DEFERRED PROSECUTION: SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES?

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

MARCH 11, 2008

Serial No. 110–174

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Available via the World Wide Web: http://judiciary.house.gov

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U.S. GOVERNMENT PRINTING OFFICE

41–190 PDF WASHINGTON : 2009

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DEFERRED PROSECUTION: SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES?

TUESDAY MARCH 11, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:40 a.m., in room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Conyers, Sánchez, Johnson, Lofgren, Delahunt, Cohen, Cannon, Feeney, and Franks.

Staff present: Eric Tamarkin, Majority Counsel; Daniel Flores, Minority Counsel; and Adam Russell, Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order. I will now recognize myself for a brief statement.

I have called today's hearing to shed light on the use of pre-trial prosecution agreements in corporate crime cases, a growing practice that has so far been operating mostly in the shadows without guidelines and without oversight. Today's hearing is not being held with prejudice for or against deferred prosecution and non-prosecution agreements, but rather with concern about the number of unanswered questions surrounding them.

The concept of deferred prosecution originated as a rehabilitation option for non-violent juvenile and drug offenders. After prosecutors file an indictment, the prosecution is put on hold in exchange for commitments by the offender to reform and provide restitution. If the offender meets the obligations in the agreement, prosecutors may ask a judge to dismiss the indictment.

In the past 6 years, the Justice Department has increasingly relied upon a similar tool for white-collar crimes, usually involving private corporations. In such cases, an independent corporate monitor is often hired to determine whether the target corporation has complied with the obligations in the deferred prosecution or non-prosecution agreement.

Late last year, I was troubled to learn of what appeared to be a back room sweetheart deal where New Jersey U.S. attorney, Christopher Christie appointed John Ashcroft, the former attorney general, to serve as an independent corporate monitor and collect

fees between $28 million and $52 million. I was also concerned to learn from press accounts that Mr. Ashcroft was selected with no public notice and no bidding, and he had to use considerable time to prepare for the assignment and learn more about the business that he was contracted to monitor.

When I continued to investigate the issue of deferred prosecution agreements and the appointment of independent corporate monitors, I discovered that the parties to these agreements were operating in a wild west type of environment with no laws and no Justice Department guidelines. Less than 24 hours before today's hearing, the department sent us a memo mapping out some guidance with regard to the selection and use of monitors. And while I do believe that this may be a good start, uncertainties still remain as to how monitors should be selected and how these agreements should be structured.

The absence of standards governing how independent corporate monitors are selected has resulted in a hodge-podge of approaches across jurisdictions. For example, in several agreements prosecutors selected the monitor, typically after consulting with the corporation. In others, the corporation selected the candidate.

Additionally, a few agreements provide for collaboration among the corporation, regulators, and prosecutors in the selection. Finally, in at least three agreements, a court played a significant role in the monitor's selection process.

Furthermore, the current system lacks guidelines to direct how independent corporate monitors conduct oversight of the corporation once they have been selected. Most monitors are granted broad powers to gather information, institute polices, and oversee compliance.

For example, in one matter, the monitor had the power to "require any personnel action, including termination regarding individuals who were engaged in or were responsible for the illegal conduct described in the information." In essence, the agreement allowed the monitor to act as the prosecutor, judge, and jury for these employees.

While uncertainty is common in many aspects of deferred prosecution agreements, one thing does remain certain. The government has tremendous leverage over a corporation entering into an agreement. Corporations facing criminal prosecution have an unfair choice. They can either risk a conviction and perhaps even dissolution after trial or be coerced into accepting the terms and the monitoring that a prosecutor unilaterally believes are appropriate.

Unfortunately, because of a lack of transparency in many aspects of deferred prosecution agreements, we still don't know the full scope of this issue. On January 10th, Chairman Conyers, Congressman Pascrell and I sent a letter to the Justice Department requesting that the department disclose all deferred prosecution agreements and the individuals selected as monitors. It has been 2 months since our request, and we have yet to receive a response.

While we patiently await the department's disclosure of information, this hearing serves as a critical starting point of bringing deferred prosecution agreements and the appointment of monitors out from behind the shadows. Accordingly, I look forward to probing

these issues further and considering whether legislation in this area is appropriate.

I would like to recognize now the Ranking Member of the full Judiciary Committee, Mr. Smith, who has joined us and has some opening words.

Mr. SMITH. Thank you, Madam Chair. I really don't have an opening statement. I do want to, however, welcome former Attorney General John Ashcroft to our hearing today. I know what he is going to say, and I agree with it. And I just appreciate his taking the time to be here today.

Madam Chair, I also want to read an excerpt from an article in the New York Times today that speaks to the subject matter that we are here to discuss. And here is the exact quote from the New York Times article today.

"Outside lawyers who have reviewed Mr. Ashcroft's fee schedule said it was not out of line." Madam Chair, if you read that in the New York Times, that says a whole lot. And so, I just appreciate their commentary, and I appreciate your having this hearing today. With that, I will yield back.

Ms. SÁNCHEZ. I thank the Ranking Member of the full Committee, Mr. Smith, and would like to recognize at this time our distinguished Ranking Member of the Subcommittee, Mr. Cannon.

Mr. CANNON. Thank you, Madam Chair. I would ask unanimous consent to have my full statement entered into the record.

Ms. SÁNCHEZ. Without objection, so ordered.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRISTOPHER B. CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Opening Statement of Ranking Member Chris Cannon at "Hearing on Deferred Prosecution: Should Corporate Settlements Agreements Be Without Guidelines?" Tuesday, March 11th, 10:30 p.m., 2141 RHOB

Thank you Madam Chair, and welcome to our witnesses.

I want to extend a particularly warm welcome to our esteemed former Attorney General, John Ashcroft. Your service to our country has been long, honorable, and, through your leadership of the Department of Justice after 9/11, heroic. It continues today, and I thank you for your appearance.

I look forward to our hearing today, because this is an area in which I believe our oversight can be fruitful.

The subject of corporate deferred prosecution agreements has received much recent attention.

The Attorney General, in his recent oversight hearings before this Committee and the Senate Judiciary Committee, has already said that the Department is looking into whether more guidelines in this area would be useful.

We have an illustrious panel of witnesses who today can supply what I hope will be a creative and

constructive discussion of what these agreements are, how they have evolved, how they help law enforcement, and whether their use might indeed be promoted by better guidelines.

If we have such a discussion, it is my hope that the Attorney General will be able to take the fruits of our hearing, factor them into his consideration, and produce better guidelines, if they are called for.

Deferred prosecution agreements are, of course, a tool used in the exercise of prosecutorial discretion. As the Supreme Court's decision in Heckler v. Cheney instructs, prosecutorial discretion is

something to which we pay extraordinary deference in our system of justice.

It is also something to which we should pay more respect in the halls of Congress.

This term, this Subcommittee and this Committee have witnessed the U.S. Attorneys investigation – in which the majority played partisan games over the Department's prosecutorial decisions. U.S. Attorneys may have been chilled and intimidated as a result.

This Subcommittee also looked into so-called "Selective Prosecution" – in a manner which seemed to be just another partisan attack on the Department's exercise of its prosecutorial discretion.

Just recently, we held a hearing that ostensibly was about the Department's Special Counsel Regulations – but that seemed largely an excuse to take the Attorney General to task for deciding not to appoint a special counsel in the CIA Tapes investigation.

Whether everyone realizes it or not, the pattern that emerges is one of this Subcommittee devoting its oversight to partisan attacks against the Department's

exercises of its prosecutorial discretion. That is not a good development for this Subcommittee, and it is not a good development for the Department, regardless of which party is in control.

The bottom line is that I don't think we should unduly trench on prosecutorial discretion, or stifle innovation in its exercise, through our efforts here on Capitol Hill.

But we can provide useful oversight, shine a light on features of the use of DPAs, and spur along their evolution in a positive way.

With that as prelude, what are deferred prosecution agreements?

They are agreements under which a prosecutor, who could indict and pursue a company to conviction, agrees instead to place a company under a kind of pre-conviction "probation." The company agrees to change its ways, pay fines, and submit to monitoring to police its conduct. The agreement is made public. The company is monitored for a substantial period of time.

If it is then cleaned up, it returns to its normal life. If it does not clean up, it is prosecuted.

Wrongdoing is rooted out. Deterrence is served. And the economy does not unnecessary lose otherwise productive companies. Instead, those companies are righted.

In the corporate crime area, isn't this the greatest thing since sliced bread?

One only has to look at the wreckage of Arthur Andersen to see how valuable the advent of deferred prosecution agreements is.

In the wake of the Enron scandal, Arthur Andersen came under suspicion, was indicted, and was convicted. The company, as a result, was destroyed. Thousands of jobs were lost. Millions of dollars went to the ash heap. Competition among the very few national accounting firms was significantly reduced. The economic consequences reached throughout the economy.

The Supreme Court eventually reversed Arthur Andersen's conviction. But it was too late. The damage was done. Arthur Andersen was gone.

What a contribution a deferred prosecution agreement could have made in that case.

Again, wrongdoing would have been rooted out. Deterrence would have been served. But innocents would not have suffered. And the economy would not have incurred substantial, unnecessary losses.

It was, in fact, in the wake of the Arthur Andersen case that the light went on at the Department of Justice, and hard-working, creative, dedicated prosecutors seized on and promoted this simple, elegant idea as a better way to serve the public while combating corporate crime.

The guidelines for the use of deferred prosecution agreements are not extensive. Through the so-called Holder, Thompson and McNulty memos, the Department has begun to articulate clear standards for their use. Recent questions have arisen over the role of the corporate monitor in their use, and this is an area in which more standards might be explored.

A more clearly articulated, publicly understood and accepted framework under which monitors are selected, deployed and compensated could help free the use of deferred prosecution agreements from appearances of impropriety.

The establishment of such a framework could actually help to protect prosecutors and monitors from those who would bandy about baseless allegations and insinuations of misconduct – allegations that sometimes may be aimed only at chilling prosecutors and monitors in the service of the public.

If our consideration of these issues today can help the Department find a way to free itself of the distractions of such fabricated scandals, then we will indeed have made a contribution.

If our discussion today can point the Department to better innovations in the exercise of its prosecutorial discretion, then we will have helped our system of justice.

I yield back the remainder of my time.

Mr. CANNON. And I do that because I understand Mr. Ashcroft has a travel obligation he has informed the majority of and would need to leave at 12. And I think that he ought to have plenty of time to respond to the allegations that are being made.

You made a point of Mr. Christie's involvement. He has been a remarkably effective prosecutor. And to a degree that becomes an issue I hope that we could address that. But I would like to thank you, Madam Chair, for this hearing. As you know, we have talked about the concerns that I have with prosecutorial discretion. And we have a marvelous panel here for addressing that issue and in particular, as it relates to the matters that we have before us today.

So I hope that we come out of here with a much expanded view of what the possibilities are for, not only helping U.S. attorneys handle the extraordinary burdens that they have, but also helping us focus on how we in Congress and particularly, this Committee can become much more involved in the process of where we are seeing prosecutorial discretion is handled throughout the country. So I want to thank you again for drawing this panel together.

I want to thank all the panelists for being here today. I suspect this will be a very interesting hearing. And I hope we can clear the air and allow Mr. Ashcroft to have the opportunity to respond with particulars to the suggestions of the possibility of impropriety, referring back to what Mr. Smith has just said, when the New York Times suggests that things don't seem out of line, there is probably a pretty good guess that they are not.

But I think it would be very important that we have the opportunity to air both the charges that have been sort of insinuated against Mr. Christie and also Mr. Ashcroft and that we get beyond that and then start looking at the—we have a marvelous panel of people who actually understand these issues in great depth. And I hope we can plumb that understanding and learn how to do our job or learn what we can do here to be much better at our job.

So thank you, Madam Chair. I yield back.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

I would now like to recognize at this time Mr. Conyers, a distinguished Member of the Subcommittee and the Chairman of the full Judiciary Committee. Mr. Conyers?

Mr. CONYERS. Thank you, Madam Chairwoman, for holding the hearing. You and Chris Cannon are to be commended. And I appreciate the constructive tone with which we are beginning these off. I welcome John Ashcroft as the former attorney general and likewise, all the witnesses.

All we are doing today, sir, is exploring the Department of Justice's use of corporate settlement agreements. We know that they are a useful prosecutorial tool, several aspects of their implementation that require congressional oversight and possibly legislative attention, as has been suggested.

Congressional oversight of these agreements is probably essential to provide transparency. We understand the importance of these agreements as effective prosecutorial tools and respect confidentiality concerns. We, nonetheless, want to know the number of agreements into which the department has entered these agree-

ments and the details around them. I am going to ask that of the Department of Justice.

How many of these kinds of agreements are floating around? And it is important in light of the fact that the number of these agreements have increased dramatically during the tenure of our star witness here, former Attorney General John Ashcroft.

In an effort to obtain information regarding the agreement, as Chairwoman Sánchez has indicated, we are still waiting to receive a response from the attorney general. Now, despite the guidance that the department released yesterday afternoon regarding the use of corporate monitors in these agreements, this guidance still fails to ensure uniformity in the agreements themselves. Indeed, some agreements require the implementation of compliance programs, restitution, and fines while others do not.

While it may be necessary to fashion some agreements on a case-by-case basis, and we can concede that, general uniformity could ensure the fairest application. We hope that we will have these concerns addressed during the hearing today.

We hope that the recently-released department guidelines regarding the selection of corporate monitors are successful applied and implemented, because otherwise there is the potential for department politicization. One such example for this potential has arisen in the agreement between Zimmer Holdings and the United States Attorney's office in which Attorney Christopher Christie, who has been described here as a stellar U.S. attorney, a trial expert, but that we still have a problem with the naming of our former Attorney General John Ashcroft as corporate monitor.

Pursuant to this agreement, they have agreed to pay Mr. Ashcroft's firm anywhere from between $28 million and $52 million. And if it is not asking too much, we would like to know exactly how much is involved here.

Prior to the appointment of our former attorney general, there was neither public notice of the monitor position nor any public bidding for the assignment that we know of. This highlights the concern that brings us all here this morning.

We must assure the public that the Department of Justice is not rewarding political allies in a forum where prosecutorial independence is absolutely necessary. Our investigation into the removal of nine U.S. attorneys has taught us, unfortunately, that the department can be politicized in a way that undermines public confidence. And so, we hope that the department guidelines released yesterday accomplish the goal of restoring public confidence.

And finally, there ought to be independent judicial oversight of corporate settlement agreements because currently there is no transparency and no requirement that they be made public. Judicial oversight would help to ensure greater legitimacy of these agreements by providing a neutral decision-maker to prevent abuses and politicization as well as ensure proper completion of the terms of the agreements.

And so, I hope that all of our witnesses will help throw light on a subject that has not been examined up until now. And that is why I commend this Committee and its leadership for holding this hearing today.

Thank you, Madam Chair.

Ms. SÁNCHEZ. I thank the gentleman for his opening statement.

And at this time, I would like to welcome two of our colleagues who have joined us on the dais, Mr. Pascrell and Mr. Pallone. They are not Members of the Subcommittee, but they will be listening in and providing testimony for our second panel.

Without objection, other Members' opening statements will be included in the record. And without objection, the Chair will be authorized to declare a recess of the hearing at any point.

I am now pleased to introduce our witness panel for today's hearing. Our first witness is Mr. John Ashcroft. Mr. Ashcroft serves as chairman of the Ashcroft Group, LLC, which provides confidential strategic consulting and crisis counseling to major international corporations. Prior to forming the Ashcroft Group, Mr. Ashcroft served during the first term of President George W. Bush from 2001 until 2005 as the 79th U.S. attorney general.

During his tenure as attorney general, the corporate fraud task force was established within the department to restore integrity to the marketplace. Prior to his appointment as attorney general, Mr. Ashcroft was elected to the U.S. Senate in 1994 and served on the Senate Judiciary, Foreign Relations, and Commerce Committees.

From 1985 through 1993, Mr. Ashcroft served as governor of Missouri and served as chairman of the non-partisan National Governors Association in 1991 and 1992. He received awards from the Business Roundtable, U.S. Chamber of Commerce, and National Federation of Independent Businessmen for his service in the Senate.

We want to welcome you, Mr. Ashcroft.

Our second witness is Timothy Dickinson. Mr. Dickinson is a partner in the Washington, D.C. firm of Paul, Hastings, Janofsky & Walker, LLP. Mr. Dickinson's practice is devoted primarily to international commercial matters, including all aspects of political risk insurance, the Foreign Corrupt Practices Act, U.S. export laws, and economic sanctions. Mr. Dickinson works closely with a wide range of industries on FCPA matters, including establishment of compliance programs, due diligence in acquisitions, special investigations, and defense before U.S. regulators.

In 2005, Mr. Dickinson was appointed independent expert by Monsanto as part of a deferred prosecution agreement with the Department of Justice. Mr. Dickinson is currently an adjunct professor at the University of Michigan Law School where he teaches trans-national law and international commercial transaction. He has served on the board of editors of the FCPA Reporter since 1997 and is the director of the International Law Institute course on government integrity and anti-corruption initiatives.

Welcome to you, Mr. Dickinson.

Our third witness is David Nahmias. Is that a correct pronunciation? Mr. Nahmias is the United States attorney for the Northern district of Georgia. He serves as the chief Federal law enforcement officer in that district representing the United States in all criminal and civil litigation in Federal court.

In January of 2005, Mr. Nahmias was appointed to serve on the attorney general's advisory committee of the United States attorney, which reviews and recommends policies for Federal prosecutors nationwide. The attorney general also appointed Mr. Nahmias

as chairman of the White Collar Crime Subcommittee in October of 2007.

Prior to his appointment as the U.S. attorney, Mr. Nahmias served as a deputy assistant attorney general in the criminal division, the fraud section, the appellate section, and the capital case unit. Mr. Nahmias practiced with the law firm of Hogan & Hartson in Washington, D.C. and served as a law clerk for Judge Warren Silverman of the U.S. Circuit Court for the District of Columbia and for Justice Antonin Scalia of the Supreme Court of the United States.

Welcome to you, Mr. Nahmias.

Our fourth witness is George Terwilliger. Is that the correct pronunciation? Thank you—a partner with the law firm of White & Case, LLP, Mr. Terwilliger's clients include national and international companies and prominent individuals. He has represented the interests of major corporations and other institutions in civil and criminal enforcement proceedings, including financial crimes and environmental, anti-trust, health care, and tax matters, among others.

Prior to joining White & Case, LLP, Mr. Terwilliger served as the presidential appointee in two Administrations. He was the deputy attorney general in charge of all Justice Department operations, including crisis response. He also served as a presidentially appointed United States attorney for 5 years and for 8 years as a Federal prosecutor.

Welcome again to you.

Our final witness on our first panel is Brandon Garrett. Professor Garrett joined the University of Virginia Law School faculty in 2005 as an associate professor of law. His areas of research and publication include criminal procedure, wrongful convictions, habeas corpus, corporate crimes, civil rights, civil procedure, constitutional law, and new forms of public governance.

Prior to joining the University of Virginia School of Law faculty, Professor Garrett worked as an associate in New York City at Cochran, Neufeld & Scheck, LLP litigating wrongful convictions, DNA exoneration, and police brutality cases. He clerked for the Honorable Pierre Leval of the U.S. Court of Appeals for the 2nd Circuit.

I want to thank you all for your willingness to participate in today's hearing. Without objection, your written statements will be placed into the record in their entirety. And we are going to ask that you please limit your oral remarks to 5 minutes.

You will note that we have a lighting system that starts with a green light when your testimony time starts. At 4 minutes, you will get the yellow warning light that you have about a minute left to conclude your testimony. And then when your 5 minutes have expired, you will see the red light.

If you are caught mid-sentence when the red light comes on, we will naturally allow you to finish your last thought before moving on to our next witness. After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

With that, I would now invite Mr. Attorney General to please begin his oral testimony.

TESTIMONY OF THE HONORABLE JOHN ASHCROFT, THE ASHCROFT GROUP, LLC, WASHINGTON, DC

Mr. ASHCROFT. Good morning. And, Chairman Conyers, and Madam Chairwoman Sánchez, and other Members of the Committee, my written testimony has about eight points, which I would like to summarize in my oral remarks now and see if I can get that done in 5 minutes.

You have covered point one, my experience. And I thank you for reminding folks that I served as state auditor, state attorney general, governor of the state, senator, United States senator, serving on Committees like Labor and Human Resources and serving as the attorney general of the United States. I thank you.

Point two—the public safety effort that we rendered at the Department of Justice is one which is important and should be considered. While most Americans focused on the Department of Justice's record in successfully preventing another attack after September 11th, violent crime dropped to a 30-year low. Teen drug use dropped for the first time in a decade. Gun crime fell to record lows.

The department won the largest health care fraud cases in the Nation's history. There was a 73 percent increase in health care fraud recoveries totaling $4.5 billion. And after the corporate malignancies of the 1990's surfaced, shaking worldwide confidence in our financial markets, we organized the corporate fraud task force, which reestablished a standard of integrity restoring America's reputation for sound and secure markets. In dozens of corporate fraud prosecutions, over 600 corporate criminals were convicted, including 31 chief financial officers.

Point three—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. My fellow panel members have written about job loss and functional dislocations of traditional criminal prosecutions destroying entire corporations rather than addressing limited malignancies.

In my experience, prosecutors understand that a corporate indictment can be a corporate death sentence. A deferred prosecution can avoid the catastrophic collateral consequences and costs that are associated with corporate conviction.

Point four—as we seek to achieve with other tools in law enforcement, we should constantly seek to improve deferred prosecution agreements. As a result, I welcome and I support the principles announced in the additional guidelines from the Department of Justice.

Point five—as attorney general, I instructed every U.S. attorney to—and I did this personally eyeball to eyeball. I had meetings with each of them—to be blind to the party affiliation and political preferences of individuals. That principle guided my endeavors, including deferred prosecution agreements. It was true then. It should be true now.

Partisan consideration should be totally unwelcome in the enforcement of our Nation's laws. I learned only last week that during my tenure more Democrats were appointed as monitors than were Republicans. Partisan affiliation should neither qualify nor disqualify a person from being selected to do public service in the

role of a monitor. The focus should be on the quality of service and the results that are expected.

Point six—A monitor should be independent, should demand the highest quality work and the finest professional standards and be unwavering in the face of pressure. As you may or may not recall, there were plenty of people who attacked me for the way that I chose to defend America from terrorism. Those assaults did not shake my commitment to protect innocent American lives from terrorist attacks.

Similarly, a monitor should be immune to pressure and should not allow attacks from whatever sources to contaminate the cause of justice. I will not allow external pressures to compromise my responsibilities as a monitor.

Point seven—a monitor protects the public from further corporate abuse. In my case, five monitors are charged with reforming an entire industry which is mired in criminal allegations of Medicare fraud and kickbacks to surgeons. There are pending criminal cases against defendant corporations, corporations that have already paid $311 million in civil settlements. There is an active, ongoing criminal investigation into multi-million dollar payments to physicians that might have altered physicians' judgments about which devices they will implant or prescribe for their patients.

A surgeon who makes decisions based on the receipt of illegal kickbacks violates his responsibility to his patients, breaches the public trust, and breaks the law. It must be stopped.

Point number eight——

Ms. SÁNCHEZ. Mr. Ashcroft, your time is expired. But we will allow you to go ahead and summarize your final points before we move on.

Mr. ASHCROFT. Thank you very much. The marketplace rewards corporations who from the chaos of contamination bring the clarity of integrity. On January 29, 2008, Zimmer, for which I am the monitor, publicly announced that it will expand its compliance program to all product lines and all of its global operations, reforms that are well beyond the mandates of the deferred prosecution agreement.

After the first full quarter working with our monitoring team, Zimmer reported adjusted net earnings of $276 million, a 28 percent increase over the previous quarter. Zimmer now projects adjusted net earnings to exceed $1 billion in 2008. Following these announcements, the corporation's market capitalization increased $2.1 billion.

The $2.1 billion increase is in direct contrast to the steep market decline in stocks generally this year. The marketplace rewards a commitment to corporate integrity and results.

In summary, effective deferred prosecution agreements can protect taxpayers. They can serve the cause of justice and enhance corporate integrity. And I thank you for the additional time.

[The prepared statement of Mr. Ashcroft follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN D. ASHCROFT

Testimony of
The Honorable John Ashcroft
Former United States Attorney General
Chairman, The Ashcroft Group, LLC and Monitor for Zimmer, Inc.

Good Morning. I am here today at your request to discuss policy issues associated with the use of deferred prosecution agreements. I look forward to answering the Committee's questions.

Raised in Springfield, Missouri, I attended public schools until enrolling at Yale University, where I graduated with honors in 1964. I received my Juris Doctor from the University of Chicago in 1967. Prior to entering public service, I taught business law at Southwest Missouri State University in Springfield. I co-authored multiple editions of two college law textbooks with my wife, Janet, who is also an attorney. My career of public service began in 1973 as Missouri Auditor. I was later elected to two terms as the state's Attorney General. My colleagues in the non-partisan National Association of Attorneys General elected me as their President.

I served as Governor of Missouri from 1985 through 1993. As the State's Chief Executive Officer, I balanced eight consecutive budgets, building a $120 million budget surplus, a new "rainy day" fund and a $190 million cash operating reserve. My management earned Missouri the highest triple-A rating from the three major Wall Street bond rating agencies, while Missouri's per capita state and local tax burden ranked 49th in the nation. Financial World and City and State magazines credited me with making Missouri one of the best financially managed states. In 1991, the non-partisan National Governors Association voted me Chairman.

I was elected to the U.S. Senate in 1994, where I championed greater fiscal responsibility. As a member of the Senate Judiciary and Commerce Committees, I helped to reform laws regulating the telecommunications, aviation, transportation, banking and information technology industries. In the Senate, I also served on the Labor and Human Resources Committee (now referred to as the Health, Education, Labor and Pensions Committee) which had oversight responsibility concerning Federal health care laws and policies.

President George W. Bush announced his decision to nominate me to serve as U.S. Attorney General on December 22, 2000. As U.S. Attorney General, I ran the world's largest international law firm, a national prison system and the world's finest law enforcement agencies. Relying on my executive experience, I emphasized strategic management, integrating strategic planning, budgeting and performance measurement across the Department of Justice.

As Attorney General of the United States from 2001 to 2005, I was the Chief Executive Officer of a Cabinet agency larger than most Fortune 500 corporations. In that period, the Department of Justice had 112,000 employees and an annual operating budget of $22 billion. For the first time in its history, under my leadership, the

Department of Justice earned a clean audit opinion, a standard matched for each of the four years of my service. During my tenure as Attorney General, the Department of Justice aggressively and successfully prosecuted a wave of high-profile corporate fraud scandals and won the largest healthcare fraud cases in our nation's history. Over my four years of service, there was a 73% increase in monetary recoveries from healthcare fraud settlements and judgments, totaling nearly $4.5 billion. In our pursuit of dozens of corporate fraud scandals, over 600 corporate criminals were convicted, including 31 Chief Financial Officers.

Today, I serve as the Chairman of The Ashcroft Group, LLC and related enterprises which provide confidential strategic consulting and crisis counseling to major international corporations. I also hold the rank of Distinguished Professor of Law and Government at Regent University.

Investigation of Zimmer, Inc. and Other Orthopedic Industry Companies

As outlined in my February 15, 2008 correspondence to the Committee, I am limited in my ability to discuss particulars of *United States v. Zimmer*, the pending criminal case in the Federal District Court of New Jersey. As the Monitor in this case, my legal duties require me to exercise impartial, independent judgment regarding the conduct of this charged defendant in the United States District Court, District of New Jersey and to assist the United States Department of Justice in the ongoing criminal investigation of the broader orthopedic industry. Certain comments about the details of these legal responsibilities would violate both my ethical responsibilities as expressed in the American Bar Association Model Rules of Professional Responsibility and under the District of Columbia Bar Association Rules of Professional Conduct.

The deferred prosecution agreement governing my responsibilities as the Monitor to Zimmer, Inc. was entered into between the United States Attorney for New Jersey and Zimmer, Inc. on September 27, 2007 (the "DPA"). The DPA defines my responsibilities to both the United States Attorney ("Office") and to the "Company", as Zimmer is referred to in the DPA. A non-exhaustive list is included at the end of this testimony.

As the Committee is aware, there are five hip and knee replacement manufacturers currently under deferred prosecution agreements and non-prosecution agreements with the United States Department of Justice. According to the Department of Justice, these companies account for nearly 95 percent of the hip and knee surgical implant industry. The goal in addressing these companies' conduct simultaneously is to ensure that the alleged illegal kick-backs to health care professionals would be eradicated industry-wide, saving American taxpayers millions of dollars. Eliminating this conduct is particularly important within the hip and knee industry because approximately two-thirds of such replacements are on patients covered by Medicare. Specifically, the

criminal complaints accuse the "companies of using consulting agreements with orthopedic surgeons as inducements to use a particular company's artificial hip and knee reconstruction and replacement products."[1]

The investigation leading to those agreements included work done by the Office of Inspector General at the United States Department of Health and Human Services ("HHS"). On February 27, 2008, Gregory Demske, the HHS Assistant Inspector General for Legal Affairs, testified before the Senate Select Committee on Aging on the breadth of this alleged conduct. These facts are important to understanding the scope and size of the responsibilities of the hip and knee replacement industry monitors. Inspector Demske stated that "in 2005, the orthopedic device market for hips and knees witnessed domestic sales in excess of $5.1 billion and worldwide sales for more than $9.4 billion." He stated further that "[we [HHS]] found that during the years 2002 through 2006, four manufacturers (which controlled almost 75 percent of the hip and knee replacement market) paid physician consultants over $800 million under the terms of roughly 6,500 consulting agreements. Although many of these payments were for legitimate services, others were not." He noted that even "[r]esearchers reporting in medical journals, such as the Journal of the American Medical Association and the New England Journal of Medicine, have found that such financial industry-physician relationships are pervasive and that the impulse to reciprocate for even small gifts have a powerful influence on behavior."[2]

Physicians who make decisions about which hip or knee replacement is implanted in patients should make those decisions solely based on what is in the best interests of those patients. A surgeon who makes decisions based on the receipt of illegal kickbacks violates his responsibility to patients, breaches the public trust, and breaks the law.

Drawing on my past professional experiences, I have built an exceptional Monitoring team of approximately 30 professionals, including lawyers, investigators, accountants, and other business consultants, to ensure enforcement of the terms of the DPA in this criminal case. These professionals include former United States Attorneys, Assistant United States Attorneys, former Federal Bureau of Investigation Special Agents, former United States Department of Justice officials serving at the very highest levels at the Department, corporate attorneys, intellectual property attorneys, former Chief Operating Officers and Chief Executive Officers of major, multi-billion dollar

[1] United States Department of Justice, U.S. Attorney, District of New Jersey, September 27, 2007 press release http://www.usdoj.gov/usao/nj/press/index.html.

[2] "Examining the Relationship between the Medical Device Industry and Physicians" Testimony of Gregory E. Demske, Assistant Inspector General for Legal Affairs, before the Senate Special Committee on Aging, February 27, 2008.

corporations. Many of these professionals carry degrees from the nation's best institutions including: Yale, Yale Law School, Harvard Business School, Harvard Law School, the University of Virginia Law School, Wharton Business School, Georgetown Law School, Vanderbilt Law School and the University of Chicago Law School.

Deferred Prosecution Agreements and Federal Monitor Involvement – Background

Deferred prosecution agreements ("DPA" or "Agreement"), or pretrial diversion programs, have a long history in the United States system of justice. Under an Agreement, the prosecutor files a criminal complaint against a defendant. However, the prosecution of that complaint is deferred while the defendant complies with the terms of the Agreement. Once the terms of the Agreement have been met, usually after a set period of time, the prosecutor seeks dismissal of the criminal charges. The terms are usually significant and require the corporate defendant to take systemic remedial measures and to cooperate with the ongoing criminal investigation.

Deferred prosecution agreements originally were used in the context of juvenile offenders so they would not suffer the long term consequences associated with a criminal conviction or guilty plea. The same theory applies to the use of such Agreements in the corporate context. Collateral damage, or externalities, associated with a corporation under the cloud of a Federal indictment or conviction are severe, or even fatal. That is particularly true for a corporation which is highly regulated, has significant government contracts or whose business is dependent upon a reputation of corporate integrity.

It is my understanding that the United States Department of Justice entered into its first Agreement with a corporate defendant in 1992 in the Salomon Brothers case. In the late 1990's and early 2000's corporate scandals began to threaten the stability and worldwide trust of the United States economy. The corporate abuses led to the formation of the President's Corporate Fraud Task Force and made uncovering and prosecuting corporate fraud a government-wide priority.

The Corporate Fraud Task Force resulted in a significant increase in prosecutions. As previously stated, during my tenure as the Attorney General, 600 corporate criminals were convicted, including 31 Chief Financial Officers. In addition, these prosecutions reminded prosecutors and policy makers of the significant collateral damage resulting from a Federal indictment. Before being indicted for its alleged wrongdoing in the Enron scandal, Arthur Andersen was an American accounting icon with annual worldwide revenues of $9.3 billion and over 25,000 employees. Following the indictment the company collapsed and those 25,000 employees lost their jobs. In working with the Corporate Fraud Task Force it became clear to me that while

addressing past criminal conduct was important, changing the corporate culture that led to the activity was necessary to prevent the offensive conduct from reoccurring.

The second deferred prosecution agreement was entered into in 1994 with Prudential Securities.[3] The Prudential Securities case was the first time the United States Department of Justice made retaining a monitor a condition of the agreement. In the five years following the Prudential Securities case, the Department of Justice continued to use deferred prosecution and non prosecution agreements as a tool to address corporate wrongdoing and misconduct. In 1999, the Department issued guidance in the form of what is commonly referred to as the "Holder Memo".[4] This guidance memorandum was drafted by Eric Holder, Jr., the Deputy Attorney General of the Department of Justice. It stated, in part, that prosecutors should consider the following eight factors in determining whether to charge a corporation for corporate fraud or other wrongdoing:

- Nature/seriousness of offense
- Pervasiveness of wrongdoing
- Prior conduct of company
- Whether company voluntarily disclosed wrongdoing and its willingness to cooperate in investigation
- Adequacy of company's pre-existing compliance program
- Remedial actions of company to deal with wrongdoing
- Impact a prosecution may have on innocent third parties, such as shareholders, pension holders and company employees
- Alternative mechanisms of prosecutors to punish company

The above eight factors were echoed four years later in a memorandum entitled "Principles of Federal Prosecution of Business Organizations", better known as the "Thompson Memo", issued by the then-Deputy Attorney General Larry D. Thompson in

[3] *See* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?, 105* MICH. L. REV. 1713 (2007).

[4] *See* Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999).

January 2003, which reiterated the above considerations while adding a ninth factor, company cooperation.[5]

The Department of Justice's current stance on corporate prosecution and the use of corporate monitors is enunciated in a memorandum issued on December 12, 2006 by U.S. Deputy Attorney General Paul J. McNulty, which was designed to supersede and replace the guidance contained in the Thompson Memo.[6]

As noted in the Department of Justice's press release regarding the McNulty Memo, the guidance contained therein continues to require consideration of the factors denoted in the Thompson Memo but adds new restrictions for prosecutors seeking privileged information from companies. Specifically, the Department created new approval requirements that federal prosecutors must comply with before they can request waivers of attorney-client privilege and work product protections from corporations in criminal investigations. The McNulty Memo instructs federal prosecutors that waivers of the attorney-client privilege can only be sought when there is a "legitimate need." He states further that when "federal prosecutors seek privileged attorney-client communications or legal advice from a company, the U.S. Attorney must obtain written approval from the Deputy Attorney General."[7]

A general principle noted in the McNulty Memo concerns the Department's philosophy regarding the prosecution of companies. As stated therein, "[c]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime." Thus, while prosecutors must apply the same factors in determining whether to charge a corporation as they do with respect to individuals, "due to the nature of the corporate 'person,'" prosecutors conducting an investigation, determining whether to bring charges, and negotiating plea agreements, must consider the factors previously outlined in the Holder Memo, as amended by the Thompson Memo, in reaching a decision as to the proper treatment of a corporate target.

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[5] *See* Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003).

[6] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (December 12, 2006).

[7] Department of Justice Press Release: "U.S. Deputy Attorney General Paul J. McNulty Revises Chargin Guidelines for Prosecuting Corporate Fraud", December 12, 2006.

In connection with this effort, Deputy Attorney General Paul J. McNulty was quoted as saying, "Our efforts to investigate and prosecute corporate fraud in the past five years through [President Bush]'s corporate initiative have been tremendously successful. With this new guidance, we want to encourage corporations to prevent corruption through self-policing and continue to punish wrongdoers through cooperation with law enforcement."

In addition to preserving innocent employee jobs, deferred prosecution agreements are thought to provide an opportunity to preserve shareholder value and company market share. They provide defendant companies with legal and business guidance on how to conduct their businesses legally and ethically. They do this at the expense of the offending business and thereby free Department of Justice resources to prosecute other law-breaking companies. A deferred prosecution agreement allows a company to maintain operations while rectifying previous wrongdoing or unlawful behavior and allows the Department of Justice to resume prosecution in the event a company fails to comply with its deferred prosecution agreement responsibilities.

A Federal monitor has a unique and critical role in the deferred prosecution agreement structure. One hundred percent of the monitor's fees are paid for by the defendant company. This system has been designed to place the cost of compliance onto the defendant company rather than further burdening American taxpayers with the cost of rectifying any improper, fraudulent, or illegal activity.

The fact that no taxpayer money is spent on monitor's fees helps insulate a monitor from political pressure. A monitor and the monitor's team is a force multiplier for the investigators, prosecutors, and regulators to ensure ongoing and meaningful changes are made by a company. This protects the public and the corporate stakeholders' interest much better than just allowing a company to pay a large fine and agree to systemic changes without any ongoing oversight.

While a monitor assists the prosecutor in the ongoing criminal investigation, the monitor also is responsible for ensuring that the company has systems and processes in place to reduce the likelihood that the conduct subject to the criminal complaint will occur in the future. My current monitoring responsibilities are unique in this respect. Because this investigation involves an entire industry, the monitors involved in these five deferred prosecution and non-prosecution agreements have an additional responsibility of not only investigating their own companies, but also assisting in the investigations of the other orthopedic manufacturers and providers. The investigations also include investigating health care professionals benefiting from improper arrangements.

Monitor Responsibilities and Authorities under September 27, 2007 Deferred Prosecution Agreement /Non Prosecution Agreements

To address, as precisely as possible, the Monitor's responsibilities and authorities, below is a non-exhaustive list of such responsibilities under the Deferred Prosecution Agreement which guides my work.[8] These are public documents relating to the monitorship for which I have responsibility. Because they are matters of public record and not law enforcement sensitive information, I am providing concepts from those documents as illustrations of the nature of modern monitorship.

Generally, the DPA requires that Zimmer "retain an outside, independent individual (the "Monitor") selected by the Office, *after consultation with the Company,* to evaluate and monitor the Company's compliance with the DPA." In addition to evaluating and monitoring the Company's compliance with every aspect of the DPA, the Agreement requires that the Monitor fulfill the following additional responsibilities and gives the Monitor the following authorities. The Monitor shall:

1. Have access to all non-privileged Company documents and information the Monitor determines are reasonably necessary to assist in the execution of his or her duties.

2. Receive notification by the Company of "any credible evidence of criminal conduct or serious wrongdoing relating to federal health care laws by the Company, its officers, employees and agents."

3. Receive all "relevant non-privileged documents and information concerning such allegations,"

4. Review and evaluate all Company policies, practices, and procedures relating to compliance with the Deferred Prosecution Agreement and the below subjects. Report and make written recommendations relating to compliance with the DPA and those same subjects:

   A. Review corporate structure and governance relative to selecting, engaging and paying consultants;

   B. Review the effectiveness of the company's procedures and practices to select, engage and pay consultants and the related legal, compliance,

[8] The Deferred Prosecution Agreement entered into between the United States Attorney's Office for the District of New Jersey and Zimmer, Inc. on September 27, 2007 is available at http:www.usdoj.gov/usao/nj/press/files/pdffiles/Deferred%20pros%20agreementZimmerfinal.pdf and www.zimmer.com.

research and development, marketing, sales, internal controls, and finance functions;

C. Review the effectiveness of the company's training and education programs in federal and state health care laws concerning relationships between the Company and consultants; Medicare, Medicaid, and other health care benefit programs; ethics; and compliance and corporate governance issues relating to federal and state health care laws;

D. Review the structure and content of agreements memorializing arrangements to engage and pay Consultants in exchange for the provision of Services the Company, and the Company's payments to Consultants made thereunder. The Monitor shall have access to and may review all previously entered agreements to the extent he or she reasonably deems necessary; and

E. Review the influence, actual or potential, over consultants' selection of the Company's product as a result of the financial relationships between consultants and the Company.

5. Monitor and review the company's compliance with the DPA and all applicable federal and state health care laws, statutes, regulations, and programs, including the Anti-Kickback Statute, relating to the sale and marketing of hip and knee reconstruction and replacement products.

6. Cooperate with federal agencies and provide information about the Company's compliance with the DPA.

7. Provide written reports to the Office [U.S. Attorney of the District of New Jersey] on a quarterly basis, beginning in January 2008

8. Make recommendations to the Company to take any steps deemed reasonably necessary for compliance with the DPA *and* to enhance the Company's future compliance with federal and state health care laws as related to the sale and marketing of joint reconstruction and replacement products, and require the Company to take such steps when it is agreed that they are "reasonable and necessary" for compliance with the DPA.

9. Retain, at the Company's expense (after consultation with the Company and the Office) consultants, accountants or other professionals deemed "reasonably necessary"

10. Monitor and approve the Company's Annual Needs Assessment (the Annual Needs Assessment determines the reasonable needs for educational consulting services and new product-development consultants).[9]

11. Approve modifications to that Annual Needs Assessment.

12. Review consultant contracts before the Company's 2008 Annual Needs Assessment is approved. Specifically, the Monitor shall:

- Review and approve all new or renewed consulting agreements;
- Review, in the Monitor's discretion, any requests for consulting services; and
- Review, in the Monitor's discretion, any payments made to consultants

13. Review consultant contracts executed after the Company's 2008 Annual Needs Assessment is approved. Specifically, the Monitor shall:

- Review and approve all new consulting agreements;
- Review, in the Monitor's discretion, any renewal of a consulting agreement;
- Review, in the Monitor's discretion, any requests for consulting services; and
- Review, in the Monitor's discretion, any payments made to consultants

14. Review, in the Monitor's discretion, any payments made to Continuing Medical Education (CME), reimbursement specialists, any non-physician engineering or marketing consultants, or any person excluded from the definition of "Consultant" in the DPA.

15. Review, in the Monitor's discretion, any payments made to consultants as honoraria, fellowships, gifts, donations, charitable contributions and other non-service payments.

[9] United States Department of Justice, U.S. Attorney, District of New Jersey, September 27, 2007 press release http://www.usdoj.gov/usao/nj/press/index.html

15. Review and approve any new or substitute consultants.

16. Approve any changes to the hourly rate or any payments [to consultants] made at a rate other than the hourly rate established by the DPA.

17. Monitor the consultant [website] disclosure obligations of the Company.

18. Monitor the information received by the Company's confidential hotline and e-mail. Follow up and investigate any allegations of wrongdoing or criminal activity.

19. Prohibit the Company from entering into any consultant agreement deemed to violate the DPA.

20. Evaluate each new consultant to be considered for a consulting agreement.

21. Approve the Company's "standard form" for documentation and verification of consulting services provided.

22. Approve any "indirect" compensation or remuneration to consultants.

23. Ensure that the aggregate royalties paid per project to all Consultants do not exceed fair market value.

24. Approve Company processes to review individual Consultant contributions on product development teams to ensure that intellectual property has been provided by the Consultant.

25. Review Company determinations whether "intellectual property" has been provided, determine whether royalty based contracts are reasonable in duration. Approve the identification of royalty-bearing products.

26. Approve the Company's "mandatory participants" for required training.

27. Approve the Company's corporate integrity and legal training programs.

This list of responsibilities guides my daily work and that of my monitoring team. It drives our deadlines and our priorities. However, this list reflects just a fraction of a monitor's duties. Because DPAs also require a monitor to determine a company's compliance with all of the requirements under the DPA, to fully appreciate the breadth and scope of all of a monitor's responsibilities you should also review the company's obligations under a DPA.

I believe this list of monitor responsibilities is significantly characteristic of previous deferred prosecution agreements. Each agreement addresses a unique set of facts, corporate culture, and challenges. Not only do the circumstances of various monitorships differ, the requirements specific to a monitorship evolve depending on the level of cooperation by the charged entity and the broad range of remedial strategies which may be employed. As a monitor fulfills his or her obligations, some responsibilities become more important and more time consuming while others take on a less significant role.

It is my hope that the Committee will gain a clear understanding of the policies associated with Deferred Prosecution or Non-Prosecution Agreements at the Department of Justice. It also is my hope that the Committee will understand the responsibilities of monitors generally. I look forward to answering your questions.

Ms. SÁNCHEZ. We thank you for your testimony, Mr. Ashcroft.

Mr. Dickinson, I would invite you to provide your testimony at this time.

TESTIMONY OF TIMOTHY L. DICKINSON, PAUL, HASTINGS, JANOFSKY, & WALKER, LLP, WASHINGTON, DC

Mr. DICKINSON. Thank you, Madam Chairwoman and Mr. Chairman, Members of the Committee. As you noted, I am a partner in the law firm of Paul, Hastings, Janofsky & Walker. I also serve as an adjunct professor at the University of Michigan Law School and hold a number of bar association and other positions.

In addition, I serve as the independent consultant for Monsanto Company and Delta and Pineland Company. I have been in practice for over 25 years and have counseled companies on issues relating to the Foreign Corrupt Practices Act, including DPAs for my entire career. I also assisted in developing the World Bank's voluntary disclosure program, VDP, and worked with bank staff to advise a VDP participant on improving its compliance program.

It is a great pleasure to be here today. And I should state at the outset that I am here in my personal capacity only and not as a representative of any company, client, law firm, law school, et cetera.

In the interest of time, I will limit my remarks to three areas. First, when is a monitor an appropriate component of a deferred prosecution agreement? Second, in such circumstances, how should the monitor be appointed? And third, how should the scope of the monitor's work be determined?

To date, no guidelines have been issued outlining the appropriate circumstances for appointment of a monitor as a part of a DPA. This is troubling because of the potential inconsistency and lack of predictability if, in similar circumstances, certain prosecutors insist upon a monitor and others do not. To remedy this concern, I would favor guidance from the Department of Justice that would establish clear criteria for prosecutors to follow when considering the inclusion of a monitor in the terms of a DPA.

I would favor the imposition of a monitor under narrow circumstances such as when a company has elected not to establish a comprehensive compliance program or when there has been a fundamental breakdown in a company's internal controls or compliance program that the company has not adequately addressed itself. Such a standard would leave some flexibility to prosecutors but would also provide companies with the option to take aggressive remedial actions themselves in lieu of the intrusion of a corporate monitor.

With respect to the appointment process prior to March 7, there were no guidelines. To date, the appointment process appears to be a mix of prosecutor appointments, recommendations for approvals, as, Madam Chair, you noted, but without any particular guidance. While I recognize that some flexibility in the appointment process may be beneficial to the government's objectives, the lack of a defined methodology for the appointment does not, in my view, serve the ultimate government's objective of ensuring compliance with the law.

I would propose that the appointment process follow a fairly simple formula. First, the company involved in the deferred prosecution would propose to the government its preferred candidate. Such candidate would be required to be clearly qualified in the substantive area of law at issue. As I am sure everyone is aware, monitors have been utilized in a number of types of cases, including securities fraud, tax issues, export violations, and my field, the Foreign Corrupt Practices Act.

It is my view that anyone who a company would propose as its monitor should have the requisite demonstrated expertise such that the government and the public can be assured that the monitor's duties will be carried out in an effective manner. Upon receipt of the company's proposed candidate, I would recommend that the government be given a veto over such appointment should the government believe that the person proposed does not possess the requisite skills or independent integrity to ensure a successful execution of his or her duties. I should point out that this was the formula or a similar formula to that which resulted in my own monitorship.

Finally, the methodology for establishing the scope of the monitor's work is another topic that might be considered. In order, once again, to ensure a successful monitorship—and I am mindful that some critics may say that my use of the term successful is by definition an impossible result to achieve—all parties involved, including the government, should agree at the early stages of any monitorship as to the scope, timing, and budget of the monitor's activities.

Of course, adjustments may be appropriate and necessary, depending on what transpires during the monitor's terms. And some flexibility must be allowed.

This would eliminate some of the uncertainty as to cost of monitors, which need to be factored into a company's analysis for entering into the agreement and would reduce the potential abuses of monitors. Thus, I would welcome guidelines to be issued by the Justice Department that would set out in a transparent manner when a monitor would be deemed necessary as well as the methodology to be followed in the appointment process and in defining the scope of work.

I would be happy to elaborate on my comments. I have included additional comments in my written statement. And thank you very much.

[The prepared statement of Mr. Dickinson follows:]

PREPARED STATEMENT OF TIMOTHY L. DICKINSON

TESTIMONY OF

TIMOTHY L. DICKINSON

HEARING ON
"DEFERRED PROSECUTION:
SHOULD CORPORATE SETTLEMENT AGREEMENTS
BE WITHOUT GUIDELINES?"

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
HOUSE COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

MARCH 11, 2008

Mr. Chairman and Members of the Committee,

My name is Timothy L. Dickinson. I am a partner in the law firm of Paul, Hastings, Janofsky & Walker; I also serve as an adjunct professor at the University of Michigan Law School, and hold a number of Bar Association and other positions. In addition, I serve as the Independent Consultant for Monsanto Company and Delta and Pine Land Company. I have been in private practice for over 25 years and have counseled companies on issues relating to the Foreign Corrupt Practices Act, including DPAs, for my entire career. I also assisted in developing the World Bank's Voluntary Disclosure Program and worked with Bank staff to advise a VDP participant on improving its compliance program.

It is a great pleasure to be here today and I should state at the outset that I am here in my personal capacity only and not as a representative of any company, client, law firm, law school, etc.

In the interest of time, I will limit my remarks to three areas; first, when is a monitor an appropriate component of a deferred prosecution agreement; second, in such circumstances, how should the monitor be appointed; and third, how should the scope of the monitor's work be determined.

To date, no guidelines have been issued outlining the appropriate circumstances for appointment of a monitor as part of a DPA. This is troubling because of the potential inconsistency and lack of predictability if, in similar circumstances, certain prosecutors insist upon a monitor and others do not. To remedy this concern, I would favor guidance from the Department of Justice that would establish clear criteria for prosecutors to follow when considering the inclusion of a monitor in the terms of a DPA.

I would favor the imposition of a monitor under fairly narrow circumstances, such as when a company has elected not to establish any compliance program or when there has been a fundamental breakdown in a company's internal controls or compliance program that the company

has not adequately addressed itself. Such a standard would leave some flexibility to prosecutors but would provide companies the option to take aggressive remedial actions themselves in lieu of the intrusion of a corporate monitor. A monitor may not be deemed necessary if a company undertakes aggressive and comprehensive remedial actions.

With respect to the appointment process, there are also no specific statutory or other guidelines. To date, the appointment process appears to be a mix of prosecutor appointments, recommendations or approvals, but without any particular guidance by Congress, the relevant government agency or otherwise.

While I recognize that some flexibility in the appointment process may be beneficial to the government's objectives, the lack of a defined methodology for appointment does not, in my view, serve the ultimate government objective of ensuring ongoing compliance with the law.

I would propose that the appointment process follow a relatively simple formula. First, the company involved in the deferred prosecution would propose to the government its preferred candidate. Such candidate would be required to be clearly qualified in the substantive area of law at issue. As I'm sure you are aware, monitors have been utilized in a number of types of cases, including securities fraud, tax issues, export violations and, my field, the Foreign Corrupt Practices Act. It is my view that anyone who a company would propose as its monitor should have the requisite demonstrated expertise such that the government and the public can be assured that the monitor's duties will be carried out in an effective manner.

Upon receipt of the company's proposed candidate, I would recommend that the government be given a veto over such appointment should the government believe that the person proposed does not possess the requisite skills or independent integrity to ensure a successful execution of his or her duties.

This process would be continued as many times as necessary until both the company to be monitored and the government agree on a candidate. This formula is similar to the process which resulted in my monitorship.

The value of this process, I believe, would be substantial. It would allow the "monitee" to consider the experience and expertise of various candidates and the company might take more ownership in the changes to its practices required by the monitor. The government's ability to exercise a veto would ensure that the monitor possesses the requisite skills and integrity to properly execute his or her duties without any criticism as to the appointment process.

Finally, the methodology for establishing the scope of the monitor's work is another topic that might be considered. In order, once again, to ensure a successful monitorship (and I am mindful that some critics may say that my use of that term is by definition impossible to achieve), all parties involved, including the government, should agree at the early stages of any monitorship as to the scope, timing and budget of the monitor's activities. Of course, adjustments may be appropriate depending on what transpires during the monitor's term. This would eliminate some of the uncertainty as to the costs of the monitor which need to be factored into a company's analysis for entering into the agreement and would reduce potential abuses by monitors who may seek a blank check for performing their duties.

Thus, I would welcome guidelines to be issued by the Justice Department that would set out in a transparent manner when a monitor would be deemed necessary as well as the methodology to be followed in the appointment process and in defining the scope of work. I would be happy to elaborate on my comments or respond to any questions. Thank you.

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Michigan Law Review

June, 2007

105 Mich. L. Rev. 1713

LENGTH: 23252 words

ARTICLE: THE CORPORATE MONITOR: THE NEW CORPORATE CZAR? +

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SUMMARY:
... Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. ... The corporate monitor of today can be traced to the special masters of the past. ... As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 Prudential Securities case in which the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the company as per a DPA. ... Monitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. ... A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. ... However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor. ... Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors. ...

HIGHLIGHT: Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. These monitors also permit enforcement authorities, such as the Securities & Exchange Commission and others, to leverage their enforcement resources in overseeing corporate behavior. However, there are few descriptive or normative analyses of the role and scope of corporate monitors. This paper provides such an analysis. After sketching out the historical development of corporate monitors, the paper examines the most common features of the current set of monitor appointments supplemented by interviews with monitors. This is followed by a normative analysis that examines when

it is desirable to appoint monitors and what powers and obligations they should have. Based on this analysis, we provide a number of recommendations for enhancing the potential of corporate monitors to serve a useful deterrent and law enforcement function without being unduly burdensome on corporations. This involves, among other things, discussion of the kinds of powers monitors should have and the fiduciary duties monitors should owe to the shareholders whose businesses they are monitoring.

TEXT:
[*1714]

Introduction

Following the recent spate of corporate scandals, government enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. n1 These monitors also permit enforcement authorities, such as the Securities & Exchange Commission ("SEC") and others, to leverage their enforcement resources in overseeing corporate behavior. However, there are few descriptive or normative analyses of the role and scope of corporate monitors. n2 This paper provides such an analysis.

We begin with an operative definition of corporate monitors - people appointed to supervise a firm for a certain period of time as part of a Deferred Prosecution Agreement ("DPA") or a NonProsecution Agreement ("NPA"). Such agreements are entered into by government regulators and the firms that are the subject of enforcement actions. If the firm satisfies the terms of this agreement, then prosecution can be avoided. n3 The monitor's range of influence in these agreements may be limited to only compliance issues or may extend more broadly to many (or all) aspects of the firm's operations. Further, the monitor's compensation is paid for by the firm.

With this definition in mind, we move on to Part I where we sketch the historical development of corporate monitors in order to better understand the enforcement background against which they developed. Part II then examines the most common features of the current set of monitor [*1715] appointments providing us with an overview of this new enforcement mechanism. The details of these arrangements are supplemented by interviews with monitors to provide a deeper sense of how these mechanisms work. Part III follows with a normative analysis that examines when it is desirable to appoint monitors and what powers and obligations they should have. Based on this analysis, we provide a number of recommendations for enhancing the potential of corporate monitors to serve a useful deterrent and law enforcement function without being unduly burdensome on corporations. We conclude with recommendations and observations on the potential growth of the corporate monitor.

I. From Master to Monitor

Although corporate monitors are relatively recent law-enforcement innovations, they have long and deep historical roots. We begin by discussing the antecedents of the corporate monitor in order to better understand the context in which the monitor developed.

A. Historical Underpinnings

The corporate monitor of today can be traced to the special masters of the past. n4 Special masters originated in the use of adjuncts to the judiciary in English Chancery practices dating back to the early sixteenth century. n5 Thus, the use of outside supervisory resources has a lengthy historical pedigree. Moreover, the evolution of the corporate monitor follows in a somewhat logical progression from a court's use of "outside" resources to leverage its own supervisory objectives. We begin by examining how these special masters operated and how the corporate monitor sprung from them.

A number of scholars have analyzed the appointment authority and duties of special masters. n6 Indeed, it seems courts have often turned to outside parties for assistance, both with prejudgment adjudicatory activities such as the

course of discovery and with postjudgment duties such as calculation of damages and implementation and monitoring of consent decrees, particularly in employment discrimination class actions. n7

[*1716] The power to appoint such outside parties appears to stem from at least two sources. First, as Justice Brandeis succinctly said in 1920:

Courts have ... inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. n8

Second, *Rule 53 of the Federal Rules of Civil Procedure* specifically authorizes special masters (unless a statute provides otherwise) to perform duties consented to by the parties, hold trial proceedings, make or recommend findings of fact on issues in certain circumstances, and address pretrial and post-trial matters that cannot be attended to effectively and in a timely manner by an available district or magistrate judge. n9

Although special masters provide a template on which to build corporate monitors, they do not provide the strict legal bases for the appointment of monitors. Neither Rule 53 nor the court's inherent powers are the basis for the appointment of monitors. n10 Corporate monitors are appointed as part of a negotiated settlement before judgment between a firm and a government enforcement agency. n11 These settlements are termed Deferred Prosecution Agreements or Non-Prosecution Agreements. n12 The monitor is then a condition of the DPA or NPA (much like a monetary penalty). We discuss how this negotiated entity developed below.

B. RICO and Beyond

The closest recent ancestors of the modern corporate monitor appeared roughly twenty-five years ago with the implementation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Between 1982 and 2004, the Department of Justice ("DOJ") filed at least twenty civil cases asserting RICO violations and, in virtually every case, won the appointment of a trustee, monitor, or other form of court-appointed overseer. n13 Thus, there was an increase in the appointment of people who had some kind of continuing oversight responsibilities for a corporation. However, these people were appointed as a result of a postjudgment action, whereas the corporate |*1717| monitor is primarily a creation of DPAs and NPAs (i.e., settlements) between regulators and firms before any court verdict is announced.

Settlements were also increasingly used by enforcement authorities. We can see this in the cease-and-desist orders that the SEC used as part of its consent decrees. n14 These orders permitted the SEC to hold companies in contempt if they violated the terms of the cease-and-desist order which was part of the negotiated settlement (i.e., consent decree). n15 Such settlements did not, however, include any ongoing supervisory function by an outside party. n16

Thus, RICO provides the modern antecedents for ongoing supervisors or monitors after a court judgment, and the SEC's cease-and-desist orders to police settlements regulators reached with firms are examples of negotiated prejudgment settlements (i.e., consent decrees). The corporate monitor reflects the confluence of these two streams - ongoing supervision a la RICO and supervision of a negotiated settlement with a government regulator a la SEC cease-and-desist orders.

C. Prudential and DOJ Memoranda

As these enforcement methods developed, regulators began to experiment with various types of settlements leading to the landmark 1994 Prudential Securities case in which the government provided for the first modern appointment of an independent expert whose role was to monitor compliance of the company as per a DPA. n17 Unlike more contemporary DPAs and NPAs, the Prudential arrangement was reached through a series of letters from the company's

counsel to the U.S. Attorney for the Southern District of New York n18 [*1718] and a response from the Department of Justice, n19 along with a complaint that set out the alleged violations. n20

Of particular note in this case are the factors raised by Prudential as reasons why a criminal prosecution of Prudential Securities Incorporated ("PSI," the Prudential subsidiary implicated in the wrongdoing) would be inappropriate. The government adopted this reasoning to justify why a deferral of prosecution was eventually chosen. These factors included (1) the time of the alleged misconduct (i.e. during the tenure of prior management); (2) the time lag from the alleged conduct to the prosecution; (3) the fact that PSI had spent over $ 1 billion to fund and administer claims of investors; (4) the fact that PSI accepted responsibility for all valid investor claims (including, according to PSI, $ 330 million in its settlement with the SEC, $ 41 million to state and federal regulators, $ 490 million in settlements with investors, and $ 195 million in expenses and legal fees); and (5) that PSI cooperated extensively with government investigators and enhanced its compliance efforts. n21

Following Prudential, the DOJ and SEC increasingly relied on the corporate "monitor" or independent expert in settlements. For example, two years after Prudential, Coopers & Lybrand settled charges of bid rigging, concealing information, and lying during grand jury testimony. n22 This resulted in a corporate monitor with even more authority than that of the monitor overseeing Prudential. n23 Thus, even before the corporate scandals of Enron and Worldcom and the brave new world of Sarbanes-Oxley, this relatively new form of enforcement tool was coming to life. n24

However, there was a lack of understanding - some might say outright confusion - as to when monitors might be appointed as part of a DPA or NPA and, more generally, when corporations themselves might be charged criminally. Such uncertainty was eventually recognized and partially addressed by the government with the publication in 1999 of the "Federal [*1719] Prosecution of Corporations," which soon became known as the "Holder Memo." n25

The Holder Memo set out eight factors for prosecutors to consider in their deliberations as to whether a criminal case should be brought for corporate malfeasance: (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the prior conduct of the company, (4) whether the company voluntarily disclosed the wrongdoing and its willingness to cooperate in the investigation of its agents, (5) the adequacy of the company's compliance program, (6) the remedial actions taken by the company to deal with the wrongdoing, (7) the impact a prosecution might have on innocent third parties, and (8) the alternative mechanisms prosecutors might choose to punish the company. n26 Thus, the Holder Memo provided parties with greater insight into what prosecutors were going to consider when determining whether and what enforcements actions would be taken. This encouraged companies to take steps such as beefing up compliance programs in order to enhance their chances for a lesser sanction or avoiding prosecution altogether.

However, the Holder Memo provides little guidance on the factors to be considered in appointing a monitor as part of a DPA or NPA. As a result, some cite the addition of a ninth factor, the cooperation of the company, which was added in the now-famous "Thompson Memo" (issued by then Deputy Attorney General Larry Thompson in 2003), as the primary factor that has led to the modern-day monitor/independent expert. n27 The difference between this ninth factor and the Holder Memo's fourth factor may be that in the Thompson memo, cooperation increasingly meant waiving attorney-client privilege. Following the issuance of the Thompson Memo, government authorities appear to have put monitors into action in a wide range of cases, including securities fraud, n28 tax fraud, n29 [*1720] and at least six cases involving charges under the Foreign Corrupt Practices Act ("FCPA"). n30

While each of these cases involves different circumstances, and in each case the monitor has different duties and obligations, it appears that the scope of the monitor's powers is increasing. For example, the recent dismissal of both the CEO and general counsel of Bristol-Myers Squibb as a result of recommendations by Bristol's monitor underscores this increasing power. n31 This was further articulated by Judge Rakoff in his final judgment in the WorldCom case:

While the Corporate Monitor's efforts were initially directed at preventing corporate looting and document destruction, his role and duties have steadily expanded, with the parties' full consent, to the point where he now acts not only as financial watchdog (in which capacity he has saved the company tens of millions of dollars) but also as an overseer who has initiated vast improvements in the company's internal controls and corporate governance. n32

Through this brief historical sketch, we can see that these various oversight institutions developed and morphed over time. However, the presence and increasing power of monitors raises a number of questions. For example, when is it appropriate to appoint an outside supervisor like a monitor, and should monitors have fiduciary duties or other obligations to shareholders? These and other questions must be examined and resolved before we can adequately assess whether monitors are accomplishing their goals. In the next Part we lay out the process of appointing corporate monitors and their powers, followed in Part III with an analysis of the questions noted above.

II. The Process of Appointing Corporate Monitors and Their Powers

The underlying investigation into alleged wrongdoing is the starting point for our inquiry. Once an investigation is started, the government gathers information and decides whether it will investigate further, pursue charges, or drop the investigation. If the investigation is not dropped, then the issue becomes whether the case will proceed to charging and adjudication or settle before then.

[*1721] Both the government and the firm have strong incentives to settle the case. For the government, corporate crime cases are difficult, complex, and expensive cases to prosecute and tend to use a great deal of resources. n33 In addition, corporations normally have access to greater resources than the average criminal defendant, which increases the likelihood of a vigorous defense and potential appeals. Thus, from the government's perspective, it might be better to obtain something certain through a settlement rather than to take its chances with a lengthy, complex, and expensive trial.

For the firm and its executives, the advantages of settling early or avoiding charges can be significant. n34 The avoidance of severe reputational losses may be significant enough to motivate firms and executives to settle. In particular, executives who may face the threat of prison might be strongly inclined to settle their own charges, as well as the corporation's. Thus, both parties have strong incentives to settle, leading to many DPAs and NPAs. n35

As part of the DPA or NPA, the government frequently seeks to have a monitor appointed with ongoing supervisory responsibility over the firm or some aspect of its operations. This helps to leverage enforcement resources but also may be useful in some other instances that we discuss below. The powers of monitors can vary - and increasingly they have extensive powers - but they are normally appointed for limited terms. n36 It is important to note that if a monitor is not satisfied with the firm's efforts, then, in certain cases, the monitor can recommend to the enforcement agency that the DPA be removed and a prosecution be restarted. This might have disastrous consequences for the firm and its executives. Indeed, some suggest that Bristol-Myers may have fired their CEO and general counsel to induce their monitor not to seek removal of the DPA. n37

To obtain a better sense of what monitoring arrangements are like, we discuss the kinds of cases in which monitors have been appointed, who are the most likely monitors, and what has been the scope of their powers to date. We examined twenty-five cases in which DPAs or NPAs required the appointment of someone with ongoing supervisory responsibility. n38 In these cases, we found that eleven were primarily securities fraud cases, three were primarily tax evasion and fraud cases, six were primarily bribery and FCPA cases, two were primarily related to suspicious activity reports, two related to healthcare fraud, and one related to unauthorized exports of defense [*1722] articles. n39 These categories overlap somewhat because the SEC has required monitors in some FCPA cases where it found a fundamental breakdown in financial controls (which may be correlated with increased chances for financial restatements and securities fraud). n40

From our perspective, the importance of this is that the practice of using monitors is not isolated to one particular

area of regulation but rather seems to be used with increasing frequency in a number of areas. n41 Thus, the SEC, the DOJ, the IRS, and others have all used monitors. Although the use of monitors has not reached endemic proportions just yet, it may be likely in the future. For example, the World Bank is now considering how to impose this feature in their projects and disciplinary actions. n42 Moreover, it has been rumored that the government's insistence on a monitor was one of the key elements causing the collapse of negotiations and subsequent indictment of the law firm of Milberg Weiss. n43

Although monitors have been appointed in a number of different areas, the identities of monitors have tended to be fairly uniform. Of the thirteen DPAs for which monitor identity and experience is available, the vast majority are former judges, prosecutors, or SEC attorneys. n44 But a more fundamental issue lies in the question of who actually selects the monitor: the firm or the government agency? In some cases, the agency provides an approved list of candidates from which to choose, and in others, the agency simply retains veto power over the appointment. n45 In any case, it is clear that [*1723] the agency has tremendous bargaining power given the weight of potential criminal penalties and imprisonment for the executives. It is perhaps not a stretch to say that the agency, in effect, chooses the monitor, even though it is the firm that pays for the monitor's services.

Finally, it becomes imperative to discuss the powers that monitors seem to possess. The process of determining their powers is a negotiation between the firm and the government resulting in a DPA or NPA. n46 The more detail provided in the DPA or NPA, the more smoothly the negotiation might proceed. Table 1 provides a quick sketch of the most common terms of monitoring arrangements based on the DPAs or NPAs we examined listed in Appendix A.

Table 1

Summary of DPA/NPA Characteristics

Characteristic	Description
Charges	Securities Fraud: 11
	Tax Evasion: 3
	FCPA or Bribery: 6
	Suspicious Activity: 2
	Healthcare Fraud: 2
	Unauthorized Export of Defense Articles: 1
Fines and Restitution	Fine Range (where known): $ 450,000 to $ 428 Million
	Restitution (where known): $ 7 Million to $ 839 Million
Duration/Term (Months)	12 to 36 is the norm with 60 months as the upper end
Extension of Duration	About half provide for some kind of extension
Background of Monitor	Large majority of known monitors are former government enforcement agents (SEC or Prosecutor) or Judges
Selection Bases	Large majority selected by mutual agreement
Reports to	Primarily audit committee and appointing government agency

Powers	Greatly vary ranging from important advisor on aspects of compliance to considerably greater say in the operation of the firm (e.g., firing/dismissing employees) Roughly one-third (7) of DPAs/NPAs provide broad ranging powers to monitor The broader cases are becoming more common (e.g., KPMG, WorldCom, RWMC)
Remuneration	Firm usually pays monitor hourly rate along with assistants, office space, and so forth
Addressing Disputes Between Monitor and Firm	Monitor essentially decides what happens (if firm does not comply the DPA may be withdrawn or a fraud charge initiated) Sometimes firm can ask for review by agency
Replace Monitor	No DPA/NPA explicitly provides firm with a way to replace a monitor In about 3 or 4 instances the firm can choose a successor for a monitor if that monitor leaves on his/her own
Postmonitoring Obligations	Majority (15) expect this in some measure

|*1724|

It appears that monitors are granted wide powers and considerable latitude, while government agencies obtain quite favorable terms for potential future actions. For example, attorney-client privilege is often waived (indeed, this is often required before a DPA or NPA will be considered); monitors are granted substantial power to oversee what the firm is doing; monitors cannot be easily replaced (indeed, even selling the firm does not necessarily terminate the monitoring obligation); monitors may be entrusted with making both important and day-to-day decisions; monitors may have the power to restructure a corporation's internal processes; and monitors' work may be protected by attorney work-product doctrine; among many other powers. Furthermore, the extent of the monitor's powers seems to be expanding, and these powers are often not defined with great precision in DPAs and NPAs. n47

At some level, it is surprising that corporations have ceded so much power to the monitor in these negotiated DPAs and NPAs. One explanation may be that, to date, corporations and government agencies do not appear to negotiate the details of a monitor's assignments early on in the DPA process. Based on our interviews to date, our sense is that the parties appear to consider the concerns in the following order: first, the charges asserted by the government; second, the size of the fine imposed; third, the ability to obtain an NPA or DPA; and fourth, toward the end of the predisposition process, the terms of the appointment of a monitor. Although this is certainly understandable at times (e.g., the American International Group ("AIG") case, which involved a fine of $ 1.6 billion and a serious possibility of criminal indictment), n48 one might expect increasing attention would be paid to the identity of the monitor and the terms of the monitor's engagement given the increasing power of the monitor. After all, many companies may be in a position where, once the initial shock of criminal fines and charges has worn off, they are left wondering what to do with their new "best friend."

Further, the lack of clarity early on may also reflect the fact that there will be some matters that may be difficult to define fully at the beginning of the process. n49 This means that for the agreement to work, certain matters may need to be left a little vague at the beginning. Thus, some flexibility is |*1725| necessary, but so is guidance. Maintaining the balance is not easy and is something we address a little later in Part III.

Once the DPA or NPA is in place, the monitor takes a more active role. This usually begins with the monitor getting to know the company, its business, and its people, including its board. n50 The monitor then develops a work plan, which generally involves discussing her potential activities with the firm and government and addressing likely disputes over what documents should be produced, whom to interview, and how much authority the monitor has to impose changes. n51 The less precise the initial language in the DPA or NPA, the more room there is for both sides (government and firm) to try to push that language in their desired direction.

Once the monitor's general scope of activity is set in place, then the task of monitoring begins. This can involve quite frequent visits to the firm and a number of mid-stream adjustments for both the firm and the monitor. An increasingly common issue is "scope creep," where the monitor and the firm disagree about the extent of the monitor's role and purview (e.g., because the DPA may be unclear on the details). Although our sense is that monitors usually get what they want, firms seem to be getting more concerned about the perceived level of interference from monitors. Perhaps this will lead to more careful negotiating at the time of the DPA or NPA.

Finally, even after the period of monitoring is complete, there is the possibility of longer-lasting consequences ensuing from a monitor's work. Monitors almost always file reports with regulators that detail the execution of their duties and may contain significant changes in corporate processes and procedures. n52 Moreover, some DPAs include ongoing obligations for the company even after the monitor has completed her tenure. n53 Thus, the effects of the monitoring system are likely to persist past the official end date of the DPA. Scholars and practitioners alike will be watching closely to see what long-lasting effects result from a monitor versus the simple imposition of a large fine. n54

Given the increasing power and frequency of monitors and their potentially large impact on firms, it becomes important to examine when they are desirable and what powers and duties they should have. Part III engages in that inquiry. However, before leaving our description of monitors, it may prove illustrative to compare the monitor to other kinds of ongoing supervisors so that one can further place the monitor in context.

|*1726| Table 2 below provides a thumbnail comparison between corporate monitors, corporate probation officers, trustees in bankruptcy, and special masters. It would appear that the corporate monitor combines aspects of the other supervisory mechanisms. For example, some monitors may have the powers of a trustee but have longer-lasting effects (i.e., the postmonitoring legacy) and apparently less stringent fiduciary duties. n55 Moreover, monitors have both considerably more-frequent contact with the firm and, at times, a broader scope of involvement than probation officers or special masters; therefore, monitors may have more information on the firm. The combination of features represented by the monitor and the flexibility in designing the scope of the monitor's involvement provides the basis for an increasing and potentially significant enforcement role for monitors. n56

Table 2

Comparing Different Kinds of Ongoing Supervisors

	Basis of Appointment	Frequency of Monitoring	Powers	Duties	Duration
Corporate Monitor	Prejudgment as part of Deferred	Very frequent	Considerable variation--narrow to	Unclear--sometimes same duties	1 year to 5 years, but with

	Prosecution Agreement or No Prosecution Agreement		broad	that a lawyer owes to client	increasing potential for long lasting effects (legacy)
Corporate Probation Officer	Usually postjudgment and court appointed	Frequent	Narrow usually (e.g., on wrong forming basis of conviction)	Duties to court	Term of sanction
Trustee in Bankruptcy	Usually court appointed as part of bankruptcy proceedings	Very frequent	Broad--essentially running the entity	Duties to estate	Until entity is no longer in bankruptcy
Special Master	Usually court appointed post judgment	Frequent	Narrow (usually	Duties to court	Term of sanction or court appointment

[*1727]

III. Analysis of the New Corporate Czars

From this description, it appears that the corporate monitor is an increasingly common feature of enforcement actions and possesses wide ranging and often very significant powers. The increasing presence of monitors raises a number of important questions that require attention, including the circumstances under which it is desirable to appoint a monitor, the extent of the monitors' powers, the scope of their duties, if any, and many others. We commence our inquiry into some of these questions in this Part.

A. Cash Fines versus Noncash, Monitor-Like Penalties

Let us begin with the most basic question - when is it optimal to require a firm to have a corporate monitor? This depends in some measure on what we expect the monitor to do. The discussion in Part II suggests that the monitor's powers range along a continuum from those of an advisor on compliance matters to a person who can essentially run the firm. Our analysis is likely to differ based on the extent of the monitor's powers. However, for expositional ease we will examine the optimality of the more extreme ends of the continuum - the highly influential monitors and the advisor-like monitors. As we shall see, the analysis for the advisor-like monitors is qualitatively similar to the analysis for the more influential monitors.

1. More Influential Monitors

This could be approached in at least two different ways. First, we could treat the imposition of the more influential monitor as a sanction and examine when such a sanction is optimal or desirable. n57 Second, we could treat the monitor as a gatekeeper and examine when such a gatekeeper is desirable. n58 In reality, these are just different ways of assessing the overall desirability of monitors. We approach it first as a sanction because most of the gatekeeper literature treats the gatekeeper as being an entity that is utilized even for those who acted legally, n59 whereas a monitor is only used in cases where an indication of wrongdoing is present - where there is some hint, if not proof, of illegality. Of course, the desirable formulation and operation of the monitor sanction may benefit from the gatekeeper literature. Thus, we approach the issue as one of sanctioning informed by the insights from the gatekeeper literature.

[*1728] Analyzing the monitor as a type of sanction requires a formulation of what the optimal sanctions would be and where a monitor fits in that scheme. We focus on deterrence concerns as the primary goal of optimal sanctions for our analysis, although we do discuss potential incapacitation arguments a little later. Generally, it is desirable to use the socially least expensive sanction to obtain deterrence first and then rely on the socially more expensive sanctions only if more deterrence is necessary and the deterrent effect of the less expensive sanctions has been exhausted. n60 In this manner one can obtain the desired level of deterrence in the socially least expensive manner.

As a general matter, the least expensive sanctions are those that simply transfer assets from one party to another (e.g., a cash judgment), whereas the more expensive sanctions are those that require expenditure by the state or others that produces some deadweight loss. n61 The quintessential example would be prison. Prisons are costly to maintain and impose other kinds of losses on society. n62 Thus, if one has the choice between obtaining the same level of deterrence from a cash fine of $ 1,000 (which has few social costs except those associated with transferring the cash) and a prison sentence of one year (which has prison maintenance and other costs), then it would be better to use the cash fine as we obtain the desired deterrence at lesser cost.

In the context of corporate defendants, prison is not an option, but cash fines are not the only kind of sanction available. We could impose greater than compensatory damages (e.g., punitive damages), deny the corporation a license to engage in certain businesses, or even impose ongoing supervision (e.g., a probation officer or a monitor). n63 These latter remedies generally carry higher social costs than a cash fine. This is because they have ongoing supervision costs (as compared to the one time cost of a cash fine) and greater costs associated with calculating their impact (e.g., determining the losses of being denied a license requires greater effort than determining the losses of a cash fine). n64 Moreover, these penalties are generally not as precise as cash fines and hence can result in both over-and underdeterrence. n65 Further, ongoing supervisory penalties suffer from a particular form of information weakness. Government agencies and monitors probably have less knowledge than a corporation's management about the firm and hence may [*1729] make less profit-maximizing decisions than these corporate managers. n66 In light of this, one may prefer to exhaust the deterrent effects of cash fines and then, if needed, consider imposing these other, more-expensive options.

Before exploring the deterrent effect of cash fines, we hasten to add that monitor sanctions are not simply all cost. Monitors often have more expertise than management on compliance matters (indeed, this is an important raison d'etre for a monitor), and this results in benefits for the firm to balance against the costs of a monitor. However, we do not need a monitor sanction to obtain this benefit. A large cash fine could induce a firm to hire an expert to consult on compliance issues (like a monitor), thereby reducing wrongdoing and avoiding the large cash fines. Thus, this advantage of a monitor could be obtained with appropriately set cash fines without having to rely on an explicit monitor sanction. n67

Let us then return to the deterrent effects of cash fines. The deterrent effect of cash fines might be exhausted for a number of reasons, including that the corporation has no more assets that can be attached or that the sanction desired for deterrence purposes is so high that it is politically or morally unacceptable and hence cannot be imposed. n68 When the highest-imposable cash fine does not generate the desired level of deterrence, other sanctions, such as corporate

monitors, merit consideration. In such situations, a monitor may be desirable if the net gains of having a monitor are greater than the net gains of other kinds of sanctions. The net gains are the additional deterrence gains from having a monitor less the costs of requiring a monitor.

When might these conditions hold? Let us begin with trying to ascertain when deterrence might require such a large cash fine that it is unlikely to be imposed. This seems more likely for wrongdoing that causes a great deal of harm because then it is more likely that the highest imposable cash fine may not suffice for deterrence. Corporate monitors and other kinds of ongoing supervisors seem more justifiable for wrongdoing that causes a great deal of harm. n69

[*1730] Another situation in which ongoing supervision may be considered is when the corporation is a recidivist. n70 When a corporation violates the same law more than once, one might surmise that fines are not a sufficient deterrent to this corporation. This may be, but it does not mean that one should resort to monitor-like sanctions. The fine may be insufficient simply because it is too low. A natural response might be to try to increase the fine. If we have reached the limit for the maximum imposable fine, then the rationale for going to monitor-like sanctions is really that the deterrent effect of fines is exhausted (as noted above). Another reason why a defendant may be recidivist is that the defendant receives large gains from the activity that exceed the fines (even the larger ones). This, by itself, may also not be enough to justify abandoning fines. For example, if someone regularly double parks for an important reason (e.g., emergency room doctors), should we impose monitors on them? On the other hand, if they double park for socially unacceptable reasons (e.g., to annoy parking officials), then we may want some greater measures like monitors. n71 Our point is not that recidivism is not sometimes a reason to opt for monitor-like sanctions but rather that by itself recidivism may not be enough without further inquiry. An additional complication in the corporate context is that sometimes recidivist behavior is the result of errant management, in which case it might be better to impose sanctions directly on management rather than on the firm. n72

Another rationale for imposing monitors might be that they save enforcement resources for the government. Enforcement agencies may be able to reduce their expenditures on enforcement and supervision by essentially subcontracting out the supervisory task to monitors. Enforcement resources are saved because the government does not pay for the monitor; the corporation does. This might be treated as a desirable division of labor, given its costs, if it frees up enough government enforcement resources that more cases can be brought and more deterrence achieved. n73

Which of these justifications is in play has important implications for when it is optimal to impose a monitor-like sanction. If our justification is that monitors might be desirable when cash fines are not high enough, then monitors are preferred in cases of great harm or where firms are insolvent. If our justification is saving enforcement resources, then monitors are preferred when the costs of having a monitor are less than the enforcement advantages gained when the government economizes on enforcement resources. This justification may not be tied to the amount of harm from the wrongdoing. Finally, recidivist corporations provide a more nuanced understanding [*1731] of when monitors are preferred. Outside of these instances, however, the appointment of a monitor may not be desirable on deterrence grounds.

However, one might also view the monitor as a way to incapacitate a corporation from committing future wrongdoing. n74 Although certainly plausible, it is not clear that this rationale motivates government agencies in imposing a monitor. Monitors are appointed as part of DPAs or NPAs and one of the critical conditions before the government agrees for such agreements is that the firm cooperate with law enforcement (e.g., by waiving attorney-client privilege). This arrangement is more consistent with a corporation that is trying not to violate the law in the future and probably less in need of incapacitation.

Moreover, even if incapacitation is important in some of the monitoring cases, that does not by itself change the foregoing analysis. n75 Incapacitation is presumably an important consideration when we think the defendant is unlikely to be deterred from future wrongdoing by a cash fine or other penalty. n76 If so, then incapacitation arguments become more compelling when deterrence has failed, which is consistent with the analysis in this section.

2. Monitors More Akin To Advisors

So far the analysis has focused only on the influential monitors who are more similar to the top management of a firm. However, a number of monitoring assignments position the monitor as being an advisor whom the firm cannot easily ignore. Thus, monitors may inform management that certain plans are not compliant with the law and others are. The monitor in these assignments cannot force the firm to adopt a particular plan but rather can tell the firm not to follow certain plans or the DPA may be revoked and prosecution initiated.

If this is the scope of the monitoring assignment, the conceptual framework described above still applies, but the margins are somewhat different. For example, the monitor-advisor is less costly to the firm than the influential monitor, and hence the social cost is less (though still higher than cash fines). However, for recidivist corporations, the monitor-advisor may be less valuable than the influential monitor. In any case, the critical point is that the conceptual framework above would apply but with a lesser cost for the monitor-advisor and fewer benefits than the influential monitor.

Before moving on to examine the scope of the monitor's powers and duties, we wish to address one potential argument. That is, sometimes we want companies to change how they do business and the most direct method of [*1732] doing this is to appoint someone to oversee these changes. We do not consider this a fully persuasive reason to appoint a monitor. If imposing a cash fine would prod such a company (and other similar companies) to make these changes to behavior, then there is no need to use a socially more costly monitor remedy. If the cash fine is insufficient to induce these changes, and we still want these changes, then a monitor becomes potentially desirable - however, this is just another way to say that when the deterrent effect of a cash fine is insufficient we may consider other more costly sanctions (e.g., monitors). n77

B. Monitor-Like Sanctions

If after careful thought it appears that monitor-like sanctions might be desirable, then we face further questions about how to structure the arrangement. The first thing to note is that monitor-like sanctions refer to a variety of ongoing supervisory mechanisms, including corporate monitors, special masters, probation officers, and others. This is more than a question of labels; rather, it is a question of which combination of features (powers) we want in the entity responsible for ongoing supervision.

Although an exhaustive analysis of monitor powers is outside the scope of this paper, some important criteria can be identified that would assist in making these determinations. We suggest that the type of wrongdoing, the type of firm, and the desirability of having access to great amounts of information are critical.

First, the different types of supervisors tend to have differing access to information. Because some corporate monitors play a fairly active role in the firm, they are likely to have access to more current and detailed information than special masters or probation officers who have less frequent and perhaps less interventionist contact with the firm. In light of this, corporate monitors may be desirable when this level of information access is desirable. This is more likely for certain wrongs than others. For example, if the wrong can be spotted and deterred by occasional oversight, then the detailed access and powers of corporate monitors would not be necessary. However, for other kinds of wrongdoing, a more continuous supervisory function may be needed to deter future wrongdoing (e.g., securities fraud or misreporting). Further, the monitor's greater access to information also implies that among the various supervisors it is the least likely to make inefficient decisions. This is more valuable when the costs of making wrong decisions are substantial. n78

[*1733] Finally, certain firms may benefit more from a closer supervisory relationship than others. This may be the case for firms that have a history of law violation or for firms in industries where, without closer supervision, wrongdoing is quite likely.

We hasten to note that monitor assignments can be drafted to achieve the desired combination of effects. For

example, if the wrongdoing does not require constant oversight, we could draft the monitor arrangement to essentially mimic a probation arrangement. The flexibility of the monitor and the negotiated nature of its existence provide a great deal more scope for tailoring than perhaps other arrangements. This is one of its advantages.

C. Duties for Monitors?

Having discussed when monitor-like sanctions may be desirable and what factors may lead us to choose corporate monitors over other kinds of supervisors, we now move on to consider what duties, if any, monitors should owe to the corporation and its shareholders. This greatly depends on the monitor's powers. As we saw in Part II, the powers of monitors differ, with some being important advisors (like attorneys) and others having more operational control of the firm (like management). The duties of these different kinds of monitors may likewise differ. Let us begin with the more powerful species of monitor.

1. More Influential Monitors

For monitors wielding a great deal of power over the firm and its profitability, it would appear that, at first cut, some duties to the shareholders should exist. This is consistent with other areas of law where those who have control over other people's assets owe duties to those people. For example, managers of a firm owe fiduciary duties to the corporation and shareholders whose assets they control. n79 To examine this in more detail, we lay out the standard case for why fiduciary duties attach to managers and then examine how those arguments may apply in the context of more influential monitors.

a. The Standard Case for Fiduciary Duties for Managers

A well-known feature of modern corporations is that the incentives of managers and shareholders may diverge. n80 This increases the agency costs of [*1734] the manager-shareholder relationship. Absent some method of containing these costs, some of these relationships may not be formed, and the gains from them would be lost. n81 Both market forces and the law serve in some measure to reduce these agency costs enough to make it profitable for the parties to enter into this relationship.

Market forces are reflected in the pressures management faces from both the market for its services (the managerial-labor market) and the market for the firm's products or services (the product market). n82 Managers compete with each other for obtaining higher positions and salaries within a firm and between firms. If managers are slack on the job or are taking too many perquisites, then the market for their services may penalize them by retarding their career growth, providing them with smaller salaries and power and perhaps even resulting in their dismissal. n83 The threat of these negative consequences might help to provide managers with additional incentives to work hard.

Similarly, the product market acts as a constraint on managers. If managers are slack, then their firms' products are likely to be inferior and may lose out to other competing products, thereby making their firm less profitable. Such firms may then pay their managers less or dismiss them from their jobs (e.g., as a result of a takeover triggered by dropping share prices). n84 Both the labor and product markets "incentivize" managers to work hard by relying on future opportunities (e.g., for managerial positions and promotions) as a prize that managers chase after. However, there may be certain instances of managerial misbehavior in which (1) the gains are so substantial that managers are willing to sacrifice future opportunities, (2) the markets do not register certain kinds of slack, or (3) that slack is commonplace. n85 In these instances something more may be needed to constrain managerial behavior.

One option is to align the incentives of management and shareholders by adjusting their contract (e.g., increase management's share of profits to twenty-five percent). However, one can only go so far in adding contractual details. The reason is that contracting is not costless, and the parties may not be able to foresee every future contingency. n86 Thus, it will be efficient for [*1735] there to be some gaps in the contract between the parties. In this situation, fiduciary duties, such as the duty of loyalty, duty of care, and duty of good faith, can be particularly valuable as

gap-filling mechanisms. n87 The question then becomes, what might the literature on managerial duties tell us about the kinds of duties, if any, that should attach to corporate monitors?

b. Fiduciary Duties for Monitors?

