation to come forward. The Division entices corporations by providing them with a transparent leniency program

6. Id. at 3.
7. Id. at 4. DOJ investigations and prosecutions lend credence to this estimate. In the late 1990s, the DOJ uncovered a vast conspiracy involving several corporations to fix not only the price of vitamins, but also how many vitamins each company would manufacture and which food production companies would receive them. Id. As the DOJ notes, this agreement meant that "every American consumer—anyone who took a vitamin, drank a glass of milk or had a bowl of cereal—ended up paying more so that the conspirators could reap hundreds of millions of dollars in additional revenues." Id. One of the defendants in this case, Hoffman-La Roche, ended up paying a $500 million fine while some of its top executives served prison sentences. See SCOTT D. HAMMOND, U.S. DEP'T OF JUSTICE, DETECTING AND DETERRING CARTEL ACTIVITY THROUGH AN EFFECTIVE LENIENCY PROGRAM 3-4 (2000), available at http://www.usdoj.gov/atr/public/speeches/9928.pdf (discussing the need for harsh penalties for violators in an effective antitrust leniency policy).

8. ANTITRUST DIV., U.S. DEP’T OF JUSTICE, CORPORATE LENIENCY POLICY 1-3 (1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.pdf (describing the conditions a corporation must meet to be eligible for corporate amnesty); see HAMMOND, supra note 7, at 2 ("[A]mnesty is automatic if there is no pre-existing investigation.").
9. GARY R. SPRATLING, U.S. DEP’T OF JUSTICE, THE CORPORATE LENIENCY POLICY: ANSWERS TO RECURRING QUESTIONS 4 (1998), available at http://www.usdoj.gov/atr/public/speeches/1626.pdf ("In the graphite electrodes investigation, the cooperation of an amnesty applicant led to the ... cracking of another international cartel ... . In this case, the amnesty company paid zero dollars in fines, and the company next in the door after the amnesty applicant paid a $29 million fine.").
10. See HAMMOND, supra note 7, at 5 ("This 'winner-take-all' approach sets up a race, and this dynamic leads to tension and mistrust among the cartel members.").
and application process. It is this dependency on transparency that makes the Division's pursuit of its recent victory in *Stolt-Nielsen, S.A. v. United States*\(^\text{11}\) so perplexing.

*Stolt-Nielsen* went to the United States Court of Appeals for the Third Circuit on the Division's challenge to a district court ruling that a corporation alleged to have breached its leniency agreement was constitutionally entitled to a pre-indictment hearing on that breach.\(^\text{12}\) The Third Circuit reversed this ruling, holding that the Due Process Clause of the Fifth Amendment contains no such right.\(^\text{13}\) Thus, corporations applying for amnesty must now do so knowing that the Division's unilateral declaration that they breached their leniency agreement will subject them to criminal indictment.

This Recent Development argues that the Antitrust Division's decision to deny corporations accepted into its Program a pre-indictment hearing on the alleged breach of its agreement to cooperate undermines the effective enforcement of federal antitrust law. Part I describes the genesis of the Division's current Program, detailing how the Division's focus on transparency made its revised Program a successful tool for enforcement. Part II introduces Stolt-Nielsen's entry into the Program and the circumstances leading to the Division's decision to prosecute. This Part first discusses the district court's decision in *Stolt-Nielsen* and concludes with an analysis that highlights the vulnerabilities of the Third Circuit's reversal and reasoning. This Part also provides a sound legal rationale for granting corporations pre-indictment hearings as a matter of constitutional right. Part III establishes the policy rationale for providing pre-indictment hearings, focusing on how the Division's denial of this process will likely undercut its Program and the enforcement of antitrust law. Part IV urges the Division to amend its Model Leniency Agreement to include a contractual right to a pre-indictment hearing. Part IV then concludes by suggesting some other minor revisions designed to enhance transparency and provide offending corporations the certainty they need to come forward with evidence of anticompetitive activity.

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12. See *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 560 (E.D. Pa. 2005) ("We agree that SNTG is entitled to a decision before the government pursues a prosecution because if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences."), rev'd, 442 F.3d 177 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006).
I. THE ANTITRUST DIVISION'S CORPORATE LENIENCY PROGRAM

The Antitrust Division of the DOJ made three significant revisions to its Corporate Leniency Program—also referred to as “the Corporate Amnesty or Corporate Immunity Program”—in August of 1993. The goal of these revisions was to “increase the opportunities and raise the incentives for companies to report criminal activity and cooperate with the Division.” The first revision made “amnesty . . . automatic if there [was] no pre-existing investigation” into the first company coming forward. This policy was a change over the old one, where coming forward merely made a company eligible for amnesty, but prosecutors retained a great deal of discretion as to who would receive amnesty from prosecution. While “automatic,” one must take particular note that the Program grants leniency only to the first corporation to come forward. Thus, if a price-fixing cartel has five members—A, B, C, D, and E—and A comes forward on Monday, A receives amnesty. Even if B comes forward only one hour after A, B is still subject to full prosecution.

The second revision to the Program created “alternative” amnesty. Whereas the beginning of an investigation automatically made a company ineligible for amnesty under the pre-1993 Program, the policy was revised to permit companies to be eligible for amnesty, though not guaranteed it, even after an investigation was underway. The third and final change stated that “if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic amnesty.”

The Division also pursued increased participation and effectiveness through the use of enhanced criminal fines and penalties for those who lost the race for amnesty. Passed in June of 2004, the

15. SPRATLING, supra note 9, at 2.
16. HAMMOND, supra note 7, at 2. The Division’s Program defines “amnesty” broadly “to mean a complete pass from criminal prosecution and zero dollars in fines for the anticompetitive conduct.” Id. at 2 n.1. Restitution to victims of the conduct is, however, still required. Id. at 2.
17. Id. at 1.
18. Id. at 5.
19. Id. at 2.
20. See SPRATLING, supra note 9, at 1 (discussing features of the revised Amnesty Program).
21. HAMMOND, supra note 7, at 2.
Antitrust Criminal Penalty Enhancement and Reform Act of 2004\(^\text{22}\) ("the Act") made serious cartel offenses such as price fixing felony crimes.\(^\text{23}\) In addition, the Act raised the statutory maximum prison sentence for individuals from three years to ten years and increased the maximum Sherman Act fine for corporations to $100 million.\(^\text{24}\) The Division also made it clear that if a company becomes aware of a second offense in an "Amnesty Plus" situation—where an investigation has already begun and the company then chooses to come forward—the Division "will urge the sentencing court to consider the company's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor."\(^\text{25}\) Furthermore, the Division will subsequently "request that the court impose a term and conditions of probation for the company [while pursuing] a fine or jail sentence at or above the upper end of the Sentencing Guidelines range."\(^\text{26}\) As significant as the policy revisions and the use of enhanced penalties have been, however, speeches and statements by leading Division administrators point to a fundamental shift in focus when explaining the Program's success.

These administrators note that the "final hallmark of both an effective Amnesty Program and an anti-cartel enforcement program

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\(^{23}\) 15 U.S.C. § 1 (Supp. IV 2004) ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .").

\(^{24}\) Id.

\(^{25}\) SCOTT D. HAMMOND, U.S. DEPT OF JUSTICE, CORNERSTONES OF AN EFFECTIVE LENIENCY PROGRAM 17 (2004), available at http://www.usdoj.gov/atr/public/speeches/206611.pdf. The United States Sentencing Guidelines ("the Guidelines") provide a base sentence, in a term of months, for certain offenses or violations of federal law. See U.S. SENTENCING GUIDELINES MANUAL § 2 (2004). The Guidelines also prescribe enhancements or downward departures from those base sentences for certain types of behavior or factual circumstances. See, e.g., id. § 3A.1 (enhancing sentences imposed when a defendant chooses a victim due to the victim's race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation). Part R of Chapter Two of the Guidelines deals specifically with antitrust offenses. See id. § 2R1.1 (prescribing the base level of antitrust offenses under the guidelines, providing a scale adjusting the offense level based upon the volume of commerce a violation affected, and supplying special instructions for the imposition of fines); see also Plea Agreement at 5–8, United States v. Samsung Elecs. Co., No. CR05-0643PJH (N.D. Cal. Nov. 30, 2005) (discussing the application of the Guidelines and their relevant sentencing factors to defendant's plea of guilty). The Guidelines are advisory in that a sentencing court must consider them but is permitted to "tailor the sentence in light of other statutory concerns as well." United States v. Booker, 543 U.S. 220, 245–46 (2005).

\(^{26}\) HAMMOND, supra note 25, at 17.
is the need for transparency in enforcement policies.”

