CORPORATE DEATH PENALTY: PROSECUTORIAL DISCRETION AND THE INDICTMENT OF SAC CAPITAL

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INTRODUCTION

On July 23, 2013, the Department of Justice ("DOJ") filed an indictment charging S.A.C. Capital Advisors LP and three related entities (collectively, "SAC") with criminal securities and wire fraud. The indictment detailed a systematic insider trading scheme that lasted from 1999 to 2010, which was perpetrated by numerous employees and aided by internal compliance failures. The federal indictment was filed in the Southern District of New York and signed by United States Attorney Preet Bharara.

The legal basis for the indictment was corporate criminal liability, which sanctions a company for the illegal acts of its own employees if the employees performed such acts on behalf and for the benefit of their company. Prior to reaching a plea agreement with the government, SAC was the first major American company since Arthur Andersen LLP ("Andersen") to face a criminal trial. In Andersen’s case, the indictment alone was a corporate death sentence, even before adjudication. The Anderson case and the lessons learned in its aftermath have been regarded as a turning point in government decisions to charge corporate offenders, especially in

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5. This Comment will use the terms firm, company, and corporation interchangeably throughout; these terms are generic and are not meant to denote specific corporate ownership structures (e.g., partnership, limited liability company, or corporation).


the financial services industry. However, while the DOJ does provide guidance that prosecutors are expected to utilize before charging a corporation, U.S. Attorneys have broad prosecutorial discretion in corporate charging decisions.

SAC was a prominent hedge fund and an important client for many of the United States’ largest financial institutions. SAC and its employees, as well as Wall Street and the market as a whole, were significantly affected in the more than three months between SAC receiving the indictment and accepting a plea agreement. The indictment of a major American corporation and the eventual plea agreement provide a rare chance to examine the Andersen Effect: a situation in which an indictment itself can destroy a company and inflict substantial collateral damage on uninvolved parties.

Part I of this Comment introduces the legal process involved in a corporate charging decision, and then analyzes the Andersen case. Part II discusses SAC, including the details and aftermath of the indictment. Finally, in Part III, this Comment proposes revisions to the United States Attorneys’ Manual (“USAM”) and judicial review of prosecution agreements. Specifically, this Comment argues that the DOJ should revise the USAM to provide more extensive guidance to prosecutors in order to avoid future incidences of the Andersen Effect. The courts should also respond to the bargaining imbalance through enhanced judicial review of prosecution agreements.

I. CORPORATE CRIMINAL LIABILITY: PROSECUTORIAL DISCRETION FROM INDICTMENT TO PLEA AGREEMENT

Prosecutors have broad discretion to seek indictments and negotiate plea agreements with companies. When charging companies, prosecutors often rely on corporate criminal liability. Section A of this Part discusses the standards for issuing an indictment, and provides an overview of corporate criminal liability and plea agreements. Section B reviews the criminal case against Arthur Andersen LLP and the indictment’s effect on the firm.

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8 Id. at 806-07 (referring to the corporate death penalty as a myth, not because it cannot happen, but rather because of a lack of indictments after Andersen).
11 See infra Part II.C.
12 See infra Part I.B for a discussion of the Andersen Effect; see also infra note 67.
14 Id. at 233-34.
Section C then analyzes U.S. Attorneys’ prosecutorial guidance in corporate charging decisions.

A. Indictment, Corporate Criminal Liability, and Prosecution Agreements

An indictment is, “[a] formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime.” Angrand jury is a pre-trial jury composed of citizens who decide whether “prosecution evidence is sufficiently strong to bring an accused to trial for the specified crime.” An indictment is an early step in the legal process. A grand jury proceeding does not allow for cross-examination of witnesses or any input from the accused’s attorney. A grand jury proceeding is not required to follow any of the Federal Rules of Evidence, and does not consider the admissibility of evidence. Furthermore, the standard of proof for issuing an indictment is probable cause to believe an offense has been committed—a much lower bar than the guilt beyond a reasonable doubt standard required for a criminal conviction. For these reasons, an indictment by a grand jury does not provide nearly the same quality of procedural protections or due process that an actual criminal proceeding requires.

The Supreme Court established corporate criminal liability in the 1909 landmark case of New York Central & Hudson River Railroad Co., which held that corporate criminal liability subjects a company to criminal liability for the illegal acts of its employees if the acts were performed within the scope of employment and for the company’s benefit. In 2009, the Court of

17 See CRIMINAL RESOURCE MANUAL, supra note 15.
18 FED. R. CRIM. P. 6.
19 FED. R. EVID. 1101(d)(2); see also Costello v. United States, 350 U.S. 359, 362 (1956) (rejecting an appeal to overturn the case when the only evidence to indict was hearsay evidence: “[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act.”).
20 DEP’T OF JUSTICE, GRAND JURY MANUAL ch. 7(I)(5) (1991) ("You should remind the grand jury that the defendants will have the benefit of the ‘beyond a reasonable doubt’ standard at trial and that more rigorous standard does not govern their proceeding."); see also United States v. Linetsky, 533 F.2d 192, 201 (5th Cir. 1976) ("A grand jury need not be convinced beyond a reasonable doubt that a defendant is guilty.").
21 212 U.S. 481 (1909).
22 Id. at 493-94.
Appeals for the Second Circuit followed precedent by treating corporate criminal liability as an extension of the tort liability theory of respondeat superior.\(^2^3\) Similarly, the Court of Appeals for the Fourth Circuit articulated a general federal law standard for corporate criminal liability: “[a] corporation may be responsible for the actions of its agents done or made within the scope of their authority.”\(^2^4\) In limited circumstances, a company can also be liable for actions outside of the employee’s authority if such actions are related to assigned work or if the employee acted at least in part to benefit the company.\(^2^5\)

For more than a decade, the federal government’s use of Deferred Prosecution Agreements (“DPAs”), Non-Prosecution Agreements (“NPAs”), and other pre-trial settlement agreements (collectively, “prosecution agreements”) has been on the rise to settle corporate criminal cases.\(^2^6\) Former Attorney General John Ashcroft has explained that “deferred prosecution agreements protect the American public from corporate criminality while placing the cost of that protection on the corporate wrongdoers, not on the taxpayers. . . . A deferred prosecution can avoid the catastrophic collateral consequences and costs that are associated with corporate conviction.”\(^2^7\) In 2012, speaking at the New York City Bar Association, then-Assistant Attorney General Lanny Breuer stated, “Another absolutely critical point is that regardless of whether we indict a company or agree to defer prosecution, individual wrongdoers can never secure immunity through corporate resolution.”\(^2^8\) He went on to praise the benefits of utilizing prosecution agreements.\(^2^9\)

Lengthy prison sentences have also become more common for individuals involved in corporate crime. For example, in 2011, the Southern District of New York sentenced hedge fund mogul Raj Rajaratnam to elev-

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\(^{23}\) United States v. Ionia Mgmt. S.A., 555 F.3d 303, 309-10 (2d Cir. 2009).
\(^{24}\) United States v. Singh, 518 F.3d 236, 250 (4th Cir. 2008).
\(^{25}\) See, e.g., United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) (upholding a corporate conviction even though the employee acted for his own benefit because the acts were also partly beneficial to the corporation).
\(^{26}\) David M. Uhlmann, Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability, 72 Md. L. Rev. 1295, 1308, 1316 (2013) (noting that there were only thirteen DPAs and NPAs in the nine years prior to 2001 and thirty-nine in the five years that followed 2001); see also Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association, DEP’T JUST. (Sept. 13, 2002), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html [hereinafter Breuer Speaks] (discussing the increased use of DPAs and NPAs).
\(^{28}\) Breuer Speaks, supra note 26.
\(^{29}\) Id. (“When the only tool we had to use in cases of corporate misconduct was a criminal indictment, prosecutors sometimes had to use a sledgehammer to crack a nut. More often, they just walked away. In the world we live in now . . . prosecutors have much greater ability to hold companies accountable for misconduct than we used to . . . ”).
en years in prison for insider trading. The sentence for Mr. Rajaratnam, chief of the Galleon Group hedge fund, was the longest ever for insider trading in the United States. The government considers the threat of incarceration to be the strongest deterrent to corporate crime. However, it can be difficult to obtain evidence sufficient to prove that a particular individual committed a crime, even when the individual’s company admits significant misconduct.

Corporate prosecution agreements can include substantial monetary fines, the amounts of which have been on the rise. Since 2000, the DOJ has collected more than $40 billion in monetary fines from DPAs and NPAs. These agreements can also contain significant structural reforms, including compliance modifications or exclusion from certain markets. Companies often agree to make restitution payments, and cooperate with prosecutors in disclosing information relevant to the government’s case. These agreements sometimes require significant structural business reforms, including the implementation of extensive compliance programs.

31 Anna Driggers, Rajaratnam’s Historic Insider Trading Sentence, 49 AM. CRIM. L. REV. 2021, 2021 (2012); see also Breuer Speaks, supra note 26 (discussing long prison sentences given out for corporate crime such as sentences of 30, 50, 105, and 110 years against four different corporate criminals and different crimes).
32 Breuer Speaks, supra note 26 (stating that “the strongest deterrent against corporate crime is the prospect of prison time for individual employees—and we do not hesitate to seek long sentences when circumstances warrant”).
33 Id.
36 See Ball & Bolia, supra note 13, at 251; Markoff, supra note 7, at 808.
37 See Sarah Marberg, Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act, 45 VAND. J. TRANSNAT’L L. 557, 567 (2012) (“While these agreements have no standard form, they usually impose on the defendant company a combination of the following conditions: (1) an internal investigation; (2) a code of conduct or a compliance program to ‘prevent or deter violations of the law’; (3) acceptance of responsibility by the corporation; (4) provision of specified information to the government with ‘full candor and completeness’; (5) waivers of attorney-client and work product privilege; (6) dismissal of employees involved in the misconduct; (7) a continuing duty to cooperate; (8) payment of restitution and/or a fine; and (9) probation with the use of continuing monitors whose duties depend on the remedial measures required of the defendant company.” (quoting another source)).
38 Uhlmann, supra note 26, at 1301.
The DOJ also seeks to exclude companies from certain markets, or modify the company’s participation in the market. Additionally, independent monitors and extensive cooperation are often required. For example, in 2005, under one of the first major DPAs, “Big Four” accounting firm KPMG LLP (“KPMG”) agreed to close its entire private tax practice and cooperated with the DOJ’s investigation of its office. KPMG agreed to retain an independent monitor formerly employed by the Securities and Exchange Commission (“SEC”), which implemented an “elaborate compliance program.” Under certain DPAs, monitors actually sit on the company’s board, thus directly influencing company policy and reporting their findings to the government. In fact, one DPA mandated that a company create 1,600 new jobs in the state over a ten-year period. Another DPA required a hospital to provide millions of dollars in free health care to patients, and yet another required a company to endow a business ethics chair at a university.