To examine the potential duties for influential monitors, we utilize the following hypothetical. Assume that monitors do not receive a share of the firm's profits but are paid in some more fixed manner. Indeed, this is the norm given that the raison d'etre for monitors is usually to ensure the firm complies with the law rather than to ensure the firm makes profits. Second, assume that there are a number of business projects or strategies that a firm can choose to follow and they have differing likelihoods of violating the law and differing levels of profitability. To stylize the example further, assume a company is considering two strategies - A (generating $ 10 million in profits) and B (generating $ 50 million in profits). Third, assume that in fact both strategies have little risk of violating the law, but it is costly to determine this - assume it requires $ 2 million of effort to determine A's compliance risk and $ 4 million to determine B's compliance risk. This may be due to uncertainty in the law or simply due to difficulty in understanding what the strategy entails. Shareholders will clearly prefer B, but what will the monitor prefer?

If the monitor is paid a fixed fee per year, then he will prefer the strategy that is lower cost to him (e.g., the strategy for which ascertaining its legality and/or payoffs is cheaper for the monitor). In our example, the monitor will prefer A (because it is less costly to determine its legality) even though shareholders (and social welfare) would prefer B. If, on the other hand, the monitor's cost of inquiry are covered by the firm, then he will investigate both A and B. This could lead him to choose B, which is desirable. However, when the monitor bears none of the costs of his inquiry, he may engage in too much inquiry (e.g., spend $ 100 million inquiring into A, B, and other [*1736] strategies that do not generate commensurate profits). n88 His incentives are still not optimal.

Indeed, one expects that hourly rate or fixed fee compensation structures are likely to lead to a divergence in the incentives of monitors and shareholders. One could try more creative compensation structures (e.g., options or hybrid hourly rates), but as we have seen in the recent past, that is also wrought with its own problems. n89 One could also attempt to address the incentive divergence through the use of fiduciary duties, but before doing that, let us examine whether there are market forces (i.e., labor and product markets) that could at least partially address our concerns.

The influential monitors may not face the same kinds of labor market forces as managers. First, monitors do not appear to be appointed because of a belief in their ability to generate great profits (through legal means) but rather the perception that they can help the firm prevent future law violations. Second, monitors cannot be easily replaced (as suggested by most DPAs), which implies that the penalty for poor performance is unlikely to be dismissal. Thus, monitors face considerably less ongoing labor market pressures as compared to managers. n90

The other primary market force would be product market competition, but the same factors that reduced the effects of the labor market reduce the effects of the product market. For example, even if the firm is failing, monitors cannot be easily replaced. Indeed, even if the firm is taken over by another entity, that may not terminate the monitoring arrangement. Of course, it is easy to understand why most DPAs or NPAs do not permit an acquisition to terminate the monitoring arrangement because otherwise that would provide the firm with a reason to sell itself - to get around the monitor. n91 Nonetheless, a corollary of this is that it is more difficult to displace monitors than managers, and hence they face lesser incentives than managers to maximize profits.

Finally, one might argue that the possibility of future monitoring assignments, which are valuable to monitors, may induce monitors to focus on maximizing profits. This depends both on what factors drive the choice of a monitor and on the efficacy of the reputational market for monitors' services. Given that monitors (even the influential ones) are chosen primarily for their expertise in law compliance, one would not expect their ability to [*1737] generate profits to significantly influence their chances at receiving future monitoring assignments. Thus, it is not clear that the market will focus much on the profit-maximizing aspect of a monitor. n92 Second, if monitoring assignments are limited primarily to former government officials, then one might be concerned that the reputational market may not be driven so much by

ability to ensure compliance as prior connections to the agency bringing the enforcement action.

Given that market forces may not induce influential monitors to focus on maximizing profits, there appears to be a role for some supplementary measures such as fiduciary duties. n93 There are a number of options one might consider. First, one could develop fiduciary duties for monitors. Second, one could draft DPAs more carefully - specifying what the monitor's duties and powers are. Third, the appointing agency could have some supervisory role over monitors. Of course, one could rely on some combination of these features as well. Indeed, it is a combination that we think in the end may best suit the goals of having monitors involved, as each option has strengths and weaknesses and together they may complement each other.

c. Suggestions for Reform for Influential Monitors

We begin with recommending greater specificity in the DPA about the tasks and powers of monitors. Greater specificity will aid in guiding monitors in determining how they, and the monitee, should act. Indeed, a number of the monitors we spoke to (and our own assessment of the DPAs) suggested that greater specificity would be very desirable. Second, more clarity in the DPA will help in evaluating how monitors are performing. After all, when there are clearer and more verifiable goals, assessment becomes easier. Additional clarity will also help in developing a reputational market for monitors that will consider profitability as a factor and will aid in allowing people to compare how monitors performed. Both of these help to incentivize monitors and reduce the need for further judicial oversight (such as [*1738] fiduciary duties). Of course, more careful DPA drafting cannot eradicate all concerns (because a completely contingent contract is unlikely), but it will prove useful to reduce some concerns. In light of that, we consider the following to be features that should be carefully considered and clearly delineated in a DPA: (1) the scope of the monitor's duties, written in a manner that minimizes interpretation, and the goals of their assignment; (2) the authority granted to and the roles to be played by each party; (3) the reporting chain between the monitor and, for example, the monitee, its board, its audit committee, its general counsel, the government, etc., as well as between the monitee and the government; (4) the expectations among the parties regarding whether the monitor's work is to be privileged; (5) the termination of the monitoring arrangement and what happens in case of acquisition; and (6) for more influential monitors, the liability of monitors to third parties for certain business decisions (e.g., corporate torts or crimes). However, even with these terms, we still expect there to be considerable room for dispute and negotiation (and renegotiation). n94 In light of this, we also recommend that there be a mechanism for referral back to the appointing agency to resolve certain key disputes between the monitor and the firm.

If there is still some slack (as we expect there will be), then we suggest a combination of fiduciary duties and a little more monitoring by the appointing agency. This is in essence a question of which arm of the government should monitor the monitors. Reliance on fiduciary duty places courts as the monitor of monitors, whereas agency monitoring places the agency as the monitor of monitors. Both have certain advantages - agencies have expertise in the area where the wrongdoing occurred and in crafting rules and regulations, but courts have more experience with fiduciary duties and ex post standard-based decision-making. n95 Thus, if one is monitoring the monitor to ensure that the firm is complying with the law, perhaps the agency may be more useful. However, if one is trying to ensure that monitors are at least attempting to make profit-maximizing decisions for the corporation and its shareholders (as is the case with standard fiduciary duty analysis), then the courts may be better positioned.

[*1739] Even if agencies might do a tolerably good job of watching monitors to maximize profits, we may have a few further concerns with solely relying on agencies. n96 First, one of the reasons for having monitors might be to reduce enforcement burdens and costs for agencies so that they can focus their resources on bringing enforcement actions rather than monitoring firms. This places something of a constraint on how much monitoring the agency can sensibly undertake without sacrificing one of the benefits of having monitors. n97 Second, given that most of the monitors are former enforcement officials (no doubt capitalizing on their considerable law compliance experience), it might prove advantageous to have a nonagency official with some oversight to help provide a broader view of the functioning of the more influential monitors.

In light of this, we suggest some oversight by the appointing agency for most monitors. For more influential monitors, we suggest additional oversight through fiduciary duty analysis by courts. As with managers, we would suggest duties of loyalty, care, and good faith. These duties could be enforced by shareholder suits, but, given the concerns with frivolous suits, n98 we would suggest tight limits on them (e.g., by requiring the largest willing shareholder to choose counsel and post bonds), application of the business-judgment rule for monitor's business decisions, n99 the purchase of directors' and officers' insurance policies, and indemnification for monitors. n100

2. Monitors More Akin to Advisors

The discussion so far has focused on the more influential monitors, n101 but many monitors have more limited roles. To the extent that monitors occupy a more limited role (e.g., those without the ability to fire employees or make [*1740] operational decisions), we do not think the analysis in Section 1 applies in full.

It is a core feature of fiduciary duty analysis that the extent of the duties depends on the extent of the vulnerability of the principal to the fiduciary. n102 When monitors are advisors, they have a much more indirect effect on profitability. They are more akin to attorneys or consultants advising the firm about various options the firm is considering. These kinds of monitors do not have as much of a say in firm profitability as the more influential monitors and hence cannot be analogized to managers as easily.

This does not, however, mean that no duties should be imposed on these monitors but simply that different kinds of fiduciary duties need to be considered. For these monitors, the concern is not that they will not maximize profits (they do not have the power to do so) but that they will not provide the best advice they can on compliance. Here market forces do provide greater assurances than they might for the more influential monitors. This is because the reputational market for monitors depends on how good the monitor is at ensuring compliance. If the monitor is not good at this task, then he is unlikely to receive future monitoring assignments. Indeed, given the currently small number of monitors, the reputational market may work rather well for the issue of compliance because it is easier to assign credit and blame, and the players may know each other better than if there were many more monitors in the market. Indeed, one advantage of appointing former enforcement officials as monitors is that the agencies already have experience with these officials, making a reputational assessment somewhat easier.

Although the reputational market works better for these monitors, the labor and product markets face the same concerns - the inability to replace a monitor hampers both. However, for these more limited monitors, the market for their regular professions (e.g., legal services) may operate as a check. If someone considered an expert on securities fraud provides poor advice to a firm he is monitoring, then that person's market prospects for advising others on securities fraud (as an attorney) would suffer.

For these reasons as well as the monitor's inability to directly influence profits, we do not think that a fiduciary duty to maximize profits would be optimal here. Instead, we would suggest a fiduciary duty akin to that of attorneys or any professional to their client. Indeed, monitors currently are treated essentially as attorneys for the firms they are monitoring. This simply reflects the primary role that monitors have played until now as advisors. In addition to these kinds of fiduciary duties, we would suggest that better drafting of the DPA or NPA and somewhat greater agency oversight may prove helpful in aligning interests and clarifying the scope of the monitoring assignment.

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D. Back to the Past?: Comparison with Professional Director Recommendations

Although corporate monitors are a relatively new part of enforcement, they bear considerable similarity to reform suggestions proffered in the past. In particular, Professors Gilson and Kraakman have suggested the creation of a market for professional, independent directors who could serve as monitors of corporate performance. n103 Their idea was that professional, independent directors might be elected by institutional investors to monitor management at firms. n104

These directors would be essentially full-time directors at half a dozen or so firms and could be selected from a pool of directors through a central clearinghouse. n105 Because these directors would be selected by institutional investors, they would be both independent of management and dependent on shareholders. n106 When this practice is combined with the presence of a market for their services, one would expect there to be good incentives to monitor. n107 Further, as these directors would serve full time on a handful of boards, we would expect them to have more time to monitor and perhaps to have better access to information about the firm than most current outside directors. n108

Although their proposal has not yet led to the creation of such a market through any organized means, we are struck by some of the parallels to the "organic" development of corporate monitors. n109 In particular, monitors are independent of management, have considerable time to monitor the firm, and have access to considerable information. Indeed, monitors frequently have considerably greater access to information (and the power to compel more) than professional directors might under the Gilson and Kraakman proposal. n110 All these features make corporate monitors rather good monitors. Moreover, they are not appointed or nominated by management.

The primary differences we see are that monitors (1) are not currently beholden to shareholders, (2) are appointed by a government agency rather than shareholders, and (3) are appointed only when some alleged wrongdoing has occurred (as opposed to always being present as in the Gilson and Kraakman proposal). However, if our reform proposals are accepted, then monitors would owe some fiduciary duties to shareholders. Thus, the primary |*1742| differences remaining are who appoints the monitor (government versus shareholders) and the trigger for their appointment.

One might view the government agency as akin to a central clearinghouse of sorts for monitors as they become the repositories for information on the monitor and their effectiveness. Of course, the government agency's incentives and those of a central clearinghouse may not be the same, but one can conceptualize the agency as serving a similar information-gathering or information-disseminating role. n111

However, the comparison to professional directors provides yet another potential reform. One way to align the interests of the influential monitors with those of shareholders is to give shareholders a greater say in who is appointed to be the monitor. Perhaps institutional investors could have some greater, explicit voice in this process by, for example, being consulted by the government agency before appointing a monitor. This would not only make monitors more responsive to shareholder concerns but also would make addressing shareholder concerns something that is reflected in the reputation of monitors and in the market for their services. This would further help to align monitors' and shareholders' interests in those cases in which monitors could exercise considerable influence over firm profitability.

Finally, monitors are currently limited only to situations where some alleged wrongdoing has occurred. n112 Although this is different from the proposal suggested by Gilson and Kraakman, one might still conceive of it as a first step in the general direction towards such professional directors. Indeed, monitors could be viewed as a test case for a core of professional directors. Although we do not speculate about the likely future development of monitors and how it may dovetail with a market for professional directors, we find the parallels both striking and instructive. We await future developments with bated breath.

Conclusion

Over the last decade, enforcement authorities have increasingly relied upon corporate monitors to help ensure law compliance and reduce the number of future violations. In this paper we describe the development and common features of corporate monitors as well as examine when monitors are desirable and what obligations they should bear.

We find that monitoring arrangements are becoming more common and their powers are expanding. Monitors possess a wide range of powers that can be aligned along a continuum of being very influential (almost running the firm) to being significant advisors. In light of this, our analysis examines the desirability of monitors along this continuum. We conclude that monitors should be used only in certain instances (e.g., when socially cheaper sanctions

are not sufficient for deterrence). When they are used, some fiduciary [*1743] duties should apply to them. The extent and nature of these fiduciary duties should vary to reflect the degree of vulnerability of shareholders to the monitor's decisions. Thus, for the more influential monitors, we suggest broader fiduciary duties than for the more advisor-like monitors. We also provide a number of recommendations that should help to enhance the performance of monitors. In some respects, if influential monitors do not owe some duties to the shareholders whose assets they are monitoring, then they become like czars - people with considerable, but largely unfettered, power.

Finally, we compare the corporate monitor to a reform proposal for creating a core of professional directors and find a number of similarities. It appears that government enforcement authorities have been creating, in a piecemeal and organic manner, something like a market for professional supervisors. The experiences with monitors may then be quite instructive for future governance developments. Whether the development of monitors will morph over time into a market for professional directors is something that corporate governance scholars and practitioners will likely be anxiously watching.

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Appendix

Critical Features of Deferred Prosecution and No Prosecution Agreements at the Federal Level Since 1993 ++

++ This Appendix contains information from a number of sources. For citations to the DPAs/NPAs involving AIG-FP Pagic Equity Holding Corp.; AmSouth Bancorporation; America Online Inc.; Aurora Foods, Inc.; Bank of New York; Bristol-Myers Squibb Co.; Canadian Imperial Bank of Commerce; Computer Assocs. Int'l, Inc.; InVision Techs., Inc.; KPMG; Merrill Lynch & Co.; Micrus Corp. & Micrus S.A.; Monsanto Co.; N.Y. Racing Ass'n; Prudential Sec. Inc.; and Symbol Tech., see Corporate Crime Reporter, supra note 1. For citations to the other DPAs/NPAs see Consent Agreement between Bureau of Political-Military Affairs, U.S. Dep't of State and The Boeing Co. (March 28, 2006), available at http://www.corporatecrimereporter.com/documents/ boeingsettle.pdf; *Diagnostic Prod. Corp., supra* note 30; Letter from Alice H. Martin, U.S. Attorney for the N. Dist. of Ala., U.S. Dep't of Justice, to Robert S. Bennett, Skadden, Arps, Slate, Meagher & Flom LLP, counsel to HealthSouth Corp., supra note 39; HVB Letter, supra note 29; Deferred Prosecution Agreement, United States v. Roger Williams Med. Ctr., supra note 39; Deferred Prosecution Agreement, United States v. SSI Int'l Far East, supra note 30; Deferred Prosecution Agreement, S.E.C. v. Titan Corp., No. 1:05cv00411 (D. D.C. March 30, 2005); Statoil, ASA, Exchange Act Release No. 54599 (Oct. 13, 2006), available at http://www.sec.gov/ litigation/admin/2006/34-54599.pdf.

	AIG (2004)	AmSouth (2004)	AOL (2004)
Charges	Aiding and abetting securities fraud.	Failing to file suspicious activity reports in a timely, complete, and accurate manner.	Aiding and abetting securities fraud.
Agency	U.S. Department of Justice, Criminal Division, Fraud Section.	U.S. Department of Justice, Criminal Division, U.S. Attorney's Office for the Southern	U.S. Department of Justice, Criminal Division, U.S. Attorney's Office for the Eastern

		District of Mississippi.	District of Virginia.
Fines		$ 40 million in fines; silent as to restitution.	$ 60 million in fines; $ 150 million in restitution.
Duration	12 months	12 months	24 months
Extension Option	12 months comply and agreement expires after 24 months.		Monitor may extend period of review up to 6 months with DOJ approval.
Monitor	No.	No.	Name not publicly available.
How selected			Mutually agreed upon by the Department of Justice and AOL.
Supervised By			Makes a report to the Audit and Finance Committee, with a copy to DOJ; makes recommendations to Audit and Finance Committee.
Duties			. Special review of the effectiveness of AOL's internal control measures related to its accounting for advertising and related transactions, the training related

			to these internal control measures, AOL's deal sign-off and approval procedures, and AOL's corporate code of conduct.
Frequency of Reports to Government			On at least a semiannual basis as to cooperation from AOL.
Funding			Retained and paid by AOL; monitor has right to select and hire outside accounting expertise.
Resolution of disagreements/ monitor's authority			
Replacement Provision			
Internal Changes Required			
Post-Monitor Obligations			P 4 survives indefinitely.
	Aurora Foods, Inc. (2001)	Bank of New York (2005)	
Charges	Admission of false and misleading statements and omissions in connection with Aurora's	U.S. Attorney's Office, Eastern District of New York Aiding and abetting fraudulent activities of	

	financial statements and public filings with the SEC. DPA is silent on specific charges.	subsidiary by executing sham escrow agreements; willfully failing to file Suspicious Activity Reports in a timely manner; and failure to notify authorities as required by law.
		U.S. Attorney's Office, Southern District of New York Aiding and abetting the operation of an unlicensed money transmitting business; aiding and abetting the unlawful operation of a foreign bank; failure to implement an effective anti-money laundering program, as required by law; and engaging in money laundering.
Agency	U.S. Department of Justice, Criminal Division.	U.S. Department of Justice, U.S. Attorney's Offices for the

		Eastern and Southern Districts of New York with the Internal Revenue Service and Federal Bureau of Investigation.
Fines	Silent as to fines; silent as to restitution.	$ 26 million in fines; $ 12 million in restitution.
Duration		36 months
Extension Option		U.S. Attorney's Office may terminate if purposes of agreement have been fully achieved and further monitoring is no longer required. PP 6 and 7 are permanent with regard to conduct covered by DPA.
Monitor		George A. Stamboulidis, Baker Hostetler, New York, NY.
How selected	Aurora must retain a mutually acceptable outside consultant.	Applications submitted to U.S. Attorney's Office; after considering views of, inter alia,

		BNY, U.S. Attorney's Office will select monitor.
Supervised By		Delivers reports to General Counsel, who must present to Board and Audit Committee for review.
Duties	. Advise Aurora regarding an appropriate compliance program.	. Review BNY's SAR practices and procedures; anti-money laundering procedures; and BNY's implementation of and compliance with the DPA and the remedial actions prescribed in it.
Frequency of Reports to Government		Semi-annual basis; monitor may file additional reports with BNY's General Counsel or, without notice to BNY, with U.S. Attorney's Office.
Funding		"BNY agrees to pay all costs associated with the retention of

		monitor for these purposes." P 12.
Resolution of disagreements/ monitor's authority		Any refusal by BNY or its agents to render full cooperation to the monitor will constitute a breach of the DPA.
Replacement Provision		
Internal Changes Required	Board . Appoint two independent and outside directors, including one to serve on audit committee to oversee implementation of compliance program. Management . Appoint a compliance officer to oversee the implementation of the compliance program.	Management . New senior-level position in Legal Division called Head of Law Enforcement and Investigations. P 10(b). . Creation of Suspicious Activity Response Team. P 10(j). . New management committee headed by BNY's president to review actions of 67 involved employees. P 10(a). Internal investigations

		. Hired Sullivan & Cromwell, results shared with U.S. Attorney's Office and attorney-client privilege waived with regard to report. P 6.
Post-Monitor Obligations	Board . Appoint two independent and outside directors, including one to serve on audit committee to oversee implementation of compliance program. Management . Appoint a compliance officer to oversee the implementation of the compliance program.	Management . New senior-level position in Legal Division called Head of Law Enforcement and Investigations. P 10(b). . Creation of Suspicious Activity Response Team. P 10(j). . New management committee headed by BNY's president to review actions of 67 involved employees. P 10(a).
	Boeing (2003)	Bristol-Myers Squibb Co. (2005)
Charges	Unauthorized exports of a defense article.	Conspiracy to commit securities fraud.

Agency	U.S. Department of State, Bureau of Political-Military Affairs; Directorate of Trade Controls, Office of Defense Trade Controls Compliance.	U.S. Department of Justice, U.S. Attorney's Office for the District of New Jersey.
Fines	$ 15 million ("civil penalty"); silent on restitution.	$ 100 million in fines; $ 839 million in restitution.
Duration	36 months	24 months
Extension Option	Minimum two years followed by an individual from inside corporation for 1 year and report to SVP, Office of Internal Governance, and DTCC.	
Monitor		Hon. Frederick B. Lacey, LeBoeuf Lamb, New York, NY.
How selected	Boeing to appoint a qualified individual from outside the corporation as monitor. Monitor forsakes for all time any future employment or representation.	Previously retained by BMS.

	Subject to approval of DTCC.	
Supervised By	Senior officers receive copies of reports to DTCC, reports may include input or comments from Boeing's VP, Global Trade Controls.	No one. Monitor shall "have authority to require BMS to take any steps he believes are necessary to comply with . . . this Agreement." P 12(a).
Duties	. Monitor Boeing's ITAR export compliance program, oversee implementation of DPA, and monitor all AECA/ITAR-regulated activities of Boeing.	. Continue the review, reforms, and other functions undertaken as Independent Advisor. . Cooperate with SEC, monitor BMS's compliance, and make recommendations necessary to ensure that the company complies with applicable securities laws. . Monitor BMS's compliance with agreements in other actions, and monitor information received by the confidential hotline and e-

		mail address. . Meet quarterly with CEO, non-executive Chairman, and General Counsel.
Frequency of Reports to Government	Reports every 90 days for first six months, semi-annually thereafter.	At least on a quarterly basis and between 30 and 45 days after filing of 10-K for FY2006. P 12(c).
Funding	"Professional staff as are reasonably necessary . . . up to two full-time equivalents." P 12(f) of annex.	
Resolution of disagreements/ monitor's authority	May present any disagreement up through management chain from BCA to Boeing CEO and eventually DTCC.	"BMS shall adopt all recommendations contained in each report submitted by the Monitor to the [U.S. Attorney's] Office unless BMS objects . . . and the Office agrees . . . ." P 14.
Replacement Provision	Boeing's SVP may recommend a	"If the Monitor resigns or is

	successor; Boeings Corporate VP. Contracts & Pricing, may fill in on temporary basis.	unable to serve for the balance of his term, a successor shall be selected by BMS and approved by the [U.S. Attorney's] Office within forty-five (45) days." P 16.
Internal Changes Required	Management. Create a senior management position reporting to VP Global Trade Controls, Office of Internal Governance, with duties to include "ensuring application of best practices across the corporation [not limited to measures required by agreement]". P 2 of annex. Also file annual reports with Directorate of Trade Controls. Meets quarterly with monitor for duration of DPA.	Board . Appoint an additional, non-executive Director acceptable to the U.S. Attorney's Office. . Establish the position of non-executive Chairman of the BMS Board of Directors, to be retained at least through the term of the agreement, who can require reports on any subject from any officer or employee of the Company. P 10.

	Internal investigations. BCA to retain an outside firm to conduct audit of implementation of the DPA and assess the overall effectiveness of BCA's compliance programs no later than 18 months after signing order. . Required to audit of affiliates for three years prior to DPA. . Within 30 months, report from senior compliance manager on audit findings. DPA silent on who report goes to.	
Post-Monitor Obligations	Management. As under "Internal Changes Required".	Board . Appoint an additional, non-executive Director acceptable to the U.S. Attorney's Office.
	Canadian Imperial	Computer

	Bank of Commerce (2003)	Associates International, Inc. (2004)
Charges	DPA describes violations of Financial Accounting Standards, but does not name specific charges.	Securities fraud and obstruction of justice.
Agency	U.S. Department of Justice, Enron Task Force; Federal Reserve Bank of New York.	U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of New York.
Fines	$ 80 million in fines; silent as to restitution.	Silent as to fines; $ 225 million in restitution; $ 163 million in stock to settle civil suits.
Duration	36 months	18 months
Extension Option		Longer of 18 months or until such time as reforms have been substantially implemented for two successive quarters.
Monitor	Michael G. Considine, Day Berry & Howard LLP, New York, NY.	Lee S. Richards III, Richards Kibbe & Orbe LLP, New York, NY.
How selected	Selected by DOJ and acceptable to	Within 30 days, CA must submit

	CIBC.	list of five candidates, U.S. Attorney's Office will approve three candidates, and then court will pick one.
Supervised By	Primarily CIBC.	
Duties	Enron Task Force Monitor . Monitor CIBC's compliance with agreement, relying, where needed, on judgment of Monitor and outside Monitor named under agreement with CIBC, OSFI, and the Federal Reserve (FR). . Coordinate with SEC, FR, and OSFI.	. Examine CA's compliance with agreement; make recommendations to the Board for review and implementation; and conduct comprehensive review of following areas: CA's practices for the recognition of software license revenue; CA's internal accounting controls and implementation of an improved ERP information technology system; CA's internal audit department; CA's ethics and compliance policies; and
	Federal Reserve Auditor . Assist in monitoring CIBS's compliance with, and effectiveness of, policies and procedures and any enhancements or revisions thereto. . Within 30	CA's records

	days of Agreement, submit a written plan detailing how Auditor intends to monitor CIBC's compliance with policies and procedures. . Report in writing any non-compliance by CIBC.	management policies and procedures.
Frequency of Reports to Government	Semi-annual basis as to CIBC's compliance with agreement.	Quarterly. Within six months of appointment, issue report making recommendations on best practices for review areas.
Funding		
Resolution of disagreements/ monitor's authority		
Replacement Provision		
Internal Changes Required	Management . CIBC must create a new Financial Transaction Oversight Committee to review quarter-end and year-end transactions.	Board . Add Laura Unger and two more independent directors to the board and establish a Compliance Committee of the Board. P 12.

P 5, Fed Agreement Appendix.	Management: . Appoint an independent, senior-level Chief Compliance Officer (CCO), after consultation with U.S. Attorney's Office, that will report directly to the Board Compliance Committee and General Counsel. P 14. . Establish a new Disclosure Committee composed of CEO, COO, CFO, CCO, CAO, and General Counsel. . Reorganize Internal Audit Department, hiring at least five more internal auditors. P 15. . Develop plan to ensure effectiveness of communications with governmental agencies engaged in inquiries on

		CA. P 16. Internal investigations . Retained Sullivan & Cromwell LLP and Pricewaterhouse Coopers, P 5, and shared findings with charging agencies. Investigation and expectation of shared results continuing.
Post-Monitor Obligations	Management . CIBC must create a new Financial Transaction Oversight Committee to review quarter-end and year-end transactions. Fed Agreement Appendix, P 5.	Upon expiration of Agreement, CA will continue to fulfill the cooperation obligations in P 6. Cooperation not required in proceedings where CA is a defendant. P 7. Board & Management . As in "Internal Changes Required".
	Diagnostic Products Corp. (2005)	Healthsouth Corp. (2006)
Charges	Violations of the Foreign Corrupt	DPA silent on actual charges,

	Practices Act of 1977.	but incorporates SEC v. Healthsouth Corp., No. CV-03-J-0615-S (N.D. Ala.), which charges falsification of financial statements, false and misleading SEC filings, and violations of the FCPA.
Agency	Securities and Exchange Commission.	U.S. Department of Justice, Criminal Division, Fraud Section; U.S. Attorney's Office for the Northern District of Alabama.
Fines	$ 2.3 million in fines; silent as to restitution.	$ 103 million in fines; $ 445 million in restitution.
Duration	36 months	
Extension Option		Expires November 17, 2009
Monitor		
How selected	DPC shall retain a qualified independent compliance consultant not unacceptable to the SEC.	Selected by audit committee and "shall be licensed as a certified public accountant." P 11.

Supervised By		Audit committee; audit committee also sets compensation.
Duties	. Review annually DPC's compliance with its FCPA policies and procedures, and make recommendations.	. Shall be charged with reporting any indications of violations of law or of HealthSouth's procedures, insofar as they are relevant to the duties of the Audit Committee, to the Audit Committee. Copies of these reports shall be submitted to the government for three years.
Frequency of Reports to Government	Annually, with first report within 90 days of appointment.	Only when reporting violations of law or procedures of audit.
Funding	"DPC . . . shall compensate the Compliance Consultant, and persons engaged to assist the Compliance Consultant, for services rendered . . . at their	HealthSouth shall permit the Inspector General to hire a staff of at least five people.

	reasonable and customary rates . . . ." P 3.
Resolution of disagreements/ monitor's authority	The company is not required to adopt any of the changes contained in the monitor's report: "In the event a Report contains any recommendation for further action by DPC, within 90 days after receiving the Report, DPC's Board of Directors shall advise [the SEC], in writing, of all decisions and determinations it has made as a result of the Report." P 1.
Replacement Provision	"DPC (i) shall not have the authority to terminate the Compliance Consultant without the prior written approval of the majority of DPC's independent board

	members and the SEC . . . ." p. 4, P 3.	
Internal Changes Required	None. The company is not required to adopt any of the changes contained in the monitor's report: "In the event a Report contains any recommendation for further action by DPC, within 90 days after receiving the Report, DPC's Board of Directors shall advise [the SEC], in writing, of all decisions and determinations it has made as a result of the Report." p. 4, P 1.	Board . Adopted transition plan resulting in addition of nine new individuals to Board. . New charters for audit-related and governance-related committees of the board. Management . Cleaned house regarding upper management.
Post-Monitor Obligations		Board . Adopted transition plan resulting in addition of nine new individuals to Board. . New charters for audit-related and

		governance-related committees of the board.
	HVB Risk Management and HVB U.S. (2006)	InVision Technologies, Inc. (2004)
Charges	Conspiracy to defraud the U.S. and the IRS, tax evasion, and fraudulent tax returns.	Bribing foreign officials to retain business in Thailand, China, and the Philippines, and failure to monitor foreign sales activity for violations of the Foreign Corrupt Practices Act.
Agency	U.S. Department of Justice, U.S. Attorney's Office for the Southern District of New York.	U.S. Department of Justice, Criminal Division, Fraud Section.
Fines	$ 22,645,801 in fines; $ 6,989,324 in restitution to the IRS.	$ 800,000 and a fine to the SEC to be decided; silent as to restitution.
Duration	18 months	18 months
Extension Option		Monitorship lasts 18 months; agreement expires in 24 months. May be extended by an additional 6

		months if DOJ deems necessary.
Monitor	No	Bill Pendergast, Paul Hastings, Washington, DC.
How selected		Selected and paid for by InVision and approved by DOJ.
Supervised By		
Duties		"The Monitor shall: (a) monitor InVision's compliance with this Agreement; (b) monitor InVision's implementation of and adherence to policies and procedures relating to FCPA compliance . . .; (c) ensure that the Policies and Procedues are appropriately designed to accomplish their goals; . . . and (e) coordinate with the SEC and provide information about InVision as requested by that agency." P

		12.
Frequency of Reports to Government		On at least a semi-annual basis and between 30 and 45 days before the end of Monitor's term.
Funding		
Resolution of disagreements/ monitor's authority		No changes to FCPA compliance policies and procedures without monitor's approval. InVision's knowingly or wilfully failing to perform the duties imposed by Monitor permits U.S. Attorney's Office to terminate agreement.
Replacement Provision		
Internal Changes Required	Management	. HVB shall maintain a permanent compliance office, and maintain a compliance and ethics program. . HVB shall take steps to audit the

	compliance and ethics program to ensure it is carrying out the duties and responsibilities set forth in this agreement.	
Post-Monitor Obligations	No monitor. However, after termination of agreement HVB's obligation to cooperate is not intended to apply in the event that a prosecution against HVB is pursued and not deferred. Management. HVB shall maintain a permanent compliance office, and maintain a compliance and ethics program.	
	KPMG (2005)	Merrill Lynch & Co., Inc. (2003)
Charges	Participating in a conspiracy to defraud the U.S. and IRS, tax evasion, and making fraudulent tax returns.	DPA is silent as to actual charges deferred, but prosecuting office agrees to "not prosecute Merrill Lynch for

		any crimes committed by its employees relating to the Year-End 1999 Transactions." P 3.
Agency	U.S. Department of Justice, Criminal Division, Fraud Section, U.S. Attorney's Office for the Southern District of New York.	U.S. Department of Justice, Enron Task Force.
Fines	$ 228 million in fines; $ 228 million in restitution to IRS.	Silent as to fines; silent as to restitution. Contra CIBC DPA.
Duration	36 months	18 months
Extension Option	If KPMG fails to pay fines in timely manner, U.S. Attorney's Office can extend term for up to 18 months; any other breach can result in one year extension. DPA not exceed five years total.	Monitorship lasts 18 months. Agreement expires on June 30, 2005.
Monitor	Richard C Breeden & Co, 100 Northfield St.,Greenwich, CT.	George A. Stamboulidis, Baker Hostetler, New York, NY.

How selected	U.S. Attorney's Office shall consult with KPMG to choose a mutually acceptable Monitor. If such a Monitor cannot be chosen, then the U.S. Attorney's Office has the sole right to select a monitor.	"Merril Lynch will also retain an individual attorney selected by the Department, who shall be acceptable to Merril Lynch." P 9.
Supervised By	No one. The Agreement grants broad powers to the Monitor. Thus, "KPMG shall adopt all recommendations submitted by the Monitor unless KPMG objects . . . and the [U.S. Attorney's] Office agrees . . ." P 18(a).	General Counsel and Head of Corporate Audit.
Duties	. Review covered opinions issued 30 days prior to this agreement. . Review and monitor KPMG's compliance with this agreement	Merrill Lynch must retain an auditing firm to review policies and procedures set forth in Exhibit A (training programs, review

	and Compliance & Ethics Program, and make recommendations necessary to comply with agreement. . Review and monitor the implementation and execution of personnel decisions regarding individuals responsible for the illegal conduct.	committees, etc.), and an attorney (monitor) to review the work of the auditing firm. The auditing firm and the attorney shall . Ensure that the policies and procedures [in Exhibit A] are appropriately designed to accomplish their goals; and . Monitor Merrill Lynch's implementation of and compliance with the Policies and Procedures
Frequency of Reports to Government	Not less often than every four months, whenever Monitor deems fit, and immediately upon violation of any law or any provision of DPA.	Semi-annual basis.
Funding	Authority to employ legal counsel, consultants, investigators, experts, and any	

	other personnel necessary. Compensation and expenses paid by KPMG in accordance with typical hourly rates. Monitor receives office space, telephone service, and clerical assistance.	
Resolution of disagreements/ monitor's authority	Monitor has "authority to take . . . actions . . . necessary to effectuate . . . oversight and monitoring responsibilities." P 18(d). If a KPMG employee fails to cooperate with monitor then monitor may, at own discretion, "recommend dismissal or other disciplinary action." P 18(e)(V).	No changes to policies and procedures without approval of auditing firm and monitor.
Replacement Provision		
Internal Changes	Management	Management

Required	. KPMG to cease or curtail certain tax services including private tax practice and issuing "covered opinions" with respect to "listed transactions". . KPMG to maintain a permanent compliance office.	. Creation of the Special Structured Products Committee, whose approval is required for any offsetting transactions.
Post-Monitor Obligations	KPMG agrees that its obligations to cooperate will continue even after dismissal of charges, unless prosecution is pursued and not deferred.	Management . As in "Internal Changes Required".
	Micrus Corp. and Micrus S.A. (2005)	Monsanto Co. (2005)
Charges	Bribing doctors in France, Spain, Germany, and Turkey.	Bribing an Indonesian Ministry of the Environment official and making false entries into its books and records.
Agency	U.S. Department of Justice,	U.S. Department of Justice,

	Criminal Division, Fraud Section.	Criminal Division, Fraud Section.
Fines	$ 450,000 in fines; silent as to restitution.	$ 1 million in fines; silent as to restitution.
Duration	36 months	36 months
Extension Option	Monitorship for 36 months; deferral of prosecution for 24 months.	
Monitor		Tim Dickinson, Paul Hastings, Washington, DC.
How selected	Micrus must retain outside independent firm with 45 days of Effective Date.	Monsanto must retain an individual, partnership, or other entity acceptable to Department.
Supervised By		Corporate compliance officer.
Duties	"The monitor shall: (a) monitor Micrus' compliance with this Agreement; (b) monitor Micrus' implentation of and adherence to policies and procedures relating to FCPA	. Certify that policies and procedures are appropriately designed. . Monitor implementation of a compliance with policies and procedures. . Report findings of special review

	compliance . . .; (c) ensure that Policies and Procedures are appropriately designed to accomplish their goals; . . . and (c) coordinate with the SEC and provide information about Micrus as requested by that agency." P 12.	(during first year) and follow-up audit (during third year) to corporate compliance officer as to effectiveness.
Frequency of Reports to Government	Semi-annual basis, and between 30 and 45 days before the end of 36 months.	Report findings of special review (during first year) and follow-up audit (in third year) to corporate compliance officer as to effectiveness.
Funding		
Resolution of disagreements/ monitor's authority	No changes to policies and procedures without approval of monitor. Knowingly, willfully failing to perform duties imposed by monitor constitutes	No modification of policies and procedures of Appendix B without approval of monitor. Monitor reports any lack of cooperation or failure to report fraud directly to

	breach.	U.S. Attorney's Office.
Replacement Provision		
Internal Changes Required		Management . Monsanto must implement a remedial compliance program as described in Exhibit B.
Post-Monitor Obligations		Management . As in "Internal Changes Required".
	New York Racing Association (2003)	Prudential Securities Inc. (1994)
Charges	Conspiracy to defraud the United States and aiding and abetting the filing of false tax returns.	Fraud in the sale of limited partnership interests.
Agency	U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of New York.	U.S. Department of Justice, U.S. Attorney's Office for the Southern District of New York.
Fines	$ 3 million in fines; silent as to restitution.	Silent as to fines. According to letter to U.S. Attorney, $ 330 million paid into fund for

		restitution through settlement with SEC, and agreed to pay any restitution to any injured party, even in excess of $ 330 million. Claims to have paid more than $ 1 billion to date.
Duration	18 months	36 months
Extension Option		
Monitor	Neil V. Getnick and Judge Margaret J. Finerty, Getnick & Getnick, New York, NYNB: Investigative work on the monitorship by Hawthorne Investigations & Security, Inc. Auditing work by P. Scutero & Associates.	
How selected	Appointed by the court upon the recommendation of the U.S. Attorney's Office.	PSI must retain, within 30 days, mutually acceptable outside counsel.
Supervised By	No one: reports directly to and is directed by an	

	agency to be designated by the U.S. Attorney's Office.	
Duties	. Monitor NYRA's compliance with the terms of the agreement.	. Review PSI's policies and procedures to ensure that PSI has adopted all the compliance-related directives in SEC agreement.
Frequency of Reports to Government		Every three months for duration of agreement.
Funding		
Resolution of disagreements/ monitor's authority		
Replacement Provision		
Internal Changes Required	Board . Formation of a Special Oversight Committee of the Board to address any issues raised by law enforcement offices. Management . Creation of an Office of the Chairman to	Board . Hire a mutually acceptable new outside director to serve on the board of PSG and the Compliance Committee of PSI. Director/ ombudsman/monitor is also responsible for anonymous tips

supervise all business areas and departments of NYRA.

. Completion of management restructuring, including significant replacement of staff.

. Must seek an advisory opinion from IRS.

Internal investigations

. Retained SafirRosetti, an investigation and security firm, reporting to Special Oversight Committee, to:

Conduct a thorough review of NYRA's operations;

Recommend revisions and improvements to NYRA's operations; and

Maintain a fulltime presence at NYRA to ensure proper implementation and follow-

from employees.

	through on such recommended revisions and improvements. P 5(g).	
Post-Monitor Obligations	Board . As in "Internal Changes Required". Roger Williams Medical Center (2006)	Board . As in "Internal Changes Required". Schnitzer Steel Industries Inc. (2006)
Charges	Conspiracy to defraud the United States.	Violations of the Foreign Corrupt Practices Act of 1977.
Agency	U.S. Department of Justice, U.S. Attorney's Office for the District of Rhode Island.	Securities and Exchange Commission and U.S. Department of Justice, Criminal Division, Fraud Section.
Fines	In lieu of fines, must provide $ 4 million in free medical care to RI residents; silent as to restitution.	$ 7.5 million fine; silent as to restitution.
Duration	24 months	36 months
Extension Option	Two years and deferral of two years. Option to extend six months for first breach of agreement.	Schnitzer may extend the time period for retention of the Compliance Consultant with

	Successive penalties of one-year extensions for further breaches may be applied, not to exceed five years. If warranted by level of cooperation, U.S. Attorney's Office may lessen duration of monitorship.	prior written approval of the Commission staff.
Monitor	Meg Curran (assisted by Leonard Henson), McCue, Lee & Greene, LLP, Boston, MA.	
How selected	Chosen and hired by RWMC with input and prior approval of the U.S. Attorney's Office.	Retained by Board of Directors and acceptable to the staff of the SEC.
Supervised By		
Duties	. Review and monitor RWMC's compliance with the agreement, and make such recommendations as the monitor believes are necessary to comply with	. Review and evaluate Schnitzer's internal controls, record-keeping, and financial reporting policies and procedures as

	agreement. . Review and monitor RWMC's maintenance and execution of the revised compliance and ethics program. . At option, may conduct investigations into any reported potentially illegal or unethical conduct, or refer to the Executive Ethics Officer or U.S. Attorney's Office.	they relate to Schnitzer's compliance with the books and records, internal accounting controls, and anti-bribery provisions of the FCPA.
Frequency of Reports to Government	No less than every four months, and whenever monitor deems fit.	Annually, with first report due 120 days after retention.
Funding	Compensation and expenses of monitor and persons hired under his or her authority shall be paid by RWMC at typical hourly rates, but not more than $ 250 per hour.RWMC may not seek reimbursement	"The compensation and expenses of the Compliance Consultant and of the persons hired under his or her authority, shall be paid by Schnitzer." P 9.

	from Medicaid/ Medicare for this expense.Monitor gets private office space, telephone service and clerical assistance.	
Resolution of disagreements/ monitor's authority	"The Monitor has the authority to take any other actions that are necessary to effectuate the Monitor's responsibilities." P 25.	Schnitzer must advise SEC and monitor of any recommendations in report that it disagrees with, and can suggest alternatives. If after 60 days of good faith negotiation parties are unable to agree, monitor's recommendations becoming binding.
	"All provisions in this Agreement regarding the Monitor's jurisdiction, powers, [etc] shall be broadly construed so that the Monitor can fully implement and review the necessary actions and programs required under this Agreement." P 22.	
Replacement Provision		None; "To ensure the independence of the Compliance Consultant,

		Schnitzer shall not terminate the Compliance Consultant without prior written approval" of the SEC and DOJ. P 17.
Internal Changes Required	Management . Must revise compliance program to conform with U.S. Sentencing Guidelines. . Redesignate compliance officer to be Executive Ethics Officer reporting directly to Board.	Management . Must adopt procedure changes set forth in monitor's report within 120 days of receiving each report.
Post-Monitor Obligations	Obligation to cooperate continues even after the DPA terminates, as long as any individual or entity is subject to prosecution. Management . As in "Internal Changes Required".	
	Statoil, ASA (2006)	Symbol Technologies (2004)

Charges	Violations of the Foreign Corrupt Practices Act of 1977.	Falsification and manipulation of accounting and filing materially false and misleading financial statements and other documents with the SEC.
Agency	Securities and Exchange Commission and U.S. Department of Justice.	U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of New York.
Fines	$ 3 million fine paid to Norwegian government; $ 10.5 million fine paid to U.S. government; silent as to restitution.	$ 3 million in fines; $ 139 million in restitution in the form of stock and cash.
Duration	36 months	36 months
Extension Option	Statoil may extend the time period for retention of the Compliance Consultant with prior written approval of the Commission staff.	
Monitor		
How selected	Retained by Board of Directors and acceptable to the	Retained by Symbol and acceptable to the

	staff of the SEC.	U.S. Attorney's Office and SEC.
Supervised By		Reports to General Counsel with copies to U.S. Attorney's Office and SEC.
Duties	. Review and evaluate Statoil's internal controls, record-keeping, and financial reporting policies and procedures as they relate to Statoil's compliances with the FCPA.	. Monitor Symbol's internal controls and financial reporting. . Annually review Symbol's revenue recognition and accounting practices, internal accounting control structure and systems, Symbol's implementation of, and compliance with remedial actions taken, and policies and procedures implemented as a result of or relied upon this agreement.
Frequency of Reports to Government	Annually, with first report due 120 days after retention.	Annually.

Funding	"The compensation and expenses of the Compliance Consultant, and of the persons hired under his or her authority, shall be paid by Statoil." p. 8, P 1.
Resolution of disagreements/ monitor's authority	Statoil must advise SEC and Monitor of any recommendations in report that it disagrees with, and can suggest alternatives. If after 60 days of good faith negotiation parties cannot agree, monitor's recommendations becoming binding [if not conflict with Norwegian law].
Replacement Provision	None; "To ensure the independence of the Compliance Consultant, Statoil shall not have the authority to terminate the Compliance Consultant

	without prior written approval" of the SEC and the DOJ. p. 12, P 10.	
Internal Changes Required	Board . Retained outside counsel to conduct an investigation. . Created a corporate compliance officer and ethics committees. . Expanded role of Audit Committee (AC) to oversee compliance with the FCPA. . New ethics policies, an ethics hotline, and new reporting lines directly to the AC. Management . Must adopt procedure changes set forth in monitor's report within 120 days of receiving report.	Board . Restructuring of board, including splitting of Chairman and CEO functions and appointing a non-executive Chairman. . Revision of charter of Audit Committee to grant more responsibility and authority to the committee. Management . Formation of a disclosure committee composed of CEO, President, COO, CFO, SVP-Finance and Business Controller, CAP and General Counsel. Internal investigations . Symbol retained Swidler Berlin Shereff

		Friedman in March 2002 and waived attorney-client privilege with regard to the results of this investigation.
Post-Monitor Obligations		Board & Management. As in "Internal Changes Required".
	Titan Corporation (2005)	
Charges	Violations of the Foreign Corrupt Practices Act of 1977.	
Agency	Securities and Exchange Commission and U.S. Department of Justice, Criminal Division, Fraud Section.	
Fines	$ 13 million in fines; $ 15.5 million in disgorged profits.	
Duration	8 months	
Extension Option	Timeline is extremely specific: monitor must be hired within 30 days, report to the DOJ within 90 days of appointment,	

	Titan must adopt changes suggested in report within 90 days, and within 150 days of receipt of report Titan must submit affidavit certifying that it has adopted and implemented recommendations of monitor.
Monitor	
How selected	Hired by Board of Directors and not unacceptable to the staff of the SEC.
Supervised By	
Duties	"The consultant shall complete a review and submit a report documenting findings . . . . The Report shall include, without limitation, recommendations concerning policies, procedures and practices necessary to remedy (i) the failures alleged in the complaint,

	and (ii) any further failures described in the report." p. 5 P 1.
Frequency of Reports to Government	Within 90 days of appointment. Titan must submit affidavit of compliance within 150 days of receiving report from monitor.
Funding	Titan "shall compensate the Consultant, and persons engaged to assist the Consultant, for services rendered pursuant to this Final Judgment at their reasonable and customary rates." p. 6.
Resolution of disagreements/ monitor's authority	Titan may suggest alternative remedies to those set forth in monitor's report, and the two parties shall negotiate new solutions in good faith, but 60 days after report is submitted, monitor gets

	final say.
Replacement Provision	None; Titan "shall not have the authority to terminate the Consultant without prior written approval" of the SEC. p. 6.
Internal Changes Required	Management Must adopt procedure changes set forth in monitor's report within 90 days of receiving report.
Post-Monitor Obligations	

FOOTNOTES:

n1. See Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. (forthcoming June 2007), available at http://ssrn.com/abstract=930240; Benjamin M. Greenblum, Note, What Happens To A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, *105 Colum. L. Rev. 1863, 1867 (2005);* Corporate Crime Reporter, Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements (2005), http://www.corporatecrimereporter.com/deferredreport.htm (last visited Feb. 16, 2007).

n2. The papers cited in note 1 examine corporate monitors from the perspective of criminal law, whereas we examine it from the perspective of its impact on corporate governance. For a discussion on some corporate governance perspectives, see John C. Coffee Jr., Deferred Prosecution: Has it gone too far?, Nat'l L.J., July 25, 2005, at 13.

n3. See Garrett, supra note 1 (manuscript at 26); Greenblum, supra note 1, at 1863.

n4. See Linda J. Silberman, Masters and Magistrates Part II: The American Analogue, *50 N.Y.U. L. Rev.*

1297, 1321-22 (1975).

n5. *Id. at 1322 n.149* ("Masters were used and appointed by the chancery from at least the reign of Henry VIII on." (citing 1 W. Holdsworth, A History of English Law 416-18 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. rev., Sweet & Maxwell 1956))).

n6. See e.g., Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication? *53 U. Chi. L. Rev. 394 (1986);* David I. Levine, The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered, *17 U.C. Davis L. Rev. 753 (1984).*

n7. See Thomas E. Willging et al., Fed. Judicial Ctr., Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters 25 (2000), available at http://www.fjc.gov/ public/pdf.nsf/lookup/SpecMast.pdf/$ file/SpecMast.pdf.

n8. *In re Peterson, 253 U.S. 300, 312 (1920)* (citation omitted).

n9. *Fed. R. Civ. P. 53(a).* Perhaps most striking from a historical context is the lack of debate, until relatively recent times, about the authority of courts to make such appointments. See Levine, supra note 6.

n10. See *Fed. R. Civ. P. 53(a)*; Levine, supra note 6.

n11. See James Fanto, Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation, *58 Fla. L. Rev. 859, 910 (2006).*

n12. See Corporate Crime Reporter, supra note 1; James K. Robinson et al., Deferred prosecutions and the independent monitor, 2 Int'l J. Disclosure & Governance 325, 326-27 (2005).

n13. James B. Jacobs et al., The RICO Trusteeships after Twenty Years: A Progress Report, *19 Lab. Law. 419, 452 (2004).*

n14. *BellSouth Corp., Exchange Act Release No. 45,279, 2002 WL 47167* (Jan. 15, 2002), available at http://www.sec.gov/litigation/admin/34-45279.htm; *Chiquita Brands Int'l Inc., Exchange Act Release No. 44,902, 75 SEC Docket 2308* (Oct. 3, 2001); *Am. Bank Note Holographics, Inc., Securities Act Release No. 7994, Exchange Act Release No. 44,563, 75 SEC Docket 912* (July 18, 2001); *KPMG Peat Marwick LLP, Exchange Act Release No. 44,050, 74 SEC Docket 1351* (Mar. 8, 2001); *Int'l Bus. Machs. Corp., Exchange Act Release No. 43,761, 73 SEC Docket 2987* (Dec. 21, 2000).

n15. See, e.g., Vanessa Blum, Justice Deferred, LEGAL TIMES, Mar. 21, 2005, at 8; Press Release, SEC, SEC charges Time Warner with Fraud, Aiding and Abetting Frauds by Others, and Violating a Prior Cease-and-Desist Order (March 21, 2005), available at http://www.sec.gov/ news/press/2005-38.htm.

n16. See supra note 14.

n17. See Deferred Prosecution Agreement, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. Oct. 27, 1994), available at http://www.corporatecrimereporter.com/documents/ prudential.pdf; see also *SEC v. Prudential Sec., Inc., No. 93 Civ. 2164, 1993 WL 473189, at 2-3* (D.D.C. Oct. 21, 1993).

n18. Letter from Scott W. Muller & Carey R. Dunne, Davis Polk & Wardwell, counsel to Prudential Sec., Inc., to Kenneth J. Vianale & Baruch Weiss, Assistant U.S. Attorneys for the S. Dist. of N.Y., U.S. Dep't of Justice (Oct. 13, 1994), available at http://www.corporatecrimereporter.com/ documents/prudential.pdf [hereinafter Letter from PSI].

n19. Letter from Kenneth J. Vianale & Baruch Weiss, Assistant U.S. Attorneys for the S. Dist. of N.Y., U.S. Dep't of Justice, to Scott W. Muller & Carey R. Dunne, Davis Polk & Wardwell, counsel to Prudential Sec., Inc. (October 27, 1994), available at http://www.corporatecrimereporter.com/ documents/prudential.pdf.

n20. See Complaint at 1, United States v. Prudential Sec., Inc., No. 94-2189 (S.D.N.Y. October 27, 1994). This includes a long list of violations, such as *15 U.S.C. §§ 78j*(b), 78ff; *17 C.F.R. 240.10b-5*; and *18 U.S.C. § 2.*

n21. See Letter from PSI, supra note 18, at 9 ("[Prudential will] cooperate with the Government and let "the chips fall as they may.'").

n22. Corporate Crime Reporter, supra note 1.

n23. For a comparison of monitoring assignments, see infra Appendix.

n24. While some scholars refer to this evolution as having a genesis in the mandate of the pretrial-services agencies as early as the 1970s, it was not until Prudential that the modern-day concept of an outside independent expert paid for by the offending company was put into effect, with the Coopers & Lybrand case soon following suit. See Greenblum, supra note 1, at 1867 (crediting the inclusion of deferrals in pretrial-services practices for their wide use).

n25. Memorandum from Eric Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys (June 16, 1999), available at http://www.usdoj.gov/criminal/fraud/policy/chargingcorps.html.

n26. Id.

n27. See Greenblum, supra note 1, at 1875 n.84 ("There is consensus, however, that the Thompson Memo was ultimately a catalyst for an increase in corporate deferrals.").

n28. See, e.g., Deferred Prosecution Agreement, United States v. Bristol-Myers Squibb Co., Mag. No. 05-6076 (RJH) (D.N.J. June 15, 2005); Deferred Prosecution Agreement, United States v. Am. Online, Inc., No. 1:04 M 1133 (E.D. Va. Dec. 15, 2004); Deferred Prosecution Agreement, United States v. Computer Assocs. Int'l, Inc., Mag. No. 04-837 (ILG) (E.D.N.Y. Sept. 22, 2004); Letter from Andrew J. Coremey & Bonnie Jones, Assistant U.S. Attorneys for the S. Dist. of N.Y., U.S. Dep't of Justice, to John T. Montgomery, Ropes & Gray LLP, counsel to Aurora Foods, Inc. (Jan. 22, 2001), available at http://www.corporatecrimereporter.com/documents/aurora.pdf.

n29. See e.g., Letter from Michael J. Garcia, U.S. Attorney for the S. Dist. of N.Y., U.S. Dep't of Justice, to

Christopher S. Rizek & Schott D. Michel, Caplin & Drysdale, Chartered, counsel to HVB Risk Mgmt. Prods. Inc., HVB U.S. Fin. Inc., and HVB Am.. Inc. (Feb. 13, 2006), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/f iles/hvb_deferred_prosecution_agreement.pd f [hereinafter HVB Letter]; Letter from David N. Kelly, U.S. Attorney for the S. Dist. of N.Y., U.S. Dep't of Justice, to Robert S. Bennett, Skadden, Arps, Slate. Meagher & Flom LLP, counsel to KPMG LLP (Aug. 25, 2005), available at http://www.corporatecrimereporter.com/ documents/kpmgdeferred_000.pdf.

n30. See, e.g., *Diagnostic Prod. Corp., Exchange Act Release No. 51,724, 85 SEC Docket 1319* (May 20, 2005); Deferred Prosecution Agreement, United States v. SSI Int'l Far East, LTD, No. CR 06-398 (D. Or. Oct. 16, 2006), available at http://www.secinfo.com/d1znFa.v22t.d.htm#1stPage; Deferred Prosecution Agreement, United States v. Monsanto Co., No. 1:05-cr-008-ESH-ALL (D.D.C. Jan. 6, 2005) [hereinafter Monsanto Agreement]; Agreement between Criminal Div., Fraud Section, U.S. Dep't of Justice, and InVision Techs., Inc. (Dec. 3, 2004), available at http:// www.corporatecrimereporter.com/documents/invision1.pdf; Agreement between Criminal Div., Fraud Section, U.S. Dep't of Justice, and Micrus Corp. and Micrus S.A. (Feb. 28, 2005), available at http://www.corporatecrimereporter.com/documents/micrus.pdf.

n31. Brooke A. Masters, Bristol-Myers Ousts Its Chief at Monitor's Urging, Wash. Post, Sept. 13, 2006, at D1.

n32. *SEC v. WorldCom, Inc., 273 F. Supp. 2d 431, 432 (S.D.N.Y. 2003).*

n33. Cf., Greenblum, supra note 1, at 1884-89 (discussing corporate incentives to settle); Cost of Litigation Haunts U.S. Corporations More Than Winning Cases, Ins. J., Nov. 7, 2005, available at http://www.insurancejournal.com/magazines/east/2005/11/07/featu res/62312.htm (discussing costs of corporate litigation); Litigation Trends Continue to Mount Worldwide; Insurers Face Five Times the Average Number of Lawsuits, Ins. J., Oct. 11, 2006, available at http://www. insurancejournal.com/news/national/2006/10/11/73220.htm (same).

n34. See Robinson et al., supra note 12, at 327 (comparing the repercussions of KPMG's acceptance of a DPA with Arthur Andersen's rejection of a DPA).

n35. See Corporate Crime Reporter, supra note 1.

n36. See infra Appendix.

n37. See Masters, supra note 31.

n38. For a fuller description, see infra Appendix.

n39. For DPAs/NPAs involving AIG-FP Pagic Equity Holding Corp., AmSouth Bancorporation, America Online Inc., Aurora Foods, Inc., Bank of New York, Bristol-Myers Squibb Co., Canadian Imperial Bank of Commerce, Computer Assocs. Int'l, Inc., InVision Techs., Inc., KPMG, Merrill Lynch & Co., Micrus Corp. & Micrus S.A., Monsanto Co., N.Y. Racing Ass'n, Prudential Sec. Inc., and Symbol Tech., see Corporate Crime Reporter, supra note 1.

For the DPAs/NPAs of additional companies, see Deferred Prosecution Agreement, United States v. Roger Williams Med. Ctr., No. 06-02T (D.R.I. Jan. 30, 2006), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/f iles/roger_williams_deferred_sentence_ agreement.pdf; Agreement between U.S. Attorneys for the Cent. Dist. of Cal. and the E. Dist. of Va., U.S. Dep't of Justice, and Boeing Co. (June 30, 2006), available at http://www.corporatecrimereporter.com/documents/boeing2.pdf; Agreement between U.S. Attorney for the Dist. of N.J., U.S. Dep't of Justice, and the Univ. of Med. & Dentistry of N.J. (Dec. 31, 2005), available at http://www.usdoj.gov/usao/nj/press/files/pdffiles/UMDNJFINALDPA .pdf; HVB Letter supra note 29; Letter from Alice H. Martin, U.S. Attorney for the N. Dist. of Ala., U.S. Dep't of Justice, to Robert S. Bennett, Skadden, Arps, Slate, Meagher & Flom LLP, counsel to HealthSouth Corp. (May 17, 2006), available at http://www.usdoj.gov/usao/aln/Docs/May% 202006/healthsouthnonpros2.pdf.

n40. See Monsanto Agreement, supra note 30. The trend is clear that in most FCPA cases in which inadequate financial controls are the cause of an FCPA books and records or financial controls violations, a monitor will result.

n41. See Corporate Crime Reporter, supra note 1.

n42. See Dep't of Institutional Integrity, World Bank, Voluntary Disclosure Program (VDP) Guidelines for Participants 12-13 (2006), available at http://siteresources. worldbank.org/INTVOLDISPRO/Resources/VDPGuidelinesforParticipan ts.pdf.

n43. See Justin Scheck, Milberg Weiss Weighs Non-Prosecution Deal, Recorder, May 16, 2006, http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=114769653 3653.

n44. Several monitors were both former judges and prosecutors or former prosecutors and SEC attorneys.

n45. See Robinson et al., supra note 12, at 332.

n46. We will occasionally refer to the firm as a "monitee," a term we have coined.

n47. The recent firings of both the CEO and general counsel of Bristol-Myers Squibb based on the monitor's recommendations underscore their increasing power. See Masters, supra note 31.

n48. See Press Release, SEC, SEC Charges AIG with Securities Fraud (Feb. 9, 2006), available at http://www.sec.gov/litigation/litreleases/lr19560.htm; see also Vikas Bajaj, AIG to Pay $ 1.6 Billion in Settlement of Fraud Charges, Int'l Herald Trib., Feb. 9, 2006, Finance, at 14, available at http://www.iht.com/articles/2006/02/09/business/aig.php.

n49. One unavoidable major problem that illustrates the difficulty for both parties in this entire undertaking is the simple fact that until the engagement letter is signed, the monitor can only speculate as to what he or she must undertake to fulfill his or her obligations. After the engagement letter is fully executed, however, the monitor is unlikely to get permission by the monitee to expand work scope. As a result, the agreement must almost certainly be prepared with provisos such as "The monitor shall undertake such investigation and review as necessary to certify to the [SEC] that the company's compliance program fulfills article X of matter Y." This, of course, still leaves open the question of what is "necessary."

n50. See Robinson et al., supra note 12, at 335-37.

n51. See id.

n52. See id. at 333-34. We consider this a potentially underappreciated aspect of the monitor mechanism. The reports may prove useful to the firm and form part of the monitor's postmonitoring legacy, but these reports also may be useful for other firms in similar situations or markets to help reduce their likelihood of violating laws and potentially improve their internal processes.

n53. See supra note 39.

n54. For an example of a settlement whose results will be closely monitored, see supra note 48 (regarding the AIG settlement).

n55. Monitoring arrangements come to an end with the end of the period noted in the DPA or NPA, and in that respect they are different than consent decrees, which may not have a set end date.

n56. In Table 2, we have not focused on the elements that are common among these supervisors (e.g., difficulty of removing them from the firm).

n57. For discussion of optimal sanctions, see Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968), and A. Mitchell Polinsky & Steven Shavell, The Optimal Use of Fines and Imprisonment, 24 J. Pub. Econ. 89 (1984).

n58. For discussions of gatekeepers, see John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance (2006), and Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. Econ. & Org. 53 (1986).

n59. See Kraakman, supra note 58, at 55-59; see also Coffee, supra note 58, at 1-5.

n60. Polinsky & Shavell, supra note 57, at 95.

n61. Id. at 90, 95, 98; Becker, supra note 57, at 193-98

n62. Becker, supra note 57, at 193-98; Polinsky & Shavell, supra note 57, at 90, 95, 98. Monitor-like sanctions have potential incapacitation benefits as well as deterrence benefits, but we do not discuss those incapacitation benefits and costs in detail in this paper. For discussion of this in the context of corporate probation officers, see Christopher A. Wray, Note, Corporate Probation Under the New Organizational Sentencing Guidelines, *101 Yale L.J. 2017, 2033-34 (1992).*

n63. V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, *109 Harv. L. Rev. 1477, 1497-98 (1996).*

n64. See id.

n65. Cf. *id. at 1503-04.*

n66. See Wray, supra note 62, at 2020 (discussing this and citing Jeffrey S. Parker, Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties, *26 Am. Crim. L. Rev. 513, 572 (1989)).* Of course, monitors are not usually appointed to run the firm in a more profit-maximizing manner than management but probably to run the firm in a more law-compliant manner.

n67. This argument raises an interesting question: if monitors help to reduce law violations (which we think they do) and reduce the substantial penalties firms face, then we would expect firms to hire these monitors themselves without a DPA or NPA being needed to impose monitors on them. The question is why firms are not doing this themselves. There could be a number of reasons for this: (1) fines are not large enough to make it worthwhile to voluntarily hire monitors, (2) the firms are unaware of the advantages of having someone like a monitor, or (3) the monitor may not be that valuable for all firms. The first reason leads us to enhance corporate sanctions and the second to advertise the benefits of compliance officers rather than force a monitor on the firm.

n68. See John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, *79 Mich. L. Rev. 386, 390 (1981);* Khanna, supra note 63, at 1498-99.

n69. To be precise, monitors are probably more desirable when the harm caused is large relative to the assets of the firm causing the harm. However, a good proxy is simply when great harm is caused because when the harm is great, fewer firms will have assets sufficient to pay for it.

n70. Wray, supra note 62, at 2021.

n71. See Steven Shavell, Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent, *85 Colum. L. Rev. 1232, 1236-38 (1985)*.

n72. We assume in this paragraph that the management present at the time of the last wrong and this wrong are the same. If they are not, then different concerns also arise. See Khanna, supra note 63, at 1509-12.

n73. In a sense, the payment to the monitor can be seen as an additional cash sanction (paid over time) on the firm along with the costs of having the monitor influencing decisions.

n74. On incapacitation generally, see Robinson, et al., supra note 12, and Shavell, supra note 71.

n75. Some of the cases in the Appendix, infra, involve firms that are insolvent or near to it. In such cases, incapacitating remedies may have greater impact than cash fines, which we know the firm cannot pay. Even so, the majority of the cases in the Appendix do not involve insolvent firms.

n76. See Richard A. Posner, An Economic Theory of the Criminal Law, *85 Colum. L. Rev. 1193, 1201-05 (1985)*; Shavell, supra note 71, at 1237-38.

n77. Another argument might be that for the period of the monitoring assignment, it is acceptable for the corporation to make fewer profits as an additional penalty for wrongdoing. Our response is that if such a penalty is desired, it is better that it be imposed explicitly because then at least its magnitude can be calculated. Relying on monitors not to run the corporation with a profit-maximizing focus (legally) as well as management seems a rather imprecise way of penalizing a firm and is likely to lead to either over-or underdeterrence.

n78. See Kraakman, supra note 58, at 62-66 (providing an analogous discussion for gatekeepers who act as "bouncers" and "chaperones").

n79. William T. Allen & Reinier Kraakman, Commentaries and Cases on the Law of Business Organization 239-40 (2003); Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 90-92 (1991).

n80. E.g., Easterbrook & Fischel, supra note 79, at 91-92. For example, if a particular investment required $ 100 of management effort to produce $ 500 in profits for the firm, then shareholders would prefer that management make that expenditure. However, if managers are paid 10% of firm profits, then they will be unwilling to expend $ 100 worth of their effort unless the firm profits by at least $ 1,000. This sort of example can be generated for many other kinds of corporate decisions as well (e.g., perquisites).

n81. See id.; see also Allen & Kraakman, supra note 79, at 3-12.

n82. See Easterbrook & Fischel, supra note 79, at 94-98. For a discussion in the context of a specific case, see Krishna Palepu & Tarun Khanna, Product and Labor Market Globalization & Convergence of Corporate Governance: Evidence from Infosys and the Indian Software Industry, (Harvard Univ. Negotiation, Org. & Mkts., Working Paper No. 02-30, 2001), available at http://ssrn.com/abstract=323142.

n83. See Easterbrook & Fischel, supra note 79, at 94-98.

n84. See id.

n85. See id. Concerns with end-of-period frauds are well known. See Cindy R. Alexander et al., Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms, *42 J.L. & Econ. 393, 395, 404 (1999).*

n86. Easterbrook & Fischel, supra note 79, at 90-92; see Oliver Hart & John Moore, Foundations of Incomplete Contracts 1 (Nat'l Bureau of Econ. Research, Working Paper No. 6726, 1998), available at http://ssrn.com/abstract=226378.

n87. See Easterbrook & Fischel, supra note 79, at 90-92. Indeed, fiduciary duties were conceived of as gap-filling measures in the early economic literature. See id. More recently, a greater focus has developed on notions of trust and fiduciary duty. See Tamar Frankel, Trusting and Non-Trusting: Comparing Benefits, Cost and Risk (Boston Univ. Sch. of Law, Law & Econ. Working Paper Series, Paper No. 99-12, 1999), available at http://ssrn.com/abstract=214588; Edward L. Glaeser et al., What is Social Capital? The Determinants of Trust and Trustworthiness 3 (Nat'l Bureau of Econ. Research, Working Paper No. 7216, 1999), available at http://ssrn.com/abstract= 171073. However, for our purposes the standard gap-filling account will suffice. This is because the standard account is probably less likely to provide fiduciary duty protection than trust-based accounts. If we can show that fiduciary duties are desired even under the more miserly gap-filling account, then it will probably be relatively easy to show that such duties are desired under a trust-based account.

n88. Cf. Lucian A. Bebchuk, The Case for Facilitating Competing Tender Offers, *95 Harv. L. Rev. 1028, 1046-48 (1982)* (discussing how there may be too much search activity in certain contexts).

n89. There is a vast literature on this. For an overview, see Lucian A. Bebchuk & Jesse M. Fried, Pay without Performance: Overview of the Issues, *30 J. Corp. L. 647 (2005)*.

n90. Of course, it is possible that the selection method for monitors tends to select those people who have good incentives and hence will probably perform well. However, this depends on one's confidence in the selection method. If it is based on agencies screening for those people with considerable business and legal experience, then we might have faith in the choice, but if it is based on prior connections to the agency, then one may view things differently. Indeed, if all monitors appear to have government connections, then the system risks a criticism of cronyism. Currently, almost all monitors have prior agency connections.

n91. If this were not the case, it would be an obvious loophole for firms to exploit.

n92. This might simply be a temporary phenomenon. If more monitoring assignments involve the influential type of monitor, then a reputational market may develop to address profit maximizing ability, too. However, one has not yet developed, and even if it did, monitors would still face lesser market pressures than managers who could be fired as well as face reputational losses.

n93. It is noteworthy that the foregoing discussion suggests that monitors face even less market pressure than managers to maximize profits (e.g., it is so difficult to replace a monitor). This may lead one to impose

additional scrutiny on monitors relative to managers (i.e., even stronger fiduciary duties on monitors than managers). However, we must be careful at this juncture. It may be that the pressure to maximize profits in part led management to consider the illegal acts in the first place (depending on the type of illegal act). See Cindy R. Alexander & Marc A. Cohen, New Evidence on the Origins of Corporate Crime, 17 Managerial & Decision Econ. 421 (1996). After all, some management may be trying so hard to maximize profits that they "push the envelope" too far. We stress "some" management because "pushing the envelope" does not describe the more recent kinds of fraud which smack more of outright theft (e.g., WorldCom). If this is correct, then one way to reduce the amount of illegal behavior is to remove (or reduce) the pressure to maximize profits. Difficult-to-displace monitors assessed on their law compliance abilities may achieve that aim. However, that does not mean we should do nothing to motivate monitors to make profit-maximizing decisions (legally) for the firm. In light of this, we are inclined to suggest that some supplement to market forces is necessary (e.g., fiduciary duties).

n94. This is when it becomes imperative that the monitor possess the requisite expertise to render his or her own independent judgment as to what is required, no more and no less, to fulfill the mandate set out in the disposition, and be able and willing to exercise that judgment in the face of criticism by both the firm and the government. For the process to work with its greatest integrity, discussions of work scope should be left to the monitor with an open door for either the government or the firm to complain to the judge if things get totally out of hand. Fortunately for the monitor, he or she can withdraw if necessary to protect his or her own integrity, but chances are that the monitor's wishes will, in the end, be honored. No monitor has been replaced as yet, and the occasional challenges to the monitor's authority are usually resolved in favor of the monitor by the agency.

n95. See Louis Kaplow, Rules Versus Standards: An Economic Analysis, *42 Duke L.J. 557 (1992)* (discussing optimal choice between rules and standards); Edward L. Glaeser & Andrei Shleifer, The Rise of the Regulatory State (Harvard Inst. of Econ. Research, Discussion Paper No. 1934, 2001), available at http://ssrn.com/abstract=290287 (comparing and analyzing court and agency enforcement; Vikramaditya S. Khanna, Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis (Univ. of Mich. John M. Olin Ctr. for Law & Econ., Paper No. 04-015, 2004), available at http://ssrn.com/abstract=657441 (discussing concerns with agency enforcement).

n96. Government agencies have been placed as the monitors of private businesses in other countries and to an extent in the United States, too (for corporate probation officers). These have not been failures nor have they necessarily been complete successes. See John C. Coffee, Jr., Privatization and Corporate Governance: The Lessons from Securities Market Failure, *25 J. Corp. L. 1 (1999)* (discussing securities markets regulation in Poland and the Czech Republic and use of government monitors); Wray, supra note 62, at 2039.

n97. Thus, agency monitoring may not occupy more than de minimis oversight of monitors.

n98. See John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, *86 Colum. L. Rev. 669 (1986).*

n99. We believe many of the concerns animating the business judgment rule apply in the context of monitors - risk aversion on directors' behalf and judicial-hindsight bias in particular. See Allen & Kraakman, supra note 79, at 251-53. Another matter supporting the business judgment rule for managers is that managers (compared to shareholders) are less able to diversify their firm-specific risk because they cannot work at many different firms at once, whereas shareholders can invest in different firms. We consider monitors better able than managers to diversify firm-specific risk because they can take on more than one monitoring assignment at a time and often have other jobs with which they are involved. However, we still consider their ability to diversify risk to be less than that of shareholders and hence consider the business judgment rule to be the appropriate liability screen.

n100. The monitor might negotiate with the government or the firm for either insurance or, if the monitor is an attorney, additional malpractice insurance.

n101. See supra notes 45-47 and accompanying text.

n102. See Easterbrook & Fischel, supra note 79, at 90-92.

n103. See Ronald J. Gilson & Reinier Kraakman, Reinventing the Outside Director: An Agenda for Institutional Investors, *43 Stan. L. Rev. 863, 883-92 (1991).*

n104. *Id. at 879-92.*

n105. *Id. at 885-87.*

n106. *Id. at 886.*

n107. *Id. at 889-90.*

n108. *Id. at 885, 890.*

n109. We use the term "organic" to capture the idea that monitors were not implemented through any organized means but rather came about through a series of settlements.

n110. This was a concern that Gilson and Kraakman address in some measure. Gilson & Kraakman, supra note 103, at 889-90.

n111. In particular, one might be concerned about the factors that go into a government agency's decision to appoint monitors (especially if most are former government officials).

n112. See supra Part III.

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Ms. SÁNCHEZ. Thank you, Mr. Dickinson. We appreciate your testimony. And you came in right at the 5-minute mark. Very well done.

Mr. Nahmias, at this time I would invite you to provide your testimony.

TESTIMONY OF THE HONORABLE DAVID E. NAHMIAS, THE UNITED STATES ATTORNEY'S OFFICE NORTHERN DISTRICT OF GEORGIA, ATLANTA, GA

Mr. NAHMIAS. Thank you, Madam Chairwoman, Ranking Member Cannon, and other distinguished Members of the Subcommittee. I appreciate the opportunity to discuss the important work of the Justice Department in preventing, deterring, and punishing corporate crime. The investigation and prosecution of corporate crime has been an important priority of the Department since the corporate fraud crisis of 2001 and 2002 and has resulted in more than 1,200 convictions of individuals and entities and the recovery of hundreds of millions of dollars in fines, penalties, and restitution for victims.

We recognize, however, that criminal conviction of a corporation and sometimes even the indictment of a corporation can have significant collateral consequences for innocent third parties who may include employees, pensioners, shareholders, creditors, customers, and the general public. As set forth in the Department's Principles of Federal Prosecution of Business Organizations, prosecutors properly consider such collateral consequences in determining whether to charge the corporation.

Prosecutors may use a variety of tools other than indictment and prosecution to achieve the goal of justice for victims and the public. These tools include deferred prosecution agreements, or DPAs, and non-prosecution agreements, or NPAs. Under these agreements, a corporation against which the government has sufficient evidence to file criminal charges, potentially undertakes a period of probation subject to specific conditions by agreement with the government instead of as a result of a criminal conviction that would have substantial collateral consequences.

A DPA differs from an NPA in that a DPA typically includes a formal charging document and an agreement that is filed with the court, while in the NPA context, there is typically no charging document and the agreement is normally maintained by the parties.

Deferred prosecution and non-prosecution agreements occupy an important middle ground in the resolution of corporate crime cases that may have distinct advantages over simply declining prosecution, which may allow a corporate criminal to escape without direct consequences, or charging and convicting a corporation and producing a result that may have calamitous collateral consequences. These agreements typically require the payment of restitution to victims, and/or fines and penalties long before such payments could be obtained in most cases through formal charging, protracted litigation, and inevitable appeals.

The agreements encourage corporate cooperation in obtaining the evidence necessary to prosecute culpable individuals. Perhaps most importantly, by requiring the adoption of solid internal controls and ethics and compliance programs, the agreements encourage

corporations to root out illegal conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates.

Thus, these agreements can help restore the integrity and preserve the financial viability of a corporation that had descended into criminal conduct. If the corporation satisfies the obligations imposed by the agreement within a defined period, usually 1 to 5 years, then the government will not proceed with the prosecution. If the corporation materially fails to comply with the agreement, then the government retains the discretion to go forward with prosecution and in most cases, to use admissions of the corporation to prove the case.

Since at least 1992, DPAs and NPAs have been used to resolve a variety of cases involving a wide variety of criminal offenses. But while the use of DPAs and NPAs to resolve such cases has expanded since the fraud crisis early in this decade, it is still a relatively limited practice.

Even more limited in number are the DPAs and NPAs that include the use of a corporate monitor. Monitors are independent. They are not employees or agents of the government, and they are not paid with taxpayer funds. Instead, the monitor is retained by the corporation, which pays for the monitor along with all the other costs of implementing the DPA or NPA.

The appointment of a monitor is not necessary in every case, but it can have distinct advantages for the public in appropriate cases. Monitors allow the government to verify through the work of an independent observer whether a corporation is fulfilling the obligations to which is has agreed. A monitor may also provide specialized expertise to oversee and ensure compliance with complex and technical aspects of a corporate agreement.

We believe, as Attorney General Mukasey has previously indicated, that the issuance of additional policy guidance concerning the use of DPAs, NPAs, and monitors will improve consistency and transparency and encourage best practices. As you know, yesterday the Deputy Attorney General issued a set of nine principles on the selection and use of monitors in corporate deferred and non-prosecution agreements.

The first of these principles sets forth a detailed policy on how monitors should be selected, which focuses on ensuring the selection of a respected, highly qualified monitor who is suitable for the particular assignment and free of any conflict of interest.

As we go forward, we recognize that we will face new and varied forms of corporate crime. The Justice Department will continue its efforts to develop appropriate policies that provide useful guidance to prosecutors in this area. In doing so, we bear in mind that while public attention may focus on high-profile corporate fraud cases, DPAs, NPAs, and independent monitors have also been used creatively and successfully in other less prominent but equally meaningful corporate crime contexts.

It is important that we avoid imposing an inflexible policy that fits one type of case—which may be the unusual type of case—but constrains the ability of Federal prosecutors to resolve other types of cases in the best interest of our only client, the citizens of the United States. Thank you.

[The prepared statement of Mr. Nahmias follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID E. NAHMIAS

Department of Justice

STATEMENT OF

DAVID E. NAHMIAS
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF GEORGIA
AND CHAIRMAN,
WHITE COLLAR CRIME SUBCOMMITTEE,
ATTORNEY GENERAL'S ADVISORY COMMITTEE
OF UNITED STATES ATTORNEYS
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON COMMERICAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"DEFERRED PROSECUTION: SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES"

PRESENTED

MARCH 11, 2008

Madam Chairwoman, Ranking Member Cannon, and other distinguished Members of the Subcommittee.

Thank you for this opportunity to discuss the important work of the Department of Justice in preventing, deterring, and punishing corporate crime in recent years. We want to discuss in particular our use of corporate deferred prosecution agreements and non-prosecution agreements, as well as independent monitors who assist in implementing and ensuring compliance with those agreements.[1]

Introduction

The government's renewed emphasis on corporate crime began, of course, with the corporate fraud crisis which emerged in 2001 and 2002 and significantly undermined confidence in our capital markets and our economy as a whole. The failure of major corporations such as Enron and WorldCom stripped employees and seniors of their retirement savings, wiped out the equity of ordinary investors, and left growing numbers of employees jobless. The President responded forcefully in July 2002, by creating the Corporate Fraud Task Force (CFTF) and directing it to coordinate and deploy a multi-agency response to the crisis. Our efforts in this area were bolstered by the reforms that Congress directed through passage of the Sarbanes-Oxley Act of 2002.

As a result of this renewed focus, the investigation and prosecution of corporations and their officers and employees has been an important priority of the Department in recent years. During the first five years of the CFTF, we obtained more

[1] The Department typically uses the terms "corporate" and "corporation" in this context to refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations. This testimony is limited to discussion of criminal matters handled by the Department of Justice, not other types of matters handled by the Department or by other prosecutorial or regulatory agencies.

than 1,200 convictions of entities and individuals in corporate crime cases, including convictions of more than 200 corporate chief executives or presidents. We have also recovered hundreds of millions of dollars in fines and penalties and in restitution to investors and other victims of corporate crimes.

Criminal charges against corporate entities are sometimes appropriate, particularly when the criminal conduct is egregious or pervasive or we conclude that the corporation is incapable of reforming its culture and practices to prevent recidivism. At the same time, however, we recognize that criminal conviction of a corporation – indeed, in many cases, even the indictment of a corporation – can have significant negative collateral consequences for individuals who played no role in the criminal conduct, were unaware of it, or were unable to prevent it, including employees, pensioners, shareholders, creditors, customers, and the general public.

The consideration of these collateral consequences for innocent third parties is often an important factor in determining how the Department will address criminal conduct by a corporation. As set forth in the Department's Principles of Federal Prosecution of Business Organizations, the latest version of which is often referred to as the "McNulty Memo," federal prosecutors properly consider the collateral consequences of a criminal conviction in determining whether to charge the corporation, and may use a variety of tools other than indictment and prosecution to achieve the goal of justice for victims and the public. These tools include deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).

Deferred Prosecution Agreements and Non-Prosecution Agreements

In a **deferred prosecution agreement** or **non-prosecution agreement,** a corporation against which the Government has sufficient evidence to file criminal charges essentially undertakes a period of probation, subject to specific conditions, by agreement with the government instead of as a result of a criminal conviction that would have substantial collateral consequences. A deferred prosecution agreement differs from a non-prosecution agreement in that a DPA typically includes a formal charging document – an indictment or a complaint – and the agreement is normally filed with the court, while in the NPA context, there is typically no charging document and the agreement is normally maintained by the parties rather than filed with a court.[2]

The obligations imposed upon the corporation in a DPA or NPA generally include: (1) the payment of restitution to victims and/or financial penalties to the government; (2) cooperation by the corporation with ongoing government investigation of potentially culpable individuals and/or other corporations; and (3) the implementation of an ethics and compliance program, including internal controls, that will effectively prevent, detect, and respond to any future misconduct. In exchange, the government agrees to defer prosecution of the corporation for a defined period of time, usually from one to five years. If the corporation satisfies the obligations imposed by the agreement within that time period, then the government will not proceed with a prosecution. If the corporation materially fails to comply with the agreement, then the government has the

[2] The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts, and commentators. The Department is seeking to define the two terms more clearly as we go forward – with the essential difference being whether the agreement is filed with a court – to more effectively identify and share best practices and to better track the use of such agreements.

discretion to go forward with a prosecution and, in most cases, to use the admissions of the corporation to prove the case.

DPAs and NPAs occupy an important middle ground in the resolution of corporate crime cases that may have distinct advantages over simply declining prosecution, which may allow a corporate criminal to escape without consequences, or charging and convicting a corporation and producing – but often only after significant delay and diversion of resources – a result that may have calamitous consequences for innocent third parties. These agreements typically require the payment of restitution to victims and/or financial penalties to the Treasury, long before such payments could be obtained, in most cases, through formal charging, protracted litigation, and inevitable appeals. The agreements promote the public interest in ferreting out crime by encouraging corporate cooperation in obtaining the evidence necessary to prosecute individuals and other corporations who have engaged in misconduct. Perhaps most importantly, by requiring solid ethics and compliance programs, the agreements encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates. Thus, these agreements can help restore the integrity and preserve the financial viability of a corporation that had descended into corruption and criminal conduct. And this is all done while preserving the government's ability to prosecute recalcitrant corporations if the agreement is materially breached.

For these reasons, since at least 1993, DPAs and NPAs have been used in a variety of cases involving a variety of crimes, including security and commodities fraud, Foreign Corrupt Practices Act violations, health care fraud, and money laundering and

tax offenses. It is worth noting, however, that while the use of DPAs and NPAs to resolve criminal cases against corporations has expanded since the corporate fraud crisis early in this decade, it is still a relatively limited practice.

Monitors

Some, but by no means all, corporate deferred prosecution and non-prosecution agreements also include the use of an independent **monitor**. Monitors are provided for in fewer than half of the agreements we have identified. A monitor is an individual or entity – independent from the corporation and the government – selected to oversee the implementation of and compliance with the provisions of the negotiated agreement. The monitor is retained by the corporation, which pays for the monitor along with other costs of implementing the DPA or NPA. Monitors retained under corporate DPAs or NPAs are not government employees or agents, and they do not contract with or get paid by the government. Monitor fees are generally negotiated between the corporation and the monitor.

A monitor may be particularly useful where the agreement requires the corporation to design or substantially re-design and effectively implement a broad ethics and compliance program and additional internal controls. In other cases, however, a monitor may not be needed, for varied reasons; an example might be where the corporation has ceased operations in the area where the criminal conduct occurred, or where the corporation has re-designed and effectively implemented appropriate compliance measures and internal controls before entering into the agreement with the government.

The appointment of a corporate monitor can have distinct advantages for the government and the public in appropriate cases. Monitors allow the government to verify, through the work of an independent observer, whether a corporation is fulfilling the obligations to which it has agreed. A monitor also may provide specialized expertise to oversee and ensure compliance with complex or technical aspects of a corporate agreement, in areas where prosecutors may lack such skills. Indeed, it is important to assure that monitors possess the expertise needed to effectively oversee a corporation's steps towards accountability. Due to the variety of situations in which it may be helpful to use a monitor, the qualifications of an appropriate monitor cannot be determined with specificity in advance.

Monitors have been selected in a variety of ways. Sometimes the monitor was selected by the corporation or by the government. Sometimes, one party selected the monitor with the other party having a right to veto. Sometimes the monitor emerged from joint discussions. And on occasion, where agreements were filed in court, the court selected or approved the monitor.

The New Principles for Use of Corporate Monitors

Based on our experience during the first five years of the President's Corporate Fraud Task Force, we recognize that the Department has now reached a point where we have developed, through many cases handled by federal prosecutors around the country as well as at Main Justice, a sufficient experience base with deferred prosecution agreements, non-prosecution agreements, and monitors to begin to craft useful policy guidance that would improve consistency and transparency and share best practices. As you know, yesterday the Deputy Attorney General issued to federal prosecutors a set of

nine principles on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations. The first of these principles sets forth a detailed policy on how monitors should be selected, which is focused on ensuring the selection of a respected, highly qualified monitor who is suitable for the assignment and free from actual or perceived conflicts of interest.

Conclusion

We will continue to review and analyze the best practices of federal prosecutors who handle corporate criminal cases, as we consider issuing additional guidance. In doing so, we bear in mind that, while public attention may focus on high-profile, Fortune 500-type corporate fraud cases, our colleagues around the country and at Main Justice have also used DPAs, NPAs, and independent monitors creatively and successfully in other, less prominent but equally meaningful corporate crime contexts. It is important that we avoid imposing an inflexible policy that fits one type of case – which may be the unusual case -- but constrains the ability of prosecutors to resolve other types of cases in the best interests of the public and victims.

We believe that federal prosecutors across the country, along with our colleagues in many regulatory and investigative agencies, have done tremendous work – hard work that requires dedication, determination, and creativity – to respond appropriately and effectively to the corporate fraud crisis. Our response has included expanded, albeit still relatively limited, use of deferred prosecution agreements, non-prosecution agreements, and monitors to resolve corporate criminal conduct in a manner that best serves the public's interests in corporate rehabilitation and reform, prompt payment of penalties and restitution for victims, and prosecution of culpable individuals, while limiting the loss of

jobs and investments that can result from a corporation's collapse after criminal indictment or conviction. As we go forward, we recognize that we will face new and varied forms of corporate crime. The Justice Department will continue its efforts to draw upon its experience and best practices to develop policies in this area that provide more consistency and transparency, while retaining the flexibility needed to address these new challenges in the best interest of our client, the citizens of the United States. Thank you.