This determination comes from the Division’s cogent realization that “[i]f prospective cooperating parties cannot predict, with a high degree of certainty, their treatment following cooperation, then they are less likely to come forward.” Therefore, “transparency” means certainty, and in the context of an effective amnesty program “certainty” means offering offending corporations a clear path to non-prosecution through a process that allows them to determine exactly what the consequences of their decision will be prior to coming forward. Recognizing the importance of transparency, the Division made this concept the focal point of its Program by abdicating prosecutorial discretion and adopting a more flexible cooperation standard.

The Division’s abdication of the prosecutorial discretion it exercised under its pre-revision Program was the key to eliminating the uncertainty preventing offending corporations from applying for amnesty. The policy tool that implements this abdication is the Program’s grant of automatic amnesty to qualifying corporations. Of course, this provision is not without its costs. Director of Criminal Enforcement Scott Hammond has frankly stated that the Division has had to “swallow hard on a number of applicants that we would have preferred to prosecute.”

Director Hammond, however, quickly followed this statement up by noting that the Division had “roughly 15 years of experience with an Amnesty Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program.”

Thus, the Division’s automatic grant of

27. HAMMOND, supra note 7, at 6 (emphasis added); see also HAMMOND, supra note 25, at 18 (“Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency throughout our anti-cartel enforcement program so that a company can predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not.”); SCOTT D. HAMMOND, U.S. DEPT OF JUSTICE, WHEN CALCULATING THE COSTS AND BENEFITS OF APPLYING FOR CORPORATE AMNESTY, HOW DO YOU PUT A PRICE TAG ON AN INDIVIDUAL’S FREEDOM 1 (2001), available at http://www.usdoj.gov/atr/public/speeches/7647.pdf (“We developed a Corporate Leniency Program that provides the ultimate prize for companies that choose to self-report . . . and we made the requirements for entering the program as transparent and attainable as possible.”).
28. HAMMOND, supra note 7, at 6.
29. See supra notes 8–10 and accompanying text.
30. HAMMOND, supra note 7, at 7.
31. Id. (emphasis added). Director Hammond then dramatically noted that “[u]ncertainty in the qualification process will kill an amnesty program.” Id.
amnesty to qualifying corporations represents its experience that any program seeking cooperation requires an agency to "be willing to make the ultimate sacrifice for transparency—the abdication of prosecutorial discretion."\(^{32}\)

The Division also enhances the transparency of its Leniency Program through its use of a flexible cooperation standard. Rather than requiring applicants to provide "decisive evidence" proving the existence of a cartel to receive amnesty, the Division’s policy merely requires "full, continuing, and complete cooperation"\(^{33}\) that advances an investigation.\(^{34}\) This approach, the Division notes, allows applicants to predict with certainty whether the Division will consider its proffer of evidence sufficient.\(^{35}\)

The Program’s revisions and their focus on transparency greatly enhanced the Division’s ability to enforce federal antitrust law, leading Director Hammond to assert that the Program is "the single greatest investigative tool available to anti-cartel enforcers."\(^{36}\) The numbers support this claim. In the two-year period from 1998 to 1999, amnesty applications were received at a "rate of approximately two per month—a **twenty-fold** increase as compared to the rate" under the old Amnesty Program.\(^{37}\) From fiscal years 1997 to 1999, the Division obtained "nearly half a billion dollars in criminal fines," a number over a two-year period "virtually identical to the total fines imposed" in the twenty years from 1976 to 1996.\(^{38}\) Finally, in fiscal year 2004 alone the Division obtained $360 million in criminal fines, including the third largest ever against a single corporation for $160 million.\(^{39}\)

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32. Id.
34. The "full, continuing, and complete cooperation standard" stands in stark contrast to the more subjective "decisive evidence" standard which, "[t]o the extent potential applicants view this standard as subjective and cannot predict the outcome of their application, ... runs the substantial risk of dissuading potential applicants from coming forward." HAMMOND, supra note 7, at 8.
35. Id.
36. Id. at 1.
37. GARY R. SPATLING, U.S. DEP’T OF JUSTICE, MAKING COMPANIES AN OFFER THEY SHOULDN’T REFUSE: THE ANTITRUST DIVISION’S CORPORATE LENIENCY POLICY—AN UPDATE 2 (1999), available at http://www.usdoj.gov/atr/public/speeches/2247.pdf. This led former Deputy Assistant Attorney General Spratling to note that "[t]oday, the Amnesty Program is the Division’s most effective generator of large cases, and it is the Department [of Justice’s] most successful leniency program." Id.
38. Id.
Realizing the uncertainty its original amnesty program created for potential applicants and those willing to come forward and cooperate, and desiring an increase in cooperation both to enhance enforcement of antitrust statutes and to deter anticompetitive behavior, the Division overhauled its program with an emphasis on creating transparency through the abdication of prosecutorial discretion and a flexible cooperation standard. This overhaul was overwhelmingly successful and worked in tandem with increased statutory penalties to garner more fines and convictions than ever before. Such was the state of the Division’s Corporate Amnesty Program as of November 2002.

II. STOLT-NIELSEN

A. The Story and Agreement Underlying the Litigation

On November 22, 2002, the Antitrust Division of the DOJ “began investigating possible collusion in the parcel tanker shipping industry.”\textsuperscript{40} This investigation began in response to an article published the same day in the \textit{Wall Street Journal},\textsuperscript{41} reporting that Stolt-Nielsen Transportation Group’s (“SNTG”) former general counsel was suing SNTG for wrongful termination.\textsuperscript{42} Also on November 22, SNTG executive Samuel Cooperman held a meeting with former Division attorney John Nannes “because Cooperman was concerned that a plaintiff’s attorney claiming to have documentary evidence of potential antitrust activity by Stolt-Nielsen had been contacting former Stolt-Nielsen customers to solicit them to institute antitrust litigation.”\textsuperscript{43} Cooperman told Nannes, whom SNTG retained as counsel during the meeting, that he believed any investigation Nannes conducted would yield evidence sufficient to allow SNTG to apply for amnesty.\textsuperscript{44} Despite not immediately possessing sufficient evidence that antitrust activity occurred, Nannes—aware of the Division’s “first in time” amnesty

\textsuperscript{40} Brief for Appellant United States of America at 8, Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d Cir. 2006) (No. 05-1480).


\textsuperscript{42} Brief for Appellant, \textit{supra} note 40, at 8–9; Bandler & McKinnon, \textit{supra} note 41.


\textsuperscript{44} \textit{Stolt-Nielsen}, 352 F. Supp. 2d at 556; Brief for Appellant, \textit{supra} note 40, at 9–10.
provision—sought and received Cooperman’s permission to contact the Division.45 Nannes then scheduled a December 4 meeting with James Griffin, Deputy Assistant Attorney General for Criminal Enforcement for the Division.46

The December meeting centered on SNTG’s eligibility for leniency, but the parties disagree on what was actually said. The Division claims that at the meeting “Nannes gave the Division six documents dated March and April 2002 that Nannes said ‘provided unequivocal evidence or proof that the company had in fact terminated its conduct in March and April.’ ”47 Griffin allegedly told Nannes that if the evidence of SNTG’s withdrawal from the conspiracy was “ ‘a head fake’ ” that SNTG “ ‘would not qualify for leniency and even if we did enter into a conditional leniency agreement, that that would be revoked.’ ”48 SNTG disputes this assertion, claiming that “[a]lthough Nannes asserted that Stolt-Nielsen had taken remedial steps, Nannes did not represent that Stolt-Nielsen’s participation in the illegal activity ceased as of March 2002.”49

The Division conducted its own investigation following this meeting and subsequently granted SNTG its “marker” establishing its place in line in the Amnesty Program on December 17, 2002.50 Nannes then began his investigation and, after obtaining evidence that SNTG executives had exchanged and agreed to divide customer lists in an arrangement that was per se unlawful, made his proffer to the Division on January 8, 2003.51 The Division does not normally require, nor did it in this case seek, evidence or an assertion of the precise starting or ending dates of SNTG’s reported conspiracy at the

45. Stolt-Nielsen, 352 F. Supp. 2d at 557; Brief for Appellant, supra note 40, at 9.
46. Stolt-Nielsen, 352 F. Supp. 2d at 557; Brief for Appellant, supra note 40, at 9–10.
47. Brief for Appellant, supra note 40, at 12 (quoting John Nannes).
48. Id. at 12–13 (quoting James Griffin).
49. Brief for Plaintiff-Appellees, supra note 43, at 10; see also Stolt-Nielsen, 352 F. Supp. 2d at 568–69 (“Neither Nannes nor anyone else represented that SNTG’s participation in the illegal activity had ended in March 2002.”); Brief for Plaintiffs-Appellees, supra note 43, at 13 (noting that Griffin’s testimony “concerning the principal contested factual issue before the district court, was not credited by the district court”). SNTG supports this claim by noting that Nannes could not have made this representation since he had yet to conduct his investigation. Id. at 10.
Following the proffer of January 8, the Division and SNTG executed a leniency agreement on January 15, 2003. Less than three months after signing its agreement with SNTG, the Division claims it learned that SNTG had continued to participate in the anticompetitive activity “until as late as November 2002,” eight months beyond the date the Division claims Nannes represented to it in December of 2002. The Division notified SNTG that it was considering withdrawing its grant of conditional leniency in light of SNTG’s apparent breach of the agreement on April 8, 2003. After further investigation—including investigation of SNTG’s co-conspirators and their subsequent pleas of guilty to participating in an illegal antitrust conspiracy in the parcel tanker industry that continued as late as November 2002—the Division formally revoked SNTG’s leniency agreement on March 2, 2004.