Courts have the authority to review plea agreements and DPAs. However, historically, courts have been deferential to the prosecutors, engaging in a merely cursory review of the prosecution agreements. However, the recent DPA with HSBC Holdings PLC (“HSBC”) may mark a shift in judicial review. The DPA resulted from charges that HSBC failed to maintain an effective anti-money laundering program and facilitated illegal financial transactions. On July 1, 2013, Judge Gleeson of the Eastern District of New York approved the DPA between the DOJ and HSBC. While Judge Gleeson approved the DPA after substantive review, the approval was contingent upon continued monitoring of the implementation and exe-

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39 See Ball & Bolia, supra note 13, at 251; Markoff, supra note 7, at 808.
42 Id.
45 Id.
47 See Uhlmann, supra note 26, at 1328.
49 Id.
ecution of the DPA. Judge Gleeson noted that this was a “novel” use of the court’s supervisory power. According to Judge Gleeson’s decision, the court “has authority to approve or reject the DPA pursuant to its supervisory power.” However, the opinion does declare that significant deference is still owed in situations involving prosecutorial discretion.

B. Arthur Andersen: Case and Effect

Arthur Andersen LLP, formerly a “Big Five” accounting firm, was one of the largest private companies in the United States in 2001. On March 14, 2002, the firm was indicted on obstruction of justice charges for shredding documents related to the accounting work that it had performed for Enron Corporation. Andersen admitted that its employees destroyed the documents, but refused to admit criminal wrongdoing. The firm’s defense, in part, was that its employees were following the firm’s internal document retention policy when shredding the documents related to Enron. Additionally, Andersen contended that the wrongdoers were rogue employees from only one of the firm’s many offices and were not representative of the firm as a whole. Following the indictment, most of the firm’s clients quickly moved their business to other accounting firms. As a result, Andersen crumbled in the aftermath of the indictment and during the period leading up to the firm’s trial in June of 2002. Before the criminal allegations against the firm were publicized, Andersen employed approximately 85,000 people; roughly a year later, only 3,000 employees remained.

After the firm’s conviction, Andersen appealed, and the Supreme Court eventually reviewed the case. In 2005, a unanimous Court reversed, finding that the jury instructions did not properly convey the elements of

\[50\] Id. at *7.
\[51\] Id. at *6.
\[52\] Id. at *4.
\[53\] Id. at *7.
\[56\] Markoff, supra note 7, at 805.
\[57\] Arthur Andersen, 544 U.S. at 699-700.
\[58\] Kathleen F. Brickey, Andersen’s Fall from Grace, 81 WASH. U.L.Q. 917, 928 (2003).
\[59\] Markoff, supra note 7, at 805.
\[60\] Id.
\[61\] Ainslie, supra note 55, at 109.
\[62\] Arthur Andersen, 544 U.S. at 702.
the crime. This result essentially cleared the firm of all criminal wrongdoing, and the government decided not to further pursue the case. However, this consolation came years too late—the firm had already gone out of business. Commentators agree that what happened to Andersen demonstrates that an indictment alone can, in effect, be a corporate death sentence.

Thus, this case gave rise to a concept, sometimes referred to as the Andersen Effect, which stresses that a mere indictment can destroy a company and result in collateral damage to many uninvolved parties. In particular, the Andersen Effect demonstrates that the reputational harm and other consequences that accompany an indictment are too much for some companies to bear. However, data to empirically test the Andersen Effect has been scarce since 2001. No major American company since Andersen has faced a criminal trial. Additionally, indictments against major corporations have been rare, and virtually nonexistent for financial services companies in the years after Andersen and before SAC. Therefore, there has

63 Id. at 698 (reversing Andersen’s conviction because the jury instructions did not properly convey the necessary consciousness of wrongdoing and a connection between the shredding of documents and the government proceeding).
64 Ball & Bolia, supra note 13, at 250.
65 Id. at 250-51.
66 See, e.g., Ball & Bolia, supra note 13, at 250-51; Ball & Bolia, supra note 13, at 250-51; Markoff, supra note 7, at 806.
67 See Ball & Bolia, supra note 13, at 250-51 (noting that even if Andersen was not convicted, the indictment alone would have likely destroyed the firm); see also Markoff, supra note 7, at 800 (explaining the “Arthur Andersen Effect” generally as the stigma, expense, and other collateral consequences that accompany a criminal conviction); Peter J. Henning, The Organizational Guidelines: R.I.P.?, 116 YALE L.J. POCKET PART 312, 313 (2007), available at http://www.yalelawjournal.org/forum/the-organizational-guidelines-rip (referring to the “Arthur Andersen Effect” as the collateral damage from a conviction on innocent employees that lose their jobs and investments).
68 Gabriel Markoff completed a recent study in which fifty-four publicly traded companies were analyzed to see whether the Andersen Effect has been felt by other companies. These companies were selected using a methodology that can be summarized as a selection of large companies that are traded on a major U.S. or international stock exchange and were federally convicted by guilty pleas between the years 2001 and 2010. Of the fifty-four companies that fit the criteria, all were convicted by guilty plea and indictments were filed against only two of the companies. The two companies that were indicted were not among the five companies in the study that went out of business. There were no cases against companies in the financial services sector to include in the sample. Markoff, supra note 7, at 812-14, 818-19, 827. See also Preet Bharara, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 AM. CRIM. L. REV. 53, 73 (2007) (SAC prosecuting attorney noting that cases of corporate death prior to Andersen include E.F. Hutton and Drexel Burnham Lambert).
69 Fitter et al., supra note 6.
70 Markoff, supra note 7, at 818-19, 828-29 (“[F]irms that provided intangible services such as investment banking were entirely absent from the list of convicted companies [from 2001-2010].”); see also Henning, supra note 67, at 313 (noting that the exodus of clients and employees following a recent indictment of the law firm Milberg Bershad & Shulman LLP “demonstrates again the disastrous effect that the mere filing of charges can have”).
not been an example of similar scope since Andersen’s indictment. Since Andersen, there has also been a significant increase in the use of prosecution agreements.\(^{71}\) Many commentators have credited Andersen with motivating both potential corporate defendants and the government to use prosecution agreements in order to avoid the Andersen Effect.\(^ {72}\)

C. Prosecutorial Discretion

A federal prosecutor has broad discretion: “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”\(^ {73}\) This is based on the belief that the decision to prosecute is “particularly ill-suited for judicial review.”\(^ {74}\) The guidance provided to assist prosecutors in corporate charging decisions has been through multiple iterations since 1999.\(^ {75}\) Then-Deputy Attorney General Eric Holder wrote the first memorandum in 1999, and most recently, in 2008, a revised version of his memo was included in the USAM.\(^ {76}\)

1. The Holder Memorandum

In 1999, then-Deputy Attorney General Eric Holder issued a memorandum entitled “Bringing Criminal Charges Against Corporations” (the “Holder Memo”).\(^ {77}\) The Holder Memo was intended to serve as a non-binding guide for prosecutors when deciding whether to criminally charge a corporation.\(^ {78}\) It provided eight factors that a prosecutor should consider when deciding whether to prosecute a case.\(^ {79}\) Despite multiple revisions by

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\(^{71}\) See, e.g., Breuer Speaks, supra note 26; Uhlmann, supra note 26, at 1316.

\(^{72}\) See, e.g., Ball & Bolia, supra note 13, at 250-51; Bharara, supra note 68, at 73-74; Henning, supra note 67, at 312; Dale A. Oesterle, Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer’s Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation, 1 OHIO ST. J. CRIM. L. 443, 476 (2004) (“Since an indicted firm is a dead firm, a decision to defend an indictment is suicide.”).


\(^{75}\) Infra note 95 and accompanying text.

\(^{76}\) Id.


\(^{78}\) Id.

\(^{79}\) Id. (The eight factors to be considered are: (1) “nature and seriousness of the offense, including the risk of harm to the public”; (2) “pervasiveness of wrongdoing within the corporation”; (3) “corporation’s history of similar conduct”; (4) “corporation’s timely and voluntary disclosure of wrongdoing and
subsequent deputy attorney generals, the factors were substantially incorporated into the DOJ’s 2008 USAM, which is discussed in detail below.80

2. The Thompson and McNulty Memoranda

In 2003, then-Deputy Attorney General Larry D. Thompson released a memorandum entitled “Principles of Federal Prosecution of Business Organizations” (the “Thompson Memo”).81 The Thompson Memo was, in most ways, identical to the Holder Memo, but with a greater emphasis on assessing the corporations’ cooperation with the government.82 Also, unlike the Holder Memo, the Thompson Memo was binding on all federal prosecutors.83 In United States v. Stein,84 aspects of the Thompson Memo were challenged.85 In Stein, the government coerced KPMG to stop paying its employees’ legal fees as a condition to avoiding indictment.86 The court found that the government’s actions unconstitutionally interfered with the defendants’ right to counsel.87 Therefore, the court held that the federal prosecutors violated the defendants’ Fifth and Sixth Amendment rights.88

Consequently, in 2006, then-Deputy Attorney General Paul J. McNulty issued a memorandum (the “McNulty Memo”) aimed at curtailing aggressive government tactics used to pressure corporations into cooperation.89 The McNulty Memo focused on the attorney-client and work product privileges.90 Specifically, it focused on whether a prosecutor can request that a corporation waive these privileges, and if the corporation’s response

80 UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.300.A.
82 Id.
83 Ball & Bolia, supra note 13, at 245.
84 541 F.3d 130 (2d Cir. 2008).
85 Id. at 142.
86 Id.
87 Id. at 157.
88 Id. at 135-36.
90 Id.
can then factor into the analysis of its cooperation. The McNulty Memo stated that the request could only be made when the prosecutor was able to demonstrate a “legitimate need”; furthermore, the corporation’s answer could only be considered when the information requested was of a purely factual nature. The McNulty Memo also addressed whether the advancement of legal fees to employees could factor into a prosecutor’s decision to charge the corporation, ultimately concluding that this was only appropriate in rare cases.