Ms. SÁNCHEZ. Thank you, Mr. Nahmias. We appreciate your testimony.

At this time, I would invite Mr. Terwilliger to please proceed with your testimony.

TESTIMONY OF THE HONORABLE GEORGE J. TERWILLIGER, III, ESQUIRE, WHITE & CASE, LLP, WASHINGTON, DC

Mr. TERWILLIGER. Thank you. Chairwoman Sánchez, Ranking Member Cannon, Members of the Committee, Mr. Smith, thank you for inviting me to appear before the Committee today. The proper handling of cases involving allegations of unlawful conduct by corporations and other businesses is a matter of vital interest to many who are stakeholders in those companies. That includes the people who own them, including the tens of millions of mutual fund owners and other shareholders of public companies, the millions of employees of those companies who depend on these employers for their livelihood, and the countless individuals and other businesses that depend on the goods and services that these companies provide.

I appreciate the opportunity to share my views as the Committee considers issues concerning business crime and related policies, and/or guidelines which are important to achieving basic fairness by ensuring that like cases are treated alike. The views I offer for your consideration are from the perspective of 30 years of law practice, now divided almost evenly between public service and private practice.

At the Justice Department I began my career as a law clerk while in law school and finished as the acting attorney general of the United States and in between dealt with many of these kinds of cases and these issues. I now represent businesses, including corporations, their boards, audit committees, and their leaders as they navigate their way through enforcement matters, including those under the jurisdiction of the Department of Justice.

Deferred prosecution agreements provide a middle ground between a criminal and a civil disposition. The company avoids the appropriate and often considerable adverse collateral consequences that would attend to either a guilty plea to criminal violations or worse, a conviction after trial, while the government achieves deterrence and punishment objectives without the expenditure of the massive resources and the litigation risks that would be necessary to indict and try such a case.

As noted, DPAs often impose an obligation on the company to employ at its expense an outside monitor. At its core, the function of an outside corporate monitor is to observe the conduct of a company relevant to its obligations under a DPA and to report the product of those observations, including the monitor's judgment about the company's conduct and its commitment to compliance obligations.

Thus, to perform these functions, a monitor should be a person, to borrow a phrase, learned in the law, but as importantly, a person with the background, experience, proven judgment, and integrity to make keen and credible observations and reports concerning the compliance of a given type of business with its legal obligations. Consistent with the government's duty to assure the public that

the administration of law is free of any partisan consideration, the process of selecting monitors with these qualifications should be transparent, subject to layered review, and approval at Main Justice in Washington.

The selection of monitors should be on the basis of merit and enjoy input from both the government and the subject company. In my own view, since the monitor will be paid for with corporate funds and can provide value to the company in achieving its compliance objectives, the best approach is for the company to select a monitor from a panel of candidates, each of whom has been previously designated as acceptable by the government. I think the Department of Justice has taken an important and valuable step forward by articulating a principled basis for the selection and use of monitors, as it did in its memorandum of March 7.

DPAs often describe the monitor as a compliance consultant. In my judgment, that is a good description of the role of the monitor as both a consultant to a company and as an internal observer of compliance who reports relevant findings to the government. Some go even farther and describe the monitor as being a government representative who is essentially given a seat at the boardroom table. I think this goes too far.

Monitors should not have the power to run companies, and those who maintain the responsibility under the law, the management and directors of public corporations, should. It is equally important that any guidelines prescribing monitor functions not be dictated by the Congress.

Under the separation of powers doctrine, neither Congress nor the judiciary can control the executive branch's exercise of prosecutorial discretion. The decision whether to enter into a DPA or require some other terms in deciding whether to bring charges in the exercise of prosecutorial discretion belongs to the executive branch. I believe the legislation that the Committee has considered is not, therefore, well-advised.

I thank the Chair and the Subcommittee for allowing me to be heard today and appreciate that my written statement will be included in the record.

[The prepared statement of Mr. Terwilliger follows:]

PREPARED STATEMENT OF THE HONORABLE GEORGE J. TERWILLIGER, III

United States of America

House of Representatives

Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

Statement of the

Honorable George J. Terwilliger III

Washington, D.C.

March 11, 2008

Introduction

The issue of the proper handling of federal cases involving allegations of unlawful conduct by corporations and other businesses is a matter of vital interest to all with a stake in those companies. That group includes truly all of our citizens: the people who own companies, including the tens of millions of Americans who invest in mutual funds and other shareholders of public companies, the millions of employees who depend on these companies for their livelihood, and the countless individuals and other businesses that depend on the goods and services these companies provide.

I appreciate the opportunity to share my views as the Subcommittee considers the questions of policies and/or guidelines that can be applied to individual case decisions, which are important to achieving basic fairness by insuring that like cases are treated alike. The views I offer for your consideration are from the perspective of 30 years of litigation experience, now divided almost evenly between public service and private practice. In fifteen years at the Department of Justice, I had the privilege to serve eight years in a career position as an Assistant United States Attorney, five years in the Reagan Administration as the United States Attorney for the District of Vermont, two years in the first Bush presidency as Deputy Attorney General of the United States with responsibility, among other things, for supervising the nation's 93 United States Attorneys, and finally concluding my public service with the privilege of briefly serving as Acting Attorney General. In private practice, I have represented business organizations, including corporations, their boards, and audit committees, as they navigate their way through enforcement matters, including those under the jurisdiction of the Department of Justice.

How Deferred Prosecution Agreements Work

Deferred Prosecution Agreements (DPAs) are a relatively recent development, at least as they are typically used, and are in part the result of the far more frequent prosecution of business organizations today than in the past. Prior to the use of DPAs, the only way a company could avoid the onerous experience of a criminal prosecution was to enter a guilty plea to a criminal offense or to convince prosecutors that they should forego a criminal prosecution in favor of either no charges or, more likely, a disposition using civil law enforcement penalties and mechanisms.

DPAs provide a middle ground between criminal and civil dispositions. The company avoids the opprobrium and the often considerable adverse collateral consequences that would attend to either a guilty plea to criminal violations or to a conviction after a trial, while the government achieves deterrence and punishment objectives without the expenditure of the massive resources—with the attendant litigation risks—that would be necessary to indict and try such a case.

DPAs are a form of what might be called "corporate probation," because the company typically will have to admit facts sufficient to prove its own guilt in the event the company fails to abide by the terms and conditions of the DPA. If the corporation successfully completes this "probationary" period, then the prosecution deferred temporarily is declined permanently. Typically, the DPA also imposes an obligation on the company to employ—

at its expense—an outside monitor to insure robust compliance with the company's regulatory and legal obligations, including those imposed by the DPA itself.

A key feature of most DPAs is the imposition on the subject company of a requirement that it utilize an outside "compliance monitor," sometimes termed a "compliance consultant," for a period of time, usually coextensive with the life of the DPA. In sum, monitors are charged with closely observing, testing, and reporting to the government on the subject company's compliance with its legal obligations. This role necessarily involves making judgments both about the nature and extent of those obligations and the effectiveness of a subject company's policies, programs, and operations that define its commitment and level of compliance with those obligations.

Brief History of the Prosecution of Business Organizations

For the purposes of this hearing, it is helpful to consider current practices regarding DPAs and monitors in the larger context of the prosecution of business organizations. The prosecution of business organizations is not quite 100 years old: in 1909, the Supreme Court held for the first time that a corporation, which obviously has no capacity to form the wrongful intent that traditionally marks criminal conduct, could be held criminally liable for the actions of its agents, declaring that providing for corporate criminal liability was "only a step farther" following existing vicarious civil liability.[1] Four years later, the Supreme Court unanimously concluded that "[t]he power of Congress [to personify a company in order to collect a fine] hardly is denied."[2] The Supreme Court eventually discarded any remnant of traditional notions of *mens rea* in the context of corporate conduct,[3] and in 1948, Congress revised the criminal code to expressly include corporations and other organizations within the definition of "person" and "whoever."[4] Subsequently, courts fashioned a "collective knowledge" doctrine, whereby corporations can be criminally liable based on employees' knowledge imputed to their employer, even in circumstances where no single employee possesses all of the knowledge necessary to prove a criminal offense.[5]

Despite these developments, the prosecution of business organizations was the exception, rather than the rule, until the 1970's and early 1980's when the frequency of corporate prosecutions increased in connection with a greatly expanded role in the federal regulation of commercial conduct.[6] Corporations and other business entities became increasingly vulnerable to criminal prosecution for "crimes" founded on regulatory standards without regard for the substantial increase in the complexity of the regulatory environment and the

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[1] *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 493 (1909).
[2] *United States v. Adams Express Co.*, 229 U.S. 381, 389 (1913).
[3] *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (this "familiar type" of [public welfare] legislation "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interests of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.").
[4] 1 U.S.C. § 1; *see* 62 Stat. 683, 859 (1948).
[5] *Inland Freight Lines v. United States*, 191 F.2d 313, 315-16 (10th Cir. 1951) (citing *New York Central & Hudson River Railroad Co.*).
[6] *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 314-15 (2007); *id.* at 314 n.6 (citing JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 309–10 (2003)).

significant available non-criminal penalties for non-compliance. A particularly apt illustration of the outcome of the intersection of these trends is the 1982 case of *United States v. Hartley*, in which the Eleventh Circuit upheld the conviction of a corporation and two of its employees for selling to the military breaded shrimp that failed to meet certain specifications, including the amount of breading on each piece of shrimp, resulting in 33 counts of conspiracy, mail fraud, violations of the National Stolen Property Act, and the Racketeer Influenced and Corrupt Organizations Act ("RICO").[7]

Beginning in the mid-1980's, agencies designed voluntary disclosure programs that had the potential for both providing corporate defendants—and prosecutors and courts—with a respite from the costs of criminal prosecutions and encouraging a more active corporate compliance effort. Voluntary disclosure programs offered corporations who reported wrongdoing the possibility of prosecutorial leniency in exchange for the company's self-policing and disclosure of possible wrongdoing. Voluntary disclosure programs were established at the Department of Defense in 1986,[8] the Environmental Protection Agency in 1995,[9] and the Department of Health and Human Services in 1998.[10] In 1993, the Antitrust Division of the Department of Justice instituted a voluntary disclosure program that imposed a contractual obligation on the government to grant leniency if the corporation met the terms and conditions of the agreement, though this guarantee to the company is the exception, not the rule, in such programs.[11] Voluntary disclosure programs are typically not available to corporations, however, once the government learns of wrongdoing, because the purpose of such agreements is to exchange leniency for the revelation of a crime that otherwise might have gone undetected or that occurred under circumstances that might have posed substantial obstacles to prosecution.

The DPA was another outgrowth of the historical expansion of corporate criminal liability. In 1994, Prudential Securities and the U.S. Attorney for the Southern District of New York entered into the first comprehensive federal DPA (the "Prudential DPA") to resolve criminal charges.[12] The Prudential DPA has essentially become the blueprint for subsequent DPAs between the government and business organizations, and at the turn of the century the Department of Justice promulgated guidelines for the prosecution of business

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[7] *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982).
[8] *See* Department of Defense, Office of the Inspector General, *The Department of Defense Voluntary Disclosure Program: A Description of the Process*, Apr. 1990, at 1, http://www.dodig.osd.mil/IGInformation/archives/vdguidelines.pdf (last visited Mar. 9, 2008).
[9] *See* Environmental Protection Agency, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 65 Fed. Reg. 19,618 (Apr. 11, 2000) (providing a history of the program).
[10] *See* Department of Health and Human Resources, Office of Inspector General, *Provider Self-Disclosure Protocol*, 63 Fed. Reg. 58,399 (Oct. 30, 1998).
[11] *See* Department of Defense, Antitrust Division, *Status Report: Corporate Leniency Program*, http://www.usdoj.gov/atr/public/speeches/10862.pdf (last visited Mar. 9, 2008).
[12] The Prudential DPA required the Company to: (1) appointed a former Federal Judge, Kenneth Conboy, as an outside director and ombudsman with reporting responsibilities to the Board and the US Attorney; (2) pay $330 million into a special restitution fund for investors (with any excess of investor claims to be paid to the US); (3) retain an independent law firm to review Prudential's regulatory and compliance controls; (4) Prudential's parent group must take appropriate steps to further compliance; (5) full and truthful cooperation with any criminal investigation; public acknowledgement of Prudential's wrongdoing. *See* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 59 (2006).

organizations that expressly identified pretrial diversion as an appropriate alternative to prosecution.[13]

Recent Trends

Recent trends reflect significantly increased use of DPAs: until the 1990s, federal prosecutors did not typically use forms of pretrial diversion with corporations; in 2003, federal prosecutors only entered into three DPAs; and in 2007, federal prosecutors entered into 35 DPAs.[14] From 2002 to 2005, the Department of Justice entered into twice as many non-prosecution agreements and DPAs than it had between 1992 and 2001.[15] This trend mirrors the significant increase in the use and threatened use of criminal sanctions against business entities generally.

The Selection and Duties of Corporate Monitors

As noted earlier, the Government typically requires the use of a corporate monitor as a condition of a DPA. The manner in which monitors are selected varies, and, as a general matter, monitors are not typically selected until the execution of the DPA. A survey of several DPAs illustrates the variance that occurs in practice: in the CIBC and Merrill Lynch DPAs, the government selected the monitor;[16] in the Monsanto and Micrus DPAs, the monitor only had to be "acceptable" or "agreeable" to the government;[17] in the Schnitzer Steel DPA, the Department of Justice proposed two possible monitors and the company was allowed to choose between the two;[18] in the Computer Associates DPA, the company presented a list of five names to the U.S. Attorney, the U.S. Attorney sent three names to the court, and the court selected the monitor from these three;[19] and, finally, in the Bristol-Myers Squibb DPA, the Company preemptively hired a monitor while it was under investigation.[20]

At its core, the function of an outside corporate monitor appointed under a DPA is to observe and report. The monitor observes the conduct of a company relevant to the company's obligations under a DPA. The monitor reports the facts learned from such observation and, very significantly to the topics of the Subcommittee's interest today, reports judgments about the company's conduct and commitment to compliance obligations. This provides the government with a process to secure additional assurances

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[13] Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Jan. 20, 2003) ("Thompson Memorandum"); Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Dec. 12, 2006).
[14] Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008.
[15] Lawrence D. Finder and Ryan D. McConnell, *Devolution of Auth.: The Dept. of Justice Corporate Charging Policies*, 51 ST. LOUIS U. L.J 1, 1 (2006).
[16] Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1722 (2007).
[17] Khanna & Dickinson, *supra* note 16, at 1722; Sue Reisinger, *Someone to Watch Over You*, Law.com, Sept. 20, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1190192571246 (last visited Mar. 7, 2008).
[18] Schnitzer Steel Deferred Prosecution Agreement ¶ 9, Oct. 16, 2006.
[19] Reisinger, *supra* note 17.
[20] Stephanie Saul, *A Corporate Nanny Turns Assertive*, N.Y. TIMES, Sept. 19, 2006.

that the company is living up to its promises in the DPA of legal compliance and general good behavior.

Thus, to perform these functions, a monitor should be a person, to borrow a phrase, "learned in the law," but as importantly, also a person with the background, experience, proven judgment, and integrity to make keen observations concerning the compliance of a given type of business with its legal obligations and to offer credible judgments and insights on what is observed. Appropriately, monitors' professional backgrounds frequently include career experiences that signal credibility and trustworthiness to current prosecutors: of the 28 monitors appointed in deferred prosecution or non-prosecution agreements from 1994 to August 1, 2007, 17 were former federal prosecutors, four were former judges, one was a former SEC chairman, and one was a former SEC general counsel.[21]

Consistent with the government's duty to assure the public that the administration of the law is free of any partisan considerations, the process of selecting monitors with these qualifications should be transparent and the subject of layered review and approval at Main Justice in Washington. The selection of monitor candidates should be on the basis of merit and enjoy input from both the government and the subject company. In my view, since the monitor will be paid for with corporate funds and the monitor can provide value to the company in achieving its compliance objectives, the best approach is for the company to select a monitor from a panel of candidates, each of whom has been previously designated as acceptable by the government.

I think many observers would conclude from the terms of typical DPAs that the government is the primary consumer of the monitor's product. A better and more realistic view of the monitor's role may be one where the monitor is an asset to the company's operations, functioning both as an outside consultant on compliance issues and as an internal observer and tester of compliance who is answerable to the government. Indeed, DPAs often expressly describe the monitor as a "compliance consultant."[22] As with many consultants, the monitor is given full access to operations in order to assess activities relative to compliance and, in a variation on the usual consultant arrangement, also has communication and reporting duties to the government in connection with the monitor's supervision of the company's obligations under the DPA. Company expenditures for the monitor, which are born by the company's owners, including the shareholders of a public company, are far more justified under this "compliance consultant" model as they return value for the company's expenditure and are not, as they might otherwise be, merely subsidizing a government function imposed by contract on the company.

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[21] Reisinger, supra note 17.

[22] The DPAs of Schnitzer Steel, Statoil ASA, and Diagnostic Products Corp. provide for a "Compliance Consultant." Similarly, the DPAs of Monsanto and Healthsouth Corp. call for a "Governance Consultant" and a "Compliance Expert," respectively. *See* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1748, 1753-54 (2007); Monsanto Company, Deferred Prosecution Agreement, Jan. 6, 2005, *available at* http://www.corporatecrimereporter.com/documents/ monsantoagreement.pdf; Letter from Alice Martin, U.S. Attorney, to HealthSouth Corporation (May 17, 2008), *available at* http://www.usdoj.gov/usao/aln/Docs/May%202006/healthsouthnonpros2.pdf.

I believe the Department of Justice has taken an important and valuable step forward by articulating a principled basis for the selection and use of monitors, as found in Acting Deputy Attorney General Craig S. Morford's March 7, 2008, memorandum on the subject.[23] These guidelines require the corporation and the government to discuss the necessary qualifications of a monitor, establish committees within the U.S. Attorneys' Offices and Department components to vet potential monitors, and provide that the Office of the Deputy Attorney General must approve the selection of all monitors. The involvement of the Deputy Attorney General, the Department's number two official, elevates the importance of both the selection and use of monitors in a positive fashion and helps to assure the public and interested parties that monitors will be selected on a principled basis. This process will certainly promote the selection of a highly qualified person, avoid potential or perceived conflicts of interest, and instill public confidence in the selection process.

The guidelines make clear that the monitor is to be an independent third party who facilitates the exchange of information, but who may not override the legal responsibilities and authority of management and directors to operate the company. The guidelines appropriately scale the monitor's authority and term of service to the underlying business conduct that necessitated the imposition of the monitor, thereby providing the subject company with a basis to articulate appropriate limitations on the scope of the monitor's activities. I think most of the guidelines' provisions will be received positively by all concerned, even if one does believe that there is still room for improvement. The surest test of these guidelines will be in how they operate in practice in the weeks and months ahead.

Those who might favor having the government be the primary beneficiary of the monitor's work might be said to adhere to the concept of a monitor as a "contract policeman," keeping a close eye on the company's conduct and arresting any bad conduct that arises. Perhaps, more narrowly, this view would have the monitor performing a role analogous to that undertaken by the Inspectors General of the Executive agencies that are charged with investigating and reporting on instances of waste, fraud and abuse. Under this "inspector general" model, a monitor would serve as an externally imposed internal watchdog on the lookout for company conduct that deviates substantially from compliance commitments and obligations.

Some go even farther and describe the monitor as being a government representative who is essentially given a seat at the boardroom table.[24] I think this goes too far and, to the extent it reflects current practice, this concept of the monitor's role should be discouraged. To the extent monitors have the power to dictate practices to be used—or not to be used—

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[23] *See* Craig S. Morford, Acting Deputy Attorney General, Memorandum for Heads of Department Components, United States Attorneys, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations*, Mar. 7, 2008.

[24] *See* Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the D. of N.J. and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1054-1055 (2006); *see also* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 St. Louis U. L.J. 1, 23 (Dec. 5, 2006).

to the company, and even to the board of a public corporation, such powers are a legal abomination that completely undercuts the legal basis of responsibility for corporate governance and management. That responsibility, and authority, ultimately resides as a matter of law in individual directors. Apart from simply giving monitors authority well beyond that necessary to perform their functions, such excess powers are inconsistent with the law and sound corporate governance practices. In short, as the new Department of Justice guidelines recognize, monitors should not have the power to run companies by being able to dictate practices, policies, and personnel decisions to the directors and others who are responsible by law for doing so and who, in a public corporation, can be held accountable to shareholders.

Constitutional Considerations

Guidelines prescribing the selection and use of monitors are the province of the Department of Justice, the agency to which the Executive Branch's constitutional power for the plenary exercise of prosecutorial discretion is entrusted. [25] The Constitution commands that the President "take Care that the Laws be faithfully executed,"[26] and under the Constitution's separation of powers doctrine, this affords the Executive Branch the exclusive power over the exercise of prosecutorial discretion.[27] Because the separation of powers dictates that Congress cannot grant powers it does not possess[28] and that the Judicial Branch cannot "be assigned nor allowed tasks that are more appropriately accomplished by [other] branches,"[29] neither Congress nor the Judiciary have lawful authority to dictate the terms of or control the exercise of prosecutorial discretion. Only the prosecutor can choose what cases to bring or decide the terms and conditions under which the prosecution of a case may be compromised.[30] The Federal Rules of Criminal Procedure comport, of course, with this Constitutional standard, providing that judges have a limited role regarding plea agreements: judges are to satisfy themselves that plea agreements meet with due process requirements and that waivers of certain rights attendant to pleas are made voluntarily, knowingly, and intelligently.[31] One circuit court of appeals has recently held that a court must accept a plea agreement that clears these

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[25] *See* Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870) (creating the Department of Justice and providing that the Department of Justice was responsible for all criminal prosecutions and civil suits in which the United States had an interest and that the Attorney General and the Department had control over federal law enforcement).
[26] U.S. Const. art. II § 3.
[27] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'"); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *see also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 U.S. Op. Off. Legal Counsel 101, 114-15 (1984) (citing *Buckley*, 424 U.S. at 138).
[28] *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that Congress cannot grant an officer subject to *congressional* remove the power to *execute* the laws).
[29] *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988) (citation and internal quotation marks omitted).
[30] Under 28 U.S.C. § 547(1), the United States Attorneys are responsible for the prosecution of offenses against the United States. This duty is subject to direction by the Attorney General. 28 U.S.C. § 519.
[31] Fed. R. Crim. P. 11(b).

constitutional hurdles.[32] The Federal Rules of Criminal Procedure also exclude judges from the negotiation of plea agreements, do not grant judges discretion to modify plea agreements, and allow for judicial rejection of plea agreements that otherwise meet with due process only when the terms of a plea agreement contemplate that the court take an action properly within the court's own discretion.[33]

Mandating specific considerations to a prosecutor regarding the terms and conditions for the disposition of cases would clearly restrict the prosecutor's exercise of discretion to enter into a DPA. As to the Judiciary's involvement, the Supreme Court has adopted the unremarkable proposition that the power to terminate is equivalent to the power to control.[34] Accordingly, a Judge's power to reject a proposed DPA would be, in practice, the power to control the exercise of the prosecutor's discretion to offer a DPA as an alternative to prosecution.

Because, under the Constitution, the decision as to whether to enter into a DPA or to require some other terms in deciding whether to bring charges belongs exclusively to the Executive, that discretion is not subject to policies dictated by Congress or to review by the courts, I believe that the legislation currently on the table before the Committee[35] runs afoul of these constitutional principles and is not, therefore, well-advised. I also believe that the Department's new guidelines address legitimate concerns regarding the selection and use of federal monitors.

I thank the committee for the opportunity to express my views and I would be pleased to answer any questions the members may have.

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[32] *In re Vasquez-Ramirez*, 443 F.3d 692, 699-700 (9th Cir. 2006) (citations omitted) (arguing that precedent holding otherwise was either decided before amendments to the federal rules removed a grant of broad discretion to the courts to reject pleas or that such precedent's holdings were not warranted by the facts of each case). *Cf. United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995) ("while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices.").

[33] Fed. R. Crim. P. 11(c)(1) (negotiations), 11(c)(3) (no modification power), 11(c)(3)(A) (providing that courts may reject plea agreements requiring the dismissal of charges or the imposition of specific sentences). *See* Fed. R. Crim. P. 11, Note, 1979 Amendments (explaining that the rule now at 11(c)(3)(A) is necessary because the parties must rely on the courts to receive such contemplated benefits under a plea agreement); Fed. R. Crim. P. 48(a) (requiring the government to obtain leave of court to dismiss an indictment, information, or complaint).

[34] *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (citation and internal quotation marks omitted).

[35] H.R. 5086, *A Bill to require the Attorney General to issue guidelines delineating when to enter into deferred prosecution agreements, to require judicial sanction of deferred prosecution agreements, and to provide for Federal monitors to oversee deferred prosecution agreements*, 110th Cong., Jan. 22, 2008.

Ms. SÁNCHEZ. Thank you, Mr. Terwilliger. And we appreciate your testimony.

And at this time, I would invite Professor Garrett to begin his.

TESTIMONY OF BRANDON GARRETT, PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Mr. GARRETT. Chairwoman Sánchez, Ranking Member Cannon, and Members of the Subcommittee, thank you for the opportunity to testify before you today. I am an associate professor of law at the University of Virginia School of Law. In 2007 I published an article exploring remedies in deferred and non-prosecution agreements in organizational cases. I will describe these agreements and then discuss two recommendations for reform, guidelines concerning their content, and judicial oversight over their adoption and implementation.

First, just to describe an example, in 2007 after a lengthy investigation, the IRS referred a criminal tax case involving KPMG International to the U.S. attorney's office for the Southern district of New York. In 2005 prosecutors announced that they had reached a deferred prosecution agreement with KPMG. The settlement stated that if at the end of 14 months prosecutors were satisfied that KPMG had complied with its terms, they would move to have the case dismissed.

In the agreement, KPMG provided detailed admissions of wrongdoing. KPMG agreed to shut down its entire private tax practice and to cooperate fully in an investigation of current and former employees.

KPMG also agreed to retain an independent monitor for 3 years in order to implement an elaborate compliance program. The monitor was paid by KPMG and had the power to recommend policy changes, obtain access to documents, interview employees, and to employ any personnel necessary. The district judge approved the agreement, and at the end of 14 months, prosecutors moved to dismiss the case stating the agreement had been effective. However, prosecutions of certain individual KPMG employees remained ongoing.

At least 39 of these prosecution agreements were entered in the 4 years after the Thompson memo was issued in 2003. I have gathered data from the texts of these agreements with some difficulty where several were not readily available. Most resembled the KPMG agreement and involved compliance programs and independent monitors.

In preparation for this hearing, I also compiled updated data reflecting 43 agreements entered into 1 year and 2 months after the McNulty memo was issued in December of 2006. In just slightly more than a year, more agreements were entered than had been entered during the almost 4 years the Thompson memo was in effect. That represents a remarkable acceleration in the use of preindictment agreements with organizations.

I turn now to reform proposals advanced most recently in legislation drafted by Representative Pallone and in the statement of principles authored by Representative Pascrell. First, while the McNulty memo provides useful guidance on whether a firm should be charged at all, scant guidance exists regarding the structure of

the remedies included in the agreements themselves or their implementation. The new Morford memo just issued by the DOJ addresses only a very limited set of issues concerning the selection and certain duties of monitors. Much more remains to be done.

Several areas are particularly ripe for such guidance. Since 2003 when the Thompson memo was signed, at least 39 agreements included the retention of monitors. Of those, only one advertised an open position to solicit candidates. And in only three did a court play any role in selecting the monitor.

The new Morford memo procedures forbid the unilateral prosecutorial selection of monitors and provide for conflict checks and vetting of monitors by prosecutors. However, those guidelines neither require public notice of a monitor position nor judicial approval, both of which would alleviate any perception of cronyism in the selection of monitors.

Many other questions remain. Why do some agreements not require creation of a compliance program? Why do some not include fines or restitution? When are non-prosecution versus deferred prosecution agreements appropriate?

Additional guidelines could clarify such issues—judicial oversight of these agreements could provide greater legitimacy by providing a mutual decision-maker as well as greater transparency by making aspects of this process public. The U.S. code requires judicial approval of any deferral of prosecution, but does not address issues unique to the deferral of organizational prosecutions.

For example, a court could be required to conduct an approval hearing in which the public or affected parties would have notice and an opportunity to comment, as is the case when certain agencies enter consent decrees. Regarding implementation, when an agreement ends, no information is typically released except the bare facts that prosecutors were satisfied it was successful. The court could publicly report on the monitor's progress.

Further, agreements provide prosecutors with unilateral authority to declare a breach and terminate an agreement. A firm may lack any pre-indictment remedies should a prosecutor arbitrarily declare a breach. Courts could be provided with the authority to adjudicate pre-indictment any dispute regarding a breach.

Now that pre-indictment agreements have become the preferred method for resolving organization prosecutions, it is time to consider ways to improve their fairness, transparency, and effectiveness. Prosecution guidelines concerning remedies and increased judicial oversight are warranted to achieve those goals.

I would be pleased to answer any questions that you and your fellow Committee Members may have. And thank you for this opportunity to speak to you.

[The prepared statement of Mr. Garrett follows:]

PREPARED STATEMENT OF BRANDON GARRETT

WRITTEN TESTIMONY FOR
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

"DEFERRED PROSECUTION: SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES?"

March 11, 2008
10:30 A.M.
2141 Rayburn House Office Building

TESTIMONY OF BRANDON L. GARRETT
ASSOCIATE PROFESSOR OF LAW
UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Chairwoman Sánchez, Ranking Member Cannon and Members of the Subcommittee,

Thank you for the opportunity to testify before you today. I am an associate professor of law at the University of Virginia School of Law. My scholarship focuses on criminal law and procedure. In 2007, I published an article in the Virginia Law Review exploring remedies in deferred and non-prosecution agreements as embodying a "structural reform" approach, because these agreements call for ongoing organizational change.[1] Since 2003, dozens of leading corporations have entered into demanding settlements with federal prosecutors, including AIG, American Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co., Monsanto, and Pfizer, Inc.

To provide an example of such an agreement, in 2004, after a lengthy investigation, the IRS referred a criminal tax case involving KPMG International to the U.S. Attorney's Office for the Southern District of New York. In 2005, prosecutors announced that they had reached a deferred prosecution agreement with KPMG. The settlement stated that if at the end of fourteen months, prosecutors were satisfied that KPMG had complied with the agreement terms they would move to have the case dismissed.[2] In the agreement itself, KPMG International provided detailed admissions of wrongdoing. KPMG paid $456 million in fines, disgorgement, and restitution. KPMG agreed to shut down its entire private tax practice and to cooperate fully in the investigation of former employees. KPMG also agreed to retain an independent monitor for three years, in order to implement an elaborate compliance program. The monitor was paid by KPMG and invested with power to recommend policy changes, obtain access to documents, interview employees, and employ

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[1] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007), at http://www.virginialawreview.org/content/pdfs/93/853.pdf. A companion essay further developed several proposals for reform. *See* Brandon L. Garrett, *United States v. Goliath*, 93 Va. L. Rev. In Brief 91 (2007), at http://www.virginialawreview.org/inbrief/2007/06/18/garrett.pdf. Both articles have been submitted for the record.

[2] *See* Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Robert S. Bennett, Attorney for KPMG (Aug. 26, 2005), http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf.

personnel. The district judge approved the deferred prosecution agreement. At the end of the fourteen months, the prosecutors moved to dismiss the case, stating that the agreement had been effective. None of the monitor's reports or actions were made public. After dismissal of the criminal case, the IRS continued to supervise compliance at KPMG for two more years. Further, prosecutions of certain individual KPMG employees are ongoing.

Federal prosecutors should be applauded for these efforts to pursue corporate crime and for adopting a creative approach designed to avoid the potentially dire consequences of an indictment, when it is appropriate to do so. However, a careful review of these complex pre-indictment agreements is warranted because of the national importance of these cases and because these remedies are new and untested. I will describe the data that I have collected from these agreements and then discuss two recommendations: (1) the adoption of prosecution guidelines concerning their content; and (2) judicial oversight over the approval, implementation and termination of these agreements.

I. Available Data From Deferred and Non-Prosecution Agreements

Though much remains outside the public eye, the terms of the agreements themselves provide one source for information. I have gathered data from the text of these agreements, with some difficulty, where the text of several agreements was not available. Given the public importance of these agreements, their complete text, including Appendices, should be promptly and routinely made available online on the DOJ Corporate Crime Task Force website. At least 39 agreements were entered in the four years after the Thompson Memo was issued in January 2003. These agreements involved leading corporations and a few public entities. They were entered by 19 U.S. Attorney's Offices as well as the main DOJ office, typically in conjunction with regulatory agencies, such as the SEC, IRS and U.S. Postal Inspection Services.

Most agreements ordered that independent monitors be retained. These monitors possessed sweeping powers to gather information, promulgate policies, and oversee compliance. However, as will be discussed further, the terms of their retention, the precise scope of the duties they owe, to whom they owe duties, the reports they generate, and the actions that they take, have all remained non-public. Most agreements also required the adoption of compliance programs, often with detailed provisions for revisions of policy, training, establishment of compliance committee, and creation of compliance officer positions within the firm. Some agreements included additional injunctions, such as permanent restrictions on conduct. Most agreements were entered in conjunction with regulatory agencies. The agreements remained in force for an average of two years. The agreements also obliged firms to cooperate with the investigation and prosecution of individual employees, typically for an indefinite period of time. Finally, most of those Thompson Memo agreements included privilege waivers.[3]

In preparation for this hearing, I compiled updated data reflecting 43 agreements entered in the one year and two months after the McNulty Memo was issued in Dec. 12, 2006, through January 2008.[4] In just slightly more than a year, more agreements were entered than had been entered during the almost four years the Thompson Memo was in effect. That represents a remarkable acceleration in the use of pre-indictment agreements with organizations. In several respects, these post-McNulty Memo agreements differ from their predecessors. Seventeen of these post-McNulty Memo agreements called for

[3]This data is developed in greater detail in Garrett, *Structural Reform Prosecution, supra,* at Part II.B, which provides an empirical analysis of the terms of Thompson Memo agreements. However, that article analyses 35 agreements. Since that article was published, four additional agreements have been located with the invaluable assistance of UVA Law School reference librarian Jon Ashley. Those agreements are included in an updated chart that has been submitted for the record.

[4]A chart reflecting that preliminary data has been submitted for the record. I note that the complete text of all agreements during this time period have not yet been obtained, where two agreements identified have not yet been made public.

independent monitors and 29 required compliance programs. However, in a departure from the prior pattern that may be accounted for by the McNulty Memo's altered policies, only six of these agreements required a privilege waiver. Also of interest and perhaps of concern, nine included no fines or restitution at all.

All of these McNulty Memo agreements, like almost all of the Thompson Memo agreements, stated that prosecutors may terminate the agreement and prosecute the firm should they, in their discretion, unilaterally find the agreement to have been breached. The agreements typically state that having been found to have breached the agreement, the firm may not object to the introduction of the firm's admissions of wrongdoing that were included in the agreement. A conviction would then be highly likely to follow, where the prosecutor can make full use of the firm's own admissions.

These data provide a sense of the scope of ambitious organizational prosecution agreements, the issues they raise, and a sense of how the remedies have shifted over time. I turn now to several of the reform proposals advanced in the articles that I have written, and most recently in legislation drafted by Rep. Pallone and in a statement of principles authored by Rep. Pascrell.

II. Prosecution Guidelines Concerning Organizational Remedies

First, while the McNulty Memo provides useful guidance on whether a firm should be charged, as well as when pre-trial diversion is appropriate, no guidance exists regarding either the structure of the remedies included in the agreements themselves or the implementation of those remedies. These agreements are the product of negotiations and can raise case-specific facts. However, these remedies appear to have evolved in an ad hoc fashion. Defense counsel, prosecutors and judges would be substantially assisted

by a document describing the range of considerations relevant when drafting – and implementing – an organizational prosecution agreement.

Several areas are particularly ripe for such guidance. The agreements vary widely in their provisions for the selection of independent monitors. Since 2003 when the Thompson Memo was signed, at least 39 agreements included the retention of monitors. Of those, only one advertised an open position to solicit candidates. In 17 agreements, prosecutors named the monitor, typically after consulting with the target firm. Yet in 13 agreements the firm selected the candidate. In still others, some combination of the firm, regulators and prosecutors selects the monitor. In only three did a court play any role in approving the monitor.

Given the central importance of monitors in supervising compliance and the sweeping powers they are provided, a fair process for selection of monitors involving public notice and judicial approval is appropriate. For example, the firm, the prosecutor, and regulators could each nominate several candidates after the position is announced and candidates apply. A court could then review submissions regarding the merits of the finalists and choose the monitor from among those names. Such a process would help to prevent any perception of cronyism in the selection of monitors.

Many other questions remain. Why do some agreements not require a monitor? Perhaps for smaller firms independent monitoring was thought to be unnecessary to secure compliance. Yet some agreements lacking monitors involve large firms.

Why do some agreements not require the implementation of a compliance program? It is unclear why prosecutors felt that in some cases, no further compliance efforts were necessary to prevent recurrence of the criminal behavior. For some

agreements that fail to require a compliance program, the agreement does not credit the firm with already having implemented a compliance program. Related to this concern, why is it that few agreements incorporate the Organizational Sentencing Guidelines' detailed criteria for effective compliance programs? For example, while the Sentencing Guidelines call for firms to adopt means to assess the success of their compliance programs, deferred prosecution agreements typically do not. Further, the agreements do not explain how to assess whether the compliance agreements have achieved their goals.

Why do some agreements not include fines or restitution? If prosecutors are to determine in cases involving serious organizational crimes that some firms deserve no punishment at all in the form of a fine, and that no victims should be compensated in any way, then perhaps at minimum some additional explanation should be provided as to when that would be appropriate.

When are non-prosecution versus deferred prosecution agreements appropriate? The terms of non-prosecution agreements, in which no complaint is even filed with a court, often are indistinguishable from those of deferred prosecution agreements. It is not clear why some firms received a non-prosecution agreement and not a deferred prosecution agreement. In contrast to deferred prosecutions, in which a court plays a role in approving the request to defer the prosecution, non-prosecution agreements are not reviewed by a court, since no criminal information is filed with the court. Given the importance of preserving the opportunity for judicial review, as discussed next, perhaps guidelines should recommend against the use of non-prosecution agreements in organizational prosecutions.

Guidelines could help to clarify each of these questions and additional issues

regarding the implementation of these agreements discussed further in the next section.

III. Judicial Oversight Over Organizational Pre-Indictment Agreements

Judicial oversight of organizational pre-indictment agreements could provide greater legitimacy by providing a neutral decisionmaker, as well as greater transparency by making aspects of the process public. The U.S. Code currently requires judicial approval of any deferral of prosecution.[5] The statute does not separately address the unique concerns raised by the deferral of the prosecution of an organization. A court asked to approve a deferred prosecution agreement likely examines whether the agreement generally serves the purposes of the Organizational Sentencing Guidelines. Several agreements include provisions that would not withstand even that kind of fairly deferential scrutiny. Examples include agreements with side-agreements that were unrelated to the underlying crime. The court could be required to conduct an approval hearing in which the public or affected parties would have notice and an opportunity to comment, as is the case when certain agencies enter consent decrees.

Judicial supervision of the implementation of agreements could also be considered, to provide greater transparency, prevent abuses, and ensure successful completion. As it stands, the public can not tell whether agreements achieve the sought after compliance. When an agreement ends, no information is typically released except the bare fact that prosecutors were satisfied that it was successful. The court could report on the monitor's progress so that the public knows how the goals of an agreement were

[5] *See* 18 U.S.C § 3161(h)(2) (2000) (stating that the time to file an indictment is tolled during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct").

achieved. Courts supervise similar efforts during organizational probation following a conviction.

Further, these agreements provide prosecutors with unilateral authority to declare a breach and terminate an agreement. A firm may lack any pre-indictment remedy should a prosecutor arbitrarily declare a breach despite the firm's substantial compliance with the terms of the agreement.[6] Courts could be provided with statutory authority to adjudicate, pre-indictment, any dispute regarding a breach. Alternatively, at the approval stage, courts could be required to approve deferral of a prosecution only on the condition that the agreement provides that the court adjudicates any dispute concerning whether the agreement was breached. The court could also insist that the agreement preserve the court's authority to rule on whether the agreement was successfully implemented and should terminate.

Conclusion

The use of pre-indictment agreements represents an important shift in white collar enforcement. However, the remedies in these agreements have evolved in a haphazard fashion. Now that such agreements have become the preferred method for resolving organization prosecutions, it is time to consider ways to improve their fairness, transparency and effectiveness. Prosecution guidelines concerning remedies and increased judicial oversight are warranted to achieve those goals.

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[6]*See* Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 187 (3d. Cir. 2006) (holding that where the district court found the government violated due process by arbitrarily breaching an agreement under the DOJ Antitrust Division's Corporate Leniency Program, the court lacked the power to enjoin the prosecution and could only provide relief post-indictment); *see also* Garrett, *Structural Reform Prosecution*, *supra* note 1, at Part III.B.

Brandon L. Garrett, Associate Professor of Law, University of Virginia School of Law

I. Chart of McNulty Memo Deferred and Nonprosecution Agreements (Dec. 12, 2006 – Jan. 2008)

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
ABT Assocs. (D. Mass.) (Dec. 29, 2006)	DP	False Claims	Yes	Yes	None noted	No	No	USAID	$2.9 million in fines and restitution	27 months	Yes
Akzo Nobel N.V. (DOJ Fraud Section) (Dec. 2007)	DP	FCPA	No	Yes; compliance code, disciplinary procedures, training	None Cited	No	No	None	No, based on criminal fine to be paid to Dutch Public Prosecutor	2 years	Yes
Alabama Contract Sales (N.D. Ala.) (May 29, 2007)	DP	Federal Program Fraud	No	Yes, training, 2 year ban on participation in federal grant programs	None noted	No	No	IRS	$894,674 in forfeiture	2 years	Yes
American Express Bank Int'l (S.D. Fla.) (Aug. 2007)	DP	Failure to establish adequate anti-laundering program	No	Yes	Agreement notes AEBI's "outstanding cooperation" and pre-agreement efforts at remediation	No	No	Federal Reserve Bank	$55 million civil forfeiture	1 year	Yes
Appalachian Oil Company, Inc. (W.D.V.A.) (Jan. 2007)	DP	Wire fraud	No	Yes, retaining compliance officer, training, supervision, disclosure program	None Cited	No	Yes	No	$255,000 civil forfeiture, $2.5 million civil settlement with R.J. Reynolds Tobacco	3 years	Yes

[326] Nonprosecution (NP) or deferred prosecution (DP).

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Baker Hughes, Inc. (S.D. Tex.) (April 2007)	DP	FCPA	Yes	Yes	Compliance program implemented, including reporting system, helpline, training, certification process, review committee	No	No; but withholding shall be a factor in determining whether BHI has fully cooperated	SEC	None	2 years	Yes
Biomet, Inc. (D.N.J.) (Sept. 2007)	DP	Anti-Kickback Statute (payments to doctors)	Yes	Yes; compliance department expanded, policy review and needs assessment in process; Corporate Integrity Agreement with HHS-OIG	Pre-agreement ethics codes	No	No	HHS-OIG, USPIS	None; simultaneous settlement with DOJ Civil Division	18 months	Yes
Blue Cross Blue Shield of Rhode Island. (D.R.I.) (Dec. 2007)	NP	Mail fraud	Yes	Yes, will strengthen compliance program to satisfy "in all respects" the U.S. Sentencing Guidelines requirements	Yes, represents that it created an enhanced compliance program	Yes, $20 million to be paid to state trust fund administered by Foundation for affordable health services	Yes	None	$20 million	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
BP America, Inc. (N.D. Ill.) (Oct. 2007)	DP	Mail and wire fraud, Commodities Exchange Act	Yes	Yes	None noted	No	No; but withholding on grounds of privilege shall be a factor in determining whether BP has fully cooperated	CFTC	$100 million fine; $53,503,000 victim restitution fund; $25 million to US Postal Service Consumer Fraud Fund	3 years	Yes
Chevron Corp. (S.D.N.Y.) (Nov. 2007)	NP	Bribery (for purchases of Iraqi oil under Oil-for-Food program)	No	Yes	None noted	No	No	Office of Foreign Asset Controls (OFAC), Treasury Dept.; SEC	$20 million in restitution to Iraq Oil Fund; $5 million to New York Country District Attorney's Office; $2 million to OFAC	2 years	Yes
Collins & Aikman Corp. (S.D.N.Y.) (Mar. 2007)	NP	Tax Fraud	No	No	None noted	No	No	USPIS, SEC	None (in light of bankruptcy)	2 years	Yes
DePuy Orthopaedics, Inc. (D.N.J.) (Sept. 2007)	DP	Anti-Kickback Law	Yes	Yes, appoint Compliance Officer as member of Management Board, annual needs assessment	Compliance policies, compliance officer and committees, training, auditing	No	No	HHS-OIG, USPIS	None	18 months	Yes
ECHO, Inc. (S.D.N.Y.) (Mar. 2007)	NP	Illegal transactions (processing payments for online gambling)	No	No	Froze illegal accounts	No	No	None	$2.3 million disgorgement	1 year	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
El Paso Corp. (DOJ Fraud Division) (Feb. 2007)	NP	Anti-Kickback Law	No	No	No	No	Yes	SEC, Office of Foreign Assets Control of the Dept. Treasury	$5.482,363 in disgorgement	2 years	Yes
English Construction Co., Inc. (W.D.V.A.) March 2007)	DP	False Statements	No	No	Yes, cited initiation of compliance program and cooperation	No	No	No	$2.5 million	1 year	Yes
Express Scripts, Inc. (D. Mass.) (Sept. 2007)	NP	Illegal distribution of human growth hormone	No	Yes, including new training program and records keeping	None noted	No	No	FDA	$10.5 million	3 years	Yes
Hitachi Corp. (USDOJ) (Jan. 20, 2006)	NP	Antitrust violations	No	Yes	None noted	No	No	None	None	Unclear	Yes
Holy Spirit Assoc. () (2007)											
Ingersoll-Rand Company Ltd. (D.D.C.) (Oct. 2007)	DP	Conspiracy to commit wire fraud and falsification of business records under FCPA	Yes (Jeffrey M. Kaplan) – retained as an outside consultant	Yes, compliance and ethics program, internal accounting controls, compliance code, training, certifications	Yes, compliance and ethics program implemented	No	No; but withholding on grounds of privilege shall be a factor in determining whether Ingersoll-Rand has fully cooperated	SEC; USDOJ, Criminal Division, Fraud Section	$2.5 million	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
ITT Corp. (W.D.V.A) (March 2007)	DP	Arms Export Control Act violations	Yes	Not stated	No	No	Not stated	No	$100 million total penalty, and additional $10 million may be assessed, or more, and determination of fine may be appealed to "a retired federal judge selected by the United States sitting as an independent Special Master."	3 years	Yes
Jazz Pharmaceuticals, Inc. (E.D.N.Y.) (July 2007)	NP (GP of acquired firm)	Fraudulent drug marketing	No	Yes, Corporate Integrity Agreement with HHS incorporated	Yes, including review of alleged illegality, training, new code of conduct, Chief Compliance Officer appointed, replacing sales staff	No	No	HHS, VA, FDA	$17,262,078 ($12,262,078 in forfeited profits and $5 million in fines)	Not stated	Yes
Jenkins & Gilchrist (S.D.N.Y) (March 2007)	NP	Tax fraud	No	No; its offices "have already been or will soon be closed"	None noted	No	No	IRS	None	Not stated	Yes
Lucent Technologies Inc. (USDOJ, Criminal Division, Fraud Section) (Nov. 2007)	NP	FCPA	No	Yes; internal accounting controls, compliance code, training	None noted	No	No	SEC	$1 million	2 years	Yes
Maximus, Inc. (D.D.C.) (July 2007)	DP	Health Care Fraud	No	Yes, revise program in accord with U.S. Sentencing Guidelines	Yes, previous compliance program to be revised	No	No	HHS-OIG	$30.5 million	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Mirant Energy (USDOJ Fraud Section, N.D.C.A., Antitrust Division) (July 2007)	DP	False Commodities reporting	No	No	None cited	No	No	CFTC	$11 million fine	15 months	Yes
NEC Corp. (USDOJ) (Jan, 20, 2006)	NP	Antitrust violations	No	No	None noted	No	None	None	Unclear	Unclear	Yes
NETeller, PLC (S.D.N.Y.) (July 2007)	DP	Conspiracy to conduct an illegal gambling business	Yes	Yes, permanent restrictions, monitoring of controls	Yes, retained forensic accounting firm	No	No	None	$136 million civil forfeiture, distribution of $94 million to U.S. customers	2 years	Yes
Omega Advisors (S.D.N.Y.) (June 2007)	NP	FCPA	No	No	Yes, implementation of a compliance policy	No	Yes	SEC	$500,000 civil forfeiture	Until criminal investigations and prosecutors are final	Yes
Paradigm B.V. (USDOJ, Criminal Division, Fraud Section) (Sept. 2007)	NP	FCPA	Yes, retained Skadden Arps as Compliance Counsel	Yes, review internal controls	Yes, conducted investigation during due diligence concerning public offering, instituted "extensive remedial compliance measures"	No	No	SEC; USDOJ, Criminal Division, Fraud Section	$1 million	18 months	Yes
Pharmacia &Upjohn Co., LLC (D.N.J.) (April 2007)	DP	Anti-Kickback Law	No	No	Yes, notes "remedial actions to date"	No	No	No	$15 million in addition to criminal fine pursuant to guilty plea of $19,680,000	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Pfizer Inc. (D.M.A.) (March 2007)	NP, also GP by subsidiary	Anti-Kickback Law	No	No	Yes, side letter agreement premised on full performance of Pharmacia & Upjohn LLC DPA	No	No	No	Pursuant to DPA and guilty plea of Pharmacia, *supra*	3 years	Yes
Purdue Pharma L.P. (W.D.V.A.) (May 2007)	NP, also a GP	Misbranding	Yes	Yes, corporate integrity agreement with HHS	None noted	No	No	HHS-OIG	Pursuant to guilty plea: $500,000 fine; $3,087,277.60 to federal and state Medicaid, $20 million to Virginia Prescription Monitoring Program trust account; $5,300,000 to Virginia Medicaid Fraud Control Unit's Program Income Fund; $276,100.000 forfeiture; $160 million civil settlement;	6 years	Yes
Reliant Energy Services (DOJ Fraud Section) (Oct. 2007)	DP	Commodity price manipulation and wire fraud	No	Yes, new corporate compliance plan	Yes, adoption of internal controls	No	Yes	FERC	$36 million	2 years	Yes
Smith & Nephew, Inc. (D.N.J.) (Sept. 2007)	DP	Anti-Kickback Law	Yes	Yes, Compliance Office, needs assessment, training, hotline	Yes, cites remedial actions to date, including "robust compliance program"	No	No	HHS-OIG, USPIS	None	18 months	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Sigue Corp. and LLC (E.D.M.O., USDOJ Criminal Fraud Section) (Jan. 28, 2008)	DP	Failure to maintain adequate anti-money laundering program	No	Yes, will spend $9.7 million to enhance anti-money laundering program	Yes, describes "considerable resources" devoted to remedial measures prior to agreement	No	No	DEA, IRS	$15 million forfeiture, $12 of which to satisfy civil fine by Financial Crimes Enforcement Network	1 year	Yes, within 6 months of material breach
Stryker Orthopedics (D.N.J.) (Sept. 2007)	NP	Anti-Kickback Law	Yes	Yes, Compliance Office, needs assessment, training, hotline	None cited	No	No	HHS-OIG, USPIS	None	18 months	Yes
Textron, Inc (USDOJ, Criminal Division, Fraud Section) (Aug. 2007)	NP	FCPA	No	Yes	Yes, notes "long-standing compliance program"	No	No	SEC	$1.15 million	Not stated	Yes
Union Bank of California, N.A. (S.D. Cal.) (Sept. 2007)	DP	Failure to establish adequate anti-money laundering program	No	Yes, incorporates Consent Order with Comptroller of the Currency	Yes, notes "considerable resources" devoted to improved compliance procedures	No	No	Federal Reserve Board, Dept. Treasure, Office of Comptroller of the Currency	$21.6 million	1 year	Yes
United Bank for Africa PLC (S.D.N.Y.) (July 2007)	NP	Obstruction of justice	No	No	Yes, subsequent merger and management change with compliance reforms	No	No	No	$5,334,331 forfeiture	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[326]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Vetco Limited (now Aibel Group Limited) (S.D.T.X.) (Feb. 2007)	DP	FCPA	Yes, outside Compliance Counsel	Yes, new Executive Chairperson on Board, Compliance Committee on Board, outside Compliance Counsel	Yes, new compliance and ethics program implemented	No	Yes	None	None	3 years	Yes
Willbros (DOJ Fraud Section) (Nov. 2007)	DP	FCPA	Yes					SEC	$32.3 million in fines and disgorgement and $7.25 interest	3 years	
York Int'l Corp. (DOJ Fraud Section) (Sept. 2007)	DP	FCPA	Yes	Yes	Yes, retained Ernst & Young LLP and other remedial measures	No	No; but withholding on grounds of privilege shall be a factor in determining whether York Int'l has fully cooperated	SEC	$10 million	3 years	Yes
Zimmer, Inc. (D.N.J.) (Sept. 2007)	DP	Anti-Kickback Law	Yes	Yes	None noted	No	No	HHS, USPIS	None	18 months	Yes

II. Chart of Thompson Memo Deferred and Nonprosecution Agreements (Jan. 20, 2003–Dec. 12, 2006)

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[327]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Adelphia Communications (S.D.N.Y.) (May 2005)	NP	Sec. fraud	No	No	None cited	No	No	SEC, USPIS	$715M restitution	2 years	Yes
AEP Energy Services (S.D. Ohio) (Jan. 2005)	DP	Fraud (commodities reports)	No	No	None cited	No	Yes	None	$30M fine	15 months	Yes
American Int'l Group (W.D. Pa., DOJ Fraud Section) (Nov. 30, 2004)	DP	Sec. fraud	Yes, chosen by DOJ, SEC, and AIG as part of separate SEC agreement	No	None cited	No	Yes	SEC	$80M, SEC disgorgement and interest of $46.3M	2 years (1 year if compliant)	Yes
AOL (E.D. Va., DOJ Criminal Div.) (Dec. 2004)	DP	Sec. fraud	Yes: 1 yr, agreed upon by DOJ and AOL	Yes: new policies, including future reporting to the DOJ of any substantial, credible evidence of new federal crimes	None cited	No	Yes	SEC	$150M to compensation/ settlement fund; $60M fine	2 years	Yes
AmSouth Bancorp (S.D. Miss.) (Oct. 2004)	DP	Bank Secrecy Act	No	No	Revised policies with respect to responding to grand jury subpoenas	No	No	None	$40M settlement with gov't	1 year	Yes
BankAtlantic (S.D. Fla.) (Mar. 2006)	DP	Bank Secrecy Act, failure to maintain effective anti-money laundering program	No	No	Investments in personnel and compliance systems	No	No	None	$10M settlement with gov't	1 year	Yes

[327] Nonprosecution (NP) or deferred prosecution (DP).

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[327]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Bank of New York (S.D.N.Y., E.D.N.Y.) (Nov. 2005)	NP	Money laundering, unlicensed money transfers; failure to maintain effective anti-money laundering program	Yes (George A. Stamboulidis, Baker Hostetler)	Yes: new policies, training; new management structure; reporting system	Retained law firm to conduct investigation; shared results	No	Yes	None	$12M restitution; $26M in civil settlements	3 years (can be terminated earlier)	Yes
BAWAG P.S.K. (Bank owned by Austrian Trade Unions Association) (S.D.N.Y.) (Oct. 2006)	NP	Banking and sec. fraud	No	No	Yes: new management took over	No	No	USPIS, SEC, CFTC	$337.5M to U.S. bankruptcy estate in *Refco* case and victims; further payments depending on sale price of bank	None	N/A
Boeing Co. (C.D. Cal., E.D. Va.) (June 30, 2006)	NP	Federal procurement fraud, conflict of interest, use of competitor's information	Yes: Special Compliance Officer appointed already under Interim Agreement with Air Force	Yes: training; discipline; prohibiting retaliation; hot line created; auditing of compliance program created; Interim Agreement with the Air Force providing for compliance, an independent monitor, and auditing of compliance	Yes: changes to ethics and compliance program; interim agreement with Air Force in 2005; appointing "Special Compliance Officer" as a monitor	No	No	NASA, NASA - OIG, USAF, DOD-OIG	$50M penalty, $565M civil settlement	2 years	No: but "conduct by a Boeing employee classified at a level below Executive Management . . . shall not be deemed to constitute conduct by Boeing" and "USAO's shall provide Boeing with written notice" of belief a breach occurred. Special Master will adjudicate any breach.

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[127]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Bristol-Myers Squibb (D. N.J.) (June 15, 2005)	DP	Sec. fraud	Yes (Hon. Frederick B. Lacey, LeBoeuf Lamb)	Yes: policy changes; data collection; info on website	Entering SEC consent decree, retained independent advisor; personnel changes; created two positions on Board of Directors; reporting	Yes: endow chair in ethics at Seton Hall Law School	Yes	None	$300M compensation fund	2 years	Yes
Canadian Imperial Bank of Commerce (DOJ Enron Task Force) (Dec. 22, 2003)	DP	Aided and abetted accounting fraud (by Enron)	Yes (Michael G. Considine, Day Berry & Howard LLP)	Yes: auditing; policy changes; data collection; confidential reporting	Agreement with OSFI and Federal Reserve of NY (new policies)	No	Yes	SEC	$80M to SEC	3 years	Yes
Computer Associates (E.D.N.Y.) (Sept. 22, 2004)	DP	Sec. fraud; obstruction	Yes (Lee S. Richards III, Richards Kibbe & Orbe LLP)	Yes: auditing; policy changes; data collection; confidential and public reporting	Terminate employees; add two independent directors to board; new CEO; reorganize Finance and Internal Audit Departments	No	Yes	SEC	$225M restitution; $163M civil compensation	18 months	Yes
Edward D. Jones (E.D. Mo.) (Dec. 2004)	DP	Sec. fraud	No	Yes: new policies, training, compliance program; new executive committee	None cited	No	Yes	SEC, USPIS	$75M and $200,000 in costs to U.S. Postal Service	2 years	No
FirstEnergy Nuclear Operating Co. (N.D. Ohio) (Jan. 20, 2006)	DP	Environmental crimes, false statements by employees	No	No	Extensive corrective actions with ongoing supervision of NRC	Fund community serv. projects	NA	NRC	$23M fines; $4.3M community service	12 months	Yes
Friedman's, Inc. (S.D.Ga.) (Dec. 2, 2005)	NP	Securities Fraud	No	Yes; including SEC permanent injunction, establishment of a Compliance Committee, comprehensive ethics and training program	Yes, including internal investigation and creation of Ethics Committee	No	No	SEC	$2 million	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[127]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
German Bank HVB (S.D.N.Y.) (Feb. 14, 2006)	DP	Conspiracy to defraud IRS	No	Yes: compliance program as per U.S. Sentencing Guidelines; policy changes; permanent restrictions on banking practices	None cited	No	N/A	IRS	$29.6M in fines, restitution	18 months	
HealthSouth Corp. (N.D. AL) (May 2006)	NP	Accounting fraud and sec. fraud	Yes: Governance Consultant as required by SEC consent decree	Yes: actions taken or agreed to pursuant to SEC settlement incorporated in agreement	Adoption of new compliance policies; payments in SEC consent decree; new management, new CEO, CFO, new Chief Compliance Officer, new General Counsel; terminated employees; confidential hotline; retained consultant	No	No	SEC, IRS, USPIS	($100M in SEC settlement; $445M class settlement); $3M to U.S. Postal Service	30 months	Yes
Hilfiger (S.D.N.Y.) (Aug. 10, 2005)	NP	Tax fraud	No	Yes: compliance program as per U.S. Sentencing Guidelines	Full cooperation; file amended tax returns; internal investigation	No	No	IRS	Pay back taxes, interest; fine (est. $15.4M; $2.7M interest)	3 years (can request to be terminated after 2 years)	No
InterMune, Inc. (N.D.C.A) (Oct. 25, 2006)	DP	Misbranding	Yes, independence review pursuant to HHS Corporate Integrity Agreement	Yes, Corporate Integrity Agreement with HHS	Yes, prior to settlement entered into voluntary compliance program	No	**No**	HHS-OIG	$36.9 million plus5% interest over five years pursuant to Civil Settlement Agreement	2 years	Yes
InVision (DOJ Fraud Section) (Dec. 3, 2004)	DP	Foreign Corrupt Practices Act ("FCPA")	Yes (Bill Pendergast, Paul Hastings)	Yes: policy changes	Voluntary disclosure; prompt disciplinary action; no prior history	No	Yes	SEC	$800,000 fine	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[127]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
KPMG (S.D.N.Y.) (Aug. 26, 2005)	DP	Tax fraud, conspiracy to defraud IRS; tax evasion	Yes (Richard C Breeden & Co.)	Yes: policy changes; confidential reporting; compliance program as per U.S. Sentencing Guidelines	None cited	No	Yes	IRS	$456M total, of which $228M consists of fines	14 months (can be extended at one year intervals; max. 5 yrs); monitorship lasts three years	Yes
MCI (S.D.N.Y.) (Sept. 1, 2005)	NP	Sec. fraud	No	Yes: compliance program as part of 2004 settlement with Okla. prosecutors and civil settlements	None cited	No	No	SEC	$750M restitution (SEC agreement)	2 years	Yes
Mellon Bank, N.A. (W.D. Pa.) (Aug. 15, 2006)	NP	Theft of gov't property, theft of mail matter, conspiracy	Yes	Yes: compliance and ethics program that satisfies U.S. Sentencing Guidelines; new training; auditing	None cited	No	Yes	USPIS, Dep't Treasury Inspector Gen. for Tax Admin.	$30,000 in costs, $18.1M in restitution to taxpayers, U.S.	3 years	
Merrill Lynch (DOJ Enron Task Force) (Sept. 17, 2003)	NP	False statements, aided/abetted Enron	Yes (George A. Stamboulidis, Baker Hostetler)	Yes: policy changes; confidential reporting; creation of a special structure products committee to review transactions	None cited	No	No	SEC	$80M (SEC agreement)	21 months	Yes
Micrus Corp. (DOJ Fraud Section) (Feb. 28, 2005)	NP	FCPA	Yes	No	Voluntary disclosure; disciplinary action of employees, no prior criminal history	No	Yes	SEC	$450,000 fine	3 years	Yes (for 24 months)

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[127]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Monsanto (DOJ Fraud Section) (Jan. 2005)	DP	FCPA	Yes (Tim Dickinson, Paul Hastings)	Yes: auditing; policy changes; confidential reporting; press release	Internal investigation; voluntary reporting; new policies	No	Yes	None	$1M fine	3 years	Yes
MRA Holdings, LLC (N.D. Fla.) (Sept. 2006)	DP	Failing to label sexually explicit material	Yes	Yes: supervised by independent monitor	None	No	No	None	$2.1M fine	3 years	Yes (provides for notice and two week opportunity to demonstrate no breach or cure)
New York Racing Ass'n (E.D.N.Y) (Dec. 10, 2003)	DP	Conspiracy to defraud; tax fraud	Yes (Neil V. Getnick and Judge Margaret J. Finerty, Getnick & Getnick)	Yes: auditing; new management; policy changes	Formation of oversight committee; retain outside firm to review; new policies; confidential reporting	Video lottery terminals installed at racetracks	Yes	None	$3M fine	18 months	Yes
Operations Management International (D. Conn.) (2006)	DP	Reporting requirements under Clean Water Act	No	Yes: auditing; data collection	New policies and compliance structure; confidential reporting; compliance program; new management	Gift to Alumni Ass'n for Coast Guard Academy to endow chair for envtl. study	Yes	None	$2M to Coast Guard Academy; $1M to Greater New Haven Water Pollution Control Authority	2 years	Yes
PNC Financial (W.D. Pa., DOJ Fraud Section) (June 2, 2003)	DP	Sec. fraud	No	No	"[E]xceptional remedial measures" and separate agreements with the SEC, the Federal Reserve Bank of Cleveland and Federal Reserve Board, and the Office of the Comptroller of the Currency	No	Yes	None	$90M restitution fund; $25M fine	1 year	Yes, upon written notice with two week opportunity to demonstrate no breach

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[127]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Roger Williams Medical Center (D.R.I.) (Jan. 27, 2006)	DP	Public corruption	Yes (Meg Curran (assisted by Leonard Henson), McCue, Lee & Greene, LLP)	Yes: revise ethical standards, in accord with U.S. Sentencing Guidelines; hire Executive Ethics Officer; ethics training; written reports	Yes: previously adopted compliance program and prior Corporate Integrity Agreement with HHS	Yes: $4M in free health care to the public	Yes	None	None	2 years; may be extended up to a total of 5 years if there are violations	Yes
Royal Ahold, N.V. (S.D.N.Y.) (Sept 20, 2006)	NP	Securities Fraud	No	No	Yes; self reporting and internal investigation	No	No	SEC, Department of Defense	$1.1 billion in restitution in separate civil settlement	2 years	No
Schnitzer Steel Industries Inc. (USDOJ) (Oct. 26, 2006)	DP	FCPA violations and wire fraud	No	Yes	None noted	No	No	SEC	$7,500,000 fine	3 years	Yes
Statoil, ASA (S.D.N.Y., DOJ Fraud Section) (Oct. 2006)	DP	FCPA	Yes	Yes	Simultaneous compliance agreement with SEC	No		SEC	$10.5M (separate $10.5M disgorgement to SEC)	3 years	Yes
Symbol Technologies (E.D.N.Y.) (June 3, 2004)	NP	Accounting fraud	Yes	Yes: new policies (training and educational program); new auditing firm; appointed independent examiner	Retained firm to conduct internal investigation; shared results; waived privilege; termination of new employees; new management appointed; restructured Board of Directors, new policies; confidential reporting	No	Previously waived	SEC, USPIS	$139M to compensation fund; $3M to U.S. Postal Service	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[127]	Crime	Indep. Monitor Req. (monitor's name)	Compliance Program Required	Pre-Agreement Compliance	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
University of Medicine and Dentistry of New Jersey (D.N.J.) (Dec. 2005)	DP	Health care fraud	Yes (John Inglesino, Herbert Stern)	Yes: new policies; confidential reporting; training programs; create position of Chief Compliance Officer, new General Counsel.	Yes: cites "remedial actions to date" without detailing them	No	Yes	None	Full restitution in amount determinod by Monitor, $4.9M to Medicaid	2 years (can be extended 1 year)	Yes
WesternGeco LLC (subsidiary of Schlumberger Seismic, Inc.) (S.D. Tex.) (June 16, 2006)	DP	Immigration (visa) fraud	No	No	Yes: cites "remedial actions" taken including "a comprehensive compliance program"	No	Yes	USPIS, Dep't Labor, OIG, IRS, Dep't State Diplomatic Sec. Serv.	$18M fine, $1.6M in costs	1 year	Yes
Whitehall Jewelers, Inc. (E.D.N.Y.) (Sept. 28, 2004)	NP	Bank fraud	Yes	Yes: hiring of Internal Audit Director; reporting hotline; compliance program; compliance committee; training program; whistleblower protection; compliance reports to USAO E.D.N.Y.	Yes: terminated employment of those involved; committed to hiring new President, General Counsel, Internal Audit Director; instituted comprehensive compliance program	No	No	USPIS	$350,000 fine, $13.3M restitution	3 years	Yes
Williams Power Co. (N.D.C.A) (Feb. 22, 2006)	DP	Fraudulent commodities reports	No	No	Yes: "remedial actions to date" cited	No	Yes	CFTC	$50M fine	15 months	Yes

ARTICLES

STRUCTURAL REFORM PROSECUTION

*Brandon L. Garrett**

IN what I call a structural reform prosecution, prosecutors secure the cooperation of an organization in adopting internal reforms. No scholars have considered the problem of prosecutors seeking structural reform remedies, perhaps because until recently organizational prosecutions were themselves infrequent. In the past few years, however, federal prosecutors have adopted a bold strategy under which dozens of leading corporations have entered into demanding settlements, including AIG, America Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co., and Monsanto. To situate the DOJ's latest strategy, I frame alternatives to the pursuit of structural reform remedies as well as alternative methods prosecutors can use to pursue structural reform. To better understand what the DOJ accomplished by choosing to pursue structural reform and then doing so at the charging stage, I conducted an empirical study of the terms in all agreements the DOJ has negotiated to date. My study reveals imposition of deep governance reforms, consistent with the purposes of the Sentencing Guidelines, but also some indications of overreaching, if perhaps not abuse of prosecutorial discretion. I conclude by framing the issues that such prosecutions raise where, given the breadth of prosecutorial discretion and the deferential, limited nature of judicial review, the DOJ's emerging structural regime for deterring organizational crime raises important questions for all actors involved and affected.

* Associate Professor, University of Virginia School of Law. I gratefully acknowledge invaluable comments from Ken Abraham, Kerry Abrams, Richard Bierschbach, Richard Bonnie, Samuel Buell, Julie Cohen, Anne Coughlin, Viet Dinh, Chris Elmendorf, Theodore Garrett, Rachel Harmon, Toby Heytens, Robert Hur, James Jacobs, Ed Kitch, Greg Klass, Jody Kraus, Donald Langevoort, The Honorable Gerard Lynch, Paul Mahoney, Greg Mitchell, Erin Murphy, Richard Myers, Jed Purdy, Dan Richman, Jonathan Rusch, George Rutherglen, David Sklansky, Dan Solove, Susan Sturm, George Yin, and David Zaring; participants at the University of Virginia School of Law and Georgetown University Law Center faculty workshops, the 2006 Junior Criminal Law Conference, and the Washington & Lee Works in Progress Conference; and research assistance from Michelle Morris, Richard Rothblatt, and Erin Montgomery.

INTRODUCTION

In the past few years, federal prosecutions of organizations have sharply accelerated under a new paradigm that I call "structural reform prosecution." Traditionally, federal prosecutors rarely pursued entire organizations. Broad federal statutes and respondeat

superior standards allowed prosecutors to charge an entity with a crime for the act of a single agent. Organizations feared the catastrophic punitive fines and severe reputational consequences of a conviction—what one court described as a "matter of life and death."[1] But despite their substantial power, federal prosecutors seldom exercised it, out of concern for the collateral consequences to an organization and also the harm to employees, stockholders, and the public. Recently, however, the Department of Justice ("DOJ") adopted a novel strategy by prosecuting large organizations far more often, but leveraging the prosecutions to secure adoption of sweeping internal reforms.[2] Without obtaining an indictment, much less a conviction, the DOJ recently prevailed on thirty-five leading corporations to enter into demanding settlements, including AIG, America Online, Boeing, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co., and Monsanto, as well as several public entities.[3]

This new settlement approach avoids the collateral consequences of an indictment, while using the prosecution as a "spur for institutional reform."[4] By entering into agreements with organizations, prosecutors imposed rigorous requirements to promote compliance. For example, in 2005, KPMG International agreed to shut down its entire private tax practice, to cooperate fully in the investigation of former employees, and to retain an independent monitor—a former Securities and Exchange Commission ("SEC") chairman—for three years, in order to implement an elaborate compliance program.[5] Such agreements became common as prosecutors initiated more organizational prosecutions than before in re-

[1] United States v. Stein, 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

[2] Throughout this Article, I use "DOJ" to refer to federal prosecutors both at the main office and the various U.S. Attorneys' Offices collectively. I do this only for convenience, because, as I will describe, the individual offices and line attorneys exercise substantial independence. I otherwise refer to individual U.S. Attorneys' Offices, the central office, divisions, or task forces separately.

[3] See infra Appendix A.

[4] John Gibeaut, Junior G-Men, A.B.A. J., June 2003, at 46, 48 (quoting then-Assistant Attorney General Michael Chertoff).

[5] See infra Section I.A.

sponse to post-Enron corporate fraud scandals.[6] The agreements form a part of the larger fabric of federal response to a perceived breakdown in corporate culture that has also included passage of the Sarbanes-Oxley Act and enhanced regulatory enforcement targeting corporate fraud.[7]

Unlike those legislative and administrative responses, structural reform prosecutions raise questions about the reach of federal executive branch power. The Senate Judiciary Committee questioned tactics used by the DOJ, as did the American Bar Association and the Committee on Capital Markets Regulation.[8] Other critics of the DOJ strategy with a different perspective, such as Ralph Nader, called failures to convict organizations a "shocking" and "systematic derogation" of the DOJ's duty to seek justice.[9] White collar defense practitioners complained in the press that federal prosecutors "exploit[] their virtually unchecked power to extract and coerce ever greater concessions."[10] Professor Richard Epstein stated that "the agreements often read like the confessions of a Stalinist purge trial."[11] All sides agree that for good or ill, federal prosecutors exercise vast discretion; Professor John C. Coffee, Jr. commented

[6] See infra Section II.A.

[7] See, e.g., Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7201 (2000 & Supp. IV 2004)); John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. Rev. 301, 303 (2004) (describing "pervasiveness of the sudden surge in financial irregularities in the late 1990s" and regulatory responses).

[8] See Lynnley Browning, Justice Department Is Reviewing Corporate Prosecution Guidelines, N.Y. Times, Sept. 13, 2006, at C3; ABA Presidential Task Force on the Attorney-Client Privilege, http://www.abanet.org/buslaw/attorneyclient/home.shtml (last visited Feb. 3, 2007); Comm. on Capital Mkts. Regulation, Interim Report 13 (2006), http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

[9] Letter from Ralph Nader & Robert Weissman to Alberto Gonzales, Attorney Gen. (June 5, 2006), posted at Multinational Monitor Editor's Blog, http://multinationalmonitor.org/editorsblog/index.php?/archives/26-The-Boeing-DOJ-Debacle.html (July 6, 2006, 15:34 EST); see Michael Seigel, Corporate America Fights Back, Wash. Post, Feb. 26, 2007, at A15.

[10] N. Richard Janis, Taking the Stand: Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed, Wash. Law., Mar. 2005, at 32, 34, available at http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/march_2005/stand.cfm.

[11] Richard A. Epstein, Op-Ed., The Deferred Prosecution Racket, Wall. St. J., Nov. 28, 2006, at A14.

that they have "something close to absolute power" when negotiating organizational settlements.[12]

Some indications of overreaching already are apparent in instances where prosecutors exacted seemingly unrelated terms, although, as discussed below, what counts as an abuse is contested in an area where prosecutors retain such broad discretion. In 2003, the New York Racing Association ("NYRA"), a state-franchised operation, agreed to install "video lottery terminals," or slot machines, at its race tracks. Federal prosecutors imposed this term only because state officials hoped to use the revenue from the slot machines to comply with a court ruling requiring adequate public school funding.[13] Similarly, in 2004, MCI (the entity that replaced WorldCom) entered into an agreement with state prosecutors in Oklahoma to settle accounting fraud charges. State officials feared that MCI might face bankruptcy if indicted, leading to job losses and harm to state pension plans with MCI stock. The agreement required MCI to create 1600 jobs over ten years in Oklahoma. MCI was later fined when it did not create those jobs as promised.[14]

Nor do prosecutors quickly relinquish their power. They retain the authority to prosecute based on their unilateral decision that an organization breached the agreement.[15] The agreements typically do not provide for judicial review of implementation or of any alleged breach, and they often require the organization's permanent future cooperation.

This recent wave of structural reform prosecutions is not the first time that the litigation process has been used to effect organizational change. Beginning in the 1960s and 1970s, private attorneys general increasingly sought structural reform of public entities by bringing lawsuits against government entities, including challenges to school segregation, conditions in mental hospitals and prisons, and housing discrimination. These lawsuits were "structural reform" cases because they sought more than cease-and-desist orders by requiring ongoing judicial oversight of government institutions.

[12] John C. Coffee, Jr., Deferred Prosecution: Has it gone too far?, Nat'l L.J., July 25, 2005, at 13.

[13] See infra notes 262–63.

[14] See Barbara Hoberock, MCI Coughs Up $280,000 Payment to State, Tulsa World, Mar. 31, 2005, at A1.

[15] See infra Section II.B.

Courts later restricted the scope of prospective remedies for reasons of equitable restraint, federalism, comity, and countermajoritarian legitimacy, but over time, a consistent body of remedial law emerged to guide government actors in a range of contexts.

The emerging approach towards structural reform prosecutions knows no such bounds. Federal prosecutors, unlike civil rights plaintiffs, operate as politically accountable public actors to whom courts remain highly deferential. In the past, however, the DOJ had not sought to reshape Fortune 500 companies, much less to achieve "deterrence on a massive scale" of entire industries.[16] We should be examining these prosecutions carefully because of their national importance and because structural reform is a new goal for federal criminal law. Legal scholars have not critically examined this bold new prosecutorial mission.[17] Nor have any scholars explored the problem of structural reform of organizations through criminal prosecutions, perhaps due to the traditional view that structural reform occurred only in civil rights cases.[18] Civil struc-

[16] Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep't Components, U.S. Attorneys 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memo].

[17] Little scholarship to date has critically examined the DOJ's recent deferral strategy, and none treats the problem as one of structural reform of organizational criminality. See Lawrence D. Finder & Ryan D. McConnell, Devolution of Authority: The Department of Justice's Corporate Charging Policies, 51 St. Louis U. L.J. 1 (2006) (suggesting that corporations try to negotiate more lenient terms and describing variation between the agreements among different U.S. Attorneys' Offices); Benjamin M. Greenblum, Note, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, 105 Colum. L. Rev. 1863, 1901 (2005) (proposing that courts act as fiduciaries for third parties affected by deferral agreements). The only additional commentary on recent structural efforts by the DOJ was written by current or former DOJ prosecutors and usefully explains DOJ policy and practice. See Christopher J. Christie & Robert M. Hanna, A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co., 43 Am. Crim. L. Rev. 1043 (2006) (praising the DOJ's new approach); Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 Am. Crim. L. Rev. 1095, 1095–98 (2006) (describing DOJ practice and its impact). Several pieces criticize recent deferred prosecution agreements but only regarding the specific subject of privilege waiver, an issue tangential to this project but discussed infra text accompanying notes 251–52. See, e.g., George Ellard, Making the Silent Speak and the Informed Wary, 42 Am. Crim. L. Rev. 985, 993 (2005).

[18] My hope is that this piece will begin to link criminal law structural reform scholarship to scholarship on civil structural remedies. Professor James Jacobs, in his land-

tural reform litigation engendered an important literature regarding the legitimacy and efficacy of such interventions.[19] Similar questions should be asked again by courts, scholars, and practitioners about structural reform in criminal cases. In this piece, I shed light on why prosecutors chose to pursue structural reform, I provide an empirical description of these structural reform efforts by prosecutors, and I begin the project of exploring questions regarding their clarity, scope, effectiveness, the alternatives, and the ability of prosecutors and courts to police them.

This Article proceeds in three Parts. The first Part introduces the structural reform prosecution by describing the KPMG case and contrasting the classic civil structural reform model and its judicial limits with the vast discretion of prosecutors. I discuss how prosecutors might decide to exercise their discretion without seeking to accomplish structural reform at all. The DOJ could seek to impose optimally deterrent fines, but the dire collateral consequences of such an approach make it highly undesirable. Or the DOJ could wholly cease prosecuting organizations and focus on prosecuting individuals, deferring to civil litigation or federal regulatory actors with expertise in governance reform. This approach, however, would ignore direction from Congress to prosecute organizations.[20] The DOJ instead reserved prosecution for serious cases and in those cases sought structural reform remedies early to avoid the harsh effects of an indictment.

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mark book on civil RICO labor racketeering prosecutions, is one of the few to recognize a need for scholarship connecting the history of structural reform litigation in civil rights cases and in federal organized crime prosecutions. See James B. Jacobs, Mobsters, Unions, and Feds: The Mafia and the American Labor Movement 246 (2006).

[19] See infra Section I.B.

[20] Regarding the problem of overbroad and vague federal criminal law, see, for example, John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 244–45 (1985); Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345; Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 908–25 (2005). Regarding the unique problem of organizational punishment, see Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Legal Stud. 833 (1994); John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981); Robert Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523 (1984); Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857 (1984).

In Part II, I describe the current approach in which prosecutors obtain structural reform settlements at the charging stage through deferral or nonprosecution agreements. While the DOJ's current deferred prosecution approach raises concerns about executive power, it remains more complex than it first appears. I provide an empirical study of the terms in agreements the DOJ has negotiated to date (summarized in Appendices A and B) to assess how prosecutors have exercised their discretion in practice.[21] This empirical analysis shows that the DOJ, in the four years after adopting its new policy in 2001, has by and large stayed true to its stated mission and consistently pursued compliance by negotiating the appointment of independent monitors and requiring compliance programs. Out of these agreements a consistent remedial approach emerged. These agreements tracked the federal Organizational Sentencing Guidelines, which already mitigate sentences for organizations with "effective" compliance programs. Yet the DOJ also exercised broad discretion to include terms unrelated to compliance and reserved for itself supervision of compliance and the unilateral power to declare a breach. Further, several alternative means to obtain structural reform were available, operating at later stages of a criminal case with greater judicial oversight. As another option, prosecutors could have sought parallel civil remedies. The DOJ chose to depart from those more traditional means for obtaining compliance. Instead, the DOJ chose to seek structural reform at the charging stage, chiefly to minimize the dire consequences of an indictment to an organization. Judicial review is also very deferential at the charging stage, however, giving prosecutors especially wide discretion.

In Part III, I explore issues raised by structural reform prosecutions, beginning with a section framing what "prosecutorial abuse" could mean in an area where prosecutors retain such broad discretion. In the civil context, the legitimacy of structural reform was questioned when private plaintiffs sought supervision of government by courts. Those concerns do not apply here. I develop how judicial review in the criminal context, unlike in civil cases, remains quite deferential, for doctrinal and institutional reasons, and particularly at the charging stage. Other concerns in civil cases related

[21] See infra Appendices A & B.

to the broad reach of remedies. Those concerns were over time addressed in some respects by judicial limits and in others by common acceptance of the effectiveness of certain remedies. Given a limited role for judicial review, the DOJ itself may be the entity with the greatest ability to shape its structural reform approach, absent intervention by Congress. Already, organizations and Congress have created pressure leading the DOJ to moderate its approach. If the DOJ, and perhaps regulators, organizations, courts, or Congress, make explicit an understanding that prosecutors now pursue a structural reform approach, and then further clarify this set of remedial practices, structural interventions may evolve towards a more predictable crime deterrent.

I. STRUCTURAL REFORM AND PROSECUTORIAL DISCRETION

Prosecutors have long sought to combat organizational crime in various forms, but, in a paradigm shift, they increasingly attempt to reform institutions themselves rather than impose punitive fines and imprisonment upon individual offenders. I first present the story of the KPMG deferred prosecution to illustrate the scope of these structural reform efforts. In the second Section in this Part, I tie these efforts to the classic civil model for structural reform litigation. Prosecutors now employ some of the same tools developed by private attorneys general. Third, I explore the alternatives to pursuing structural reform that prosecutors could have chosen and suggest some reasons why they did not. I show how the structural reform agenda of prosecutors was shaped by the substance of federal criminal law and the power and discretion of prosecutors in our criminal system.

A. The KPMG Prosecution Deferred

One Assistant U.S. Attorney explained that what I term structural reform prosecutions provide "a way to get better results more quickly. . . . We're getting the sort of significant reforms you might not even get following a trial and conviction."[22] The KPMG case provides a vivid illustration of the injunctive terms federal prosecu-

[22] Vanessa Blum, Justice Deferred: The Feds' New Weapon of Choice Makes Companies Turn Snitch to Save Themselves, Legal Times, Mar. 21, 2005, at 1 (quoting the lead Assistant U.S. Attorney in the Computer Associates case).

tors obtain in agreements resolving the most high-profile corporate prosecutions, and the successes and flaws of such settlements.

By 2005, it emerged that KPMG, one of the largest accounting firms in the world, engaged in tax fraud that resulted in $2.5 billion in evaded taxes by wealthy individuals. As early as 2001, the Internal Revenue Service ("IRS") investigated certain tax shelters and issued summonses to KPMG, with which KPMG did not comply, prompting the IRS to seek judicial enforcement in 2002.[23] A Senate Subcommittee began an investigation and at hearings in November 2003, KPMG employees were questioned.[24] By 2004, the IRS referred the case to the DOJ for possible criminal prosecution.[25]

In 2004, a criminal complaint was filed by the DOJ against KPMG, "the largest criminal tax case ever filed."[26] In 2004 and 2005, KPMG and prosecutors at the United States Attorney's Office for the Southern District of New York entered into lengthy discussions. KPMG offered to cooperate and "clean house" to save the company and avoid an indictment.[27] The negotiations operated at a high level, with executives meeting directly with the U.S. Attorney.[28]

On August 25, 2005, after the grand jury had been convened but before an indictment had been issued, the DOJ and IRS announced that the criminal prosecution of KPMG would not go forward, though prosecution of individual employees would proceed, because an agreement had been reached.[29] U.S. Attorney

[23] See United States v. KPMG, 316 F. Supp. 2d 30, 31–32 (D.D.C. 2004).

[24] See United States v. Stein, 435 F. Supp. 2d 330, 380 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

[25] See id. at 339.

[26] See Press Release, Dep't of Justice, KPMG to Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case (Aug. 29, 2005), http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html; Letter from David N. Kelley, U.S. Attorney, S. Dist. of N.Y., to Robert S. Bennett, Attorney for KPMG (Aug. 26, 2005), http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf [hereinafter KPMG Agreement].

[27] See *Stein*, 435 F. Supp. 2d at 341.

[28] See id. at 348.

[29] See id. at 349; see also Sue Reisinger, Mr. Clean, Corp. Counsel, Nov. 2005, at 82, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1131425800801. The DOJ had been intent on pursuing a trial, in part because of perceived evasion by KPMG in not turning over documents. Id. at 85. Ultimately, negotiations that included KPMG's new general counsel, former U.S. District Judge Sven Erik Holmes, produced an agreement. Id. at 87–88.

General Alberto Gonzales cited "the reality that the conviction of an organization can affect innocent workers and others associated with the organization, and can even have an impact on the national economy."[30]

Though federal courts have statutory authority to reject the deferral of a prosecution, District Judge Loretta A. Preska apparently ratified it on August 29, 2005, after a hearing and without any alterations to the terms.[31] The resulting deferred prosecution agreement provided a remarkable blueprint for radical structural change at KPMG.

The agreement begins with a detailed admission of wrongdoing, stating that KPGM "[a]ssisted high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gain and ordinary income by developing, promoting and implementing unregistered and fraudulent tax shelters."[32] The agreement provided for a payment of $456 million, including fines and full restitution to the IRS.[33] The provisions placed "permanent restrictions" on KPMG's tax practice, barring taking on new private tax clients, terminating its tax and benefits practice, preventing it from issuing advice and selling certain pre-packaged tax products, and limiting work for individual clients.[34] The agreement is also "permanent" in that it requires continuing cooperation with the DOJ, without any time limit.

The compliance reforms reached further. KPMG agreed to "implement and maintain an effective compliance and ethics program that fully comports with the criteria set forth in Section 8B2.1 of the United States Sentencing Guidelines."[35] Attorney General Gonzales called this the "most important" part of the agreement,

[30] Id. at 89.

[31] See United States v. KPMG LLP, No. 1:05-CR-00903-LAP (S.D.N.Y. Aug. 29, 2005) (docket entries 1–4); see also KPMG Agreement, supra note 26, ¶ 11 (the Agreement "must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2)").

[32] KPMG Agreement, supra note 26, ¶ 2.

[33] Id. ¶ 3; see also Mark W. Everson, Comm'r, IRS, Statement Regarding KPMG Corporate Fraud (Aug. 29, 2005), http://www.irs.gov/newsroom/article/0,,id=146998,00.html (noting importance of "blue chip firms like KPMG that, by virtue of their prominence, set the standard of conduct for others").

[34] See KPMG Agreement, supra note 26, ¶ 6.

[35] Id. ¶ 16.

vital to "help prevent such wrongdoing in the future."[36] The Guidelines, as discussed below, require a comprehensively defined series of compliance protocols, risk analysis, training programs, and auditing.

Beyond those efforts, KPMG created "a permanent compliance office and a permanent educational and training program relating to the laws and ethics governing the work of KPMG's partners and employees."[37] The program paid "particular attention to practice areas that pose high risks."[38] The agreement added that whistleblowers shall be protected and rewarded, a hotline shall be created to report noncompliance, and "KPMG shall take such additional personnel actions for wrongdoing as are warranted."[39] Further, the agreement mandated that "KPMG shall take steps to audit the Compliance & Ethics Program to ensure it is carrying out the duties and responsibilities set out in this Agreement."[40] Thus the compliance program itself was to be evaluated so that compliance efforts would be continually improved. Such data collection tasks KPMG with not only detection of employee wrongdoing but also predicting and preventing future criminality among employees.