On February 6, 2004, SNTG responded by filing a complaint to enforce its rights under the Amnesty Agreement in the Federal District Court for the Eastern District of Pennsylvania. The complaint specifically sought a declaratory judgment, specific performance, and injunctive relief in the form of (1) a preliminary injunction to enjoin the Division from indicting SNTG until after a hearing to determine whether SNTG had fully complied with its obligations under its agreement with the Division, and (2) a permanent injunction enjoining the Division from indicting SNTG at any point.

52. See Stolt-Nielsen, 352 F. Supp. 2d at 558; Brief for Plaintiffs-Appellees, supra note 43, at 12; see also Antitrust Div., U.S. Dep’t of Justice, Model Amnesty Agreement, in SPRATLING, supra note 37 [hereinafter Model Amnesty Agreement] (providing terms of model leniency agreement).
54. Brief for Appellant, supra note 40, at 15.
56. The successful prosecution and guilty pleas of SNTG’s co-conspirators began in September of 2003. This success, based on facts and evidence that would have otherwise been unknown to the Division, circumstantially supports SNTG’s claim that it fully cooperated throughout the investigation. See Brief for Plaintiffs-Appellees, supra note 43, at 22–23; see also Stolt-Nielsen, 352 F. Supp. 2d at 568 (“DOJ acknowledges that the prosecutions as a result of SNTG’s cooperation were successful.”).
57. Stolt-Nielsen, 352 F. Supp. 2d at 559; Brief for Appellant, supra note 40, at 17–18.
58. Stolt-Nielsen, 352 F. Supp. 2d at 559; Brief for Plaintiffs-Appellees, supra note 43, at 23.
59. Brief for Appellant, supra note 40, at 3.
B. The Decisions

1. The District Court’s Recognition of a Due Process Right to a Pre-Indictment Hearing

The district court issued its ruling on January 15, 2005, reaching two primary conclusions on the evidence and law before it: (1) “due process dictates that a court must decide whether there has been a breach of [an immunity agreement] before it can be voided, and the decision should be made before indictment,” and (2) “SNTG performed its obligation under the agreement when it supplied DOJ with self-incriminating evidence that led to the successful prosecution of SNTG’s co-conspirators.” Based on these conclusions, the court enjoined the Division from indicting SNTG for its role in the antitrust conspiracy.

The court’s opinion first addressed SNTG’s argument that the Due Process Clause of the Fifth Amendment required a pre-indictment hearing on its alleged breach of its agreement with the Division. Relying on the Seventh Circuit’s decision in United States v. Meyer, the district court agreed. The court quoted Meyer for the proposition that “the preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment,” noting that the Meyer court’s reasoning on this issue rested on the fact “that the burden on the government to obtain a pre-indictment judicial determination is minimal because the government must eventually obtain one.” The district court signaled its agreement with this reasoning in its concluding statement on the issue:

[T]he government’s interest will not be significantly compromised by a judicial proceeding and decision prior to indictment rather than later after the other party’s interest will

60. Stolt-Nielsen, 352 F. Supp. 2d at 555 (emphasis added).
61. Id. at 562–63.
62. See Brief for Plaintiffs-Appellees, supra note 43, at 46–47 (citing cases for the proposition that “[d]ue process compels the government to prove to a court that the defendant breached the terms of the agreement”).
63. 157 F.3d 1067 (7th Cir. 1998).
64. Stolt-Nielsen, 352 F. Supp. 2d at 560–61.
65. Id. (quoting Meyer, 157 F.3d at 1077) (emphasis added).
66. Id. A judicial determination on breach is necessary in every instance because “due process requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence . . . implicat[ing] themselves.” Meyer, 157 F.3d at 1076 (quoting United States v. Eliason, 3 F.3d 1149, 1153 (7th Cir. 1993)).
have been adversely affected. If the court determines that DOJ
is correct that SNTG breached the agreement, DOJ can indict.
If not, SNTG will have been saved from being wrongfully
indicted and harmed as a result.67

The second portion of the district court’s opinion addressed
SNTG’s alleged breach of its leniency agreement with the Division.
The Division argued that SNTG violated the terms of the agreement
between the two parties in that: (1) the agreement contained an
express representation by SNTG that it “‘took prompt and effective
action to terminate its part in the anticompetitive activity being
reported upon discovery of the activity,’ ” when in fact SNTG
continued to participate in such activity beyond the “discovery”
date,68 and (2) “‘SNTG explicitly agreed to provide full, continuing,
and complete cooperation, including providing a full exposition of all
facts known to SNTG relating to the anticompetitive activity being
reported,’” when in fact SNTG had failed to report its ongoing
participation in the activity being reported.69 The district court
summarized the Division’s argument by stating that the Division’s
“justification for revoking SNTG’s amnesty is that SNTG
misrepresented when its participation in the anticompetitive activity
had ended.”70

SNTG responded to the government’s argument by focusing on
the term “discovery,” noting that no discovery date was stated in the
agreement.71 In fact, the corporation argued that the only date
printed in the agreement was January 15, 2003, the date the
agreement was signed.72 Therefore, any “discovery” date in the
agreement had to be January 15, 2003, and since the Division did not
claim that SNTG participated in anticompetitive activity beyond the
January date, SNTG had not breached the agreement. SNTG
bolstered this argument by pointing to the agreement’s integration

68. Brief for Appellant, supra note 40, at 43 (quoting Model Amnesty Agreement,
supra note 52, at 1). The key to this argument was the Division’s contention that SNTG
had “discovered” the illegal activity in March of 2002, the date the Division alleged
Nannes represented to Deputy Griffin in their meeting on December 4. See Stolt-Nielsen,
352 F. Supp. 2d at 562 (“DOJ argues that March 2002 was understood to be the date
SNTG said it had discovered the anticompetitive activity and implemented prompt and
effective steps to end its participation in it.”).
69. Brief for Appellant, supra note 40, at 43 (quoting Model Amnesty Agreement,
supra note 52, at 1).
70. Stolt-Nielsen, 352 F. Supp. 2d at 562.
clause—"[t]his letter constitutes the entire agreement between the Antitrust Division and [SNTG], and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein"73—as a bar to any alleged oral representation made by Nannes at the December meeting with Deputy Griffin.74

The district court agreed with SNTG's analysis on all counts. After noting that "[n]owhere in the agreement is there a reference to March 2002 as the date SNTG discovered the illegal activity," and that the Division's "inaartful drafting cannot inure to its own benefit and to SNTG's detriment," the court concluded that the "DOJ rescinded the agreement based on its own belief that SNTG had to have ceased its participation in the illegal activity in March 2002, a date that is not specified in the agreement."75 The court then held that "[w]hen an immunity agreement contains an integration clause expressly excluding any terms other than those set forth in the agreement, a party cannot rely on a purported implicit understanding in order to demonstrate" a breach of the agreement.76 Therefore, the court concluded that the Division, "especially because it drafted the agreement, cannot depend upon a tacit understanding of what it contends was meant during negotiations but was not memorialized in the integrated agreement."77 These two conclusions led the district court to enjoin the Division from prosecuting SNTG for any anticompetitive activity it may have engaged in through January 15, 2003.78 The Division quickly filed a notice of appeal.79

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73. Model Amnesty Agreement, supra note 52, at 4.
74. Brief for Plaintiffs-Appellees, supra note 43, at 54–55 ("The Amnesty Agreement contained an integration clause that superseded any oral or other representations contained therein.").
75. Stolt-Nielsen, 352 F. Supp. 2d at 562. The district court actually went further. After hearing and evaluating live testimony from both Nannes and Griffin, the district court found that Nannes never made the alleged representation. See id. at 565–66 ("Although he asserted during the meeting that SNTG had taken remedial steps to cease the activity in question, Nannes did not represent that SNTG's participation in the illegal activity ceased as of March 2002."); see also id. at 568–69 ("Neither Nannes nor anyone else represented that SNTG's participation in the illegal activity had ended in March 2002.").
76. Id. at 562.
77. Id.
78. Id. at 562–63. The problem with the district court's opinion is that its due process analysis did not rest on a firm judicial holding, but rather on dicta—a point neither the Division nor the Third Circuit Court of Appeals overlooked. See infra notes 81–85 and accompanying text. However, when applied in the context of a corporate criminal prosecution, and to the specific and recurring problems posed by poorly drafted plea and immunity agreements, it appears that the district court's constitutional calculus makes more sense than that of either the Division or the Third Circuit.
2. The Third Circuit's Reversal