3. The Filip Memorandum and the USAM

On August 28, 2008, then-Deputy Attorney General Mark Filip issued a memorandum (the “Filip Memo”). The Filip Memo included a revision of the Principles of Federal Prosecution of Business Organizations, and was incorporated for the first time in the USAM. Inclusion in the USAM meant that it was binding on all federal prosecutors within the DOJ, requiring that prosecutors act under its guidance. The content of the Filip Memo was mostly unchanged from the McNulty Memo, except for revisions to the “cooperation” mitigating factors, which were aimed at further alleviating prosecutorial pressure to cooperate.

The USAM states that prosecutors should apply the same considerations against corporate targets as those routinely used in individual charging decisions. These considerations include “the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches.” Also, the prosecutor, when handling a corporate target, is expected to consider the following nine factors: (1) “the nature and seriousness of the offense”; (2) “the perversiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing.

91 Id.
92 Id.; see also Ball & Bolia, supra note 13, at 255 (explaining the process of requesting a waiver of the work product privilege or attorney-client privilege).
93 McNulty Memo, supra note 89.
95 UNITED STATES ATTORNEYS’ MANUAL, supra note 9.
96 Filip Memo, supra note 94; but cf. UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.1300.B (giving the caveat that the USAM is only for internal Department of Justice guidance and cannot be relied upon to create any legal right); see also Ball & Bolia, supra note 13, at 259 (explaining that this caveat means that the USAM does not carry the force of law and is thus not truly binding).
97 Filip Memo, supra note 94.
98 UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.300.A.
99 Id.
by corporate management”; (3) “the corporation’s history of similar misconduct”; (4) “the corporation’s timely and voluntary disclosure”; (5) “the existence and effectiveness of the corporation’s pre-existing compliance program”; (6) “the corporation’s remedial actions”; (7) “collateral consequences”; (8) “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance”; (9) “the adequacy of remedies such as civil or regulatory enforcement actions.”

The USAM states that “national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.”

Each of the nine factors includes a “general principle” section, and also a “comment” section providing further guidance for the prosecutor. The seventh factor advises prosecutors to consider the collateral consequences of an indictment or conviction in determining how to proceed against a corporate defendant. The comment section explains that “prosecutors may take into account the possibly substantial consequences to a corporation’s employees, investors, pensioners, and customers, many of whom may . . . have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it.” The comment section focuses on the harm to “innocent third parties who played no role in the criminal conduct,” while noting that inflicting punishment “upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly.” The comment section also notes that other factors discussed in the USAM are relevant to the evaluation of collateral consequences. Additionally, it states that where appropriate, a DPA or NPA can be used to sustain the viability of the corporation.

The ninth factor of the USAM advises prosecutors to consider non-criminal alternatives to prosecution: “Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation.” The comment section notes that when determining whether a non-criminal alternative is...
appropriate, the prosecutor should consider the same factors used to determine whether to prosecute a person.\textsuperscript{109}

II. SAC CAPITAL: HISTORY, INDICTMENT, AND AFTERMATH

This Part begins in Section A by providing a brief profile of SAC, including the firm’s history and operating strategy. It then proceeds in Section B to analyze SAC’s indictment and its subsequent plea agreement. Section C then reviews the aftermath of the indictment, before settlement was agreed upon. Finally, Section D discusses SAC’s plea agreement with the DOJ.

A. Firm History

Founded in 1992, SAC became one of the most successful hedge funds in the world, with average annualized returns of more than 25 percent.\textsuperscript{110} Its founder, Steven A. Cohen, started the firm with just $25 million.\textsuperscript{111} At its peak, the hedge fund had over $15 billion in assets under management (“AUM”).\textsuperscript{112} Approximately $8 billion of the AUM was Cohen’s personal assets, while the remainder was from outside investors, and a small fraction from other SAC employees.\textsuperscript{113} In July 2013, at the time of indictment, SAC had approximately 1,000 employees.\textsuperscript{114}

SAC Capital Advisors operated as a hedge fund with many closely affiliated entities that traded or helped facilitate the business of the other entities.\textsuperscript{115} SAC charged its clients a management fee, calculated as a percentage of AUM, in addition to a fee based on the performance of the fund.\textsuperscript{116}

\textsuperscript{109} Id. at § 9-28.1100.B (including “the strength of the regulatory authority’s interest; the regulatory authority’s ability and willingness to take effective enforcement action, the probable sanction if the regulatory authority’s enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcements interests”).

\textsuperscript{110} Flitter et al., supra note 6; see also Ben Protess & Alexandra Stevenson, SAC Capital Closes a Trading Unit as It Starts to Retrench, N.Y. TIMES (Aug. 12, 2013), http://dealbook.nytimes.com/2013/08/12/sac-capital-closes-a-trading-unit/ (noting that SAC has had nearly 30 percent annualized returns, although this figure is boosted by a 70 percent return in 1999 during the dot-com boom).

\textsuperscript{111} Protess & Stevenson, supra note 110.

\textsuperscript{112} SAC Indictment, supra note 3, at 2.

\textsuperscript{113} See id.; see also Michael Rothfeld et al., Prosecutors Pursue Big SAC Settlement, WALL ST. J. (Sept. 24, 2013), http://online.wsj.com/news/articles/SB10001424052702304713704579095450045665772.

\textsuperscript{114} Protess & Stevenson, supra note 110.

\textsuperscript{115} SAC Indictment, supra note 3, at 2.

\textsuperscript{116} Id. (“These management companies generally charged outside investors in the SAC Hedge Fund annual fees of approximately three percent of assets under management and up to 50 percent of investment returns.”).
This fee structure was similar to that of most hedge funds.\textsuperscript{117} SAC’s strategy was focused on using leverage, usually obtained through loans from large banks, to invest far more than its actual AUM.\textsuperscript{118} Throughout the year, the firm then performed frequent trading in many different types of securities, activity that totaled hundreds of billions of dollars each year.\textsuperscript{119}

\textbf{B. The SAC Capital Indictment}

In July 2013, a federal indictment, signed by United States Attorney Preet Bharara and charging the firm with one count of wire fraud and four counts of securities fraud, was filed against SAC in the Southern District of New York.\textsuperscript{120} The indictment also charged SAC with criminal liability related to insider trading offenses committed by numerous employees and facilitated by institutional practices.\textsuperscript{121} According to the indictment, “Unlawful conduct by individual employees and an institutional indifference to that unlawful conduct resulted in insider trading that was substantial, pervasive and on a scale without known precedent in the hedge fund industry.”\textsuperscript{122} The trades that were allegedly made based on insider information resulted in over $300 million in profits and avoided losses for SAC.\textsuperscript{123} The allegations against the firm fell into three general categories, discussed below.

The first category of allegations related to SAC’s hiring practices. SAC allegedly focused on hiring employees who had established connections at publicly traded companies.\textsuperscript{124} Furthermore, SAC failed to have corresponding compliance procedures to monitor the use of these connections.

\textsuperscript{117} GREGORY CONNOR & MASON WOO, AN INTRODUCTION TO HEDGE FUNDS 19 (2004), available at http://eprints.lse.ac.uk/24675/1/dp477.pdf (“Fung and Hsieh (1999) determine that the median management fee is between 1-2% of AUM and the median incentive fee is 15-20% of profits. Ackermann et al. (1999) cite similar median figures: a management fee of 1% of assets and an incentive fee of 20% . . . ”).

\textsuperscript{118} Carney, supra note 10 (noting that just prior to indictment the firm had greater than two times leverage on its roughly $15 billion of assets under management, listing its regulatory assets as $50 billion).

\textsuperscript{119} Id.

\textsuperscript{120} SAC Indictment, supra note 3, at 1.

\textsuperscript{121} Id.

\textsuperscript{122} Id.; see also Phyllis Diamond & Yin Wilczek, DOJ Indicts SAC in Insider Scheme, Files Civil Forfeiture, Penalty Action, 144 DER EE-13, BLOOMBERG BNA 1-2 (July 26, 2013) (U.S. Attorney Preet Bharara said at a press briefing that SAC “trafficked in inside information on a scale without any known precedent in the history of hedge funds . . . . It spanned more than a decade in time, involved securities of at least 20 public companies, extended across multiple sectors of the economy, and benefited SAC to the tune of hundreds of millions of dollars.”).

\textsuperscript{123} SAC Indictment, supra note 3, at 4, 27-28 ($300 million is a conservative estimate based almost entirely on one of the charged offenses discussed below).

\textsuperscript{124} Id. at 3-4.
for illegal activity. One employee candidate was described as “the guy who knows the quarters cold, has a share house in the Hamptons with the CFO of [a Fortune 100 industrial sector company], tight with management.” Red flags on the candidate’s record were also allegedly ignored during the hiring process. For example, another candidate was hired despite objections from SAC’s legal department regarding suspicions, albeit unsubstantiated, of prior insider trading activity.