Overseeing these efforts, the agreement required KPMG to permit the DOJ to appoint an "independent monitor" to serve for three years.[41] Richard Breeden, a former SEC Chairman, received the appointment (he previously served as a special master overseeing SEC compliance at MCI/WorldCom). Once his term expired, the IRS then was to monitor KPMG's tax practice for two more years.[42]

Breeden was empowered to "review and monitor KPMG's compliance with this Agreement," to "review and monitor KPMG's maintenance and execution of the Compliance & Ethics Program,"

[36] Alberto R. Gonzales, U.S. Attorney Gen., Prepared Remarks at the Press Conference Regarding KPMG Corporate Fraud Case (Aug. 29, 2005), http://www.usdoj.gov/ag/speeches/2005/082905agkpgmcorpfraud.htm.

[37] KPMG Agreement, supra note 26, ¶ 16.

[38] Id.

[39] Id. KPMG then created and described on its website a 24-hour whistleblower website and telephone hotline for employees. See KPMG's Ethics and Compliance Hotline, http://www.us.kpmg.com/news/index.asp?cid=2012 (last visited Mar. 6, 2007).

[40] KPMG Agreement, supra note 26, ¶ 16.

[41] See id. ¶ 18(e)(I). Up to two additional years may be added to the Monitor's term if, in its sole discretion, the DOJ finds KPMG breached the agreement. Id.

[42] Id. ¶ 19.

and to "recommend such changes as are necessary to ensure conformity with the Sentencing Guidelines and this Agreement, and that are necessary to ensure that the Program is effective."[43] To accomplish those broad ends, he was invested with sweeping powers, such as unrestricted access to information, including any correspondence or email of KPMG employees, and inquisitorial powers, including the right to call a meeting or interview any KPMG partner, employee, or agent.[44] In addition, "[t]he Monitor shall have the authority to employ legal counsel, consultants, investigators, experts, and any other personnel necessary to assist in the proper discharge of the Monitor's duties."[45] Furthermore, "[t]he compensation and expenses of the Monitor, and of the persons hired under his or her authority, shall be paid by KPMG."[46] The Monitor had the authority to "take any other actions that are necessary to effectuate his or her oversight and monitoring responsibilities."[47] Neither the KPMG Monitor's reports, nor any of its other actions, have been made public.

In addition to the ways it reshaped corporate governance within KPMG, the agreement had substantial effects on nonparties. Nineteen individual employees and former KPMG tax partners face criminal charges and must argue that KPMG's admissions that the relevant tax shelters were illegal and intended to assist clients in breaking the law should not prejudice them or constitute a finding as a matter of tax law.[48] Further impeding their defense (and empowering their prosecution), the Monitor may interview any current employee for any reason.[49]

Several of those employees filed motions complaining that the DOJ pressured KPMG to decline to pay for their criminal defense as part of its effort to show its cooperation. District Judge Lewis Kaplan ruled that the DOJ unconstitutionally pressured KPMG to cut off legal defense payments, and though the indictments would

[43] Id. ¶ 18(a).
[44] Id. ¶ 18(b).
[45] Id. ¶ 18(c).
[46] Id. ¶ 18(e)(VI).
[47] Id. ¶ 18(d).
[48] See Press Release, Dep't of Justice, Superseding Indictment of 19 Individuals Filed in KPMG Criminal Tax Fraud Case (Oct. 17, 2005), http://www.usdoj.gov/opa/pr/2005/October/05_tax_547.html.
[49] KPMG Agreement, supra note 26, ¶ 18(b).

not be dismissed, the defendants could file ancillary civil actions for reimbursement.[50] Judge Kaplan, mincing no words, decried the power the DOJ exercises in organizational cases, stating:

> Justice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law.[51]

Judge Kaplan's rulings have continued to raise important issues for scholars to consider concerning the effects of these far-reaching agreements on employees. For example, Judge Kaplan recently excluded certain proffer statements made by two employees of KPMG as involuntary, ruling that the employees cooperated with prosecutors due to the threat that KPMG would not pay their legal fees, which was itself the product of government coercion.[52] Again using strong language, Judge Kaplan complained that by "altering the manner in which suspected corporate crime has been investigated, prosecuted, and, when proven, punished," federal prosecutors have used "the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights."[53]

The KPMG agreement may also have industry-wide effects. Given KPMG's prominence in the industry, any reforms adopted by the Independent Monitor may become established "best prac-

[50] See United States v. Stein, 435 F. Supp. 2d 330, 380 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

[51] Id. at 381–82 (footnotes omitted).

[52] See United States v. Stein, 440 F. Supp. 2d 315, 326–38 (S.D.N.Y. 2006) (ruling that while some employees did not offer evidence that they cooperated due to coercion, two offered "compelling" evidence that their proffers were the product of coercion).

[53] Id. at 337. Judge Kaplan also noted "more than a little tension" between two DOJ lines of argument: while the DOJ argued that these statements were uncoerced by the government, it simultaneously took the position that employees who make false statements to private attorneys representing their employer under investigation and cooperating with the DOJ may be obstructing justice. Id. at 337 & n.114.

tices" in the industry. The Monitor may thus wield tremendous influence.[54]

The agreement may also create industry-wide effects in a regulatory manner. The agreement includes detailed factual findings regarding the criminality of particular tax shelters that had not previously been found illegal by a court nor been made illegal by an IRS regulation. Some tax experts predict that, using those stipulated findings, "[t]he IRS and Justice Department will attempt to use KPMG's admissions as evidence in litigation with taxpayers on the merits of the shelters."[55] In that sense, the agreement does an end run around time-consuming notice and comment rules.[56] More broadly, the process through which the agreement was reached reflects a collaborative approach by the DOJ, where the IRS was intimately involved from the investigation stage to the drafting and implementation of the agreement.

A different kind of effect on industry may also have been considered in negotiations between KPMG and the DOJ. Proceeding to trial against KPMG, a "big five" accounting firm (already reduced to a "big four" by the Andersen prosecution), might have weakened the accounting industry, which the DOJ counts on to audit corporations to prevent and detect corporate fraud.[57] Indeed, KPMG provides consulting on corporate compliance issues, including on technology to improve compliance programs and auditing.[58]

[54] See Scott D. Michel & Kevin E. Thorn, Deferred Prosecution Agreements: Implications for Corporate Tax Departments, 58 Tax Executive 49, 53–54 (2006).

[55] Id. at 52. The DOJ obtained similar factual admissions in the related German Bank HVB deferred prosecution agreement.

[56] Raising additional questions regarding the KPMG tax shelters, nicknamed "Blips, Flip, Opis and SOS," a newly discovered IRS document indicates that there was substantial debate within the IRS about whether such shelters had to be registered with the agency. See Lynnley Browning, Document Could Alter KPMG Case, N.Y. Times, Sept. 15, 2006, at C1. Nevertheless, the government's case also relies upon other related frauds in addition to failure to register the shelters. See id. In an additional possible blow to the case, a federal judge in Texas ruled that the IRS cannot retroactively apply 2003 rules regarding these tax shelters to prior conduct. See Lynnley Browning, Judge Rules a Tax Shelter In KPMG Case Is Legitimate, N.Y. Times, July 21, 2006, at C3.

[57] See Albert B. Crenshaw & Carrie Johnson, Regretful KPMG Asks for a Break, Wash. Post, June 17, 2005, at D1.

[58] KPMG's website describes its corporate compliance consulting services, including an annual "integrity survey" of compliance at firms nationwide. See KPMG Home

KPMG had every incentive to fully comply to protect its business in the compliance industry and to distance itself from wrongdoing employees.

The agreement ended on December 31, 2006, at which point the DOJ consented to the dismissal of the criminal information, stating that "monitorship . . . has been comprehensive and effective."[59] Up until that point, the DOJ, in its sole discretion, could have found that KPMG breached the agreement,[60] and in that case, the DOJ could have added up to five years to the agreement term or, at its option, pursued a criminal proceeding. This would have nearly certainly resulted in conviction because the DOJ could have made full use of all statements and admissions by KPMG obtained in the agreement and through KPMG's cooperation with the DOJ and the Monitor.[61] The indictment was dismissed by the court on January 2, and shortly thereafter, the individual defendants filed motions with Judge Preska to intervene and appear as amicus curiae to vacate the dismissal order.[62] The court accepted the filings, which were contradictory: one former employee argued that it was against public policy to allow the prosecution to be terminated given KPMG's actions, while a group of former employees argued that the entire agreement should be rescinded and the fines returned, because the agreement provided the DOJ with unconstitutional power over KPMG.[63] Judge Preska rejected those arguments, questioning whether the intervenors had standing as nonparties to the deferred prosecution, noting that prosecutors have exceedingly broad discretion when deciding to terminate a prosecution, and affirming the dismissal of the indictment.[64] Now that the charges have been dismissed, the monitoring continues for two more years supervised by the IRS, and the DOJ still reserves

Page, http://www.us.kpmg.com (last visited Mar. 6, 2007); KPMG's Audit Committee Institute, http://www.kpmg.com/aci/international.asp (last visited Mar. 6, 2007).

[59] Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Statement on the Dismissal of Charges Against KPMG (Jan. 3, 2007), http://www.usdoj.gov/usao/nys/pressreleases/January07/kpmgdismissalstatement.pdf [hereinafter Dismissal Statement].

[60] See KPMG Agreement, supra note 26, ¶¶ 10–12.

[61] See id. ¶ 13.

[62] See United States v. KPMG LLP, No. 1:05-CR-00903-LAP, 2007 WL 541956 (S.D.N.Y. Feb. 14, 2007).

[63] Id. at 8–9.

[64] Id. at 14–16.

the right to reinstate the charges or extend the time that the monitorship lasts should it determine that "KPMG has violated any provision of the [Deferred Prosecution Agreement]."[65]

B. The Classic Civil Structural Reform Model

The KPMG example demonstrates the substantial power and discretion prosecutors may exercise when, for the reasons just described, they choose to pursue structural reform against an entity rather than an indictment or conviction. Structural reform refers to injunctive relief seeking to reform an institution, and its origins were in civil rights litigation. Stepping back several decades to take a longer view of the origins of the model, the structural reform ideal's recent ascendance in criminal law follows its metamorphosis since the 1960s in civil rights law, reflecting shifts in policy goals of government and the public.

In civil rights law, structural reform litigation rose to assume central importance given a need for deep institutional change following efforts to end segregation in the wake of *Brown v. Board of Education*. As federal courts struggled to enforce decrees ordering desegregation of schools, the school desegregation decree became "[t]he prototype for the judiciary's new supervisory role" in the 1970s as the model was then extended from schools to diverse areas such as prisons, medical care, public housing, disability assistance, and special education.[66] In his landmark article, Professor Abram Chayes describes such efforts as fundamentally unlike traditional civil litigation "settling disputes between private parties about private rights," but rather constituting a new form of "public law litigation" involving multipolar disputes, institutional reform, outside involvement of parties such as "masters, experts, and oversight personnel," and "a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer."[67] In particular,

[65] Dismissal Statement, supra note 59.

[66] Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 44 (1979).

[67] Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282, 1284, 1298 (1976).

structural reform involved courts changing "the operation of large-scale organizations."[68]

The legitimacy of the classic structural reform model in part was analogized to the model of the prosecutor. Civil rights lawyers were envisioned as "private attorneys general" that would define and then vindicate the public interest,[69] and were bolstered by statutes providing for attorney's fees to reward successful litigation under that rationale.[70]

Professors Chayes, Owen Fiss, and others argued that courts would inevitably move toward broad structural reform litigation and that in appropriate circumstances, judges should exercise great discretion, decoupling the remedy from the contours of the constitutional right when designing and implementing a structural remedy.[71] A new body of remedial law developed. As courts and special masters continued to seek the means to remedy problems like school segregation, poor prison and mental hospital conditions, and housing discrimination, new remedial norms took hold in each particular context, which in turn helped to define the content of the underlying constitutional rights.[72]

As remedies matured during years of experience implementing structural reform remedies, courts also limited the scope, duration, and content of structural reform remedies. While the Court ini-

[68] Owen Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 5 (1979).

[69] See Hast v. Cohen, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting) (describing origins of the term "private attorneys-general"); Associated Indus. of New York State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (first decision using the term); William B. Rubenstein, On What A "Private Attorney General" Is—And Why It Matters, 57 Vand. L. Rev. 2129 (2004).

[70] The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000); S. Rep. No. 94-1011, at 4–5 (1976) (explaining the Senate's intent to shift fees to reward civil rights lawyers acting as "private attorneys general").

[71] See Abram Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 45–46 (1982); Fiss, supra note 68, at 21–22; William Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635 (1982); Donald Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1268.

[72] See John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 110–13 (1999); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 873–82 (1999); David Zaring, National Rulemaking Through Trial Courts: The Big Case and Institutional Reform, 51 UCLA L. Rev. 1015, 1040 n.122 (2004) (noting a path dependency in adoption of structural remedies in certain contexts).

tially held that district courts could exercise broad discretion in exercising equitable powers,[73] during a decades-long period of retrenchment beginning in the early 1970s, the Court narrowed the scope of available structural remedies.[74] The Court enacted justiciability limits specific to actions seeking injunctive relief;[75] emphasized doctrines of federalism,[76] comity, and local control;[77] urged least restrictive remedies for civil rights violations;[78] and encouraged lower courts to modify, narrow, and terminate consent decrees.[79] Supreme Court Justices then disparaged overreaching in structural reform remedies as "wildly . . . intrusive,"[80] leaving courts "enmeshed in . . . minutiae,"[81] and "judicial overreaching . . . [that] eviscerates a State's discretionary authority over its own programs and budgets."[82] Particularly in school desegregation decisions, the Court instructed lower courts to limit the boundaries of remedies that departed too far from the scope of the constitutional violations

[73] See, e.g., Milliken v. Bradley, 433 U.S. 267, 281 (1977) ("Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad.'") (citation omitted); Griffin v. County Sch. Bd., 377 U.S. 218, 221 (1964); Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300 (1955); see also Judith Resnik, For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication, 58 U. Miami L. Rev. 173, 178–79 (2003); David Rudovsky, Running in Place: The Paradox of Expanding Rights and Restricted Remedies, 2005 U. Ill. L. Rev. 1199, 1209.

[74] See, e.g., Brandon Garrett & James Liebman, Experimentalist Equal Protection, 22 Yale L. & Pol'y Rev. 261, 270–72 (2004); Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 587 (1983); Jeffries, supra note 72, at 113.

[75] See City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (urging "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws").

[76] See Missouri v. Jenkins, 515 U.S. 70, 112–13 (1995); Younger v. Harris, 401 U.S. 37, 53 (1971).

[77] E.g., Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[78] See, e.g., *Jenkins*, 515 U.S. at 83–90 (condemning, as beyond the district court's remedial powers, a plan to desegregate Kansas City schools by inducing white suburban children to transfer voluntarily).

[79] Frew v. Hawkins, 540 U.S. 431, 442 (2004); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

[80] Lewis v. Casey, 518 U.S. 343, 362 (1996).

[81] Bell v. Wolfish, 441 U.S. 520, 562 (1979) (disapproving orders that "enmeshed [lower courts] in the minutiae of prison operations").

[82] *Jenkins*, 515 U.S. at 125, 131 (Thomas, J., concurring); accord *Lewis*, 518 U.S. at 349 ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

and to terminate oversight when substantial compliance was obtained.[83]

The consensus account describes that as courts defined and limited the scope of remedies, the structural reform era passed, such that "[t]here are no contemporary examples of bold, *Brown*-like reformist judicial enterprises."[84] Scholars produced a substantial body of literature critically examining concerns of countermajoritarian legitimacy, federalism, comparative institutional competence, and the need for coherent remedial limits for the classic structural reform model.[85]

However, structural reform litigation still persists and succeeds in new forms, such as in state courts, in challenges brought by opponents of affirmative action,[86] in areas governed by statutes,[87] and in areas in which plaintiffs and government share incentives to enter into experimentalist arrangements, such as in consent decrees to resolve pressing public problems.[88] Rather than withering on the

[83] See supra notes 79–80.

[84] Myriam Gilles, An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!, 58 U. Miami L. Rev. 143, 145 (2003); accord Resnik, supra note 73, at 193; Carl Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 Cornell L. Rev. 270, 295 (1989) ("Institutional reform litigation generally has decreased since the mid-1970s."); Russell L. Weaver, The Rise and Decline of Structural Remedies, 41 San Diego L. Rev. 1617, 1623–28 (2004).

[85] See, e.g., Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (2003); Paul J. Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 951 (1978); Edward L. Rubin & Malcolm M. Feeley, Judicial Policy Making and Litigation Against the Government, 5 U. Pa. J. Const. L. 617, 630–36 (2003); Susan P. Sturm, A Normative Theory of Public Law Remedies, 79 Geo. L.J. 1355, 1359 (1991); John Choon Yoo, Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts, 84 Cal. L. Rev. 1121, 1122–24 (1996).

[86] Gilles, supra note 84, at 145–46.

[87] Statutes that permit injunctive remedies include the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12188(b)(2) (2000), the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1403 (2000), and 42 U.S.C. § 1437d(j) (2000) (permitting the Department of Housing and Urban Development to seek receivership of troubled housing projects). Regarding the persistence of such litigation, see, for example, Zaring, supra note 72, at 1033.

[88] See Diver, supra note 66, at 70–75 (identifying where various institutional actors have strategic incentives to cooperate in structural reform litigation); Brandon Garrett, Remedying Racial Profiling, 33 Colum. Hum. Rts. L. Rev. 41, 92–98 (2001); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1019–20 (2004); Margo Schlanger, Civil Rights

vine, the structural reform model instead adapted as it was reshaped by judicial review, political realities, and practical difficulties in implementation.

An emerging consensus regarding an "industry standard" or set of "best practices" was central to the development of each area where structural reform remedies were pursued. These practices then provided a template for attorneys, institutions, experts, and courts.[89] Early disputes over the scope of remedies led to experimentation until settled practices emerged that organizations could rely on to structure their own governance and avoid litigation. Thus, over time, not only did courts limit and clarify structural reform remedies, but a consensus emerged regarding a defined set of the most effective remedial practices.

The new and previously unexamined brand of structural reform litigation developed by prosecutors shares the ambitions, though not the form, of the Chayesian model.[90] The KPMG example illustrates how in structural reform prosecutions it is prosecutors, and not courts, who serve as the chief decisionmakers and create the clearinghouse for "multilevel" bargaining among parties and regulators.[91] This structural reform litigation remains unsaddled with the history of civil rights litigation and the remedial limitations that federal courts elaborated to rein in private litigants seeking to reform public institutions. Here the paradigm is somewhat reversed, with federal, public actors seeking to reform private institutions (though also several local public institutions). The relevant "rights" being vindicated are also of a very different character. Prosecutors bring this modern wave of structural reform litigation in response

Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81 N.Y.U. L. Rev. 550, 554–55 (2006).

[89] See Garrett & Liebman, supra note 74, at 300–03; supra note 88; see also John C. Jeffries & George A. Rutherglen, Structural Reform Revisited, 95 Cal. L. Rev. (forthcoming 2007); see generally Zaring, supra note 72.

[90] Abram Chayes did briefly note in his seminal article that "securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation." Chayes, supra note 67, at 1284.

[91] See Diver, supra note 66, at 64–67, 77 (discussing civil structural reform litigation as a bargaining process with the judge acting as a power broker between the parties); Sabel & Simon, supra note 88, at 1019.

to organizational crime and as government actors tasked with defining law enforcement goals.

Structural reform in criminal cases, at first blush, appears impossible. Injunctions are not technically available in criminal law. The common law rule since the demise of the Star Chamber has been that "equity will not enjoin a crime."[92] Only where a legislature authorizes it by a civil statute, such as in the RICO statute or federal fraud statutes, may courts enter civil injunctions.[93] As I discuss in Part II, civil RICO labor racketeering cases dating back to the early 1980s provide an important early civil model for the recent structural reform prosecutions, with similar provisions including independent monitoring and compliance programs. Yet even in a criminal case, prosecutors may, during pre-trial diversion or plea bargaining, impose injunctive conditions as alternatives to prosecution, just as courts do during probation. There is a long-standing practice of adopting programs to defer and ultimately withdraw individual prosecutions so long as the defendants comply with certain conditions; a federal statute permits deferral of prosecutions pursuant to written agreements.[94] When extending that approach to organizations, however, none of the well-developed limitations placed on civil structural remedies necessarily apply. After all, prosecutors are public attorneys general. Further, as the following Section explains, not only do civil remedial limits not apply to prosecutors, but their discretion, resources, and power in the criminal system permit far more expansive remedies than are available in civil cases brought by private attorneys general.

[92] SEC v. Carriba Air, 681 F.2d 1318, 1321 (11th Cir. 1982). For some time, courts could issue limited injunctions to prevent crimes to property or nuisance. See United States v. Dixon, 509 U.S. 688, 694 (1993); In re Debs, 158 U.S. 564, 593–94 (1895). The Supreme Court later insisted that jury trial rights be provided during contempt proceedings and rejected "standardless" injunctions deeming behavior a public nuisance. See Bloom v. Illinois, 391 U.S. 194, 208 (1968).

[93] See 18 U.S.C. § 1964(a) (2000) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders . . . ."); James M. Fischer, Understanding Remedies § 27 (1999) (describing modern "legislative supremacy" approach to enjoining criminality).

[94] See 18 U.S.C. § 3161(h)(2) (2000); infra note 166. Prosecutors have pursued deferred prosecution in individual cases dating back to the "Brooklyn Plan" agreements with first-time juvenile offenders in the 1930s. See, e.g., Stephen J. Rackmill, Printzlien's Legacy, the "Brooklyn Plan," A.K.A. Deferred Prosecution, Fed. Probation, June 1996, at 8, 8–15; see also infra notes 207–08.

C. Alternatives to Structural Reform Prosecution

The DOJ need not have pursued structural reform in the KPMG case, nor did it often pursue structural reform in the past. Unlike civil plaintiffs in the traditional structural reform litigation just discussed, prosecutors, federal prosecutors in particular, operate with broad and often nearly unfettered discretion that provides them with enhanced status in our criminal system.[95] Prosecutors are tasked with seeking justice in the criminal system by defining the state's enforcement goals and deciding when to prosecute those they deem deserving of criminal sanction.[96] The DOJ can pursue convictions or not prosecute organizations at all. This Section explores those alternatives to shed light on the dilemmas raised by organizational prosecutions and why, in response, the DOJ decided to pursue structural reform.

1. Prosecuting All Organizations

Rather than pursue structural reform, first, the DOJ could prosecute organizations to obtain deterrent fines. Following deterrence theory, which provides an economic justification for corporate criminal liability, prosecutors should seek to impose an optimal punishment based on the harm and the probability of

[95] See, e.g., Albert W. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. Pa. L. Rev. 550, 563–64 (1978); Marc L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1252–59 (2004); see also United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993) ("The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review."). Whereas local prosecutors primarily enforce criminal violations, federal prosecutors can often handpick their cases. The DOJ brings very few corporate prosecutions and typically only in egregious cases. See Daniel C. Richman & William J. Stuntz, Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583, 608–12 (2005); Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 758–67 (2003) (describing the structure and discretion of U.S. Attorneys' Offices).

[96] See Standards for Criminal Justice: Prosecution Function & Defense Function Standard 3-1.2(c), at 4 (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); Model Code of Prof'l Responsibility EC 7-13 (1980) ("The responsibility of a public prosecutor . . . is to seek justice, not merely to convict."); Anthony V. Alfieri, Prosecuting Violence/Reconstructing Community, 52 Stan. L. Rev. 809, 843–47 (2000); William Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1090, 1123–25 (1988).

detection of the malfeasance.[97] In individual cases, by way of contrast, the DOJ now pushes for the most severe punitive sentence and does not seek leniency.[98] If punitive fines were imposed, organizations could then rationally decide what socially efficient compliance measures to pay for. An important reason for a fines-oriented approach is a lack of empirical evidence demonstrating whether structural reforms such as compliance programs create effective remedies. The Sarbanes-Oxley Act, industry regulators, and now the DOJ emphasize such reforms. Yet scholars raise important questions about whether compliance programs have utility, whether the move to excuse criminal liability may simply reward "cosmetic compliance,"[99] and whether firms may claim "good corporate citizenship" in order to shift blame to lower-level "wayward" employees.[100] All of those concerns suggest cause for skepticism regarding the current legislative, regulatory, and prosecutorial focus on compliance, and, in particular, these questions should be further explored now that the DOJ emphasizes compliance in organizational crime prosecutions.

To be sure, scholars point out that if prosecutors did seek punitive fines, firms might still be reluctant to adopt optimal precautions in response because doing so could also mean detecting and making a record of misconduct for which they could then be held

[97] See A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 874–75 (1998); see also Guido Calabresi, The Costs of Accidents 26–30 (1970); Richard A. Posner, Economic Analysis of Law 165 (2d ed. 1977); Keith N. Hylton, Punitive Damages and the Economic Theory of Penalties, 87 Geo. L.J. 421, 421 (1998) (explaining principle of optimal deterrence).

[98] The DOJ more recently has added guidelines that prosecutors should seek "the most serious, readily provable offense" in individual prosecutions. Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

[99] William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, 52 Vand. L. Rev. 1343, 1415 (1999).

[100] Id. at 1343 ("Given equivocal evidence of compliance effectiveness, the rise of the good corporate citizenship movement risks undermining the objectives and spirit of the corporate criminal law."); see also Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 Wash. U. L.Q. 487, 504–05 (2003). For a study suggesting that compliance programs can prevent misconduct, see Christine E. Parker & Vibeke Lehmann Nielsen, Do Corporate Compliance Programs Influence Compliance? 3–5 (Univ. of Melbourne Legal Studies Research Paper No. 189, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930238.

liable.[101] Agency problems may also undercut the effectiveness of a punitive fine.[102] Indeed, agency problems are exacerbated in the organizational crime context in ways that may explain why the DOJ now focuses on compliance and not on optimal punitive fines. Two features of federal organizational criminal law define the problem: (1) minimal respondeat superior requirements, and (2) open-textured federal criminal prohibitions.

First, organizational prosecutions raise unique problems of overbreadth not present in prosecutions of individual criminals, due to the fictional nature of such entities.[103] In criminal law, organizations are treated as individual persons. For that reason, organizations do possess some of the same protections as individual defendants. A corporate defendant has the right to a grand jury, to a jury trial, to be found guilty beyond a reasonable doubt, and to protection under the Double Jeopardy Clause.[104] However, unlike an individual, an organization may be criminally liable for the act of a single agent who violates a criminal law in the scope of employment and with intent to benefit the corporation.[105] That broad standard, in-

[101] See Vikramaditya S. Khanna, Should the Behavior of Top Management Matter?, 91 Geo. L.J. 1215, 1228–31 (2003); see also Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 704–09 (1997).

[102] See Arlen & Kraakman, supra note 101, at 690–91; Chris William Sanchirico, Detection Avoidance, 81 N.Y.U. L. Rev. 1331, 1337 (2006).

[103] See Samuel W. Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473, 526 (2006); Coffee, supra note 20, at 407–10; Annie Geraghty, Corporate Criminal Liability, 39 Am. Crim. L. Rev. 327, 338 & n.73 (2002); V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477, 1479–81 (1996); William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox of Compliance, 52 Vand. L. Rev. 1343, 1350 (1999).

[104] See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1230 (1979); Vikramaditya S. Khanna, Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis 7–11 (Michigan Law & Econ. Research Paper, Paper No. 04-015, 2004), available at http://ssrn.com/abstract=657441.

[105] See N.Y. Cent. R.R. v. United States, 212 U.S. 481, 494–95 (1909). Further, after-the-fact approval of the agent's conduct, or ratification, can satisfy the scope and intent requirements. See Restatement (Second) of Agency § 82 (1958); see also United States v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982) (stating that the agent's "acts must be motivated—at least in part—by an intent to benefit the corporation"); Thompson Memo, supra note 16, at 1–2 (approving of the conviction of a corporation "despite its claim that the employee was acting for his own benefit, namely his 'ambitious nature and his desire to ascend the corporate ladder'" (citing United States v. Automated Med. Lab., 770 F.2d 399, 407 (4th Cir. 1985))). This twentieth-century de-

tended to deter and to avoid issues of assigning responsibility within complex firms, permits enormous exposure to acts of agents[106] and was drawn from tort principles of enterprise liability.[107] Critics have asked the DOJ to impose its own more restrictive respondeat superior standard. For example, the Committee on Capital Markets Regulation recommends that the DOJ largely adhere to its approach, but limit prosecutions only to "exceptional circumstances of pervasive culpability throughout all offices and ranks."[108]

Second, the criminal prohibitions for which organizations may be held liable under those broad respondeat superior standards remain notoriously vague. Congress enacted substantive criminal law rules with open-textured prohibitions and reduced culpability resembling civil standards for liability.[109] For example, broad federal criminal fraud statutes leave much to the interpretation of

velopment altered the common law rule that "[a] corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity: though [its] members may, in their distinct individual capacities." William Blackstone, 1 Commentaries *464.

[106] See Gerard E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 Law & Contemp. Probs. 23, 24 (1997) ("[T]here is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability."); see also John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 246 (1991).

[107] By 1918, Judge Learned Hand observed "there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose." United States v. Nearing, 252 F. 223, 231 (S.D.N.Y. 1918). On tort origins for enterprise liability, see George L. Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. 461, 465 (1985).

[108] Comm. on Capital Mkts. Regulation, supra note 8, at 13. Of course, that standard is entirely consonant with the DOJ's current Guidelines. See Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys 4 (Dec. 12, 2006), http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf. [hereinafter McNulty Memo].

[109] See, e.g., John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime, 21 Am. Crim. L. Rev. 1, 9–10 (1983); John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It, 101 Yale L.J. 1875, 1875 (1992); Lynch, supra note 106, at 36–37; see also Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757, 760–70 (1999).

courts and prosecutors, and many incorporate compliance with regulations.[110]

Thus, the DOJ can readily obtain convictions given broad respondeat superior liability and substantive criminal law. The DOJ nevertheless rejected a deterrence approach in which it would have sought convictions or punitive fines because of a different agency problem: an indictment has such great collateral consequences on the entire entity and also blameless employees, shareholders, consumers, and creditors.[111] Those collateral consequences include severe regulatory prohibitions such as debarment or revocation of licensing.[112] Even for firms without extensive reliance on government contracts or licensing, the reputational effects of an indictment,

[110] See, e.g., 18 U.S.C. §§ 1341, 1343 (2000) (mail fraud and wire fraud); see discussion in Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 475–76 (1996).

[111] See Thompson Memo, supra note 16, at 12 ("[P]rosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it."); see also Bruce Coleman, Is Corporate Criminal Liability Really Necessary?, 29 Sw. L.J. 908, 919–20 (1975).

[112] See Thompson Memo, supra note 16, at 12 ("Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care."); 48 C.F.R. § 9.406-2(a) (1998) (providing for debarment and suspension from government contracts or subcontracts during criminal prosecution). However, interestingly adopting a parallel structural reform approach, the debarment provisions permit excusing debarment if "the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment." 48 C.F.R. § 9.406-1(a)(1). Other factors relevant to the excusal of debarment include whether "the contractor cooperated fully with Government agencies," and whether it adopted any Government-recommended remedial measures. 48 C.F.R. §§ 9.406-1(a)(4), (7). Examples of laws governing regulated industries that disqualify criminally prosecuted firms include the following: Securities Act of 1933, 15 U.S.C. § 77t(b) (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(b)(4)–(6), 78u(d)–(e) (2000); Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(e) (2000); Commodity Exchange Act, 7 U.S.C. § 12a (2000); Federal Deposit Insurance Act, 12 U.S.C. § 1818(a)(2) (2000); Medicare and Medicaid Patients and Program Protection Act, 42 U.S.C. § 1320a-7 (2000). See generally White Collar Crime Comm., Am. Bar Ass'n, Final Report: Collateral Consequences of Convictions of Organizations (1991); Andrew T. Schutz, Too Little Too Late: An Analysis of the General Service Administration's Proposed Debarment of WorldCom, 56 Admin. L. Rev. 1263 (2004).

much less a conviction, may be severe.[113] As a result, prosecutors face great incentives to avoid an indictment that can destroy a corporation and as a result harm employees, shareholders, and customers.

The overdeterrent effect of an indictment provided great impetus for the DOJ to resolve prosecutions pre-indictment at the charging stage. A turning point for the DOJ was the Arthur Andersen LLP case. Andersen decided to go to trial rather than agree to a deferred prosecution agreement because the terms gave so much "power and discretion to the Justice Department."[114] Andersen later sought bankruptcy in part because its conviction, though later reversed, resulted in automatic debarment by the SEC and inability to provide services to public corporations.[115] The DOJ suffered great criticism following Andersen's collapse and has since moderated its approach to explicitly take into account collateral consequences in organizational cases.[116] That said, the DOJ still sometimes pursues indictments; the class action law firm Milberg Weiss Bershad & Schulman was indicted after balking at a deferral agreement.[117]

Organizational prosecutions also impose special burdens on the DOJ, further explaining the "cooperation dynamic."[118] Organiza-

[113] See Buell, supra note 103 (providing analysis of the functioning and the role of reputational sanction in organizational prosecutions); Pamela H. Bucy, Organizational Sentencing Guidelines: The Cart Before the Horse, 71 Wash. U. L.Q. 329, 352 (1993) ("In some instances adverse publicity alone can cause corporate devastation.").

[114] See Richard B. Schmitt et al., Behind Andersen's Tug of War with U.S. Prosecutors, Wall St. J., Apr. 19, 2002, at C1.

[115] See Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005); Elizabeth K. Ainslie, Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution, 43 Am. Crim. L. Rev. 107, 110 (2006). See generally 17 C.F.R § 201.102(e)(2) (2005).

[116] See Thompson Memo, supra note 16, at 12–13.

[117] See Julie Creswell, U.S. Indictment for Big Law Firm in Class Actions, N.Y. Times, May 19, 2006, at A1 (quoting the U.S. Attorney as saying, "We really had a situation where the firm was not accepting responsibility, was not making any substantial changes to the firm itself. We really were in a situation where we had no choice but to indict."). Milberg Weiss responded that the agreement would have required improper waiver of attorney-client privilege. See Milberg Weiss, Statement Regarding Indictment (May 18, 2006), http://www.milbergweissjustice.com/ourstatements.php.

[118] See Darryl K. Brown, The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement, 1 Ohio St. J. Crim. L. 521, 526–29 (2004).

tional prosecutions require a substantial investment due to their complexity, the organizations' greater ability to conceal information, attorney-client privilege issues, access to very highly paid defense counsel, and the factual complexity of such cases. Perhaps for those reasons, for decades federal prosecutors chose to prosecute very few organizations.[119] It was not until 1999 that the DOJ issued any document making transparent its approach to exercising discretion regarding organizations. That document, known as the Holder Memo, was updated in 2001 in a memo by then-Deputy Attorney General Larry Thompson known as the Thompson Memo, and then slightly revised in the 2006 McNulty Memo.[120] Prosecutors are instructed to consider whether prosecution is necessary at all or whether civil or regulatory fines sufficiently punish and deter.[121] The need for more formalized procedures may also be explained by the acceleration in organizational prosecutions post-Enron, discussed next.

The DOJ has now firmly rejected an optimal deterrence approach to organizational punishment, and, as developed below, the DOJ does not chiefly seek punitive fines in its settlements and emphasizes instead restitution to compensate victims. Nor could the DOJ easily adopt optimal deterrence as its goal because the Sentencing Commission has already adopted Guidelines that reject optimal punishment and instead mitigate fines if a firm has "effective compliance" programs.[122] Due to the Guidelines, even if the DOJ aggressively pursued convictions, the resulting sentences might

[119] See Khanna, supra note 104, at 25–26.

[120] See Thompson Memo, supra note 16, at 13; McNulty Memo, supra note 108, at 17. Also, until the Organizational Sentencing Guidelines were promulgated in 1991, fines remained low and civil awards might have had the greater effect. See Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms, 42 J. Law & Econ. 393, 395, 409 (1999) (stating that before 1984, "the average fine was about $46,000," while "[t]he mean criminal fine imposed on a publicly held firm increased from $1.9 million pre-Guidelines to $19.1 million under the Guidelines").

[121] See Thompson Memo, supra note 16, at 13; see also Lynch, supra note 106, at 32.

[122] See Ilene H. Nagel & Winthrop M. Swenson, The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future, 71 Wash. U. L.Q. 205, 217–22 (1993) (describing the Commission's conscious departure from the orthodox model of optimum deterrence, finding it impossible to estimate with any accuracy or possibility of empirical support the probability of detection of any particular crimes).

look similar to the reforms already obtained in settlements—except for the terrible adverse collateral consequences of an indictment and conviction.

2. Prosecuting Individuals Not Organizations

The DOJ could alternatively exercise the opposite option to not prosecute organizations at all. Scholars have called for that result, criticizing organizational criminal law as lacking a sound deterrence foundation.[123] They suggest outright decriminalization of organizational crime and greater reliance on individual criminal prosecutions and regulatory enforcement.[124] For reasons just discussed, organizations may not be able to efficiently prevent criminal acts by their agents. Prosecuting only individual wrongdoers would continue to deter individual wrongdoing and do so without subjecting the corporation and third parties to the enormous potential collateral costs of indictment. Prosecutors' expertise may lie in prosecuting individual wrongdoers and not in reform of organizations or long-term implementation of structural remedies.[125]

A move to prosecute only individuals would also address concerns regarding the unfairness of organizational prosecutions to individual defendants by avoiding the situation where individual employees have the power of both the DOJ and the organization arrayed against them. Although there is nothing unusual or impermissible about prosecutors seeking the cooperation of one defendant as against another in criminal cases, an organization is

[123] See Epstein, supra note 11; supra note 20.

[124] See Arlen, supra note 20; John Braithwaite, Enforced Self-Regulation: A New Strategy for Corporate Crime Control, 80 Mich. L. Rev. 1466 (1982); Kraakman, supra note 20.

[125] Mary Jo White, former U.S. Attorney for the Southern District of New York, commented that "[f]or a prosecutor to get into the business of changing corporate culture is skating on fairly thin ice." Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York, Corp. Crime Rep. (Corporate Crime Reporter, Wash., D.C.) Dec. 12, 2005, at 48, available at http://www.corporatecrimereporter.com/maryjowhiteinterview010806.htm. Professor Coffee has similarly commented: "I don't think prosecutors are particularly skilled in corporate governance." Janet Novack, Club Fed, Deferred, Forbes.com, Aug. 29, 2005, http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html. Similar criticisms are directed at civil structural reform efforts. See Zaring, supra note 72, at 1040 n.122 (observing a path dependency in remedial design and stating that "the Civil Rights Division regularly enters into cookie-cutter consent decrees across jurisdictions").

unlike the typical cooperator or informant in many respects. The organization's cooperation provides the DOJ with employee records and documents, and, where privilege is waived, with attorney-client communications and work product. The KPMG case raises the manner in which an organization can exert other pressures. Employees can face a difficult choice whether to cooperate or lose their jobs and employer payment of legal bills. Future scholarship should explore in depth the effects of DOJ agreements on individual defendants.

Individual prosecutions, however, would not be nearly as easy to mount absent cooperation of the entity itself. Given limited government resources and an organization's "often formidable resources," the DOJ significantly depends on the organization's cooperation to mount individual prosecutions, particularly where documents and witnesses are in the organization's control.[126]

Further, abandoning organizational prosecutions may have been politically unrealistic for the DOJ, though this may change. As noted earlier, in the past federal prosecutors only pursued organizational cases against very small organizations, but, as will be developed further in the next Part, the landscape changed after a wave of large-scale corporate fraud. With the passage of Sarbanes-Oxley, Congress gave strong direction to the Sentencing Commission, which in turn enhanced organizational sentences.[127] For the DOJ to have simply ignored those directions and refused to prosecute a wide range of organizational crimes would have been a political nonstarter. Instead, the DOJ crafted an intermediate approach to prosecute only some organizations and to accommodate interests of shareholders, third parties, agencies, and the public.

3. Deferring to Private Litigation and Regulators

As a third alternative approach, the DOJ could not prosecute at all, instead deferring entirely to private civil litigation or regulatory action. Doing so would greatly reduce the deterrent threat entities may face, where, unlike in civil law, the "primary goals of criminal law are deterrence, punishment, and rehabilitation," and further, where the costs of an indictment, much less a conviction, may be

[126] Wray & Hur, supra note 17, at 1170–71; accord Brown, supra note 118, at 528–29.
[127] See infra notes 143, 224–25.

severe.[128] The DOJ already defers to private litigation and explicitly requires prosecutors to consider whether private civil suits would suffice.[129] Arguments can be made that this deference should be enhanced. If shareholders are the primary victims of failures by management to adequately supervise agents, then the shareholders can file a derivative suit; other victims can file civil tort or consumer fraud actions.[130] The DOJ might enter into a settlement that does not serve shareholder interests.[131] Adding to fear of collusion, agreements before indictment raise similar concerns as early settlements in class actions.[132] On the other hand, prosecutors offer advantages over private litigation. Unlike private attorneys, DOJ prosecutors lack a financial stake in the outcome and do not incur the transaction costs of attorney's fees.[133] In addition, the DOJ often seeks civil restitution that provides victims with a similar rem-

[128] Thompson Memo, supra note 16, at 13.

[129] See id. ("Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct.").

[130] Regarding the deterrent threat of securities class actions, see Comm. on Capital Mkts. Regulation, supra note 8, at 71 (describing how securities class action settlements increased sharply in value since the 1990s; in 2004, the DOJ secured $16.8 million in sanctions, or 2% of total securities enforcement, compared to over $3.1 billion in SEC enforcement, or 30%, and $5.4 billion in private class actions, or 52.5% of enforcement); see also Michael P. Dooley, Two Models of Corporate Governance, 47 Bus. Law. 461, 510 n.185 (1992); Roberta Romano, The Shareholder Suit: Litigation Without Foundation?, 7 J.L. Econ. & Org. 55, 60 (1991).

[131] Not only may shareholders ultimately bear the cost that a prosecution incurs, but, raising a moral hazard problem, management may agree to incur suboptimal costs to settle with the DOJ to avoid their own individual liability. See Coffee, supra note 20, at 387 (calling this the "overspill" problem of corporate penalties); see also Polinsky & Shavell, supra note 97, at 948–49. DOJ actions do not involve multibillion dollar settlements as in some blockbuster securities class actions. See Stanford Securities Class Action Clearinghouse, Top Ten List, http://securities.stanford.edu/top_ten_list.html (last visited Apr. 7, 2007) (displaying ten securities class action settlements over $500 million).

[132] See Class Action Fairness Act of 2005, 28 U.S.C.A. §§ 1712–1715 (West 2006) (requiring judicial scrutiny and approval of certain types of class action settlements); see also S. Rep. No. 109-14, at 35 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 7 (describing congressional concern with attorney collusion at the expense of the plaintiff class).

[133] See Comm. on Capital Mkts. Regulation, supra note 8, at 79 (criticizing efficacy of securities class actions in compensating victims).

edy. Deferral agreements contain detailed admissions of wrongdoing that can empower civil plaintiffs.[134]

Second, the DOJ currently defers to administrative agency enforcement, and arguments can be made that they could do so to a greater degree. Agencies can pursue a wide range of civil remedies, from forfeiture to fines, restitution, and injunctive remedies.[135] Agencies not only often detect the underlying crimes in the DOJ's cases, based on their own public reporting regimes, but they have specialized expertise. Agencies may also better protect third parties and the public; in contrast to a largely secret exercise of prosecutorial discretion, several federal agencies must permit notice and comment from the public before they enter into consent decrees regarding certain federal statutes.[136] Further, in civil actions filed by agencies, third parties potentially affected by a consent decree may often participate in a fairness hearing conducted before the decree is approved.[137]

These advantages of agency action explain why in all but a few cases the relevant agency already handles the litigation. Agencies only refer serious cases to the DOJ, and the DOJ explicitly considers whether a prosecution is a necessary supplement to pending agency action before asserting jurisdiction.[138] Indeed, regulatory

[134] An issue for future exploration is whether DOJ actions could undermine civil suits. A proposed amendment to the Federal Rules of Evidence would make clear that a corporation may selectively waive privilege only for cooperation with the DOJ, preventing civil plaintiffs from making use of material uncovered. Report of the Advisory Comm. on Evidence Rules 5 (2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf (proposing addition of Fed. R. Evid. 502(c)).

[135] See Lynch, supra note 106, at 27–31.

[136] See, e.g., Tunney Act, 15 U.S.C. § 16(b) (2000); 16 C.F.R. § 2.34(c) (2006) (FTC consent orders); Clean Water Act, 33 U.S.C. § 1319(g)(4) (2000); Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(3)(B) (2000); 40 C.F.R. § 22.45 (2006) (Environmental Protection Agency ("EPA") public notice requirements); CERCLA, 42 U.S.C. § 9622(d)(2) (2000).

[137] See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986) (describing third party right to participate in fairness hearing).

[138] See Thompson Memo, supra note 16, at 3 (including an entity's efforts to "cooperate with the relevant government agencies" in the list of factors prosecutors should consider in determining whether to charge a corporation); id. at 7 ("[T]he Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in

agencies including the SEC have adopted parallel approaches also emphasizing self-reporting, disclosure, and compliance.[139] Further, the DOJ continues to coordinate and collaborate with regulatory agencies during the implementation of its deferral agreements.[140] The DOJ's added value may be that in unusually serious cases, it can secure cooperation using the deterrent threat of indictment.

As this Section has explained, the DOJ chooses to pursue structural reform settlements rather than indicting and convicting (which would impose grave collateral consequences), or prosecuting only individuals (which would pose practical difficulties absent the entity's cooperation and would ignore the DOJ mandate to enforce organizational criminal law), or deferring more to private litigation and regulators (which the DOJ does, except in serious cases where agencies refer cases to the DOJ for the added deterrent of a criminal prosecution). The next Part develops in greater detail the decisions that shaped the DOJ's structural reform approach and provides a richer empirical description of that approach.

II. THE DOJ'S NEW MODEL FOR STRUCTURAL REFORM PROSECUTION

Like the explosion of public interest law firms in the late 1960s and early 1970s pursuing structural reform, the DOJ has now consciously adopted a structural reform litigation strategy in the wake of Enron and dozens of other high-profile corporate malfeasance

which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions.").

[139] The SEC's Seaboard Report closely resembles the DOJ's McNulty and Thompson Memos in its approach. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 296 (Oct. 23, 2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm [hereinafter Seaboard Report] (asking, among the factors informing SEC discretion, "[d]id the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?"); Information Memorandum from Susan L. Merrill, Executive Vice President, Div. of Enforcement, N.Y. Stock Exch., to All Members, Member Orgs. & Chief Operating Officers 2 (Oct. 7, 2005), http://apps.nyse.com/commdata/PubInfoMemos.nsf/0/85256FCB005E19E8852570920068314A/$FILE/Microsoft%20Word%20-%20Document%20in%2005-77.pdf; see also infra note 163.

[140] See infra Section II.B.

scandals.[141] A structural reform paradigm is different from the traditional role of prosecutors, which focuses on seeking convictions. Further, although prosecutors have previously pursued institutional reforms in several contexts, the DOJ has recently fixed upon one model for its recent structural reform litigation: the deferred or nonprosecution agreement, secured at the charging stage, far earlier than in typical negotiations that occur during plea bargaining after an indictment.

The DOJ's new structural reform prosecutions have been brought in a range of areas, from securities fraud, to environmental cases, to foreign corrupt practice cases. These disparate efforts have not been viewed as sharing a common project, whereas on the civil side, institutional reform interventions in schools, police departments, and prisons have been considered as part of a common reform agenda.[142] In this Part, I describe in greater detail the DOJ's adoption of a strategy at the charging stage resulting in a recent wave of high-profile settlements. I then provide empirical analysis of the terms of these agreements to develop a richer picture of what the DOJ seeks to accomplish. Second, after describing the charging stage approach that the DOJ decided to adopt in pursuing structural reform, I frame the different ways prosecutors could obtain structural reform at other stages in a criminal case. The prevention, charging, plea bargaining, and sentencing stages each involve progressively greater court supervision, and, as a fifth alternative, prosecutors could seek civil consent decrees. Though the DOJ can pursue structural reform using any one or a combination of these approaches, this discussion will shed light on why the DOJ chose instead to seek structural reform early in a criminal case, at the charging stage, where prosecutors have particularly broad discretion.

A. The Making of the DOJ's Structural Approach

The Department of Justice now operates at the center of a program chiefly seeking reform of private corporations (though also targeting a few public entities) engaging in such crimes as criminal white collar fraud, money laundering, securities fraud, tax viola-

[141] See Blum, supra note 22.
[142] See supra Section I.B.

tions, foreign corrupt practices, health care fraud, and environmental crimes. In the past several years, corporate culture has been scrutinized in the wake of the recent "epidemic" of accounting and financial malfeasance. Congress responded to the crisis with the Sarbanes-Oxley Act, which relies on both enhanced criminal penalties and regulatory reform of governance to create "internal controls" to prevent malfeasance.[143] At the same time, the DOJ responded with a series of large-scale organizational prosecutions. Only a negligible number have been convicted, however.[144]

Instead, DOJ prosecutors have done something unprecedented. In 2002, President George W. Bush created a DOJ Corporate Fraud Task Force ("Task Force") to coordinate investigation and prosecution of companies.[145] A novel strategy emerged. Typically only in cases involving small organizations do federal prosecutors still proceed to trial, though in exceptional cases they still prosecute. Far more than ever before, the DOJ avoids trial by entering into pre-trial diversion agreements, permitting organizations to commit to a rehabilitative program, and agreeing to defer prosecution should they comply. Such agreements are signed at the charging stage, after filing a criminal complaint but without an indict-

[143] The Act, among its provisions, creates new offenses for destruction or falsification of records with intent to obstruct federal investigations, requires accountants to maintain audit documents, creates independent audit committees within corporations, requires companies to report on their "internal controls," and, finally, establishes an independent Public Accounting Oversight Board. 15 U.S.C.A. 78j-1(m) (West 1997 & Supp. 2006); 15 U.S.C. §§ 7211, 7241(a), 7245(1), 7262 (Supp. IV 2004); see Coffee, supra note 7, at 336, 353–64; Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 Yale L.J. 1521, 1529 (2005).

[144] In the past few years, only two large firms per year have been sentenced. See U.S. Sentencing Comm'n, 2003 Sourcebook of Federal Sentencing Statistics 108 tbl.54 (2003), available at http://www.ussc.gov/ANNRPT/2003/SBtoc03.htm [hereinafter 2003 Sourcebook of Federal Sentencing Statistics] (only two of ninety organizations sentenced in fiscal year 2003 had more than five thousand employees; eighty-six had fewer than two hundred employees, with approximately half in firms of fewer than ten employees); U.S. Sentencing Comm'n, 2004 Sourcebook of Federal Sentencing Statistics 124 tbl.54, 330 tbl.54 (2004), available at http://www.ussc.gov/ANNRPT/2004/SBtoc04.htm [hereinafter 2004 Sourcebook of Federal Sentencing Statistics] (only two of sixty-nine organizations sentenced in 2004 had more than five thousand employees; sixty-two had fewer than two hundred employees, with approximately half in firms of fewer than ten employees). The Milberg Weiss indictment is one of the few reported indictments of a large firm since Andersen. See supra note 117.

[145] See Exec. Order No. 13,271, 3 C.F.R. 245 (2002).

ment.[146] The numbers are accelerating. While no more than two such agreements a year were reported before 2003, there were four such agreements in 2003, eight in 2004, ten in 2005, and thirteen in 2006.

This change can be attributed to a new approach announced in January 2003 by the then-head of the Task Force, Deputy Attorney General Larry Thompson, in a document known as the Thompson Memo.[147] The Memo recommended "granting a corporation immunity or amnesty or pretrial diversion . . . in exchange for cooperation" when that cooperation "appears to be necessary to the public interest."[148] Not only was "pre-trial diversion" for corporations a fairly new concept, but the Memo did not suggest when the "public interest" might be served by not prosecuting a corporation in exchange for an agreement. The Memo did, however, set out factors to provide guidance as to when the DOJ should prosecute. They include: (1) the nature, scope, and pervasiveness of wrongdoing, (2) the history of misconduct, (3) timely and voluntary disclosures and cooperation with the investigation (versus "circling the wagons"), (4) remedial actions taken, including disciplining wrongdoers, (5) whether the company has an adequate compliance program, (6) collateral consequences to shareholders, pensionholders, and employees, and (7) the adequacy of individual prosecutions or civil and regulatory remedies.[149]

The heart of the Thompson Memo approach is the fifth factor, emphasizing compliance in the DOJ's exercise of discretion and in the design of remedies. The approach creates, in effect, a "due diligence" defense for corporations.[150] Corporations that adopt an

[146] See Corporate Crime Reporter, Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements (2005), http://www.corporatecrimereporter.com/deferredreport.htm ("[P]rosecutors have entered into twice as many non-prosecution and deferred prosecution agreements with major American corporations in the last four years . . . .").

[147] See Thompson Memo, supra note 16. Generally, the DOJ suggests prosecutors enter into deferred prosecution agreements when "the person's timely cooperation appears to be necessary to the public interest." U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.600 (2d ed. 2000).

[148] Thompson Memo, supra note 16, at 6.

[149] Id. at 3–4.

[150] See Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, supra note 104, at 1258 (1979) (advocating a due diligence defense in federal criminal law to modify respondeat superior).

"adequate compliance program" may avoid prosecution. Of course, a central concern of the DOJ is to screen out "cosmetic compliance" programs.[151] Organizations, including large organizations, have been adopting compliance programs for some time.[152] As the DOJ well knew, Enron had a compliance program entitled "Respect, Integrity, Communication and Excellence," which despite the lofty title existed only on paper.[153] The Thompson Memo guidelines counsel that prosecutors investigate whether compliance efforts are implemented effectively.[154] Further, the U.S. Sentencing Commission adopted guidelines mitigating punishment but only where organizations develop "effective" compliance programs.[155]

The DOJ now seeks to use prosecution in egregious cases to leverage compliance on a "massive scale" and provide "a force for positive change of corporate culture."[156] In keeping with its new mission, the DOJ has obtained deferred or nonprosecution agreements with thirty-five companies, many of which are leading Fortune 500 companies. These agreements resulted in $4.9 billion in fines and restitution as well as sweeping compliance reforms.[157] The

[151] See Krawiec, supra note 100.

[152] See, e.g., Weaver et al., Corporate Ethics Practices in the Mid-1990's: An Empirical Study of the Fortune 1000, 18 J. Bus. Ethics 283, 285–86 (1999).

[153] See Enron Corp., Code of Ethics 4 (2000), http://www.thesmokinggun.com/enron/enronethics1.html; Public Hearing Held by the Ad Hoc Advisory Group on Organizational Sentencing Guidelines 60 (Nov. 14, 2002), available at http://www.ussc.gov/corp/ph11_02/plenary1.pdf.

[154] The Thompson Memo states: "[i]n evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct." Thompson Memo, supra note 16, at 10; see also Memorandum from the Deputy Attorney Gen. to All Component Heads and U.S. Attorneys para. VII(A) (June 16, 1999), http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (noting that the mere "existence of a compliance program is not sufficient").

[155] See U.S. Sentencing Guidelines Manual § 8B2.1 (2005), discussed infra Section III.B.

[156] Thompson Memo, supra note 16, at 1 ("[C]orporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale.").

[157] See infra Appendix A; infra Section II.B.

DOJ has also declined prosecution of organizations in part because they maintain "effective" compliance programs.[158]

The DOJ's approach in organizational crime cases has several important progenitors in addition to civil structural reform efforts; structural reform is not an entirely new goal for prosecutors. Prosecutors beginning in the 1980s pursued long-term structural reform remedies in civil RICO cases that I describe in Section C below. The DOJ Antitrust Division adopted compliance-oriented approaches to criminal prosecutions decades ago, as have several other DOJ divisions.[159] Thus, federal prosecutors already had practical experience implementing institutional reforms. The DOJ's current approach also has origins dating back to compliance approaches adopted in the 1970s by a series of federal regulatory agencies.[160] States have more recently adopted parallel strategies to

[158] See U.S. Sentencing Comm'n, Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines 27 n.107 (2003) [hereinafter Ad Hoc Committee Report] (citing examples).

[159] While the Thompson Memo generally governs all criminal prosecutions, divisions within the DOJ adopted earlier compliance-based strategies in division-specific areas ranging from antitrust to environmental enforcement to civil rights. The DOJ's Antitrust Division adopted a "Corporate Leniency Policy" in 1978. The policy was revised in 1993 to focus on compliance. See Antitrust Division, U.S. Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.pdf. Similarly, the DOJ's Environment & Natural Resources Division adopted an approach rewarding compliance and voluntary disclosure. See Env't & Natural Res. Div., U.S. Dep't of Justice, Factors in Decisions on Criminal Prosecution for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991), http://www.usdoj.gov/enrd/Electronic_Reading_Room/factors.htm. In the area of police misconduct, in which the DOJ may file civil suits for injunctive relief against local governments, the Civil Rights Division at the DOJ has in recent years settled cases pursuant to Memoranda of Agreements rather than consent decrees. See 42 U.S.C. § 14141 (2000); Matthew J. Silveira, Comment, An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation, 52 UCLA L. Rev. 601, 617 & n.73 (2004). The DOJ also emphasizes voluntary settlement of ADA violations and mistreatment of institutionalized persons in correctional facilities under the Civil Rights of Institutionalized Person Act. See News Release, U.S. Dep't of Justice, Fact Sheet: Civil Rights Accomplishments (July 23, 2003), http://www.usdoj.gov/opa/pr/2003/July/03_crt_414.htm.

[160] Such agencies include the Department of Defense, the Department of the Treasury, the Department of Health and Human Services ("HHS"), the EPA, the Federal Financial Institutions Regulatory Agency, the Federal Aviation Administration, the State Department, and the SEC. See, e.g., U.S. Dep't of Defense, Voluntary Disclosure Program Guidelines (2000); Office of Thrift Supervision, U.S. Dep't of the Treasury, Regulatory Bull. No. 32-28, Thrift Activities Regulatory Handbook Update § 370, at 370.1–.2 (2003), available at http://www.ots.treas.gov/docs/7/74085.pdf; Publi-

create "'incentives . . . to implement compliance programs,'"[161] with then-New York Attorney General Eliot Spitzer having led the way.[162] The convergence in regulatory approaches amongst state and federal actors continues. Since the DOJ issued its Thompson Memo, still more regulatory agencies have enacted new policies even more closely resembling the DOJ's approach.[163]

cation of the [HHS] OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (Oct. 30, 1998); Memorandum from Earl E. Devaney, Dir., Office of Criminal Enforcement, U.S. EPA, to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), available at http://www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf (known as the Devaney Memo); Steve Herman, From the Assistant Administrator, Audit Policy Update (U.S. EPA, Wash., D.C.), Jan. 1997, at 1, http://www.epa.gov/compliance/resources/newsletters/incentives/auditupdate/spr1997.pdf; Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59,423 (Sept. 9, 1980); see also Wray & Hur, supra note 17, at 1108–33 (describing the compliance approaches of each of these federal agencies in turn); supra note 112.

[161] Ad Hoc Committee Report, supra note 158, at 35 (quoting Jeffrey M. Kaplan, The Sentencing Organizational Guidelines: The First Ten Years, Ethikos & Corp. Conduct Q., Nov./Dec. 2001, at 1, 2–3, available at http://www.singerpubs.com/ethikos/html/guidelines10years.html).

[162] See Michael Bobelian, Companies Under Fire Often Decide to Settle to End Problems Quickly, N.Y. L.J., Nov. 29, 2004, at 1; Junda Woo, Self-Policing Can Pay Off for Companies, Wall St. J., Sept. 8, 1993, at B5. Perhaps most remarkable was a global settlement of a dozen of the leading Wall Street investment banking firms with the New York Attorney General, the SEC, the New York Stock Exchange, and other regulators, "mandating sweeping structural reforms." See Joint Press Release, SEC, NASD, NYSE, NYSAG & NASAA, Ten of Nation's Top Investment Firms Settle Enforcement Actions (Apr. 28, 2003), http://www.sec.gov/news/press/2003-54.htm.

[163] These agencies include the Commodity Futures Trading Commission, Department of Commerce, Department of Labor, Department of the Treasury, EPA, the Federal Energy Regulatory Commission, the Occupational Safety and Health Administration, and the SEC. See, e.g., Enforcement Advisory, Div. of Enforcement, U.S. Commodity Futures Trading Comm'n, Cooperation Factors in Enforcement Division Sanction Recommendations (Aug. 11, 2004), available at http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf; Office of Foreign Assets Control, Dep't of the Treasury, 31 C.F.R. § 501.601–.606 (2006); U.S. EPA, Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000); Seaboard Report, supra note 139; Press Release, U.S. SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at http://www.sec.gov/news/press/2006-4.htm (noting that for the SEC, the use of "very large corporate penalties" is comparatively recent); see also Ad Hoc Committee Report, supra note 158, at 48 nn.189–94, 119 n.391; Wray & Hur, supra note 17, at 1109–13, 1125–34 (describing SEC experience under the Sea-

Finally, the DOJ has, in response to criticism from industry and Congress, moderated its approach in two respects. The McNulty Memo that superseded the Thompson Memo includes two brief but important additions. It discourages prosecutors, except in unusual cases, from conditioning agreement on nonpayment of employee legal fees, and, second, discourages prosecutors from obtaining privilege waivers, requiring central DOJ approval of such waivers.[164]

B. Empirical Analysis of the DOJ's Agreements

Judge Gerard E. Lynch and others have argued that as the best solution for the problem of vast prosecutorial discretion, prosecutors should develop standards to constrain their discretion and to provide clear notice to organizations.[165] In some respects that is what the DOJ did when it issued its Thompson and McNulty Memo guidelines. Nevertheless, no DOJ guidelines define what remedies prosecutors should seek when they negotiate structural reform agreements. Courts have statutory authority to approve deferral of a prosecution, but no court has rejected an agreement.[166] All have been approved without judicial modification. The DOJ's remedial discretion could create substantial uncertainty among potential targets of prosecution. The agreements, for example the KPMG agreement, show the vast power of the DOJ to achieve structural oversight with a wide range of intrusive terms. Nevertheless, looking at the KPMG agreement alongside the others casts them all in a different light.

board Report and describing post-Thompson Memo approaches by regulatory agencies).

[164] See McNulty Memo, supra note 108, at 10–12.

[165] See Lynch, supra note 106, at 64–65; infra note 320.

[166] See 18 U.S.C § 3161(h)(2) (2000) (stating that the time to file an indictment is tolled during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct"); Deferred Prosecution Agreement at 14, United States v. Computer Assocs. Int'l, Inc., No. 1:04-cr-00837-ILG (E.D.N.Y. Sept. 22, 2004), available at http://www.usdoj.gov/dag/cftf/chargingdocs/compassocagreement.pdf ("[T]he Agreement to defer prosecution of CA must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2). Should the Court decline to approve the Agreement to defer prosecution for any reason, both the Office and CA are released from any obligation imposed upon them by this Agreement, and this Agreement shall be null and void.").

To determine whether or how the DOJ adopts any consistent approach that would provide somewhat clearer notice to organizations, I compiled terms from deferred and nonprosecution agreements entered in federal organizational prosecutions. I separated the agreements into two groups, before and after January 20, 2003, the date of the Thompson Memo; as noted, the numbers of such agreements began to sharply accelerate in 2003. I have included at Appendices A and B charts of the main features of these deferred prosecution agreements (DP's) and nonprosecution agreements (NP's). I am confident that the thirty-five agreements identified include all of the agreements entered in the first four years since the Thompson Memo was announced (and covering the entire period until the McNulty Memo was adopted), and for that reason I focus the analysis on that time frame.[167] I provide this comprehensive study of the DOJ approach both to better understand its features and also to provide guidance to prosecutors, courts, and practitioners in future negotiations and litigation. The table below summarizes several central findings regarding post-Thompson memo agreements.

Table 1: Post-Thompson Memo DOJ Agreements (Jan. 2003–Jan. 2007)

	Independent Monitor	*Compliance Program*	*Agency Cooperation*	*Privilege Waiver Required*	*DOJ Can Unilaterally Terminate*
Number of agreements	21	24	23	20	29
Percentage of the 35 agreements	60	69	66	57	83

Overall, the compliance focus of the DOJ is clear. Of the thirty-five agreements entered in the four years after January 2003, twenty-one included Independent Monitors (sixty percent).

[167] See infra note 326 on methodology. It is striking that thirty-five agreements have been entered since 2003, while I have been able to locate only thirteen such deferred organizational agreements in the years prior.

Twenty-four of the agreements ordered compliance programs (sixty-nine percent). However, far more of the agreements involved compliance programs than even this data illustrates. In ten of the remaining eleven, the corporation had already implemented a compliance program: in seven, the prosecutors recognized the organization had already taken sufficient steps to implement compliance measures;[168] in two, simultaneous compliance agreements were reached with regulators;[169] and in one case, the company voluntarily imposed a compliance program.[170] Of course, we cannot know from any of these agreements what other prior compliance or acts the DOJ may have taken into account.

[168] Those companies are AEP, AIG, AmSouth Bancorp, Micrus Corporation, PNC Financial, WesternGeco LLC, and Williams Power Co. See infra Appendix A; see, e.g., Press Release, Fed. Energy Regulatory Comm'n, Commission Accepts $21 Million Civil Penalty to Settle Investigation of AEP's Natural Gas Activities (Jan. 26, 2005), http://www.ferc.gov/press-room/press-releases/2005/2005-1/01-26-05-aep.asp ("Commission staff understands that the companies' new owners are not repeating the improper practices."). In addition, the Healthsource agreement incorporated actions taken in response to an SEC settlement, and the MCI agreement recognized cooperation with the Oklahoma Attorney General. See infra Appendix A.

[169] The Adelphia and FirstEnergy Nuclear cases involved agreements with regulators. See Press Release, SEC, SEC and U.S. Attorney Settle Massive Financial Fraud Case Against Adelphia and Rigas Family for $715 Million (Apr. 25, 2005), http://www.sec.gov/news/press/2005-63.htm; FirstEnergy Nuclear Hit With Record Fine for Reactor Damage, Env't News Service (Apr. 22, 2005), http://www.ens-newswire.com/ens/apr2005/2005-04-22-04.asp ("'Davis-Besse's performance has been closely monitored by a dedicated NRC oversight panel and the inspection staff.'" (quoting Luis Reyes, the Nuclear Regulatory Commission's Executive Director for Operations)); see also infra Appendix A.

[170] The BankAtlantic agreement does not include or recognize compliance programs or monitors, but the company issued a public statement that it had implemented substantial compliance efforts. See Press Release, BankAtlantic, BankAtlantic Enters into Agreements with the Department of Justice, Office of Thrift Supervision, and FinCEN Relating to Bank Secrecy Act and Anti-Money Laundering Compliance Matters, http://phx.corporate-ir.net/phoenix.zhtml?c=106823&p=irol-newsArticle&ID=847985&highlight (Apr. 26, 2006) (quoting BankAtlantic CEO Alan B. Levan as saying, "we have worked tirelessly to ensure we are in full compliance with the Bank Secrecy Act and other anti-money laundering laws and regulations, and have made significant investments in personnel and compliance systems").

The only firm left, the exception, is BAWAG, a foreign bank that was in the process of being sold. Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Austrian Bank "BAWAG" to Pay $337.5 Million for Restitution to Victims of Refco Fraud (June 5, 2006), http://www.usdoj.gov/usao/nys/pressreleases/June06/bagwagnon-prosecutionagreementpr.pdf.

Thus, the DOJ appears to follow the Thompson and McNulty Memo guidelines in emphasizing compliance, at least in the written terms of the agreements. Some consistency would not be surprising given that the Corporate Fraud Task Force coordinates the prosecution of these cases (and importantly ensures that the various U.S. Attorneys' Offices do not issue competing or preemptive indictments in the same matter), but some inconsistency could also be expected, given that the Task Force does not currently oversee prosecutions, each U.S. Attorney's Office negotiates the agreements independently, and there is no requirement of central office approval of their terms.[171]

The DOJ did not invent this approach from whole cloth. As noted, it pursues compliance-based remedies similar to those of regulatory agencies such as the SEC, Environmental Protection Agency ("EPA"), Treasury Department, Defense Department, Department of Labor, Department of Health and Human Services ("HHS"), State Department, and the voluntary disclosure and cooperation regimes that DOJ Divisions and U.S. Attorneys' Offices had earlier adopted, also mirroring the substantial innovations of former New York Attorney General Eliot Spitzer's compliance-oriented approach.[172]

It should come as no surprise that my data shows sixty-six percent of these agreements were reached in conjunction with regulatory agencies, sometimes more than one in a given agreement. By far the leading agency was the SEC, cooperating in fifteen agreements, followed by the U.S. Postal Inspection Services (eight), the IRS (five), the Commodity Futures Trading Commission (two), and several other agencies that only cooperated in one agreement (Treasury Department Inspector General, Nuclear Regulatory

[171] See Andrew Hruska, The President's Corporate Fraud Task Force, U.S. Att'y Bull., May 2003, at 1, 1, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5103.pdf (stating that the Task Force members "consult regularly with the prosecutors and investigators . . . to coordinate the overall scope and direction of the Department's effort to combat corporate fraud"); Wray & Hur, supra note 17, at 1187–88 & n.407. Prosecutors in different districts use each others' work as a template. The U.S. Attorney's Office for the District of New Jersey "utilized the work of other districts as a starting point and crafted the final document to fit the facts of the case and the negotiations with Bristol-Myers." Christie & Hanna, supra note 17, at 1049.

[172] See Wray & Hur, supra note 17, at 1107–08; supra notes 160–61.

Commission, U.S. Air Force, NASA, and Diplomatic Security Services).

Prosecutors also drew inspiration from the framework of the Organizational Sentencing Guidelines, rewarding corporations with "effective" compliance programs.[173] Nevertheless, many of the agreements fall short of the Guidelines' rigorous criteria for what constitutes effective compliance; only five formally incorporate the Guidelines requirements.

Twelve agreements were nonprosecution agreements, while twenty-three were deferred prosecution agreements. Deferred prosecutions must be approved by a court, as discussed further below. However, the terms of deferred prosecution agreements did not vary significantly from those found in nonprosecution agreements. I discuss each category of provision in turn.

First and most prominent is the role of independent monitors. Twenty-one of the thirty-five prosecution agreements entered since the Thompson Memo required independent monitors. These monitors had sweeping powers to gather information, promulgate policies, and oversee compliance. As the U.S. Attorney for New Jersey explains, "[a] strong, independent monitor is in a far better position to ride herd over a mammoth corporation than any U.S. Attorney's Office or Probation Office. Independent monitors are visible, on-site reminders that compliance with the terms of a deferred prosecution agreement is mandatory, not optional."[174] The monitors do not report to a court, but report to the DOJ and perhaps also a federal agency. Further, none of the agreements provide that the reports of these monitors are to be made public (nor does the DOJ take a position on whether the reports are privileged). The work of these monitors resembles the sort of internal investigations by independent auditors that the DOJ increasingly demands for cooperating entities.[175]

[173] The Thompson Memo cites the Organizational Guidelines in several places. See Thompson Memo, supra note 16, at 5, 7 n.2, 10 n.6. The Sentencing Commission then returned the favor, citing the Thompson Memo as part of the reason why it strengthened its compliance requirements. See Ad Hoc Committee Report, supra note 158, at 119–20, nn.392–93.

[174] See Christie & Hanna, supra note 17, at 1055.

[175] See, e.g., Lawrence D. Finder, Internal Investigations: Consequences of the Federal Deputation of Corporate America, 45 S. Tex. L. Rev. 111 (2003).

The length of monitoring is often longer than the typical eighteen months for deferral agreements and can be as long as three years. The average amount of time that these agreements last is two years. A few specify that they can be extended if needed to secure compliance.[176]

The monitors may become involved in uncovering and remedying new criminality totally unrelated to the agreement. Demonstrating the power of these monitors, in the Bristol-Myers Squibb case the monitor recommended that the Board dismiss the CEO based not on failures related to the agreement deferring prosecution of securities fraud charges, but on a new criminal investigation relating to a patent dispute.[177] However, as will be developed below, outside monitors may face difficulties gaining access to information and cooperation, particularly where they work with a limited staff and are charged with assessing a very large organization.

Second, all of the agreements either contain requirements to create detailed compliance programs or to continue programs the entity already created voluntarily. These compliance programs are often sweeping, affecting both top management and low level employees. Some, because of the prosecution of key actors, inevitably affect entire industries. Most require the creation of elaborate programs, including auditing, new policies, reporting systems, and training.

As noted, only five agreements incorporate the Sentencing Guidelines requirements for effective compliance programs.[178] The other agreements often do not satisfy the Guidelines' seven criteria. For example, they do not specify that the compliance program itself be audited to improve its effectiveness and do not specify involvement of high-level officials. Some also go farther than the Guidelines in some respects, for example by requiring top-level governance changes apart from the creation of a compliance pro-

[176] See U.S. Dep't of Justice, United States Attorneys' Manual § 9-22.010 (2d ed. 2000) ("The period of supervision is not to exceed 18 months."). The few deferral agreements, such as the KPMG agreement, that specify that they can be extended if compliance is not complete do not specify how that is to be judged.

[177] See Stephanie Saul, Drug Chief May Lose His Job: Firing Is Urged at Bristol-Myers, N.Y. Times, Sept. 12, 2006, at C1.

[178] The KPMG, Hilfiger, German Bank HVB, Mellon Bank, and Roger Williams Medical Center agreements require creation of "effective compliance" programs as per the U.S. Sentencing Guidelines. See infra Appendix A.

gram, including adding members to the Board of Directors of the corporation and, in one case, DOJ approval of an independent director.[179]

Third, ten of the agreements include data-gathering efforts in the compliance programs to enable monitors to better oversee compliance.[180] They do not, however, specify what measures the monitor should use to quantify compliance.

Fourth, the agreements include provisions that require cooperation with the DOJ during investigations of individual employees or former employees.[181] These provisions do not have time limits; they state in very general terms that the organization has an obligation to fully cooperate with the DOJ for as long as the DOJ continues to investigate the underlying crimes. Some obligate the organization to cooperate should the DOJ uncover additional criminality. Not only do the generic cooperation provisions contain sweeping language, but the DOJ specifies certain types of cooperation, including access to documents and employees for interviewing. In effect, the organization serves as "an investigative partner" of the DOJ.[182] Such provisions also controversially include waivers of attorney-client and work-product privileges.

I note, though, that despite the controversy over a "culture of waiver,"[183] and though the DOJ may also request waiver during investigations, in its agreements at least, the DOJ exercised some

[179] See Christie & Hanna, supra note 17, at 1052–53 (describing the Bristol-Myers agreement requirement that two directors be appointed to the Board, one with the approval of the U.S. Attorney's Office, and stating that the "aim was to bring fresh blood and a new perspective to the board of directors; our preference for someone with a law enforcement background was made clear").

[180] See infra Appendix A (showing that the Boeing, Bristol-Myers Squibb, Canadian Imperial Bank, Computer Associates, and Operations Management International agreements require data gathering, and that the KPMG, Hilfiger, German Bank HVB, Mellon Bank, and Roger Williams Medical Center agreements require creation of "effective compliance" programs under the Guidelines and therefore must comply with the Guidelines' requirement that data be gathered to evaluate the effectiveness of the compliance program itself).

[181] There is one exception—the Hilfiger agreement does not require full cooperation with the DOJ—but only because Hilfiger had already provided it.

[182] See Michael R. Sklaire & Joshua G. Berman, Deferred Prosecution Agreements: What Is the Cost of Staying in Business?, Wash. Legal Found. Legal Opinion Letter, June 3, 2005, at 1, 2, available at http://www.wlf.org/upload/060305LOLSklaire.pdf.

[183] See Am. Chemistry Council et al., The Decline of the Attorney-Client Privilege in the Corporate Context 2–3 n.7 (2006), http://www.acca.com/Surveys/attyclient2.pdf.

underappreciated sensitivity. As my chart shows, the DOJ did not seek privilege waiver in many of its agreements, though it did seek privilege waiver in the majority, or twenty agreements (fifty-seven percent). After the McNulty Memo, and in response to critics, the DOJ may seek such waivers less frequently.

Fifth, the agreements often retained a key nonstructural element typical of criminal law judgments—damages, with amounts ranging from the thousands to the hundreds of millions. The total fines, restitution, and compensation paid as a result of the thirty-five agreements was $4.95 billion, with an average amount of $141 million per agreement. This figure is only approximate because it includes some payments secured not by the DOJ, but credited as separately (or jointly) secured by regulatory agencies that cooperated in the investigation. These ballpark figures do confirm that the DOJ has, on average, pursued substantial cases involving relatively large costs.

Nevertheless, many of the agreements chiefly require payments of civil restitution only, rather than a punitive fine (including to shareholder compensation funds), compensation to settle civil lawsuits, disgorgement, or payment of back taxes.[184] The added punitive fine was often negligible.[185] A generous calculation of punitive fines imposed provides a total of $670 million, or $19 million on average per agreement, and only 14% of the total.[186] Thus, the DOJ does not seem to rely on fines for deterrence, but rather on civil remedies such as restitution, disgorgement, and civil compensation, with a small proportion of payment as fines. In so doing, the agreements comport with the Guidelines' emphasis on providing restitution to victims.[187]

[184] The Sentencing Guidelines prioritize payment of restitution. See U.S. Sentencing Guidelines Manual § 8B1.1 (2005); cf. 18 U.S.C. § 3572(b) (2000) ("[T]he court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution."); Christie & Hanna, supra note 17, at 1059 (describing why the Bristol-Myers agreement did not include a punitive fine).

[185] As in civil structural reform cases, a structural reform remedy may cost far less than a damages award (or, in a criminal case, a punitive fine). See Jeffries, supra note 72, at 107–10.

[186] This figure is certainly overstated; I counted as a fine the entire sum in several cases (worth $63.5 million total) where, though naming a large damages payment, the DOJ did not specify what part of the award was a fine and what part was restitution.

[187] See U.S. Sentencing Guidelines Manual § 8B1.1.

The overall approach requires comprehensive compliance programs, including independent monitors whose terms last for years, detailed injunctive changes of policy and practice, training programs, auditing, data collection, cooperation with the DOJ, and payment of restitution to victims. This is a real change from the general features of the few known organizational agreements prior to the Thompson Memo because previous agreements tended to last for a short time and typically did not require compliance.[188]

Given each of the reasons why prosecutors possess near overwhelming power to prosecute organizations, the adoption of a more lenient approach, an "entente cordiale," is perhaps surprising.[189] Explanations already given include that prosecutors hope to avoid the catastrophic collateral consequences of an indictment, and also that settlement conserves DOJ resources, where organizational prosecutions are complex and firms can afford expensive and experienced defense counsel. Prosecutors also claim that they could not obtain such sweeping injunctive relief through courts.[190]

An additional explanation suggested by these agreements is that prosecutors often confront situations in which the organization is less blameworthy than individual employees. Prosecutors may confront two general types of organizations. If rogue employees can be blamed for the criminality, then the interests of prosecutors and the current leadership of the organization may be aligned. Both may wish not only to reform the organization and punish those involved in criminality, but also take special care to avoid undue collateral consequences to blameless employees, shareholders, pension plans, and the public.[191] Thus, it is often defense lawyers representing the employees being individually prosecuted that protest about the prejudicial effects of these agreements.[192] In cases

[188] As illustrated in Appendix B below, about one-third of those agreements had independent monitors, most lasted for a short time or listed no duration at all, and approximately one-third required compliance programs.

[189] See Joseph A. Grundfest, Over Before it Started, N.Y. Times, June 14, 2005, at A23.

[190] See supra note 22 and accompanying text.

[191] See Blum, supra note 22, at 1 ("'Deferred prosecutions give a company the chance to reform itself without creating a situation where a lot of people are going to lose their jobs and a lot of investors are going to lose more money.'" (quoting Timothy Coleman, Senior Counsel to Deputy Attorney General James Comey, Jr.)).

[192] In the Computer Associates case, an attorney for the company called the agreements "an excellent way for prosecutors to satisfy their objectives without imposing

where the current leadership of the organization shared a role in the wrongdoing, however, reforms may require purging the leadership and fundamentally changing the organizational mission. Those cases may not easily be settled, perhaps explaining the occasional inability to reach agreements, such as in the Andersen and Milberg Weiss cases, or more commonly in cases involving small firms.

Finally, the DOJ's own deterrence goals may be better served by a system of narrow standards that provide enhanced notice.[193] I discuss the DOJ's exercise of prosecutorial discretion next.

C. Alternative Stages to Pursue Structural Reform Prosecutions

Prosecutorial discretion remains fundamental to the nature of organizational prosecutions, and prosecutors, in the exercise of their broad discretion, chose the structural reform alternative to avoid the collateral consequences of indictment and conviction.[194] Having chosen to seek structural reform, however, they have not just one but a range of alternative means to that end. I divide the exercise of a prosecutor's discretion into four stages chronologically: prevention, charging, plea bargaining, and sentencing. As a fifth option, prosecutors may seek parallel civil remedies. Further, the prosecutor's choice of which stage to exercise discretion has great significance. At each successive stage of the criminal process, the nature of the discretion changes and courts further constrain it. In addition, the DOJ could choose to pursue more than one of these alternatives in a given case, such as by seeking a conviction and parallel civil remedies. In this Section, I explore these alterna-

serious collateral consequences." Id. In contrast, an attorney representing a former Computer Associates executive facing criminal charges objected to the decrees as "undermin[ing] the adversarial system of justice." Id.

[193] Few organizational prosecutions were brought before the Thompson Memo provided notice of the new approach. See supra notes 119–20, 146–49, and accompanying text. The DOJ's current structural reform approach resembles the "benign big gun" approach towards regulatory compliance and the "enforced self-regulation" developed in Professors Ian Ayres and John Braithwaite's book. See Ian Ayres & John Braithwaite, Responsive Regulation 19 (1992).

[191] Regarding the problem of prosecutorial discretion, particularly in organizational cases, see, for example, Lynch, supra note 106; Richman, supra note 109; William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 790–91 (2006).

tive approaches to structural reform to shed light on what the DOJ decided by selecting a charging stage approach.

1. The Prevention Stage

First, prosecutors may seek to achieve structural reform goals without prosecuting at all. While prosecutions typically litigate in response to specific reports of criminal activity, as a complement to their traditional role, prosecutors sometimes also focus on prevention to influence primary behavior. For example, in individual cases they may participate in early intervention programs to prevent youth violence, truancy, or drug use,[195] or task forces that raise public awareness, encourage voluntary reporting, hinder criminals, and assist victims.[196] In organizational cases, the DOJ operates joint task forces with other agencies in a range of areas in part to focus on prevention. The Corporate Fraud Task Force, for example, allocates resources among federal and state agencies to develop capability to audit organizations and compliance procedures, encourage voluntary disclosures, and detect criminality.[197] The Katrina Fraud Task Force aimed to develop institutional ability to prevent fraud directed at the $85 billion in Gulf region relief spending.[198] Prosecutors may also impact industry significantly by announcing their enforcement priorities, such as through memoranda like the Thompson Memo or in speeches to the white collar bar.

[195] See Anthony V. Alfieri, Community Prosecutors, 90 Cal. L. Rev. 1465, 1473–80 (2002) (describing community outreach and violence-prevention efforts by prosecutors); James C. Backstrom, The Role of The Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community, 50 S.C. L. Rev. 699, 712 (1999) (listing examples nationwide of prosecutors' involvement in juvenile crime prevention programs).

[196] For example, as part of the Trafficking Victims Protection Act, a task force was tasked in part with developing economic opportunities for potential victims of trafficking. 22 U.S.C. §§ 7103(d)(4), 7105(a)(1) (2000).

[197] See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002); Corporate Fraud Task Force, First Year Report to the President (2003), available at http://www.usdoj.gov/dag/cftf/first_year_report.pdf. On the early roots of a problem solving approach among prosecutors leading, for example, to the creation of the DOJ's Organized Crime Section, see Ronald Goldstock, The Prosecutor as Problem Solver (1991) (unpublished manuscript, on file with the Virginia Law Review Association).

[198] See Hurricane Katrina Fraud Task Force, A Progress Report to the Attorney General 21 (2006), http://www.usdoj.gov/katrina/Katrina_Fraud/docs/katrinareportfeb2006.pdf.

Further, though federal prosecutors remain focused in their day-to-day work on investigations and prosecutions, they operate against a regulatory background in which auditing and reporting aim to prevent crime. Regulators have long promulgated policies encouraging prevention-oriented reporting and auditing, and they may prefer those approaches to prosecutions that can discourage cooperation.[199] A range of agencies have also adopted rewards for voluntary disclosure, including the Department of Defense, EPA, Federal Aviation Administration, HHS, SEC, State Department, and Department of Labor.[200] The emphasis on voluntary disclosure increased in response to corporate governance scandals. With the passage of Sarbanes-Oxley, with its elaborate reporting and compliance requirements, and then with the addition of SEC requirements, corporations face more onerous rules governing auditing and compliance.[201] Prosecutors rely on these pre-existing disclosure regimes to prevent crime. They coordinate training on those regulatory reporting requirements and then bolster those rules by investigating, along with agencies, noncompliance as an early signal of possible criminality.[202] The net result may allow prosecutors to rely on criminal sanctions only in egregious cases, but otherwise to rely on self-reporting and prevention.

2. The Charging Stage

Second, having been made aware of alleged criminality, prosecutors decide whether or not to pursue charges and then what charges to pursue. The DOJ now chooses to pursue structural reform in organizational cases at the charging stage. Particularly sig-

[199] See supra notes 139, 159, 163, and accompanying text.

[200] See id.; see also Wray & Hur, supra note 17, at 1108–33.

[201] See 18 U.S.C. § 1519 (2006) (Sarbanes-Oxley Act anti-shredding provision); Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 17 C.F.R. §§ 228, 229, 249 (2003); NYSE, Inc., Listed Company Manual § 303A.10 (2004); Cristie L. Ford, Toward a New Model for Securities Law Enforcement, 57 Admin L. Rev. 757 (2005); Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197, 1209–20 (1999); supra note 143.

[202] See Larry D. Thompson, Introduction *to* Corporate Fraud Task Force, supra note 197, at iii, available at http://www.usdoj.gov/dag/cftf/first_year_report.pdf (describing contributions of task force members, joint training efforts, policy initiatives, and enforcement); see also infra Appendix A, which shows that most agreements were negotiated in collaboration with regulators.

nificant is that the charging stage occurs before indictment, and thus the DOJ avoids the severe collateral consequences of an indictment to the organization. Also significant at the charging stage is that prosecutors have considerable discretion. The Supreme Court has held that the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case."[203] Prosecutorial exercise of discretion is generally unreviewable if the prosecutor had probable cause, unless prosecutors rely on invidious characteristics like race or religion.[204] This "broad discretion" stems from separation of powers and the President's power to "take Care that the Laws be faithfully executed."[205] Prosecutors may also publicly define charging guidelines or standards that, though legally unenforceable, internally limit exercise of their discretion.[206] Further, at the charging stage, prosecutors may seek permission from the court to "defer" prosecution in individual cases pending an opportunity to complete a rehabilitative program.[207] Typically only nonviolent or first time offenders are eligi-

[203] United States v. Nixon, 418 U.S. 683, 693 (1974).

[204] See, e.g., Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (quoting United States v. Goodwin, 457 U.S. 598, 380 n.11 (1982))), *cited with approval in* United States v. Armstrong, 517 U.S. 456, 464 (1996); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o 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.").

[205] See U.S. Const. art. II, § 3; 28 U.S.C. §§ 516, 547 (2000) (reserving conduct of litigation to officers of the Department of Justice); *Armstrong*, 517 U.S. at 464 (noting that prosecutors retain their broad discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'"); United States v. Hicks, 693 F.2d 32, 34 n.1 (5th Cir. 1982).

[206] See U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.230 (2d ed. 2000) (defining charging standards using very broad factors such as "[f]ederal law enforcement priorities," "[t]he person's culpability," and "[t]he nature and seriousness of the offense"); see also Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2143 (1998) (calling for prosecutors to "declare the standards by which" they decide "what cases to bring and not bring"). See generally Thompson Memo, supra note 16; McNulty Memo, supra note 108.

[207] Generally, federal prosecutors enter into deferral agreements when "the person's timely cooperation appears to be necessary to the public interest." U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.600; see also United States v. Richardson, 856 F.2d 644, 647 (4th Cir. 1988) ("A defendant has no right to be placed in pretrial diversion. The decision . . . is one entrusted to the United States Attorney.");

ble for deferral (or "diversion"), and if they agree to participate, courts typically supervise such efforts in drug courts or other alternative courts.[208] The DOJ's more recent innovation was to extend the practice of pre-trial diversion to organizations.[209] As developed in the next Part, the discretion prosecutors receive at the charging stage limits the ability of courts to review structural reform prosecutions.