The district court's conclusion that due process required the Division to seek a judicial determination of SNTG's breach of its immunity agreement prior to indictment relied heavily upon the Seventh Circuit Court of Appeals' decision in Meyer. The district court cited Meyer for the proposition that due process compels the government "to seek relief from its obligations under [an] immunity agreement prior to indictment." \(^{80}\) The problem for the district court was that it quoted the foregoing phrase while glossing over the Seventh Circuit's notation that a pre-indictment hearing on breach is the "preferred procedure" when the government seeks to avoid its obligations, not the procedure required by the Fifth Amendment.\(^1\)

As the Division pointed out in its brief to the Third Circuit, the court in Meyer "expressed a preference for a pre-indictment hearing in dictum . . . [but] its actual holdings reflect the reality that there is no such right."\(^{82}\)

The Division's characterization is accurate. Before expressing its preference for a pre-indictment ruling, the Meyer court explicitly concluded that the individual criminal defendant in that case, who had received a pretrial hearing on the issue of breach that nonetheless came after indictment, "received all of the protection demanded by due process."\(^{83}\) The Meyer court then affirmed the defendant's conviction despite the denial of a pre-indictment hearing.\(^{84}\) The Third Circuit Court of Appeals in Stolt-Nielsen expressly adopted the Division's interpretation of Meyer in reaching the following conclusion:

[N]otwithstanding its dicta regarding the "preferred procedure," the Meyer court held the defendant was constitutionally "entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement," and that this "interest" was in not being convicted, rather than not being indicted. As the court noted, "a post-indictment evidentiary hearing on the

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80. Stolt-Nielsen, 352 F. Supp. 2d at 560 (quoting United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998)).
81. Id.
82. Brief for Appellant, supra note 40, at 37.
83. Meyer, 157 F.3d at 1077.
84. Id. at 1082.
defendant's alleged breach was sufficient to satisfy due process."\(^{85}\)

Judging by the appellate briefs filed by both sides, it appeared that the second major issue before the Third Circuit in *Stolt-Nielsen* would be whether a criminal indictment constitutes the "irreparable harm" necessary to justify the issuance of a civil injunction.\(^{86}\) The Division's brief to the Third Circuit stressed as its first and primary argument that "[i]njunctive relief was not warranted in this case because... plaintiffs had an adequate remedy at law and would not have suffered irreparable injury if an injunction had been denied."\(^{87}\) Presented in terms of individual criminal defendants, precedent overwhelmingly favors the Division's position.\(^{88}\) In the face of the precedent cited by the Division,\(^{89}\) the district court supported its assertion that SNTG's indictment would impose irreparable harm only with a footnote citation to *In re Fried*.\(^{90}\) *In re Fried* was a Second Circuit case that predated the Supreme Court's conclusion in *Younger* and railed against interrogation techniques it deemed "foul exploits" and "miserable misbehavior."\(^{91}\)

The problem with the Division's analysis—as well as that of SNTG and the district court insofar as they are both incomplete—is that the "harm" a criminal indictment imposes on a corporation is different in kind and scope to that visited upon an individual. While there is little doubt that an individual suffers an injury to reputation, in some instances even economic loss due to that injury, as a result of a criminal indictment, the collateral, economic effects of a corporate

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85. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 184 (3d Cir. 2006) (citations omitted), cert. denied, 127 S. Ct. 494 (2006). In fact, the Third Circuit's agreement on this point appears to have provided the dominant rationale for its holding since it cited *Meyer* near the end of its opinion, just before noting that SNTG's contention they were entitled to a pre-indictment hearing was "belied by precedent." *Id.* at 187.

86. *See infra* note 94.


88. *See, e.g., Younger v. Harris*, 401 U.S. 37, 46 (1971) ("Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term."); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.").

89. *See Brief for Appellant, supra* note 40, at 26–30 (citing seven additional cases refuting the district court's claim that indictment alone constitutes "irreparable harm").

90. 161 F.2d 453 (2d Cir. 1947).

91. *Id.* at 459; *see also Brief for Appellant, supra* note 40, at 28 (referencing the exceptional circumstances and facts of *In re Fried*).
indictment are arguably much greater, and therefore “irreparable.”

Interestingly, the Third Circuit’s opinion gave little consideration to the severity of the harm imposed by a criminal indictment, dismissing the district court’s finding of “irreparable harm” to SNTG in a footnote stating that “other courts have not accepted the argument that the unpleasantness of an indictment brought in good faith constitutes an injury that may be remedied by a pre-indictment injunction, and neither have we.”

One view of the Third Circuit’s summary treatment of the issue that both parties briefing the court believed to be so critical is that the circuit court does not believe “irreparable harm” is necessary or even relevant for the issuance of an injunction. This view is supported by the court’s notice that different circuits utilize different tests when determining the appropriateness of issuing a permanent injunction. In light of the Third Circuit’s frank statement regarding the overwhelming precedent in opposition to the district court’s conclusion and its characterization of criminal indictment as “unpleasant[,]” the better view is that the court did not see this issue as significant to its holding once it found that precedent clearly established that indictment does not “irreparable harm” create. Exactly which view the Third Circuit would adhere to absent abundant precedent to the contrary, and where the harm was much more tangible and visited on a large number of individuals, is significant in the analysis to come.

92. See infra notes 111–35 and accompanying text.
94. See Brief for Appellant, supra note 40, at 25–30 (placing “irreparable harm” as its first argument and devoting six pages of argument to the topic); Brief for Plaintiffs-Appellees, supra note 43, at 41–44 (devoting four pages to irreparable harm).
95. Stolt-Nielsen, 442 F.3d at 185 n.5.
96. Id.; see supra note 93 and accompanying text.
97. See infra Part II.C. The Third Circuit did not limit its analysis of SNTG’s due process rights under its leniency agreement to its discussion of Meyer or the issue of irreparable harm upon which this Recent Development focuses. For instance, the court addressed the Division’s argument that the separation of powers denies a court the jurisdiction to enjoin a criminal prosecution because the executive has the “exclusive authority and absolute discretion to decide whether to prosecute a case,” see Stolt-Nielsen, 442 F.3d at 183 (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)), as well as Stolt-Nielsen’s counterargument that this authority is not unlimited, see id. at 183–84 (distinguishing cases cited by Stolt-Nielsen as those invoking a narrow exception for the protection of First Amendment rights). However, the court frames the ultimate issue as “whether, even when there is no risk of a chilling effect on constitutional rights, the existence of an immunity agreement provides federal courts with authority to enjoin a federal criminal prosecution in order to avoid the filing of an indictment.” Id. The court then immediately turns its analysis to Meyer.
A brief look at the underpinnings of the district court’s ruling in *Stolt-Nielsen* therefore makes it difficult to see why the Third Circuit required even the limited space it devoted to the case to decide the issues located therein. Admittedly, virtually any federal court in the nation would likely have reached the same conclusion after examining *Meyer*’s dicta and the precedent holding that the indictment of an individual does not visit an “irreparable harm” on that person. Significantly, however, *Meyer*’s dicta stands on powerful reasoning, and SNTG is indeed a corporation with over 1,000 shareholders and not an individual. The next section probes these lines of thought and concludes that the Third Circuit’s opinion, in light of the increased government use of immunity agreements in ferreting out corporate crime, is not as sound as it initially appears.

C. A Nuanced Approach to *Stolt-Nielsen and a Corporation’s Right to a Pre-Indictment Hearing*

1. The Sound Logic of *Meyer*’s Dicta in the Context of Corporate Leniency

The district court’s reliance on dicta is curious until one goes on to read the reasoning behind the Seventh Circuit’s “preference” in *Meyer*. First, the *Meyer* court noted that the burden on the government, which must seek a judicial determination of breach at some time before or during trial, is a “de minimis inconvenience” at best. The Division’s inability to supply a valid reason for not adhering to this pre-indictment hearing process in *Stolt-Nielsen*—beyond a general appeal to principles of separation of powers and the “public’s interest in the fair and expeditious administration of the criminal laws”—demonstrates the truth behind the *Meyer* court’s assertion. Second, and more significantly for the purposes of this Recent Development, the Seventh Circuit in

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98. As of May 10, 2005, all 65,279,171 Common Shares of Stolt-Nielsen, S.A.—SNTG’s parent company—were registered in the names of 1,552 shareholders. Stolt-Nielsen, S.A., Annual Report (Form 20–F), at 103 (May 31, 2005).