The second category involved allegations about the actual trading. The indictment alleged that SAC’s management, specifically owner Steven Cohen, ignored signs that his employees’ trading recommendations were based on insider information. Further, employees were incentivized to recommend to Cohen “high conviction” trading ideas obtained through “edges” on the market, regardless of how those “edges” were obtained. U.S. Attorney Preet Bharara described SAC as “a firm with zero tolerance for low returns, but a seemingly tremendous tolerance for questionable conduct.”

In the indictment, the government offered as evidence many messages sent by employees to Cohen. One such email stated, “I am very comfortable that this qtr is going to be solid vs current consensus and guidance. I am getting coffee on tues afternoon with the guy who runs [N]orth American generic business,” and Cohen responded, “Let’s talk later.” On another occasion, Cohen began selling off his $12.5 million Dell position ten minutes after receiving an email from an employee recommending this course of action. The employee allegedly based his recommendation on a “2nd hand read from someone at the company” before the public quarterly earnings announcement. The indictment discussed many other instances in which Cohen received recommendations and did not question the basis of those recommendations, at least in the monitored return communications. The government charged eight of the employees identified in the indictment with insider trading, and six of them have already pleaded guilty.

125 Id. at 13.
126 Id. at 14 (alteration in original).
127 Id. at 15.
128 Id.
129 SAC Indictment, supra note 3, at 16.
130 Id. at 4.
131 Diamond & Wilczek, supra note 122.
133 Id. at 17.
134 Id.
135 Id.
136 Id. at 16-21.
The third category of allegations involves the adequacy of the SAC compliance department. The government contends that SAC’s compliance department was inadequate and overwhelmed by the amount of trading and other activity within the firm.  

The department rarely reviewed electronic communications prior to late 2009. The department’s internal investigations were allegedly weak, and only caught one instance of suspected insider trading. In that instance, the firm collected monetary fines, but the employees involved kept their jobs and the firm kept the infractions internal. Also, the department failed to effectively monitor employee use of expert networking firms, although its internal policy prohibited the use of these networks. The government also questioned the firm’s document retention policies, which called for frequent purging of emails and instant messages prior to its adoption of a revised document retention policy in September 2008.

One important example of the SAC compliance department’s inadequacy, mentioned by the government in the indictment, involved trades of Elan and Wyeth securities. At the time of the incident, SAC’s largest equity securities position consisted of over $700 million worth of Elan and Wyeth securities. Martoma, one of the employees mentioned in the indictment, allegedly obtained nonpublic information from a doctor regarding the results of drug trials that Elan and Wyeth had performed. Martoma then allegedly called Cohen. A day later, Cohen began selling the $700 million position and short selling approximately $260 million worth of stock prior to the public announcement of the drug trial results. This activity resulted in $276 million in profits and avoided losses.

After receiving the indictment, SAC issued the following statement: “SAC has never encouraged, promoted or tolerated insider trading and takes its compliance and management obligations seriously. The handful of men who admit they broke the law does not reflect the honesty, integrity and character of the thousands of men and women who have worked at

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138 SAC Indictment, supra note 3, at 4; see also Diamond & Wilczek, supra note 122 (U.S. Attorney Preet Bharara stated “[t]he SAC companies operated a compliance system that appeared to talk the talk, but never walked the walk”).
139 Id. at 25.
140 Id. at 26.
141 Id. at 22.
142 Id.
143 Id. at 27.
144 Id. at 27.
145 SAC Indictment, supra note 3, at 27.
146 Id.
147 Id.
148 Id. Short selling rewards an investor if the security decreases in value.
149 Id. at 27-28.
SAC.\textsuperscript{150} In August 2013, a protective order was filed that required SAC to put aside 85 percent of its assets—a reported $5 billion—to cover potential liability from a separate civil forfeiture suit.\textsuperscript{151} The indictment did not charge Cohen, although much of the alleged conduct was closely related to activities that he performed.\textsuperscript{152}

C. Aftermath of SAC Indictment

In the three months following the indictment, but before the plea agreement was entered (the “indictment period”), SAC’s outside investors rapidly withdrew their funds.\textsuperscript{153} Less than a month after the indictment, outside investors had already withdrawn $5 billion of the total $6 billion in outside capital managed by SAC.\textsuperscript{154} The Blackstone Group reportedly withdrew more than $500 million in assets.\textsuperscript{155} Following the withdrawals, the remaining $9 billion in AUM consisted almost entirely of Cohen’s personal assets.\textsuperscript{156}

The indictment caused layoffs and the loss of valuable portfolio managers to competing entities.\textsuperscript{157} At least a dozen sales and marketing staff members were laid off.\textsuperscript{158} SAC lost many important employees during those few months.\textsuperscript{159} Many more employees were expected to stay until the end of the year in order to receive their year-end bonuses before ultimately leav-

\begin{itemize}
  \item \textsuperscript{150} Jan Wolfe, \textit{Feds Bring Criminal Charges Against SAC}, AM. LAW. (July 25, 2013).
  \item \textsuperscript{152} See supra Part II.B; see also Peter J. Henning, \textit{The Impact of the Settlement on SAC Capital and Cohen}, N.Y. TIMES (Nov. 4, 2013), http://dealbook.nytimes.com/2013/11/04/what-the-settlement-means-for-sac-capital-and-cohen/?_r=0 (discussing the government’s plea agreement with SAC and the continued investigation focused on Cohen).
  \item \textsuperscript{154} Stevenson & Lattman, supra note 153.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} E.g., Svea Herbst-Bayliss, \textit{Update 1—Three London-Based Fund Managers Leave Cohen’s SAC Capital}, REUTERS (Oct. 3, 2013), http://in.reuters.com/article/2013/10/02/hedgefunds-sac-idINL1N0HS2DN20131002.
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Burton & Westbrook, supra note 153; Matthew Goldstein, \textit{More Employees Depart SAC Capital as Firm Shifts Focus}, N.Y. TIMES (Dec. 18, 2013 5:05 PM), http://dealbook.nytimes.com/2013/12/18/more-employees-depart-sac-capital-as-year-end-nears/?_r=2.
According to regulatory filings in September, SAC employed 950 people, down from the 1,000 employees that the firm had just prior to the indictment. In the days following the indictment, “[b]anks that provide[d] credit and trading facilities through their prime brokers to SAC were . . . assessing their counterparty risk to the hedge fund, deciding whether to keep it as a client.” Bank executives were examining “whether SAC’s cash pile was sufficient to safeguard against any potential losses and deciding whether it was a riskier credit, potentially pushing up the hedge fund’s cost of borrowing.” According to at least one bank executive, the indictment would make it difficult to continue doing business with SAC. Other executives were also contemplating whether the indictment marked a stopping point for their company’s business relationship with SAC.

Wall Street and other financial institutions had a significant financial interest in the wake of the SAC indictment. SAC provides a substantial amount of business to the banks and the brokers they do business with. Due to SAC’s strategy of relying on significant leverage provided by banks, they are able to make trades likely valued at hundreds of billions of dollars a year. One analyst has estimated that hedge funds generally pay out as much as 25 to 30 percent of their commission revenue to the banks and brokers with which they work. In 2006, the Wall Street Journal reported that on a typical day, trades made by SAC amounted to 2 percent of overall stock-market activity. The report also noted that SAC was one of Wall Street’s best clients, paying securities firms more than $400 million in trading commissions each year. Analysts estimate that SAC has paid billions in fees over the years to its prime brokers, mostly comprised of the largest

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160 See Burton & Westbrook, supra note 153; Goldstein, supra note 160; Stevenson & Lattman, supra note 153.
161 Burton & Westbrook, supra note 153.
162 Carney, supra note 10.
164 Id.; see also SAC Executives “Hope” Prime Brokers Will Continue on Same Terms, DOW JONES BUS. NEWS (July 25, 2013 7:05 PM), http://www.nasdaq.com/article/sac-executives-hope-prime-brokers-will-continue-on-same-terms-20130725-01747#ixzz2b72HgH47.
165 McCrum, supra note 163.
166 Id.
167 Id.
168 Carney, supra note 10.
169 Id.
170 McCrum, supra note 163.
172 Id.
firms on Wall Street. Many employees at these firms have spent their entire careers focused on servicing SAC, and their paychecks depend on SAC’s activity.

D. SAC Capital Plea Agreement

On November 1, 2013, more than three months after the indictment, SAC entered a plea agreement with the DOJ. The agreement required SAC to plead guilty to one count of wire fraud and four counts of securities fraud. As part of the guilty plea, SAC was required to admit that at least one employee of each of the wholly-owned entities charged engaged in insider trading for the benefit of the respective entity. Pursuant to the plea agreement, SAC agreed to a $1.8 billion monetary sanction. A five-year probation term was also levied on each charged entity. Additionally, SAC agreed to end its advisory business and cease accepting outside investors. SAC would also have to accept a compliance consultant at its own expense and make the compliance changes recommended by the consultant. In exchange, under the plea agreement, SAC would not face further criminal prosecution for any insider trading violation that occurred between 1999 and December 31, 2012. However, the plea agreement did not provide

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173 Carney, supra note 10 (stating that SAC’s prime brokers include Merrill Lynch, Barclays, BNP Paribas, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, JPMorgan Chase, Morgan Stanley, and UBS); see also Julia La Roche, Here’s the Real Reason Why Wall Street Is Freaked Out About the Insider Trading Charges Against SAC Capital, BUSINESS INSIDER (July 26, 2013), http://www.businessinsider.com/sac-capital-brokerage-business-impact-2013-7 (noting that SAC is one of the biggest clients for Goldman Sachs and Morgan Stanley).

174 Carney, supra note 10 (quoting an employee at a broker used by SAC who does not work directly on the SAC account: “These folks may be eating crumbs that fall from the table of SAC—but those crumbs are made of gold.”).