3. The Plea Bargaining Stage

Third, prosecutors may choose to negotiate a plea bargain. Almost all individual criminal prosecutions result in guilty pleas.[210] Plea bargaining retains the same prominence in organizational prosecutions; the overwhelming majority of organizations charged plead guilty.[211]

Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential.[212] Judges examine voluntariness, factual basis, fairness, abuse of discretion, or infringement on the judge's sentencing power.[213] Judges

Hicks, 693 F.2d at 34 n.1 ("Since pretrial diversion is a program administered by the Justice Department, considerations of separation of powers and prosecutorial discretion might mandate an even more limited standard of review."); Thomas E. Ulrich, Pretrial Diversion In The Federal Court System, Fed. Probation, Dec. 2002, at 30, 31–33, 35.

[208] See Richard C. Boldt, Rehabilitative Punishment and the Drug Treatment Court Movement, 76 Wash. U. L.Q. 1205, 1208–09 (1998) (describing the use of courts to supervise drug treatment programs for nonviolent offenders).

[209] See supra Section II.A; infra Appendix A.

[210] See Mitchell v. United States, 526 U.S. 314, 324–25 (1999) ("Over 90% of federal criminal defendants whose cases are not dismissed enter pleas of guilty or nolo contendere."); Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics tbl.5.22 (2005), available at http://www.albany.edu/sourcebook/pdf/t5222005.pdf (finding that in 2004 95.1% of individual defendants disposed of in federal district courts pleaded guilty or nolo contendere); see also Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1282–83 (2005).

[211] See 2003 Sourcebook of Federal Sentencing Statistics, supra note 144, at 107 tbl.53 (in fiscal year 2003, 182 of 200 organizations prosecuted plead guilty, with 18 proceeding to trial).

[212] Nolo contendere agreements without an admission of guilt must be approved by the court. See Fed. R. Crim. P. 11(a)(3) (requiring that the court evaluate nolo contendere pleas by considering "the parties' views and the public interest in the effective administration of justice").

[213] See Santobello v. New York, 404 U.S. 257, 262 (1971) ("A court may reject a plea in exercise of sound judicial discretion."); Fed. R. Crim. P. 11(e) advisory committee's

may reject plea agreements "when the district court believes that bargain is too lenient, or otherwise not in the public interest."[214] However, plea agreements cannot be modified but can only be accepted or rejected.[215] Once entered, both prosecutors and defendants are bound by plea agreements as contracts and may seek relief for any material breach.[216]

The DOJ has sometimes pursued guilty pleas combined with compliance settlements. Before the Thompson Memo, the DOJ occasionally sought structural reforms from corporations charged with crimes and did so chiefly by securing plea agreements including injunctive reforms. The E.F. Hutton and the Drexel Burnham Lambert cases in the 1980s were leading examples.[217] More recently, for reasons discussed, the DOJ sought to avoid indictments of large firms, preferring deferral or nonprosecution agreements.[218]

note ("The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge."); Lowell B. Miller, Judicial Discretion to Reject Negotiated Pleas, 63 Geo. L.J. 241, 246–47 (1974).

[214] United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985) (quoting United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983)); see also United States v. Freedberg, 724 F. Supp. 851, 854–55 (D. Utah 1989) (holding that a plea agreement dismissing charges against owner but not corporation was contrary to the public interest); cf. United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973) ("[A]uthority has been granted to the judge to assure protection of the public interest."); United States v. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473, 474–75 (S.D.N.Y. 1977) (finding that the dismissal of a corporate conspiracy case involving life-saving drugs would be contrary to the manifest public interest).

[215] See, e.g., United States v. Reyes, 313 F.3d 1152, 1156–57 (9th Cir. 2002); United States v. Martin, 287 F.3d 609, 622 (7th Cir. 2002); United States v. Cunavelis, 969 F.2d 1419, 1422 (2d Cir. 1992).

[216] See Ricketts v. Adamson, 483 U.S. 1, 9–12 (1987); *Santobello*, 404 U.S. at 262 (1971); see also Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1914–15 (1992).

[217] The E.F. Hutton case was the most high-profile early instance. See Notice of Plea Agreement and Plea Agreement, United States v. E.F. Hutton & Co., No. 85-00083 (M.D. Pa. Apr. 30, 1985), *reprinted in* Staff of Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong., E.F. Hutton Mail and Wire Fraud 329 (Comm. Print 1986).

[218] In a few cases brought under the Foreign Corrupt Practices Act, however, the DOJ used a different approach. In conjunction with obtaining guilty pleas by subsidiaries resulting in criminal fines, the DOJ entered into separate agreements with regulators and the parent corporation to adopt compliance reforms. The ABB corporation agreed to compliance-based reforms with the SEC in conjunction with guilty pleas by its subsidiaries, ABB Vetco Gray and ABB Vetco Gray UK. See SEC Sues ABB, Ltd. in Foreign Bribery Case, Litigation Release No. 18,775, 83 SEC Docket 1014,

4. The Probation Stage

Fourth, a prosecutor may pursue a conviction. The threat not just of indictment but also of conviction shapes the current structural reform approach. In some individual cases, a court may decide to order supervised probation in which all or part of the sentence is deferred pending successful compliance.[219] Similarly, in organizational cases, upon a guilty plea or a conviction, the court may impose supervised probation. At the probation stage, a court may supervise structural reform.

Unlike in individual prosecutions, where sentences are largely "charge-offense based" and plea bargaining occurs in the shadow of a prosecutor's own charging decisions,[220] organizational sentences reflect a range of flexible factors. The organizational sentencing guidelines consider the type and severity of an offense to establish a base fine, and then look to organizational culpability, which depends on a range of factors including whether top management or middle management "participated in" the criminality and whether the organization reported the offense or cooperated.[221] Based on those factors, the court assesses a punitive fine together with any civil restitution or remediation, including community service and notice to victims.[222] In addition, organizations may receive mitigation for compliance. When Congress passed Sarbanes-Oxley, it directed the U.S. Sentencing Commission to consider revising its organizational guidelines. New guidelines, which took effect in November 2004,[223] explicitly permit reducing the fine if an entity

1014–15 (July 6, 2004). That approach secures compliance but also avoids harsh consequences on the parent corporation.

[219] The Guidelines were intended to reduce use of probation through determinate sentencing. See U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 68–69 tbls.2 & 3 (1987); U.S. Sentencing Guidelines Manual § 1A1.4(d) (1987) (amended 1990, 1995, 2000, 2004); Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 Yale L.J. 933, 951–57 (1995).

[220] For individuals, the Guidelines provide a grid that "scores" on one axis the defendant's prior record and on the other axis the seriousness of the crime. See U.S. Sentencing Guidelines Manual ch. 5, pt. A (2005).

[221] See id. §§ 8C2.3–.5.

[222] See id. § 8A1.2(a)–(b).

[223] The recent amendments to the Sentencing Guidelines were adopted in response to the Sarbanes-Oxley Act's direction to promulgate new Guidelines that could better deter corporate wrongdoing. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204,

adopts an "effective" compliance program meeting detailed criteria.[224] The Commission adopted "structural reform" reasoning; approved compliance programs were intended to create structural safeguards against criminality.[225]

In addition to organizational sentencing, a court may impose probation on an organization after a conviction. This model more closely resembles classic civil, court-centered structural reform litigation, except here it is the Guidelines that provide the authority under which a federal court may impose reforms. The vast majority of organizations that are convicted or that plead guilty are sentenced by federal courts to probation.[226] Most require that an entity not engage in criminality during a probationary period. The Guidelines also permit a court to impose affirmative structural conditions, including ordering the creation of an "effective ethics and compliance program."[227] One criterion for probation is "if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct."[228]

§ 805(a)(2)(5), 2002 U.S.C.C.A.N. (116 Stat.) 745, 802 (stating that the Sentencing Commission should promulgate rules "sufficient to deter and punish organizational criminal misconduct"); see also U.S. Sentencing Guidelines Manual § 8B2.1 cmt. background (noting that Congress "directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter 'are sufficient to deter and punish organizational misconduct'").

[224] U.S. Sentencing Guidelines Manual § 8B2.1. Under the 1991 Guidelines, such programs had been defined previously only in the advisory notes. See id. § 8A1.2 cmt. n.3(k) (2003) (amended 2004); cf. id. § 8C2.5(f)–(g) (2005) (explicitly setting out the criteria an effective compliance program must conform to); Ad Hoc Committee Report, supra note 158, at 50.

[225] See U.S. Sentencing Guidelines Manual ch. 8, introductory cmt. (2005).

[226] See 2003 Sourcebook of Federal Sentencing Statistics, supra note 144, at 107 tbl.53 (in fiscal year 2003, 148 of 200 organizations received probation, with 24 court-ordered compliance programs); 2004 Sourcebook of Federal Sentencing Statistics, supra note 144, at 123 tbl.53, 329 tbl.53 (in fiscal year 2004, 94 of 130 organizations received probation with 21 court-ordered compliance programs).

[227] U.S. Sentencing Guidelines Manual § 8D1.4(c)(1).

[228] U.S. Sentencing Guidelines Manual § 8D1.1(a)(6). Probation is also to be ordered if necessary "to secure payment of restitution . . . enforce a remedial order . . . or ensure completion of community service." Id. § 8D1.1(a)(1). Furthermore, probation is required "if the organization within five years prior to sentencing engaged in similar misconduct," and if an "individual within high-level personnel of the organization . . . participated in the misconduct underlying the instant offense." Id. § 8D1.1(a)(4)–(5). See also Richard Gruner, To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation, 16 Am. J.

The court then orders, as a condition of probation, that the entity maintain "an effective compliance and ethics program consistent with §8B2.1."[229] An "effective" program must be quite comprehensive, including auditing, data collection, policy changes, training, and involvement of high-level management. Courts now order a significant number of organizations to install such compliance programs during probation.[230] The court may also impose other sanctions including restitution, community service, and requiring an entity to publicize its noncompliance to victims.[231]

Courts supervise implementation of these compliance programs in much the same fashion as in a civil structural reform case. Once courts order an organization to develop a compliance program as a condition of probation, courts monitor the organization to decide whether it has successfully done so. Courts largely rely on organizational self-reporting, but in a form specified by the court.[232] The Sentencing Commission also recommends that a regulatory body review those reports and that appropriate experts be employed to assess compliance.[233] The court, relying on reporting and evaluations, remains closely involved until it determines that the firm has complied and should be released from probation.

5. Civil Actions

Fifth, prosecutors may file civil actions, typically obtaining a settlement imposing injunctive reforms designed to prevent future

Crim. L. 1, 4 (1988); Christopher A. Wray, Note, Corporate Probation Under the New Organizational Sentencing Guidelines, 101 Yale L.J. 2017, 2027–29 (1992) (describing the breadth of the probation option).

[229] U.S. Sentencing Guidelines Manual § 8D1.4(c)(1).

[230] See 2003 Sourcebook of Federal Sentencing Statistics, supra note 144, at 107 tbl.53 (seventy-four percent of organizations had probation ordered and twelve percent had court-ordered compliance programs). Most notable was the Consolidated Edison case, in which ConEd pleaded guilty mid-trial and accepted a probation agreement as well as the appointment of a special master. See Arthur F. Mathews, Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations, 18 Nw. J. Int'l L. & Bus. 303, 430–31 (1998).

[231] U.S. Sentencing Guidelines Manual §§ 8D1.3, 8D1.4(a).

[232] See id. §§ 8D1.1(a), 8D1.4(b)–(c).

[233] See id. § 8D1.4 cmt. n.1. ("To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program.").

criminality. The DOJ has used this approach in the health care context, occasionally bringing parallel criminal fraud charges and civil False Claims Act proceedings.[234] The dismissal of criminal charges against the organization or a guilty plea by a subsidiary may then be accompanied by a parallel civil settlement requiring adoption of compliance measures.[235] If the DOJ is concerned about the collateral effects of an indictment, it could pursue such a strategy rather than enter into deferral agreements.

The DOJ has also in the past adopted an approach seeking civil consent decrees, in which a court supervises the implementation of any agreement and adjudicates any breach and the agreement's ultimate termination. Beginning in the 1980s, the DOJ used a civil consent decree approach to combat organized crime in RICO prosecutions of labor unions.[236] The RICO statute provides both for criminal punishment and civil injunctions,[237] permitting a court to issue "such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper."[238] The DOJ filed twenty such lawsuits,[239] negotiating consent decrees in which trusteeships took over control of affected unions or locals.[240] These decrees were closely monitored by courts, often involving judges in years of protracted efforts to obtain compliance. Such a supervising role closely

[234] An example is the recent Medco settlement. See Press Release, U.S. Attorney, E. Dist. of Pa., U.S. Dep't of Justice, U.S. Announces Settlement of $155 Million Medco False Claims Case (Oct. 23, 2006), http://www.usdoj.gov/usao/pae/News/Pr/2006/oct/MedcoPressReleaseUpdated10.20.06.pdf.

[235] See, e.g., Wray & Hur, supra note 17, at 1165–69 & n.334 (listing examples of civil False Claims Act settlements together with dismissals of criminal charges or a subsidiary guilty plea regarding Abbott Laboratories, Gambro Healthcare, Schering-Plough, McKesson, Serono, S.A., Novartis, and Tenet Healthcare).

[236] On the influence of organized crime efforts on recent corporate fraud prosecutions, see Kurt Eichenwald & Alexei Barrionuevo, Tough Justice for Executives in Enron Era, N.Y. Times, May 27, 2006, at A1 ("The tactics and strategies used in the successful prosecution of the former Enron chief executives, Jeffrey K. Skilling and Kenneth L. Lay, highlight the transformation that has occurred in recent years in the investigation and prosecution of white-collar crime, a change that has brought many of the techniques applied to drug cases and mob prosecutions into the once-genteel legal world of corporate wrongdoers.").

[237] 18 U.S.C. §§ 1963–1964 (2000).

[238] Id. § 1964(b). See generally Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 Colum. L. Rev. 661 (1987).

[239] See James B. Jacobs et al., The RICO Trusteeships After Twenty Years: A Progress Report, 19 Lab. Law. 419, 419 (2004).

[240] In only two cases was the trusteeship imposed post-trial. Id. at 420 n.5.

resembles the traditional "public law" judging model. Where these cases involved efforts to eradicate organized crime, many cases involved long and difficult remedial phases, with resistance by union leadership.[241] For example, in the Teamsters litigation, each of three special masters faced prolonged challenges to their authority, with "incessant attacks against the Court Officers, Government and [the] Court objecting to the implementation of the Consent Decree,"[242] as well as with litigation by nonparties.[243] DOJ trustees have had mixed results, with successes in eradicating racketeering but "very little success in establishing union democracy."[244] The experience illustrates the difficulty of structural reform in the face of institutional resistance; RICO consent decrees remained supervised by courts for years, even decades. The civil consent decree approach used courts to bolster the DOJ's authority and delegated to courts the long-term project of overseeing compliance. Whether the recent wave of DOJ deferred prosecution regimes will face the same roadblocks during their intended shorter life-spans and absent court supervision remains to be seen. Obviously there are significant differences in a context where the entity may be essentially law-abiding and seeks to remedy employee malfeasance.[245]

To conclude this Section, the DOJ not only made a choice among several options when deciding to pursue structural reform as a strategy, but the DOJ also chose a unique approach towards structural reform by seeking to enter settlements at the charging stage. At that early stage, prosecutorial discretion remains extremely broad, unlike after a conviction or under a civil consent decree, where a court supervises the remedy. Opportunities for overreaching may be greater at the charging stage, and, at the same time, the scope of judicial review is quite limited. Thus, the deci-

[241] See George Kannar, Making the Teamsters Safe for Democracy, 102 Yale L.J. 1645 (1993).

[242] United States v. Int'l Bhd. of Teamsters, 742 F. Supp. 94, 102 (S.D.N.Y. 1990).

[243] See Yellow Freight System, Inc. v. United States, 506 U.S. 802 (1992); United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 613–14, 617–20 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 806, 810–13 (S.D.N.Y. 1992).

[244] Jacobs, supra note 18, at 160.

[245] Indeed, federal prosecutors had greater success in their structural efforts to use civil RICO and regulatory actions to eradicate the influence of organized crime from private industry, such as the New York garment, waste-hauling, and construction industries. See James B. Jacobs, Gotham Unbound 223–30 (1999).

sion to pursue structural reform at the charging stage has important consequences for the future of organizational crime enforcement, which I take up in the last Part.

III. PROSECUTORS, COURTS, AND REMEDIAL DISCRETION

Locating structural reform with prosecutors creates both benefits and problems that are unique to the role of prosecutors in our federal criminal system. Recall the range of difficult questions raised in civil structural reform cases that led to judicially imposed limits on their scope and a focus on identifying the most effective set of best practices. Prosecutors face none of those limitations. Federal criminal law delegates to them vast discretion while, at the same time, considerations of separation of powers constrain courts. Further, though several structural reform alternatives were available, the DOJ chose to pursue structural reform at the charging stage, where prosecutorial discretion remains particularly broad. This Part first examines the question of whether prosecutors may abuse their discretion in these agreements, and frames what calling an act an abuse means in an area where prosecutors retain such broad discretion. Second, it discusses how courts may not effectively limit prosecutorial discretion in these cases because judicial review remains very deferential and limited. Finally, this Part concludes by raising a series of questions for further scholarship, including whether the DOJ itself, perhaps in conjunction with other actors, can provide greater clarity regarding the remedies pursued.

A. Defining Abuse of Power in Organizational Prosecutions

Despite their many benefits for the organizations involved, critics in the press have called certain terms in DOJ agreements prosecutorial "abuses of power."[246] Rhetoric aside, abuse of prosecutorial power is a quite limited legal concept, given the scope of a prosecutor's authority and discretion. First, many perceived abuses lack a legal remedy and are permissible exercises of prosecutorial discretion. Second, other perceived abuses may lack a legal remedy but nevertheless implicate a prosecutor's ethical responsibilities.

[246] See Epstein, supra note 11. See generally also Coffee, supra note 7.

Third, only in rare cases do prosecutors so exceed their discretion that a court may provide a remedy.

First, critics in the press have attacked features of these agreements as involving abuses of power when in fact prosecutors did not violate any rights for which there is any legal redress. For example, as described, prosecutors retain substantial discretion over whether to charge defendants at all and over what charges to pursue. While I have described a striking family resemblance among the agreements to date, critics have observed some case-by-case inconsistencies that cannot be easily explained by the type of organization involved, nor by misconduct or prior compliance.[247] Some nonprosecution agreements have more onerous terms, for example, than deferred prosecution agreements, which may indicate "sweetheart deals."[248] However, prosecutors may not cite to prior compliance in the text of the agreement; we do not have all of the information that they relied upon. Even assuming outright special treatment of defendants occurred, that is consistent with the broad discretion vested in prosecutors. Only disparate treatment of protected classes or extreme cases of special treatment may be reviewed by a court. Thus, to the extent that preferential treatment in organizational cases raises a problem, it raises a serious question of prosecutorial ethics, but those affected lack a legal remedy.

Second, a range of prosecutorial actions in organizational cases implicate their ethical responsibilities. Though ethical rules typi-

[247] See Finder & McConnell, supra note 17, at 2 (attributing inconsistency to a "devolution" of DOJ authority); F. Joseph Warin & Peter E. Jaffe, The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform, White Collar Crime Litig. Rep., Sept. 2005, at 1, 1, available at http://media.gibsondunn.com/fstore/documents/pubs/WarinJaffeWCCDeferredPros0905.pdf ("[I]n Shell and Monsanto we have two blue-chip, highly regarded public companies[, and] . . . each cooperated fully with the investigations of both the DOJ and the SEC. . . . Yet one corporation walked away with the disconcerting prospect of conducting 36 months of business under the shadow of a deferred criminal information and a corporate monitor, while the other was let off with a good talking to. . . . Shell, the one admonished to 'go forth and sin no more,' admitted to a misreporting scheme that allegedly cost investors billions of dollars, while Monsanto, the one with the hammer-shaped cloud hanging over its head, admitted to a failed five-figure bribery attempt that, in the end, cost no one but itself.").

[248] Warin & Jaffe, supra note 247, at 3 (comparing the American Electric Power Inc. deferred prosecution agreement with the Symbol Technologies Inc. nonprosecution agreement and noting "the curious result that some non-prosecution agreements are quite possibly more oppressive than some deferred-prosecution agreements").

cally do not provide enforceable rules, criticism of perceived ethical breaches may gain public traction and result in prosecutors adopting new internal controls such as model guidelines. Model disciplinary rules typically forbid only prosecuting without probable cause and concealing exculpatory evidence.[249] None have suggested that prosecutors violated any such rules regarding organizational agreements. Model ethical rules chiefly provide abstract aspirational goals to "seek justice."[250]

In some contexts, however, organizations, together with other critics, have effectively protested perceived breaches of prosecutorial ethics. Using strong rhetoric, many organizations, lawyers, academics, and politicians have called securing organizational privilege waivers an abuse of power.[251] Prosecutors took the "important policy considerations" raised by critics seriously, and voluntarily restricted their pursuit of privilege waivers to limited cases raising a "legitimate" need.[252]

The agreements may, as described, severely impact the rights of individuals being prosecuted.[253] Prosecutors face few restrictions on the use of cooperating defendants, except that they may not deceive or coerce (which Judge Kaplan held the government did by applying pressure to KPMG to threaten to cut off employee legal fees[254]). Outside that situation, criminal law typically does not provide remedies to third parties collaterally affected by prosecutions. In response to outside criticism and political pressure, the DOJ revised its policies to generally prohibit rewarding refusal to pay employees' attorney's fees.[255] Nevertheless, while prosecutors may promulgate memoranda with guidelines, and while such internal

[249] See Model Code of Prof'l Responsibility DR 7-103(A) (1983).

[250] Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2001); see also Carolyn B. Ramsey, The Discretionary Power of "Public" Prosecutors in Historical Perspective, 39 Am. Crim. L. Rev. 1309, 1310–12 (2002); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 60–65 (1991).

[251] See supra text accompanying notes 9–12.

[252] See McNulty Memo, supra note 108, at 8–9.

[253] See supra Subsection I.C.2.

[254] United States v. Stein, 435 F. Supp. 2d. 330, 365 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

[255] See McNulty Memo, supra note 108, at 8–9.

guidelines provide added notice and clarity regarding their discretion, they are legally unenforceable.[256]

In other areas, the organizations themselves may not perceive any breach of ethics even when they are the only entity adversely affected. Critics have attacked four agreements that include "community service" requirements, such as funding the chair in ethics at Seton Hall Law School in the Bristol-Myers case, donating to the Coast Guard Alumni Association and funding a chair in environmental studies in the Operations Management International case, and funding environmental community service projects in the FirstEnergy Nuclear Operating Co. case.[257] The Roger Williams Medical Center agreement contained terms particularly far afield; in that case the government feared that indicting a nonprofit hospital for public corruption would jeopardize health care to the poor in Providence, Rhode Island. The deferral agreement required that the hospital provide $4 million in additional free uninsured health care to low-income residents.[258] The DOJ has articulated no principle to limit the reach of such terms. Nor is there anything unusual about those four cases making community service more appropriate than in other post-Thompson Memo agreements.

A court would be unlikely to provide any relief should a firm try to challenge such community service requirements. The Guidelines permit community service agreements, but caution against requirements not "directly related to the offense," and they prohibit "requiring a defendant to endow a chair at a university or to con-

[256] See Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 Fordham L. Rev. 1511, 1512 n.6 (2000).

[257] See Prosecutor to Corporation: Endow a Chair at My Law School, or Else, Corp. Crime Rep. (Corporate Crime Reporter, Wash., D.C.), Aug. 3, 2005, at 32, available at http://www.corporatecrimereporter.com/coffee080305.htm (quoting Professor John Coffee as saying that the Bristol-Myers Squibb agreement implicated "prosecutorial accountability" and as asking, "[s]hould a U.S. attorney exploit his leverage over a corporate defendant to compel it to do good deeds, such as creating a chair at the U.S. attorney's law school?").

[258] See Deferred Prosecution Agreement at ¶ 12–13, United States v. Roger Williams Med. Ctr., No. 06-02T (D.R.I. Jan. 27, 2006), available at http://www.usdoj.gov/usao/ri/press_release/jan2006/rwmcdef.PDF; Press Release, Office of Governor Donald L. Carcieri, State of R.I., Health Department to Renew Hospital License with Increased Oversight (Apr. 7, 2006), http://www.ri.gov/GOVERNOR/view.php?id=1697.

tribute to a local charity" in order to avoid potential abuses.[259] Yet at the charging stage, a court's hands are tied. As described in the next Section, a court cannot subtract terms from an agreement, but can only reject an entire agreement if it is grossly contrary to the goals of the Guidelines. Further, it can be difficult to conclude whether there was any overreaching. Perhaps the entity itself proposed to perform community service.[260] After all, community service creates positive publicity and imposes minimal costs on firms, and by settling, organizations avoid far more punitive terms (such as large fines).[261] No organization has challenged these terms, which could explain why courts have never rejected such agreements, even if prosecutors arguably strayed from the core Guidelines mission.

Third, some terms suggest that prosecutors may have actually exceeded the legal bounds of their broad discretion. Some terms may be unrelated to either rehabilitative or punitive ends. In the prosecution of the New York Racing Association ("NYRA"), a state-franchised operation,[262] federal prosecutors required, as part of the conditional dismissal of the criminal charges, that the NYRA install slot machines ("video lottery terminals") at its race tracks. This requirement was imposed in deference to state officials who feared that the loss of slot machine revenue at race tracks would impair their ability to comply with a ruling requiring additional school financing.[263] The settlement between state prosecutors and MCI included "a first-of-its-kind economic development agree-

[259] U.S. Sentencing Guidelines Manual § 8 B1.3 (2005).

[260] The U.S. Attorney for New Jersey has stated that the Seton Hall ethics chair was requested by Bristol-Myers, for example. See Lisa Brennan, Deferred White-Collar Prosecutions: New Terrain, Few Signposts, N.J. L.J., Apr. 11, 2006, available at http://www.law.com/jsp/article.jsp?id=1144330167949.

[261] See U.S. Sentencing Guidelines Manual § 8B1.3; Brent Fisse, Community Service as a Sanction Against Corporations, 1981 Wis. L. Rev. 970.

[262] See Press Release, U.S. Attorney's Office, E. Dist. of N.Y., U.S. Dep't of Justice, Two Former Directors of the New York Racing Association's Pari-mutuel Department Plead Guilty to Scheme to Defraud the United States (May 6, 2004), http://www.usdoj.gov/tax/usaopress/2004/txdv042004may06.htm.

[263] See James M. Odato, NYRA Deal in the Works, Albany Times Union, Dec. 6, 2003, at A1 (reporting that "Gov. George Pataki and legislative leaders are counting on the gambling hall to help balance the state budget" and projecting that the slots would generate $500 million for state coffers); see also Greenblum, supra note 17, at 1878.

ment" that MCI would add 1600 jobs over ten years in Oklahoma.[264] Critics call such unrelated obligations imposed on corporations by prosecutors "Tammany Hall politicking"; indeed, prosecutors in both cases acted solely to benefit state government by imposing conditions bearing no relationship to the alleged crimes.[265] Such terms resemble similar provisions in civil structural reform agreements under which resources are exacted from state governments for the benefit of local governments. For example, by entering into a consent decree, a local school system could obtain vast state funds to create new magnet schools.[266] Here, however, the paradigm is altered. Federal prosecutors cooperate with state or local governments to obtain financial benefits from private parties.

Such side agreements raise the question of whether prosecutors always pursue criminal law goals. Nevertheless, firms may have little interest in challenging such terms. They avoid far more punitive fines and the costs of an indictment by entering into an agreement. In cases of egregious abuses, however, I suggest in the next Section that a court might reject an agreement as incompatible with the Guidelines.

So far I have discussed possible abuses in the terms of agreements, but one could also imagine potential abuses during their implementation. We have little information about implementation. It has remained nonpublic, with the exception of two examples in which independent monitors, as noted, exerted substantial influence and detected additional malfeasance by the subject organization. Critics have cited those as examples of abuses.[267] In principle, these agreements are no different than any cooperation or probationary agreement with prosecutors in the criminal law context. Moreover, where organizations have contracted to confer broad supervisory power to independent monitors, calling such acts abuses seems difficult. Nevertheless, prosecutors have ethical responsibilities to do justice when supervising organizational compliance.

[264] Corporate Crime Reporter, Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements (2005), http://www.corporatecrimereporter.com/deferredreport.htm.

[265] See Warin & Jaffe, supra note 247, at 4.

[266] See, e.g., Missouri v. Jenkins, 515 U.S. 70, 91–92 (1995).

[267] See Epstein, supra note 11.

Finally, an organization would be severely impacted if the DOJ improvidently declared a breach and pursued an indictment. The vast majority of agreements (eighty-three percent) permit the DOJ, in its sole discretion, to find that an agreement has been breached and then pursue a prosecution. Interestingly, only two firms negotiated alternative provisions (the other four agreements without such provisions were silent). Boeing negotiated a unique provision where a Special Master, a retired federal judge, will adjudicate any alleged breach—any breach by an employee "at a level below Executive Management" is not to "be deemed to constitute conduct by Boeing."[268] BDO Seidman negotiated a provision that any declared breach must be adjudicated in proceedings the DOJ initiates before a federal district judge. One would expect more firms to have bargained for such protections against the harm of an improper indictment. Instead, most permit a unilateral DOJ finding of breach, risking the indictment and severe collateral consequences that provided the impetus for these agreements. This risk may be mitigated only somewhat by judicial review, as discussed next.

Problems of perceived, actual, and potential prosecutorial abuses all flow from the sweeping discretion of prosecutors and their ability to obtain far-reaching relief in these structural reform cases. Next, I address a series of additional questions regarding whether constraints exist on that discretion.

B. Judicial Review

In the classic structural reform model, "public law" litigation fundamentally reallocates government power and places judges as impartial power brokers in an ongoing bargaining process between citizens and government.[269] During remedial efforts, courts serve as gatekeepers, approving remedies, supervising implementation of remedies, deciding when the entity has substantially complied with constitutional mandates, and then terminating remedial decrees.

[268] Deferred Prosecution Agreement Between the United States Attorney's Offices for the Central District of California and the Eastern District of Virginia and The Boeing Company ¶¶ 10–12 (June 29, 2006), available at http://www.corporatecrimereporter.com/documents/boeing2.pdf.

[269] See Diver, supra note 66, at 64.

In structural reform prosecutions, prosecutors, not courts, assume the public law mantle. In the criminal system, courts typically remain on the sidelines except in the few cases that proceed to trial. While courts supervise structural reform when they sentence firms to probation following a conviction, before an indictment the role of courts remains circumscribed. In Judge Gerard E. Lynch's terms, the criminal system in practice operates as "an administrative system" in which almost all cases are resolved in plea bargaining based on the prosecutor's internal procedures and standards, "in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker."[270]

In many respects, structural reform by prosecutors in the criminal law setting should be far less troubling than civil structural reform before a judicial decisionmaker. The chief criticism raised in civil structural reform was that unaccountable private parties sought to reform institutions under the aegis of unaccountable courts.[271] Indeed, critics argued that separation of powers principles demand that courts abstain from exercising "traditionally executive functions," and that structural reform instead come from the political branches.[272] Structural reform prosecutions answer those criticisms. Except in a few cases, the subjects of structural reform prosecutions are private firms, not government entities. Prosecutors are executive actors and politically accountable. For that reason, they receive substantial separation of powers deference. This is not to say deference is always justified; in practice, federal prosecutors are not wholly accountable to the central DOJ but maintain real independence, including in the organizational crime context.[273]

Though both the litigants and the institutional targets are very different from those in civil cases, structural reform prosecutions raise similar challenges in that they rely on the same broad remedial tools. Institutional remedies raise a raft of difficult practical and policy questions regarding their scope, cost, duration, detail,

[270] Gerard E. Lynch, Screening Versus Plea Bargaining: Exactly What Are We Trading Off?, 55 Stan. L. Rev. 1399, 1404 (2003).

[271] See Mishkin, supra note 85, at 971; Yoo, supra note 85, at 1124.

[272] Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 662 (1978); see also Fletcher, supra note 71, at 636–37 (arguing that political intervention by courts should only occur where an entity is "seriously and chronically in default").

[273] See supra text accompanying note 171.

implementation, role for experts, reporting, effects on third parties, degree of participation by third parties, and alterations when conditions change.[274] Critics of civil interventions typically called, not for an end to reform, but for stricter and principled limits to judicial discretion.[275] In turn, civil courts fashioned such remedial limits.[276] In the school desegregation context, for example, the Supreme Court developed a three-part test requiring a court to (1) consider the nature and scope of the constitutional violation, (2) impose the least restrictive injunctions to restore victims to the position they would have been in absent unconstitutional acts, and (3) take account of administrative prerogatives of state and local authorities.[277] Some argue the Court went too far in hampering remedies for constitutional violations, while others argue the Court did not go far enough.[278]

In the criminal context, though problems of federalism or legitimacy of judicial discretion are not implicated, the complications just discussed arise precisely because prosecutors have almost unlimited discretion. Courts do review actions of prosecutors, despite substantial separation of powers deference, in order to protect rights of criminal defendants from prosecutorial zeal, but judicial review remains highly limited except in unusual cases. The uncertain existence of meaningful limits on structural reform prosecutions raises substantial questions for future scholarship. Here, I look more closely at what stages actors might consider or reject such limits by looking at the roles of courts, prosecutors, legislators, and organizations regarding (1) the approval, (2) the implementation, and (3) the termination of structural reform agreements. Where judicial review can play only a very limited role given separation of powers deference, absent legislative intervention and so long as the DOJ pursues remedies at the charging stage, I conclude the DOJ will chiefly define the development of structural reform prosecutions.

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[274] See supra Section I.B.

[275] See, e.g., Yoo, supra note 85, at 1171–73.

[276] See Missouri v. Jenkins, 515 U.S. 70 (1995); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991); Milliken v. Bradley, 433 U.S. 267, 282 (1977); see also Fed. R. Civ. P. 60(b) (permitting a court to relieve a party of a judgment if "it is no longer equitable that the judgment should have prospective application").

[277] See *Milliken*, 433 U.S. at 280–81.

[278] See supra notes 71–72, 84–85 and accompanying text.

1. Approval

Courts have not intervened at the approval stage during which the parties negotiate and agree on the terms of a structural reform prosecution agreement. Perhaps, even at the charging stage of a criminal case, a federal judge need not accept a "fait accompli" deferral agreement.[279] None have suggested how judges can review such charging decisions. However, the U.S. Code provides that courts must review deferred prosecution agreements and approve any deferral.[280] There is no case law interpreting that provision. There is no commentary on it. Every judge approving a deferred prosecution agreement has done so without any published rulings or modifications to the agreement.

Perhaps that has been due to institutional limits on a court's capacity to evaluate deferred prosecution agreements dealing with complex governance matters. A court is in the position of reviewing a complex agreement already reached. A court can only reject the entire agreement; the U.S. Code does not (clearly, at least) provide any power to modify a proposed diversion. At the charging stage, as noted, prosecutorial decisions receive a "presumption of regularity."[281] Similarly, in the plea agreement context, federal courts scrutinize agreements not only for several reasons noted, including voluntariness, factual basis, and fairness, but also to see whether they comply with the "public interest" or conflict with the purposes of the Guidelines.[282] However, such criteria are "difficult to enforce," and courts rarely reject an agreement unless defendants were denied minimally adequate procedural protections or there was a gross departure from prosecutorial discretion.[283]

[279] See Greenblum, supra note 17, at 1864.

[280] See 18 U.S.C § 3161(h)(2) (2000) (stating that the time to file an indictment is tolled during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct").

[281] United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14–15 (1926)).

[282] See supra Subsection I.C.1.

[283] See Abraham S. Goldstein, The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea 9 (1981). Just as in civil cases, where appellate courts face great difficulties reviewing discretionary decrees in institutional cases, courts here may only intervene given clear violations of legal rules. See Fletcher, supra note 71, at 661–63.

Organizational defendants, while highly unlikely to sign an agreement involuntarily, may enter into an agreement that grossly departs from the purposes of the Guidelines. The Guidelines, as noted, are far more demanding than many organizational agreements. They include seven detailed criteria for what constitutes an "effective" compliance program[284] that make clear an organization must develop ways to cure systemic shortcomings.[285] Still more demanding, the Guidelines require that a company remain vigilant in its problem solving and "evaluate periodically the effectiveness of the organization's compliance and ethics program."[286] An organization must "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[287] Courts consider best practices in an industry and take into account the size of an organization.[288] While courts now apply these demanding Guidelines at the sentencing stage[289] and when ordering compliance programs during probation,[290] in such cases the organi-

[284] See U.S. Sentencing Guidelines Manual § 8B2.1 (2005) (requiring that an organization (1) "establish standards and procedures to prevent and detect criminal conduct," (2) ensure its governing authority and high-level personnel oversee an effective compliance program, delegating specific individuals to implement it and report on its progress, (3) exclude from positions of authority persons involved in illegality, (4) conduct effective training on the compliance and ethics program, (5) use monitoring and auditing to detect criminal conduct and to evaluate the effectiveness of the compliance program and create avenues for confidential reporting of malfeasance, (6) discipline failures to comply, and (7) after criminality is detected, take reasonable steps to respond and modify the compliance program).

[285] See U.S. Sentencing Guidelines Manual § 8B2.1 cmt. nn.2–5.

[286] Id. § 8B2.1(b)(5)(B).

[287] Id. § 8B2.1(a)(2).

[288] See id. § 8B2.1 cmt. n.2(A).

[289] Few courts have thus far given credit to organizations for having effective compliance programs (only 0.4% of 812 organizations sentenced from 1993 to 2001). See Ad Hoc Committee Report, supra note 158, at 26. Part of the reason may be that most companies sentenced had fifty or fewer employees and thus were small enough that a high-level person engaged in or approved of the criminal offense (66.4% had 50 or fewer, 27.5 % had 10 or fewer, and only 7.4% had 1000 or more). Id. However, a fair number of cases (40%) did involve mitigation for cooperation with the government. See 2003 Sourcebook of Federal Sentencing Statistics, supra note 144, at 108 tbl.54.

[290] See Dellastatious v. Williams, 242 F.3d 191, 196 (4th Cir. 2001) (stating directors may avoid derivative liability if they demonstrate "an adequate corporate information-gathering and reporting system"); McCall v. Scott, 239 F.3d 808, 819–20 (6th. Cir. 2001) (stating that "inaction" and failure to implement compliance programs in the face of "red flags" supports liability); In re Caremark Int'l Derivative Litig., 698 A.2d

zation was convicted and is legitimately subject to punitive sentencing conditions.

Absent a conviction, the Guidelines do not squarely apply and judicial intervention will be highly deferential. Courts would likely presume the agreement is proper or conduct a "reasonableness" inquiry, as they do when reviewing whether plea agreements comport with the broad goals of the Guidelines.[291] Applying such deferential review, a court would likely reject only a highly atypical, egregiously nonconforming agreement and would routinely approve the rest without hesitation. Most agreements will generally serve the compliance goals of the Guidelines, even if some of their specific terms do not. Imposing substantial, unrelated obligations on an organization might deserve judicial intervention.[292] Yet if the organization itself does not protest, a court would be unlikely to act. Further, the U.S. Code does not provide for review of nonprosecution agreements. Should courts start to more rigorously review deferral agreements, the DOJ could merely secure nonprosecution agreements rather than deferred prosecution agreements.

Deferential judicial review would also likely prove of little use in protecting nondefendant third parties, such as current and former employees, who face individual prosecutions and are negatively impacted by the firm's cooperation with the DOJ.[293] In the KPMG case, the District Court offered individual employees only the rem-

959, 969 (Del. Ch. 1996) (noting that because the Guidelines offer "powerful incentives for corporations today to have in place compliance programs to detect violations of law," failure to implement compliance systems supports derivative liability).

[291] One court has evaluated the reasonableness of a plea agreement with a corporate defendant that included substantial compliance and remedial measures, approving it with reference to the Organizational Sentencing Guidelines. See United States v. C.R. Bard, Inc., 848 F. Supp. 287 (D. Mass. 1994).

[292] Perhaps if an agreement almost exclusively contained overreaching community service terms a court could intervene, given that the Guidelines caution against imposing community service not "directly related" to the offense. Now that the Guidelines commentary no longer suggests that privilege waiver supports a reduction, courts may also consider whether terms requiring privilege waivers support the purposes of the Guidelines. See News Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids (Apr. 11, 2006), http://www.ussc.gov/PRESS/rel0406.htm.

[293] See Mark Hamblett, Judge: Evidence Shows Government Influenced KPMG's Defense Fees Policy, N.Y. L.J., May 12, 2006, available at http://www.law.com/jsp/article.jsp?id=1147338329237.

edy of a civil suit for legal fees.[294] The court did not consider the rights of those employees when it approved the KPMG deferred prosecution agreement in the first place. Nor would doing so necessarily be practicable; it might require consolidated hearings including individual and organizational defendants.[295] Such hearings could turn into prolonged multipolar disputes, and courts do not typically permit third parties to intervene in criminal matters. When former employees challenged the KPMG agreement (only after it was terminated), the court permitted them to file motions as amicus curiae, but ruled they lacked standing to object; regardless, the court ruled that prosecutors retain exceedingly broad discretion to terminate a prosecution.[296]

If Congress is concerned about prosecutorial discretion in shaping structural reform remedies, legislation could provide for enhanced judicial review. Alternatively, legislation could focus on the DOJ's relationship with industry and the public, requiring an opportunity for public notice and comment as some agencies must currently provide before entering into consent decrees.[297] No such proposals have been made.

2. Implementation

Courts are also unlikely to play any role during the implementation of structural reform agreements. The DOJ chose not to pursue alternative approaches such as civil consent decrees or corporate probation, which heavily involve courts in policing the implementation process and settling disputes. Where the parties agree to a structural reform remedy that leaves courts out of the project, the only mechanism for judicial oversight would be for judges to insist

[294] United States v. Stein, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006), appeal docketed, No. 06-4358 (2d Cir. Sept. 19, 2006).

[295] A court could perhaps, pursuant to its inherent authority to consolidate cases, enter joint rulings on narrow legal issues raised by the limited group of parties also being criminally prosecuted for the same underlying conduct. See Section II.A. In contrast, I find it highly unrealistic, as one author suggests, that courts broadly serve as a "fiduciary for constituencies otherwise unrepresented in the corporate deferral process and potentially vulnerable to negative externalities." See Greenblum, supra note 17, at 1901.

[296] See United States v. KPMG LLP, No. 1:05-CR-00903-LAP, 2007 WL 541956 (S.D.N.Y. Feb. 14, 2007).

[297] See supra note 136 and accompanying text.

that a deferral not be approved in the first instance absent periodic reports to the court regarding the progress of compliance. Such an occurrence seems highly unlikely given that judges would have to reach out to assume a supervisory role not sought by the parties and in areas regarding organizational governance.

The U.S. Code provision requiring that the court approve a deferral, though intended to "strengthen[] the supervision over persons released pending trial,"[298] does not clearly provide the sort of supervisory power that courts have under the Guidelines at the probation stage after a conviction. If Congress intended to provide for supervision over pre-trial diversion, it could pass a statute to that effect.

Absent such interventions, prosecutors will supervise implementation of these agreements, a difficult task for which they may lack institutional competence. For that reason prosecutors understandably appear to rely heavily on independent monitors, just as a court would, to structure compliance programs and audit performance. The criminal law context raises special challenges for independent monitors, however, that are worth further exploration, just as scholars have explored challenges facing civil monitors.[299] The DOJ has selected former regulators and former corporate crime prosecutors to serve as independent monitors.[300] Those credentials nevertheless may not always prepare a monitor for the work of reconstituting a compliance program, even if they have such experience. While internal groups might welcome a monitor to eradicate criminality, an outside monitor could have difficulty obtaining cooperation or even information. Internal groups can mislead a monitor and disguise criminality.[301] Gatekeepers such as auditors

[298] See H.R. Rep. No. 93-1508, at 1 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7401, 7401.

[299] See Lloyd C. Anderson, Implementation of Consent Decrees in Structural Reform Litigation, 1986 U. Ill. L. Rev. 725, 732–35 (1986) (describing roles of independent monitors in civil structural remedies); Note, "Mastering" Intervention in Prisons, 88 Yale L.J. 1062, 1063–68 (1979) (exploring use of "masters" in prison reform litigation).

[300] A similar development has occurred with the rise in the retention of independent private sector inspectors general, often former prosecutors, by government to prevent fraud in contracting and by private firms conducting internal investigations. See James B. Jacobs & Ron Goldstock, Monitors & IPSIGS: Emergence of a New Criminal Justice Role, Crim. L. Bull., Mar.–Apr. 2007.

[301] See id.

and lawyers may already have failed to detect employee malfeasance or contributed to failures to properly supervise compliance.[302] If they face resistance, monitors may need more time to achieve deep changes than many short-lived agreements provide.[303] One monitor has uncovered substantial new criminality in an organization, which could result in additional individual prosecutions but perhaps also complicates the compliance process.[304] Another, at Bristol-Myers Squibb, recently recommended that the CEO be dismissed. The board did so, but a new investigation is now ongoing regarding new criminality uncovered.[305] Given difficulties in quickly achieving reform, prosecutors may require more sustained interventions. Indeed, prosecutors might themselves seek out judicial involvement and supervision of the type that provided an important buttress in civil RICO prosecutions. While courts may not have any more expertise, they would have authority to modify the terms of supervision and perhaps better adapt reform to changed circumstances.

3. Termination

A final occasion where courts may become involved is at the back end, if disputes arise where the DOJ unilaterally terminates an agreement. Federal courts already conduct analogous review in individual cases where the defendant made promises in exchange for a plea agreement, asking whether the government acted in "good faith" and "lived up to its end of the bargain."[306] Almost all

[302] See John C. Coffee, Jr., What Caused Enron? A Capsule Social and Economic History of the 1990s, 89 Cornell L. Rev. 269, 287–97 (2004).

[303] See Jill Nawrocki, Home Improvement, Corp. Governance, Apr. 2006, at 90, 95, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1146560723743 (describing the sustained efforts of the Computer Associates' General Counsel to "weave the [DP] agreement's principles into the fabric of the company").

[304] See Troy Graham & Jennifer Moroz, UMDNJ Monitor Says Fraud, Failures Now Up to $243 Million, Phila. Inquirer, July 21, 2006, at B01 (describing how the monitor's investigation of the University of Medicine and Dentistry of New Jersey led to the resignation of the Dean and the firing of an Associate Dean, and uncovered $243 million in mismanagement and $35 million in potential Medicare fraud).

[305] See Saul, supra note 177.

[306] United States v. Leonard, 50 F.3d 1152, 1157 (2d Cir. 1995) (quoting United States v. Knights, 968 F.2d 1483, 1486–87 (2d Cir. 1992)). This issue arises where the government promises to move for a downward departure for "substantial assistance" under § 5K1.1 of the Sentencing Guidelines, but later decides it did not receive such

of the deferred and nonprosecution agreements contain provisions in which the DOJ can unilaterally assert a breach, terminate the agreement, and then pursue a criminal prosecution of the organization. The DOJ can then typically take full advantage of all of the admissions of criminal wrongdoing contained in the agreement, making indictment and conviction all but certain. Despite those stringent terms, federal courts hold that due process prevents the government from "unilaterally determining" that a defendant breached an agreement not to prosecute and that prosecutors "must obtain a judicial determination of the defendant's breach."[307] Nevertheless, as I will describe, organizations may still face severe harm.

Federal courts developed standards grounded in contract law to interpret immunity, cooperation, and plea agreements, mostly in cases involving individual defendants. Under contract law principles, the government is not entitled to rescission if the defendant had substantially performed.[308] If "nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance," then the government "is not entitled to rescission."[309] Conversely, defendants are entitled to the benefit

assistance and does not make the § 5K1.1 motion. Other courts of appeals either adopt a more deferential review, see, e.g., United States v. Garcia-Bonilla, 11 F.3d 45, 47 (5th Cir. 1993) (government refusal to file § 5K1.1 motion not reviewable absent unconstitutional motive), or an intermediate rationality review approach, see, e.g., United States v. Pipes, 125 F.3d 638 (8th Cir. 1997); United States v. Copeland, No. 96-6043, 1997 WL 563141 (4th Cir. Sept. 11, 1997).

[307] United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998); accord United States v. Miller, 406 F.3d 323, 334 (5th Cir. 2005) ("In the context of non-prosecution agreements the government is prevented by due process considerations from unilaterally determining that a defendant is in breach and nullifying the agreement."); United States v. Castaneda, 162 F.3d 832, 835–36 (5th Cir. 1998); United States v. Ataya, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) ("A pre-indictment hearing would help prevent overreaching by prosecutors . . . in the drafting of ambiguous plea agreements . . . ."); United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986).

[308] See, e.g., Ricketts v. Adamson, 483 U.S. 1, 9 (1987); United States v. Crawford, 20 F.3d 933, 935 (8th Cir. 1994); United States v. Tilley, 964 F.2d 66, 71 (1st Cir. 1991); United States v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988); *Verrusio*, 803 F.2d at 888.

[309] *Castaneda*, 162 F.3d at 838 (quoting White Hawk Ranch v. Hopkins, No. CIVA.91-CV29-DD, 1998 WL 94830, at *3 (N.D. Miss. Feb 12, 1998)); accord, e.g., United States v. Riggs, 287 F.3d 221 (1st Cir. 2002); *Crawford*, 20 F.3d at 933; Rodriguez v. New Mexico, 12 F.3d 175 (10th Cir. 1993); United States v. Fitch, 964 F.2d 571 (6th Cir. 1992).

of the bargain and may try to demonstrate that the government did not substantially perform.[310]

This inquiry is similar to that in civil consent decrees, where the Supreme Court ruled that courts should craft injunctions within "appropriate limits" to be dissolved after local compliance "for a reasonable period of time,"[311] and that consent decrees may be terminated in stages.[312] A federal court has the equitable discretion to modify a prospective judgment or a consent decree to take account of changed circumstances.[313] A consent decree is treated as a contract in that its terms are interpreted using contract principles, based on its text and, if ambiguous, based on extrinsic sources such as the intent of the parties when they entered the bargain.[314]

Those standards apply in the criminal context but not in the same manner, due to separation of powers in the form of deference to prosecutors. In one example, a federal court recently intervened

[310] See, e.g., Santobello v. New York, 404 U.S. 257, 262 (1971) (holding defendant entitled to enforcement of bargained-for plea agreement); United States v. Hodge, 412 F.3d 479, 485 (3d Cir. 2005); United States v. Nolan-Cooper, 155 F.3d 221, 236 (3d Cir. 1998); United States v. Price, 95 F.3d 364, 367 (5th Cir. 1996); United States v. Badaracco, 954 F.2d 928, 939 (3d Cir. 1992) (asking "'whether the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty'" (quoting United States v. Nelson, 837 F.2d 1519, 1522 (11th Cir. 1988))).

[311] Bd. of Educ. v. Dowell, 498 U.S. 237, 247–48 (1991); accord Missouri v. Jenkins, 515 U.S. 70 (1995); Milliken v. Bradley, 433 U.S. 267 (1977); see also Fed. R. Civ. P. 60(b) (permitting a court to relieve a party of a judgment if "it is no longer equitable that the judgment should have prospective application").

[312] See Freeman v. Pitts, 503 U.S. 467, 490–91 (1992); cf. Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004) ("[A] federal consent decree must . . . further the objectives of the law upon which the complaint was based."); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (holding that a consent decree may provide "broader relief than the court could have awarded after a trial").

[313] See *Local No. 93*, 478 U.S. at 526–27; see also Fed. R. Civ. P. 60(b). The Court also noted in *Frew* that Rule 60(b)(5) "encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances." 540 U.S. at 441–42. Similarly, in *Rufo v. Inmates of Suffolk County Jail*, the Court held that district courts should apply a flexible standard to the modification of institutional reform consent decrees. 502 U.S. 367, 392 n.14 (1992).

[314] See *Local No. 93*, 478 U.S. at 522; United States v. I.T.T. Continental Baking Co., 420 U.S. 223, 238 (1975) ("Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree."); see also Anderson, supra note 299, at 726.

to enjoin prosecution of the Stolt-Nielsen company, a supplier of parcel tanker shipping services, after the DOJ unilaterally found a breach in the corporation's cooperation under the DOJ Antitrust Division's Corporate Leniency Program. The court explained:

> When it entered into the agreement, DOJ never intended to prosecute SNTG [Stolt-Nielsen Transportation Group]. Its goals were to pursue SNTG's co-conspirators and to break up the conspiracy. It got what it had bargained for in the agreement. SNTG's partners in the conspiracy were prosecuted and convicted, and the conspiracy has been terminated.

The court then enjoined any future prosecution.[315] The United States Court of Appeals for the Third Circuit, however, reversed, ruling that the court could not enjoin a prosecution but that the company could raise the defense post-indictment.[316] Only the Seventh Circuit counsels pre-indictment relief.[317] Thus, an organization that substantially complied with an agreement might nevertheless face the very threat of indictment that caused it to settle in the first place.

Absent pre-indictment judicial remedies, the DOJ decides whether an organization has substantially complied, yet it has never defined how its prosecutors measure compliance. The DOJ

[315] Stolt-Nielsen, S.A. v. United States, 352 F. Supp. 2d 553, 562–63 (E.D. Pa. 2005).

[316] See Stolt-Nielson, S.A. v. United States, 442 F.3d 177, 187 (3d Cir. 2006). The Supreme Court denied certiorari. Stolt-Nielsen, S.A. v. United States, 127 S. Ct. 494 (2006). The U.S. Chamber of Commerce and others as amici urged the Court to rule that an agreement could be specifically enforced and the prosecution enjoined. Perhaps the corporation could have sought a declaratory judgment stating that it did not breach. See *Stolt-Nielsen*, 442 F.3d at 184–85 (collecting authority).

[317] The Seventh Circuit recommends pre-indictment hearings, see United States v. Meyer, 157 F.3d 1067, 1076–77 (7th Cir. 1998), while the Third Circuit, along with others, holds that pre-trial determinations are not required. See *Stolt-Nielsen*, 442 F.3d at 184; United States v. Bailey, 34 F.3d 683, 690–91 (8th Cir. 1994); United States v. Bird, 709 F.2d 388, 392 (5th Cir. 1983). But see United States v. Ataya, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988); United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986) (holding that the preferred procedure, "absent exigent circumstances," is for the government to seek a hearing pre-indictment to seek relief from an agreement). The Seventh Circuit's approach seems appropriate given due process requirements and the great harm of improper indictments. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (stating that the pre-deprivation hearing is the "root requirement" of due process (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971))).

could have adopted the Guidelines definitions providing a detailed seven-part test to evaluate whether compliance is "effective."[318] Lacking such a standard, it is not clear whether or how anyone determines whether there has been full, partial, or no compliance. The agreements specify that while obligations to cooperate continue indefinitely, formal DOJ supervision terminates after eighteen months to three years, without any evaluation of success, and with only the extreme provision that the DOJ may unilaterally find a breach and terminate the agreement. Further, the process remains nonpublic, so outsiders cannot assess compliance nor whether these DOJ efforts are effective.

Where organizations may only be able to raise a defense of "substantial compliance" after an indictment, the threat of improper termination remains severe and ill defined. Only the DOJ can provide clearer notice of its compliance goals, unless organizations negotiate for additional specificity in the terms of agreements, courts provide pre-indictment remedies, or Congress intervenes.

C. Rethinking Remedies for Organizational Crime

Understanding the current organizational prosecution regime as a structural reform regime and making that new approach explicit, as I have done in this Article, raises a series of problems for future work that extends far beyond the traditional critiques of organizational criminal law. In the past, scholars focused on the need to narrow the open-textured, underlying federal substantive law for which organizations may be prosecuted, together with the sweeping respondeat superior standard.[319] Scholars have advocated two solutions for the problem of broad prosecutorial discretion in organizational cases: that prosecutors voluntarily constrain their own discretion, or that judges narrow federal organizational criminal law. Structural reform prosecutors then add an additional layer of problems relating to the choice of what remedies are negotiated

[318] See U.S. Sentencing Guidelines Manual § 8B2.1 (2005). Courts also already rely on compliance experts to define what reforms are reasonably effective to "reduce the likelihood of future criminal conduct." Id. § 8D1.1(a)(6).

[319] See, e.g., Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 717 (2005); William Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 519–20, 531 (2001); see also supra notes 106, 109.

between organizations and prosecutors, which, as discussed, courts currently will review only at the margins. Below I outline a series of additional issues that arise once we understand that prosecutors have adopted a structural reform approach. I discuss here both issues for exploration in future scholarship, and also the problems these remedies raise for prosecutors, courts, legislators, industry, and compliance experts.

Judge Gerard E. Lynch, Professor Daniel Richman, and others argue that prosecutorial self-regulation of discretion offers the most practical means for allocating enforcement resources and is the approach that best fits our constitutional and political system.[320] While under the typical account prosecutors push for high-profile convictions and expansive interpretations of federal criminal law in order to advance their institutional interests,[321] these commentators instead argue that prosecutors will often narrow their focus and create standards to provide notice and better deter wrongdoers. However, structural reform prosecutions raise complex questions where though the DOJ has limited its prosecutors' discretion, it has done so in a different and novel way that raises a new kind of uncertainty. Rather than choosing to provide notice of what criminal provisions deserve certain punishments, the DOJ has begun to elaborate a set of explicit charging guidelines, now limited in response to political pressure and advocacy from organizations. I have described how the DOJ has also implicitly adopted a range of remedial principles to govern the content of agreements entered into and the compliance process under those agreements. The scope of the DOJ's remedial discretion raises a series of additional unexplored issues.

First, structural interventions remain highly contextual. While the agreements themselves provide some clarity once their terms are compared, a set of DOJ guidelines describing the terms to be

[320] See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1969); Lynch, supra note 206; Lynch, supra note 106; Richman, supra note 194; see also Buell, supra note 103, at 535–36 (arguing prosecutors should restrict charging to corporations for whom reputational sanctions would appropriately deter); Laufer, supra note 99, at 1350 (calling for "significant constraint of prosecutorial discretion").

[321] Individual U.S. Attorneys may do so not just for internal rewards, but also for political gain and publicity. See Kahan, supra note 110, at 487 n.105 (citing Daniel R. Fischel, Payback 98–127 (1995)); see also James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 230–31 (1978).

pursued in agreements would be an improvement. Even this, however, may not provide sufficient notice of how the agreements will be implemented by a local U.S. Attorney's Office in the context of a particular organization over a period of many years. Much of the work in their implementation remains nonpublic and may be particularly geared towards the unique problems an institution faces. Nor has the DOJ asserted any central review over the content of organizational agreements. The DOJ has not publicly reviewed the efficacy of its agreements, nor has it promulgated internal guidelines to guide the content of these agreements; the approach has emerged through ad hoc efforts and replication of other U.S. Attorneys' and agencies' efforts. Future research could ask whether prosecutors provide sufficient guidance and notice regarding their remedial approach and whether prosecutors, over time, continue to proceed ad hoc or produce a more clearly defined set of best practices.

A related problem is the exercise of prosecutorial discretion regarding individual employees of target organizations. An organizational employer is no ordinary cooperator, and the criminal procedure rights of employees when the forces of the government and an organization are arrayed against them will continue to deserve careful study. A separate question will be whether ongoing individual prosecutions hamper or distract from efforts to implement structural reform.

Second, structural reform prosecutions also complicate the relationship between substantive law and organizational punishment. Scholars have observed that courts rarely ensure that underlying substantive criminal statutes are interpreted narrowly or that vagueness is eliminated, in part due to separation of powers deference.[322] Congress continues to pass an increasing number of broad, ill-defined statutes.[323] Where courts do not narrow the meaning of such statutes, prosecutors fix their meaning in practice, so that in effect the legislature has delegated common law crime-making au-

[322] See, e.g., Jeffries, supra note 20, at 244–45 (describing the demise of strict construction of criminal statutes); Kahan, supra note 20, at 353.

[323] See Lynch, supra note 206, at 2137–38; Richman, supra note 194, at 763–65; William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 66–76 (1997); cf. Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269 (1998).

thority to prosecutors.[324] Structural reform prosecutions raise a set of still more complex problems because their remedies are not closely tied to the already often broad and vague underlying substantive law. As arm's-length deferral agreements, they need only accomplish the general purposes of that underlying substantive law and the Sentencing Guidelines. The possibilities for effectual judicial review of structural reform agreements remain highly limited; courts may only exclude flagrant abuses to define the broad outer reaches of permissible agreements. An issue for future exploration is whether courts can help define what constitutes substantial compliance and clarify a set of best compliance practices. An important issue for the courts and Congress will be whether pre-indictment relief should be provided if prosecutors do violate due process and unilaterally declare a breach of an agreement. Also worth further exploration is the extent to which Congress could enact a range of reforms, including (1) narrowing the underlying substantive law applicable to organizations, (2) altering the respondeat superior standards that create such broad exposure, and (3) mitigating the collateral consequences of an indictment or conviction.

Third, the possibility for the emergence of best practices should also be explored. In civil structural reform cases, one benefit that scholars observed is that despite ad hoc efforts at first, over time remedial law developed a clarity not found in the underlying constitutional law, providing a set of best practices and notice to all sides. This often occurred over decades, due to a converging recognition that certain remedies were effective. Whether evolution of a clear body of remedies in the area of organizational crime can occur may remain an open question for some time. A related and very difficult question for future scholarship will be the efficacy of these compliance remedies. Given uncertainty regarding the effectiveness of these various compliance programs, it is far from clear whether structural reform prosecutions have produced or will produce the sought-after compliance. The DOJ makes no public effort to test whether structural reform remedies succeed in obtaining compliance or whether other remedies should be used instead. No public effort is being made to measure the effectiveness of these reform efforts.

[324] See Kahan, supra note 110, at 484–85.

Fourth, the role of industry and political pressure on prosecutors should be explored further. Organizations themselves may produce greater clarity by insisting on more detailed agreements, based on the experience of others in industry. Organizations may evaluate the effectiveness of these remedies and develop industry practices. We can be confident that industry will continue to exercise significant political clout to affect the formal and informal rules governing these prosecutions. Already organizations and business groups have successfully lobbied for changes in DOJ practices. Over time, if prosecutors exercise essentially unconstrained choices of what remedies to impose, organizations might demand or receive remedial clarity, concessions in individual cases, regulatory change, or legislation. Indeed, Congress is considering legislation regarding privilege waivers and could legislate regarding other terms in these agreements.

Fifth, the role of independent monitors and compliance experts is worth evaluating. These monitors may come to have substantial influence based on their experience shaping the implementation of these agreements. Perhaps informal exchange of information amongst independent monitors, prosecutors, regulators, and industry experts will, over time, create a narrowed set of accepted best remedial practices.

Finally, I underscore again that prosecutors retain fundamentally broad discretion. Even if constrained by judicial or legislative or internal limits on structural reform settlements, prosecutors can always choose not to settle but rather to pursue a conviction. Unless prosecutors cease to prosecute organizations entirely, all future scholarly, judicial, regulatory, or legislative efforts to rethink or clarify structural settlements must be understood in the context of organizations bargaining under the long shadow of the threat of indictment. Prosecutors have limited resources and remain politically accountable, whereas the large organizations affected often have substantial resources and political influence. Nevertheless, prosecutors retain a giant stick—the ability to indict—and unless the nature of that deterrent changes, prosecutors will remain the key to the success or failure of structural reform prosecutions.

CONCLUSION

In its sheer novelty, the rise of structural reform prosecution calls into question the traditional civil rights-centric view of structural reform. While Owen Fiss wrote that "[t]he structural injunction received its most authoritative formulation in civil rights cases,"[325] now it receives a reformulation in criminal law. This illuminates not only the continuing vitality of the structural reform model, but also how the challenges faced during decades of civil structural reform efforts acquire new relevance today in the area of organizational criminality. Structural reform litigation engendered an important literature regarding legitimacy and efficacy of such interventions by federal courts. Now that prosecutors have harnessed powerful civil institutional reform tools, similar questions should be asked again in the criminal context.

The move towards a structural reform approach is, in my view, the most important development in decades in the law of organizational crime. Federal prosecutors have stepped far outside of their traditional role of obtaining convictions, and, in doing so, seek to reshape the governance of leading corporations, public entities, and ultimately entire industries. This development has gone largely unexamined. To show the range of alternative approaches for structural reform prosecutions, I framed structural reform remedies at four stages of the criminal process, each with mounting judicial involvement, together with parallel civil remedies. The DOJ adopted a strategy to accomplish ambitious structural reform at the charging stage alone, and for an important reason: to avoid the collateral consequences of an indictment. My empirical study of the DOJ agreements' terms illuminates a consistent compliance-based approach. These results provide clearer notice to organizations and counsel.

Nevertheless, the DOJ exercises substantial discretion in its charging decisions that remains essentially unreviewed by courts, except at the margins during the approval and termination stages. The DOJ has also declined to provide guidelines on what remedies prosecutors should seek and what constitutes compliance with their agreements. Perhaps predictably, one result of this wide discretion has been some perceived overreaching, which, though mostly un-

[325] Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965, 965 (1993).

reviewable by a court, has already in two discrete respects (relating to privilege waiver and employer-funded attorney's fees) been addressed through the political process.

Structural reform prosecutions place the focus not on prosecutorial discretion to charge, indict, or convict, but rather on supervision of practical efforts to reform institutions. In the civil structural reform context, consensus often developed over time regarding a set of accepted and effective remedial practices. The advent of structural reform prosecutions raises a host of new problems of remedial design regarding the use of criminal prosecutions to rehabilitate organizations. My empirical study describing the DOJ's approach can serve as a foundation for future work investigating those important questions. The DOJ chose to pursue structural reform at the charging stage for several reasons, including the underlying substantive law, the scope of their prosecutorial discretion, the nature of judicial review, and the unique dynamics of prosecuting large organizations. That strategy then defined the resulting body of ambitious structural reform undertakings on a scale never before attempted. Now that this structural reform approach has taken hold, however, prosecutors, scholars, and other actors should make sustained efforts to assess its efficacy and delimit its scope. At minimum, such efforts could clarify the relationships between courts, Congress, prosecutors, administrative agencies, and organizations. Federal organizational criminal law would then itself benefit from a much-needed structural reform.

Appendix A: Chart of Post-Thompson Memo Deferred and Nonprosecution Agreements (Jan. 20, 2003–Jan. 2007)[326]

Organization (U.S. Atty's Office) (date of agreement)	NP or DP[327]	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Adelphia Communications (S.D.N.Y.) (May 2005)	NP	Sec. fraud	No	No	None cited
AEP Energy Services (S.D. Ohio) (Jan. 2005)	DP	Fraud (commodities reports)	No	No	None cited
American Int'l Group (W.D. Pa., DOJ Fraud Section) (Nov. 30, 2004)	DP	Sec. fraud	Yes, chosen by DOJ, SEC, and AIG as part of separate SEC agreement	No	None cited
AOL (E.D. Va., DOJ Criminal Div.) (Dec. 2004)	DP	Sec. fraud	Yes: 1 yr, agreed upon by DOJ, SEC, and AOL	Yes: new policies, including future reporting to the DOJ of any substantial, credible evidence of new federal crimes	None cited

[326] A note on methodology: the charts in Appendices A and B were compiled from the DOJ website and U.S. Attorneys' Offices ("USAO") websites, where the full texts of deferred and nonprosecution agreements since 2003 have been publicly posted. See Office of the Deputy Attorney Gen., Significant Criminal Cases and Charging Documents, http://www.usdoj.gov/dag/cftf/cases.htm (last visited May 11, 2007). I have used news searches and have not found reports of agreements entered into that have not had their terms made public. However, I am not confident that I have included all of the pre-Thompson Memo prosecution agreements because not all agreements from the 1990s have been made public or are posted on DOJ websites. I have, whenever possible, reconstructed their terms using available news sources. Details regarding parallel SEC, IRS, and other federal agency agreements were confirmed in press releases on those agencies' websites.

For ease of reading, the table has been split across two pages. Half of the columns relating to each agreement appear on the facing page. For a printable version of the charts, see http://virginialawreview.org/inbrief/2007/06/18/appendices.pdf.

[327] Nonprosecution (NP) or deferred prosecution (DP).

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Adelphia Communica-tions	No	No	SEC, USPIS	$715M restitu-tion	2 years	Yes
AEP Energy Services	No	Yes	None	$30M fine	15 months	Yes
American Int'l Group	No	Yes	SEC	$80M, SEC dis-gorgement and interest of $46.3M	2 years (1 year if com-pliant)	Yes
AOL	No	Yes	SEC	$150M to com-pensation/ settlement fund; $60M fine	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
AmSouth Bancorp (S.D. Miss.) (Oct. 2004)	DP	Bank Secrecy Act	No	No	Revised policies with respect to responding to grand jury subpoenas
BankAtlantic (S.D. Fla.) (Mar. 2006)	DP	Bank Secrecy Act, failure to maintain eff. anti-money laundering program	No	No	Investments in personnel and compliance systems
Bank of New York (S.D.N.Y., E.D.N.Y.) (Nov. 2005)	NP	Money laundering, unlicensed money transfers; no anti-money laundering program	Yes	Yes: new policies, training; new management structure; reporting system	Retained law firm to conduct investigation; shared results
BAWAG P.S.K. (Bank owned by Austrian Trade Unions Association) (S.D.N.Y.) (Oct. 2006)	NP	Banking and sec. fraud	No	No	Yes: new management took over

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
AmSouth Bancorp	No	No	None	$40M settlement with gov't	1 year	Yes
BankAtlantic	No	No	None	$10M settlement with gov't	1 year	Yes
Bank of New York	No	Yes	None	$12M restitution; $26M in civil settlements	3 years (can be terminated earlier)	Yes
BAWAG P.S.K.	No	No	USPIS, SEC, CFTC	$337.5M to U.S. bankruptcy estate in *Refco* case and victims; further payments depending on sale price of bank	None	N/A

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Boeing Co. (C.D. Cal., E.D. Va.) (June 30, 2006)	NP	Federal procurement fraud, conflict of interest, use of competitor's information	Yes: Special Compliance Officer appointed already under Interim Agreement with Air Force	Yes: training; discipline; prohibiting retaliation; hot line created; auditing of compliance program created; Interim Agreement with the Air Force providing for compliance, an independent monitor, and auditing of compliance	Yes: changes to ethics and compliance program; interim agreement with Air Force in 2005; appointing "Special Compliance Officer" as a monitor
Bristol-Myers Squibb (D. N.J.) (June 15, 2005)	DP	Sec. fraud	Yes	Yes: policy changes; data collection; info on website	Entering SEC consent decree, retained independent advisor; personnel changes; created two positions on Board of Directors; reporting
Canadian Imperial Bank of Commerce (DOJ Enron Task Force) (Dec. 22, 2003)	DP	Aided and abetted accounting fraud (by Enron)	Yes	Yes: auditing; policy changes; data collection; confidential reporting	Agreement with OSFI and Federal Reserve of NY (new policies)

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Boeing Co.	No	No	NASA, NASA-OIG, USAF, DOD-OIG	$50M penalty, $565M civil settlement	2 years	No: but "conduct by a Boeing employee classified at a level below Executive Management . . . shall not be deemed to constitute conduct by Boeing" and "USAO's shall provide Boeing with written notice" of belief a breach occurred. Special Master will adjudicate any breach.
Bristol-Myers Squibb	Yes: endow chair in ethics at Seton Hall Law School	Yes	None	$300M compensation fund	2 years	Yes
Canadian Imperial Bank of Commerce	No	Yes	SEC	$80M to SEC	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Computer Associates (E.D.N.Y.) (Sept. 22, 2004)	DP	Sec. fraud; obstruction	Yes	Yes: auditing; policy changes; data collection; confidential and public reporting	Terminate employees; add two independent directors to board; new CEO; reorganize Finance and Internal Audit Departments
Edward D. Jones (E.D. Mo.) (Dec. 2004)	DP	Sec. fraud	No	Yes: new policies, training, compliance program; new executive committee	None cited
FirstEnergy Nuclear Operating Co. (N.D. Ohio) (Jan. 20, 2006)	DP	Environmental crimes, false statements by employees	No	No	Extensive corrective actions with ongoing supervision of NRC
German Bank HVB (S.D.N.Y.) (Feb. 14, 2006)	DP	Conspiracy to defraud IRS	No	Yes: compliance program as per U.S. Sentencing Guidelines; policy changes; permanent restrictions on banking practices	None cited
HealthSouth Corp. (N.D. AL) (May 2006)	NP	Accounting fraud and sec. fraud	Yes: Governance Consultant as required by SEC consent decree	Yes: actions taken or agreed to pursuant to SEC settlement incorporated in agreement	Adoption of new compliance policies; payments in SEC consent decree; new management, new CEO, CFO, new Chief Compliance Officer, new General Counsel; terminated employees; confidential hotline; retained consultant

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Computer Associates	No	Yes	SEC	$225M restitution; $163M civil compensation	18 months	Yes
Edward D. Jones	No	Yes	SEC, USPIS	$75M and $200,000 in costs to U.S. Postal Service	2 years	No
FirstEnergy Nuclear Operating Co.	Fund community serv. projects	NA	NRC	$23M fines; $4.3M community service	12 months	Yes
German Bank HVB	No	N/A	IRS	$29.6M in fines, restitution	18 months	
HealthSouth Corp.	No	No	SEC, IRS, USPIS	($100M in SEC settlement; $445M class settlement); $3M to U.S. Postal Service	30 months	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Hilfiger (S.D.N.Y.) (Aug. 10, 2005)	NP	Tax fraud	No	Yes: compliance program as per U.S. Sentencing Guidelines	Full cooperation; file amended tax returns; internal investigation
InVision (DOJ Fraud Section) (Dec. 3, 2004)	DP	Foreign Corrupt Practices Act ("FCPA")	Yes	Yes: policy changes	Voluntary disclosure; prompt disciplinary action; no prior history
KPMG (S.D.N.Y.) (Aug. 26, 2005)	DP	Tax fraud, conspiracy to defraud IRS; tax evasion	Yes	Yes: policy changes; confidential reporting; compliance program as per U.S. Sentencing Guidelines	None cited
MCI (S.D.N.Y.) (Sept. 1, 2005)	NP	Sec. fraud	No	Yes: compliance program as part of 2004 settlement with Okla. prosecutors and civil settlements	None cited
Mellon Bank, N.A. (W.D. Pa.) (Aug. 15, 2006)	NP	Theft of gov't property, theft of mail matter, conspiracy	Yes	Yes: compliance and ethics program that satisfies U.S. Sentencing Guidelines; new training; auditing	None cited
Merrill Lynch (DOJ Enron Task Force) (Sept. 17, 2003)	NP	False statements, aided/abetted Enron	Yes	Yes: policy changes; confidential reporting; creation of a special structure products committee to review transactions	None cited

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Hilfiger	No	No	IRS	Pay back taxes, interest; fine (est. $15.4M; $2.7M interest)	3 years (can request to be terminated after 2 years)	No
InVision	No	Yes	SEC	$800,000 fine	2 years	Yes
KPMG	No	Yes	IRS	$456M total, of which $228M consists of fines	14 months (can be extended at one year intervals; max. 5 yrs); monitorship lasts three years	Yes
MCI	No	No	SEC	$750M restitution (SEC agreement)	2 years	Yes
Mellon Bank, N.A.	No	Yes	USPIS, Dep't Treasury Inspector Gen. for Tax Admin.	$30,000 in costs, $18.1M in restitution to taxpayers, U.S.	3 years	
Merrill Lynch	No	No	SEC	$80M (SEC agreement)	21 months	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Micrus Corp. (DOJ Fraud Section) (Feb. 28, 2005)	NP	FCPA	Yes	No	Voluntary disclosure; disciplinary action of employees, no prior criminal history
Monsanto (DOJ Fraud Section) (Jan. 2005)	DP	FCPA	Yes	Yes: auditing; policy changes; confidential reporting; press release	Internal investigation; voluntary reporting; new policies
MRA Holdings, LLC (N.D. Fla.) (Sept. 2006)	DP	Failing to label sexually explicit material	Yes	Yes: supervised by independent monitor	None
New York Racing Ass'n (E.D.N.Y) (Dec. 10, 2003)	DP	Conspiracy to defraud; tax fraud	Yes	Yes: auditing; new management; policy changes	Formation of oversight committee; retain outside firm to review; new policies; confidential reporting
Operations Management International (D. Conn.) (2006)	DP	Reporting requirements under Clean Water Act	No	Yes: auditing; data collection	New policies and compliance structure; confidential reporting; compliance program; new management

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Micrus Corp.	No	Yes	SEC	$450,000 fine	3 years	Yes (for 24 months)
Monsanto	No	Yes	None	$1M fine	3 years	Yes
MRA Holdings, LLC	No	No	None	$2.1M fine	3 years	Yes (provides for notice and two week opportunity to demonstrate no breach or cure)
New York Racing Ass'n	Video lottery terminals installed at racetracks	Yes	None	$3M fine	18 months	Yes
Operations Management International	Gift to Alumni Ass'n for Coast Guard Academy to endow chair for envtl. study	Yes	None	$2M to Coast Guard Academy; $1M to Greater New Haven Water Pollution Control Authority	2 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
PNC Financial (W.D. Pa., DOJ Fraud Section) (June 2, 2003)	DP	Sec. fraud	No	No	"[E]xceptional remedial measures" and separate agreements with the SEC, the Federal Reserve Bank of Cleveland and Federal Reserve Board, and the Office of the Comptroller of the Currency
Roger Williams Medical Center (D.R.I.) (Jan. 27, 2006)	DP	Public corruption	Yes	Yes: revise ethical standards, in accord with U.S. Sentencing Guidelines; hire Executive Ethics Officer; ethics training; written reports	Yes: previously adopted compliance program and prior Corporate Integrity Agreement with HHS
Statoil, ASA (S.D.N.Y., DOJ Fraud Section) (Oct. 2006)	DP	FCPA	Yes	Yes	Simultaneous compliance agreement with SEC
Symbol Technologies (E.D.N.Y.) (June 3, 2004)	NP	Accounting fraud	Yes	Yes: new policies (training and educational program); new auditing firm; appointed independent examiner	Retained firm to conduct internal investigation; shared results; waived privilege; termination of new employees; new management appointed; restructured Board of Directors, new policies; confidential reporting

Organization	Unrelated Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
PNC Financial	No	Yes	None	$90M restitution fund; $25M fine	1 year	Yes, upon written notice with two week opportunity to demonstrate no breach
Roger Williams Medical Center	Yes: $4M in free health care to the public	Yes	None	None	2 years; may be extended up to a total of 5 years if there are violations	Yes
Statoil, ASA	No		SEC	$10.5M (separate $10.5M disgorgement to SEC)	3 years	Yes
Symbol Technologies	No	Previously waived	SEC, USPIS	$139M to compensation fund; $3M to U.S. Postal Service	3 years	Yes

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
University of Medicine and Dentistry of New Jersey (D.N.J.) (Dec. 2005)	DP	Health care fraud	Yes	Yes: new policies; confidential reporting; training programs; create position of Chief Compliance Officer, new General Counsel.	Yes: cites "remedial actions to date" without detailing them
WesternGeco LLC (subsidiary of Schlumberger Seismic, Inc.) (S.D. Tex.) (June 16, 2006)	DP	Immigration (visa) fraud	No	No	Yes: cites "remedial actions" taken including "a comprehensive compliance program"
Whitehall Jewelers, Inc. (E.D.N.Y.) (Sept. 28, 2004)	NP	Bank fraud	Yes	Yes: hiring of Internal Audit Director; reporting hotline; compliance program; compliance committee; training program; whistleblower protection; compliance reports to USAO E.D.N.Y.	Yes: terminated employment of those involved; committed to hiring new President, General Counsel, Internal Audit Director; instituted comprehensive compliance program
Williams Power Co. (N.D. Cal.) (Feb. 22, 2006)	DP	Fraudulent commodities reports	No	No	Yes: "remedial actions to date" cited

Organization	Un-related Terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
University of Medicine and Dentistry of New Jersey	No	Yes	None	Full restitution in amount determined by Monitor, $4.9M to Medicaid	2 years (can be extended 1 year)	Yes
WesternGeco LLC (subsidiary of Schlumberger Seismic, Inc.)	No	Yes	USPIS, Dep't Labor, OIG, IRS, Dep't State Diplomatic Sec. Serv.	$18M fine, $1.6M in costs	1 year	Yes
Whitehall Jewelers, Inc.	No	No	USPIS	$350,000 fine, $13.3M restitution	3 years	Yes
Williams Power Co.	No	Yes	CFTC	$50M fine	15 months	Yes

Appendix B: Pre-Thompson Memo Deferred and Nonprosecution Agreements (before Jan. 20, 2003)

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
Aetna (D. Mass.) (Aug. 1993)	NP	N/A	No	No	$9.5M restitution; structural/policy changes; internal investigation
Arthur Andersen (D. Conn.) (April 1996)	DP	Accounting fraud	No	No	None listed
Aurora Foods (S.D.N.Y.) (Jan. 2001)	NP	Accounting fraud	Yes: outside consultant	Yes: new policies; confidential reporting by employees	Immediate disclosure; voluntary cooperation; termination of employees; compliance program
Banco Popular De Puerto Rico (D.P.R.) (Jan. 2003)	DP	Failure to file SARS	No	No	None listed
BDO Seidman (S.D. Ill.) (Apr. 12, 2002)	DP	Accounting fraud	No	Yes: auditing; data collection	None cited
Coopers & Lybrand (Sept. 1996)	NP	Obtaining confidential bid info during K selection; lying to grand jury	Yes		

Organization	Unrelated terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
Aetna	No	No	None	$3.7M restitution; civil assessment $1M	None listed	Yes
Arthur Andersen	No	Yes	IRS	$10.3M reimbursement fund; $200,000 costs	Gov't conclude investigation in 90 days	Yes
Aurora Foods	No	Yes	SEC	None listed	None listed	Yes
Banco Popular De Puerto Rico	No	No	FinCEN	$21.6M settlement; $20M fine	12 months	Yes
BDO Seidman	No	Yes	None	$16M restitution	18 months	No, DOJ must initiate proceedings in the district court to determine whether a breach occurred
Coopers & Lybrand	3000 hrs community service; teach ethics classes			$2.75M settlement with gov't; $725,000 to Ariz.		

Organization (U.S. Atty's Office) (date of agreement)	NP or DP	Crime	Indep. Monitor Req.	Compliance Program Required	Pre-Agreement Compliance
John Hancock Mutual Life (D. Mass.) (Mar. 1994)	NP	Mail fraud	No	No	Internal investigation; voluntary disclosure; waived privilege; new policies
Lazard Freres (D. Mass.) (Oct. 1995)	NP	Individual employee's misconduct	No	No	New compliance policies; internal investigation voluntary notification; waived privilege
Merrill Lynch (D. Mass.) (Oct. 1995)	NP	N/A	No	Those already enacted by company; injunctive policy changes	Administrative payment to U.S.; new compliance policies
Prudential Securities (S.D.N.Y.) (Oct. 1994)	DP	Fraud in sale of limited partnership interests	Yes	Yes (previous SEC agreement); new outside director; confidential reporting	None listed
Salomon Brothers (May 1992)	NP				
Sears (S.D. Ill.) (April 2001)	DP	Mail fraud	No	Injunctive policy changes; data collection; auditing	None listed
Sequa (June 1993)	NP			N/A	

Organization	Un-related terms	Priv. Waiv.	Reg. Agency	Fines	Length	Can DOJ Unilaterally Terminate Agreement?
John Hancock Mutual Life	No	Yes	None	$900,000 civil assessment; $110,000 to Mass. State Ethics Commission	None listed	Yes
Lazard Freres	No	Already waived	None	$4.28M restitution; $4.43M administrative payment; $300,000 reimbursement; $3M civil penalty	None listed	Yes
Merrill Lynch	No	Already waived	None	$3.8M restitution; $4.91M administrative payment; $3M civil penalty; $300,000 reimbursement	None listed	No
Prudential Securities	No	Yes (limited)	SEC, USPIS	$330M settlement with SEC	3 years	Yes
Salomon Brothers						
Sears	No	Yes	None	$62.6M fine	18 months	Yes
Sequa						

ATTACHMENT 3

VIRGINIA LAW REVIEW
IN BRIEF

VOLUME 93 JUNE 18, 2007 PAGES 105–114

ESSAY

UNITED STATES V. GOLIATH

Brandon L. Garrett[*]

CRIMINAL prosecutions of large organizations exhibit a unique power dynamic. The target organizations include goliaths—some of the largest corporations in the United States, including AIG, America Online, Bristol-Myers Squibb Co., Computer Associates, HealthSouth, KPMG, MCI, Merrill Lynch & Co., and Monsanto. A U.S. Attorney's office with its limited resources may look like a tiny David by comparison. But prosecutors have their slingshot: they wield the threat of an indictment, which results in potentially catastrophic collateral and reputational consequences to a corporation. Yet it is a threat that prosecutors can ill afford to carry out due to those consequences. The détente resulting from the collision of those oversized forces has taken a surprising turn, perhaps because there was nowhere else to turn—from criminal prosecution towards structural reform. By that I mean that prosecutors adopted a strategy to avoid an indictment and a conviction by entering into detailed compliance agreements with organizations. In one example of a demanding structural reform agreement, KPMG International, charged with marketing illegal private tax shelters, agreed to shut down its private tax practice, to cooperate fully in criminal investigations of former employees, and to hire an independent monitor for three years to implement an elaborate compliance program.

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In my piece, "Structural Reform Prosecution,"[1] I present a picture of why and how federal prosecutors now enter into such agreements supervising the rehabilitation of these goliath organizations. The Article examines the agreements' origins, goals, terms, and the broader legal and institutional setting, including through empirical analysis of the agreements entered after the Department of Justice ("DOJ") announced its new approach in January 2003.[2] While hue and cry over organizational prosecutions have focused on privilege waiver and employer payment of attorney fees, those two issues just scratch the surface of the complex problems that these massive efforts raise. I hope here to draw attention first to a series of problems raised by how these agreements define compliance and second to the multi-polar context in which these agreements are entered. "Structural Reform Prosecution" concludes by posing questions for future work. I expand on that discussion here by proposing reforms that, from different perspectives, address some of the difficult issues that these agreements raise.

1. DEFINING ORGANIZATIONAL COMPLIANCE

Agreements between large organizations and prosecutors are very different from the typical deferral agreement in which a person agrees to refrain from any additional offenses for a period of time and perhaps to enter into a rehabilitative program. Instead, I have argued that these agreements should be viewed as structural reform efforts, designed to prevent future criminality among the members of a complex entity.

The first respect in which these agreements resemble classic civil structural reform efforts is that they seek to reform entire institutions. Many of these agreements carefully describe institution-wide goals. For example, the KPMG agreement details the changes to be made to KPMG's tax program and specifies an elaborate compliance program.[3] The terms of compliance in such agreements are fairly clear, as is a core understanding of what sort of criminality the agreement is intended to prevent from recurring. The agree-

[1] Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 853 (2007).

[2] See id. at 938–57 (summarizing the terms of the agreements entered since January 2003).

[3] KPMG Deferred Prosecution Agreement, August 26, 2005, available at http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf.

ments also rely on many of the same tools that commonly appear in civil structural reform cases: independent monitors tasked with overseeing reforms, detailed injunctive provisions, and reporting and auditing requirements to assess progress towards compliance.

As in civil efforts, these agreements also envision a rehabilitative process lasting for some time, and therefore, also as in civil cases, one can imagine their compliance goals shifting over time. There will be some uncertainty in any such ongoing reform effort, given broad terms due to a need for flexibility should the compliance process itself uncover new problems. Unlike civil structural reform efforts (and unlike earlier prosecutorial settlements of labor racketeering cases in the 1980s), these efforts are largely non-public. This poses a difficulty for outsiders in assessing how compliance was defined during the implementation of any particular case. In most cases all we have is the text of the agreement, with no information regarding the subsequent implementation. Perhaps over time more information will emerge regarding the successes and failures in achieving the sought-after compliance.

Cooperation requirements included in many agreements appear to last in perpetuity. How long does the KPMG agreement last? Like many of the others, the KPMG agreement extended for three years and has now terminated (with two additional years of IRS supervision, during which time the DOJ may still terminate). Yet KPMG also agreed to a series of "permanent restrictions and elevated standards for its tax practice."[4] Nor may KPMG ever make statements contradicting the representations in the Agreement, including in civil litigation. Nor may KPMG cease "its continuing cooperation" with the DOJ's ongoing criminal investigations, "even after the dismissal of the Information," and with any other prosecution or agency action "relating to or arising out of the conduct."[5] Other agreements have still broader language regarding an obligation to cooperate. For example, Roger Williams Medical Center agreed to "cooperate fully and actively with the [United States Attorney's Office for the District of Rhode Island ("USAO-RI")], and with any other government agency designated by the USAO-RI . . . regarding any matter being investigated by the govern-

[4] Id. at ¶ 6.
[5] Id. at ¶ 8–9.

ment . . . about which RWMC has knowledge or information."[6] These terms suggest that compliance in the form of cooperation with government investigations may last into the indefinite future regarding a broad array of matters of indefinite scope.