99. See supra note 4 and accompanying text.

100. See United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986) (“[D]ue process prevents the government from unilaterally determining that the defendant breached the ... agreement.”).

101. United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998) (citing United States v. Ataya, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988)).

102. See Brief for Appellant, supra note 40, at 31 (“[C]riminal prosecution is an inherently executive function within the absolute discretion of the Executive Branch.”).

103. Id. at 39 (citing United States v. Dionisio, 410 U.S. 1, 17 (1973)).
Meyer believed that pre-indictment hearings "would curtail prosecutorial overreaching in drafting ambiguous immunity agreements and, in cases in which the defendant had fulfilled his obligations under the agreement, would help to prevent the government from using the threat of criminal prosecution 'to achieve by coercion what it could not achieve through voluntary negotiation.'"'104

Confronted with powerful evidence of SNTG's cooperation with the Division,105 as well as its finding that Nannes never misrepresented the discovery date of the anticompetitive activity,106 the district court likely concluded that the interposition of a pre-indictment hearing on breach was the only way to prevent the specific danger alluded to in Meyer and looming behind Stolt-Nielsen's agreement with the Division. This conclusion on SNTG's due process rights, however, did not grant the court the authority to enjoin the DOJ from seeking an indictment. As the Division argued on appeal, a civil injunction required the court to conclude that an indictment would impose "irreparable harm" on SNTG.107

2. Distinguishing Between Corporate and Individual "Harm"

While the Third Circuit's conclusion as to the insignificance of "irreparable harm" is debatable in light of the other issues animating its discussion,108 its statement that "other courts have not accepted the argument that the unpleasantness of an indictment brought in good faith constitutes an injury that may be remedied by a pre-indictment injunction"109 is entirely accurate. The problem is that the cases cited by the Division and the Third Circuit in support of this assertion all

104. Meyer, 157 F.3d at 1077 (quoting Ataya, 864 F.2d at 1330 n.9).
106. See id. at 568–69 (finding as fact that "[n]either Nannes nor anyone else represented that SNTG's participation in the illegal activity had ended in March 2002").
107. Brief for Appellant, supra note 40, at 20 ("Injunctive relief is never appropriate when there is an adequate remedy at law and the moving party will not suffer irreparable injury if an injunction is denied."). The Third Circuit dedicated very little of its opinion to irreparable harm. First, the court was not convinced that irreparable harm was the proper standard. See Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 185 n.5 (3d Cir. 2006), cert. denied, 127 S. Ct. 494 (2006). Second, as mentioned elsewhere, the Third Circuit stated that it did not accept the proposition that the "unpleasantness" of a good-faith indictment constitutes such harm. Id.
108. See supra notes 100–07 and accompanying text.
109. See Stolt-Nielsen, 442 F.3d at 185 n.5.
refer to the harm, reputational and otherwise, an indictment visits upon individuals charged with criminal offenses.\textsuperscript{110} Conversely, Stolt-Nielsen and, by definition every other defendant with which the Division enters into a Corporate Leniency Agreement, is a corporation. Neither the parties nor the two courts involved in the \textit{Stolt-Nielsen} litigation recognized this key distinction in the very nature of the defendant charged with a crime. This failure to distinguish between individuals and corporations makes it impossible to see that while an individual may not suffer the "irreparable harm" necessary to warrant the issuance of an injunction or imposing a requirement for a pre-indictment hearing, the harm a corporation suffers—the harm its thousands of shareholders suffer—warrants pre-indictment hearings on breach.

Numerous courts have taken judicial notice of the harm an individual suffers from an indictment.\textsuperscript{111} These courts have specifically noted the harm done to an individual's reputation in the community,\textsuperscript{112} the anxiety and inconvenience of having to defend a criminal prosecution,\textsuperscript{113} and the general "cost[s]" of facing an indictment.\textsuperscript{114} Though not explicitly referenced or explained, these costs will likely include those of hiring counsel and preparing a legal defense, as well as any collateral costs imposed due to reputational harms like the loss of a job or business due to the stigma of criminal involvement.\textsuperscript{115} These are serious costs to impose, and one could

\textsuperscript{110} See, e.g., Younger v. Harris, 401 U.S. 37, 46 (1971) (applying "irreparable harm" analysis to individual criminal defendant); Cobble Dick v. United States, 309 U.S. 323, 325 (1940) (noting the insufficiency of an individual's indictment to grant an injunction where defendant was subpoenaed in his individual capacity and as director of a corporation); Shields v. Zuccarini, 254 F.3d 476, 482 (3d Cir. 2001) (applying "irreparable harm" standard for injunction to individual defendant in civil proceeding); Deaver v. Seymour, 822 F.2d 66, 69 (D.C. Cir. 1987) (applying \textit{Younger} holding to "federal injunctions that interfere with state criminal proceedings" of criminal defendants).

\textsuperscript{111} See, e.g., \textit{Younger}, 401 U.S. at 46 ("[C]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term."); see also Brief for Appellant, \textit{supra} note 40, at 27 (citing several cases addressing the "irreparable injury" standard).

\textsuperscript{112} \textit{Deaver}, 822 F.2d at 69 ("[I]t is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously charged with a crime . . . .").

\textsuperscript{113} \textit{Younger}, 401 U.S. at 46.

\textsuperscript{114} Id.

\textsuperscript{115} See Jerome Hall, \textit{Objectives of Federal Criminal Procedural Revision}, 51 \textit{Yale L.J.} 723, 741 n.25 (1941) ("But I have known rich men whose characters were ruined by unwarranted indictments under which they were never convicted, and I have known others who spent their every dollar and beggared their families defending indictments which should never have been found.") (quoting William Harman Black, \textit{The Progress of a Criminal Case, in 7 Lectures on Legal Topics} 339, 345 (1929)).
argue that courts have not granted them sufficient weight against the "larger societal interests" in criminal prosecutions. That said, the costs an indictment imposes on a corporation are far greater in that the economic ramifications of corporate indictment are larger and are imposed on broader segments of society that are entirely blameless. Research has made these wider costs clear.

Event study methodology examines the movement of stock prices due to specific events—"unexpected actions by managers or policy-makers that are expected to affect firm values"—in an attempt to determine the effect of these events or policy decisions on stock prices. Over the past three decades, event studies have led statistical and economic researchers to conclude that "no matter who brings a lawsuit against a firm, be it a government entity, another firm, or a private citizen, defendants experience economically meaningful and statistically significant wealth losses upon the filing" of a lawsuit against them. One group of researchers made this assertion after the statistical analysis of legal disputes consisting of filings and settlements announced in the Wall Street Journal from 1981 through 1983. The data—representing corporate share values in the early 1980s that are probably much greater now due to inflation—allowed the architects of the study to specifically conclude that the average wealth loss for a defendant corporation when a suit is merely filed is 0.97% of the corporation's market value of the equity, or an average of $15.96 million. This figure alone should raise the eyebrows of courts casually relying on precedent to conclude that a criminal indictment does not create "irreparable harm."

116. Deaver, 822 F.2d at 69.
118. Sanjai Bhagat et al., The Shareholder Wealth Implications of Corporate Lawsuits, 27 FIN. MGMT. 5, 6 (1998); see also Alan K. Reichert et al., The Impact of Illegal Business Practice on Shareholder Returns, 31 FIN. REV. 67, 67 (1996) ("Using the single index market model, the study finds that public announcements of indictments for major corporate crimes have a significant and long-term negative impact upon shareholder wealth, particularly for firms found guilty of the indictment."); James L. Strachan et al., The Price Reaction to (Alleged) Corporate Crime, 18 FIN. REV. 121, 129 (1983) ("[F]irms involved in [criminal] acts suffer a statistically significant loss in market value of common stock. The result is particularly striking for firms involved in alleged price fixing schemes and those initially accused of wrongdoing.").
119. Bhagat et al., supra note 118, at 10.
120. Id. at 6.
Significantly, however, this figure does not stand alone. In fact, a
deeper look into the study indicates that a criminal indictment, as
opposed to the announcement of a corporation’s entrance into a
leniency agreement, has disastrous consequences for corporate
defendants and their innocent shareholders. Seeking to explain the
differentiated impact on shareholder wealth of lawsuits where one
side is a corporation, Professors Bhagat, Bizjak, and Coles examined
a large sample of lawsuits with an eye towards three aspects of the
litigation: (1) the corporation’s opponent in the suit, (2) the type of
legal issue involved, and (3) whether the announcement involving the
corporation was a filing or a settlement. The professors
hypothesized that these three factors largely explained the differences
in shareholder wealth effects seen following lawsuits, and the results
of their study largely confirmed their expectation.