176 Id.

177 Id. at 4.


180 Id. at 2.

181 Id. at 3.

182 Id.
immunity to protect individuals, including Cohen, from future prosecution.\footnote{183}

After signing the plea agreement, SAC made the following statement: “SAC has never encouraged, promoted or tolerated insider trading.”\footnote{184} This statement violated the plea agreement and the government required a retraction.\footnote{185} In a press release following the statement, prosecuting U.S. Attorney Preet Bharara stated, “[n]o institution should rest easy in the belief that it is too big to jail.”\footnote{186}

The plea agreement was subject to judicial approval under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure.\footnote{187} Pursuant to this rule, if the court did not accept the agreement, SAC would have had the option of withdrawing its guilty plea or accepting a modified agreement.\footnote{188} On April 10, 2014, U.S. District Judge Laura Taylor Swain approved the plea agreement.\footnote{189}

Steven Cohen has since renamed SAC and continues to operate his business essentially as a family office.\footnote{190} Cohen does business as Point72 Asset Management (“Point72”) with approximately $10 billion under management, almost entirely comprised of Cohen’s own money.\footnote{191} As of October 2014, Point72 generated a year-to-date gross profit of approximately $1.8 billion.\footnote{192} Through the first six months of 2014, Point72 had returns of a little over 9 percent; however, if it had still been operating with the fees associated with a standard hedge fund, its returns would have been 4 or 5 percent for outside investors.\footnote{193} If this performance continues, Point72 will have an annual return approximating 10 percent for hypothetical outside

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\footnote{183}{Id.}
\footnote{185}{Id.}
\footnote{186}{Press Release, U.S. Attorney’s Office S.D.N.Y., supra note 178.}
\footnote{188}{See FED. R. CRIM. P. 11(c)(1)(C); see also Ashby Jones, SAC Plea Deal Ties Judge’s Hands, WALL ST. J. (Nov. 5, 2013), http://blogs.wsj.com/law/2013/11/05/sac-plea-deal-ties-judges-hands/.}
\footnote{191}{Id.}
\footnote{192}{Id.}
investors. However, SAC has long since lost all its outside investors and cannot accept new outside investors as part of the plea agreement. Cohen has yet to face personal criminal charges, and it is unlikely that he ever will. 194

III. AVOIDING THE ANDERSEN EFFECT IN CORPORATE CHARGING DECISIONS

SAC’s indictment and eventual plea agreement present a rare opportunity to observe the Andersen Effect and the particular vulnerabilities of a financial firm. 195 Analysis of the indictment’s effect on SAC provides rare empirical support for the Andersen Effect. The SAC case reinforces many of the principles associated with the Andersen Effect and highlights the susceptibility of companies with similar attributes. 196 The type of work performed by a company seems to be a reliable predictor of the effect of an indictment. The effect of an indictment should be considered when deciding whether to criminally charge a company. This is important not only because of the potentially widespread economic loss caused by the Andersen Effect, but also because of two due process concerns: (1) the inability to provide a defense before the business’ failure, which is especially troublesome in light of the grand jury process that brings about this result; and (2) the prosecutorial leverage that results from the company’s urgency to accept any terms offered by the government in an effort to avoid indictment. Section A analyzes the effects of SAC’s indictment and the impact of an indictment on a financial firm more generally. It also considers the possibility of using alternatives to indictment in light of the Andersen Effect. Section B then recommends revisions to the USAM, and advocates additional considerations that should be made during the judicial review of prosecution agreements.

A. The Power of an Indictment

The indictment of SAC and the three months leading up to the firm’s entrance into a plea agreement provide a case study to test the Andersen

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195 “Financial firm” means hedge funds, mutual funds, and certain types of brokerage or investment adviser firms; however, the discussions in this Comment may apply to other financial services companies (e.g., banks and insurance companies).

196 While other corporate characteristics (e.g., public/non-public, corporation/partnership) are also important indicators of vulnerability, the effect is undetermined and not the focus of this Comment. See Markoff, supra note 7, at 40 n.6 (noting that commentators have frequently ignored the fact that Andersen was not a corporation but rather a partnership).
Effect. This three-month period provides empirical support for the Andersen Effect. It also spotlights the particular vulnerability of financial firms that causes collateral consequences following an indictment. In this three-month period, SAC lost almost all of its outside investors.\textsuperscript{197} Also during this three-month period, a number of other individuals, including uninvolved employees, clients, and third parties, incurred substantial collateral harm.

1. Vulnerabilities of Financial and Accounting Firms

For accounting firms, an indictment alone carries destructive force, as was observed in the aftermath of the Andersen indictment.\textsuperscript{198} There are multiple reasons why accounting firms are particularly susceptible to harm from an indictment. These reasons have been explored in depth following Andersen’s demise.\textsuperscript{199} Financial firms share many of the same characteristics as accounting firms, and are similarly vulnerable to the Andersen Effect.

Accounting and financial firms rely heavily on reputation in order to keep clients and acquire new ones.\textsuperscript{200} These firms are entrusted with very important matters. For accounting firms, auditing public companies is a particularly crucial aspect of their business.\textsuperscript{201} Accounting firms have access to a wide variety of confidential materials, including business secrets, bank accounts, and other insider information.\textsuperscript{202} Financial firms’ clients entrust them with direct control over at least some of their money. Clients are, understandably, not going to trust a firm that is charged with defrauding or stealing from its own clients, no matter how weak the underlying basis for the indictment. The Bernard Madoff ponzi scheme is just one example of a flagrant fraud or misappropriation of assets resulting in total loss for the trusting clients.\textsuperscript{203} Therefore, once charges are filed, clients will attempt to leave as quickly as possible.


\textsuperscript{198} \textit{Supra} Part I.B.

\textsuperscript{199} See, e.g., \textit{supra} note 67 and accompanying text.


\textsuperscript{201} See Markoff, \textit{supra} note 7, at 805.


\textsuperscript{203} Stephanie Yang, 5 Years Ago Bernie Madoff Was Sentenced to 150 Years in Prison—Here’s How His Scheme Worked, BUS. INSIDER (July 1, 2014), http://www.businessinsider.com/how-bernie-madoffs-ponzi-scheme-worked-2014-7.
SAC and Andersen show that it is not just alleged crimes against a firm’s own clients that cause clients to leave. Accounting and financial firms typically have informed and knowledgeable clients who are rational decision makers and wary of uncertainty. In general, investors are risk averse. Also, many of SAC’s clients were institutional investors, who are typically even more risk averse than the ordinary investor. Another big concern for clients of financial firms is the possibility that their funds will be tied up during litigation. Clients of accounting firms are worried about the criminal and civil charges that may result from noncompliant financial statements. Additional client concerns include the prospect of having their accounting firm lose its license before completing a lengthy and time-sensitive report; or perhaps, even worse, the reputational harm of having accounting work completed and signed by a firm that is later found guilty. For example, following indictment, “Andersen clients fled in droves at the prospect of allowing an accounting firm charged with a crime to serve as their financial watchdog.”

It is rational for clients of accounting and financial firms to react to this uncertainty by moving business away from the indicted firm. Financial and accounting firms have many competitors providing similar services. Government contracts, a specialty of many financial and accounting firms, can also be terminated or put on hold due to an indictment alone. In brief, due to the reputational harm and uncertainty, as well as the fear of total

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204 SAC was charged with trading on insider information that, if true, may have helped the success of its client Enron, as well as itself. The alleged victims for both companies were not its direct clients.


206 EDWIN J. ELTON ET AL., MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS (8th ed. 2010).

207 Patricia Hurtado & David Voreacos, SAC’s Cohen Risks Losing Fortune While Keeping Freedom, BLOOMBERG (July 26, 2013), http://www.bloomberg.com/news/2013-07-26/sac-s-cohen-risks-losing-fortune-while-keeping-freedom.html. Institutional investors usually have a fiduciary responsibility to the individuals that make up the total investment. Examples of institutional investors that may be particularly risk averse include charitable organizations, pension funds, or insurance companies. Interestingly, many of Madoff’s victims were institutional investors, including many charities.

208 Id.


210 See Markoff, supra note 7, at 805 (discussing Andersen’s reluctance to admit guilt to settle the charges because doing so would disbar Andersen from auditing public companies).

211 Ball & Bolia, supra note 13, at 249 (internal quotations omitted).

212 The big four accounting firms are considered the same quality, and then there is a large group of accounting firms that can provide the same level of service. Financial firms provide more unique services but most, if not all, have competitors that provide a similar service and similar return on investment.

213 See Markoff, supra note 7, at 806.
loss, the rational client will flee to a substitute service provider following an indictment. The risk is too great, and the tangible reward too small, for a rational decision maker to remain loyal to an indicted financial or accounting firm.

2. Financial Firms and Collateral Damage

Financial firms have some unique attributes that make the collateral damage from the Andersen Effect even more costly to the economy. It would also seem that the demise of a large financial firm has a much more direct effect on the economy than an accounting firm. Although not unique, financial firms rely on relationships with many different outside entities. An indictment can damage these relationships, causing lost profits or even business disruption for both parties.