In addition to the important similarities, structural reform takes on a different form in criminal law than in civil law, particularly when implemented at the charging stage, due to the unique power dynamic of an organizational prosecution. These agreements, though often subject to court-approval, are supervised not by a court, but by prosecutors. Prosecutors lack palatable alternatives to structural reform. They cannot easily decline to prosecute the most serious organizational crime cases, but nor can they abide the collateral consequences of seeking convictions in all such cases. Upon entering into settlement negotiations, however, prosecutors will typically have enormous negotiating leverage by threatening the "nuclear" option of an indictment, and it shows in the terms of the agreements. For example, in most of these agreements, the DOJ retains its enormous stick throughout the term of the agreement by retaining the unilateral authority to find a breach and then prosecute. Though few agreements say anything about what the DOJ can count as a breach, courts may not be able to remedy effectively an arbitrary declaration of breach unless they provide pre-indictment relief.[7]

In some cases, that power dynamic may undermine the goal of achieving compliance. Illustrative of the often serious consequences of an organizational prosecution—even where the organization settles—is a recent nonprosecution agreement (entered in March 2007, after my Article's study period of January 2003 through January 2007) with the Dallas law firm Jenkins & Gilchrist regarding the same tax shelters at issue in the KPMG prosecutions.[8] The agreement was far simpler than the others. It required cooperation in the ongoing investigation, privilege waiver, and noted a fine ($76 million) paid to the IRS. It did not include com-

[6] Deferred Prosecution Agreement at ¶ 7, U.S. v. Roger Williams Med. Ctr., No. 06-02T (D.R.I. 2006), available at http://www.virginialawreview.org/inbrief/2007/06/18/rwmc_agmt.pdf.

[7] Id. at ¶ 12.

[8] See Ameet Sachdev, Firm Admits Selling Bogus Tax Shelters, Jenkens & Gilchrist Closes Chicago Office, Dallas HQ, Chi. Trib., Mar. 30, 2007, at 1.

pliance. Instead, the agreement noted that the firm planned to close its doors.[9] Though part of the reason the firm voted to dissolve was due to settlements in civil suits, it was also significant that most of the firm's attorneys left during the ongoing criminal investigation of the firm's tax group.[10] This example shows how even an investigation ending in a settlement can result in a catastrophic result for the entity, perhaps justifiably to deter future wrongdoing, but also not so different from the result had the firm been indicted and been convicted. An IRS Commissioner commented, "This should be a lesson to all tax professionals that they must not aid or abet tax evasion."[11] That sort of punitive goal was at odds with the rehabilitative purpose of these agreements; if the goal was to teach a lesson, then why not indict? The reason for settling seemed chiefly to secure cooperation in individual prosecutions. The agreement thus highlighted not only the power prosecutors may wield, but also how the structural reform goals that ostensibly animate these agreements can fall by the wayside, resulting not in a structural reform agreement but rather a cooperation agreement.[12]

2. MULTI-POLAR PROSECUTIONS

A multi-polar dynamic created these prosecution agreements, as in classic public law adjudication. State prosecutors, the Sentencing Commission, regulatory agencies, compliance experts, industry, and federal prosecutors each developed parallel approaches toward organizational compliance. Which structural reformer came

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[9] See Letter from Michael J. Garcia, United States Attorney, Southern District of New York, to Robert B. Fiske, Jr. & James P. Rouhandeh, Davis Polk & Wardwell (Mar. 26, 2007), available at http://www.virginialawreview.org/inbrief/2007/06/18/jenkens_gilchrist.pdf.

[10] See Sachdev, supra note 8, at 1 ("The firm settled the civil suits in 2005 for $81.6 million, but the harm to the firm's reputation was greater than the financial pain. About two-thirds of its more than 600 lawyers have left since 2001.").

[11] Terry Maxon, Jenkens & Gilchrist Closing After Admitting Role in Tax Fraud: Dallas Firm to Pay IRS $76 Million, Aid in Investigation of Shelters, Dallas Morning News, Mar. 30, 2007, at 1A.

[12] The experience of Sidley Austin LLP shows how context specific the effects of a nonprosecution agreement may be. Sidley was investigated for providing legal opinion letters on KPMG-marketed tax shelters, and like the Jenkens firm, it also entered into a nonprosecution agreement. Yet unlike the Jenkens firm, Sidley did not suffer dire consequences, perhaps because only one partner was involved in the conduct and while at a firm that later merged with Sidley. See Lynnley Browning, Court Ruling Jeopardizes U.S. Tax Case, N.Y. Times, May 24, 2007, at C1.

first is hard to say. If the DOJ decided to stop entering into these agreements by instructing all of the U.S. Attorneys' Offices not to defer prosecution in this way, similar agreements would still be entered in large numbers and in many of the same cases by regulators.

First, several regulators may be involved in negotiating any one structural reform agreement. Federal prosecutors often take only egregious cases referred by regulatory agencies, which retain an important role in subsequent negotiations and implementation. This follows where a raft of regulatory agencies have sought to accomplish similar goals through voluntary disclosure regimes or consent decrees for decades. For example, the SEC's Seaboard Report looks very much like the DOJ's Thompson and McNulty Memos.[13] Nothing could be more standard practice than granting organizations cooperation credit and encouraging self-investigation and self-reporting. Little distinguishes these current deferral and nonprosecution agreements except that they occur in criminal cases where the stakes may be particularly high. These agreements were often investigated in conjunction with agencies, negotiated in conjunction with agency consent decrees, and then supervised by independent monitors jointly appointed by the DOJ and agencies and reporting to both. The nature of this interaction between agency compliance regimes and the DOJ's emerging regime is an important area for future study.

Second, federal efforts should be considered alongside efforts by state Attorneys General to pursue similar goals using similar methods. Although traditionally states—like the federal government had been—were reluctant to enforce criminal laws against

[13] Compare Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, 76 SEC Docket 296 (Oct. 23, 2001), available at www.sec.gov/litigation/investreport/34-44969.htm (asking among the factors informing SEC discretion, "[d]id the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?") with Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Department Components, United States Attorney, Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/business_organizations.pdf, and Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Department Components, United States Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

corporations, Elliot Spitzer transformed the practice by leading efforts to pursue structural reform, even crafting industry-wide agreements. Others have followed suit, such as California Attorney General Bill Lockyer and Massachusetts Secretary of State William Galvin.[14]

Third, the Sentencing Guidelines emphasize compliance goals at the penalty phase. A conviction can result in a similar remedy as that in a settlement, where organizations may be required by courts to create compliance programs as a condition of probation. Further work could investigate how judges now apply those Guidelines.

Fourth, the role of outsiders—in particular, the compliance industry —will be a rich subject for future study. Former prosecutors or regulators have often been appointed as independent monitors, and were frequently active in the burgeoning compliance industry, serving the needs of organizations under investigation or seeking to head off potential scrutiny. Legal scholars should continue to explore the emerging influence and role of compliance experts.

Finally, the compliance industry has eager clients. Organizations have themselves focused—in response to regulators, of course—on compliance-oriented approaches. Many of the entities prosecuted had already made significant structural changes once these entities discovered the malfeasance. Bristol-Myers, for example, had already retained Judge Frederick B. Lacey, later appointed as an independent monitor, to conduct a review of its internal controls. Pursuant to this review, it had made "significant personnel changes" at the highest levels and had adopted a whole series of other auditing and compliance measures.[15] In turn, organizations may influence the nature of compliance demands. The political dynamics of such prosecutions are very different in a RICO prosecution than in a prosecution of a firm under the Foreign Corrupt Practices Act. Some cases have industry-wide effects and entire industries may lobby the executive branch or Congress; the DOJ has already changed its approach regarding privilege waiver and employer payment of attorney's fees in response to pressure.

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[14] See Renee M. Jones, Dynamic Federalism: Competition, Cooperation and Securities Enforcement, 11 Conn. Ins. L.J. 107, 115–21 (2004).

[15] Bristol-Myers Squibb Company Deferred Prosecution Agreement, June 15, 2005 at ¶ 5, available at http://www.usdoj.gov/usao/nj/press/files/pdffiles/deferredpros.pdf.

The multi-polar nature of these negotiated dispositions has not been sufficiently recognized. Whether the convergence in compliance approaches represents path dependency or emerging best practices in part depends on their efficacy. Future work will hopefully take on the very difficult task of assessing whether these approaches successfully prevent, detect, or remedy organizational crime.

A Series of Reform Proposals

Taking as a given that organizational prosecutions will continue for some time and that some kind of settlement option will remain preferable for both prosecutors and for organizations, defining the scope of those settlements and their terms is an important and under-examined project. The DOJ has not yet made policy statements regarding most structural reform aspects of the agreements. Reforms have not even been suggested much less explored, perhaps because these issues were drowned out by the political fray over privilege waiver issues (and now over U.S. Attorney firings). Structural reform prosecutions are so new that any next generation approach, moderated by reforms and adjustments by all sides, may be years away. It will be fascinating to see how future administrations approach such prosecutions and then how regulators, industry, and Congress react. A few possibilities for reform are outlined below, not because they should necessarily be adopted but because they suggest additional ways to think about structural reform prosecutions.

First, severe collateral consequences of indictment in organizational cases could be decreased if the relevant agencies reinterpreted debarment rules or if Congress legislated to modify those regulatory consequences. Regulatory or legislative change to the collateral consequences that organizations face would totally alter the underlying bargaining relationship between corporations and prosecutions. Reputational effects would remain, but the change could, among other things, move the negotiations from the charging stage to the plea bargaining stage. That result would permit adjudication later in a case, with more court involvement and with more information exchanged between the parties. The disadvantages, however, include a reduced deterrent threat of indictment.

A statute permitting a court to enjoin a prosecution if a prosecutor arbitrarily or unjustifiably declares a breach of an agreement would reduce the unilateral power that the terms of these agreements provide prosecutors during their implementation. An arbitrary declaration of a breach would violate the organization's due process rights, but courts are reluctant to enjoin an indictment. Unless prosecutors no longer insist on such terms, legislation would be necessary to prevent the possible harm of an improper declaration of breach and indictment. Little attention has been paid to the enormous leverage the provisions give prosecutors at the termination stage, perhaps because prosecutors themselves may have been wary of relying on those terms and risking the dire consequences to an organization of finding a breach. Reforms might give prosecutors less catastrophic means to address a partial failure and therefore provide more appropriate tools to obtain the sought after compliance. A discussion about how these agreements terminate would also focus attention on how prosecutors should make the ultimate decision in assessing whether compliance is finally obtained.

More broadly, the DOJ could issue guidelines explaining the remedies it seeks in these agreements. All that the DOJ has done thus far is include in the McNulty memo restrictions on securing privilege waiver and nonpayment of employee legal fees. Though prosecutors have informally imitated each other's agreements and shared practices (perhaps simply cutting and pasting other agreements, or perhaps with more consultation), there appears to be no formalized assessment within the DOJ regarding what remedies work best and which should be sought. The lack of collaboration regarding organizational prosecution policy spilled into the press recently with accusations that the rank and file within the DOJ were not even consulted during deliberations regarding the important McNulty Memo changes.[16] The DOJ has adopted a structural reform mission but appears not to be using its Corporate Crime Task Force to evaluate that mission to assess whether the sought after reforms are being achieved. Nor for that matter have any regulatory agencies pursuing similar structural reform goals issued public remedial guidelines.

[16] See David Johnston & Neil A. Lewis, The Ousted Prosecutors; U.S. Prosecutors Assail Gonzales in Closed Session, N.Y. Times, Mar. 29, 2007, at A1.

Finally, during the implementation of these agreements, independent monitors have not released their compliance reports, apparently for confidentiality reasons. The DOJ does not appear to be sharing this information internally or releasing general information regarding how the compliance process has been conducted. Without such information sharing, one cannot expect effective best practices to evolve internally, nor can one expect the public (or legal academics) to assess whether meaningful structural reform is occurring.

To return to where I began: difficult practical and theoretical problems of remedial design occur in any structural reform enterprise. They surface now in criminal law because the DOJ increasingly confronts Goliath but not by securing an indictment or a conviction. The United States and Goliath instead negotiate and then implement an ongoing project of structural reform. Structural reform prosecutions raise a series of complex questions and possibilities, on which my colleagues who have generously agreed to comment have shed more light. This prosecution approach warrants a sustained effort by the DOJ, organizations, regulators, legislators, courts, and scholars to assess which structural reforms effectively address underlying criminality and to carefully consider their design. Hopefully our discussion and others yet to come can be of some use both to the United States and Goliath.

Preferred citation: Brandon L. Garrett, United States v. Goliath, 93 Va. L. Rev. In Brief 105 (2007), http://www.virginialawreview.org/inbrief/2007/06/18/garrett.pdf.

Ms. SÁNCHEZ. Thank you, Professor Garrett. We appreciate your testimony.

We will now begin our questioning. And I will begin by recognizing myself for 5 minutes of questions.

Mr. Ashcroft, do you know who besides yourself was considered for the appointment of monitor in the Zimmer case? Or are you familiar with the selection process?

Mr. ASHCROFT. I know what the deferred prosecution agreement provides for in terms of the selection process. It provides that the——

Ms. SÁNCHEZ. With all due respect, Mr. Ashcroft, I am just asking if you know how they came to select you as a monitor. I mean, did you just get a phone call one day saying we would like to consider you for this or we want you to be the monitor? Can you——

Mr. ASHCROFT. I would like to answer your question. And so, that is about what I was going to do, if you don't mind.

Ms. SÁNCHEZ. Okay.

Mr. ASHCROFT. I understand that I was selected in accordance with the deferred prosecution agreement after consultation with the company by the U.S. attorney. And I was asked then to evaluate and to monitor the company's performance. I understand the corporation and the Department of Justice agreed to seek my service during the course of their discussions over the deferred prosecution agreement. So in the course of their discussion——

Ms. SÁNCHEZ. Do you know if they considered anybody else for the position of monitor?

Mr. ASHCROFT. I don't know what kinds of discussions they had.

Ms. SÁNCHEZ. Okay. That is fair.

Mr. ASHCROFT. I wasn't part of those discussions.

Ms. SÁNCHEZ. Okay.

Mr. ASHCROFT. I learned about this after they had the discussions.

Ms. SÁNCHEZ. I understand. That answers my question. Do you know whether there was any public notice or bidding prior to your appointment?

Mr. ASHCROFT. I did not participate in any bidding. Not a single cent of tax dollars is spent for monitors.

Ms. SÁNCHEZ. I understand that. That is not the question that I am asking, though. I am just trying to get to the very things that——

Mr. ASHCROFT. This hearing costs far more in tax dollars than my monitorship will cost in tax dollars because not a thin dime of public money——

Ms. SÁNCHEZ. I understand that. But the subject of the financing is not what I am trying to ask you.

Mr. ASHCROFT. Sure. Go ahead and ask me something.

Ms. SÁNCHEZ. I am just trying to get some very basic questions out of the way.

Mr. ASHCROFT. I would like to get some very basic answers because your original remarks——

Ms. SÁNCHEZ. Okay.

Mr. ASHCROFT [continuing]. Made a series of accusations. I would like to get to those so that I can answer them and clarify this situation because it deserves clarification.

Ms. SÁNCHEZ. Okay. Well, if you will allow me to ask my questions, we will have many other questions from the panel, I am sure. In your view, would the monitor selection process in the Zimmer case comply with the guidance that was issued publicly by the department yesterday? Or have you had a chance to review those guidance?

Mr. ASHCROFT. I have reviewed them very briefly. They were made available to me late yesterday afternoon. I believe it would have been very possible that I could have been chosen under the kinds of guidelines. I would hope so.

Let me say, as I said in my remarks, I don't think there should be a discrimination against individuals who have had the privilege of public service. I don't think there should be a discrimination against people on the basis of their partisan identification. And I would certainly hope that whatever guidelines would be promulgated by this Justice Department or encouraged by this Congress that they wouldn't discriminate against individuals whose qualifications are those like mine are.

Ms. SÁNCHEZ. Okay. Well, Mr. Ashcroft, on that issue, I would like to call your attention to the fact that the guidance issued yesterday indicated—and I am quoting from the guidance, "Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict of interest guidelines set forth in 18 USC, section 208 and 5CFR, part 2635." So the question that I want to get at, which I think is part of the problem, and we have heard from several witnesses talk about no conflict of interest, is do you believe that Mr. Christie violated any laws or regulations already in the books when he appointed you, his former employer, as a monitor in the Zimmer case?

Mr. ASHCROFT. I really don't believe that Mr. Christie is a law violator. His record as a prosecutor is——

Ms. SÁNCHEZ. So you don't believe that conflict——

Mr. ASHCROFT [continuing]. An outstanding record. No law that I know of has been violated. And I don't think there is an even plausible suggestion that any has been violated. Now, Mr. Christie has made his reputation prosecuting——

Ms. SÁNCHEZ. You don't believe that there is a problem——

Mr. ASHCROFT [continuing]. Public corruption in New Jersey. And for this Committee——

Ms. SÁNCHEZ. You don't believe that there is——

Mr. ASHCROFT [continuing]. To attack him on political grounds——

Ms. SÁNCHEZ. I am not attacking his record of prosecution.

Mr. ASHCROFT [continuing]. Is inappropriate. As a matter of fact——

Ms. SÁNCHEZ. I am talking specifically about the issue of——

Mr. ASHCROFT [continuing]. Here is Mr. Christie's record from the newspapers.

Ms. SÁNCHEZ [continuing]. Conflict of interest. Mr. Ashcroft, it is very interesting about his record. And we are not attacking his record of prosecution.

Mr. ASHCROFT. No innocent verdicts. No——

Ms. SÁNCHEZ. We happen to be talking specifically about conflict of interest. That is a very appropriate question for this hearing.

This is what we are trying to get at the crux of the problem is either conflict of interest or at least the appearance of conflict of interest.

And if I am hearing your testimony correctly, would it be fair to say that you don't believe there is any kind of conflict of interest in a former employee hiring their former boss or suggesting that he be hired for a very lucrative contract of monitoring? You don't believe that there is a conflict or a problem with an appearance of a conflict of interest?

Mr. ASHCROFT. There is not a conflict. There is not an appearance of a conflict. The ability to hire individuals who have the qualifications to conduct monitorship should not be impeded by the fact that someone has at some time or another served in public life or public office.

It should not be impeded based on partisan grounds. It should not be determined or dispositive in the Justice Department. And it shouldn't be equally dispositive or determinative here in the Judiciary Committee of the United States House of Representatives.

Ms. SÁNCHEZ. Very interesting answer, Mr. Ashcroft. My time has expired.

At this time, I would recognize Mr. Cannon for 5 minutes of questioning.

Mr. CANNON. Madam Chair, I would prefer to pass, if that is acceptable to you, but would like to introduce for the record an article in the record that I think Mr. Ashcroft was just referring to about Christie's all-out war and which includes his rather remarkable list of successful prosecutions and point out that you keep referring to the problem. I think that we have an issue before us that we need to manage and develop, but I don't think there is a problem, especially when it comes down to Mr. Ashcroft's character and record on his own or Mr. Christie's.

Ms. SÁNCHEZ. Will the gentleman yield on that point?

Mr. CANNON. Let me just defer my time, if you don't mind. But I would be happy to—I think the Chair actually would control the time and can speak directly.

Ms. SÁNCHEZ. Well, without objection, the article will be entered into the record. And the point that I was trying to get at is the public confidence in our justice system and whether or not conflicts of interest, actual or perceived, are a problem in terms of—a perceived problem in terms of the public's confidence in our justice system. And——

[The information referred to follows:]

The Record
FRIEND OF THE PEOPLE IT SERVES
SUNDAY
SEPTEMBER 23, 2007
www.northjersey.com

More than 125 public officials and employees have been charged with corruption-related crimes under Christopher J. Christie's watch.

Public office / private gain

The list of public servants in New Jersey charged with federal crimes in recent years is diverse. North Jersey names are listed.

17 mayors
- Sammy Rivera (Passaic)
- Martin G. Barnes (Paterson)
- Anthony J. Russo (Hoboken)
- Peter LaVilla (Guttenberg)

15 council members/ commissioners
- Marcellus Jackson (Passaic)
- Jonathan Soto (Passaic)
- Peter Perez (North Bergen)

5 state legislators
- Alfred E. Steele (Passaic)
- Sharpe James (Newark)
- Mims Hackett Jr. (Orange)

2 county executives
- Robert Janiszewski (Hudson)
- James Treffinger (Essex)

92 guilty pleas

10 trial convictions

58 prison sentences

0 acquittals

CHRISTIE'S ALL-OUT WAR

By PETER J. SAMPSON
STAFF WRITER

The crimes have been outrageous – like the Port Authority commissioner who admitted trying to silence a witness by setting him up with a prostitute and secretly taping their tryst. Or the judge who traveled to Russia to film himself having sex with a teenage boy.

They've also been mundane, like the MVC workers who ran their own driver's license mill.

But the list of government officials and employees arrested by federal agents in New Jersey the past several years shows a spectrum of public servants – from state senators to building inspectors – who authorities said were eager to sell their offices for cash.

For U.S. Attorney Christopher J. Christie, it's a never-ending well.

CHART INSIDE

■ A look at the **public servants charged** by the U.S. Attorney's Office in the past five years. **A-12**

"Our approach is that there really is no act of corruption too small," said Christie, in an interview with The Record.

More than 125 government officials and employees in New Jersey have been charged with corruption related crimes in the nearly six years since Christie took office.

The vast majority – 92 public servants in all – pleaded guilty. Two of them died before they were sentenced. Ten more went to trial and were convicted. Two died while charges were pending.

None have been acquitted.

In addition to the public servants – 22 of whom are still facing indictments or awaiting trial – two dozen developers, contractors, vendors and political operatives were swept up in the probes.

Critics, particularly Democrats, have repeatedly accused the Republican appointee of targeting certain officials while attempting to set the stage for a gubernatorial run. Among the elected officials charged by Christie's office, Democrats outnumber Republicans by more than 2 to 1.

If he were pursuing cases merely to be partisan, Christie responded, there would at least be some acquittals.

"Corruption is corruption, no matter which party is doing it," he said. "Both have participated in it in this

PUBLIC OFFICE, PRIVATE GAIN

Corruption: Cases often start at the local level, then grow

Christopher J. Christie, speaking to reporters, says this decided the fate of five corrupt officials at his office.

"This culture of corruption in New Jersey is a culture of just much-too-much government for anyone to effectively staff or police."
U.S. Attorney Christopher J. Christie

By the numbers
Attached New Jersey public servants, by party
Democrats: 48
Republicans: 20
Not available: 04

The Record

A-12 THE RECORD SUNDAY, SEPTEMBER 23, 2007

PUBLIC OFFICE, PRIVATE GAIN

Here are the public servants charged by the U.S. Attorney's Office, their title or position, the charges against them and the outcome or status of their case:

2002

James Condos
Asbury Park councilman
Accepting a liquor license from developer
Prison, 15 months

Kenneth E. Nixon
Asbury Park PHA executive director
Bribing officials to reappoint him
Deceased

Robert E. Gibson
Camden director of public utilities, superintendent of water and sewer
Extorting vendor
Prison, 13 months

Ismael Rodriguez
Essex County sheriff's officer
Defrauded federal housing programs
5 years' probation

Anthony J. Russo

Hoboken mayor
Conspiracy, mail fraud, embezzlement of public funds
Deceased

Robert Janiszewski

Hudson County executive, former assemblyman
Extortion, tax evasion
Prison, 41 months

Nilda Davila-Colon

Hudson County freeholder
Abetting extortion
Prison, 30 months

William C. Brinker

Hudson County freeholder, former deputy director of Jersey City Police Department
Extorting county vendor
Prison, 41 months

Joseph Mercadante
North Bergen MUA purchasing agent
Accepting gifts, rigging quotes
Prison, 30 months

Michael Bridgeforth
INS information officer
Embezzling checks
3 years' probation

Sara B. Bost

Irvington mayor
Witness tampering in kickback probe
Prison, 12 months

Peter Perez

North Bergen commissioner
Accepting cash and gifts from vendor
Prison, 6 months

Vincent Zappulla
North Bergen mayoral aide
Insurance fraud with contractor
6 months' home detention

Joseph Ashtamma

North Bergen township administrator, MUA operations director
Accepting contractor bribes
Prison, 36 months

Terrance D. Weldon
Ocean Township mayor and Asbury Park city manager
Extorting bribes from developers
Prison, 98 months

Conway Mangulis
Paterson public works director
Extorting contractor
3 years' probation

Martin G. Barnes

Paterson mayor
Accepting vendor gifts
Prison, 37 months

Milagros Gomez
Perth Amboy PHA assistant director
Embezzling federal housing subsidies
Prison, 24 months

John F. Richardson
Somerset County Superior Court judge
Failed to maintain records for client
1-year probation

Andrea Turner
SSA service representative
Conspiring to sell Social Security cards
Prison, 30 months

Wilfredo Vidal
Union City code official and electrical inspector
Extortion, tax fraud
Prison, 41 months

2003

Kenneth E. Saunders Sr.

Asbury Park mayor
Conspiracy to bribe a council member
Prison, 90 months

James R. Mather Jr.
Camden council president
Accepting gifts from mob
Prison, 27 months

Stephen W. Thompson
Camden County Superior Court judge
Traveling to Russia to have sex with a boy
Prison, 120 months

Dominick Russo
Deputy U.S. marshal
Accepting bribes from accounting firm
Prison, 30 months

Nicholas Spedaliere
Deputy U.S. marshal
Stole cash from a fugitive
Prison, 6 months

James W. Treffinger

Essex County executive, U.S. Senate candidate
Obstruction of justice, mail fraud
Prison, 19 months

Michael DeFino
Essex County executive aide
Consulting to obstruct probe
3 years' probation

Cecilio Colon
Fort Dix guard
Accepting inmate bribes
5 years' probation

Peter LaVita

Guttenberg mayor
False tax return, misappropriating campaign contributions
4 years' probation

Frank D'Agosta
Jersey City police detective
Extorting illegal gambling business
Prison, 13 months

James J. Nash
New Hanover Township administrator
Misapplying federal funds in a bid-rig scheme
Prison, 3 months

Patrick G. Malloy
New Hanover Township mayor
Obstructing justice in bid-rig probe
Prison, 5 months

Marcella Lewis
NJMVC examination technician
Selling driver's licenses
Prison, 12 months

Peter Murphy

Passaic County Republican Party chairman
Mail fraud
Prison, 11 months

Elisabeth Rivera
SSA customer service representative
Conspiring to sell Social Security cards
Prison, 26 months

Rebecca Rivera Arenoso
SSA clerk
Selling Social Security cards to aliens
Prison, 14 months

Otis L. Rackley
U.S. Customs and Border Protection inspector
Accepting bribes to smuggle aliens
Prison, 90 months

2004

Clinton Van Berry
Atlantic City assistant tax collector
Conspiring with wife to steal tax receipts
Prison, 48 months

Zachary W. Turner
East Orange councilman
Conspiracy, extortion, mail fraud
Prison, 30 months

Alfred W. Bridges
Ewing Township mayor
Possession of crack cocaine
5 years' probation

Michael C. Harkins
Executive Director DRBA
Billing for personal expenses
Prison, 14 months

Jean Anderson
Hudson County CVG deputy registrar
Conspiring to sell birth certificates
3 years' probation

Earl Hasselbrook
Irvington Township finance director
Filing false tax returns
2 years' probation

Richard Musto
Marlboro Township MUA chairman
Extorting, bribing official, false tax return
Prison, 50 months

Henry G. Perkin
Mercer County Executive's ODS, member Delaware River JTBC
Mail fraud, attempted extortion
Prison, 69 months

James R. Lambert Sr.
Mercer County IA executive director
Mail fraud, conspiracy to bribe mayor
Prison, 5 months

Lori Avon
NJMVC customer service representative
Selling driver's licenses
3 years' probation

Linda Carlo
NJMVC customer service representative
Selling driver's licenses
Prison, 12 months

Anita Feathers
NJMVC customer service representative
Selling driver's licenses
3 years' probation

Tonya Horn
NJMVC customer service representative
Selling driver's licenses
Prison, 12 months

Lauren Joyce
NJMVC customer service representative
Selling driver's licenses
Prison, 12 months

Shelina D. Moore
NJMVC customer service representative
Selling driver's licenses
Prison, 12 months

Lyliana Pablo
NJMVC customer service representative
Conspiring to produce bogus driver's licenses
Prison, 33 months

Linda Love
NJMVC examination technician
Conspiring to sell 750 driver's licenses
Prison, 30 months

Mary Ann Peterson
Picatinny Arsenal manager
Conspiring to embezzle
5 years' probation

Charles Kushner

Port Authority commissioner
Witness tampering, illegal campaign contributions, tax evasion
Prison, 24 months

Terence Walden
U.S. Customs and Border Protection senior inspector
Accepting bribes to smuggle illegal aliens
3 years' probation

2005

John J. Hamilton Jr.

Asbury Park councilman
Accepting bribes
Awaiting trial

Thomas A. Greenwald
Fair Hills councilman
Conspiracy to launder illicit cash
Sentence pending

Paul Coughlin
Hecket mayor
Extorting contractor bribes
Prison, 24 months

Bohdan Serpayeg
IRS agent
Preparing fraudulent returns, tax evasion
Awaiting trial

Robert L. Hyer
Keyport councilman
Extorting contractor bribes
Deceased

John J. Ilerta
Keyport mayor
Extorting bribes
Sentence pending

Matthew V. Scannapieco
Marlboro Township mayor
Accepting bribes, tax evasion
Sentence pending

Stanley Young
Marlboro Township Planning Board member
Accepting bribes from developers
Sentence pending

Raymond J. O'Grady

Middletown committeeman, former mayor
Attempted extortion, accepting bribes, conspiracy
Prison, 43 months

Joseph McCumin
Monmouth County DOT operations manager
Extorting bribes
Sentence pending

Patsy R. Townsend

Monmouth County fire marshal, emergency management and code enforcer
Attempted extortion of bribe
Prison, 6 months

Harry Larrison Jr.

Monmouth County freeholder director
Accepting bribes from developers
Deceased

Anthony Pakuhl
Monmouth County superintendent of bridges, former Long Branch councilman
Conspiracy to accept bribes
Sentence pending

Thomas Broderick
Monmouth County undersheriff, highway department assistant supervisor, former councilman
Money laundering
Prison, 4 months

Richard Iadanza
Neptune Township deputy mayor
Extorting bribes
Sentence pending

Robert Dessess
New Jersey Turnpike supervisor
Accepting towing contractor bribes
3 years' probation

Stephen D. Kessler
Ocean Township SA chairman
Accepting bribes
Sentence pending

James M. Cummings Jr.
Paterson schools director of facilities
Accepting contractor bribes
Prison, 48 months

Louis Milone

Paterson schools supervisor of maintenance and custodial services
Accepting gifts
5 years' probation

Peter K. Bathurst
State trooper
Conspiracy to extort stock and money
Prison, 37 months

Joseph DeLisa

West Long Branch councilman
Extorting bribe
Prison, 15 months

Paul R. Zambrano

West Long Branch mayor
Extorting bribes from contractor
Sentence pending

2006

Craig Callaway
Atlantic City Council president
Accepting contractor bribes
Prison, 48 months

Glen Jones
Atlantic City councilman
Extortion
5 years' probation

Ramon Rosario
Atlantic City councilman
Accepting bribes
Prison, 13 months

Joseph Foy Sr.
Burlington Township mayor
Tax evasion
2 years' probation

Ali Boan El
Camden councilman
Extorting bribes from contractor
Prison, 20 months

Connie Davidson
GSA employee, Fort Monmouth
Arranging no-show jobs
Prison, 12 months

Michael Rapp
GSA programs director, Fort Monmouth
Conspiracy to defraud U.S., tax evasion
Prison, 48 months

Eric D. Hart
Hoboken PHA account manager
Embezzlement
Prison, 41 months

Anthony Lukowiak
Newark Division of Sanitation manager
Accepting corrupt payments
Prison, 43 months

Rita Peterson
NJMVC customer service representative
Selling driver's licenses
Prison, 12 months

John A. Lynch

State senator
Mail fraud, tax evasion
Prison, 39 months

Frank G. Abate
Western Monmouth UA executive director
Accepting contractor gifts
Prison, 51 months

2007

Joseph C. Scarpelli

Brick Township mayor
Extorting bribes from developers
Sentence pending

Darrell Woods
Federal Aviation Administration supervisor
Accepting bribes in a procurement fraud
Sentence pending

Matthew P. Valvano
Linden building inspector
Extorting bribes from contractor
Pending indictment

Richard Kaplan
New Brunswick construction inspector
Accepting contractor bribes
Prison, 30 months

William Walker
New Brunswick director of housing rehabilitation
Extorting bribes from contractors
Awaiting trial

Linda Roach
New Brunswick supervisory clerk typist
Extorting bribes from contractors
Sentence pending

Keith O. Reid
Newark City Council president's COS
Accepting bribes
Pending indictment

Louis Marchi
Newark court clerk
Extorting bribes to fix records
Pending indictment

Mims Hackett Jr.
Orange mayor and assemblyman
Accepting bribes
Pending indictment

Mark Hooks
Passaic building inspector
Extortion
Pending indictment

Marcellus Jackson
Passaic councilman
Accepting bribes
Pending indictment

Jonathan Soto

Passaic councilman
Accepting bribes
Pending indictment

Alfred E. Steele

Passaic County assemblyman and undersheriff
Accepting bribes
Pending indictment

Victor Ortiz
Passaic PHA building inspector
Conspiracy to extort
Awaiting trial

George Morgan

Passaic Valley Water Commission employee
Conspiracy to extort
Sentence pending

Robert Schneiderwick
Passaic Valley Water Commission employee
Attempted extortion
Sentence pending

Standley Williams
Paterson building inspector
Conspiracy to accept bribes
Sentence pending

Princess Reaves
Paterson deputy court administrator
Bribery
Awaiting trial

Yolanda Lane
Paterson lead paint inspector
Extortion
Sentence pending

Lee Holland
Paterson PHA building inspector
Accepting bribes
Sentence pending

Maribel Cortes
Paterson PHA caseworker
Bribery
Sentence pending

Piora Cruz
Paterson PHA caseworker
Bribery
Sentence pending

Elisa Griffin
Paterson PHA caseworker
Bribery
Sentence pending

Maria Rosa

Paterson PHA caseworker
Conspiring to accept bribes
Sentence pending

Benny Ramos
Paterson PHA deputy director
Bribery
Pending indictment

Javier Nunez

Paterson PHA employee
Conspiring to accept bribes
Sentence pending

Maurice "Pete" Calloway
Pleasantville school board member
Accepting bribes
Pending indictment

James T. McCormick

Pleasantville school board member
Accepting bribes
Pending indictment

James Priestley

Pleasantville school board member
Accepting bribes
Pending indictment

Rafael Velez

Pleasantville school board member
Accepting bribes
Pending indictment

Jayson Adams

Pleasantville school board president
Accepting bribes
Pending indictment

Shorpe James

State senator and former Newark mayor
Abusing credit cards, fraudulent land sales
Awaiting trial

Sammy Rivera

Passaic mayor
Accepting bribes
Pending indictment

Wayne R. Bryant

State senator
Fraud, trading tribunal for no-show job
Awaiting trial

Key
DOT: Department of Transportation
GSA: U.S. General Services Administration
DVS: Division of Motor Vehicles
COO: Chief of Staff
SSA: Social Security Administration
JTBC: Joint Toll Bridge Commission
IA: Improvement Authority
PHA: Public Housing Authority
SA: Sewerage Authority
NJMVC: New Jersey Motor Vehicle Commission
MUA: Municipal Utilities Authority
DRBA: Delaware River & Bay Authority

Mr. CANNON. If the Chair would yield?

Ms. SÁNCHEZ. I will yield.

Mr. CANNON. This is a remarkably important issue, and we have an amazing panel. And on that panel we have a guy who is lionized in America for his willful determination to not sign a memorandum on his, some people call it, his death bed. It certainly was a very ill bed.

And to say there is a problem related to him is one that I think ought to be squarely confronted. I know that we have two witnesses on the next panel who are representatives from New Jersey who want to attack Mr. Christie. And I understand the urge to attack Mr. Ashcroft's credibility. I find it appalling.

Ms. SÁNCHEZ. Will the gentleman yield? I was not attacking Mr. Ashcroft's credibility. I was simply posing a question with respect to a potential——

Mr. CANNON. You are questioning his integrity and calling it a problem.

Ms. SÁNCHEZ. Well, if there is a conflict of interest, I would submit, that is a problem.

Mr. CANNON. When you get the list of people who are capable of doing the job that needed to be done at Zimmer, I think it was a remarkably short list. And the people that appear on a list like that are going to be people that have relationships. And therefore, you can never get beyond the problem.

I think the proper scope of this Committee is to actually oversee these monitors. I think that is an appropriate role. And I think we need a lot more staff in this Committee to do that. But right now I think we ought to be looking at policy rather than creating the question of a problem when you are talking about a man of such distinguished history and unquestioned ethics as Mr. Ashcroft.

Ms. SÁNCHEZ. If the gentleman will yield back, I will recognize Mr. Johnson for 5 minutes of questions.

Mr. Johnson?

Mr. JOHNSON. Thank you, Madam Chair. And during 27 years of practicing law back home in Dekalb County, Georgia, I represented many people. And they were all just regular working class people, blue collar folks. And they were all subject to the maxim of you do the crime, you do the time. And so, now today I am hearing about non-prosecution agreements with corporations and also deferred prosecution agreements.

And if there were any deferred prosecution, it would be something for my clients that they would have to appear in court and face the charge and admit to the allegations and ask the judge for some consideration. And the judge in his discretion, his or her discretion, would decide whether or not that person would be placed in a deferred prosecution program.

And we don't have any of those kinds of qualities that exist or that existed for these prosecution agreements here. But I do want to ask Mr. Ashcroft, while appreciating your service to the Nation, according to billing records that detail 5 months of work from September 2007 to January 2008, your firm has billed Zimmer, Incorporated more than $7.5 million. Over these 5 months, your total fees are higher than other monitors, particularly the four other monitors for the four other orthopedic device makers who entered

into deferred or non-prosecution agreements with the Justice Department.

Your firm is the only one of the group that charges a set monthly fee of $750,000 on top of your hourly billing rate, which is also the highest of the five firms, topping out at $895 an hour. To your knowledge, are you aware of any monitors charging a monthly fee of $750,000 on top of an $895 hourly billing rate, Mr. Ashcroft?

Mr. ASHCROFT. Well, we do not charge both an hourly fee. The hourly fee covers one group of workers. Other individuals are covered in the set amount. And they are not working on an hourly basis.

The reason our fees are appropriate is the complexity of the case and the responsibilities in which we have to be involved. I have been required to assemble an exceptional monitoring team of about 30 professionals, including lawyers, investigators, accountants, other business consultants to ensure that the deferred prosecution agreement is met. These professionals include former United States attorneys, assistant United States attorneys, former FBI members, former United States Department of Justice officials, intellectual property lawyers.

Mr. JOHNSON. Well, you have answered my question. You have got a high-powered and highly-paid staff that consumes that monthly retainer fee.

Now, for each monthly billing period, all that you have provided is a one-page bill that simply lists the total amount due and the bank information about where to wire the money. Whereas other firms would have submitted bills, detailed billing, 200 pages long, for instance, or 78 pages long. Why don't you provide Zimmer with a detailed accounting explaining the services provided and the monitoring expenses?

Mr. ASHCROFT. We believe that the quality of the services is the important point and that we have agreed and provided information about our fees in advance.

Mr. JOHNSON. Will you provide this Committee with a detailed accounting of the services provided and expenses incurred in the Zimmer monitoring?

Mr. ASHCROFT. I will provide this Committee with the documents that are required under the deferred prosecution agreement. And I will make available to the Committee those items which are required by that agreement.

Mr. JOHNSON. Who is tasked with monitoring the monitor? In other words, who ensures that you complete all of your responsibilities under the deferred prosecution agreement?

Mr. ASHCROFT. First of all, the company has an opportunity to raise issues if it finds the work of the monitor to be inappropriate, insufficient, of low quality or finds directions of the monitor to somehow be against what it considers to be the terms of the agreement, outside the scope of the agreement or otherwise inconsistent with the purposes of the corporation in remediating the problems that are faced by the corporation. The company carries those items to the U.S. attorney or to the office of the U.S. attorney to individuals in the office who are involved in the administration of the deferred prosecution agreement.

Ms. SÁNCHEZ. The time of the gentleman has expired.

At this time, I would recognize Mr. Feeney for 5 minutes of questions.

Mr. FEENEY. Well, thank you, Madam Chairman.

Mr. Attorney General, it is great to see you back. The startling thing for me here is all of the suggestion or innuendoes, the mere implication of having the hearing today that there is some either conflict or something fundamentally wrong and we are worried about the costs to corporations. I have to be candid with you. The Congress voted overwhelmingly a few years ago for a bill that is commonly referred to as SOX, Sarbanes-Oxley.

And what Sarbanes-Oxley effectively did—you know, Mr. Ashcroft, whose firm has been charged with monitoring a corporation where several individuals and perhaps the corporate entity itself may have been indicted or convicted of a crime to keep it alive and protect it, despite the wrongdoing. What Sarbanes-Oxley has done is effectively to take every innocent corporation that wants to go public in America and require them to spend about $6 million annually at the requirement of Congress to pay additional accounting fees on top of the accountants that they already have.

I can't get members of the majority party to be concerned about the fact that Sarbanes-Oxley costs the United States economy, according to one study done by a professor from the Brookings Institute and another professor from the American Enterprise Institute—they estimate the annual costs, superfluous and unnecessary costs of accounting that bill costs the American economy $1.4 trillion. And that is for innocent corporations that have done no wrong.

And yet when you have a corporation, some of whose leaders have actually committed crimes, you have a couple choices. You can, in effect, give that corporation the death penalty, even though the overwhelming majority of individual employees, partners, maybe even members of the board of directors and certainly the shareholders were totally innocent of any wrongdoing.

So as Congress is continually battering and punishing the innocent because of the faults of the few, now we are here suggesting that there is something fundamentally wrong with hiring perhaps the most qualified individual in the country on health care and matters of jurisprudence from the attorney general's perspective, there is something fundamentally wrong about giving a company and its shareholders and the innocent employees and the innocent members of the board and the innocent partners a second chance.

I don't know how many innocent people worked for Arthur Andersen when it was given the death penalty. Perhaps it was a prudent thing to do to punish all of the innocent along with a few of the guilty. But it didn't help the American accounting system very much.

As a consequence of Sarbanes-Oxley, we now have only four corporations in America willing to do the type of work that is required by Sarbanes-Oxley. And so, you have a quadropoly where they get to charge whatever they want to. And every corporation in America has to pay the price. Presumably if you are, for example, Pepsi, and you have an inside auditor and your major competitor, Coca-Cola, has one inside auditor and has to hire one of the other big four out-

side, there is only one left. And you have to do business, whatever the cost.

The indirect costs have totaled, according to this one estimate, $1.4 trillion for innocent American companies. And as capital flees America, we are out-sourcing our 100-year lead to places like London's stock market that advertises itself as a SOX-free zone, the Frankfurt market, the Hong Kong market. We have done this to ourselves. And we are happy about it.

And yet, we find a situation where we are giving a company and the innocent people that are affiliated with it a second chance and most importantly, the shareholders. And we are here today battering people that are trying to save a company and giving it a second chance. I just find it remarkable.

There is no situation in America that Congress can't make worse. And I think the hearing today is a great example of that.

With that, I don't have any questions. I guess I have got an opinion already on this subject. But I will yield back the balance of my time.

Ms. SÁNCHEZ. The gentleman yields back.

And at this time, I would recognize Mr. Delahunt for 5 minutes of questions.

Mr. DELAHUNT. Well, I thank my friend from Florida for the exposition of Sarbanes-Oxley. I would suggest that Enron had more to do with it than Sarbanes-Oxley. We are talking about confidence here. And I think that Congress in its wisdom, in its bipartisan wisdom decided that if investors were going to have confidence in our free market system and free enterprise that something had to be done in terms of accountability.

And maybe we are seeing that again in terms of the so-called sub-prime crisis that has generated a tremendous magnitude, if you will, of economic pain as witnessed by the plummeting stock markets. But having said that, I am certainly not interested in discrimination against individuals who have served in government at whatever level. I don't think there should be any discrimination. And I don't think that, General Ashcroft, is the import of today's hearing.

Again, to echo the observations by the Chair, I think it is a question of confidence in the integrity of the system, not your personal integrity, not the personal integrity of anyone here at the panel because we know it does count. Because while there are no taxpayer dollars involved, this is, if you will, a fine being levied on a company that could have presumably been indicted.

Really, what it occurring here is a monitorship is performing a public function, a function that is a key element in terms of assuring the American people that justice is being done. I am a believer in prosecutorial discretion and judicial discretion. That is why I vote against mandatory sentences. But I do believe in sentencing guidelines and transparency. And what I would suggest is what we have here is a situation that doesn't provide the kind of transparency and raises issues and legitimately raises issues that ought to be addressed.

General Ashcroft, you heard the testimony of Professor Garrett. Would you make any comments in terms of those policy issues that he raised in his testimony regarding guidelines, transparency, ac-

countability? Because I was shocked, to be perfectly candid, that this company, Zimmer, was consulted about whether you were acceptable. I find that remarkable.

There ought to be something better than receiving the imprimatur of a corporation that I would suspect was involved in significant wrongdoing and asking whether it is okay if former Attorney General Ashcroft leads a monitoring team. That was stunning to me.

What I suggest is there ought to be a good, hard look at what the guidelines are, what we have in terms of transparency and accountability. I haven't had a chance yet to read the legislation proposed by my good friends from New Jersey. But something ought to be done.

General?

Mr. ASHCROFT. Well, thank you very much. First of all, I don't believe that the monitorship is a fine. I think the monitorship is a way to say that because there is an agreed upon area where the law has not been respected in the way that the system believes it should be, that there should be a way to remediate that. And trusting the person who has been a wrongdoer to remediate that on his own is inappropriate.

In our case—and this is public information because I am not here to discuss things that aren't public about the case or to telegraph where the investigation may go or not go. And there are real serious problems with having open hearings about ongoing criminal investigations. And this is an ongoing criminal investigation that relates not just to one——

Mr. DELAHUNT. I understand that, General. But——

Mr. ASHCROFT [continuing]. But to five different companies that comprise 95 percent of the orthopedic joint replacement industry. But in the industry, consulting contracts were used as a cover for kickbacks to doctors. So a doctor implanting a device like an artificial knee or hip might have his decision clouded by the fact that if he implanted one, it would be in the interest of his wallet, whereas if he implanted another, it would in the interest of the patient.

Mr. DELAHUNT. General, with all due respect, my question went to the recommendations.

Mr. ASHCROFT. Yes.

Mr. DELAHUNT. And maybe you didn't have an opportunity to hear them closely.

Mr. ASHCROFT. Well, what I am saying is——

Mr. DELAHUNT. Because what I suspect in terms of how appointments are made, when reports ought to be filed, when things ought to be made public would fall within appropriate discretions of a court, of maybe a probation service. Because I think that there could be a way to achieve the goals of those members who have expressed concern about this in a public—I mean, the reality is you are the former Attorney General. In some ways that is helpful. In some ways it is a burden that you will always carry.

I was a former district attorney, and I have 70 former assistants that are currently serving on the Massachusetts bench. I know that half of them would recuse themselves if I simply came before them and argued a case. Although there is no conflict. But appearances do count. And I think that has got to be factored into the equation.

Mr. ASHCROFT. May I——

Ms. SÁNCHEZ. The time of the gentleman has expired.

At this time, I would invite——

Mr. CANNON. Is the Chair going to let the attorney general respond?

Ms. SÁNCHEZ. Briefly.

Mr. ASHCROFT. I would just say I have read a number of the professor's articles. He is a prolific author and a valuable contributor in raising the questions that ought to be discussed. I was attentive to Counselor Terwilliger's remarks that raised the issues that relate to the separation of powers. And I think that the decisions, as a former prosecutor you would agree, to prosecute or not to prosecute are appropriated vested in a way in a separate branch of government.

The idea that you might have people in the judicial branch making decisions about whether or not to prosecute cases that they later sit in judgment on has serious—there are serious drawbacks to that. I noted that when the professor has addressed these items he has tried to avoid those kinds of problems with separation of powers. And any approach to this ought to be very tenderly undertaken with a view to respect, of not having the judge and the prosecutor be sourced in the same part of the governmental system.

Now, I need to give my thanks to the Committee. When you scheduled this, I indicated to you that I had a speaking responsibility in Central Florida this evening and that I had a 12:50 flight at Dulles. And so, I intend to leave in accordance with our previously agreed to scheduling. And I thank you for your understanding of that. I am grateful to you.

And I want to thank each of these thoughtful individuals who has participated. And I think in my absence your ability to discuss the real issues here and not to be bogged down in this specific case, which would be inappropriate in any event, will be enhanced. Thank you very much.

Ms. SÁNCHEZ. Thank you for your testimony, Mr. Ashcroft. We appreciate you coming today. And we wish you luck in catching your flight. You are excused.

Mr. FRANKS. Madam Chair? Madam Chair?

Ms. SÁNCHEZ. I don't know that congressional immunity actually exists for anything. If it does, I am not aware of it.

Who seeks recognition?

Mr. Franks?

Mr. FRANKS. Yes, Madam Chair, General Ashcroft is leaving. I guess I wish that he could have been here for my own comments just related to the gentleman's reputation in this country for personal integrity. I think that he represents the kind of public servant that a lot of us would like to be when we grow up, other than a few partisan Members of Congress.

It occurs to me that what is at stake here to this company, to Zimmer—one of the reasons I think they wanted someone like Mr. Ashcroft to be involved in this agreement was simply because they knew that his reputation was such that if indeed he entered into it that he would do so and would expand that commitment to integrity to their company.

And, you know, in all respect to Mr. Delahunt's concerns, if I were on the board of this company and the guilty members had been expunged from the company, I was doing everything that I could to restore this company, not only to profitability, but to coming in compliance with the law and being a company that the stockholders could aspire to, I would do everything I could to bring a man like General Ashcroft into the equation. It makes all the sense in the world to me.

And certainly, the result in the company's profitability and in their credibility, the change that took place in this company, I think, is partly something that we can lay at Mr. Ashcroft's feet. And I just——

Mr. DELAHUNT. Well, if the gentleman would yield?

Mr. FRANKS. Certainly.

Mr. DELAHUNT. He referenced me. I think that we have a larger obligation. I am not in any way questioning the credentials of the former attorney general. But I dare say there are major law firms all over this country that could perform the kind of services necessary, that have people of high profile with bona fides that are impeccable.

But when you have a potential wrongdoer, which is the corporate entity, requesting or signing off on who is going to monitor compliance with the agreement, I would suggest that the public says what is going on.

Mr. FRANKS. Well, reclaiming my time, keep in mind there is two parties to the agreement. That is the company and the prosecutors. And they are trying to find someone who can be acceptable to both of them and to present to the public a credible image. And I think General Ashcroft does that in a way that very few people can.

I mean, this gentleman has been the attorney general of Missouri, Missouri's chief auditor. Let me finish. I am about out of time—it is chief auditor, the governor of Missouri, U.S. senator from Missouri, the attorney general of the United States. And I don't know how you could find someone that more personifies the perfect example of what someone in this capacity—what qualifications they should have.

Mr. DELAHUNT. If again my friend would yield for just a moment, I think that we all approve, as the Ranking Member indicated, of the former attorney general's courage in the face of the pressures that came from the White House in the form of Mr. Card and——

Mr. FRANKS. Well, reclaiming my time, reclaiming my time, Madam Chair.

Mr. DELAHUNT [continuing]. Former Attorney General Gonzalez to get him to——

Mr. FRANKS. Reclaiming my time, Madam Chair.

Mr. DELAHUNT. Well, I will yield back.

Ms. SÁNCHEZ. Pardon me. The time belongs to the gentleman from Arizona.

Mr. FRANKS. Yes, Madam Chair, I mean, if we are going to deviate into these other situations—if Mr. Ashcroft is an example here of what is wrong with the system, where is Mr. Toricelli? Where is Mr. Stryker? If we are going to deviate off here, this is a bad example to use someone like General Ashcroft as to what is wrong

with the system. And I think that that has been done here to a degree.

And I just wonder, you know, if the public realizes that he had nothing to do with the prescribed DPA or he didn't negotiate the terms with the company in any way. And the fee arrangements he didn't negotiate with the company in any way.

And yet these things have been previously not released publicly. And I am wondering how the fee arrangements were made public in this situation. And I am about out of time, so I will now yield back to Mr. Delahunt.

Mr. DELAHUNT. Well, I thank my friend.

Ms. SÁNCHEZ. The gentleman yields back his time.

Mr. DELAHUNT. Yes, I know. There is still some time on the clock I see, Madam Chair. But I wanted——

Ms. SÁNCHEZ. Yes, but the gentleman has yielded.

Mr. DELAHUNT [continuing]. To respond that I wasn't being——

Ms. SÁNCHEZ. Does the gentleman seek unanimous consent for 30 seconds to respond?

Mr. FRANKS. Madam Chair, I have yielded my time to the gentleman.

Ms. SÁNCHEZ. You have yielded your time? I am sorry. I misunderstood. The gentleman from Arizona has yielded the remainder of his time to Mr. Delahunt. Mr. Delahunt is recognized.

Mr. DELAHUNT. Thank you, Madam Chair. I wasn't deviating. I was making a point that was brought up by Mr. Cannon, the Ranking Member, about the credentials, the credentials in terms of his political courage to stand up against the White House, against the then counsel to the White House, Mr. Gonzalez, and to support Mr. Colmey in what I consider an act of political courage.

But my point is it is about appearances and the confidence of the American people in the system. No one here is questioning his morals, his ethics. It is what about the perception of a fee that, I am just reading, ranges from $28 million to $57 million. That is a lot of money.

Now, I am all in favor of lawyers making money. That is something that I have fought for all my life. And I have to tell you I am glad to hear that we can agree on that, because in the past, it has been the then majority, now minority that have argued for capping lawyers' fees when it came to class action suits. So I am glad that we have adjusted our sights and are now moving forward. And I thank my friend for yielding and yield back.

Ms. SÁNCHEZ. The time of the gentleman has expired.

At this time, I would recognize Mr. Cannon, who chose to pass, for 3 minutes of time.

Mr. Cannon?

Mr. CANNON. Thank you, Madam Chair. And I expect to ask unanimous consent for an additional 2 when we get to that point. But I am a little confused by this last exchange. We are talking about the courage of a man and his willingness to stand up and do the right thing, but somehow making a distinction between his courage and his credentials. I think that there is probably not a lawyer in America who has the credentials that Mr. Ashcroft has.

The amazing thing about this hearing so far is we have this really incredible panel that could inform us on where we need to go,

and virtually every single question on the Democratic side has been about raising the question of the problem of the perception of a conflict of interest.

Ms. SÁNCHEZ. Will the gentleman yield?

Mr. CANNON. Yes, I will briefly.

Ms. SÁNCHEZ. And you will be granted time, I assure you. We will be moving on to a second round of questions. And I assure you there will be many questions that we will have for our remaining witnesses. I think our asking Mr. Ashcroft questions first was due to the time constraints. We knew he would not be here for the remainder of the hearing.

Mr. CANNON. Reclaiming my time, these are not questions the majority was asking Mr. Ashcroft. These were veiled charges. This is all about innuendo.

The fact is did we do—did this Committee do an open bidding process for Mr. Irv Nathan's services, for instance? The fact is—and as the Chair knows, I have been a big supporter of Mr. Nathan in his current job. But we didn't do it with a bidding process for a very good reason. And I think that we have sort of exhausted that——

Ms. SÁNCHEZ. Will the gentleman yield?

Mr. CANNON. No. I think we have sort of exhausted that issue with the attorney general. Now, if I might, I would like to actually turn to the panel and see if we can rekindle the discussion, which I think is absolutely fascinating. And so, I am going to ask two general questions that I would like the panel to respond to.

Mr. Garrett said something to the effect of much more remains to be done with respect to guidelines. We have memos, three memos now. We have some guidelines that have been developed. And if I can just give these two questions to the panel, I won't ask for additional time, Madam Chair. But first of all, where do we go? Are we done with these guidelines? I think the answer is no. But where do we go with new guidelines?

And then could each of you also address that and then secondarily, address the issue of oversight? Should courts oversee monitors? Or should Congress oversee monitors? We have a vast issue of separation of powers, and I would very much like to have your opinions on those two issues.

We may start with Mr. Dickinson.

Ms. SÁNCHEZ. Mr. Dickinson?

Mr. DICKINSON. Thank you. On your first point, where are we going, I think I would certainly hope that we are going with more guidelines from the Justice Department. I think we have a very, very good start with the guidelines that came out yesterday on the appointment process.

I would still like to see, as I said in my remarks, the criteria in which a monitor should be appointed. That is an area where we still do not have any guidelines. And I think the work scope was the third area that I mentioned and one that perhaps should also be considered. But I think we definitely need some guidance as to when a monitor will or will not be incorporated into a DPA.

With respect to the oversight, it is my view that the oversight should come from Department of Justice in conjunction with the DPA and the prosecutor and the entities involved with the nego-

tiated DPA itself. And I think that I have proposed that there should be periodic meetings. There should be a discussion between both the government, the monitor, and the company involved, all three of them, throughout the monitorship period, which would allow all parties to discuss and understand the status of the monitorship, issues that arise, and how anything that has arisen should be resolved.

And remember that these are not just for the typical criminal things that we are talking about today. These issues arise in the tax fora, in export laws. There are a variety of issues that may require a monitorship. So I think that the government expertise in this area should also be brought to bear in the oversight.

Mr. CANNON. So justice continues to do oversight, and this Committee oversees justice?

Mr. DICKINSON. Correct.

Ms. SÁNCHEZ. Mr. Nahmias?

Pardon me. And if the witnesses could please keep their answers brief because we are running long.

Mr. NAHMIAS. Well, I think it is useful to understand that we started really around the 5-year anniversary of the President's Corporate Fraud Task Force to realize that we had accumulated enough of an experience base with these types of agreements across the country and at Main Justice to start developing the type of best practices and guidance that we recognize is important in this area. There is some guidance, and we have started this process with the issuance of the criteria on selection and use of monitors that came out on the 7th.

One of the things that has struck me in working on developing this guidance is I had a perspective from my time at Main Justice seeing many of these large corporate fraud, Fortune 500-type cases. You have a very different perspective when you are in the field where a lot of the cases that involve these issues are not of that type, do not involve those types of offenses. And even more so when I talk to my colleagues as we develop policy and find out from them, yes, what appears to be a good policy will need an exception or some recognition of the fact that there are very legitimate prosecutorial reasons in another case that need to be taken into account.

I think it is our view that this is an area that we need to continue to study. We are interested in input, obviously, from all sources, including the Congress. And we will take that into account as we go forward. We would like to have a chance to see how these guidelines that have come out work.

On the issue of when a monitor should be used, while that is not fully spelled out, there are indications in the policy that came out this week that of the types of considerations that should be taken into account in deciding whether a monitor should be used. And there are also some guidance in the principles on the type of scope of work that a monitor should be considered for.

With regard to the issue of oversight, it is important to distinguish between deferred prosecution agreements, which are filed with a court, both the charging document and the agreement is taken to a magistrate judge or a district judge who has to approve the deferral. And so, there is court approval of that deferral.

As Mr. Ashcroft was saying, there are concerns about the court getting more enmeshed in the details of approving these agreements, which are agreements not to seek an indictment and final conviction of a corporation. Courts generally do not get involved in that area. I think Professor Garrett has talked about some court involvement. That is in the civil settlement context of consent decrees. In the criminal prosecution discretion area, the prosecutorial discretion is very important, and the concern about intrusion by the other branches of government is, I think, heightened.

With regard to congressional involvement, the same issues arise. The principles for our exercise of prosecutorial discretion have typically been developed within the Justice Department often seeking input from various sources. But those are kind of core prosecutorial discretion functions. And I think there would be some fairly significant separation of powers issues if one of the other branches of government was too enmeshed in the exercise of who should be charged.

Ms. SÁNCHEZ. Mr. Terwilliger—and I hate to do this to you, the last two witnesses. But considerable amount of time was given in the first two witnesses' response to these two questions. I would please encourage you to be brief in your answers to the two questions Mr. Cannon posed.

Mr. TERWILLIGER. Thank you. In terms of where it goes from here, I want to commend the Committee for having this hearing, at least in so far as the focus is on the use of these kinds of agreements because from my clients' perspective, that is the business community, some focus on these issues is critically important.

The guidelines the department issued, I think, are a very, very positive step forward in bringing some level of policy guidance and structure to the use of DPAs and, in turn, the use of monitor arrangements within DPAs. I do think, however, just based on the comments that have come from the Members at this hearing today, there is not yet a common understanding of what purpose a monitor serves and what purpose a monitor serves within the larger context of a DPA and what the use of DPA is in terms of an alternative disposition method. And I think it would be well-worth the time of the Committee to continue to look at that and look at that as an oversight matter in terms of how the Justice Department approaches that.

In terms of oversight, courts have not proven to be very adept at running prisons, running school systems. And I don't think they would be very adept at running corporations through monitors. So while the courts have a role, it is a limited role in a criminal disposition involving any defendant, including a corporation.

The responsibility for seeing to it that DPAs achieve their remedial purposes, vis a vis, corporate behavior, rests with the Justice Department. And this Committee clearly has a role in oversight to determine that the Justice Department is, in turn, meeting that responsibility.

Ms. SÁNCHEZ. Thank you.

Professor Garrett?

Mr. GARRETT. Just briefly, as——

Ms. SÁNCHEZ. Please turn your microphone on.

Mr. GARRETT. I am sorry. So I think it is a wonderful development that the department is exploring best practices in this area. And there is a sufficient body of agreements and experience with them that I think this is an important time to be doing that.

It is hard for outsiders like a law professor to study these agreements with so little information available. It is hard to even get the text of some of them. I think at minimum for the public to be able to evaluate what is going on we would need to know who are these monitors. It is hard to find out their names, much less the terms of their retention.

A court could at minimum, even if it is not engaged in intrusive review of the work of a monitor, could ensure some transparency so that we know what the reports are or some version of what the implementation is. I think it is important to distinguish between the remedies and the implementation of these agreements from the charging discretion of the prosecutors.

Courts could be involved in the implementation of the agreements or in just minimally approving the remedies, as they do now under the U.S. code if it is a deferred prosecution agreement. I think we should be more concerned about non-prosecution agreements in which the court has no role. I think it is troubling to proceed in that fashion, and many practitioners have complained that there is little difference between the sorts of situations in which a non-prosecution agreement is entered versus a deferred prosecution agreement.

I would just finally just point out that if a company is convicted and is placed in corporate probation, a court could very much supervise compliance or supervise a monitor. It is not unheard of. It is something that the sentencing guidelines provide for. So this is not a new role for courts. And it is something worth thinking about.

Ms. SÁNCHEZ. Thank you.

Mr. CANNON. Thank you, Madam Chair. And I yield back.

Ms. SÁNCHEZ. I thank the gentleman for yielding back time which he does not possess.

There is sufficient interest in a second round of questions, so I hope the witnesses will bear with us. These are sort of clean-up questions that hopefully will enlighten us further before we move on to our second panel. So I will recognize myself for 5 minutes of questions. And I will begin with Mr. Dickinson.

I am interested in knowing, in your opinion or in your professional experience, to whom do you think that independent monitors owe duty. Are they owed to the prosecutor? Are they owed to the corporation? Can you enlighten us a little bit on that?

Mr. DICKINSON. It is a very good question, and I think a very difficult one to respond to. I notice in the Justice Department guidelines they state that the monitor does not have a responsibility to shareholders. I believe that the monitor really has a responsibility to all the parties involved and indeed is appointed for their independent expertise and their independent capability to assess both sides of the coin.

They are brought into a matter after a problem has occurred. They are given a mandate. I would hope that the written structure of the DPA would actually inform the monitor as to those duties.

Some monitors may, in fact, be required to report to the Justice Department. Some are not. Some are actually instructed to report on additional issues that arise. Some are not. These are the types of things that Mr. Nahmias has pointed out I think the Justice Department is getting better at and needs to refine more, as a short answer.

Ms. SÁNCHEZ. Thank you. And I am interested in asking you, according to the Washington Post, Mr. Ashcroft had to use considerable time to prepare for the assignment and learn more about the business before he became the monitor in the Zimmer case. And I notice that both you and Professor Garrett emphasized in your testimony that the person selected have the requisite background, expertise, skills, and integrity in order to fulfill that role.

In your view, should a monitor have to use considerable time to prepare for a monitoring assignment? Or do you think that they should essentially be ready to hit the ground running when they are appointed?

Mr. DICKINSON. I think they should be ready to hit the ground with respect to the substantive law at issue. I think it is only appropriate to appoint a monitor that has substantive expertise in the issue that has arisen that is the underlying issue of the problem.

With respect to the business, however, I think it is very fair and vital that the monitor come in and understand both the background of the problem and the industry in which the monitor is to work.

Mr. TERWILLIGER. Madam Chair, may I address that just briefly?

Ms. SÁNCHEZ. Certainly.

Mr. TERWILLIGER. My law firm, my practice group has conducted worldwide compliance reviews for companies looking—where they go voluntarily to look at their own conduct and ascertain the level of compliance that exists in their international operations. It is absolutely essential, and really expensive, that the lawyers spend the time on the front end of that process understanding exactly what that business is and how it is conducted because otherwise, you don't know where to look for where the problems might be.

Ms. SÁNCHEZ. Certainly, but you would also agree, would you not, with Mr. Dickinson that the selected monitor should have the requisite experience in that field of law that they can hit the ground running, so to speak?

Mr. TERWILLIGER. Yes. Certainly in that field of law. But my point is slightly different.

Ms. SÁNCHEZ. I understand. There are two different types of——

Mr. TERWILLIGER. And that is that understanding the business is important.

Ms. SÁNCHEZ. Absolutely. There are two different types of experience one would hope that the monitor would have. And both are important.

I am interested in asking Mr. Nahmias—in the agreement deferring prosecution of Bristol-Myers Squibb, U.S. Attorney Christopher Christie inserted a provision requiring Bristol-Myers Squibb to endow a chair in business ethics at Mr. Christie's alma mater, Seton Hall. I am interested in knowing why was that provision inserted into the Bristol-Myers Squibb's agreement? And do you

think it is an appropriate type of thing to include into a deferred prosecution agreement? I am a little puzzled by that, to be honest with you.

Mr. NAHMIAS. Well, this is an area that some people refer to as extraordinary restitution, the payment by a defendant or putative defendant to a third party. It is not an unusual occurrence for defendants, individuals or corporations, to do that in an effort to seek leniency with a court. And the issues arise when the government has some involvement in it. It is actually an area that is worthy of further consideration by the Department.

With regard to the matter you are referring to in the Bristol-Myers Squibb case, my understanding is that that idea was actually raised by counsel for Bristol-Myers Squibb, not by the U.S. attorney's office.

Ms. SÁNCHEZ. But would that not be a way to sort of curry favor with the prosecutor who is deciding whether or not they want to charge this defendant? I mean, don't you think that that creates this either conflict or potential conflict?

Mr. NAHMIAS. Well, when it was raised, the only request by the U.S. attorney's office is that it be at a law school in New Jersey where the district is. My understanding is that Bristol-Myers Squibb initially approached Rutgers Law School, which is not Mr. Christie's alma mater, and found out they already had a chair in business ethics. And only after they determined that they weren't going to go to Rutgers did they go to Seton Hall.

These arrangements——

Ms. SÁNCHEZ. But do you think that those types of extraordinary measures that get inserted there probably should be some kind of guidance?

Mr. NAHMIAS. This is an area, I believe, is worthy of further guidance. And I think the Department is committed to looking into that area, hopefully, in the near future to establish some guidelines. Again, it is the kind of area that has occurred in both individual cases and corporate cases across the country for years, and we are reaching a point that we think we have the experience and the best practices to form the kind of policy guidance that could be useful.

Ms. SÁNCHEZ. I think it would be well-advised to actually develop that guidance. My time is expired.

Mr. Cannon is recognized for 5 minutes.

Mr. CANNON. Thank you, Madam Chair. This has been interesting. And I appreciate the discussion we have had about deferred prosecution agreements and in particular, your answers on who should oversee that process. And I think that we have a consensus on the panel that that should be done at DOJ, the Department of Justice, with oversight by Congress, which would mean this Committee, the Committee on Commercial and Administrative Law, which has the jurisdiction within the Judiciary Committee of the House to oversee the U.S. attorneys.

I would like to expand the idea of oversight of prosecutorial discretion a little bit and give you a couple of quick cases and then get your response to what ought to happen. We had a very famous case in Salt Lake City over the Olympic Committee when the first organizers of the Salt Lake Olympic Committee were charged with

a crime. I just couldn't understand the simple country lawyer who actually didn't do much criminal law. But I couldn't figure out where the crime would be.

And then after 5 years and a tortuous time and millions of dollars in defense fees—and by the way, in the middle of all that, the judge had dropped a number of the charges. And that was an appropriate time, I thought, to ask the Department of Justice to review the case. But there is really no other place where a congressman or a senator or anyone could actually suggest to a prosecutor that maybe there wasn't substance to the case.

And then ultimately the case was presented. And we heard a pathetic plea by the prosecutor to the judge who was on his own motion going to dismiss the case, that the prosecutors plea was to the judge to let the jury inform the judge's conscience. And the judge says you can't—the jury can't inform my conscience as a matter of law, you didn't make your case, and dismissed the case.

We had another similar case where in Utah the FTC had prosecuted a guy. And during the whole course of the prosecution, they demanded his financial statements. He said my financial situation is sort of complex. If I give you my financial statements and then the reality turns out to be different and I have signed those financial statements, then you will prosecute me for lying. And they said yes.

So he said why don't we just decide what the penalty is that you want and I will pay the penalty. And they said, no, we want your financial statements because we are going to determine the penalty based upon your financial statements. But the guy could never get out of liability. So he went to trial. He was given 500 names of potential witnesses, had to interview those 500 names at a very high cost in lawyer fees per hour.

When they got to trial, two witnesses were called. Both of them exonerated the fellow. And the case was dismissed, again, on, I guess in that case, on the motion by the defendant.

The problem I am posing to you here is that there is no way for anybody to look at those kinds of cases. Now, in the case of the FTC, I know there is a review process. In the case of the Justice Department there is a review process. But basically political appointees are not ever going to want to get involved in the details of a case. So to the degree that you have got an official at the Justice Department or any other agency that can bring a criminal prosecution, there is very little that can be done to oversee that process. And yet we get a tendency for many reasons to prosecute people in ways that those two examples demonstrate.

It seems to me that we need somewhere to have oversight that becomes effective. In other words, a new Administration takes over. New political people come in. They are loathe to go in and say show me the details of your case. In other words, I don't think the real world works like law and order works where you have got a brilliant prosecuting attorney who tells the cops why their case doesn't work or why it does work and is deeply involved in every detail. That just doesn't happen, I think, in our system.

What do we do to create a process—and I am going to ask the whole panel, but I am going to start with you, Mr. Nahmias because of your particular experience, but also because we have very

different views on this. But if we start here and go through the panel and come back to Mr. Dickinson, I would appreciate that. Because I would like to know what we can do.

Do we have a select committee like the Select Intelligence Committee where people—we have guidelines in Congress and we have the ability to go in and look at particular cases? Do you set that up as a separate panel, an outside agency of some sort? Or do we just do it in this Committee with more oversight staff?

Ms. SÁNCHEZ. The time of the gentleman is about to expire. I will allow each of the witnesses to give a very brief answer, 30 second or less, please.

Mr. CANNON. Actually, I do believe it is in the interest of the Chair to have a long answer because this goes to the very core of the jurisdiction of this Committee, which I think we would like to expand.

Ms. SÁNCHEZ. I understand we were very generous in the last round of questioning with the amount of time that went over. I am just asking the witnesses to please pare down your answers to the essential points that you would like to make.

Mr. NAHMIAS. I will try to be brief. I am not familiar with the cases you discussed, obviously. But, you know, I think the system is set up in lots of ways to provide accountability for the types of decisions that are made in cases, both through, I think, are very high-quality career assistant U.S. attorneys, U.S. attorneys who are confirmed by the Senate, and by the adversarial system and the other party's abilities to fight through the system with review by the court and ultimately by juries. There is obviously a proper role of oversight by this Committee or the Congress generally——

Ms. SÁNCHEZ. Mr. Nahmias, I am sorry.

Mr. NAHMIAS. The only concern I have is that it not happen while cases are pending because of the risk of injecting political influences into what should always and invariably be nonpartisan and non-political prosecutorial decision-making.

Ms. SÁNCHEZ. Mr. Dickinson?

Mr. DICKINSON. Justice should be the first stop. And this Committee should be the second stop. I am quite familiar with the IOC case, if you want to talk about it.

Ms. SÁNCHEZ. Thank you, Mr. Dickinson. I appreciate your brevity.

Mr. Terwilliger? Sorry, it is a tongue twister.

Mr. TERWILLIGER. Thank you, Madam Chair.

Mr. Cannon, you have raised so many important and in-depth issues that couldn't possibly be responded to in 30 seconds or 120 seconds. But I would be happy to submit some thoughts on the questions you raised for the record subsequently. I will say this.

When I served as a presidentially-appointed United States attorney in the field, I thought the idea of oversight of my decision-making and exercise of prosecutorial discretion by the Department of Justice was extremely ill-advised. When I served as deputy attorney general supervising the Nation's 93 United States attorneys and saw some examples of some of the kinds of things you are talking about, I formed a very different view.

But I do think the responsibility in the first instance has to be at the Justice Department on the decisions on cases and that Con-

gress ought to have oversight on that to ensure that there are not improper factors and so forth, but also should exercise that oversight after the fact, after Mr. Nahmias suggests, and with a very light hand.

Ms. SÁNCHEZ. Mr. Garrett?

Mr. GARRETT. Yes. Briefly I would say that——

Ms. SÁNCHEZ. Could you please turn your microphone on?

Mr. GARRETT. I keep forgetting. As to prosecutorial discretion regarding charging, which I think was mostly what you were talking about, you know, prosecutors have wide discretion for separation of powers reasons. Courts review that discretion very deferentially, for good reasons.

And the DOJ has promulgated the Thompson memo and the McNulty memo to provide guidance to organizations on how they go about making those charging decisions. So, you know, I think it makes more sense to focus instead on what happens after a charging decision is made and then there is the question of what does that agreement look like, how is it entered, how is it implemented, what remedies are included in it.

Ms. SÁNCHEZ. Thank you, Professor Garrett. I think that that was the main crux of today's hearing.

I would like to get through the final Member who would like to question because we have been summoned for votes across the street. And after Mr. Johnson is allowed to ask questions, I think we will be able to dismiss our first panel.

Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON. Yes, thank you, Madam Chair.

Professor Garrett, in the case of a non-prosecution agreement, there is no charging document that is filed. How can there be oversight on those cases where there is nothing filed with the court, there is no public record, it is a secret process?

Mr. GARRETT. I think those agreements are troubling. And one possibility would be if the department issued a guideline recommending against the use of such agreements. I don't see, unless there is some legislation, you know, which I am not sure how that would operate, that forbade the use of such agreements. Perhaps the guidance would have to come first from the department.

Mr. JOHNSON. Mr. Nahmias, I see you shaking your head.

Mr. DICKINSON. Could I make a comment on that? I would disagree with Professor on that statement. As with Mr. Terwilliger, I have been working in this area for 25 years. I have represented companies doing this type of work all over the world. I think a non-pros agreement is a highly appropriate remedy in certain circumstances. There may be cases where companies are willing to make voluntary undertakings and provide certification.

Mr. JOHNSON. But it is done in secret, though.

Mr. DICKINSON. I am not sure I would use the term secret.

Mr. JOHNSON. No public record.

Mr. DICKINSON. There may be a public record, yes.

Mr. JOHNSON. Well, no requirement that there be a public record or——

Mr. DICKINSON. I am not sure about the requirement, but I have personally engaged in non-pros agreements where there have been

public documents so citing. I think Mr. Nahmias can explain further.

Mr. NAHMIAS. I think non-prosecution agreements are really at the core of the prosecutorial discretion not to bring charges. Those decisions by prosecutors not to bring charges against either individuals or companies have traditionally not been made public.

Mr. JOHNSON. They involve the use of monitors, correct?

Mr. NAHMIAS. Some of them involve the use of monitors. Many of them don't. Many of the ones involving individuals involve conditions but do not involve monitors, obviously.

One of the things is in the area of publicly-traded——

Mr. JOHNSON. But it is a secret process?

Mr. NAHMIAS. Well, in the area of publicly-traded companies and others who have regulatory disclosure obligations, very often these agreements are made public by the effected entity. This is another area the Department has considered. But it is important that we be careful to guard the rights of people who are not charged in prosecutions. And the fact that they are corporations versus individuals may or may not make a difference in an appropriate case.

Mr. JOHNSON. Thank you.

Mr. Dickinson, the Ashcroft Group will reportedly receive fees of approximately $52 million for 18 months of monitoring in the Zimmer case. Furthermore, the Ashcroft Group gets a monthly fee of $750,000 against an hourly billing rate which tops out at $895 an hour. In your experience, is this reasonable compensation for monitoring Zimmer?

Mr. DICKINSON. I am sorry to say it is impossible to answer that in terms of the reasonableness factor. Every monitorship is different. Every monitorship has a different scope of work. Certainly, that hourly rate would not be unusual for a very senior person such as the attorney general. And depending upon the scope and the required activities, that may or may not be a reasonable amount.

Mr. JOHNSON. Mr. Nahmias, U.S. Attorney Christopher Christie spearheaded the prosecution and the decision to enter a deferred prosecution agreement or an agreement with the five medical device companies who were engaged in the largest Medicare fraud case in recent history. This was a national case which affected thousands of Americans and involved hundreds of millions of dollars.

How was Mr. Christie as the U.S. attorney for New Jersey able to obtain the right to prosecute this case instead of other U.S. attorneys? And was the decision as to which office or which U.S. attorney would prosecute the case—was that decision reached from Washington at the Department of Justice? Or was Mr. Christie just faster in asserting a claim to the prosecution in this national case?

Mr. NAHMIAS. I don't know the direct answer to that. I believe that some of these companies had extensive activities in New Jersey. New Jersey's U.S. attorney's office has been a leader in a lot of the major health care fraud cases in the country.

Mr. JOHNSON. All right. Okay. Thank you.

Mr. NAHMIAS. Under Department policy, it is often the U.S. attorney who acts first and best that takes the case.

Mr. JOHNSON. Okay, thank you. All right. Thank you.

Professor Garrett, do you have any idea of how many non-prosecution agreements and deferred prosecution agreements have been entered into by the Justice Department since 2003?

Mr. GARRETT. Yes, it is over 80.

Ms. SÁNCHEZ. Please use your microphone.

And the time of the gentleman has expired. I will allow the witness to answer.

Mr. GARRETT. It is over 80 agreements, at least those that we have able to locate.

Mr. JOHNSON. I am sorry. Say that again.

Mr. GARRETT. We have been able to locate more than 80 agreements. There may be others that haven't been made public. I don't know about those, of course.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Does Mr. Cannon wish to be recognized for 30 seconds?

Mr. CANNON. Thank you, Madam Chair. I want to again thank the panel for being here today. And as the Chair knows, I am deeply concerned about abuses of prosecutorial discretion and arbitrary prosecution in particular, prosecution by the Department of Homeland Security of groups that haven't committed crimes but maybe harboring or may have on their payroll, without being able to tell who they are, people who are illegal aliens. That would include the Swift prosecution or the raid of the Swift Company and the raids of various dairies and other groups around the country where there seems to be no consistent thought behind how it is done except to terrorize industries.

And that, I think, is one of the issues that this Committee should clearly have jurisdiction for. I want to thank the panel for their opinions in informing us on what the nature of that jurisdiction should be as it relates both the deferred prosecution and also to prosecutorial discretion.

And thank you, Madam Chair.

Ms. SÁNCHEZ. I thank the gentleman. And issues of prosecutorial discretion are something that I think is sort of tangential to what the crux of today's hearing is. And I have enjoyed the discussion.

I want to thank the first panel for their testimony. I am going to excuse you now so that Members can go across the street to vote. And we will remain in recess.

[Recess.]

Ms. SÁNCHEZ. I am now pleased to introduce the witnesses for our second panel for today's hearing. Our first witness is Congressman Frank Pallone, Jr., of the 6th District of New Jersey. First elected to Congress on November 8, 1988, Mr. Pallone serves as a senior member of the House Energy and Commerce Committee. And in January 2007 he became the Chairman of the Energy and Commerce Committee Subcommittee on Health.

Mr. Pallone also serves on the House Natural Resources Committee. Additionally, Mr. Pallone authored H.R. 5086, legislation to require the attorney general to issue guidelines regarding deferred prosecution agreements.

We want to welcome you and thank you for your patience, Mr. Pallone.

Our second witness is Congressman Bill Pascrell representing the 8th District of New Jersey. Elected to Congress in November

1996, Mr. Pascrell serves on the Ways and Means Committee and on the House Committee on Homeland Security.

I want to welcome you both. I appreciate your patience in waiting until we could actually have you guys here to testify.

And with that, I would invite Mr. Pallone to proceed with his testimony.

TESTIMONY OF THE HONORABLE WILLIAM PASCRELL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you. I want to thank the Subcommittee for holding this very important hearing on the process for appointing Federal monitors in deferred prosecution agreements and particularly, thank the Chairwoman, Linda Sánchez, for inviting me to testify today.

Recently it has come to light that certain Federal prosecutors are using their powerful positions to steer no-bid contracts to former employers and other influential people with which they have close ties. And I find it troubling that Federal prosecutors have such tremendous discretion in appointing these corporate monitors. Allowing an unelected official unfettered leverage against companies and corporations who have potentially engaged in criminal behavior invites the type of abuse our judicial system is designed to prevent.

Specifically, in my home state of New Jersey, a consulting firm led by former Attorney General John Ashcroft received a contract from U.S. Attorney Chris Christie, his former employee. The fact that there was no competitive bidding and no public input in this process is problematic.

It seems that every U.S. attorney handles the process of appointing corporate monitors differently. Some, like Christie, literally dictated the choice. Others provided a short list to the company accused of criminal activity or simply reserved the right to veto a company's selection.

With little say over which firm is appointed as the corporate monitor, companies are strong-armed into complying with the will of the U.S. attorney. And this essentially amounts to corporate blackmail on the part of the U.S. attorneys, in my opinion.

Yesterday the Justice Department released in internal memo outlining a set of guidelines for the use of Federal monitors in connection with deferred prosecution agreements. While it is encouraging that the Justice Department considered some of the reforms included in that legislation I have introduced, the new guidelines are far too weak. I believe that the only way to ensure that politics and favoritism are completely removed from this process is to have someone independent of the Justice Department, like a U.S. district court judge, involved in the process.

And that is why I have introduced H.R. 5086, which would establish safeguards and eliminate the culture of favoritism and political interference that permeates these corporate monitor agreements. My legislation would direct Attorney General Michael Mukasey to issue guidelines delineating when U.S. attorneys should utilize corporate monitors.

While the Justice Department touches upon this in its memo, the guidelines the Department outlines still give too much latitude to

U.S. attorneys. My legislation requires that a corporate monitor be selected and approved by a third party district court judge or other magistrate from a pool of pre-qualified firms. These monitors would then be paid according to a pre-determined fee schedule set by the district court.

The legislation also sets out criteria for consideration in the determination of whether to enter into deferred prosecution agreements. The Justice Department guidelines do not provide sufficient guidance as to when these agreements are appropriate. My legislation recommends that the Justice Department consider the impact an agreement will have on employees and shareholders.

Additionally, the Department should consider remedial action taken by the corporation in response to wrongdoing and possible alternative punishments available. Having a uniform set of criteria available for when to enter into these agreements will be essential in eliminating abuse.

Another important aspect of my bill mandates that all corporate monitors submit reports to the appropriate U.S. attorney and U.S. district court. The Department guidelines vaguely state that "it may be appropriate for the monitor to make periodic written reports to the government and the corporation." But this needs to be a requirement.

It is essential to these monitors to keep the Department and all involved parties appraised of the progress being made on the agreement. And this will also ensure that the corporate monitor is properly performing all of the duties mandated in the agreement.

Now, Madam Chairwoman, I would suggest to the Subcommittee that the separation of powers issue is a red herring coming from the Justice Department in an effort to avoid congressional action. Mr. Nahmias said there was no problem with the court approval of the deferral. So why would the guidance as to when to defer be a problem? Why would court approval of the monitor or the other transparency provisions in my bill create any constitutional problems? I don't see them.

The use of deferred prosecution agreements and corporate monitors has increased exponentially from five in 2003 to 35 such agreements last year. I believe that the reforms offered in my bill are essential in rooting out any possible corruption or wrongdoing in the process of distributing these monitor arrangements. We can't allow U.S. attorneys or the Justice Department to have unyielding and absolute powers in this process.

And once again, I just want to thank you, Madam Chairwoman and the Subcommittee for inviting me here and Congressman Pascrell to testify. It is my hope that we can work together to have further hearings on the issue so that constructive reform to the process of deferred prosecution agreements can be brought about. Thank you.

[The prepared statement of Mr. Pallone follows:]

PREPARED STATEMENT OF THE HONORABLE FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

TESTIMONY OF
REPRESENTATIVE FRANK PALLONE, JR.

DEFERRED PROSECUTION:
SHOULD CORPORATE SETTLEMENT AGREEMENTS BE WITHOUT GUIDELINES?

MARCH 11, 2008

I would like to thank the subcommittee for holding this very important hearing on the process for appointing federal monitors in deferred prosecution agreements. I would also like to thank Chairwoman Linda Sanchez for inviting me to testify today.

Recently, it has come to light that certain federal prosecutors are using their powerful positions to steer no-bid contracts to former employers and other influential people with which they have close ties.

I find it troubling that federal prosecutors have such tremendous discretion in appointing these corporate monitors. Allowing an unelected official unfettered leverage against companies and corporations who have potentially engaged in criminal behavior invites the type of abuse our judicial system is designed to prevent.

Specifically, in my home state of New Jersey, a consulting firm led by former Attorney General John Ashcroft received a contract from U.S. Attorney Chris Christie, his former employee. The fact that there was no competitive bidding and no public input in this process is problematic.

It seems that every U.S. Attorney handles the process of appointing corporate monitors differently. Some, like Christie, literally dictated the choice. Others provide a short list to the company accused of criminal activity or simply reserve their right to veto a company's selection.

With little say over which firm is appointed as a corporate monitor, companies are strong-armed into complying with the will of the U.S. Attorney. This essentially amounts to corporate blackmail on the part of the U.S. Attorneys.

Yesterday the Justice Department released an internal memo outlining a set of guidelines for the use of federal monitors in connection with deferred prosecution agreements. While it's encouraging that the Justice Department considered some of the reforms included in legislation I have introduced, the new guidelines are far too weak. I believe that the only way to ensure that politics and favoritism are completely removed from this process is to have someone independent of the Justice Department, like a U.S. district court judge, involved in the process.

That is why I have introduced H.R. 5086, which would establish safeguards and eliminate the culture of favoritism and political interference that permeates these corporate monitor arrangements.

My legislation would direct Attorney General Michael Mukasey to issue guidelines delineating when U.S. Attorneys should utilize corporate monitors. While the Justice Department touches upon this in its memo, the guidelines the department outlines still give far too much latitude to U.S. Attorneys. My legislation requires that a corporate monitor be selected and approved by a third-party district court judge or other magistrate from a pool of pre-qualified firms. These monitors would then be paid according to a predetermined fee schedule set by the district court.

The legislation also sets out criteria for consideration in the determination of whether to enter into a deferred prosecution agreement. The Justice Department guidelines do not provide sufficient guidance as to when these agreements are appropriate. My legislation recommends that the Justice Department consider the impact an agreement will have on employees and shareholders. Additionally, the department should consider remedial action taken by the corporation in response to wrongdoing and possible alternative punishments available. Having a uniform set of criteria available for when to enter into these agreements will be essential in eliminating abuse.

Another important aspect of my legislation mandates that all corporate monitors submit reports to the appropriate U.S. Attorney and U.S. district court. The department guidelines vaguely state that "it may be appropriate for the monitor to make periodic written reports to the Government and the corporation." This needs to be a requirement. It is essential for these monitors to keep the department and all involved parties apprised of the progress being made on the agreement. This will also ensure that the corporate monitor is properly performing all of the duties mandated in the agreement.