The first major conclusion of the Bhagat study was that “[d]efendants involved in government suits suffer larger declines in
shareholder wealth (-1.73%) than defendants involved in lawsuits with other firms (-0.75%) or with private parties (-0.81%).” This
average loss by corporations named in government lawsuits is the
equivalent of a “substantial drop in shareholder equity of $32.20
million”—as opposed to an average $16.62 million loss by
corporations named in suits with private parties—experienced when a
lawsuit is filed, an event similar to the filing of an indictment in that
both create uncertainty in regard to a corporation’s financial future,
and therefore uncertainty in the minds of investors. Conversely,
the data indicate that defendants in government suits suffer no
statistically significant equity loss at the announcement of a
settlement, an event similar to a firm’s announcement it has entered
into a leniency agreement in that both provide certainty to the market
regarding the corporation’s financial future. This detailed empirical
analysis therefore provides substantial support for the proposition
that defendant corporations—specifically their shareholders and not
merely managers and employees—suffer “irreparable harm” as a

121. Id.
122. Id. at 25.
123. Id. at 6.
124. Id. at 17. The negative 1.73% average abnormal return for corporations named in
government suits has an observed value of nearly five (Z=-4.99). This means that the
observed value is essentially five standard deviations away from the expected value. The
p-value is less than 1.0% (p=0.000), meaning that the chance of getting a sample average
five standard errors away is less than 1%. In laymen’s terms, these numbers are highly
significant and not the result of chance error.
125. Id. at 19.
result of indictment, rebutting the conclusion of many courts, including the Third Circuit.

The second significant conclusion reached by the Bhagat study is that "certain types of litigation are more costly for defendants."\(^{126}\) The study specifically looked at the shareholder wealth effects of actions involving breach of contract, issues of corporate governance, environmental actions, patent infringement, and most significant here, antitrust violations.\(^{127}\) The data indicated that "[a]ll but corporate governance suits have negative returns," meaning a loss of shareholder wealth at the time of filing.\(^{128}\) This confirmed the authors' hypothesis that the type of legal issue involved would be a factor affecting the cost of a lawsuit and behavior in suit settlement due to the fact that, "[f]or example, certain types of violations carry relatively large penalties."\(^{129}\)

While the data indicated that disputes involving antitrust issues led to relatively lesser wealth losses (-0.81%) for defendant firms than those involving environmental actions (-3.08%) and violations of securities laws (-2.71%),\(^{130}\) the authors acknowledged that "changes in the legal environment after the sample period reduce the applicability of some of the results" found in the data.\(^{131}\) They specifically pointed to the 1991 changes in the Federal Sentencing Guidelines and the Department of Defense's crackdown on procurement fraud as support for the proposition that "government suits are even more serious (e.g. involve more extreme wealth implications for defendants) than even our data suggests."\(^{132}\) Given the substantially increased penalties available for criminal antitrust actions,\(^{133}\) as well as the Division's vigorous enforcement through the use of its Leniency Program, one would expect the negative wealth effects of an antitrust indictment to have grown much more severe than they were in the early 1980s.

The Bhagat study on the shareholder wealth implications of corporate lawsuits, as well as the less detailed studies that preceded

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126. *Id.* at 6.
127. *Id.* at 18 tbl.5.
128. *Id.* at 19.
129. See *id.* at 9 (listing other reasons that the legal issue involved in a lawsuit would create variation in the effect on shareholder wealth to include the probability distribution of outcomes, attorney's fees and court costs, the nature of judicial penalties, and the applicable legal standard).
130. *Id.* at 6.
131. *Id.* at 24.
132. *Id.*
133. See *supra* notes 22-26 and accompanying text.
it,\textsuperscript{134} provide strong, empirical evidence of the very real economic harm that corporations experience as a result of a criminal indictment. Equally significant is the fact that the corporations themselves are not the only ones affected by the indictment: hundreds to thousands of innocent shareholders suffer millions in equity losses when the market hears of a criminal indictment for antitrust violations. The judiciary’s failure to recognize this harm to the lives of thousands of individuals, and to distinguish it from the serious but certainly less severe harm imposed on an indicted individual, exposes a significant flaw in the judicial reasoning that corporate defendants lack a due process right to a pre-indictment hearing on their alleged breach of an immunity agreement. This reasoning, particularly that of the Third Circuit in \textit{Stolt-Nielsen}, is further undermined, given the need to guard against the prosecutorial overreaching identified by the Seventh Circuit in \textit{Meyer}.\textsuperscript{135}

The analysis to this point has focused on the vulnerabilities of the legal argument put forward by the Division and accepted by the Third Circuit in \textit{Stolt-Nielsen}, demonstrating that there are sound legal reasons for the Division to grant, and the courts to enforce, a corporate defendant’s right to a pre-indictment hearing on the alleged breach of an immunity agreement. Interestingly, however, this legal analysis does not provide the Division with the most persuasive reason to provide pre-indictment hearings. Rather, it is the Division’s own policy interest in a transparent, effective leniency program and the successful enforcement of the nation’s antitrust laws that should compel it to reverse course in its treatment of applicants for antitrust amnesty.

\textbf{III. A POLICY RATIONALE FOR PRE-INDICTMENT HEARINGS}

Beginning in 1998, officials from the Antitrust Division of the DOJ began lauding the success of the Division’s Corporate Amnesty Program in speeches addressing the antitrust bar and fellow law enforcement agencies.\textsuperscript{136} Several of these speeches discussed the success of the Division’s Program,\textsuperscript{137} with at least one of these

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\textsuperscript{134} See \textit{supra} note 118 and accompanying text.

\textsuperscript{135} See \textit{supra} note 104 and accompanying text.

\textsuperscript{136} See, e.g., HAMMOND, \textit{supra} note 7, at 1 (addressing the International Workshop on Cartels); SPRATLING, \textit{supra} note 9, at 1 (addressing the Antitrust Section of the American Bar Association).

\textsuperscript{137} See, e.g., HAMMOND, \textit{supra} note 7, at 1 (“Over the last five years, the United States’ Corporate Leniency Program ... has been responsible for detecting and cracking more international cartels than all of our search warrants, secret audio or video tapes, and FBI interrogations combined.”); SPRATLING, \textit{supra} note 9, at 4 (“In the last six months
speeches specifically addressing the “hallmarks” of an effective program and how the Division’s 1993 amendments to its Program led to its success. An omnipresent theme of these speeches is “transparency” and the Division’s perceptive realization that “[i]f prospective cooperating parties cannot predict, with a high degree of certainty, their treatment following cooperation, then they are less likely to come forward.” This realization, and the success of the Division’s Amnesty Program after its implementation of a more transparent process for leniency applicants, makes the Division’s insistence upon denying pre-indictment hearings on the alleged breach of agreements difficult to understand.

Fundamentally, a pre-indictment hearing guarantees a corporation an opportunity to present its side of the story to a judicial arbiter before suffering the costly effects of a public indictment. This opportunity is especially important given the parameters of the Division’s Program and its own recognition of the need to abdicate prosecutorial discretion in order to operate an effective leniency policy. First, the Division’s “first in time” provision requires applicants to beat all other conspirators to the courthouse to avoid prosecution, meaning that corporate executives will often need to come forward without having a full understanding of how extensive the corporation’s wrongdoing is. This creates a dilemma for companies wishing to cooperate, a dilemma on full display at Stolt-Nielsen. SNTG executive Samuel Cooperman first contacted counsel Nannes with only imperfect information regarding his company’s wrongdoing. Knowing that time was of the essence, Nannes immediately contacted the Division to inquire about receiving amnesty and establishing a marker as the first conspirator to cooperate before conducting his own investigation of the corporation’s wrongdoing. The Division granted SNTG its marker despite the fact that an internal corporate investigation had yet to

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138. HAMMOND, supra note 7, at 1–2.
139. Id. at 6; see supra notes 27–28 and accompanying text.
140. See supra notes 36–39 and accompanying text.
141. See supra notes 111–33 and accompanying text.
142. See HAMMOND, supra note 7, at 7 (“Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. Uncertainty in the qualification process will kill an amnesty program.”).
143. Id. at 5; see also supra note 18 and accompanying text.
145. Id. at 9–11.
occur, but after its own investigation failed to turn up any misrepresentations by SNTG.146 The Division then attempted to revoke the marker and leniency based on an alleged misrepresentation made at a meeting before SNTG’s counsel had the opportunity to investigate the company’s wrongdoing.147 The lack of a pre-indictment hearing therefore creates a catch-22 for corporations wishing to supply the Division with evidence of criminal activity. Eligibility requires a corporation to come forward with imperfect information, but doing so opens the corporation up to claims that it misrepresented its activity to the Division and therefore violated its agreement.