Many financial firms, particularly hedge funds, rely on symbiotic relationships with their lenders in order to use a leveraged investing strategy. These relationships were harmed by the loss of investable assets and the increased risk of doing business with SAC. SAC has been one of the leading clients for many of the largest lending institutions. Following indictment, SAC encountered many issues with its lenders, likely resulting in higher cost of capital rates and a decrease in available credit. It is likely that many lenders stopped doing business with SAC entirely. Those that did not likely required an increase in collateral to offset the firm’s decrease in credit worthiness. The infamous collapse of the hedge fund Long-Term Capital Management (LTCM) is an interesting example of the effect that a change in available credit can have on a highly leveraged firm. Although not caused by an indictment, the collapse of LTCM serves as a cautionary tale, as the Federal Reserve of New York was eventually required to bail

214 Supra Part II.A.
215 Supra Part II.C.
216 CONNOR & WOO, supra note 117, at 15.
217 Supra Part II.C.
218 Id.
219 See supra notes 163, 164 and accompanying text; see also PRESIDENT’S WORKING GRP. ON FIN. MKTS., HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG-TERM CAPITAL MANAGEMENT 5, 8, 10 (1999), available at http://www.treasury.gov/resource-center/fin-mkts/Documents/hedgfund.pdf (explaining that the creditworthiness of the hedge fund determines the collateral required, credit available, and financial reporting requirements of the lending firm).
220 Id. at 5.
221 Id. at 8.
222 CONNOR & WOO, supra note 117, at 15 (“Before its collapse LTCM controlled $120 billion in positions with $4.8 billion in capital. In retrospect, this represented an extremely high leverage ratio . . . . At that time, more than 10 hedge funds with assets under management of over $100 million were using leverage at least ten times over. Since the collapse of LTCM, hedge fund leverage ratios have fallen substantially.” (citation omitted)).
LTCM out to avoid a default on billions of dollars in loans from fourteen lenders.\footnote{Id. at 15-16.} Indicting a financial firm runs the risk of causing loan defaults, the consequences of which are almost completely borne by the lending institutions or the taxpayers for a government bailout.\footnote{Id.} The chances of significant loan defaults increase if, at the time of indictment, the borrowed money is at a loss position or cannot be liquidated.\footnote{Id. at 15 (discussing LTCM’s severe liquidity issues: “[LTCM] could not sell billions in illiquid assets at fair prices, nor could it find more capital to maintain its positions until volatility decreased”).} At the very least, prosecutors should attempt to analyze the financial firms’ outstanding debt and current market positions before issuing an indictment.

The decrease in available capital for a financial firm means a decrease in investing activity, resulting in harm to more third parties. In addition, the loss of clients following indictment means that a financial firm has fewer investable assets. As discussed, SAC was one of Wall Street’s best clients, paying hundreds of millions in trading commissions each year.\footnote{Supra note 172 and accompanying text.} Thus, the SAC indictment caused significant collateral harm to many Wall Street firms and individual employees who relied on SAC as a business partner.\footnote{Supra Part II.C.}

SAC lost talented employees either because it could no longer afford to keep them or because the uncertainty made it easier for competing firms to pursue them.\footnote{Supra note 159.} Although the cost to replace these employees and the impact of losing successful money managers to the competition is difficult to quantify, it is a significant economic loss. Accounting firms are likewise susceptible to losing valuable employees to the competition; however, for many reasons, this seems to be a more significant issue for financial firms.\footnote{In accounting firms the partners are usually the most irreplaceable employees. However, partners are required to invest into the partnership and will be hesitant to leave and lose that investment. In addition, mid-level employees are more easily replaced by similarly trained accountants because of the formality in the discipline. Lastly, most of the accounting services provided by the major firms are somewhat uniform and do not contain as many business secrets that could benefit a competitor.} The exodus of outside investors, large fines, and other business disruptions likely led to a decrease in income for SAC’s remaining employees, whose incomes were closely tied to the AUM.\footnote{Lattman, supra note 153 (“In losing money from outside investors, SAC also loses the lucrative revenue it earns from charging among the most expensive fees in the industry—as much as a 3 percent management fee and 50 percent of the profits. Without those fees, Mr. Cohen will have to compensate employees out of his own pocket, and there is a sense inside the firm that payouts could drop.”).} This is a predictable result following an indictment of a financial firm.

Clients of an indicted financial firm are indirectly harmed by the indictment, even if they are able to liquidate their full investment in the firm. For example, SAC’s former clients who withdrew more than $5 billion

\begin{itemize}
  \item Id. at 15-16.
  \item Id.
  \item Id. at 15 (discussing LTCM’s severe liquidity issues: “[LTCM] could not sell billions in illiquid assets at fair prices, nor could it find more capital to maintain its positions until volatility decreased”).
  \item Supra note 172 and accompanying text.
  \item Supra Part II.C.
  \item Supra note 159.
\end{itemize}
combined incurred real economic harm. As discussed, these clients were essentially forced into making the rational decision to liquidate their investments. This transaction can cause economic loss in a few different ways. There are search costs for the time spent locating and vetting a substitute financial firm. There are opportunity costs associated with the lack of investment during the time spent looking for a substitute financial firm. The most tangible harms for investors are the tax consequences of having to liquidate their investments, likely generating a hefty capital gains tax bill. Transaction costs and tax implications result in less investable assets in the market. When a large financial firm is indicted, it seems likely that the aggregate economic costs incurred by the firm’s former clients alone can damage the financial markets as a whole. The collateral damage incurred by financial firms’ clients is a predictable and direct result of indicting a financial firm.

Another reason for the particular vulnerability of financial firms has to do with the types of criminal allegations these firms are likely to face. Financial firms need current and potential clients to trust the accuracy of past performance results. When a financial firm is accused of cheating, the typical reaction is to question whether all of its past performance was a result of cheating. In other words, a financial firm is likely to be charged with crimes that discredit the core business that the firm performs. In contrast, companies in other industries are more likely to face charges that are short-term, one-off harms that do not threaten the company’s long-term chances of survival. Companies in other industries are more likely to face charges that are unrelated to the product that they offer or service that they

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231 Supra Part II.C.
233 Id.
234 See INTERNAL REVENUE SERV., TAX GUIDE 2013 FOR INDIVIDUALS 102 (2013). Large gains are assumed because of the percentage returns on SAC’s funds. Note that it is possible that the investors who left SAC kept their money invested in the same securities and did not face any tax consequences.
235 See Houman B. Shadab, The Law and Economics of Hedge Funds: Financial Innovation and Investor Protection, 6 BERKELEY BUS. L.J. 240, 260 (2009) (stating “governance devices adopted by hedge funds are explicable, in part, by the transaction cost theory of the firm, according to which companies adopt governance structures aligned with transaction-specific characteristics to reduce transaction costs and increase performance”).
236 See, e.g., CONNOR & WOO, supra note 117, at 31 (explaining the use of hedge fund indices to compare the performance of hedge funds to one another and alternative investment options).
237 Markoff, supra note 7, at 831-32 (explaining this difference by separating the harm inflicted by the crime into two categories: acute harms and structural harms. Acute harms are short-term, one-off harms that do not threaten the company’s long-term chance of survival. Structural harms are those harms that are long lasting and discredit the company’s core product or service.).
238 Id.
perform. This is due in part to the greater likelihood that companies in other industries will face infractions that occur during the manufacturing or distribution process. Environmental, antitrust, and Foreign Corrupt Practices Act ("FCPA") violations are examples of common infractions that occur during the manufacturing and distribution processes and, therefore, do not usually threaten a company’s long-term viability. Companies in other industries are also more likely to have customers who are less concerned with the legal status of the company, for a myriad of reasons.

For these reasons, financial firms have attributes that make their industry particularly vulnerable to the Andersen Effect. Indicting a financial firm has the predictable result of harming many uninvolved parties, including clients and third-party business partners. Indicting a financial firm can also cause unnecessary economic inefficiencies, and disrupts the financial markets. The collateral consequences resulting from SAC’s indictment were both predictable and avoidable. Similar to Andersen, the indictment essentially destroyed SAC even before it had a chance to present a defense or respond to the allegations.

3. Alternative Resolutions

The government has many alternative options available to punish corporate offenders. The use of these alternative options, most notably prosecution agreements, helps to avoid the Andersen Effect, while still punishing the corporations and individuals responsible. For this reason, there has been a significant increase in the use of prosecution agreements after the Andersen debacle. Prosecution agreements can replace indictments and therefore avoid instances of the Andersen Effect. The government can also, where appropriate, criminally charge the responsible individuals and seek prison sentences.

The government does not need to regularly issue indictments to influence corporate decision making. The government having the option to indict is enough to cause a shift in the bargaining positions. The fear of in-

239 Id. at 818-21.
240 Id.
241 Id. at 831-34.
242 Id.
243 See supra notes 103-105 and accompanying text.
244 See SEC Announces Actions for Issuers in Light of Indictment of Arthur Andersen LLP, Fed. Sec. L. Rep. ¶ 86,620, 86,620 ("The [SEC] approved . . . regulatory actions . . . to minimize any potential disruptions that may occur as a result of the indictment of Arthur Andersen LLP.").
245 See supra notes 34, 36 and accompanying text; see also SAC Plea Agt., supra note 175, at 3 (preserving the ability to charge individuals including Cohen).
246 Supra notes 27-29 and accompanying text.
247 Supra note 25.
dictment gives the government a sizeable negotiating advantage against accounting and financial firms. Companies recognize the benefit of entering into prosecution agreements and are willing to quickly accept ample punishment in order to avoid an indictment. However, this means that the Andersen Effect has been one of the main reasons the government has the ability to negotiate draconian content into prosecution agreements. The government can use this power to demand concessions from corporations, including large monetary settlements, structural changes, admissions, debarment, imposition of detailed compliance programs, and many other forms of punishment. However, the vastly unequal bargaining positions can have a perverse effect on the legal system.