The use of deferred prosecution agreements and corporate monitors has increased exponentially, from 5 in 2003 to 35 such agreements last year. I believe that the reforms offered in my legislation are essential in rooting out any possible corruption or wrong-doing in the process of distributing these monitor arrangements. We cannot allow U.S. Attorneys or the Justice Department to have unyielding and absolute power in this process.

Once again, I would like to thank Chairwoman Sanchez and the subcommittee for inviting me here to testify at this important hearing. It is my hope that we can work together to have further hearings on the issue so that constructive reform to the process of deferred prosecution agreements can be brought about.

Ms. SÁNCHEZ. Thank you, Mr. Pallone. We appreciate your testimony, specifically about the legislation that you have introduced.

At this time, I would invite Mr. Pascrell to give his oral testimony.

TESTIMONY OF THE HONORABLE WILLIAM PASCRELL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PASCRELL. I want to thank full Committee Chairman Conyers and Subcommittee Chairwoman Sánchez and Ranking Member Cannon for allowing me to testify today. On November the 26th of last year, I wrote to Chairman Conyers and Chairwoman Sánchez calling for hearings on this critical issue. So I appreciate how far we have come in such a short period of time.

My attention was first brought to this issue of deferred prosecution agreements because of the published reports that the U.S. attorney for the district of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. The fact that Mr. Nahmias has admitted that he has no idea why Mr. Christie got prosecution of this case is exactly why this whole process needs real oversight.

And if I might add, Madam Chairwoman, it is the only reason why we are here today, is because Zimmer Holdings filed an SEC report. So we were in the dark up until that particular point about all of these procedures.

Let us not kid ourselves. Let us cut to the chase here as to what we are talking about.

This agreement raised questions about the discretion of the U.S. attorney's office to select Federal monitors since Mr. Christie had selected Ashcroft Group Consulting Services, which according to reports, stands to collect as much as $52 million in 18 months from its monitoring of Zimmer Holdings of Indiana. I am disappointed that Mr. Christie is not appearing before this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement.

Mr. Christie is needed in this hearing in part because he awarded a $10 million monitorship contract to a former public official that served in the Morris County board of freeholders. A contract that was paid by UMDNJ, a public education entity, meaning that taxpayers footed the bill.

Now, I want to make it very clear that throughout this process I have not made any accusations of corruption on the part of Mr. Christie. Indeed, in his examination of corruption in New Jersey, I have publicly and privately spoken out and applauded him for all of his efforts on a nonpartisan basis.

So let us get that. Somebody said up there we were attacking him. That is absolutely absurd.

There are a number of indisputable facts in this case that raise very troubling questions that have yet to be answered. First and foremost is the fact that Mr. Christie selected Former Attorney

General John Ashcroft, his own former superior, for a highly lucrative Federal monitoring contract. No conflict of interest?

In addition, he selected four other Federal monitors under this deferred prosecution agreement. In every instance, Mr. Christie selected former Justice Department associates to monitor these medical device manufacturers under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees, any consideration of selecting monitors with whom he was not closely associated with.

In my mind, these monitoring agreements clearly amount to no-bid Federal contracts that are ripe for political considerations. I want to be clear in saying that the selection of close associates by a Federal law officer to take on highly lucrative contracts which are never negotiated and in which outside contractors are never considered is the essence of political favoritism.

I am pleased that the former U.S. attorney general agreed to testify before this Subcommittee, as is necessary to understand the process or lack of it of which he was selected as the monitor for Zimmer Holdings. In the end I am troubled by the fact that as Attorney General, Mr. Ashcroft literally created the process of deferred prosecution agreements, a process that he now benefits from handsomely.

As I delved deeper into this case involving U.S. Attorney Christie and former Attorney General Ashcroft, I came to the realization that this case of deferred prosecution agreements encompasses an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trials Act of 1974 and that this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses.

Almost 20 years later in 1993, the Department of Justice somehow interpreted this narrow statute used for small-time crimes to now be used to fight large-scale corporate corruption. It is my contention that the legislative intent of the Speedy Trials Act of 1974 was never meant to adjudicate large corporations. And it seems clear that the Department of Justice in recent years has consistently worked to shield its practice from oversight by Congress and the courts.

I myself have not yet introduced legislation on this significant issue because I believe that this issue must first be investigated by this Committee. This is appropriate.

In December of last year in lieu of legislation, I sent to the Committee my statement of principles on deferred prosecution agreements. These four principles laid out a comprehensive approach to reforming deferred prosecution agreements.

I cannot, in conclusion, stress more strongly the need for comprehensive legislation to reform a deferred prosecution process that has been created by the DOJ to generate unmitigated power for Federal prosecutors without the necessary oversight. There is no oversight.

These deferred prosecution agreements lack any checks and balances within the system as power is almost entirely concentrated in the hands of Federal prosecutors alone. No one here, including

myself, is in a position of defending corporate corruptions or arguing against their full prosecution by the law. In this instance, we are left with a deferred prosecution system that gives Federal prosecutors unmitigated power to be the judge, the jury, and the sentencer.

Truly it was never the intent of our justice system to concentrate such power in the hands of the few. We must not allowed deferred prosecution to become a form of deferring justice.

Thank you, Madam Chairwoman.

[The prepared statement of Mr. Pascrell follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM J. "BILL" PASCRELL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Opening Statement of
Congressman Bill Pascrell, Jr.
Eighth Congressional District of New Jersey

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

HEARING
Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

March 11, 2008

Introductory Remarks

I want to thank Full Committee Chairman Conyers and Subcommittee Chairwoman Sanchez for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. On November 26th of last year I wrote to Chairman Conyers and Chairwoman Sanchez calling for hearings on the ability of the U.S. Attorney's Office to enter into deferred prosecution agreements. I appreciate the fact that they have both realized the critical nature of this issue and have pursued it vigorously since that day. I have believed since the beginning that the Judiciary Committee is the most appropriate forum to investigate this issue.

My attention was first brought to this issue of deferred prosecution agreements in large part because of published reports regarding the actions taken by the U.S. Attorney's Office in New Jersey. It had been reported that U.S Attorney for the District of New Jersey, Christopher Christie had reached a $311 million settlement to end an investigation into kickbacks being made by leading manufacturers of knee and hip replacements. This settlement reportedly ended a two-year federal probe into allegations that these manufacturers paid surgeons millions of dollars to use and promote their knee and hip replacements, which would constitute a violation of Medicare fraud statutes. Within this agreement these manufacturers agreed to hire a federal monitor, selected by the U.S. Attorney, which would ensure they comply with the law and a strict set of reforms. However, I was initially concerned that there was little transparency within this provision of the agreement as it could allow the federal monitor to act with impunity while the manufacturers remain under the threat of prosecution.

Furthermore, this agreement raised questions about the discretion of the U.S. Attorney's Office to select federal monitors. In this case, Mr. Christie selected Ashcroft Group Consulting Services, which according to reports stands to collect as much as $52 million in 18 months for its monitoring of Zimmer Holdings of Indiana. Apparently, these compensation agreements for federal monitors are almost never known publicly and were only released in this instance because they were disclosed in the SEC filings for Zimmer Holdings of Indiana. I was concerned that under the continued threat of prosecution, any party being investigated seemingly has little choice but to agree to the selection of these federal monitors and their exorbitant fees. Therein the selection of these federal monitors by Mr. Christie could give the impression of impropriety and political favoritism.

Actions of U.S. Attorney Christopher Christie

I am disappointed that Mr. Christie is not appearing at this Subcommittee today. Mr. Christie is at the center of this investigation and has thus far failed to enlighten Members of Congress or the general public about the process by which he concluded this deferred prosecution agreement. Prior to his appointment as U.S. Attorney for New Jersey, he served as an attorney in private practice defending large corporate clients and therefore has intimate knowledge of both sides of corporate prosecutions. Furthermore, Mr. Christie has failed to shed any light on his selection of federal monitors in this case.

I want to make clear that throughout this process I have not made any accusation of corruption on the part of Mr. Christie. However, there are a number of indisputable facts in this case that raise very troubling questions, which remain unanswered. First and foremost is the fact is that Mr. Christie selected former Attorney General John Ashcroft, his own former superior, for a highly lucrative federal monitoring contract. In addition, there were four other medical device manufacturers given deferred prosecution agreements under this case. In every instance Mr. Christie selected former Justice Department associates to serve as federal monitors under highly lucrative monitoring contracts. This was seemingly done without any negotiation of fees or any consideration of selecting monitors with whom he was not closely associated with. These actions are all the more troubling in the light of testimony by representatives of Zimmer Holdings to the Senate Special Committee on Aging that

Mr. Christie never presented the evidence he held against them and that he never forewarned them to the fact that he would be selecting Ashcroft Group as their monitor. This representative also made clear that Zimmer Holdings felt compelled to consent to this deferred prosecution agreement because they feared being taken off the Medicare providers list, which would have crippled their business. Therefore, Mr. Christie held all the leverage in this agreement and dictated the terms completely as he saw fit.

In my mind, these monitoring agreements amount to no-bid federal contracts that are ripe for political considerations. Current Attorney General Michael Mukasey tried to defend this practice last month before the full Judiciary Committee by stating that these monitoring contracts are paid out by private corporations and not through federal funds. However, the Attorney General fails to mention that these are publicly traded companies and these exorbitant monitoring fees will surely impact American consumers. In the end, Mr. Christie may defend himself by saying that he needed to select these monitors since he knew he could trust them. But, I must be clear when I say that the selection of close associates by a federal officer to take on highly lucrative contracts, which are not negotiated and in which outside contractors are not even considered, is the essence of political favoritism.

Testimony from Former Attorney General Ashcroft

I am pleased that former U.S. Attorney General John Ashcroft has agreed to testify before this Subcommittee. Mr. Ashcroft's testimony is critical to understanding the process by which he was selected as the monitor for Zimmer Holdings. In addition, as Attorney General Mr. Ashcroft created the current system of deferred prosecution agreements. To this date, Mr. Ashcroft has also remained quiet in explaining his role in this process. As in the case of Mr. Christie, I have never made any accusation of wrongdoing on the part of Mr. Ashcroft. However, the troubling fact is that Mr. Ashcroft created a process for corporate prosecutions within the Department of Justice, from which he now benefits handsomely from. I hope that Mr. Ashcroft will choose, through his testimony to this Subcommittee, to answer these questions regarding his relationship with U.S. Attorney Christie and this exorbitant monitoring contract.

History of Deferred Prosecution Agreements

As I delved deeper into this issue involving U.S. Attorney Christie and former Attorney General Ashcroft I came to the realization that this case of deferred prosecution agreements encompassed an even larger issue of corporate prosecutions in the post-Enron era. In researching the history, I discovered that the practice of deferred prosecution agreements was made legal through the Speedy Trial Act of 1974 (Public Law 93-619, codified at 18 U.S.C. 3161(h)(2)), which first gave the attorney for the Government the right to have a period of delay during which prosecution is deferred pursuant to a written agreement with the defendant. In the beginning this remedy was rarely used by government prosecutors, except in small-scale drug cases involving diversion programs usually for marijuana-related offenses. However, the indictment and ensuing collapse of accounting giant Arthur Andersen in March 2002 made clear to both prosecutors and defense attorneys the susceptibility large corporations have to federal prosecutions and the consequences that result. In response to the large number of federal prosecutions against corporations, the Department of Justice issued a memorandum, known as the "Thompson Memo" after Deputy Attorney General Larry Thompson, which, instructed federal prosecutors to explicitly consider "granting a corporation immunity or amnesty or pretrial diversion…in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."

However, it has become clear in the years since the 'Thompson Memo' that federal prosecutors hold even greater power and discretion through deferred prosecution agreements since oversight of such agreements seemingly has not existed through the federal government or the judiciary. In fact, a study conducted by Lawrence D. Finder and Ryan D. McConnell found that the number of deferred prosecution agreements

between the Department of Justice and corporations grew to thirty-five last year from just five in 2003, highlighting the explosive use of this hidden policy. It is my contention that the intent of the Speedy Trial Act of 1974 was never to the scope and breadth of deferred corporate prosecutions now being brought by federal prosecutors. It seems clear that the Department of Justice in recent years has consistently worked to shield this practice from oversight by Congress and the courts.

'Statement of Principles on Deferred Prosecution Agreements'

I myself have not yet introduced legislation on this critical issue because I believe that this issue must first be investigated by the Judiciary Committee through proceedings like this hearing. Additionally, I believe any legislation cannot merely address the issue of contracting with federal monitors, but must have a comprehensive approach to the larger issue of corporate prosecutions. In December of last year in lieu of legislation, I sent to this Committee and to the Department of Justice, my *Statement of Principles on Deferred Prosecution Agreements*. These four principles lay out a comprehensive approach to reforming deferred prosecution agreements and I look forward to continuing my work with this Committee to turn these principles into legislation that will finally provide oversight to this practice.

1. Require Guidelines on Deferred Prosecution Agreements: Corporate attorneys including the Association of Corporate Counsel have long complained that the Department of Justice has never issued any formal guidelines on the practice of deferred prosecution agreements. These attorneys believe that they can not properly represent their client's best interests when they have no guidelines to rely upon as to when corporations may be offered a deferred prosecution agreement and without clear knowledge of the parameters of such an agreement. This has left many to believe that the Department of Justice refuses to offer written guidelines so that its federal prosecutors can continue to have unmitigated discretion as to when to offer a deferred prosecution agreement and the manner in which they are carried out. Clearly, without any written rules on such agreements it becomes impossible to hold federal prosecutors to account. The requirement to issue formal written guidelines on deferred prosecution agreements would be the first place to start in order to provide any accountability to such agreements.

2. Restore Judicial Oversight of Deferred Prosecution Agreements: Under the current system deferred prosecution agreements allow federal prosecutors and corporate offenders to avoid the scrutiny of the judicial system entirely. These agreements are conducted between the two parties outside of a courtroom and once such an agreement is reached the courts are no longer involved in the case. Conversely, in other criminal cases that come before the court, the prosecution and defense are free to reach a plea bargain agreement, but the presiding judge is not bound by any such agreement and has the discretion to deny it based upon legal precedent. In order to restore this balance it is necessary to give the presiding judge the authority to sign-off on the terms of a deferred prosecution agreement as well as the selection of a federal monitor. In addition, the federal monitor and the corporation should be required to submit quarterly reports to the Chief Judge of the District Court. These reports would allow the judiciary to monitor the progression of these agreements through the federal monitor as well as allow corporations to have confidential communication with the judiciary to voice any concerns that they may fear to bring up with the federal prosecutor.

3. Take the Selection of Federal Monitors Out of the Hands of U.S. Attorneys: The U.S. Attorney's Office wields immense clout and in fact has the authority to bring the full weight of the federal government upon those individuals and parties whom they consider under suspicion of federal law. However, as the actions of U.S. Attorney Christie have made clear, deferred prosecution agreements allow federal prosecutors to brandish even greater influence especially as it relates to the selection of federal monitors. While these monitors work for the prosecution and are hired by the U.S. Attorney, they are in fact paid at the expense of the corporations. In additions, the fees are set by firms who have already been selected to serve as federal monitors and corporations feel they are in no position to negotiate. These factors have led to massive legal fees thus making it very lucrative to be selected as a federal monitor and have led some to believe there to be the appearance of

impropriety and political favoritism on the part of the U.S. Attorney's office. This issue could be remedied by taking the decision on whom to hire as a federal monitor out of the hands of U.S. Attorneys. Instead, the Executive Office for United States Attorneys could contract with firms and create a set fee structure for services rendered as a federal monitor. This would allow the Department of Justice to create a national database of firms who would have the experience and specialized skills necessary to serve as federal monitors. The Executive Office for United States Attorneys would then make a final decision on which firm to hire based upon the particular requirements of each case.

4. Require Full Disclosure of Deferred Prosecution Agreements: Since the introduction of the 'Thompson Memo' in January 2003 the public has had little understanding about the nature of deferred prosecution agreements specifically because few details have ever been released. This is particularly the case as it relates to the fees charged by federal monitors, which have always been held secret. In fact, in the case involving U.S. Attorney Christie the fees charged by Mr. Ashcroft's firm were only released because the corporation, Zimmer Inc., found the fees to be so large and burdensome that they felt compelled to report them to their shareholders through their SEC filings. In order to create any transparency through this process there must be a requirement for full disclosure of the terms of a deferred prosecution agreement as well as any contracts reached with firms serving as federal monitors.

Department of Justice Action on the Selection of Federal Monitors

Last week the Acting Deputy Attorney General at the Department of Justice Craig Morford introduced a memorandum discussing the 'Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations.' This memorandum was apparently introduced in response to the actions taken by U.S. Attorney Christopher Christie in hiring his former superior John Ashcroft as a federal monitor. However, this memorandum comes far too late and does far too little to truly reform the practice of deferred prosecution agreements, as is necessary. First and foremost, is the fact that this memorandum only addresses the selection of federal monitors and entirely ignores the need to provide guidance on deferred prosecution agreements to corporate attorneys as well as fully disclose all such agreements to the public. In addition, the memorandum does not acknowledge the lack of judicial or Congressional oversight of this practice and the imbalanced system of justice that this creates. Finally, this memorandum merely ascribes many principles that already exist within statues governing the ethics of this issue. For example, the memorandum states pre-existing guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635 to avoid the appearance of a conflict-of-interest in the selection of monitors. From reading these statutes it seems quite reasonable to understand that Mr. Christie has already violated the letter and the spirit of these pre-exiting ethics guidelines with his selection of former colleagues and associates to serve as federal monitors. I would hope then that the Department of Justice would hold Mr. Christie to account for his actions that run counter to ethics guidelines he should have been following from the start.

Concluding Remarks

I can not stress more strongly the need for comprehensive legislation regarding deferred prosecution agreements. This practice has clearly been created by the Department of Justice to generate unmitigated power for federal prosecutors in pursuing corporations, as is highlighted by the actions of U.S. Attorney Christie in this case. Corporate prosecutions are of critical importance to our nation because of the money, resources and jobs that can be at stake. However, an even more essential concern has emerged through these deferred prosecution agreements and that is the lack of any checks and balances within the system. We are all well versed on the checks and balances between the executive, legislative and judiciary branches of government. However, within each of these branches also exists its own set of checks and balances necessary to avoid the concentration of power. As Members of this Committee know, within the judiciary branch these checks and balances involve the powers and responsibilities of the defense, the prosecution and the courts. However, within the deferred

prosecution system power is almost entirely concentrated in the hands of federal prosecutors. For example, if an individual is charged with a crime and strikes a plea bargain with the prosecution then that plea must go before a judge who has the power to deny and in some cases to alter that agreement based on judicial discretion. However, when it comes to these deferred prosecution agreements that are struck between federal prosecutors and corporations it means that neither party ever sees the inside of a courtroom let alone has to put these agreements before a judge.

In essence federal prosecutors hold all the cards over these corporations, which have everything to fear in a prolonged prosecution and little to gain in challenging powerful federal prosecutors. No one here, including myself, is in a position of defending corrupt corporations or arguing against their full prosecution by the law. But the presumed innocence of defendants before trial and the balance between the prosecution and defense are hallmarks of our justice system. In this instance however, we are left with a deferred prosecution system that gives federal prosecutors unmitigated power to be judge, jury and sentencer. Truly, it was never the intent of our justice system to concentrate such power in the hands of any one individual or office. We must not allow deferred prosecution to become a form of deferred justice.

Again, I want to thank Chairman Conyers and Chairwoman Sanchez for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and further efforts to develop comprehensive corporate prosecution legislation.

Thank You.

Ms. SÁNCHEZ. Thank you, Mr. Pascrell, for your testimony. I want to thank this panel for their testimony. And unless we have any questions for this panel, they will be excused.

Mr. CANNON. Madam Chair, I would love to question this panel.

Ms. SÁNCHEZ. The gentleman seeks recognition. The gentleman is recognized for 5 minutes of questioning.

Mr. CANNON. Thank you. And we don't look to you as experts on an issue that I think is very, very important. In fact, Mr. Pascrell and I had a discussion yesterday about the importance of this issue. I want to get some information out.

And I know this is a relatively emotional issue, but as you are looking at this, both of you talked about courts reviewing the process. It seems to me that we are much better off if you have an administration process, that is DOJ, which I think you would both say is inadequate. But if that were complemented by an external review in Congress, which would probably be this Committee. Is that consistent with what you both are thinking about this?

Ms. SÁNCHEZ. Mr. Pallone?

Mr. PALLONE. It is not in the sense that I am concerned that if the only review is—I mean, I should say if the process continues to be internal within the Justice Department and there is no court approval or court appointing of the monitor, then I do think that the potential for abuse continues. And so, a hallmark——

Mr. CANNON. Why are we better off with a court or various courts approving monitors as opposed to having a process internal to justice with some advances that they have recently made and a series of memos that have helped verify or helped qualify the problems? Why would you want a court or courts around the country to do it instead of having one sort of central review place like Congress?

Mr. PALLONE. Well, I will answer your question consider the three-step process. I don't mean to suggest that the Justice Department in putting forth something isn't moving, you know, in a progressive way. But I do have the problem with three things.

First of all, they don't really delineate what criteria would be looked at.

Mr. CANNON. Let me cut to it. We agree that the current guidelines are not sufficient. Everybody on the prior panel agreed that they are a work in progress, we need to advance it. So no question about that.

Mr. PALLONE. Well, I——

Mr. CANNON. But the first place you have to go is you have to have better guidelines.

Mr. PALLONE. Right.

Mr. CANNON. But ultimately as you develop those guidelines and as this Committee oversees those guidelines, aren't we better off retaining oversight here in Congress than letting——

Mr. PALLONE. Well, you still have oversight. But the problem is even if you have guidelines and criteria for when you should have deferred prosecution agreements, which we have in my legislation, even if the Justice Department went that far and did that on their own, which I would hope they would, but, you know, even if they did that, and they haven't, if you don't have a third, you know, independent party, third party, in this case, a judge or a district

court judge, which is what I suggest in the legislation, then I think the potential for abuse and the conflicts that we talk about could still be out there because it is still within the Justice Department. And then you also need the transparency of, you know, having, you know, the courts look at the agreement, how much the person is being paid.

Mr. CANNON. Given the shortness of time, I think Mr. Pascrell has something he wants to say. And then I want to pose what I think is the dilemma that this all creates.

Yes?

Mr. PASCRELL. Mr. Cannon, the first thing I would do is make sure we have full disclosure. We do not have this now.

Mr. CANNON. To the world or to——

Mr. PASCRELL [continuing]. Exaggerating——

Mr. CANNON. To the world or to a judge or to this Committee? Who would you do full disclosure to?

Mr. PASCRELL. Well, I incorporated in my recommendations the chief judge of the district court should be monitoring the situation. Every quarter he should get a report from both the prosecutor and the company so that somebody knows and somebody has some oversight. This Committee in no manner, shape or form should be minimized in that process. It is an attempt basically to have a checks and balance system.

But you need to have full disclosure. We have no disclosure right now. And the only reason why we discussed that—I don't think I was exaggerating using an hyperbole—is because Zimmer Holdings had to file with the—or did file with the SEC. That is how we got to know what was going on. And the reports came out. Newspaper reported it. And I was shocked to find that nobody knew what was going on.

In fact, we just learned that some corporations——

Mr. CANNON. Pardon me, Mr. Pascrell, I see that I only have a minute. And there are just a couple of things I want to do. And I appreciate the intensity and the lack of transparency, which we really need to focus on.

But let me suggest that the problem here is that we are now lambasting a lot of people's reputation. And so, I would like to submit for the record two articles from the Washington Times, one dated March 11th, "A Medical Supplier Stryker Probe," the other dated also the 11th, "First Spitzer, Now Stryker," is the title.

Ms. SÁNCHEZ. Without objection, so ordered.

[The information referred to follows:]

THE AMERICAN SPECTATOR

Print Article Close Window

First Spitzer, Now Stryker

By The Prowler

Published 3/11/2008 10:20:16 AM

Lost amid the **Eliot Spitzer** scandal is a front-page story from the *Washington Times* that may be just as devastating to Democrats.

According to House Democrat leadership aides, House Speaker **Nancy Pelosi** has asked advisers to examine FEC and other records to determine if Judiciary Committee Chairman **John Conyers** may have steered money from an influential Michigan family to other Democrats. The Stryker family of Kalamazoo, Mich., made its fortune from the company that bears its name, though members of the family are not involved in the day-to-day operations. The Stryker Corp. has had issues with federal authorities, including a possible investigation by the Department of Justice into possible violations of the Foreign Corrupt Practices Act.

Subsidiaries of Stryker cut a deal with a U.S. Attorney in New Jersey that caught the attention of Conyers, as well as several New Jersey House members, who it turned out have received thousands of dollars in political donations from physicians and organizations with ties to Stryker. Now Conyers has opened an investigation into the matter, which includes demanding testimony of former Attorney General **John Ashcroft** at a Judiciary Committee subcommittee hearing.

The Stryker family has, according to FEC records, pushed more than $17 million toward Democrat candidates and causes over the years. "The concern is that if Conyers is involved directly with this investigation, and he was steering money from the Stryker family to colleagues for their campaigns and they are sitting on the same committee that is undertaking the investigation, you have more than an appearance of conflict of interest, you have a conflict of interest," says a leadership aide for Pelosi. "In our current environment, we can't afford to have too many more of these situations."

The aide pointed to the fact that both Reps. **Frank Pallone Jr.** and **Bill Pascrell Jr.**, who requested that Conyers look into the Stryker Corp. deal with U.S. Attorney **Christopher Christie**, had extensive financial ties to the medical equipment industry and lobby. Combined, the two Jersey boys have raised tens of thousands from the industry. "Both men have put us in an awkward situation, and Conyers' decision to pursue this matter further has put us in deeper," says the aide. "Speaker Pelosi is concerned and has us monitoring the situation."

Article published Mar 11, 2008

Medical supplier Stryker probed

March 11, 2008

By Jerry Seper and Jim McElhatton - A major medical equipment supplier, whose owners have spent millions of dollars helping elect Democrats nationwide, is under criminal investigation for its foreign sale of medical devices after already being tied to a kickback scheme involving U.S. doctors, public records show.

A subsidiary of Stryker Corp. of Kalamazoo, Mich., last year signed an agreement to avoid prosecution and cooperate in the probe involving consulting contracts, trips and gifts to U.S. doctors.

But it recently informed investors in a Securities and Exchange Commission filing that the Justice Department's Criminal Division is investigating the company for "possible violations of the Foreign Corrupt Practices Act." That law prohibits U.S. companies from paying bribes overseas.

The company, founded in 1941 by Dr. Homer Stryker, an orthopedic surgeon, is partly owned by his three grandchildren, Jon, Pat and Rhonda Stryker. Not including other stock holdings, the siblings control a trust that owns nearly one-fourth of the $6 billion company.

Jon Stryker alone has given at least $6 million to federal and state political campaigns since 2004. According to the nonpartisan Center for Responsive Politics, he and his sister, Pat, rank among the nation's top individual donors by giving hundreds of thousands of dollars to "soft money" special interest political groups in 2006 on top of their donations to candidates and political parties.

For instance, Pat Stryker separately contributed $500,000 to the Michigan Coalition for Progress, which successfully helped return Democrats to control of the state legislature in the last election.

Family ties

Stryker Corp. officials said that while the company is partly owned by the Stryker siblings, the family has no hand in running the daily affairs of the business.

"They are owners of the company, but they do not have management experience," said Stryker Corp. spokesman J. Patrick Anderson, adding that any contributions by the company's executives and the Stryker siblings are made independently. "There would be no direct ties at all."

In 2006, the company found itself in the cross hairs of Republican state leaders in Colorado and Michigan, where Jon Stryker, who founded the Michigan Coalition, and Pat Stryker have donated millions of dollars to help Democratic candidates and causes.

"Jon Stryker bought a legislative majority in the statehouse for the Democrats in 2006," said Bill Nowling, director of communications and research for the state's Republican Party.

A spokeswoman for Mr. Stryker declined to comment, saying only that his political activities have no relationship to the company.

Stryker Corp. owned one of five companies that agreed last year to settle a criminal investigation by U.S. Attorney Christopher J. Christie in New Jersey that focused on their payments to U.S. surgeons.

Stryker Orthopedics Inc., the Mahwah, N.J., subsidiary of the Stryker Corp.; Zimmer Holdings Inc.; Depuy Orthopaedics Inc.; Biomet Inc.; and Smith & Nephew Inc. together supplied nearly 95 percent of the lucrative worldwide market in hip and knee surgical implants.

Common corruption

According to a report last month from Sen. Herb Kohl, Wisconsin Democrat and chairman of the Senate Special Committee on Aging, the five companies together spent $230 million on payments to physicians. He accused the companies and physicians of putting their financial interests ahead of patients.

"These types of unethical payments are not anecdotal, but rather have been pervasive and industrywide for far too long," Mr. Kohl said. "The physicians who take their money are equal participants and equally culpable."

Stryker Corp. disclosed the Justice Department investigation in its annual report, filed with the SEC last month. The company said the department requested documents from Jan. 1, 2000, to the present, regarding possible violations of federal criminal and antitrust laws.

Prosecutors said financial inducements were offered to the U.S. physicians in the form of consulting agreements and were entered into with hundreds of surgeons, who did little or no work in return but did agree to exclusively use the paying company's products.

The physicians, prosecutors said, also failed to disclose the existence of the relationships with the companies to the hospitals where the surgeries were performed and to the patients they treated. More than 700,000 hip and knee replacement surgeries are performed in the U.S. each year, about two-thirds of which are for patients covered by Medicare.

Aide targeted

Mr. Christie's decision to appoint his former boss, Attorney General John Ashcroft, as the compliance monitor for one of the companies, Zimmer Holdings, has made him of target of Rep. John Conyers Jr., Michigan Democrat and chairman of the House Judiciary Committee, who has asked the Government Accountability Office to investigate "if political or personal

Mr. CANNON. These things have wild allegations in them. $17 million directed, according to this article, toward Democratic candidates over the years. And that is directed at John Conyers and quoting an aid to Nancy Pelosi talking about—let us see, "You have more than an appearance of a conflict of interest. You have a conflict of interest," says the leadership aid to Pelosi. "In our current environment we can't afford to have many more of these situations."

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. CANNON. The fact is as we continue to pound on people's public reputations, you two guys are both from New Jersey and were all tied into people slamming people's reputations where I don't think, at least in the case of Mr. Ashcroft, there is a shred of evidence that he has done anything improper——

Ms. SÁNCHEZ. The time of the gentleman has——

Mr. PASCRELL. Whose reputation are we slamming?

Mr. CANNON. Well——

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. CANNON. Mr. Christie's and Mr. Ashcroft's.

Ms. SÁNCHEZ. The time of the gentleman has expired. I think I have been more than lenient today with time to the gentleman.

Does Mr. Johnson have any questions that he would like to ask of this panel?

Mr. JOHNSON. I would just say that this legislation appears to be reasonable in its scope and its intent. And I think it is something that I certainly look forward to supporting. And I do appreciate the heads up given to this Committee by Mr. Pascrell about the need for hearings. And my hat is off to the Chairlady for calling this hearing.

And I am concerned about the outsourcing of justice in white collar criminal cases to private industry, i.e., insiders of prosecutors. And it is a system that begs for oversight. Something else in addition to what I have heard about you do the crime, you do the time is that there is two types of crime. One is legal crime, the other is illegal crime.

The illegal crime is blue collar. And the legal crime is white collar. And society should definitely—American society—we should have full confidence in our justice system that justice is fair and is blind. And so, if we have every corporation that gets in trouble being able to take advantage of a deferred prosecution agreement and in some cases, a non-prosecution agreement and there being no oversight, no guidelines, in fact, no information about it that is available to the public, that is a disservice to the ideals that this country was built upon.

And so, we must consider this legislation that has been introduced. I want to thank you.

Mr. CANNON. Would the gentleman yield?

Ms. SÁNCHEZ. Does the gentleman yield back?

Mr. CANNON. Would the gentleman yield just for a moment?

Mr. JOHNSON. Before I yield, I will ask Mr. Pallone to respond.

Mr. PALLONE. Well, I just wanted to say that I appreciate the fact that the gentleman is talking or focusing on whether and when we should even have these agreements because I think that, you know, a lot of the focus today was on the monitor and the process.

But I really think that the Committee needs to focus on, you know, whether or not these agreements should even be out there and how often they should be used. And that is why in the legislation I also have criteria that would be met before they would even proceed.

Because I do think that there are too many of them and that it is a problem in itself separate and apart from the issue of the monitor and the conflict of interest and the abuses that Mr. Pascrell and I have talked about. I think that that larger issue needs to be looked at.

Mr. JOHNSON. Thank you.

Mr. CANNON. Would the gentleman yield?

Mr. JOHNSON. I will yield.

Mr. CANNON. Because I know that Mr. Pascrell wanted to make a comment. I don't want to be offensive here. This whole hearing has largely been about Mr. Ashcroft and Mr. Christie. Their reputations have been put on the line. But I didn't want to see you cut off, Mr. Pascrell. And I didn't want to make that an accusation. But we are now in the middle of a lot of reporting about things that are problematic for many people's reputations. So with that, Mr. Pascrell, I know that you wanted to comment.

Mr. JOHNSON. Reclaiming the balance of my time and asking for Mr. Pascrell's response.

Mr. PASCRELL. Thank you. I just wanted to make this very clear, again, Mr. Cannon, that I was one of the few people from my party that praised Mr. Christie's work. That does not give me a pass on what I believe is a significant area to look into and investigate. I personally believe that this Committee, not only has the wherewithal and the responsibility to do such.

When you look at the term conflict of interest, it is at the basis of practically every corruption case. Now, there are 44 of these deferred agreements that I have looked at for the knowledge that I have and for the information available. Because in sum, we have no knowledge. We have absolutely no knowledge.

I think that you have a right, and I have a right, the public has a right, particularly when 10 of the 44 deal with health matters. And a lot of the others deal with international funneling of money. I think we have a right to ask the questions, particularly at a time when we are examining Medicare fraud. Because this is increasing the price and the costs of what products are sold to our senior citizens.

These doctors bribe—you use whatever term you wish—were bribed by the company to push the product. I think that is pretty serious business.

Mr. CANNON. I think that is not just a right, but a responsibility that we have in this Committee.

Mr. PASCRELL. Absolutely.

Ms. SÁNCHEZ. The time of the gentleman has expired. And I just would like to take my 5 minutes to thank you both for testifying today, for following with such passion the developments of these deferred prosecutions, Mr. Pallone, the thoughtfulness of your legislation.

And just to pick up on a couple of things, I think the reason why this Subcommittee was interested in holding this hearing is because there are a number of problems that we have identified.

Number one, the discretion to use these deferred prosecution agreements, the fact that there aren't real concrete guidelines as to when they are used and who is making the decision and why are certain corporations allowed to enter these and others are prosecuted criminally. I think certainly it is a first step in the analysis that needs to be thoroughly done.

I think once deferred prosecutions are entered into, how the monitor is selected is a very relevant question for this Committee to ask. And I think that we need to look to potential solutions that would take away any conflicts of interest or potential conflicts of interest that might exist.

Now, I know Mr. Delahunt was particularly concerned with the fact that corporations sometimes in these deferred prosecution agreements get to choose who they want to have monitoring them. And I think we heard from our first panel of witnesses, all experts or have familiarity of these deferred prosecution agreements, that whoever is selected needs to meet some basic criteria and needs to have, not just a well-established knowledge in the area of law in which these corporations have fallen short, but also an understanding of how some of these businesses run so that they can do their job effectively.

And I don't think that it would harm the system to have some kind of entity that can oversee the monitors because right now, it doesn't appear that anybody is monitoring the monitors. There was some debate as to who does the monitor owe a duty to. Is it the corporation? Is it the shareholders? Is it the U.S. government? Is it, you know, the taxpayer?

I mean, it seems like there are some of these conflicting ideas about to whom the monitor owes a duty to do their job and the fact that there isn't the kind of oversight available to go back and look at, you know, how are they billing the corporation for their time, what exactly are they doing to receive, in some cases, some very lucrative contracts. And I am not suggesting that the fees are wildly inappropriate, depending on whether or not there has been adequate work that justifies those fees.

And I don't think it is asking a lot to require some detailed billing statements. We have seen some examples where some monitors have submitted 200 pages of very detailed billing statements delineating who did what work and for how long.

And then we have got others' billing statements that are just a couple pages long, and they are sending out a monthly fee to the corporation. We don't know what the monitor is doing to earn those fees. And I think that is a very troubling area of this issue for me.

So again, I want to thank both of my colleagues from New Jersey for their interest in this and their time and last of which was their patience in waiting until we got to this panel. I know typically we allow Members the courtesy of testifying first. But because Mr. Ashcroft could not stay for the whole hearing period, we did want to give an opportunity for him to testify and Members to ask questions. So——

Mr. CANNON. Would the gentlelady yield?

Ms. SÁNCHEZ. I will yield briefly to the gentleman. I don't have much time.

Mr. CANNON. I only need to be brief. But I just wanted to say that I agree entirely with your summary of the hearing and what faces this Committee. But I think, frankly, Mr. Pallone and Mr. Pascrell have helped us focus on that. And I wanted to thank them as well.

Ms. SÁNCHEZ. Great.

I would like to thank you, again, for your testimony today. And without objection, Members will have 5 legislative days to submit any additional written questions, which we will have forwarded to the witnesses and ask that you answer as promptly as you can so that they can be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any additional materials. Again, I thank everybody for their time today. And this hearing on the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 1:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material submitted for the Hearing Record

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW TO THE HONORABLE JOHN ASHCROFT, THE ASHCROFT GROUP, LLC, WASHINGTON, DC

United States Congress
House of Representatives
Committee on the Judiciary; Subcommittee on Commercial and Administrative Law
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

BY EMAIL

April 29, 2008

Dear Chairwoman Sánchez,

Thank you for your April 7, 2008 letter following my appearance before the Subcommittee. It pleases me that you found my testimony of March 11, 2008 informative. Below are the written responses to your complete series of final questions contained in your letter. I have made an effort to answer each question thoroughly and to the best of my knowledge and awareness. Members of my staff have contributed their knowledge and awareness to the responses in an effort to provide the Subcommittee with complete and accurate information.

Please excuse the volume of these responses; I have endeavored to provide a fulsome response in each instance. Thank you for your interest allowing us to complete our responsibilities to the Subcommittee in this manner.

Sincerely,

John Ashcroft

1. **In your testimony, you make the point that your compensation comes from Zimmer rather than from public funds.**

   How was the amount of compensation determined? Did Zimmer provide input on the amount of compensation that the Ashcroft Group would be awarded for the monitoring contract? If so, please explain who provided the input and what was discussed. Did U.S. Attorney Christopher Christie or any other government official provide input on the amount of compensation the Ashcroft Group would be awarded for the monitoring contract? If so, please explain who provided the input and what was discussed.

   Given the fact that Zimmer is facing a criminal prosecution that could dissolve the corporation, does the government have unfair leverage over a corporation entering into a deferred prosecution agreement? As a result of their weakened bargaining position, are corporations therefore more likely to accept high monitoring fees?

   In your view, are corporations, in effect, entering into a contract of adhesion when they submit to a deferred prosecution agreement?

Compensation payable to The Ashcroft Group Consulting Services, LLC ("AGCS" or the "Monitor") is detailed in the Zimmer, Inc. Monitor Agreement (the "Monitor Agreement"), dated October 25, 2007, by and between Zimmer, Inc. (the "Company"), a Delaware corporation, and AGCS. *See* Exhibit A. I serve as the Chairman of AGCS. As you are aware, the Monitor Agreement became public

when it was filed by the Company with the United States Securities and Exchange Commission in October 2007. This Monitor Agreement was negotiated by legal counsel for the Company and for the Monitor. As such, the Company had an opportunity to negotiate the amount of compensation that AGCS would be paid for the 18-month monitoring contract.

The Monitor believes that compensation payable under the Monitor Agreement is not out of line with compensation paid to other monitors under previous deferred prosecution agreements and non-prosecution agreements. The Monitor also believes that such compensation is commensurate with the Monitor's previous experience in managing large organizations such as the State of Missouri government and the United States Department of Justice. In addition, the Monitor and monitoring team has experience appropriate to managing distressed businesses and crafting, implementing and reviewing best practices concerning corporate governance and institutional governance. I will also note that a *New York Times* article published on March 11, 2008 states that "[o]utside lawyers who have reviewed Mr. Ashcroft's fee structure said it was not out of line." *See* Exhibit B. As described above, this contract was privately negotiated by the Company and by the Monitor and not by any government official.

I do not believe that the government has "unfair leverage" over a corporation entering into a deferred prosecution agreement. Both a deferred prosecution agreement and the agreement governing a monitor's compensation are fully negotiated by an investigated company (often with the help of its outside

counsel) with the government, in the case of a deferred prosecution agreement, and with the particular monitor, in the case of the latter agreement. I therefore do not agree that a corporation entering into a deferred prosecution agreement would have unfair leverage vis-à-vis a corporate monitor with respect to determining monitorship fees payable during the term of a deferred prosecution agreement.

By definition, a contract of adhesion, otherwise known as a standard form contract, is a contract so imbalanced in favor of one party over the other that there is a strong implication it was not freely bargained. These are usually "take it or leave it" contracts in which the unequal bargaining position of the parties thereto essentially results in an agreement where the weaker party has little or no input into the terms of the agreement. As stated above, under deferred prosecution and non-prosecution agreement negotiations, corporations are represented by legal counsel to ensure the company's rights and interests are being protected. In the case at hand, the Company was assisted by its long-standing outside counsel when negotiating both the terms and conditions of the Monitor Agreement and the Deferred Prosecution Agreement (the "DPA"), dated September 27, 2007, by and between the Company and the United States Attorney's Office for the District of New Jersey. As I understand, the process by which the Company entered into its DPA does not differ materially from the process in which other corporations enter into deferred prosecution agreements with Federal prosecutors. Based on this understanding and analysis, it appears

that referring to either a deferred prosecution agreement or a non-prosecution agreement as a contract of adhesion is a mischaracterization of the term.

2. **From a calculation of invoices from September 2007 to January 2008, it appears as though your company received $7.5 million in compensation from Zimmer. This suggests that over the term of your 18 month contract, the total compensation would be approximately $34 million. This is just an estimate, however, because monthly invoices varied.**

   How much money does your firm expect to get paid over the full 18 month term of your contract with Zimmer Holdings to serve as its corporate monitor?

The U.S. House of Representatives Subcommittee on Commercial and Administrative Law (the "Subcommittee") was provided AGCS invoices in respect of its monitorship of the Company from September 2007 to January 2008. As you have stated, the exact compensation payable monthly to AGCS will vary depending on the number of hours expended in a given month, in accordance with the compensation structure described in the Monitor Agreement. The progress of the monitorship, by its very nature, is dependent on the requirements of the DPA, the complexity of the alleged illegal conduct, the activities of the Company and, more particularly, on the speed with which, and the degree to which, the Company is able to make the required changes to comply with the terms of the DPA. For this reason, the Agreement Regarding Fees and

Reimbursements attached to the Monitor Agreement contains an estimated range of monthly compensation that would be due to the Monitor throughout the effective period of the DPA. It is my understanding that this is the first instance where a Monitor has provided a ceiling on how much the Monitor's services will cost a corporation during the duration of a monitorship. Such transparency was important to me in my interactions with the Company to establish a solid framework based on trust in our work together.

Providing a range of costs was necessary since it would be difficult, if not impossible, to provide an accurate estimate of the total compensation that AGCS will receive throughout the duration period of the DPA pursuant to the Monitor Agreement. As with any deferred prosecution agreement or non-prosecution agreement and any professional services being provided, there are certain factors that may drive total hours, and thus compensation, up or down. Such factors include: (i) monitoring remedial, complex Company projects or initiatives, (ii) number of employee, vendor, consultant or contractor interviews required, (iii) receiving referrals of wrongdoing, either on the part of the Company or an industry competitor and (iv) reviewing voluminous Company documents in an effort to validate the legality of payments made by the Company to its outside consultants.

3. **According to *The Washington Post*, in the Zimmer monitorship, you had to use considerable time "to prepare for the assignment and learn more about the business."**

What did you and your colleagues do to prepare for the assignment and to learn more about the business?

Did you bill Zimmer for the time it took you and your colleagues to do this? If so, how much was Zimmer charged for the time used "to prepare for the assignment and learn more about the business?" Please provide these billing records.

I decided to undertake the monitorship of the Company after careful consideration of the alleged corporate conduct of the Company, its then-current corporate governance program and what I perceived would be the necessary skills and experiences of any monitor in undertaking such task. Contrary to the inference the public might have drawn from the line of questioning at the March 11, 2008 hearing before the Subcommittee, members of my senior team and I had the requisite experience and preparation to promptly carry out the responsibilities under the DPA. Indeed, the team was prepared to begin carrying out these responsibilities on the very day the Company executed the DPA.

To put the news report and language you cited in this question and before the Subcommittee in the appropriate context, the direct quotation from the January 15, 2008 article in *The Washington Post* reads, "To prepare for the assignment and learn more about the business, Ashcroft said he recently watched as a replacement knee made by [the Company] was implanted in a cadaver." *See* Exhibit C. Such article does not support the characterization that I, or any other member of the Monitor team, had to spend "considerable time" to prepare for the

monitorship. Indeed, after accepting the monitorship assignment, members of my senior team and I traveled to the Company's headquarters in Warsaw, Indiana to meet with the Company's leadership and continue to do so on a monthly basis. During one of my many trips to Indiana, I agreed to the Company's request that I witness a cadaveric procedure performed by one of the Company's consultants at the Zimmer Institute, the Company's on-site research operating and demonstration room. This meeting was the subject of *The Washington Post* article text cited by the Subcommittee. In light of the allegations brought against the orthopedic industry by the U.S. Department of Justice concerning the industry's relationships with its surgeon consultants, it is critically important the Monitor understands the role the Company's consultants play in its medical education and training programs.

In accordance with the Monitor Agreement, other members of AGCS and I are collectively paid a fixed monthly fee for engagement of AGCS's Senior Leadership Group to perform the duties and responsibilities set forth in the Monitor Agreement and in the DPA. The Company is not billed any other fee for my time spent monitoring the Company. As previously noted, the Subcommittee has been provided AGCS invoices in respect of its monitorship of the Company from September 2007 to January 2008. Such invoices will detail a monthly fee for the month of November 2007.

4. **I am deeply concerned with the lack of judicial oversight of deferred prosecution agreements. If an individual is charged with a crime and**

agrees to a guilty plea with the prosecution, then that plea must go before a judge who has the power to deny or alter that agreement based on judicial discretion. However, when federal prosecutors and corporations enter into deferred prosecution agreements, neither party is required to appear in court to have the agreement scrutinized by a judge.

> **As the Attorney General who implemented the current system of deferred prosecution agreements, are you concerned that this has created two completely different systems of justice, one for individuals that is accountable to the judiciary and another for corporations that is based entirely on the discretion of federal prosecutors? Please explain.**

While it is correct to state that the terms and conditions of a deferred prosecution agreement are not subject to review by a court of law, it is important to note, however, that the court is under no obligation to actually "defer" the criminal compliant filed in conjunction with the execution of a DPA. Specifically, in the DPA under which I fulfill my obligations it states that "[i]f the Court declines to defer prosecution for any reason, this DPA shall be null and void, and the parties will revert to their pre-DPA positions."

It also is important to understand that, under its terms, a deferred prosecution agreement does not amount to a guilty plea by the corporate entity signing the agreement. Indeed, while the Company acknowledges in the DPA that it had "been engaged in discussions with the United States Attorney's Office for the

District of New Jersey (the "Office") in connection with an investigation being conducted by the Office into activities of [the Company] relating to certain payments to [c]onsultants" and consents to resolution of those discussions by entering into the DPA, the Company and other companies who execute deferred prosecution agreements do not otherwise formally respond to a criminal complaint in the way an individual charged with a criminal offense would.

As I will explain more fulsomely in my responses to questions 5-7 below, while the Department of Justice aggressively and successfully prosecuted a wave of high-profile corporate fraud scandals under my tenure, the increased use of deferred prosecution agreements arose in response to the need by individual prosecutors to use all practical remedies available to them to handle an increasing number of corporate defendants.

Deferred prosecution agreements are, by their very nature, designed to allow corporate entities to continue their operations while addressing alleged improper behavior. When an individual admits guilt to a crime or is adjudicated guilty in a court of law, the criminal conduct of that individual is not directly felt by innocent parties who had no involvement in the conduct or who had no ability to stop the conduct. In the corporate criminal context, there is often significant collateral community damage involving many innocent parties, including corporate employees and shareholders.

It is important to note also that even though a given corporate defendant is provided an opportunity to rectify previous wrongdoing, Federal prosecutors can,

and do, retain the ability throughout the term of a deferred prosecution agreement to curb criminal activity by the corporate defendant.

Pursuant to the DPA executed by the Company, the Department of Justice retains the right to "investigate and prosecute any current or former Company officer, employee, agent or attorney." As mentioned previously, Paragraph 4 of the DPA notes that while the Office recommends to the United States District Court for the District of New Jersey (the "Court") that prosecution of the Company be deferred for a period of 18 months, "[i]f the Court declines to defer prosecution for any reason, this DPA shall be null and void, and the parties will revert to their pre-DPA positions." In addition, pursuant to Paragraph 54 of the DPA, "in the case of a knowing and willful material breach" of the DPA, the Company waives its right to assert a statute of limitations defense relating to the prosecution of allegations set forth in the Office's criminal complaint that are not otherwise time-barred by the applicable statute of limitations as of September 27, 2007, notwithstanding the expiration of any applicable statute of limitations during the term of the DPA. Simply stated, the Office retains the right to prosecute the Company with respect to any allegations contained in its criminal complaint filed in conjunction with the DPA, even if the statute of limitations expires during the life of the DPA.

5. **When you served as Attorney General, what was the Department of Justice's role in developing the types of remedies we now see in deferred prosecution agreements?**

I had the honor of serving as U.S. Attorney General from 2001 to 2005. As noted in my prepared testimony in advance of the March 11, 2008 hearing before the Subcommittee, as Attorney General, I was the Chief Executive Officer of a Cabinet agency larger than most Fortune 500 corporations. In that period, the Department of Justice had 112,000 employees and an annual operating budget of $22 billion. For the first time in its history, under my leadership, the Department of Justice earned a clean audit opinion, a standard matched for each of the four years of my service. During my tenure as Attorney General, the Department of Justice aggressively and successfully prosecuted a wave of high-profile corporate fraud scandals and won the largest healthcare fraud cases in our nation's history. Over my four years of service, there was a 73% increase in monetary recoveries from healthcare fraud settlements and judgments, totaling nearly $4.5 billion. In our pursuit of dozens of corporate fraud scandals, over 600 corporate criminals were convicted, including 31 Chief Financial Officers.

It is my understanding that the United States Department of Justice, in the Salomon Brothers case, entered into its first deferred prosecution agreement with a corporate defendant in 1992, nine years prior to the beginning of my tenure as U.S. Attorney General. The second deferred prosecution agreement was entered into in 1994 with Prudential Securities. The Prudential Securities case

was the first time the United States Department of Justice made retaining a monitor a condition of the agreement. In the five years following the Prudential Securities case, the Department of Justice continued to use deferred prosecution and non-prosecution agreements as a tool to address corporate wrongdoing and misconduct.

In 1999, the Department issued seminal guidance in the area of corporate fraud prosecution in the form of what is commonly referred to as the "Holder Memo." *See* Exhibit D. Drafted by Eric Holder, Jr., the Deputy Attorney General of the Department of Justice, the guidance stated, in part, that prosecutors should consider certain delineated factors in determining whether to charge a corporation for corporate fraud or other wrongdoing. Those factors were clarified four years later, during my tenure as Attorney General, in a memorandum entitled "Principles of Federal Prosecution of Business Organizations", better known as the "Thompson Memo", issued by the then-Deputy Attorney General Larry D. Thompson in January 2003. *See* Exhibit E. This memo reiterated the considerations noted in "Holder Memo" while adding a ninth factor for prosecutorial consideration: company cooperation.

The focus of the Department of Justice on corporate fraud prosecution during my years as Attorney General fueled the need by prosecutors to have all available remedies at their disposal. In some instances involving corporate criminal behavior, prosecutors may need to craft a remedy that lies somewhere between declining to prosecute and prosecuting the offender. As David E. Nahmias,

United States Attorney of the Northern District of Georgia, testified before the Subcommittee on March 11, 2008, deferred prosecution agreements and non-prosecution agreements provide an "important middle ground in the resolution of corporate crime cases." As previously stated, out-of-court settlements such as those represented by deferred prosecution agreements provide a unique opportunity for defendant companies to receive legal and business guidance on how to conduct their businesses legally and ethically while also protecting the company, and by extension the U.S. economy, from unnecessary job and market share loss. Indeed, a deferred prosecution agreement allows a company to maintain operations while rectifying previous wrongdoing or unlawful behavior and allows the Department of Justice to resume prosecution in the event a company fails to comply with its deferred prosecution agreement responsibilities.

6. **When you served as Attorney General, what was the role of the Corporate Fraud Task Force in adopting the use of deferred prosecution agreements?**

The wake of corporate scandals of the late 1990's and early 2000's began to threaten the stability and worldwide trust of United States markets. Corporate abuses led to the formation of the President's Corporate Fraud Task Force (the "CFTF" or "task force") and made uncovering and prosecuting corporate fraud a government-wide priority. The task force includes senior Department of Justice officials, U.S. Attorneys, the heads of the Departments of Treasury and Labor, and the heads of the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Energy Regulatory Commission, Federal

Communications Commission, United States Postal Inspection Service, and the Department of Housing and Urban Development's Office of Federal Housing Enterprise Oversight. This multi-agency effort to address corporate fraud was instrumental in driving the efforts of the Department of Justice to investigate and prosecute corporate wrongdoing. I am grateful for the fact that during my time as Attorney General, 600 corporate criminals were convicted, including 31 Chief Financial Officers.

As previously noted, these prosecutions reminded prosecutors and policy makers of the significant collateral damage resulting from a Federal indictment. I previously cited the Enron scandal in this regard: before being indicted for its alleged wrongdoing in the Enron scandal, Arthur Andersen was an American accounting icon with annual worldwide revenues of $9.3 billion. Following the indictment, the company collapsed and its employees lost their jobs.

Prosecutors who focused on corporate criminal activity were instrumental in the increased use of deferred prosecution agreements as a means of curbing criminality while maintaining the viability of a corporate defendant.

7. **How did the Corporate Fraud Task Force review, if at all, organizational prosecution agreements, during your tenure as Attorney General?**

As the Subcommittee may be aware, the Corporate Fraud Task Force was created by Executive Order No. 13271 in July 2002 to "strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate

and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes." Among its enumerated functions are the following:

- providing direction for the investigation and prosecution of cases of securities fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses, and other related financial crimes committed by commercial entities and directors, officers, professional advisers, and employees thereof ("financial crimes"), when such cases are determined by the Deputy Attorney General, for purposes of such Executive Order, to be significant;

- providing recommendations to the Attorney General for allocation and reallocation of resources of the Department of Justice for investigation and prosecution of significant financial crimes, recovery of proceeds from such crimes to the extent permitted by law, and other matters determined by the CFTF from time to time to be of the highest priority in the investigation and prosecution of such crimes; and

- making recommendations to the President, through the Attorney General, from time to time for:
    - action to enhance cooperation among departments, agencies, and entities of the Federal government in the investigation and prosecution of significant financial crimes;

- action to enhance cooperation among Federal, State, and local authorities responsible for the investigation and prosecution of significant financial crimes;
- changes in rules, regulations, or policy to improve the effective investigation and prosecution of significant financial crimes; and
- recommendations to the U.S. Congress regarding such measures as the President may judge necessary and expedient relating to significant financial crimes, or the investigation or prosecution thereof.

As previously stated, the task force represented a multi-agency effort to address and combat corporate fraud, focusing efforts at the Department of Justice to investigate and prosecute corporate wrongdoing.

Faced with increasing numbers of corporate defendants as a result of such effort, the Department of Justice issued guidelines, in the form of what I previously referenced as the "Holder Memo," informing prosecutors of eight factors they should consider in determining whether to charge a corporation for corporate fraud or other wrongdoing. *See* Exhibit D. These factors, which guide prosecutors as to the appropriateness of the use of remedies such as deferred prosecution agreements and non-prosecution agreements, include:

- Nature/seriousness of offense;
- Pervasiveness of wrongdoing;
- Prior conduct of company;

- Whether company voluntarily disclosed wrongdoing and its willingness to cooperate in investigation;
- Adequacy of company's pre-existing compliance program;
- Remedial actions of company to deal with wrongdoing;
- Impact a prosecution may have on innocent third parties, such as shareholders, pension holders and company employees; and
- Alternative mechanisms of prosecutors to punish company

The above eight factors were echoed four years later in the Thompson Memo, which reiterated the above considerations while adding a ninth factor, company cooperation. *See* Exhibit E.

8. **Why are reports of independent monitors not made public? Should they be made public? Please explain.**

Reports issued by monitors pursuant to the terms of a deferred prosecution agreement are, as you note, not made public. It is my view that prosecutors should exercise their discretion in determining whether such reports are made public, taking into account the circumstances surrounding a given corporate defendant and the benefits of disclosing the particulars of a monitor's activity with such corporate entity. On the other hand, making an independent monitor report public has the potential for causing grave harm to a corporate entity, as the monitor is likely to discuss trade secret and/or proprietary information of the

company in such report, the disclosure of which could risk disadvantaging a company vis-à-vis its competitors.

As previously mentioned, one of the benefits of a deferred prosecution agreement is the ability of a prosecutor to effectuate the excising of illegal behavior of a corporate entity without causing mortal harm to the entity as a going concern. By way of an example, it may be determined that a corporate entity's illegal conduct resulted from its practice of pressuring its employees to make unrealistic sales goals. A monitor charged with administering such company's deferred prosecution agreement would likely scrutinize and/or discuss several areas of that company's corporate operations, including proposed new market practices and sales forecasting, in its monitor report. To that end, disclosure of the monitor report would have the antithetical effect of damaging the corporate defendant's competitiveness in the market it operates in, insofar as the report disclosed company practices and processes that would put the company at a competitive disadvantage were such information to enter the public domain.

Moreover, monitor reports are a tool to keep an open dialogue of information concerning the monitor's perceptions of company operations, as well as company efforts to respond to monitor recommendations for change, with the prosecutor who deferred prosecution of that entity. Keeping the monitor report outside the public domain may encourage the flow of information, both from the company to the monitor and from the monitor to the prosecutor, and encourage

cooperation between the company and the monitor as the company endeavors to curb its previous illegal practice(s). Conversely, if a corporate defendant knew that a monitor report would be made public, it might seek to limit the sensitive information flowing to the monitor. As you can imagine, the monitor and a corporate defendant are engaged in a cooperative relationship which could turn adversarial if a corporate defendant were to know that any and all information shared with the monitor would become public.

Thus, while I believe that certain cases may necessitate the disclosure of a monitor report, care must be given to ensure that a corporate defendant isn't disadvantaged vis-à-vis its competitors by such disclosure.

9. **To whom do independent monitors owe duties? Are your duties owed to U.S. Attorney Christopher Christie, who appointed you, or to Zimmer, who you have been charged with monitoring?**

What duties do you owe Zimmer?

What duties do you owe to U.S. Attorney Christopher Christie and the prosecutors at the New Jersey U.S. Attorney's Office?

As previously noted, the counterparty to the DPA executed by the Company is the United States Attorney's Office for the District of New Jersey (the "Office"). Although the Monitor is not a signatory to the DPA, the Monitor Agreement, which governs the contractual relationship between the Monitor and the Company, states that the Monitor is to fulfill the monitor duties described in the

DPA. Paragraph 16 of the DPA establishes the relationship and duties owed by the Monitor:

> "The Company agrees that until the expiration of this DPA, it will retain an outside, independent individual (the "Monitor") selected by the Office, after consultation with the Company, to evaluate and monitor the Company's compliance with the DPA. Among the conditions of the Monitor's retention are that the Monitor is independent of the Company, the Monitor works exclusively for and at the direction of the Office, and no attorney-client relationship shall be formed between the Monitor and the Company."

Section 1.2 of the Monitor Agreement confirms that "[a]s a result of the appointment of the Monitor under the [DPA], and by this express [Monitor Agreement], no client relationship will be formed between the Monitor and [the Company]" and, further, that "the Monitor will perform its duties and responsibilities under the terms of the [DPA] and at the direction of the Office."

The crux of the Monitor's duties is detailed in Paragraphs 18 and 19 of the DPA and largely relate to monitoring and reviewing the Company's compliance with the DPA and all applicable federal health care laws, statutes, regulations, and programs, including the Anti-Kickback Statute, relating to the sale and marketing of hip and knee reconstruction and replacement products. *See* Exhibit F. A monitor also owes a duty to the U.S. Attorney's Office and to the U. S. Department of Justice to conduct his or her monitoring responsibilities in accordance with the highest professional and ethical standards. Such standards

include the rules of professional conduct and ethical responsibilities outlined in the various bar association rules of professional conduct.

10. **What process is involved in deciding that a corporation has successfully satisfied the terms of an agreement?**

The process of determining whether a corporation has successfully satisfied the terms of a deferred prosecution agreement include the monitor's careful study of the terms and conditions of the particular deferred prosecution agreement and observation that the offending activity of the corporation has ceased. Such analysis would include whether the company has established a framework for its corporate operations that would reduce the opportunity for the company's recidivism. Deferred prosecution agreement requirements are designed to meet this end so that a company can operate legally while sustaining its continued viability.

11. **How will you decide if Zimmer has complied fully with the deferred prosecution agreement?**

The Monitor is guided by the clear, distinct set of duties and responsibilities contained in the body of the DPA to determine whether the Company has properly and fully complied with the DPA. Certain of these duties note specific timelines under which the Company must implement those directives. In other cases, the DPA mandates that the Monitor examine certain areas of the

Company's operations, including, by way of an example, its corporate compliance program and the methodology by which it makes "Payments" (as defined in the DPA) to its "Consultants" (as defined in the DPA) and make recommendations for change at its discretion. In that sense, the role of the Monitor is to both ensure that internal DPA deadlines are met as well as, where necessary, to prescribe its own. The Company's success in fulfilling the requirements of the DPA is thus measurable by its fulfillment of the specific responsibilities delineated in the DPA and by its implementation of the recommendations of the Monitor contained in each monitor report to the Office, in each instance within the timeframes established therein.

12. **Can Zimmer fully comply with the deferred prosecution agreement in just 18 months? What policies have you implemented to ensure that this occurs?**

While it would be entirely inappropriate for a monitor to prejudge an outcome of a deferred prosecution agreement, it is important to note that the term of this particular DPA is sufficient that any company would be capable of fully complying with its terms in 18 months. The structure of DPA sets up internal timelines the Company must meet in enacting certain changes to its corporate structure and business operations. In addition, the Monitor team has spent a considerable amount of time and energy formulating its own interim goals for the Company over the course of the DPA period so that, by the expiration of the 18-month

engagement, the Company has instituted practices which support a continuity of business consistent with all applicable laws and regulations.

My team has given great care to instituting a quarterly work schedule, which forms part of the larger yearly work schedule, to implement the requirements of the DPA as well as to focus the Company's attention and efforts in areas the Monitor has identified as being helpful toward building a sustainable, legal and ethical business enterprise. This work schedule is propriety to my firm and confidential in nature. The Monitor works with the Company to provide realistic interim timelines the Company can utilize to help focus its compliance efforts generally.

The purpose of the Monitor's quarterly report to the Office is to communicate with both the Company and the Office regarding the Monitor's evaluation of the Company's progress in adjusting Company conduct as necessary to fulfill DPA requirements. Consistent with its DPA-mandated duties, the Monitor works with the Company in its adoption of certain compliance policies which, in the Monitor's view, are instrumental in fulfilling the DPA requirements and obligations of the Company. I am pleased to draw the Subcommittee's attention to a *Wall Street Journal* article of April 18, 2008, which quoted the Company as stating that it was "making big changes 'to aggressively reduce potential or perceived conflicts of interest inherent in consulting relationships between the industry and healthcare professionals'" and stated that "[s]urgeons and Wall Street Analysts have already been seeing signs of change from [the Company]." *See* Exhibit G.

Prosecutors are in a unique position to assess the gravity of the prior wrongdoing of a given corporate defendant and should thus be allowed to establish the duration of a given deferred prosecution agreement to properly address such conduct. A cookie-cutter approach to deferred prosecution agreement terms across corporate defendants would not address the difference in the alleged wrongdoing, the complexity of the legal issues and remedies, the complexity of the corporate structure and the pervasive nature of the conduct. Certain companies may need more time to bring their operations into compliance while others may need less. However, in all cases, and contrary to the contention in question 1 that a deferred prosecution agreement may be likened to a "contract of adhesion," it is my understanding that the duration of a deferred prosecution is a negotiated element of any agreement and one that many corporate defendants seek to adjust during the negotiation process prior to execution.

It is also worthwhile to note that, while the monitorship will expire in 18 months by the terms of the DPA, the Company will undergo an additional three and a half years of supervision by certain other regulatory agencies pursuant to the other agreements it executed along with the DPA in September 2007, most notably the Corporate Integrity Agreement, dated September 27, 2007, by and among the Company, Zimmer Holdings, Inc. and the Office of Inspector General of the United States Department of Health and Human Services. It is my hope that at the expiration of the DPA period the Monitor will have overseen a comprehensive reinvigoration of the Company's practices that are in full compliance with the terms of the DPA.

13. **What is the best way to select independent monitors for prosecution agreements?**

According to my understanding, during the past year, the Department of Justice has been reviewing the use of deferred prosecution agreements and non-prosecution agreements as well as the appropriate selection criteria of corporate monitors. In March 2008, the Department of Justice released a memorandum from Acting Deputy Attorney General Craig S. Morford entitled "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations." *See* Exhibit H. Under such guidelines, monitors are to be chosen by a committee and approved by the office of the deputy attorney general. In my view, these guidelines provide a process for United States Attorneys to follow in recruiting and selecting corporate monitors for a specific defendant company. By providing this structure, prosecutors will be able to focus their time and energy on ensuring that corporate defendants rectify previous alleged malfeasance rather than addressing issues associated with selecting monitors. I believe in transparency and hope that a deliberative process of selecting monitors will ensure that monitors with experience and qualifications are chosen.

I remain concerned, however, that a cookie-cutter approach to the selection of monitors may ultimately impair the public interest. It is important that monitors be particularly suited to the specific array of issues of a given case presented for deferred prosecution. For instance, I am aware of a proposal that would require

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW TO TIMOTHY L. DICKINSON, PAUL, HASTINGS, JANOFSKY, & WALKER, LLP, WASHINGTON, DC

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May 5, 2008

VIA EMAIL

Ms. Linda J. Sanchez
Chair, Subcommittee on Commercial and Administrative Law
United States House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: Follow-up to hearing on March 11, 2008

Dear Chairwoman Sanchez:

Thank you for your letter of April 7, 2008. It was my honor to participate in the hearing, and I am happy to expand upon my testimony as per your request.

1. Please explain the process where you were appointed to monitor Monsanto Company and Delta and Pine Land Company.

I do not have any specific information regarding how the selection process was determined. Monsanto ("the Company") interviewed me, and subsequently informed me that I had been selected. When Delta & Pine Land Company entered into a deferred prosecution agreement prior to its acquisition by Monsanto, I was asked to become the monitor for that entity as well.

2. Who is tasked with "monitoring the monitor" – ie who ensures that you complete all of your responsibilities under the deferred prosecution agreement?

From my experience, the Fraud Section of the Department of Justice ("the Department") provides oversight of the monitor, as does personnel at the Securities and Exchange Commission ("SEC"), if a consent order has been entered in an action brought by the SEC.

The Department's memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," dated March 7, 2008 (the "Department's Memorandum") at least partially addresses this issue by requiring communication among the Government, the defendant corporation and the monitor. The Department's Memorandum also states that periodic written reports by

the monitor to the Government and the corporation may be appropriate in some cases. I agree with this approach. Ultimately, the integrity of the monitor is probably the best assurance that the monitor's duties will be carried out properly and in accordance with the applicable DPA.

3. On the day before this hearing, the Department released a memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations."

   Does this memorandum address the problems with selection and use of monitors in deferred and non-prosecution agreements? Please explain.

In my opinion, the Department's Memorandum will markedly improve the process for selecting monitors; however, I would recommend revisions in the following three areas: (a) criteria for determining the circumstances justifying imposition of a monitor; (b) the process for selecting a monitor; and (c) the qualifications required of a monitor.

a. Criteria for determining the circumstances justifying imposition of a monitor.

The Department's Memorandum does not include any specific principles regarding the circumstances in which imposition of a monitor is appropriate. The only reference to that issue is in the introduction, which includes the following statement:

> "A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary."

While I generally agree with this statement, I would recommend that the Department elaborate further on the appropriate circumstances for the imposition of a monitor. As I stated in my testimony on March 11, 2008 before the Subcommittee on Commercial and Administrative Law, I would favor the imposition of a monitor under narrow circumstances, such as when a company has elected not to establish a comprehensive compliance program or where there has been a fundamental breakdown in a company's internal controls or compliance program that the company has not adequately addressed itself. With this standard, since there is usually a significant time period from the initial stages of most cases to their eventual disposition, the Department would be able to assess how a company responded to any apparent inadequacies following discovery of a

violation. If a company had undertaken aggressive and comprehensive remedial actions by the time of settlement, the Department might not deem a monitor necessary. This type of clearly defined criteria for imposing a monitor would help ensure consistent treatment of corporate defendants and would encourage companies to undertake immediate aggressive remedial measures following discovery of a violation.

b. The process for selecting a monitor.

The Department's Memorandum outlines a reasonable process for approving the selected monitor, but I would take issue with the provision that "there is no one method of selection that should necessarily be used in every case." The Department's Memorandum states that either the corporation may select a monitor candidate or, based on the facts of the case, the Department could "play a greater role in selecting the monitor." I would recommend that the defendant company always be permitted to select a pool of at least three candidates, to interview those candidates, and to select its preferred candidate from that pool. The Department, of course, would approve the final selection in accordance with the procedure outlined in the Department's Memorandum. If deemed necessary, the Department also could approve the pool of candidates before the company selects its preferred candidate.

I believe the value of this process would be substantial. First, it would allow the company to consider the experience and expertise of various candidates, including different proposed approaches to the monitoring activities. Second, the company might take more ownership in the changes to its practices required by the monitor, which hopefully would result in a robust compliance program effectively implemented that would endure beyond the tenure of the monitor. Third, the company could consider the personality and working style of various candidates to ensure a good "fit" with the culture of the company and, thus, positive working relationship between the monitor and company. Allowing the company to make the initial choice of its monitor is likely to yield a more successful monitorship from all perspectives and add value to a company's compliance program. In addition, the government's ability to exercise a veto would ensure that the monitor possesses the requisite skills and integrity to properly execute his or her duties without any criticism as to the appointment process. Thus, I would not favor any process in which the Department could simply impose a monitor of its choice.

c. The qualifications required of a monitor.

As I stated during my testimony, it is my view that anyone who a company would propose as its monitor should have the requisite demonstrated expertise such that the government and the public can be assured that the monitor's duties will be carried out in an effective manner. While the Department's Memorandum states that a monitor must be selected "based on the merits" and should be "highly qualified and respected," the

memorandum provides no real guidance as to the other qualifications that should be required. I would recommend that anyone selected as a monitor should be a widely identified expert in the relevant substantive area at issue in the underlying case. Determination of whether an individual is an expert in a given subject area could be based on a number of factors, including number of years in practice, written publications and oral presentations, and the opinion of known practitioners. I would not, however, endorse a system in which a monitor is chosen purely by integrity and respect, but without a thorough demonstrated expertise in the relevant law underpinning the monitorship.

4. What other guidelines should the Department issue regarding deferred and non-prosecution agreements? Please explain.

Duties of the Monitor

I would recommend that the Department issue additional guidelines regarding the scope of a monitor's duties. The Department's Memorandum states that the scope of a monitor's duties should be tailored to the facts of each case. I agree with this statement but would recommend that, in each case, the Department and monitor agree on a scope at an early stage in the monitorship. Providing a written scope at this time ensures that the issues of interest to the Department are addressed and also ensures that the monitor and company remain true to the pre-defined scope and budget and avoid miscommunication.

Again, I thank you and the Committee for the opportunity to submit my views and I remain available for further consultation as your Committee deems appropriate.

Respectfully submitted,

Timothy L. Dickinson

Timothy L. Dickinson
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW TO THE HONORABLE DAVID E. NAHMIAS, THE UNITED STATES ATTORNEY'S OFFICE NORTHERN DISTRICT OF GEORGIA, ATLANTA, GA

Questions for the Record Posed to
U.S. Attorney David E. Nahmias
House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
Hearing on
"Deferred Prosecution: Should Corporate
Settlement Agreements Be Without Guidelines?"
March 11, 2008

QUESTIONS FROM CHAIRWOMAN LINDA SÁNCHEZ

1. **Please describe the monitor selection process in the Zimmer case.**

RESPONSE:

The following describes the monitor selection process that was used not only for the deferred prosecution agreement (DPA) between the United States Attorney's Office (USAO) for the District of New Jersey and Zimmer, Inc., but also for the DPAs with Depuy Orthopaedics, Inc., Biomet Inc., and Smith & Nephew, Inc. and the non-prosecution agreement (NPA) with Stryker Orthopedics, Inc. These five agreements were announced together on September 27, 2007, and are known collectively as the "hip and knee replacement industry cases."

With respect to each corporation, the USAO attorneys involved in the matters, including the Assistant United States Attorneys (AUSAs) handling the criminal investigations, supervisory AUSAs (who included the USAO's Ethics Advisor), and the United States Attorney, informally met over a period of time to discuss what type of monitor was needed based on the facts and circumstances of each case. The USAO also met with counsel for each corporation to discuss their views on the necessary qualifications for its monitor. The USAO next developed a list of potential monitor candidates for the corporations, and ultimately decided that Mr. Ashcroft was the most appropriate candidate for the Zimmer DPA. The USAO proposed a monitor to each corporation approximately two weeks before the agreements were executed, asking each company to meet with and interview its proposed monitor and then report back to the USAO. The companies were advised that, if they objected to their proposed monitor, the USAO would consider proposing a different monitor. All of the corporations, including Zimmer, interviewed their proposed monitors and informed the USAO that the monitors were acceptable before the agreements were executed.

(a) Who, besides former Attorney General Ashcroft was considered for the appointment?

RESPONSE: Other names under consideration for the five monitorships included other former New Jersey Attorneys General, other former United States Attorneys, other former United States Attorneys General, a former career Assistant United States Attorney, and a former FBI Special Agent-in-Charge. Several of the corporations also suggested persons that were considered by the USAO.

(b) Was there public notice or bidding prior to the appointment?

RESPONSE:

No. As is often the case with corporate DPAs and NPAs, the USAO was in the midst of an ongoing criminal investigation and could not appropriately have disclosed to the public specific information on the investigation. Public disclosure also could have upset the delicate, ongoing, multilateral negotiations to resolve these matters through four DPAs and an NPA.

(c) Would the selection process in the Zimmer case comply with the guidance issued publicly by the Department on March 10, 2008?

RESPONSE:

The guidance issued to federal prosecutors by Acting Deputy Attorney General Craig S. Morford on March 7, 2008 (about five months after the hip and knee replacement industry DPAs and NPA were entered), entitled *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (the "Monitor Principles"), provides nine principles regarding monitors in corporate NPAs and DPAs, including one on selection. The principles were the result of a review of best practices in numerous cases involving monitors from around the country over the past 15 years, as well as case law and commentary on these issues. The principles are therefore forward-looking, to be applied in future cases, and no one case handled before the Monitor Principles were promulgated could be expected to conform to all of its terms.

(d) The guidance issued indicated that "Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict-of-interest guidelines set forth in 18 U.S.C § 208 and 5 C.F.R. Part 2635." Do you believe Mr. Christie violated laws or regulations when he appointed Mr. Ashcroft as a monitor in the Zimmer case? Please explain.

RESPONSE:

No, we do not believe that Mr. Christie violated any conflict-of-interest law or regulation with respect to the selection of Mr. Ashcroft as the monitor in the Zimmer case. The conflict rules referenced in the Monitor Principles are well understood and applied routinely in the work of United States Attorneys and other federal prosecutors. We do not believe that there was any financial relationship between Mr. Christie and Mr. Ashcroft, or that their personal relationship was of the type that would have required recusal.

2. Please describe the monitor selection process for the four other monitors appointed to oversee the orthopedic device makers that entered into deferred or non-prosecution agreements with the U.S. Attorney's Office in New Jersey.

RESPONSE:

Please refer to the answer to question 1 above.

3. How were the fees determined for the monitoring contract in the Zimmer case and the four other related cases?

RESPONSE:

The fees for the monitors in the five hip and knee replacement industry cases were negotiated between each corporation and its monitor. The USAO played no role in determining the fees and was not provided a copy of the contracts between the corporations and their monitors.

(a) In your view, are the fees of $52 million for 18 months of monitoring in the Zimmer case appropriate?

RESPONSE:

The $52 million figure was Zimmer's high-end estimate of the monitor costs; the company's low-end estimate was about half that amount, approximately $28 million. Not knowing all of the details of the fee arrangement, including the exact type and quantity of services to be performed and the rates to be charged by specific members of the monitor team, it is impossible to express a definite view on this question. As noted above, the USAO played no role in determining the fees and was not provided a copy of the contracts that were negotiated between the corporations and their monitors.

(b) Will the Department issue guidelines on how fees should be determined?

RESPONSE:

Fees have typically been negotiated between the monitor and the corporation that will pay the fees, and the Department has not been a party to those arrangements. However, the Department will continue to identify and promote best practices for the use of deferred and non-prosecution agreements. In the event that this analysis identifies best practices on the topic of monitor fees, the Department will consider adopting additional principles.

4. **Besides the appointment of former Attorney General Ashcroft in the Zimmer case, what other former high-level Department employees have been selected as monitors?**

RESPONSE:

With its letter to Chairman Conyers, dated May 15, 2008 (a copy of which is attached), the Department enclosed 85 corporate DPAs and NPAs and, where a monitor was provided for in those agreements, provided the Committee with a list identifying the monitors. I am familiar with some of the monitors listed as being former United States Attorneys and/or Assistant United States Attorneys, but others listed may also have served in those roles or in senior positions at Main Justice.

(a) What are/were their compensation arrangements?

RESPONSE:

In all of the corporate DPAs and NPAs we have collected, the fees were agreed upon by the monitor and the corporation, and the Department was not a party to those arrangements.

(b) Please explain Attorney General Mukasey's consideration to become a monitor.

RESPONSE:

The corporation initially recommended several candidates for the potential monitorship to the Department component handling the investigation. The Department component interviewed those candidates, but wanted to see a broader range of candidates. One additional candidate, whom the Department component interviewed on June 7, 2007, was Michael Mukasey, who at the time was a partner at Patterson, Belknap, Webb & Tyler and the retired Chief Judge of the United States District Court for the Southern District of New York. The corporation also proposed additional candidates, and the Department component continued to interview candidates through October 2007. On September 17, 2007, Judge Mukasey was nominated to be Attorney General. As a result, he was no longer considered a candidate for this monitor position.

5. **On January 10, 2008, Chairman Conyers, Congressman Pascrell, and I sent a letter to Attorney General Michael Mukasey requesting information about the Department's utilization of deferred prosecution agreements. It has been three months since our request and we have yet to receive a response.**

(a) When will we receive the requested material?

RESPONSE:

The Department sent a letter responding to your request on May 15, 2008.

(b) Will we also receive the names of all independent monitors, how they were selected, and which U.S. Attorney or Department official provided input on the selection? If not, we request that the Department provide this material.

RESPONSE:

By letter dated May 15, 2008, the Department provided the Committee with copies of 85 corporate DPAs and NPAs and, where a monitor was used in those agreements, with a list identifying the monitors. We have not collected information on how each of those monitors was selected, although that process is occasionally set forth in the agreements and my written statement provides an overview of various methods that have been used. Going forward, the monitor selection process in all corporate DPA and NPA cases will follow Principle 1 of the Monitor Principles.

6. **The deferred prosecution agreements entered into by U.S. Attorney Christopher Christie with five medical device companies called for a $311 million settlement and the hiring of monitors by each company to install a new set of ethics and better business practices. However, the deal also allowed each company to avoid criminal charges of conspiracy and to avoid admitting wrongdoing. Since no judicial oversight is required of these agreements, how can the public be assured that Mr. Christie was able to obtain the strongest deal possible for these acts of large-scale Medicare fraud?**

RESPONSE:

The DPAs in the hip and knee replacement industry cases did not include monetary settlements; however, the four companies that entered DPAs did pay a total of $311 million pursuant to their related Civil Settlement Agreements. The four corporations that entered DPAs did not avoid criminal charges. A criminal complaint against each corporation was filed in the United States District Court for the District of New Jersey. Prosecution of those complaints has been deferred pursuant to the DPAs, but the charges are still pending. In addition, there was judicial review of both the criminal complaints and the DPAs by a United States Magistrate Judge, who approved deferring prosecution of the complaints after reviewing the complaints and the DPAs, all of which are on file with the court.

One corporation, Stryker Orthopedics, Inc., was the first of the hip and knee replacement industry companies to voluntarily cooperate in the USAO investigation.

Due to its cooperation, Stryker entered a non-prosecution agreement, under which Stryker is required to implement all of the reforms imposed on the four corporations that entered DPAs, including 18 months of monitoring, but did not have a criminal complaint filed against it. Stryker did not enter a civil settlement and was not released from any civil liability.

(a) Did Mr. Christie have this deal approved by any of his superiors at the Department of Justice? If so, who approved the deal?

RESPONSE:

The USAO was not required to obtain approval from Main Justice to enter the criminal DPAs and NPA. The Civil Settlement Agreements were approved by the appropriate Department officials for such civil settlements.

(b) Is there anyone, at any level, at the Department of Justice or in the courts that has the ability to supervise such agreements to ensure that a just settlement was reached?

RESPONSE:

The United States Attorney or Department component head whose office handles a corporate criminal case is responsible for supervising a DPA or NPA that resolves the matter, just as he or she would be responsible for supervising a declination of or a charge and plea agreement in such a case. A deferred prosecution agreement and the related criminal charging document are also typically filed with the appropriate court, which approves deferral of the prosecution.

7. When, if ever, should a non-prosecution agreement rather than a deferred prosecution agreement be used?

RESPONSE:

Like all charging decisions, the decision to enter into a non-prosecution agreement is based on application of the law and Department policy to the facts and circumstances of the particular case. In this context, key Department policies are the *Principles of Federal Prosecution* and the *Principles of Federal Prosecution of Business Organizations*. The spectrum of charging options ranges from declination to non-prosecution agreement to deferred prosecution agreement to pre-indictment plea agreement to indictment, and the decision regarding which option to pursue is very case-specific, as it is in cases involving individuals.

(a) Are you troubled that non-prosecution agreements do not involve the courts at any stage of the process? Please explain.

RESPONSE:

No. Unlike deferred prosecution agreements, non-prosecution agreements do not involve the filing of criminal charges with a court, which is the event that gives the court jurisdiction over a criminal case.

8. According to The Washington Post, in the Zimmer monitorship, Mr. Ashcroft had to use considerable time "to prepare for the assignment and learn more about the business." Should a monitor have to use considerable time to prepare for the assignment and learn more about the business?

RESPONSE:

The Department believes that a monitor should be a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances of the case, a position now memorialized in the Monitor Principles. However, the fact that the monitor is respected and highly qualified in terms of general knowledge about relevant legal issues, compliance programs, etc., does not mean that the monitor will come to the assignment with an intimate knowledge of the misconduct that led to the DPA or NPA or the inner workings of the particular corporation. Thus, it would not be unusual for a monitor to take some time to prepare for the assignment and learn about the corporation and issues involved. I believe other witnesses at the hearing also addressed this issue.

9. What should the role of the Corporate Fraud Task Force be in coordinating implementation of these agreements?

RESPONSE:

The President created the Corporate Fraud Task Force (CFTF) in July 2002 to coordinate and oversee all corporate fraud matters under investigation by the Department of Justice and to enhance inter-agency coordination of regulatory and criminal investigations. The CFTF, which is chaired by the Deputy Attorney General, has been very successful in these areas; in our ongoing efforts to identify and promote best practices for the use of deferred and non-prosecution agreements, the Department may continue to look to the CFTF for input and ideas. However, the CFTF is not an operational entity and is not responsible for the investigation or prosecution of particular cases. Responsibility for implementing a NPA and DPA rests with the USAO or Department component that entered the agreement.

10. What should the standards be for deeming an agreement successfully completed?

RESPONSE:

The non-prosecution or deferred prosecution agreement itself sets forth the obligations expected to be successfully completed by each party during the term of the agreement, as negotiated by the parties based on the facts and circumstances of the particular case.

11. Will guidelines address whether agreements should give prosecutors unilateral authority to declare an agreement breached?

RESPONSE:

The Department will continue to identify and promote best practices for the use of deferred and non-prosecution agreements. In the event that this analysis identifies best practices on the topic of breach, the Department will consider adopting additional principles.

12. Will Department guidelines address the circumstances under which monitors are necessary?

RESPONSE:

The Monitor Principles provide some guidance in this area:

> A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals. A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.
>
> In negotiating agreements with corporations, prosecutors should be mindful of both: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.

See Monitor Principles, Introduction. In addition, the Department will continue to identify and promote best practices in the use of deferred and non-prosecution agreements. In the event that such analysis identifies best practices on the topic of when to use a monitor, the Department will consider adopting additional guidance.

13. Will guidelines address the duties of monitors, and to whom are they owed?

RESPONSE:

Section III of the Monitor Principles, Scope of Duty (Principle 2-7), addresses the duties of monitors and to whom they are owed. In addition, the Department will continue to identify and promote best practices in the use of deferred and non-prosecution agreements. In the event that such analysis identifies best practices on these topics, the Department will consider adopting additional guidance.

14. Will guidelines address whether monitor reports will be made public?

RESPONSE:

Principle 5 of the Monitor Principles discusses periodic written reports by the monitor, but does not address whether such reports should be made public, which would raise a number of concerns. The Department will continue to identify and promote best practices in the use of deferred and non-prosecution agreements. In the event that such analysis identifies best practices on the topic of whether or not to make monitor reports public, the Department will consider adopting additional guidance.

15. Will guidelines address the implementation of these agreements?

RESPONSE:

The Monitor Principles address implementation of corporate NPAs and DPAs in various respects. In addition, the Department will continue to identify and promote best practices in the use of deferred and non-prosecution agreements. In the event that such analysis identifies best practices on the topic of implementing agreements, the Department will consider adopting additional guidance.

16. Will guidelines address the amounts set in agreements for payment of fines and restitution?

RESPONSE:

The calculation of fines, penalties, and restitution is very case-specific. Nevertheless, the Department will continue to identify and promote best practices in the use of deferred and non-prosecution agreements. In the event that such analysis identifies best practices on the topic of fines and restitution, the Department will consider adopting additional guidance.

17. When will these guidelines be completed?

RESPONSE:

The Acting Deputy Attorney General signed the Monitor Principles on Friday, March 7, 2008, and the guidance was formally issued on Monday, March 10, 2008.

18. Who will be involved in drafting guidelines? Will the U.S. Attorneys Offices have input during the process? Will past monitors have input? Will regulatory agencies that are members of the Corporate Crime Task Force have input?

RESPONSE:

Representatives of all of these groups had input in the process that resulted in the Monitor Principles.

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW TO THE HONORABLE GEORGE J. TERWILLIGER, III, ESQUIRE, WHITE & CASE, LLP, WASHINGTON, DC

United States of America
House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

Response of George J. Terwilliger III

To Question for the Record from Chair Linda Sánchez

Arising from March 11, 2008, Hearing:

Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

In your written testimony, you indicate that the selection of monitors should be transparent and subject to layered review. From your knowledge of Mr. Ashcroft's appointment in the Zimmer case, did his appointment meet this criteria?

Respectfully, as I did not participate in the appointment of Mr. Ashcroft in the Zimmer case and do not otherwise have knowledge of the circumstances of the selection, I am not able to provide a substantive response to this question.

In your view, would the monitor selection process in the Zimmer case comply with the guidance issued publicly by the Department?

Please see my response above.

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW TO BRANDON GARRETT, PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Responses to Question for Professor Brandon Garrett
from Chairwoman Linda Sánchez

April 28, 2008

I thank Chairwoman Sánchez and the Subcommittee for the opportunity to present my research at the hearing on March 11. I also thank you for these thoughtful follow-up questions. Below are responses. Please let me know if I can be of any further assistance as your Subcommittee continues to consider these important issues.

1. How would judges review agreements if there was greater judicial oversight?

Judicial review of the approval, implementation and termination of organizational deferred prosecution agreements would likely be fairly deferential and limited, but nevertheless critical to ensuring transparency, legitimacy and to prevent any potential abuses regarding such agreements.