The second reason the Division’s refusal to provide pre-indictment hearings on breach undermines the certainty corporations need to come forward is that it opens corporations up to the prosecutorial overreaching discussed in Meyer.148 Knowing an agreement, and the parties’ actions under it, will not receive judicial scrutiny until after the filing of an indictment gives prosecutors license to press applicants to provide information they may not have, and to do so on an unrealistic timeline, or face the dire economic consequences of an indictment. Stolt-Nielsen’s predicament once again illustrates the point. The Division claimed that “SNTG’s misrepresentations plus its failure to fully disclose evidence concerning its involvement in the conspiracy similarly impeded the grand jury’s investigation and amounted to a material breach of the Agreement.”149 This explanation was essentially the Division’s argument that SNTG breached the agreement not only by misrepresenting the date on which it ceased its illegal activity, but also by failing to disclose information about the conspiracy after the date it allegedly ended in March of 2002.150 The district court’s findings of fact directly contradict this assertion, reciting the list of convictions the Division obtained as a result of the information supplied by SNTG151 and noting that the “DOJ acknowledges that the

146. Id. at 10.
148. See supra note 104 and accompanying text.
149. Brief for Appellant, supra note 40, at 53.
150. Id. at 54.
151. See Stolt-Nielsen, 352 F. Supp. 2d at 568 (detailing convictions, guilty pleas, and fines obtained as a result of SNTG’s cooperation against its co-conspirators).
prosecutions as a result of SNTG’s cooperation were successful.”¹⁵² Thus, it appears the Division used its power to unilaterally declare SNTG in breach to press for additional information, which may or may not have been in SNTG’s possession, despite clear evidence of SNTG’s cooperation. This runs completely counter to the Division’s rationale behind the removal of the “decisive evidence” standard for applicant eligibility,¹⁵³ as well as its assertion that “while an amnesty applicant’s cooperation alone may not always add up to decisive evidence, it can provide us with leads and opportunities that will take us to additional evidence and, ultimately, result in successful prosecutions.”¹⁵⁴ Given this interest in successful prosecution, prudence dictates examining the possible reasons the Division took the action it did.

The Division’s reasons for opposing the grant of a pre-indictment hearing fit neatly into two pages of its brief to the Third Circuit. The Division first claimed that allowing Stolt-Nielsen’s action for an injunction would “‘encourage a flood of disruptive civil litigation.’ ”¹⁵⁵ The Division offered no empirical support for this assertion. Even accepting this proposition, however, does not explain the Division’s denial of a hearing. Stolt-Nielsen’s civil suit for an injunction was necessitated by the government’s refusal to grant a pre-indictment hearing on breach.¹⁵⁶ Therefore, the fact that a voluntary grant of a hearing could stem any tide of civil litigation demonstrates that this assertion is not a valid reason for the Division to deny a hearing without a court order and as a matter of course.

The second reason the Division provides in support of its interest in not granting a pre-indictment hearing is that this would “impermissibly circumvent federal criminal procedure and intrude on the prosecutorial discretion of the Executive Branch.”¹⁵⁷ This statement is overbroad. Providing applicants with a hearing would not “intrude” upon the Division’s prosecutorial discretion so much as it would delay it. More importantly, however, the Division’s leniency program was redesigned to do exactly what the Division now complains of—abdicate prosecutorial discretion to encourage

¹⁵². Id.
¹⁵³. See supra note 34 and accompanying text.
¹⁵⁴. HAMMOND, supra note 7, at 8.
¹⁵⁵. Brief for Appellant, supra note 40, at 38 (quoting Deaver v. Seymour, 822 F.2d 66, 71 (D.C. Cir. 1987)).
¹⁵⁶. See supra notes 58–59 and accompanying text.
¹⁵⁷. Brief for Appellant, supra note 40, at 38 (citations omitted).
applicants to come forward. This justification therefore runs counter to the Program’s purpose, indicating the Division is trying to have it both ways.

The final argument the Division supplies in support of its interest in denying pre-indictment hearings is "the public’s interest in the fair and expeditious administration of the criminal laws," and the need to avoid disrupting and delaying criminal investigations by conducting mini-trials on issues that should be resolved post-indictment." It is most certainly true that in those rare instances where breach is at issue a delay in prosecution is likely to occur. However, this truth is offset by two considerations. First, the delay in prosecuting the allegedly breaching party will not necessarily delay the Division’s pursuit of an offending cartel. For example, the Division used information provided by SNTG to prosecute SNTG’s co-conspirators both before the Division revoked SNTG’s leniency and while the parties waited for the district court’s decision on SNTG’s alleged breach. Second, any delay in prosecution must be weighed against the costs a corporation and its shareholders face when an indictment is issued. Given the enormity of these costs and the number of individuals upon which they are imposed, delay should not dismissively be considered too burdensome.

The unconvincing nature of the Division’s arguments as to the denial of pre-indictment hearings leaves some room for speculation regarding why the Division pursued SNTG the way it did. The Division’s own words fill this void. Discussing the transparency in the Division’s revised Program, and emphasizing the vital nature of transparency in a successful leniency program, former Director of Criminal Enforcement Scott D. Hammond noted that under the more transparent Program the Division had been forced to “swallow hard on a number of ... applicants that we would have preferred to prosecute.”

158. See HAMMOND, supra note 7, at 7 (“Our Amnesty Program by its nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application.”).
159. Brief for Appellant, supra note 40, at 39 (quoting United States v. Dionisio, 410 U.S. 1, 17 (1973)).
160. The Division’s revocation of SNTG’s amnesty was the first of its kind under the Corporate Leniency Program. See id. at 18 n.12.
162. See supra notes 111–25 and accompanying text.
163. HAMMOND, supra note 7, at 7.
SNTG regarding the date the latter discovered and ceased its illegal activity no doubt left the Division feeling as though it were choking on yet another instance of corporate wrongdoing.

Wishing to set an example for future applicants, and perhaps angered by its view of SNTG's conduct, the Division set out to establish a precedent. Unfortunately, this precedent undermines the program that is the "most effective generator of international cartel cases" for the Division. If the Division's actions against SNTG were indeed an attempt to deter future applicants from making misrepresentations—rather than a punitive response to SNTG's specific conduct—the deterrence was not necessary. The Division candidly admitted that no applicant had ever previously "lied" or otherwise failed to cooperate fully after gaining admission to the program. This point is further evident in the fact that the Division's allegation that SNTG breached its agreement was the first allegation of its kind. Therefore, if the Division predicated its actions on either of the unstated rationales above, it did so to the detriment of effective enforcement policy and in search of a solution to a problem that does not appear to exist.

The Division's declaration of Stolt-Nielsen's breach illustrates just two potential ways in which a leniency program that denies applicants a pre-indictment hearing produces, rather than reduces, uncertainty. While these two examples provide specific evidence, the uncertainty surrounding the Division's policy is a simple matter of intuition. Executives who suspect their corporation is guilty of antitrust activity are unlikely to come forward for amnesty without knowing whether their attempt to cooperate will protect them from prosecutorial overreaching and the harm of a criminal indictment. The substantial economic losses facing an indicted corporation serve only to increase executive hesitancy, making it more likely that corporations and their management will risk detection by an overburdened agency rather than cooperation with one lacking a check on discretion. In short, the Division's approach ignores its
“roughly 15 years of experience with an Amnesty Program that was
designed to maintain a greater degree of prosecutorial discretion
[that] ... simply did not work.”169 The result of the Division’s
approach is therefore a likely return to the lack of cooperation it
experienced under its pre-revision Amnesty Program,170 and a
Corresponding drop in its ability to enforce laws designed to curb
anticompetitive activity. Thus, in light of the Third Circuit’s
holding,171 the Division’s interest in effective enforcement is best
served by a provision in its Model Agreement guaranteeing
applicants a pre-indictment hearing on the issue of breach, as well as
a few other transparency-enhancing revisions.

IV. SUGGESTED AMENDMENTS TO THE ANTITRUST DIVISION’S
MODEL LENIENCY AGREEMENT

A. A Contractual Right to a Pre-Indictment Hearing

The Third Circuit’s opinion in Stolt-Nielsen deals a serious blow
to corporations applying for the Corporate Leniency Program and
seeking to assert a constitutional right to a pre-indictment hearing.
This holding does not, however, prohibit the Division from granting a
right to a hearing in its Model Agreement pursuant to the freedom of
contract. This Recent Development suggests the Division provide
applicants this right to enhance transparency and certainty,
encouraging potential applicants to come forward. Now in an
Enviurable bargaining position, the Division may even tailor the terms
of the hearing to its own preferences.