Following the 2008 financial crisis, many criticized the lack of criminal charges and the bailout of many of the companies that were responsible, at least in part, for the magnitude of the financial crisis. The criticism was fueled by the notion that the government decided not to criminally charge these blameworthy financial institutions, and instead provided them with billions of dollars in bailouts to save the institutions, as they were deemed “too big to fail.” Therefore, some may bristle at a suggestion that financial firms need more protection from indictment. However, choosing alternatives to corporate indictment involves different logic than “too big to fail.” There are two main reasons that making considerations based on the Andersen Effect is very different than “too big to fail.” First, the government is not saving a company when it chooses not to indict. Instead of saving a company with a bailout, the government is merely delaying indictment and thus delaying the destruction of the company. This is merely an

248 See Henning, supra note 67, at 312 (“[T]he mere threat of criminal prosecution is enough to cause even the largest corporation to cower. Few companies are willing to risk an indictment, much less a criminal trial . . . . And alternatives do exist: deferred and non-prosecution agreements offer corporations the chance to avoid an indictment altogether.”).
249 See supra note 34; see also Ball, supra note 13, at 251; Markoff, supra note 7, at 806-08 (although Andersen refused to admit wrongdoing, the firm was willing to enter a DPA, implement a new compliance program, and have an independent monitor appointed).
250 See id.
251 See Ball & Bolia, supra note 13, at 251; see also Markoff, supra note 7, at 808.
252 See Baharara, supra note 68, at 73-75.
253 Troy S. Brown, Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail?, 3 Ala. C.R. & C.L. Rev. 1, 11 (2012) (“In the wake of the 2008 financial crisis, many clamored for financial reform that would end the reviled too big to fail concept, particularly in light of the massive federal bailouts for the shadow banks who many believed caused or exacerbated the meltdown.”).
254 Id. at 2 (“The too big to fail concept describes the belief that certain entities are so central to the macro-economy that their failure will precipitate widespread financial disaster and, thus, should become recipients of beneficial financial and economic policies from governments and central banks. Favorable treatment, however, leads to moral hazard when an entity does not take account of the full consequences and responsibilities of its actions, and therefore has a tendency to act less carefully than it otherwise would, leaving another party to hold some responsibility for the consequences of those actions, a perversion of insurance theory.”).
effort to avoid significant collateral damage, as well as the due process concerns associated with the Andersen Effect. Second, the government is not protecting the company; it is merely using a different method or route to justice. The responsible individuals can still face criminal charges, and companies can incur significant punishment through prosecution agreements and civil penalties. The government knows that prison sentences are the biggest deterrent for corporate criminals.

This recommendation to make a concerted effort to avoid indictments in certain situations is not for the purpose of protecting guilty companies. If there exists evidence that is a proverbial smoking gun, or if there is cognizable ongoing risk to clients or the greater public, then the company should be criminally charged as soon as possible. Thus, Ponzi schemes and other frauds in which there was never an underlying economic activity should be shut down and criminally charged. Nevertheless, in many instances it is impossible to accurately determine whether a company is actually guilty, and it is unwise to rely on a grand jury determination. Therefore, companies vulnerable to the Andersen Effect should not face indictment unless the prosecutor has indisputable evidence, or if there is need to stop the company’s operations immediately. Otherwise, prosecution agreements and charging individuals provides sufficient punitive and deterrent effects without the collateral consequences.

B. Limiting Prosecutorial Discretion and Counteracting the Power of an Indictment

The use of prosecutorial discretion against financial and accounting firms, even when well intentioned, turns the prosecutor into judge and jury. These firms cannot be fairly treated in the criminal law system without accounting for the Andersen Effect. As discussed, prosecutors’ acceptance and understanding of the Andersen Effect can be inferred from the

255 See supra Part I.A.
256 See supra note 27.
258 See infra note 283 and accompanying text.
259 Interestingly, SAC was not forced to immediately cease operations. Many inferences can be made by the DOJ’s lack of urgency.
260 Supra Part I.A (explaining grand jury practices and the lack of procedural safeguards in comparison to a federal criminal proceeding); see also Ball & Bolia, supra note 13, at 251 (noting that abusive DPAs can undermine the principles of separation of powers by turning the prosecutor into judge and jury).
261 See supra Part III.A.
lack of criminal charges against companies in the financial services industry since Andersen’s demise. Nevertheless, the recent cases against SAC and other large financial services companies may mark a shift away from Andersen Effect concerns. The DOJ should revise the USAM to incorporate guidance related to the Andersen Effect in an effort to increase awareness and avoid future occurrences. Further, the DOJ should continue to use prosecution agreements, but with the understanding that the Andersen Effect greatly influences the agreed upon contents of prosecution agreements. The courts must also account for the influence of the Andersen Effect on prosecution agreements and reject agreements that are inequitable.

1. Revising the USAM

There are a few areas in which the USAM should be revised so that a prosecutor may account for the Andersen Effect when determining whether to charge a company. Revising and adding to the USAM is a much easier and quicker fix than attempting to change the underlying legal issues. Formulating and explaining the factors that cause the Andersen Effect is a positive first step for many reasons. While the USAM is purely advisory, information related to the Andersen Effect would provide a frame of reference for prosecutors that is currently lacking in the USAM.

To start, the USAM section on “General Considerations of Corporate Liability” notes that, in certain instances, it may be appropriate to use means other than an indictment, such as an NPA or DPA, to resolve corporate criminal cases. The USAM should provide guidance on instances in which it would be appropriate to use other means. This guidance should include consideration of the industry in which the company operates. This

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263 UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at §§ 1-1.200, 1-1.600 (periodical revisions of the United States Attorneys’ Manual are facilitated by the Executive Office for United States Attorneys in consultation with the attorney general, deputy attorney general and associate attorney general. Substantive changes to the USAM are submitted by the attorney general, deputy attorney general, associate attorney general, a litigating division, or the Executive Office for United States Attorneys).


265 These explicit revisions will help prosecutors who are not as familiar with the Andersen Effect. It may even help prosecutors who are experts on issues related to the Andersen Effect by providing the guidance within the context of the USAM, or as just a reminder on some issues that must be considered. Probably most important is having explicit guidance for future prosecutors.

266 See supra Part I.C.

267 UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.200.B.
Comment argues that financial firms, as well as accounting firms, should be treated with greater caution and analysis prior to indictment. The USAM should include a description and analysis of risk factors. Examples, hypotheticals, and reference to actual cases would also be helpful for prosecutors.

The USAM advises prosecutors to apply the same considerations against corporate targets as the ones used in decisions to charge individuals, including, “the sufficiency of the evidence [and] the likelihood of success at trial.” Applying these considerations can pose particular issues in the corporate crime context, as “[m]any white-collar crimes are especially difficult to prosecute because the perpetrators use sophisticated means to conceal their activities through a series of complex transactions.” Moreover white-collar crime at the corporate level creates the added complexity of investigating whether to charge the entity or the individuals responsible for the actions of the entity. A mistake could result in the indictment of an innocent company, a punishment disproportional to the wrongdoing, or indictment of an entire company instead of a few rogue employees. Accurately determining the likelihood of success at trial at the early stages of a corporate criminal case can be very difficult, if not impossible. Part of this difficulty is the many practical issues in ascertaining the sufficiency of evidence before trial, such as lack of discovery, which is further magnified by the usual complexity of these cases. Further, not having to follow the Federal Rules of Evidence in order to bring an indictment can give a false impression about the sufficiency of the evidence and the pre-trial strength of the case. An otherwise weak case may be propped up by unusable and unreliable evidence.

Moreover, considerations about the adequacy of the evidence and the likely result at trial have the potential for significant cognitive bias, especially at this stage of a corporate criminal case. Cognitive bias can cause tunnel vision whereby a prosecutor will

select and filter the evidence that will “build a case” for conviction, while ignoring or suppressing evidence that points away from guilt. . . . Through that filter, all information sup-

268 The risk factors are many of the relevant attributes that make a company vulnerable to the Andersen Effect. See supra Part III.A.1-2. There are also other potential risk factors that have not been analyzed in this Comment, for example whether the company is public or private.

269 UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.300.


271 See infra note 285.

272 Id.

273 See supra note 20 and accompanying text.

274 See supra notes 20-21 and accompanying text.

porting the adopted conclusion is elevated in significant, viewed as consistent with the other evidence, and deemed relevant and probative.276

Confirmation bias277 and belief persistence278 are two forms of cognitive bias that can lead to overestimating the probative value of evidence. In the SAC case, for example, the indictment discusses the hiring of a trader whom the company knew shared a summer home with the CFO of a large industrial company, implying that SAC had a desire to obtain and use illegal inside information.279 However SAC, like many hedge funds, might have just possessed an ordinary desire to seek employees with strong corporate relationships for the benefits of legal observation and research. Lastly, there is no supporting evidence that SAC’s hiring decision was influenced by this relationship at all, and no further information, such as the trader’s qualifications, was provided in the indictment to put this evidence in context.280 There are many other pieces of supposed inculpatory evidence that can just as likely have innocent explanations.

The seventh factor of the USAM, collateral consequences, should be revised in light of two issues in the current guidance.281 First, the collateral consequences discussed in the USAM are almost exclusively concerned with parties who are not in any way involved with the underlying conduct.282 This part should be revised to emphasize that the prosecutor should also consider the consequences for those who allegedly played a role in the criminal conduct. This part should consider the idea that the USAM is meant for use in preparation for indictment and that anybody criminally implicated is innocent until proven guilty. Other than judicial fairness, an update like this would be more in line with reality. It is often very tough for a prosecutor to know exactly who, or what parts of a company, were involved in white-collar crime because of the complexity and sophistication

276 Id. (quoting another source) (internal quotation marks omitted).
277 Keith A. Findley, Wrongful Conviction, SAGE REFERENCE ONLINE (Jan. 20, 2010), https://media.law.wisc.edu/m/2zdd2/wrongful_conviction_-_encyclopedia_of_psychology_and_law.pdf (defining confirmation bias as “the natural human tendency to seek, interpret, and recall information in ways that support existing expectations, beliefs, or hypotheses”).
278 Id. (referring to belief persistence as a condition in which “people are naturally disinclined to relinquish initial conclusions or beliefs, even when the bases for those initial beliefs are undermined”).
279 See supra Part II.B; Matt Levine, SAC’s Rigorous Compliance Program Focused on Coming Up with Euphemisms for Insider Trading, DEALBREAKER (July 25, 2013), http://dealbreaker.com/2013/07/sacs-rigorous-compliance-training-focused-on-coming-up-with-euphemisms-for-insider-trading/#more-107841 (“Hedge funds really are allowed to do extensive research into the companies they invest in, talk to people in the industry, talk to people at the companies, and generally try to build a mosaic of information and insight that is better than everyone else’s . . . then trade on it”).
280 See supra Part II.B.
281 UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.1000.A.
282 See supra notes 104-05 and accompanying text.
involved in these types of crimes. Therefore, assumptions regarding who was involved in the underlying conduct are both difficult to make and ripe for mistake. While it is understandable to give more weight to the potential collateral harm of an uninvolved third party, ignoring the consequences for those thought to be involved is imprudent. The USAM notes that shareholders who have substantially profited, even unknowingly, are also of lesser concern when analyzing collateral consequences. This is another difficult determination in many cases that requires prosecutors to first consider whether a shareholder “substantially” profited, and then determine how much to discount consideration of these shareholders when analyzing this factor.