The Division’s primary, practical reservation regarding pre-
indictment hearings appears to be the delay these “mini-trials” may
impose upon the investigation and prosecution of anticompetitive
behavior.172 The Division could address this concern by drafting its
leniency agreements to provide expedited hearing procedures. First,
the Division could limit the time period in which an applicant could
seek a hearing upon receiving the Division’s notification that it
intends to revoke its grant of amnesty. A primary source of the
Division’s frustration with its situation in Stolt-Nielsen no doubt
centered on the ten-month period that elapsed between its notifying
SNTG that it was considering withdrawing conditional leniency and

169. HAMMOND, supra note 7, at 7.
170. See supra note 31 and accompanying text.
171. See supra Part II.B.2.
172. See supra note 159 and accompanying text.
SNTG's filing of its complaint.\textsuperscript{173} Providing a contractual ten-day window in which an applicant could seek a hearing on breach would eliminate any significant time impediment to the Division's investigation and prosecution of the applicant.

The Division could also dictate the body or court designated to decide the issue. Depending upon how much incentive it wished to provide potential applicants to come forward, the Division could adopt policies ranging from a requirement that a private mediator decide the issue without appeal, all the way to allowing a district court to adjudicate the claim while providing applicants a right of appeal. Finally, the Division could even limit the scope of the adjudicating body's inquiry and the type of evidence admissible at the hearing. While this may sound somewhat unfair, each of the options mentioned above are available under contract law, not as a matter of constitutional principle. Besides, even if these pre-indictment procedures were immeasurably slanted in the Division's favor, the applicant would still be permitted to assert its agreement as a defense at the trial for their alleged criminal activity.\textsuperscript{174}

The crucial point underlying the foregoing discussion is that the Division's determination as to how much pre-indictment process it contractually grants applicants to its leniency program is likely to have a direct impact on the applicants' willingness to come forward and incriminate its co-conspirators in the first place. The Division would therefore be wise to grant as much process as possible in the hopes of maintaining enforcement at pre-\textit{Stolt-Nielsen} levels.

\textbf{B. Secondary Amendments To Enhance Transparency}

Two additional revisions to the Division's Model Agreement would enhance transparency and encourage the cooperation necessary for effective enforcement. The first revision involves the insertion of a specific "discovery" date into the agreement. The current Model Agreement includes a representation that the applicant "took prompt and effective action to terminate its part in the activity upon discovery of the activity."\textsuperscript{175} Incredibly, however, the Model Agreement does not provide a specific discovery or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} See Brief for Appellant, \textit{supra} note 40, at 16, 18 (stating that the Division formally notified SNTG of revocation on March 2, 2003, and that SNTG filed its complaint in district court on February 6, 2004).
\item \textsuperscript{174} See Deaver v. Seymour, 822 F.2d 66, 69–70 (D.C. Cir. 1987) (noting that criminal defendants are afforded "a federal forum in which to assert their defenses" at trial and after indictment).
\item \textsuperscript{175} Model Amnesty Agreement, \textit{supra} note 52, at 1.
\end{itemize}
\end{footnotesize}
termination date.176 The Division explains this lack of a discovery date as necessary because “neither the Division nor the applicant seeking leniency may know the exact dates at the time the Agreement is signed.”177 The Division also noted that not specifying dates allows both parties to “focus on the real issue—did the applicant take prompt and effective action . . . upon discovery of the illegal conduct.”178 The Stolt-Nielsen litigation vividly illustrated the problem with this approach, which is that the issue of promptness is time-dependent and cannot be determined without a definitive starting point. That said, the Division is correct in noting that it may take a prolonged investigation by both parties to determine the exact discovery date. The solution is not the omission of a discovery date, however, but rather the granting of a “marker” to hold the applicants’ place until a discovery date can be determined, agreed upon by all parties, and included in the agreement.

This revision would have protected both parties in the Stolt-Nielsen litigation, particularly the Division. The exact date upon which SNTG “discovered” its illegal activity was the primary issue before the district court regarding the agreement’s interpretation.179 The court concluded that in the absence of any date in the agreement, beyond the January 15, 2003 execution date, “[t]he agreement immunize[d] SNTG from prosecution for activity prior to January 15, 2003.”180 Reaching this conclusion was much easier given the clause in the current Model Agreement stating that “the Antitrust Division agrees not to bring any criminal prosecution against [applicant] for any act or offense it may have committed prior to the date of this letter.”181 Thus, amending the Model Agreement to include a specific discovery date determined after investigation, and replacing “date of this letter” with that discovery date, would provide both parties more certainty in regards to their obligations.

176. See id.
177. Brief for Appellant, supra note 40, at 47 n.23.
178. Id.
179. See Stolt-Nielsen, S.A. v. United States, 352 F. Supp. 2d 553, 562 (E.D. Pa. 2005) (“Did DOJ and SNTG agree that the illegal conduct was discovered in March 2002, thus triggering SNTG’s obligation to withdraw from its participation in the anticompetitive activity?”), rev’d, 442 F.3d 177 (3d Cir. 2006), cert. denied, 127 S. Ct. 494 (2006); Brief for Appellant, supra note 40, at 47 (“Thus, the relevant issue the court failed to address was: When did SNTG discover the illegal conduct and when did it terminate its participation in it?”).
The second revision concerns the Model Agreement’s use of the term “prosecution” in its promise “not to bring any criminal prosecution” against an applicant in exchange for cooperation.\textsuperscript{182} The Third Circuit’s opinion in \textit{Stolt-Nielsen} cited a string of cases addressing whether a government’s promise not to “prosecute” means not to force a defendant to stand trial or not to punish.\textsuperscript{183} Though the weight of authority is that this language merely provides protection against punishment, and therefore does not stand as a bar to indictment and trial,\textsuperscript{184} the language would provide all parties more certainty if the government agreed not to “convict” the defendant while expressly stating that the agreement does not bar indictment.

The uncertainty the Third Circuit’s decision creates in the minds of corporate criminal defendants seeking amnesty under the Leniency Program calls on the Division to provide some assurances to these defendants to ensure they continue to come forward at a rate similar to that prior to \textit{Stolt-Nielsen}. Providing a certain, identifiable “discovery” date in amnesty agreements would allow corporations wishing to cooperate to provide information without worrying about subsequently being declared in breach and indicted. Changing the term “prosecute” to “convict” would have a similar effect, providing certainty and transparency and making corporations more likely to come forward with evidence of anticompetitive activity.

\textbf{CONCLUSION}

Fourteen years ago the Antitrust Division of the Department of Justice amended its Corporate Leniency Program, immeasurably enhancing its ability to enforce federal antitrust law. The Division’s emphasis on transparency encouraged those engaging in anticompetitive activity to come forward with incriminating information about their co-conspirators in exchange for a promise of amnesty for their own wrongdoing. By giving up a modicum of prosecutorial discretion, the Division, for the first time in its Program’s history, provided the incentive necessary for successful

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} See \textit{Stolt-Nielsen, S.A. v. United States}, 442 F.3d 177, 184 (3d Cir. 2006), \textit{cert. denied}, 127 S. Ct. 494 (2006) (“Other immunity agreements that have promised not to charge or otherwise criminally prosecute a defendant, like the agreement at issue in this case, have likewise been construed to protect the defendant against conviction rather than indictment and trial.”).

\textsuperscript{184} See \textit{id.} (citing United States v. Bailey, 34 F.3d 683, 690–91 (8th Cir. 1994) and United States v. Bird, 709 F.2d 388, 392 (5th Cir. 1983)).
enforcement and deterrence. Surprisingly, the Division appears to have reversed course with its actions and victory in *Stolt-Nielsen*.

The Third Circuit’s decision constitutionalizes the Division’s refusal to grant corporations promised amnesty a pre-indictment hearing in the event they are accused of breaching their amnesty agreement. While this decision removes any constraint on the Division’s right to indict, simultaneously providing the Division increased leverage over even those corporations with leniency agreements in hand, it does so at a cost. Armed with the knowledge that their corporations and shareholders can suffer the economic and collateral effects of an indictment despite their cooperation and without being heard, corporate executives will now think twice before providing the Division with the information that made the lion’s share of its convictions and penalties over the past decade possible. The Division, against its own advice and experience, has reclaimed a large degree of prosecutorial discretion at the cost of transparency. The only question remaining in the wake of *Stolt-Nielsen* is where the Division goes from here.

The Division’s interest in effective enforcement dictates a contractual grant of pre-indictment process to corporations entering the Leniency Program through formal agreement. The form of that process will likely turn on the corporate reaction to the Third Circuit’s holding, as well as the Division’s conduct in its aftermath. The future success of the Amnesty Program is therefore unclear. What is clear, however, is that the Division’s failure to amend its Model Agreement to include some form of pre-indictment process will almost certainly lead corporate executives to run the risk of detection rather than that of indictment at the sole discretion of the Division, choosing the devil they know over the one they do not.

M. RYAN WILLIAMS**

** For my wife, Stacey, and my mother, Judy. Women of courage and character.