The next proposed revision to the seventh factor is concerned with guidance on estimating and aggregating collateral consequences. The USAM’s seventh factor would be most useful if the collateral consequences were analyzed both separately and in total. By aggregating the total damage to get a true assessment of an indictment’s potential consequences, prosecutors are able to see a more complete picture of the significance of their decisions. As discussed, indicting a company can cause economic loss in many different ways. When considering the collateral consequences, a prosecutor must consider the impact that the indictment has on all affected parties and the economy as a whole. This is a complicated task, and one of the problems of allowing unfettered prosecutorial discretion is that “federal prosecutors are trained to be trial lawyers who can get convictions and may be entirely ignorant of the working of capital markets.” There is no simple formula to calculate the consequences, but an economist, or a lawyer

\[283\] See supra note 270; see also A Brief Description of the Federal Criminal Justice Process, FED. BUREAU INVESTIGATION, http://www.fbi.gov/stats-services/victim_assistance/a-brief-description-of-the-federal-criminal-justice-process (last visited Nov. 26, 2014) (explaining that prior to indictment on white collar crimes an agent will frequently need to review documents that can only be obtained by first applying for a search warrant or requesting a subpoena from a grand jury. However, discovery and motions process occurs after an indictment is issued by the grand jury.).

\[284\] See Bharara, supra note 68, at 112 (noting that prosecutors are making business assessments on whether to indict that may result in destroying a company, and that these decisions are so specialized and complex that they have been the focus of volumes of law literature and make up an entire field of law practice).

\[285\] UNITED STATES ATTORNEYS’ MANUAL, supra note 9, at § 9-28.1000.B.

\[286\] See supra Part III.A.1-2.

\[287\] Id.

\[288\] Alternatively, if prosecutors do not want to consider all affected parties, they can aggregate without consideration of the consequences on those parties. Prosecutors can also discount the consequences on shareholders who profited from of the alleged scheme. While this Comment just argued that all these consequences should be considered, refusal to include these consequences should not preclude this aggregation step.

\[289\] See Bharara, supra note 68, at 112 (quoting Ralph K. Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 DUKE L.J. 945, 963 (1993)) (internal quotation marks omitted).
with law and economics training, can make these calculations.\textsuperscript{290} Analysis of SAC and Andersen are useful in order to predict and estimate the collateral consequences resulting from indictment. Moreover, the USAM should stress the importance of incorporating easily deducible information about the corporation into a prosecutor’s analysis. Information that can be found in financial statements or other disclosures, such as the number of employees or the magnitude of a firm’s corporate debt, can help a prosecutor predict and measure the collateral consequences of an indictment. The goal of this change is to allow a prosecutor to do a cost-benefit analysis that captures all the variables involved in the charging decision.

The ninth factor, “non-criminal alternatives,” should be revised to provide further guidance on what factors the prosecutor should consider.\textsuperscript{291} The least collaterally harmful way to deter corporate crime is to charge the individuals allegedly responsible.\textsuperscript{292} The ninth factor indicates that a prosecutor should consider the same factors used to determine whether to prosecute an individual person.\textsuperscript{293} This should be expanded to state that a prosecutor should also consider the weight of other corporate factors to determine whether to prosecute a corporation. The ninth factor should include a reference to the eighth factor, which states that a prosecutor should consider “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”\textsuperscript{294} Considering both the eighth and ninth factors together will enable a prosecutor to gain a full understanding of the punishment options available if the choice not to indict the company is made. The ninth factor should also reference the seventh factor, collateral consequences. Generally, if the collateral consequences of indictment outweigh what is gained in deterrence and punishment, then prosecutors should seek alternative resolutions. Put another way, the risk of collateral consequences can outweigh the judicial benefit of indictment. This is especially true when the non-criminal alternatives, and the availability of individual criminal liability, are comparable to the punishment of criminal conviction. This is not to say that a guilty firm should be afforded leniency, but rather that alternatives are able to punish at a similar level without the collateral harm. Therefore, the sufficiency of “non-criminal alternatives” should be considered in conjunction with many of the other factors, in order to do a proper cost-benefit analysis.

\textsuperscript{290} See \textit{id.}
\textsuperscript{291} \textit{UNITED STATES ATTORNEYS’ MANUAL}, supra note 9, at § 9-28.1100.A.
\textsuperscript{292} See \textit{id.} § 9-28.200B; see also \textit{supra} notes 31-32.
\textsuperscript{293} \textit{UNITED STATES ATTORNEYS’ MANUAL}, supra note 9, at § 9-28.1100.B.
\textsuperscript{294} \textit{Id.} § 9-28.300.A.
2. Leverage and Judicial Review

The prosecutor has significant bargaining power when negotiating a prosecution agreement with a corporate offender.295 As discussed above, certain companies must accept a prosecution agreement or face almost certain corporate death, allowing the prosecutor to make one-sided deals.296 Prosecutors have broad discretion when drafting prosecution agreements.297 While ways to counteract this unequal bargaining position could be addressed further in the USAM, it is the courts that are best suited to address this issue through review of prosecution agreements.298

After the guilty pleas of former SAC employees, the government had significant leverage because of corporate vicarious liability.299 Corporate vicarious liability would have made SAC’s conviction all but certain in court.300 Prosecuting U.S. Attorney Preet Bharara has extensively discussed the vulnerability of corporate defendants and the inequitable leverage that the government has.301 Mr. Bharara warned “efforts to reduce the risk of prosecutorial excess are, in the long run, better directed at the source of prosecutors’ leverage rather than at their conduct.”302 For certain firms the leverage is predominately based on the fear of the Andersen Effect, which is grounded in the DOJ’s ability to indict.303 This is not to say that leverage alone would make SAC’s agreement unfair. The fairness of the agreement should be a fact-intensive analysis performed by the courts.304

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295 See Bharara, supra note 68, at 73-74 (explaining that the source of bargaining power comes in part as a result of the inherent vulnerability of corporations, similar to eggshell plaintiffs in tort law, as well as the relative ease in obtaining a conviction, and emphasizing that the doctrine of criminal respondeat superior and near certainty of conviction gives a prosecutor confidence that the indictment will be successful); see also Paulsen, supra note 264, at 1467 (2007) (discussing the bargaining imbalance and that “the principal reason prosecution agreements can be abused is the expansive nature of vicarious liability law and corporate vulnerability to bad publicity—two factors that likely will not change”).

296 See United States v. Stein, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) (noting that the government “held the proverbial gun to [KPMG’s] head” because of the threat of prosecution); see also Oesterle, supra note 72, at 476.

297 See Paulsen, supra note 264, at 1444.

298 Id. at 1463-64 (noting that commentators have proposed two solutions to address the bargaining imbalance: first, to change the law of vicarious corporate liability, and second, to require judicial review of prosecution agreements).

299 See supra note 296 and accompanying text.

300 Id.

301 See Bharara, supra note 68, at 54.

302 Id.

303 See supra Part III.A.

304 See Hartado & Van Voris, supra note 46 (noting that the district judge presiding over the SAC case set sentencing for March 14th so that she would have time to review the pre-sentence report and the sentencing submissions provided by each party).
Judicial review of prosecution agreements should focus on abuse of leverage and undue pressure. The lower court in Stein applied strict scrutiny in reaching its decision in light of concerns about the defendant’s substantive due process. The Andersen Effect can also create due process issues that should be explored. Courts should consider the Andersen Effect when determining the leverage that may have been employed, and which defendants are particularly susceptible. The presiding judges should be aware of the distinct characteristics that are likely to make defendants vulnerable to the Andersen Effect, and how this may have impacted the negotiated prosecution agreement. Companies that fear indictment are more likely to enter prosecution agreements that are abusive. For these reasons, courts should apply a strict scrutiny analysis to prosecution agreements, especially in cases where a legitimate fear of the Andersen Effect could have influenced a company’s incentives and decision making. By understanding the Andersen Effect, courts will be better able to spot prosecution agreements that are the result of abusive leverage or undue pressure. Nonetheless, judicial review comes too late for the company that would not have entered any agreement but for the threat of indictment. Thus, corrections are necessary earlier in the process.

Judicial review of prosecution agreements is a positive development, but obviously judicial review will not stop the next unnecessary corporate indictment. Even in a case like SAC, where an indicted company later reaches a plea agreement, judicial review can only help an overly punitive agreement. Judicial review comes at too late a stage to save an accounting or financial firm from the Andersen Effect. Therefore, it is the DOJ and not the courts that must address the concerns related to death by indictment.

CONCLUSION

SAC’s indictment provided a rare case study for the Andersen Effect. Following the indictment, SAC rapidly lost all of its outside investors and incurred many other damaging consequences. SAC helps to validate many of the observations made regarding Andersen’s demise. Further, SAC demonstrates financial firms’ particular vulnerabilities, such as increased costs of capital and decreased access to capital. SAC also reveals the wide range of parties harmed by indictment and the risk to the financial markets as a whole. The USAM should be revised to provide prosecutors with usable guidance to avoid an unnecessary corporate death by indictment.

305 See United States v. Stein, 541 F.3d 130, 135-36 (2d Cir. 2008).
ing prosecutors to apply a more detailed analysis of the collateral consequences, the individual culpability, and the availability of non-criminal alternatives will provide greater assurance that the Andersen Effect will be avoided whenever possible. Revisions to the USAM can help a prosecutor estimate the full impact of an indictment, and a cost-benefit analysis will then expose the equitable charging decision. Prosecution agreements are an important tool to be used in place of an indictment. However, the Andersen Effect creates a bargaining imbalance that must be addressed. Prosecutors can use their bargaining power to force one-sided prosecution agreements. Revisions to the USAM and detailed judicial review of prosecution agreements will help counteract the substantial leverage that a prosecutor holds.