The Speedy Trial Act currently requires judicial approval of any deferral of prosecution, but legislation could address issues unique to the organizational context. A court asked to approve a deferred prosecution agreement would likely examine whether agreements generally serve the interests of justice and the purposes of the Sentencing Guidelines, as a court would do when examining a plea agreement. I discuss such deferential review in "Structural Reform Prosecution," 93 Va. L. Rev. 853, 919-25 (2007).

During the implementation of an agreement, a court could similarly review reports regarding the monitor's progress, resolve any disputes concerning the scope and progress of implementation, and make selected information available so that the public knows whether the goals of an agreement were achieved.

Further, federal courts may currently lack the authority to enjoin an arbitrary prosecution declaration of a breach. *See id.* at III.B.3. Courts could be provided with that authority to adjudicate, pre-indictment, any dispute regarding a breach.

2. How can we know if the compliance programs adopted under these agreements are working?

Where prosecutors do not make any effort to publicize whether the sought-after compliance was obtained, we do not now know whether these agreements succeed in achieving their goals. Legislators, scholars and the public would be better able to judge the process if information was available in the form of monitor's reports. Those reports could include information concerning what steps were taken to supervise the implementation of a compliance program during an agreement. Better yet, if reports are addressed to a court that oversees the compliance process, the public may have further

assurance that meaningful compliance is being conducted. As to the broader question whether the remedies adopted are effective, the public can only begin to assess whether remedies succeed over time with access to meaningful information regarding the implementation of these remedies.

3. Why are prosecution guidelines especially important in the context of organizational prosecutions?

As I noted in my testimony, little guidance exists regarding the structure of the remedies included in organizational agreements and the implementation of those remedies. Organizational prosecutions can arise from broadly framed criminal statutes for which firms may then be held responsible under a broad respondeat superior standard. Organizational prosecutions that result in deferred prosecution agreements raise even more complex issues regarding remedial measures appropriate to prevent future misconduct and then how to implement those remedies. Guidance could assist prosecutors and firms as they negotiate and implement compliance measures.

4. How can prosecution guidelines be useful even if they are not binding?

Guidelines promulgated by the Department of Justice are internally binding but not enforceable. Though not enforceable, guidelines serve to promote consistency across the U.S. Attorney's Offices. In addition to promoting uniformity, guidelines provide notice to firms and help them structure their compliance efforts. The Holder, Thompson, McNulty and now the Morford Memoranda all provided critical guidance to industry and prosecutions. The DOJ should be applauded for its ongoing efforts to define best practices in this area. Of course, the utility of any particular set of guidelines depends on whether they provide sufficient clarity and whether the policies adopted are sound.

5. Why is it so important to many corporations to avoid an indictment?

An indictment may have several consequences including regulatory prohibitions, debarment, or revocation of licensing. *See, e.g.* 48 C.F.R. § 9.406-2(a) (1998) (providing for debarment and suspension from government contracts or subcontracts during criminal prosecution). Even firms without extensive reliance on government contracts or licensing may suffer severe reputational effects from an indictment. *See* Pamela H. Bucy, Organizational Sentencing Guidelines: The Cart Before the Horse, 71 Wash. U. L.Q. 329, 352 (1993) ("In some instances adverse publicity alone can cause corporate devastation."). For some firms and for some criminal matters, however, neither an indictment nor a conviction has such a devastating effect. For example, some firms have pleaded guilty to criminal offenses without substantial adverse effects.

6. On the day before this hearing, the Department released a memorandum entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations."

Does this memorandum address the problems with selection and use of monitors in deferred and non-prosecution agreements? Please explain.

The new procedures forbid unilateral prosecutorial selection of monitors and provide for conflict checks and vetting of monitors by prosecutors. However, those guidelines neither require public notice of a monitor position nor judicial approval of the person selected, both of which would alleviate any perception of partiality in the selection of monitors.

What other guidelines should the Department issue regarding deferred prosecution and non-prosecution agreements? Please explain.

The new memo addresses a limited set of issues concerning the selection and certain duties of monitors. That memo does not address the structure of the remedies included in the agreements themselves or their implementation, except to discuss the duties and responsibilities of monitors.

A host of additional issues could and should be addressed in additional guidelines, including: what types of remedies the agreements should include; when should compliance programs be established and what types should be adopted, including whether they should satisfy the Organizational Sentencing Guidelines requirements; what constitutes a material breach of an agreement and who adjudicates any alleged breach; what fines or restitution should be appropriate; which aspects of the implementation process should be make public; guidance on joint involvement of regulatory agencies and division of responsibilities; and defining cooperation with any ongoing criminal investigations, including the nature of that cooperation, responsibilities of the entity and employees, and the length of such an obligation.

Finally, I have recommended that a guideline be adopted advising against the use of non-prosecution agreements in cases in which an ongoing compliance process is contemplated. Such cases are in the nature of a deferred prosecution, because they contemplate an ongoing compliance process, rather than just a prosecution decision not to prosecute. Thus, agreements calling for the establishment of compliance programs or retention of monitors, I have suggested, should involve some judicial oversight and should therefore be negotiated as deferred prosecution agreements rather than non-prosecution agreements.

Absent such a guideline, substantial guidance is necessary on the circumstances when a non-prosecution agreement is justified versus a deferred prosecution agreement. Practitioners have noted that there appears to be little difference between the content of deferred prosecution and non-prosecution agreements, nor are the reasons clear why some cases receive one and not the other.

7. . . . Do you believe Mr. Christie violated laws or regulations when he appointed Mr. Ashcroft as a monitor in the Zimmer case? Please explain.

I do not have sufficient familiarity with federal conflict-of-interest rules, their interpretation, nor all of the facts concerning Mr. Ashcroft's appointment. Thus, I have formed no opinion regarding the legality of Mr. Ashcroft's appointment.

As a general rule, however, as I described in my remarks to the Subcommittee, I believe that in the future, involving a judge in the selection of monitors can help to avoid any appearance of partiality in the selection of the monitor.

PREPARED STATEMENT OF JAMES K. ROBINSON, FORMER ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

STATEMENT FOR THE RECORD OF
JAMES K. ROBINSON
FORMER ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL & ADMINISTRATIVE LAW

DEFERRED PROSECUTION AGREEMENTS & INDEPENDENT MONITORS

MARCH 11, 2008*

I. Introduction

Chairwoman Sánchez and members of the subcommittee, I am pleased to offer my views on deferred prosecution agreements and independent monitors, and specifically H.R. 5086, the legislation recently introduced by U.S. Rep. Frank Pallone, Jr. that would require new guidelines and judicial oversight of deferred prosecution agreements. I also want to thank you personally, Madam Chairwoman, for your attention to the issue of deferred prosecution agreements. While serving as the Assistant Attorney General for the Criminal Division of the Department of Justice, I was honored to work with the Judiciary Committees of both the House and the Senate on many important criminal justice issues, and I am honored to address this important issue. A copy of my CV is attached to this Statement.

My position as Assistant Attorney General from 1998 to 2001, my experience in private white collar criminal practice, and my appointment as the independent monitor for Time Warner's wholly-owned subsidiary AOL (AOL Time Warner) in 2004 have familiarized me with all aspects of corporate deferred prosecution arrangements. When I became Assistant Attorney General in 1998, deferred prosecution agreements had only recently come to be used by prosecutors in the corporate context. In fact, prior to 1994, when the U.S. Attorney for the Southern District of New York entered into a deferred prosecution agreement with Prudential Securities, such arrangements, which originated in the juvenile justice system, had been reserved largely for first-time offenders, including drug offenders, who might benefit from rehabilitation as opposed to incarceration. While I was at the Criminal Division, the Department of Justice promulgated and issued the *Principles of Federal Prosecution of Corporations*, referred to as the "Holder Memorandum" after then-Deputy Attorney General Eric H. Holder, Jr., in an attempt to provide guiding principles to channel prosecutorial decision-making in the corporate realm. The 1999 *Principles*, which were subsequently slightly revised and re-issued in 2003 as the so-called

* At the time of the preparation of this Statement, the Department of Justice had not yet issued the memorandum entitled "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations."

"Thompson Memorandum," after then-Deputy Attorney General Larry D. Thompson, and again in 2006 as the "McNulty Memorandum," after then-Deputy Attorney General Paul J. McNulty, form the backdrop for the recent investigations into corporate fraud, as well as to their resolutions in the form of deferred prosecution agreements and independent monitors.

During my two-year term as the independent monitor for AOL Time Warner pursuant to that company's deferred prosecution agreement with the United States Attorney for the Eastern District of Virginia and the Criminal Division for the Department of Justice, I saw first-hand the impact of such an arrangement on a company and its employees, and experienced personally the demands placed on a monitor and his or her staff. During that appointment, in 2005, two colleagues and I published an article entitled *Deferred Prosecutions and the Independent Monitor* in the INTERNATIONAL JOURNAL OF DISCLOSURE AND GOVERNANCE, which discussed many of the same issues we are covering today. A copy of that article is attached to this Statement. In that article, my colleagues and I called for the Department of Justice to issue guidance on deferred prosecution agreements.

Notwithstanding my earlier call for guidelines, and although I have no doubt that Representative Pallone's bill is offered with the best interests of the Department of Justice, corporations and their shareholders, and the American public in mind, I believe the wisdom of some of the proposed legislation's provisions merit careful examination from a law enforcement and a separation of powers perspective.

II. Advantages and Disadvantages of Deferred Prosecution Agreements

Corporate deferred prosecution agreements, and their adjunct, the Independent Monitor, have provided a useful third option to prosecutors, who previously had only two choices in dealing with corporate wrongdoing: bring charges or decline prosecution. In that system, the absence of middle ground led to problems for prosecutors and corporations alike. Prosecutors, through the use of deferred prosecution agreements, are now able to impose continued supervision and enforced remediation on corporations in appropriate cases. Likewise, corporations may submit to such sanctions to avoid the collateral consequences of prosecution, which, as we saw in the case of *Arthur Andersen*, can include the utter elimination of the entity. (I understand, however, that the Department of Justice was willing to consider a deferred prosecution agreement for Arthur Andersen, but Andersen declined.) Also, quite significantly, such arrangements benefit third parties including shareholders, by restoring confidence in their companies and encouraging investment more generally by strengthening the integrity of the markets, as well as the innocent corporate employees who are often victimized twice – first by the criminal misconduct and then again by the prosecution that may result in lost jobs.

Notwithstanding their benefits to prosecutors, corporations, and third parties, deferred prosecution agreements carry with them some disadvantages. One of these is the potential overuse of the option of a deferred prosecution agreement by prosecutors, particularly in situations where declination to prosecute is warranted.

The threat of criminal prosecution, with its devastating consequences for corporations, gives prosecutors tremendous power to demand that a corporation agree to almost anything to

avoid prosecution. The bargaining power is not equal and without the careful and prudent exercise of prosecutorial discretion the very real danger exists that that power may be misused.

Ironically, and perhaps inadvertently, the *Principles of Federal Prosecution of Corporations*, by drawing prosecutors' attention to factors such as cooperation, remediation, compliance programs, collateral consequences, and recognizing that those factors might justify not charging a corporation, have had the effect of encouraging prosecutors to turn to alternatives to prosecution, including the deferred prosecution agreement, instead of simply declining to prosecute the corporation. Also, the obligations of a deferred prosecution agreement, and a monitorship in particular, carry with them enormous monetary costs (in addition to the penalties paid for the privilege of entering the agreement), that may cause companies to question whether the penalty associated with a guilty plea and conviction might be more economical for shareholders. Moreover, the long-term nature of a deferred prosecution agreement, under which a company is under ongoing compliance obligations and facing the imminent threat of prosecution for a period typically lasting two to three years, may lead to overdeterrence through interference with normal business practices. Not only must a company under a deferred prosecution agreement divert substantial resources in terms of money and time to its new compliance and monitoring obligations, but also, such close scrutiny may cause excessive trepidation in what otherwise would be routine exercises of business judgment and the taking of normal business risks. In other words, such agreements may wind up stifling companies' growth, thereby harming shareholders and markets as a whole.

In light of these pros and cons of deferred prosecution agreements, it is important to consider carefully whether any given situation involving alleged corporate wrongdoing warrants such an arrangement. Corporations benefit most from deferred prosecution agreements and independent monitors when they suffer from a culture that encourages pervasive criminal conduct that is not limited to select individuals operating in violation of company policy. If wrongdoing can be isolated to particular persons within a corporation, prosecution of those individuals and declination to prosecute the corporation may be the most appropriate course, despite the improper temptation for some prosecutors and law enforcement agents to improve their crime fighting statistics or to generate headlines. The Department of Justice itself recognizes the distinction between conduct and culture, as is evident in its treatment of future mergers, sales, or acquisitions of companies under deferred prosecution agreements. In such situations, the Department of Justice has imposed much less burdensome obligations on the acquiring company or successor corporation, including retaining or keeping a monitor only for the purpose of integrating the acquired company (still under a deferred prosecution agreement) into its compliance program, and then dismissing the compliance and monitor provisions of the agreement. Such modifications recognize that deferred prosecution agreements and monitors should only be used when a corporation really needs "training wheels" to assure implementation of robust compliance measures.

III. Ideal DOJ Guidelines/Procedure

Given the increasing use of deferred prosecution agreements and monitors by prosecutors, it is essential that the Department of Justice issue guidelines to promote consistency and impose appropriate oversight. Such guidelines would ideally address what would make a company eligible for a deferred prosecution agreement, the limits of the sanctions to be imposed

under those agreements, and what remains of the promise of declination to prosecute offered by the *Principles of Federal Prosecution of Corporations*. As I explained earlier, although the *Principles* are used (and ironically seem to have given rise to) decisions to enter into deferred prosecution agreements, they largely address the prosecutor's decision of *whether* to charge, and make only a single mention of deferred prosecution or diversion (in the context of encouraging or rewarding cooperation). In addition, the ideal guidelines would require approval by Main Justice for deferred prosecution agreements and monitors. Clearly the practice of entering deferred prosecution agreements has outpaced the policies governing them, and it is time to fill this policy void.

What has resulted from the absence of guidelines is inconsistency and possible impropriety in both the use of the deferred prosecution option and the contents of such agreements. As the Committee is well-aware, recent events in the District of New Jersey have raised concerns about allowing individual United States Attorney's Offices to control the deferred prosecution process. These concerns include imposing obligations on corporations that raise suspicions about possible pork barrel politics, as well as cronyism in the selection of independent monitors. Even absent such extreme consequences, permitting disparate offices led by prosecutors having varying political or philosophical predilections to drive the deferred prosecution process creates the danger that corporate defendants, their shareholders, and the American public will be denied the benefit of a justice system defined by transparency, consistency, and fairness. Accordingly, I support the issuance of guidelines by the Department of Justice laying out: (1) when deferred prosecution is ideal (as opposed to declination or prosecution); (2) the process for selection of a monitor that avoids the cronyism perception problem, specifies reasonable fees, and obtains the most qualified persons (by listing specific ideal experience and credentials and creating a merit-based selection process); and (3) requirements for approval and oversight by Main Justice.

Having served both as a United States Attorney (Eastern District of Michigan, 1977-1980) and as the Assistant Attorney General of the Criminal Division (1998-2001), I understand that requiring Main Justice approval is a potential hot-button issue for prosecutors within the Department of Justice. There is always tension between Main Justice and the United States Attorney's Offices about "centralized control" versus United States Attorney autonomy. Nevertheless, in a variety of important areas (e.g., tax and RICO prosecutions), the wisdom of uniformity and consistency achieved through Main Justice approval trumps the value of independence in ninety-three separate United States Attorney's Offices.

IV. **Proposed Legislation**

I applaud Representative Pallone's interest in the area of deferred prosecution agreements and appreciate that his proposed bill aims to reform a system that seems on occasion to suffer from inconsistency, or, in rare instances, even the appearance of impropriety. Therefore, I support the guidelines articulated in Section 1 of the proposed bill, which cover prospective guidelines to be issued by the Attorney General "delineating when United States Attorneys should enter into deferred prosecution agreements." However, I do not support the proposed judicial approval of deferred prosecution agreements presented in Section 2 of the proposed bill. I believe that the consistency and integrity of agreements and associated monitorships can be achieved by requiring approval and oversight by the Criminal Division of Main Justice, instead

of the judiciary. Indeed, the decision whether to prosecute a corporation or to enter into a deferred prosecution agreement involves the careful exercise of prosecutorial discretion and, in my view, such a decision is not an appropriate one to be made or reviewed by members of the independent judiciary. Therefore, I believe that the guidelines and their oversight should be left entirely under the control of the Department of Justice.

The Supreme Court has stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). That authority naturally extends to situations where the Department of Justice decides to defer prosecution, as this modification only goes to the timing of the contemplated prosecution. Therefore, interposing the judiciary in the process of prosecutorial discretion presents separation of powers concerns, which have been recognized by federal courts of appeal. For example, the Fifth Circuit, reviewing a district court's order to a United States Attorney to sign an indictment in line with a grand jury's recommendation, stated in *United States v. Cox*, "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." 342 F.2d. 167, 171 (5th Cir. 1965)(*en banc*). The Third Circuit recently cited *Cox* in reversing a lower court's judgment that enjoined the Department of Justice from indicting a corporation after an alleged breach of an immunity agreement because the lower court lacked the authority to employ such a remedy. *See Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 187 (3d Cir. 2006). Such decisions are important to maintaining the appropriate balance of power among our three branches of government.

In light of the constitutional concerns that the proposed new judicial authority would pose, and the Department of Justice's unquestionable authority to make decisions regarding the prosecution of criminal cases, I believe that it is within the Department's powers, and therefore its obligation, to issue the appropriate guidelines regarding deferred prosecution agreements and independent monitors.

It is with great sorrow that I acknowledge that the inclusion of a provision requiring judicial oversight of the prosecutorial process for deferred prosecutions likely arises from recent questions concerning the integrity and credibility of the Department of Justice. As the Committee may know, I have been quite vocal in the wake of the recent scandals at the Department of Justice under the leadership of former Attorney General Alberto Gonzalez and some members of his staff, and I have expressed my views about the need to restore the integrity and credibility of the Department. In particular, these concerns related to the Department's ability to assure the public that when a criminal case is brought (or not brought), it is because an appropriate decision was made that was untainted by political influence. I feel similarly about the use of deferred prosecution agreements and independent monitors. But, I have not lost faith in our Justice Department, and I believe that institution remains stronger than the individuals who visit it in temporary political posts. I therefore believe that the Justice Department remains capable of exercising one of its core powers – making determinations about federal prosecutions – and that to impede that power through legislatively imposed judicial intervention would be an inappropriate and unwarranted response to momentary concerns about those temporary visitors. It is my hope that the Department of Justice will regain its credibility with Congress and that, through appropriate responsiveness to the legitimate oversight of Congress, the Department will

earn the right to perform its legitimate executive powers without the need for judicial review of prosecutorial decisions.

ATTACHMENT

International Journal of Disclosure and Governance Volume 2 Number 4

Deferred prosecutions and the independent monitor

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Received: 28th September, 2005

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ABSTRACT
KEYWORDS: corporate deferred prosecution agreement, independent monitor, fraud, enforcement

In response to today's wave of corporate investigations and prosecutions, prosecutors have sought to require significant changes in corporate culture, compliance and controls and, as importantly, to monitor those changes for a reasonable time. The result is the corporate deferred prosecution agreement and its adjunct, the Independent Monitor. This paper first will review the development of deferred prosecution agreements and the factors which may determine which companies receive such treatment; secondly, it will analyse the Independent Monitor's role, both the common terms of reference and certain unique terms relevant to specific cases; and thirdly, it will suggest the outlines of an Independent Monitor's workplan.

INTRODUCTION

'That which hath been is that which shall be, and that which hath been done is that which shall be done; and there is nothing new under the sun.'[1] Applying that lesson to today's climate of corporate wrongdoing, it is probably fair to say as long as there have been governments, investors and lenders who are keenly interested in a business's books, certain businesses have been willing to cook them. Further, periodically or even cyclically, one or more businesses get caught at it, engaging in such outrageous and unambiguously dishonest behaviour that the public demands corrective action, whether it be in the form of new regulation or, as now, criminal investigation and prosecution of the wrongdoing businesses and their executives.

Today's wave of corporate investigations and prosecutions is usually dated to the breaking of the Enron scandal in the autumn of 2001, since which time the Department of Justice has indicted over 900 defendants for corporate fraud-related offences, including 60 chief executive officers (CEOs), and obtained 500 convictions and pleas.[2] Similarly, the Securities and Exchange Commission

International Journal of Disclosure and Governance, Vol. 2, No. 4, 2005, pp. 325–347
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(SEC) brought 679 enforcement actions in 2003 alone, approximately a third of which involved financial reporting and issuer disclosure violations.[3] Granted, not all of these defendants' alleged frauds rise to the level of the Enrons and WorldComs of this world, but it is nevertheless an impressive record.[4]

What, then, of the corporations, in whose name or on whose behalf these crimes were committed? Until recently, a prosecutor's choices, when faced with corporate wrongdoing, were essentially binary: he or she could either bring charges or decline prosecution, with no middle ground allowing for continued supervision or enforced remediation. Although the Organizational Sentencing Guidelines provided for a period of corporate probation,[5] neither the courts nor the Probation Office had jurisdiction unless the company was charged and convicted. For public and other regulated companies, prosecutors could, and often did, defer to the SEC or other federal and state regulatory agencies to bring administrative and civil enforcement actions, with sanctions ranging from injunctions to fines. Companies, however, may have viewed such actions, in which they did not have to admit to wrongdoing when settling, as merely being a cost of doing business. Prosecutors, therefore, sought a third way — a way that would enable them to exercise their discretion not to charge a corporation in appropriate circumstances but that would, at the same time, give them sufficient leverage to require significant changes in corporate culture, compliance and controls and, as importantly, *monitor* those changes for a reasonable period of time. Thus was born the corporate deferred prosecution agreement (DPA) and its adjunct, the Independent Monitor.

This paper will review the development of DPA and the factors which appear to determine which companies receive such treatment. It will then describe the role of the Independent Monitor, both the common terms of reference and certain unique terms relevant to the facts of circumstances of particular cases. Finally, it will suggest the outlines of an Independent Monitor's workplan.

DEFERRED PROSECUTION AGREEMENTS

Generally, a DPA requires the potential defendant to agree to comply with certain conditions for a set period of time. In return, the US government agrees not to charge or to dismiss any charges at the end of the period if the defendant has fulfilled his or her side of the bargain.[6] To enable the prosecutor to enforce this agreement, not to mention avoiding the risk of having postponed the trial only to lose witnesses and evidence, these agreements usually also require the potential defendant to admit to sufficient facts to ensure a conviction should he, or it, breach the agreement.[7]

Historical application of DPAs in the non-corporate context

The DPA, or pretrial diversion, is a 'long-standing alternative to incarceration . . . in which criminal charges are dropped or postponed on the condition that the offender fulfill certain requirements over an extended period of time.'[8] Pioneered in the juvenile courts, ostensibly to deal with first-time offenders, diversion from prosecution was extended to adult defendants in light of the 1962 Supreme Court decision in *Robinson v California*.[9] *Robinson* found, *inter alia*, that states could create, as an alternative to prosecution and incarceration, programmes for compulsory treatment of drug offenders with the possibility of penal sanctions for treatment failure.[10] In 1967, two pilot Pretrial Intervention programs (PTI) began in Washington D.C. and New York City.[11] These pilot programmes targeted juveniles, first-time offenders and misdemeanour defendants — groups, it was hoped, who would be more amenable to rehabilitation

programmes and for whom prosecution might be 'unnecessary, ineffective, or counterproductive.'[12] In exchange for a DPA, the individual took part in a rehabilitation programme that included counselling, training and job placement.[13]

Variations of these programmes have spread throughout the country, generally targeting the same groups of low-level offenders, first-time offenders and juveniles.[14] Under the protocols of these programmes, prosecutors consider a defendant's entrance into a DPA based more on the offender's characteristics — ie, whether he or she is likely to be rehabilitated — than on the offence, provided, of course, that the offence is not so serious as to disqualify the defendant from participation.[15] In most programmes, the prosecutor has discretion to offer a particular defendant a DPA, although some jurisdictions have given this responsibility to the courts.[16]

The new trend of application of DPAs in the corporate context

In the world of corporate crime, prosecutors did not experiment with DPAs until the 1990s. In many ways, the same factors that support and oppose deferred prosecutions in drug cases apply to corporate deferred prosecutions. Although criminal charges may be justified, prosecuting a corporation may carry significant collateral consequences and harm innocent shareholders, employees and customers, as the *Arthur Andersen* case demonstrated.[17] In contrast, the resolution of the *KPMG* case[18] demonstrates that many of the collateral consequences associated with corporate prosecution may be avoided by the use of a DPA.

In 2002, the press reported that the Department of Justice had offered Arthur Andersen a deferred prosecution, which was not accepted, possibly due to the collateral consequences of admitting to wrongdoing (such as liability in civil lawsuits and issues with state regulators and public companies).[19] KPMG, on the other hand, although initially combative, set the stage for a settlement by issuing a statement in which it took 'full responsibility for the unlawful conduct by former KPMG partners' and, indeed, fired or forced the resignation of approximately 30 partners allegedly involved in that conduct.[20] The divergent results of the respective tactical decisions of Andersen and KPMG provide an interesting case study in the evolving field of deferred corporate prosecution. Andersen, having failed to agree to deferred prosecution, is nearly defunct.[21] KPMG, conversely, having agreed to deferred prosecution, will, if it can avoid criminal prosecution by other jurisdictions,[22] suffer the long-term loss of only certain practice areas directly related to the fraud.[23]

It is arguable, therefore, that in some cases, deferring prosecution and creating incentives for rehabilitation and quick restitution in the corporate context may benefit society more than bringing charges.[24] Indeed, Professor John Coffee of Columbia University has noted that, given the sanctions and remedial requirements included in corporate DPAs, 'As a practical matter . . . you are getting about what you would get at sentencing. You are getting it quicker. The corporation is forced to enter into this plea bargain and admit its guilt at the outset, rather than contest the charges for a year or more.'[25] On the other hand, prosecutors have to be wary of appearing to be soft on corporate crime or open themselves to accusations that they allowed a corporation to buy itself out of a prosecution.[26]

The earliest known deferred prosecution in the corporate context is the *Prudential Securities* case in 1994. In that case, the US Attorney for the Southern District of New York charged Prudential Securities with securities fraud related to the sale of certain oil and gas partnerships.[27] Because Prudential had made restitution payments to investors, enhanced its compliance procedures, cooperated with federal authorities and

acknowledged wrongdoing, the US Attorney's Office agreed to defer prosecution for three years.[28] In exchange, Prudential agreed to pay an additional $330m to a restitution fund, install an independent director to receive complaints, and retain an independent law firm to review regulatory and compliance controls.[29] In 1996, Coopers & Lybrand entered into a similarly constructed agreement that deferred prosecution for two years for similar reasons.[30]

Corporate criminal liability is not a new concept; the underlying principles are black-letter: a corporation is liable for the acts of its employees and agents that were within the scope of their employment and, at least in part, for the benefit of the corporation.[31] Nevertheless, although the principle may have been clear, why particular corporations were charged and others were not (or, as in the cases of Coopers & Lybrand and Prudential, given deferred prosecutions) was much less obvious. The absence of clear guiding principles to channel prosecutorial discretion made many corporate lawyers, not to mention their clients, nervous, and, in 1999, the Department of Justice responded by issuing the *Principles of Federal Prosecution of Corporations*,[32] a list of non-determinative factors that were intended to address the facts and circumstances that might, or might not, lead to a corporate indictment and to thereby provide a structure within which prosecutors would exercise their discretion.[33]

The 1999 *Principles*, which were subsequently slightly revised and reissued in 2003,[34] form the backdrop for the current investigations and prosecutions of corporate financial fraud and other corporate malfeasance. The *Principles* made it clear that the Department viewed prosecutions of corporations as a valuable tool for changing corporate culture and deterring future misconduct, both within the defendant corporation and more broadly within the business community.[35] Despite the large number of individuals charged since the Enron debacle, however, very few corporations have been criminally prosecuted. Thus, perhaps inadvertently, the *Principles*, by drawing prosecutors' attention to a number of factors, such as cooperation, remediation, compliance programmes, collateral consequences and alternatives to prosecution,[36] and recognising that those factors might justify not charging the corporation, had the effect of encouraging prosecutors to consider alternatives to criminal prosecution, including DPA.[37]

This is not to say that corporations have not been charged in the recent past. Over the past year alone, the US government has charged corporations with environmental crimes,[38] price fixing,[39] fraud in federal grant programmes[40] and violations of the Foreign Corrupt Practices Act (FCPA).[41] DPAs, however, have been used with more frequency recently to resolve a wide variety of criminal investigations, ranging from accounting fraud to tax fraud to violations of the FCPA. For example, the Enron Task Force entered into separate agreements with the Canadian Imperial Bank of Commerce (CIBC) and Merrill Lynch & Co. after concluding that both had aided and abetted Enron's manipulation of separate financial reports.[42] Similarly, the Department agreed to defer prosecution against America Online, Inc. (AOL) and Bristol Myers-Squibb, both of which were alleged to have engaged in improper accounting to meet market expectations.[43] In one matter, both sides of a conspiracy to commit securities fraud, PNC ICLC Corp. (PNC) and American Insurance Group (AIG), were given DPAs.[44] As noted above, KPMG LLP recently entered into a DPA involving its participation in designing and marketing fraudulent tax shelters.[45] Finally, in the FCPA context, since December 2004, the Department has entered into DPAs with InVision Technologies, Monsanto Company and Micrus S.A., all of which are alleged to have paid bribes to

foreign officials to obtain business.[46] Even state prosecutors have joined in, with the Attorney General of Oklahoma entering into a deferred prosecution with MCI, WorldCom's successor, to settle charges of fraudulent accounting.[47]

Apart from the *Principles of Federal Prosecution of Corporations*, which largely address the binary decision of to charge/not to charge, the Department has not provided any official guidance as to when a prosecutor should agree to *defer* prosecution. Indeed, the only reference to DPAs in the *Principles* is in the context of encouraging or rewarding cooperation.[48] Readers are, therefore, left to review the explanations, such as they are, that are contained in the DPAs themselves or in the Department's press releases announcing them.

In the earliest corporate deferred prosecution, *Prudential Securities*, the US Attorney for the Southern District of New York provided one of the most detailed explanations, stating:

> '[T]he decision to enter into a deferred prosecution agreement with PSI was based on a variety of factors, including: PSI's payment of an additional $330 million to compensate innocent investors and its prior settlement with the SEC in October 1993, which included its paying an initial $330 million into a fund established to compensate victims and its agreeing to enhanced compliance procedures; PSI's cooperation with the United States Attorney's Office during the investigation, including its acknowledgement of its own wrongdoing; the concern that an indictment would cause crippling collateral consequences to thousands of innocent employees and investors; and the fact that the core of the criminal conduct occurred in the 1980's and the departure from PSI of the individuals believed to be responsible for the wrongful acts. . . . The public interest is well served by this agreement. Upon conviction, a corporation cannot be sentenced to jail but only to pay restitution, fines and adopt measures aimed at enhancing internal controls to prevent and detect future wrongdoing. This agreement imposes such sanctions. . . . If PSI fulfills all of its obligations under the agreement, further prosecution will be unnecessary.'[49]

Similarly, in the *Coopers & Lybrand* matter, the US Attorney for the Central District of California noted several factors as supporting the decision to defer prosecution:

> 'Cooper's & Lybrand's conduct following notification of possible wrongdoing . . . coupled with its public acceptance of responsibility, its ongoing cooperation in the government's investigation, its payment of a multi-million dollar sum, its agreement to perform significant community service, and its agreement to institute ethics training nationwide exemplify a commitment to ethical corporate behavior and minimize the likelihood of future misconduct.'[50]

The public acceptance of responsibility referred to in the US Attorney's statement, which consisted of a very detailed seven-page 'public statement' setting out the improper conduct and condemning it.[51] Of course, the fact that the former Coopers & Lybrand partner who was allegedly involved in the conduct had died shortly following his indictment and that the US Attorney was continuing to investigate Coopers & Lybrand's client, a high-profile local politician, may also have been relevant factors.[52]

In more recent times, the Department has generally not provided such detailed *apologia* but has instead listed a fairly uniform set of factors. For example, in *Micrus*, the Department stated that it had 'determined that entry into the Agreement, as opposed to

institution of a criminal prosecution, is appropriate under the circumstances', which included the company's voluntary disclosure, its prompt disciplinary action of officers and employees 'primarily responsible for the conduct', its ongoing cooperation, and the absence of any prior criminal history.[53] Similarly, in *Monsanto*, the Department stated that its agreement to defer prosecution 'reflects Monsanto Company's previous actions in investigating misconduct in its Asia-Pacific operations, voluntarily reporting its findings, and cooperating in the government's subsequent investigation; its adoption of the remedial measures set forth herein; its commitment to maintain and independently review such measures, and its willingness to continue to cooperate with the Fraud Section in its investigation.'[54]

The government's most detailed recent explanation for deferring a prosecution can be found in the Bristol Myers-Squibb agreement, which recites in detail what the government obviously viewed as extraordinary remedial acts by the company. These included retaining a former federal judge as an 'Independent Advisor' to conduct a comprehensive review of its 'internal controls, financial reporting, disclosure, planning, budget and projection processes and related compliance functions of the Company'; settling an enforcement action with the SEC which entailed payment of a substantial penalty and restitution as well as continued retention of the Independent Advisor; making an additional substantial restitution payment in connection with a shareholders' securities litigation; making significant personnel changes including replacing several senior officers and creating new senior positions devoted to compliance and controls; making changes to various controls; and establishing an effective compliance programme.[55] In addition, the company agreed to make changes to its corporate governance structure, including the appointment of a non-executive chairman of the board and the appointment of a non-executive director 'acceptable to the [US Attorney]'; retaining a Monitor; endowing a chair for teaching business ethics and corporate governance at a local university; making additional restitution payments; and disclosing specific categories of information in its quarterly and annual public filings with the SEC.[56]

Similarly, although KPMG had engaged in a pattern of deception and even obstruction with respect to IRS and congressional inquiries,[57] it apparently took a more cooperative approach once the Department of Justice opened a criminal investigation. For example, in June 2005, *before* it reached any settlement with the Department, the firm issued a statement acknowledging responsibility for the 'unlawful conduct of former KPMG partners', stating that it was taking steps to 'ensure that those responsible for wrongdoing have been separated from the firm,' and announcing that it had undertaken various 'firm-wide structural, cultural and governance reforms to ensure the highest ethical standards.'[58] Although the KPMG agreement merely recites the usual factors involving acceptance of responsibility and ongoing cooperation,[59] the Statement of Facts provides additional details concerning KPMG's cooperation and remediation, including, *inter alia*, conditioning employment and payment of legal fees for current *and* former partners on cooperation with the government (and, in fact, terminating employees who refused to cooperate), declining to enter into any joint defence agreements, waiving privileges and refraining from conducting certain internal inquiries that the government feared might interfere with its investigation.[60]

The scope of Bristol Myers-Squibb's remedial actions and KPMG's cooperation is breathtaking and is probably well beyond what most companies would be willing or need to do. The factors noted in other agreements such as *Monsanto* and *Micros*,

however, are not particularly enlightening when it comes to predicting whether the government will agree to a DPA. Voluntary disclosure, cooperation, employee discipline and remedial compliance steps are almost *de rigueur* in the post-Enron, post-Sarbanes–Oxley atmosphere and they closely track the factors identified both in the *Principles* as leaning towards non-prosecution and in the Sentencing Guidelines for reducing a corporation's sentence if charged.[61] Therefore, it appears that the decision whether to prosecute, decline prosecution, or defer prosecution remains, as it always has, in the hands of the individual prosecutor and is dependent upon his view not only of the factors in the *Principles*, including such aggravating factors as the involvement of senior management and the extent and duration of the unlawful conduct, but also of intangibles such as the prosecutor's view of the genuineness of the corporation's cooperation, compliance and remediation. Further, it is likely that particular Divisions at Main Justice or particular US Attorney's Offices may be more or less likely to entertain requests for deferred prosecutions, based on policy concerns or the front office's political or philosophical predilections.

A further complicating factor is that corporate DPAs may take one of two forms. In the first, the corporation is actually charged, with a complaint or criminal information being filed in the appropriate federal district court. The government then requests that the court continue any proceedings for the period of the DPA, at the end of which period the government will move to dismiss the charges. In this form, although the court may require the company to appear for a status conference or to adopt the agreement on the record, the company is not required to enter any formal plea. In the second form, no charges are filed, and the agreement will take the form of a letter containing the usual conditions as well as a waiver of the statute of limitations to permit the government to file charges at a later date if the company breaches the agreement. In both forms, the company may be required to pay the equivalent of a criminal fine — usually denominated as a non-refundable 'penalty', adopt a statement of facts in which it admits to all the elements of the offence, agree to implement various remedial steps and, as discussed below, retain an Independent Monitor.

Again, the Department, unfortunately, has not provided any public guidance as to which factors will determine whether a particular company will be able to obtain a letter agreement or will have to suffer the further stigma of being charged in a filed pleading. The facts in *InVision* and *Monsanto* provide some clues but they are by no means determinative. In *InVision*, the bribes in question were few in number and amount and, in fact, the company's management had identified a suspicious payment request from an intermediary in Thailand and refused to make the payment.[62] In contrast, although the criminal information in Monsanto charged only one bribe, the parallel SEC complaint alleges that the company's Indonesian subsidiary paid an additional $700,000 of questionable payments to 140 Indonesian government officials and family members over an extended period of time, during which time the company apparently conducted no internal audits of its subsidiary.[63] Thus, although both companies voluntarily disclosed the conduct, agreed to cooperate and implemented remedial measures, the Department apparently viewed the amount and duration of the corrupt conduct in Monsanto's case as justifying the more public denunciation of a filed pleading.

Corporations are probably grateful that the government is willing to entertain the thought of deferred prosecutions rather than automatically reaching for the indictment trigger. The *Principles* initially suggested, however, that a prosecutor faced with a corporation which had, through its officers, employees and agents, violated

the law, had three choices: prosecution, alternatives to prosecution and non-prosecution. Although there are exceptions,[64] deferred prosecution appears to have largely replaced non-prosecution as an option. Like a deferred prosecution against a low-level, first-time offender, there are good policy reasons for deferring prosecutions against corporations. It is possible, however, that the burdens of a deferred prosecution — significant monetary penalties, the looming threat of prosecution for the term of the agreement, mandatory cooperation, remedial compliance measures and the potential nuisance of a Monitor — may cause corporations to question the benefits of such agreements.

INDEPENDENT MONITORS

An Independent Monitor was included in the first-known corporate DPA — the *Prudential Securities* case — and it has been a regular condition of almost every DPA since. Indeed, prosecutors have become so enamoured of the idea that they have begun to include them in outright prosecutions — matters in which charges are brought and the corporation sentenced.[65] Further, the SEC has also adopted the mechanism and included either prospective monitors or retrospective examiners in several recent agreements.[66]

Independent Monitors have been used in a variety of recent enforcement actions. In the five most recent enforcement actions involving the Foreign Corrupt Practices Act, against Titan Corp., InVision Tech, DPC Tianjin, Monsanto Co. and Micrus Corp., the Department of Justice and the SEC have each required the corporation to retain an Independent Monitor.[67] Independent Monitors have also figured in several recent accounting fraud matters,[68] as well as the KPMG fraudulent tax shelter investigation.[69] Similarly, the SEC has recently used Independent Monitors as parts of settlement agreements with both WorldCom and Credit Suisse First Boston (CSFB).[70]

Independent Monitors are not, however, necessarily required by every DPA with the Department of Justice. The agreements with ALP Energy Services, PNC, BDO Seidman, Sears and Banco Popular did not require Independent Monitors. In those cases, however, the prosecutors may well have relied on monitors appointed by other regulatory agencies or on the fact that the company was already a highly regulated entity subject, particularly after its deferred prosecution, to strict oversight. For example, the AEP Energy Services' DPA was part of a multi-agency package that included settlements with the Federal Energy Regulatory Commission (FERC) and the US Commodity Futures Trading Commission. As part of the FERC settlement, the company agreed to monitoring by the FERC staff of its 'compliance with Standards of Conduct, Market Behavior rules, and the Commission's NGPA regulations'.[71]

In most cases, the Independent Monitor is not selected until the DPA has been executed and, where necessary, accepted by the court. The Department of Justice or the SEC obviously has a great deal of input into the selection process, whether going so far as to select the Monitor, as in *CIBC* and other agreements drafted by the Enron Task Force,[72] or merely requiring that any Independent Monitor selected by the company be 'acceptable' to the government, as in *Monsanto* and *Micrus*.[73] In some cases, however, such as *Bristol Myers-Squibb*, where the company had already retained a retired federal judge as an 'Independent Advisor', the agreement will contemplate that the company's previously retained consultant be retained as the Monitor.[74] In other cases, the Department and the company may agree on an acceptable Monitor during the settlement negotiations.[75]

The terms of reference, of course, vary depending on the nature of the under-

lying offence. In *AOL*, which had already restated its financial statements, revamped its controls, and was in the process of negotiating a settlement of remaining accounting issues with the SEC, the focus of the Monitor's terms of reference was on 'AOL's internal control measures related to its accounting for advertising and related transactions; the training related to these internal control measures; AOL's deal sign-off and approval procedures; and AOL's corporate code of conduct.'[76] In contrast, in *InVision*, *Monsanto*, *Micrus*, *Titan* and *DPC*, all of which were FCPA matters, the focus was on evaluating the effectiveness of the companies' FCPA compliance programmes and its controls related to preventing corrupt payments.[77] On the other hand, in *KPMG*, which involved the design and marketing of fraudulent tax shelters, the Monitor was charged not only with monitoring compliance with the agreement and implementation of a compliance programme, but also with monitoring personnel decisions involving culpable employees, certain restrictions on KPMG's tax practice and the operations of certain practice areas.[78]

Nevertheless, there are certain common elements. First, all of the agreements include some requirement that the Monitor be 'independent' of the company. For the most part, this term is not defined, but other provisions provide some guidance. For example, the *DPC Tianjin* plea agreement provides: 'It shall be a condition of the Monitor's retention that the Monitor is independent of DPC Tianjin and that no attorney-client relationship shall be formed between them.'[79] Further, to the degree that there is any privilege pertaining to communications between the Monitor and the company, most agreements require the company to waive the privilege and state that any revocation of the waiver is a breach of the agreement, thereby ensuring that the Monitor is able to communicate with the government without restriction.[80] Further, in some cases, the Monitor is given tasks beyond mere monitoring and is charged with acting as a conduit and intermediary between the government and the company, gathering information at the government's request.[81]

Secondly, most agreements involving Independent Monitors include some sort of reporting requirement. For example, the *AOL* DPA requires the Monitor to prepare a report 'on the effectiveness of AOL's internal control measures',[82] while the *CIBC* agreement provides simply that the Monitor shall 'report to the Department . . . on an [*sic*] least a semi-annual basis, as to CIBC's compliance with this Agreement.'[83] The Department appears to have envisioned that the Monsanto and KPMG Monitors, on the other hand, would have more immediate reporting obligations. The Monsanto Monitor, for example, was to report concerning any corrupt payments he might detect first to the company's General Counsel and then, if not satisfied with the company's response, to the Department directly.[84] Similarly, the KPMG Monitor was specifically empowered to 'at his or her option, conduct an investigation [into potentially illegal or unethical conduct], and/or refer the matter to KPMG's compliance office, the [US Attorney's] Office, the IRS, or a Designated Agency'.[85] Some agreements are structured so that the Monitor files his reports with the company's Audit Committee,[86] General Counsel[87] or compliance officer,[88] albeit usually with copies to the Department.[89] Finally, particularly in agreements involving FCPA violations, the Monitor's reporting responsibilities may be extended to include reporting to or sharing its reports with 'any . . . foreign law enforcement or regulatory agency' investigating payments to foreign officials by the company.[90]

Thirdly, most agreements spell out the broad terms of a compliance programme that addresses the specific underlying conduct, such as accounting fraud or the FCPA, and

then tie the Monitor's responsibilities directly to this programme. For example, the *Micros* and *InVision* agreements noted that the companies had *no* effective FCPA compliance programmes and accordingly instructed the respective Monitors to monitor the companies' implementation of a FCPA compliance programme and to 'ensure that the Policies and Procedures are appropriately designed to accomplish their goals.'[91] In the *CIBC* agreement, the Monitor was charged with evaluating the bank's compliance with its agreement not to 'engage in certain structured finance transactions with United States public companies' and 'to implement specific new policies and procedures relating to the integrity of client and counterparty financial statements and quarter-end and year-end transactions'.[92] A significant part of the implementation of such programmes is, of course, training, and the Monitor in *Coopers & Lybrand* was specifically charged with monitoring and reporting on the company's ethics training.[93]

In addition, many of the agreements permit the company latitude to amend any policies implemented as a result of the agreement provided that such amendments do not 'diminish' the new policies.[94] In some cases, however, the Monitor is given final authority over the programme. For example, the *Micros* DPA provides, 'During the Monitor's term, no amendments or changes will be made to the Policies and Procedures without the prior approval of the Monitor.'[95]

Fourthly, in most cases the agreements envision a lawyer or a law firm acting as the Monitor,[96] although some agreements, such as those in the *Monsanto* and *DPC Tianjin* matters, refer more generally to 'an outside, independent compliance expert . . . (who may be an individual, partnership or other entity, including outside counsel)'.[97] In some cases, the Monitor is specifically authorised to hire accounting experts[98] or to coordinate with experts appointed by other agencies.[99] In the *Merrill Lynch* case, the Department required the company to hire *two* monitors — an auditing firm 'to undertake a special review' of the company's new policies and procedures concerning the integrity of client and counterparty financial statements and year-end transactions and 'an individual attorney . . . to review work of the auditing firm'.[100] Similarly, in *AOL*, the Department required AOL to hire an Independent Monitor to focus on prospective compliance, while the SEC, in a separate agreement with AOL's parent, TimeWarner, required it to hire a forensic examiner to review the accounting for certain historical transactions.[101]

Lastly, several agreements have included clauses addressing the consequences of future mergers, sales, or acquisitions. As early as the *Prudential Securities* agreement, the government required the company, as well as its parent corporation, to agree that it would 'not directly or indirectly transfer ownership or assets of [Prudential Securities] in such a way that would frustrate the purposes of this Agreement.'[102] Several recent agreements specifically emphasise that the appointment of a Monitor continues even in the event of a sale, transfer or merger. For example, at the time the *InVision* agreement was executed, the company had already signed a merger agreement with General Electric (GE). The agreement, therefore, obligated the company to retain a Monitor *only* if the merger did not close; if it did, the agreement provided that 'the obligations of InVision respecting an FCPA compliance program shall be governed by the separate agreement entered between the Department and GE.'[103] That agreement obligated GE to retain an Independent Consultant for the more limited purpose of 'evaluat[ing] the efficacy of the integration by GE of InVision into GE's existing FCPA compliance program' and reporting to the Department on this integration.[104]

A similar structure was established in the *DPC Tianjin* plea agreement, even though

that company was not, at the time, involved in any known merger discussions. In that agreement, the government required the company to include in any future sales or merger agreement a provision 'binding the purchaser or successor fully to the obligations described in this Agreement . . . including the provisions set forth in the FCPA Compliance Program and Monitor Section'.[105] The government also recognised, however, that a new owner, who had not been involved in the corrupt conduct, might not need the supervision and oversight of a Monitor. Thus, it provided that, in the event of a merger, the Monitor would review 'the effectiveness of the purchaser's or successor's program for compliance' and, if that programme is satisfactory to the government, determine the 'efficacy of the integration' of the company into the purchaser's programme.[106] If the government is satisfied that 'the purchaser or successor has effectively integrated [the company] into its existing . . . compliance program, the purchaser or successor will no longer be bound by the . . . Compliance and Monitor provisions of this Agreement'.[107] On the other hand, if the government is *not* satisfied with the purchaser's programme or the company's integration into the purchaser's programme, then the purchaser or successor remains subject to the Monitor provision of the agreement, 'solely with respect to the business operations of the [company].'[108]

To sum up, then, almost all deferred prosecution or plea agreements calling for an Independent Monitor will include the following elements: (1) some guarantee of the independence of the Monitor; (2) some form of reporting requirement; (3) some responsibility for monitoring a newly implemented compliance programme, in addition, perhaps to other responsibilities; (4) some description of the Monitor's necessary qualifications or expertise; and (5) some provision for future changes in the corporate structure or ownership. Where they differ is largely on the margins and will depend, in large part, upon the facts and circumstances of the offence conduct and, in some cases, the corporate structure of the company.

A MODEL INDEPENDENT MONITOR WORKPLAN

Independent Monitors operate pursuant to the terms of reference in a carefully negotiated agreement. The scope of their review may be narrow or broad, their reporting requirements may be periodic or singular, and their reporting obligation may be to the government alone or also to the company's management, to its Audit Committee, or, as in *AOL*, to its parent corporation's Audit Committee.[109] Obviously, any workplan must be custom-designed to satisfy these requirements. The following basic elements, however, are likely to be present in any Independent Monitor's workplan.

Retention

Selection is only the beginning of the process. The first step is obviously to negotiate a retention agreement. This is a three-part negotiation, involving the Monitor, the government and the company. The retention letter must fill out or clarify any vague or ambiguous terms of reference in the deferred prosecution or plea agreement; establish fees and expenses, as well as any limits thereon; state whether the Monitor is authorised to hire experts to assist him; etc.

Further, as most Monitors are lawyers who are members of law firms, it must establish the relationship between the Monitor and his law firm, including whether the Monitor may use (and bill for) lawyers at the firm, address the issue of any current or future conflicts between the company and the firm, and set the limits for future recusal by the Monitor from work involving the company or its affiliates.

Familiarisation

Once selected and retained, the Monitor needs to 'get up to speed' on what brought

the company to its current unfortunate situation. The first step in this process is, of course, to read the basic pleadings or other documents related to the DPA. These would include the agreement itself; the complaint, criminal information, or statement of facts; any related pleadings, such as charges or complaints against the company's current or former officers or employees or third parties alleged to have conspired with them; and any written submissions by the company to the government, such as any submission to the Department relating to the *Principles* or a Wells submission to the SEC.

Secondly, the Monitor should meet with the prosecutors or the SEC enforcement attorneys and, if appropriate, the investigating agents or accountants. This conversation should include both a debriefing concerning the scope of the government's investigation, including allegations that were not included in the pleadings, as well as a discussion as to the government's expectations in terms of the Monitor's work.

Thirdly, the Monitor should seek and review public source information, such as articles or books about the company or about any trials involving the alleged misconduct.

Workplan: Initial stages

The workplan obviously needs to reflect the terms of reference. The workplan should include both a list of documents that the Monitor wants the company to provide and a list of employees that the Monitor wants to interview.

The Monitor should plan on an initial period of 'getting the lights up', in which he familiarises himself with the company's organisation, meets with the senior management, identifies the key compliance and control processes, interviews the employees responsible for them, and begins to identify relevant periodic reports and other documents in which he is interested.

Interviews may raise several issues that the Monitor will need to address at this early stage. Generally, the company, having just signed an agreement with the government, has sufficient incentive to be cooperative and will likely make any employee available to the Monitor. The employees, on the other hand, to the extent they were even tangentially involved in any of the conduct that was under investigation, may be understandably nervous and, even more, may still be represented by counsel. In some cases, therefore, it may be necessary to discuss with counsel the scope of the requested interview and to agree to focus on the employee's current duties and the current practices at the company and to avoid questions focused on historical facts and procedures. Further, if this employee is a potential government witness in a forthcoming trial, the Department or the SEC may also prefer that the Monitor does not generate additional written statements that could, conceivably, be discoverable by the defence.

In addition, the Monitor should determine what form of *Miranda*-style warnings should be given prior to beginning the interview. As discussed above, although retained by the company, the Monitor's reporting obligation is often to the government, and the DPA or retention agreement usually provides the government with unfettered access to the Monitor. The company's communications with the Monitor, therefore, will likely not be deemed privileged, regardless of the terms of the agreement, nor will the Monitor's interviews with the company's employees.[110] Thus, to dispel any misconception that the Monitor is representing the company, the Monitor should, prior to any interview, explain that any information provided to him may be shared with the government.

During this initial period, the Monitor will also want to familiarise himself with the company's controls. While doing so, of course, the Monitor should begin to focus on the specific controls, if any, that relate to his terms of reference. For instance, if, as in

Monsanto, the Monitor is tasked with reviewing and monitoring the FCPA compliance programme,[111] the Monitor will want to identify the procedures in place for retaining agents, making payments overseas, lobbying foreign governments, etc. On the other hand, if, as in *AOL*, the Monitor is tasked with a broader mandate to review and monitor a compliance culture as it relates to business practices and revenue recognition,[112] then the Monitor will need to focus on the company's general compliance and ethics programme, its accounting controls, and its Sarbanes–Oxley cycles and certification procedures.

Once the Monitor is satisfied that he has a basic understanding of how the company is organised, which procedures and controls are relevant to his task, and which employees are responsible for those procedures and controls, he should schedule meetings with the government and company management. With respect to the government, the Monitor needs to confirm that he is doing what the government expects from him and understand what the government will want to see and hear at the end of the process. In addition, the Monitor may want to provide the government with his preliminary views and report on the company's cooperation.[113] With respect to the company, the Monitor will want to ensure that the company understands what he will be doing for the rest of the term of his appointment and what the Monitor is going to expect in terms of reports and access. In addition, the Monitor may want to provide the company with any preliminary suggestions for improvement or discuss any issues that have arisen during the initial period.

Workplan: Secondary stages

Having identified key controls and procedures, the Monitor can now move on to the task of *monitoring*. This will, of course, involve both reviewing documents and conducting more interviews.

There is simply no way in which the Monitor can, or should, review all transactions in which the company is involved. Thus, the Monitor must identify some way of viewing the 'big picture' and then focus on specific transactions that are, or may be, of interest. For example, in the *AOL* matter, which involved advertising sales and revenue recognition, the Monitor may review periodic reports on advertising sales and only request the underlying documentation for transactions over a threshold amount or that meet other criteria. He can then follow up on specific transactions by asking for additional detail or interviewing the employees involved in the transaction. He may also want to attempt to follow the transaction through the company's procedures from inception to final accounting. In contrast, in an FCPA matter, such as *Monsanto* or *InVision*, the Monitor may request regular reports on due diligence involving foreign agents, consultants and joint venture partners as well as performing in-depth reviews of all the documents relating to a particular foreign contract.

Further, in addition to monitoring specific transactions or types of transactions, the Monitor should plan on conducting regular periodic interviews or meetings with the key personnel responsible for the relevant controls and procedures. For example, in an accounting case, it may make sense to schedule these meetings after the close of each quarter and review any issues that came up in preparing the quarterly reports and certifications.

Reports

At a minimum, the Monitor is likely to want to create a record of what he did during the term of his appointment, provide some description of the relevant controls and procedures that he monitored, and identify any flaws or problems he encountered. How detailed this report should be and whether it should include supporting documentation

will likely be the subject of discussions with the government and the management, particularly as it may become public at some point.

CONCLUSION

The Independent Monitor is still largely a new creature in corporate criminal prosecutions. Thus far, no Monitor's report has been released, and it is not possible to evaluate the efficacy of the Monitor mechanism. In theory, however, the Monitor should serve as a sort of private Pretrial Services Officer (or, in the case of a company that is charged and convicted, a private Probation Officer), ensuring that the company, which has been allowed essentially to 'remain out on bond' for the length of the DPA remains on good behaviour and fulfils its part of the bargain. At the very least, the presence of the Monitor may provide sufficient incentive to maintain a heightened level of controls after the initial scare of the government investigation has worn off and perhaps long enough for a culture of compliance and controls to become engrained in the company.

The value of the DPA is also yet to be determined. The fact that the government has not announced even informal policies that would provide guidance on what would make a company eligible for a deferred prosecution, what the limits on the sanctions that can be imposed through a deferred prosecution, and what remains of the promise of non-prosecution offered by the *Principles of Federal Prosecution of Corporations*, is disturbing. Although companies may feel relieved to have escaped a full-blown prosecution and conviction, with the attendant collateral consequences, the prospect of living for several years with the threat of a prosecution hanging over them may turn out to be more limiting than a quick conviction might have been. Further, companies that examine the level of monetary 'penalties' and punitive remedial requirements exacted by the government in return for a deferred prosecution, not to mention the costs associated with retaining an Independent Monitor, may well wonder whether the game is worth the candle.

REFERENCES

1 Ecclesiastes 1:9, The Holy Scriptures (J.P.S. of America 1917).

2 These numbers include convictions and guilty pleas during the period from the inception of the President's Corporate Task Force on 9th July, 2002 through to 31st May, 2004. Corporate Fraud Task Force, *Second Year Report to the President*, § 3.2 (July 2004), available at http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf.

3 US Securities Exchange Commission (2003) *Annual Report*, at 103, available at http://www.sec.gov/about/annrep03.shtml.

4 Indeed, the intent behind the statistics is clear. Former Deputy Attorney General Thompson explained the goal of the President's Corporate Fraud Task Force, and noted that '[a]s we establish with ever increasing certainty the prospect that corporate criminals will lose both their fortunes and their liberty, we will have gone a long way to restoring the integrity of the market and the confidence of the nation'; available at http://www.usdoj.gov/dag/cftf/.

5 The *Guidelines Manual* promulgated by the US Sentencing Commission notes that corporate probation 'is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct'. *Guidelines Manual*, Introductory Commentary to Chapter 8 — Sentencing of Organizations, 1st November, 2004, available at http://www.ussc.gov/GUIDELIN.HTM. See also *ibid.*, § 8D1.4, Application Note 1 ('To assess the efficacy of a compliance and ethics program submitted by an organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a

comprehensive assessment of the proposed program.').

6 See Rosenblum, L. (2002) 'Mandating effective treatment for drug offenders', *Hastings Law Journal*, **53**, 1217, 1233; see also Armstrong, A. (2003) 'Drug courts and the de facto legalization of drug use for participants in residential treatment facilities', *Journal of Criminal Law and Criminology*, **94**, 133, 146.

7 Typically, this is accomplished through the appendage of a lengthy and inculpatory 'Statement of Facts' to the DPA, which facts the infringing company must agree not to contest in the event that a trial becomes necessary due to noncompliance with the agreement. See, eg, *Deferred Prosecution Agreement, US v Monsanto Company*, para. 3 (D.D.C. 2004) ('Should the Fraud Section . . . initiate the prosecution that is deferred by this Agreement, Monsanto Company will neither contest the admissibility of, nor contradict, the Statement of Facts in any such proceeding.'); *accord Deferred Prosecution Agreement, US v America Online, Inc.*, para. 3 (E.D. Va. 2004) (noting that AOL agrees not to contradict the factual statements set forth in Appendix A to the agreement). As James Comey, US deputy attorney general, stated in announcing the AOL DPA, 'If AOL fails to comply with the agreement, the deal is off, and they are in a world of trouble.' Available at http://www.dailystar.com/dailystar/related articles/35945.php.

8 Harvard Law Review Association (1998) 'Developments in the law: Alternatives to incarceration', *Harvard Law Review*, **111**, 1863, 1902 (1998).

9 370 U.S. 660 (1962).

10 See 'Developments in the law', ref. 8 above, at 1902 (citations omitted).

11 *State of New Jersey v Leonardis*, 71 N.J. 85, 94 (1976).

12 *Ibid.* at 94–95.

13 *Ibid.* at 95.

14 See *ibid.* *Accord* Belenko, S. (2000) 'The challenges of integrating drug treatment into the criminal justice process', *Albany Law Review*, **63**, 833, 846; Brennan, L. M. (1998) 'Drug courts: A new beginning for non-violent drug addicted offenders — An end to cruel and unusual punishment', *Hamline Law Review*, **22**, 355, 378; McCaskill, C. (1998) 'COMBAT drug court: An innovative approach to dealing with drug abusing first time offenders', *University of Missouri–Kansas City Law Review*, **66**, 493, 494. See also Rosenblum, ref. 6 above, at 1236; Armstrong, ref. 6 above, at 144.

15 See *Leonardis*, ref. 11 above, at 102.

16 *Ibid.*, at 95. See also 21A Am Jur. 2d *Criminal Law* § 936 (1998).

17 See, eg, Cooper, R. M. (2005) 'Deferred prosecution: A primer', *National Law Journal*, 25th July, at 12 ('The clearest example of collateral damage from prosecution of an institution is Arthur Andersen, which was not a public company or even a corporation. The prosecution destroyed the firm, put out of work thousands of Andersen employees who had no involvement in the conduct that led to the prosecution, and significantly reduced the number of large accounting firms available to meet the needs of large corporations.').

18 KPMG admitted criminal wrongdoing pertaining to tax fraud conspiracy relating to the design, marketing and implementation of fraudulent tax shelters, agreed to pay a substantial fine and penalty, as well as to implement a number of remedial compliance steps. Press Release, Department of Justice (2005) 'KPMG to Pay $456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case', 29th August, available at http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.htm. See also KPMG deferred prosecution agreement, para. 2 (SDNY, 2005).

19 See, eg, Johnsson, J. (2002) 'Where's Aldo? Andersen's leadership void: needed: Truck unit jump start, balance sheet tune up', *Crain's Chicago Business*, 22nd April, available at http://www.kellogg.northwestern.edu/news/hits/020422ccb.htm ('Andersen's legal problems were amplified last week when talks collapsed with the Justice Department to settle an indictment against the firm for destroying Baron-related

documents. Andersen now faces a criminal trial, due to begin May 6, unless it can revive the talks. Prosecutors had offered a "deferred prosecution" that would place the embattled accountancy on probation in exchange for the firm admitting criminal wrongdoing.').

20 *KPMG LLP Statement Regarding Department of Justice Matter*, 16th June, 2005, available at http://www.us.kpmg.com/about/press.asp?cid=1872. See also Johnson, C. (2005) 'Challenges just starting at KPMG', *Washington Post*, 30th August, at D01 ('In the past, KPMG had been famous for pushing back on regulatory initiatives and shareholder lawsuits. . . . One of KPMG's most important signals about a new tone came June 16, when the firm issued a statement taking "full responsibility for the unlawful conduct by former KPMG partners."'); Norris, F. (2005) 'News analysis: Once-proud KPMG finds itself humbled', *International Herald Tribune*, 31st August, available at http://www.iht.com ('KPMG had already been forced to grovel as it realized that its continued existence might be in question if the Justice Department chose to file criminal charges against it. Even before the settlement was issued, it had said it took "full responsibility for the unlawful conduct by former KPMG partners.").

21 The Supreme Court's recent *per curiam* decision to overturn the Andersen conviction, while providing a symbolic (perhaps even pyrrhic) victory for the company, is not likely to make white collar prosecutions any more difficult. Robert Mintz, a former federal prosecutor, and Columbia Law School Professor John Coffee, an expert on securities law, have noted that 'since the Andersen prosecution, Congress has changed the law about obstruction, making it a simpler case for prosecutors to make'. See 'Andersen conviction overturned', *CNN Money*, 31st May, 2005, available at http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scotus/index.htm. Even this vindication for Andersen, therefore, may prove little incentive for other corporate entities to reject an offered DPA.

22 See Johnson, ref. 20 above (KPMG 'must try to stave off Mississippi's attorney general, who according to news reports may file similar criminal charges against KPMG'.)

23 'The agreement requires permanent restrictions on KPMG's tax practice, including the termination of two practice areas, one of which provides tax advice to wealthy individuals; and permanent adherence to higher tax practice standards regarding the issuance of certain tax opinions and the preparation of tax returns. In addition, the agreement bans KPMG's involvement with any pre-packaged tax products and restricts KPMG's acceptance of fees not based on hourly rates.' Press Release, Department of Justice, ref. 18 above.

24 See Warin, F. J. and Schwartz, J. C. (1997) 'Deferred prosecution: The need for specialized guidelines for corporate defendants', *Iowa Journal of Corporate Law*, **23**, 121, 121–22.

25 'Professor Coffee: Andersen committed suicide, not murdered by prosecutors', *Corporate Crime Reporter*, **33** (8), 24th August, 2005, available at www.corporatecrimereporter.com/coffee082405.htm.

26 See Novack, J. (2005) 'Club Fed, deferred', Forbes.com, 24th August (noting that some critics believe deferred prosecution as a method for dealing with big name corporations accused of everything from accounting fraud to violations of the Foreign Corrupt Practices Act is 'too soft'), available at http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html. The balancing act between a fear of disproportionate or otherwise unfair collateral consequences and the appearance of being 'too soft' is evident in the comments of Attorney General Alberto R. Gonzales concerning the recent DPA with KPMG LLP: 'Today's agreement requires KPMG to accept responsibility and make amends for its criminal conduct while protecting innocent workers and others from the consequences of a conviction. The stiff financial penalty announced today means that the firm is paying for its conduct, while the guarantees of cooperation, oversight, and meaningful

reform will help to insure that its future business is conducted with honesty and integrity.' Press Release, Department of Justice, ref. 18 above.

27 See *United States v Prudential Securities Incorporated* (S.D.N.Y. Mag. # 94-2189) (filed 27th October, 1994). See also Warin and Schwartz, ref. 24 above, at 126.

28 The Prudential Securities DPA is a one-page document attached to the criminal complaint. It was accompanied by a letter agreement that spelled out the company's obligations. In pertinent part, the Prudential DPA states 'after a thorough investigation it has been determined that the interest of the United States and your own interest will best be served by deferring prosecution in this district'. The term of the agreement was for three years, whereupon, after successful compliance by Prudential, the United States would institute 'no further prosecution'. See *United States v Prudential Securities Incorporated* (S.D.N.Y. Mag. # 94-2189).

29 Letter from Mary Jo White, US Attorney, US Department of Justice, to Scott Muller and Carey Dunne, Counsel for Prudential (27th October, 1994).

30 See Coopers & Lybrand LLP (C&L) *Settlement Agreement* (C.D. Cal. 1996). C&L obtained confidential information, including the amounts of competitors' bids, pertaining to an Arizona government contract. One of C&L's former partners aided and abetted the concealment of prior violations of federal criminal law, including the deliberate non-production of documents responsive to federal grand jury subpoenas. C&L agreed to (1) pay a $3m fine; (2) implement a formal ethics and integrity programme, and (3) perform 3,000 hours of community service. C&L's compliance with the agreement would be monitored by independent legal counsel. These reforms were deemed sufficient to minimise the likelihood of future misconduct. *Ibid.*

31 See, eg, *US v Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998) ('A corporation is criminally responsible for the acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation.') (internal quotation marks and citations omitted); *Mylan Laboratories, Inc. v Akzo N.V.*, 2 F.3d 56, 63 (4th Cir. 1993) ('[I]t is undoubtedly true that a corporation is liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation.'); *US v Sun Diamond Growers of California*, 964 F. Supp. 486, 490 (D.D.C. 1997) ('[I]t has long been established that corporations are criminally liable for the crimes of their senior officers, particularly when the corporation benefits from the officers' offensive conduct.') (internal quotation marks and citations omitted).

32 Deputy Attorney General Eric Holder (1999), *Principles of Federal Prosecution of Corporations*, US Department of Justice (16th June), available at http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html.

33 *Ibid.* ('The attached document, *Federal Prosecution of Corporations*, provides guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case. I believe these factors provide a useful framework in which prosecutors can analyze their cases and provide a common vocabulary for them to discuss their decision with fellow prosecutors, supervisors and defense counsel. These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.') In remarks before the National Press Club, then Assistant Attorney General for the Criminal Division James K. Robinson noted that 'We are stepping up white collar crime enforcement, while at the same time, examining the issues of fairness and proportionality in investigating and prosecuting these cases.' See Robinson, J. K. (1999) 'Corporate crime in America', *Corporate Crime Reporter*, 17th February.

34 Deputy Attorney General Larry D. Thompson (2003), *Principles of Federal*

Prosecution of Business Organizations, US Department of Justice (20th January), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

35 The following passage appeared in the 1999 version of the Federal Prosecution of Business Organizations attached to the Holder Memorandum, and remained unchanged in the 2003 version promulgated with the Thompson Memorandum, refs. 32–34 above. 'Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.' *Ibid.* at § I.A Charging a Corporation: General.

36 Thompson Memorandum, ref. 34 above, at § II.A (listing the relevant factors as (1) the nature and seriousness of the offence, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; (2) the pervasiveness of the wrongdoing within the corporation, including the complicity in, or coordination of, the wrongdoing by corporate management; (3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation including, if necessary, the waiver of attorney-client and work-product protection; (5) the existence and adequacy of the corporation's compliance programme; (6) the corporation's remedial actions; (7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and the impact on the public; (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).

37 *Ibid.* at § VI.B ('Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may become critical in identifying the culprits and locating relevant evidence. In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation.'); see also 'Principals Governing Non Prosecution Agreements', *United States Attorneys Manual*, § 9-27.600-650 (permitting non-prosecution agreements in exchange for cooperation when a corporation's 'timely cooperation appears to be necessary to the public interest and other means of attaining the desired cooperation are unavailable or would not be effective'). The Thompson Memorandum cited this text from the USAM § 9-27.600-650, illustrating the point.

38 Press Release, 'Evergreen to Pay Largest-Ever Penalty for Concealing Vessel Pollution', 4th April, 2005, available at http://www.usdoj.gov/opa/pr/2005/April/05_enrd_159.htm; Press Release, 'Phosphorus Manufacturer Sentenced to Pay $18 Million in Criminal Fine and Restitution and Clean Up Site', 29th April, 2004, available at http://www.usdoj.gov/opa/pr/2004/April/04_enrd_282.htm; Press Release, 'W.R. Grace and Executives Charged with Fraud, Obstruction of Justice, and Endangering Libby, Montana Community', 7th February, 2005, available at http://www.usdoj.gov/opa/pr/2005/February/05_enrd_048.htm.

39 Press Release, 'Korean Company — Hynix — Agrees to Plead Guilty to Price Fixing and Agrees to Pay $185 Million for Role in DRAM Conspiracy', 21st April, 2005, available at http://www.usdoj.gov.opa/pr/2005/Apr./05_at_207.htm; Press Release,

'Indiana Ready Mixed Concrete Producer [Lee's Ready Mix & Trucking, Inc.] Indicted on Price Fixing Charge', 19th May, 2005, available at http://www.usdoj.gov/opa/pr/2005/May/05_at_279.htm. The Department of Justice has also pursued price fixing charges in the polychloroprene rubber industry. See Press Release, 'Italian Company [Syndial S.p.A.] to Plead Guilty and Pay $9 Million Fine for Participating in Polychloroprene Rubber Cartel', 2nd May, 2005 (also noting that DuPont Dow Elastomers L.L.C. participated in the same international conspiracy, pleaded guilty on 29th March, 2005, and was sentenced to pay an $84 million dollar criminal fine), available at http://www.usdoj.gov/opa/pr/2005/May/05_at_232.htm.

40 Press Release, 'Six Corporations and Five Individuals Indicted in Connection with Schemes to Defraud the Federal E-Rate Program', 7th April, 2005 ('A federal grand jury in San Francisco today returned a 22-count indictment against six companies and five individuals on charges of fraud, collusion, aiding and abetting, and conspiracy in connection with E-Rate projects at schools in seven states'), available at http://ww.usdoj.gov/opa/pr/2005/April/05_at_169.htm.

41 On 1st March, 2005, in federal district court in San Diego, Titan Corporation pleaded guilty to a three-count criminal information charge of violating the Foreign Corrupt Practices Act's anti-bribery and books-and-records provisions, as well as aiding and abetting the filing of a false tax return. See *United States v Titan Corporation* (S.D. Cal. No. 05-0314, 2005); see also Press Release, 'DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act', 20th May, 2005 (alleging payment of approximately $1.6m in bribes in the form of commissions to physicians and laboratory personnel employed by government-owned hospitals in China), available at http://www.usdoj.gov/opa/pr/2005/May/05_crm-282.htm; Press Release, 'ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd Plead Guilty to Foreign Bribery Charges', 6th July, 2004, available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm.

42 The Enron Task Force determined that CIBC and its personnel violated federal criminal law in connection with the sale of financial assets by Enron to a Special Purpose Entity and also that CIBC aided and abetted Enron's violation of federal criminal law in connection with the same transactions. Letter from the Enron Task Force to Gary Naftalis, Counsel for Canadian Imperial Bank of Commerce (22nd December, 2003). The Enron Task Force, additionally, found violations in transactions initiated at year-end 1999 relating to Merrill Lynch & Co.'s temporary 'purchase' from Enron of Nigeria power barges, and the subsequent sale of the barges and offsetting energy trades involving back to back options. Letter from the Enron Task Force to Robert Morvillo and Charles Stillman, Counsel for Merrill Lynch & Co., Inc. (17th September, 2003).

43 See *Deferred Prosecution Agreement, US v America Online, Inc.* (E.D. Va. 2004); *Deferred Prosecution Agreement, US v Bristol-Myers Squibb Company* (D.N.J. 2005).

44 See *Deferred Prosecution Agreement*, PNC ICLC Corp. (W.D. Pa. 2003); see also Press Release, 'American International Group, Inc. Enters Into Agreements with the United States', 30th November, 2004 ('With today's joint agreements totaling $126,366,000, coupled with an agreement reached last year between the Department and [PNC], in which PNC agreed to pay $155 million in penalties and restitution. The Department of Justice and the SEC have obtained $241,366,000 in restitution disgorgement, penalties and prejudgment interest in connection with off balance sheet transactions . . .'), available at http://www.usdoj.gov/opa/pr/2004/November/04_crm_764.htm.

45 See letter agreement between David N. Kelley, US Attorney for the Southern District of New York, and Robert S. Bennett, Esq., counsel for KPMG LLP, dated 26th August, 2005 (available at http://www.usdoj.gov/usao/nys/pressrelease2005.html).

46 See *Non-prosecution Agreement* between the Department of Justice and InVision Technologies Corp. (December 2004) (the *InVision* matter also included a civil settlement with the SEC); agreement between the United States Department of Justice, Criminal Division, Fraud Section and Micrus Corporation and its Swiss Subsidiary Micrus S.A. (28th February, 2005); *Deferred Prosecution Agreement, US v Monsanto Company* (D.D.C. 2004).

47 News Release: 'State to Gain 1,600 Jobs from WorldCom Agreement', 12th March, 2004, available at www.oag.state.ok.us.

48 See *Principles* at § VI(B) ('[A] corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation.').

49 Press Release, 'US Attorney's Office for the Southern District of New York', (27th October, 1994), at 3–4.

50 News Release, 'US Attorney for the Central District of California', 19th September, 1996, at 2.

51 Public Statement, Coopers & Lybrand LLP, 20th September, 1996.

52 *Ibid.*

53 *Micrus*, para. 3.

54 *Monsanto*, para. 2.

55 *Bristol-Myers*, para. 5.

56 *Bristol-Myers*, paras. 7–11, 18, 20–21, 25.

57 Information, *United States v KPMG LLP*, Civ. No. 05-Cr-903 S.D.N.Y., at paras. 27 and 31 *et seq.*, available at http://www.usdoj.gov/usao/nys/pressrelease2005.html. See also *Statement of Facts, KPMG*, at para. 23, *et seq.* This pattern of behaviour contrasts sharply with that of two other firms implicated in the tax shelter scandal, PricewaterhouseCoopers LLP and Ernst & Young LLP, both of which reached civil settlements with the IRS and were apparently not the subject of a criminal investigation. See Johnson, ref. 20 above.

58 See *KPMG LLP Statement*, ref. 20 above; see also Johnson, ref. 20 (KPMG's new management team had taken 'aggressive steps . . . to clean house', including firing or inducing the resignation of 30 partners.).

59 *KPMG*, para. 10.

60 *Statement of Facts*, ref. 57, at paras. 35–36.

61 *Guidelines Manual*, ref. 5 above, at § 8C2.5 — Culpability Scores (and factors relevant thereto); see also *Principles of Federal Prosecution of Business Organizations*, ref. 36 above, at § II.A(1)-(9) — Factors to be Considered.

62 *InVision*, para. 3.

63 See Complaint, *Securities and Exchange Commission v Monsanto Company*, Case No. 1:05CV00014 (U.S.D.C. D.D.C.) (filed 6th January, 2005), at paras. 2–3, 21, 23, 24; see also SEC Litigation Release No. 19023, 'Monsanto Settles Action and Agrees to Pay a $500,000 Penalty', 6th January, 2005, available at http://www.sec.gov/litigation/litreleases/lr19023.htm.

64 During the summer of 2005, just prior to the transition from one US Attorney to another in the Southern District of New York, the US Attorney's Office announced a spate of non-prosecution agreements, including ones with *Tommy Hilfiger, USA* with respect to an investigation into foreign and domestic tax fraud, *Royal Dutch Petroleum Company* in connection with overstating oil reserves in its filings with the SEC, and *MCI*, in connection with the WorldCom accounting fraud debacle. See News Releases at www.usdoj.gov/usao/nys. In its News Releases announcing these agreements, the US Attorney's Office specifically referred to the *Principles* and noted the company's cooperation, its remedial actions, and its settlement with the other agencies, including the SEC and the IRS.

65 *Plea Agreement, United States v DPC Tianjin Ltd.*, No. CR 05-482 (C.D. Cal. 2005), at paras. 26–30.

66 See, eg, *SEC v Monsanto Co.*, ref. 63 (monitor); *SEC v TimeWarner Inc.*, Civil Action No. 1:05CV00578 (G.K.) (D.D.C. 2005) (forensic examiner); *SEC v The Titan Corp.*, Civil Action No. 05-0411 (J.R.) (D.D.C. 2005) (Titan required to retain an

independent consultant to review the company's FCPA compliance and procedures and to adopt and implement the consultant's recommendations).

67 In the *Titan* matter, the SEC required retention of an independent consultant to review the company's FCPA compliance procedures. See *Titan*, ref. 66 above. 'DOJ also required Titan to retain an independent consultant to assist in instituting a strict compliance program and internal controls to prevent future FCPA violations — an increasingly common settlement requirement.' Shaheen, F. and Geren, N. (2005) 'Penalties get tougher for FCPA violations', *National Defense*, September, available at http://www.nationaldefensemagazine.org/issues/2005/sep/ethics_corner.htm. InVision was required to retain an FCPA Compliance Monitor by the DOJ (*InVision*, paras. 10–13) and also an 'Independent Consultant' by the SEC to ensure that its corporate compliance programme was designed to detect and prevent violations of the FCPA (Litigation Release No. 19078, 'SEC Settles Charges Against InVision Technologies for $1.1 Million for Violations of the Foreign Corrupt Practices Act', 14th February, 2005), available at http://www.sec.gov/litigation/litreleases/lr19078.htm). DPC Tianjin's plea agreement and the SEC order requires DPC itself to implement an effective FCPA compliance programme and requires the retention of an Independent Monitor (or, for the SEC, independent consultant), who is charged with monitoring the implementation of the FCPA compliance programme and reporting back to the agencies. See Cadwalader, *FCPA Advisor*, June 2005, at 3. The DOJ required that Monsanto retain an independent expert for a period of three years to review its compliance programme (*Monsanto*, para. 9), and the SEC mandated that Monsanto retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures (Litigation Release No. 19023, 'SEC Sues Monsanto Company for Paying a Bribe', 6th January, 2005), available at http://www.sec.gov/litigation/litreleases/lr19023.htm). Micrus, however, received only an FCPA Compliance Monitor. See *Micrus*, ref. 46, paras. 10–13.

68 See Deferred Prosecution Agreement, America Online, Inc. (investigation into various business transactions between AOL and numerous AOL business partners); agreement between the Enron Task Force and Merrill Lynch & Co., ref. 42.

69 *KPMG Deferred Prosecution Agreement*, ref. 18, at para. 18, *et seq.*

70 The SEC sought, and, on 3rd July, 2002, received approval for the appointment of a corporate monitor as part of the settlement with WorldCom. See Litigation Release No. 18147, 'In WorldCom Case, SEC Files Proposed Settlement of Claim for Civil Penalty', 19th May, 2003, available at http://www.sec.gov/litigation/litreleases/lr18147.htm. The SEC filed charges against CSFB for abusive practices relating to the allocation of stock in 'hot' initial public offerings. CSFB undertook, among other remedial measures, to retain an independent consultant to review its new policies concerning the allocation of IPO stock, and also to adopt the recommendations of the independent consultant. SEC Release 2002-14, 'SEC Charges CSFB with Abusive IPO Allocation Practices', 22nd January, 2002, available at http://www.sec.gov/news/headlines/csfbipo.htm.

71 See News Release, 'Federal Energy Regulatory Commission, Commission Accepts $21 Million Civil Penalty to Settle Investigation of AEP's Natural Gas Activities', 26th January, 2005, at 2, available at http://www.ferc.gov/press-room/pr-archives/2005/2005-1/01-26-05-aep.asp.

72 See, eg, *CIBC*, para. 10; *Merrill Lynch*, para. 9.

73 *Monsanto*, para. 9; *Micrus*, para. 11.

74 *Bristol Myers-Squibb*, para. 11.

75 See, eg, Press Release, Department of Justice, ref. 18 above ('Richard Breeden, former Securities and Exchange Commission Chairman, has been appointed to serve as the independent monitor.').

76 *AOL*, para. 13.

77 See, eg, *Monsanto*, para. 9.

78 *KPMG*, para. 18(a).

79 *DPC Tianjin*, para. 27. See also *Micrus*, para. 11.

80 See, eg, *Monsanto*, para. 9 ('To the extent that Monsanto Company structures the retention of the independent compliance expert such that the attorney-client privilege could conceivably be applicable, it shall be a condition of that retention that Monsanto Company shall waive as to the Fraud Section and the US Securities and Exchange Commission the attorney-client privilege and any other protections accorded to communications and client confidences with respect to communications between the independent compliance expert and Monsanto Company and the independent compliance expert's work product.'); *DPC Tianjin*, para. 27 ('If DPC Tianjin, the Monitor, or any other party or tribunal asserts or determines that communications between the Monitor and DPC Tianjin are protected by the attorney-client privilege or that documents created or reviewed by DPC Tianjin or the Monitor in connection with the Monitor's work are protected by the work product doctrine, then DPC Tianjin shall waive . . . any protections afforded to such communications and documents concerning the Monitor's work.'); *CIBC*, para. 10.

81 See, eg, *CIBC*, para. 10 ('The Monitor shall . . . coordinate with the SEC, Federal Reserve, and OSFI and provide information about CIBC as requested by those agencies.'); *Micrus*, para. 12 ('The Monitor shall: . . . (e) coordinate with the SEC and provide information about Micrus as requested by that agency.'); *InVision*, para. 12(e) (same).

82 *AOL*, para. 13(c).

83 *CIBC*, para. 10.

84 *Monsanto*, para. 9.

85 *KPMG*, para. 18(e)(IV). The agreement also requires the Monitor to report 'not less often than every four months' regarding KPMG's compliance with the agreement and on any changes 'necessary to foster KPMG's compliance with any applicable laws and standards'. *Ibid.*

86 *AOL*, para. 13(c). The AOL agreement requires the Monitor to provide its report to TimeWarner's Audit and Finance Committee, with copies to the Department of Justice. However, it also requires the Monitor to provide periodic reports to the Department 'as to AOL's cooperation with the Monitor'. See *AOL*, para. 13(e).

87 *Merrill Lynch*, para. 9(c).

88 *Monsanto*, para. 9(c).

89 See ref. 86 (noting that under *AOL*, para. 13(e) the Monitor is to provide periodic reports to the Department of Justice).

90 See *DPC Tianjin*, para. 29; *Micrus*, para. 13; *InVision*, para. 13. This provision is not included in the *Monsanto* agreement.

91 *Micrus*, para. 11; *InVision*, para. 12 and app. A, para. 1.

92 *CIBC*, paras. 3, 9, 10.

93 *Coopers & Lybrand*, para. 13.

94 See, eg, *CIBC*, para. 9; *Monsanto*, para. 8.

95 *Micrus*, para. 13. See also *DPC Tianjin*, para. 29; *Monsanto*, para. 8.

96 See, eg, *Prudential Securities*, p. 3 ('retain a mutually acceptable outside counsel'); *CIBC*, para. 10 (CIBC 'will retain and pay for an outside, independent law firm'); *InVision*, para. 11 (same).

97 *Monsanto*, para. 9; *DPC Tianjin*, para. 27.

98 *AOL*, para. 13(f); *DPC Tianjin*, para. 31.

99 *CIBC*, para. 10 (Monitor may rely 'as appropriate in the judgment of the Monitor on the outside monitor named under the agreement between CIBC and OSFI and the Federal Reserve').

100 *Merrill Lynch*, para. 9.

101 SEC Release 2005-38, 'SEC Charges Time Warner with Fraud, Aiding and Abetting Frauds by Others, and Violating a Prior Cease-and-Desist Order; CFO, Controller, and Deputy Controller Charged with Causing Reporting Violations', 21st March, 2005 ('The company also agreed to engage an independent examiner to determine whether the company's historical accounting for certain transactions was in conformity with [GAAP].'), available at

http://www.sec.gov/news/press/2005-38.htm.

102 *Prudential Securities*, p. 3.

103 *InVision*, para. 11.

104 *GE*, para. 5.

105 *DPC*, para. 31. See also *Monsanto*, para. 17; *AOL*, para. 21.

106 *DPC*, para. 31(a) and (b).

107 *Ibid.*, para. 31(b).

108 *Ibid.*, para. 31(c).

109 *AOL*, para. 13(d).

110 The government has been willing to include language in its agreements that provides the company with a basis for preserving the privilege. See, eg, *CIBC*, para. 10 (requiring CIBC to waive privilege 'as to the Department, the SEC, the Federal Reserve, and OSFI' but stating that the 'sharing of such communications . . . is not intended to constitute a waiver of any privilege under any federal or state law that would shield from disclosure to any other third party any such communications'); *DPC Tianjin*, para. 27 (providing that waiver is 'only as to' the Department of Justice, the US Attorney's Office and the SEC and stating 'The sharing of such communications by the Monitor with the DOJ and the SEC is not intended to constitute a waiver of any privilege under any federal or state law that would shield from disclosure to any other third party any such communications.'); *Micrus*, para. 11 (same); *KPMG*, para. 8(e)(II) (same). In the absence, however, of a congressionally enacted federal rule or law recognising a privilege for such communications to the government, the traditional rule against selective waivers will probably prevail. See Loomis, 1. (2003) 'DOJ encourages waiving attorney-client privilege', *New York Law Journal*, 23rd February ('Corporate defense lawyers also point out that once a company waives the privilege, anyone can gain access to the unprotected documents, including class action plaintiffs' lawyers.'); see also US Attorney's Bulletin, 'Interview with James Comey Concerning DOJ Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection', November 2003 ('While there is varying case law in this area, it is true that courts have held that waiver to the Government during a criminal investigation can result in a waiver with respect to civil litigants. There is pending litigation about the enforceability of Government Agreements to keep privileged information confidential and there have been legislative proposals to protect information disclosed via waivers to the SEC. So the landscape in this area may be changing.'), available at http://10.173.12/usao/eousa/ole/usabook/usab/0311/0311bu05.htm.

111 See *Monsanto*, para. 9(c).

112 See *AOL*, para. 13.

113 See *ibid.* (requiring periodic reports to the government on the company's cooperation with the Monitor).

LETTER TO THE HONORABLE LINDA T. SNCHEZ FROM THE HONORABLE GEORGE J. TERWILLIGER, III, ESQUIRE, WHITE & CASE, LLP, WASHINGTON, DC

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April 16, 2008

VIA FEDEX

Chairwoman Linda T. Sánchez
House Judiciary Committee
Subcommittee on Commercial and Administrative Law
1222 Longworth House Office Building
Washington, DC 20515

Re: March 11, 2008, Hearing on Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines?

Dear Chair Sánchez:

Thank you for inviting me to testify at the Subcommittee on Commercial and Administrative Law's March 11, 2008, hearing on deferred prosecution agreements ("DPAs") and related matters. At the request of Ranking Member Cannon, I am submitting the following additional information for the record.

In regard to DPAs and other matters, the Subcommittee has recognized the importance of the administration of justice being free of improper partisan influence and control. The Subcommittee has also recognized that a fundamental aspect of such efforts is to ensure the integrity of the criminal investigative process during which enforcement officials deliberate and consider the appropriate outcome of a given matter. In furtherance of these laudable goals, and in support of the Subcommittee's consideration of the scope and nature of oversight to exercise over the Department of Justice ("Department") regarding deferred prosecutions, I respectfully submit my views on the adverse effects of the disclosure of information relating to criminal investigations generally, how our legal system has sought to protect against disclosure, and how congressional oversight and Department policies could operate in tandem to further the Subcommittee's efforts in this area.

The Virtues of Confidentiality of Pending Criminal Investigations

The integrity of the investigative process is rooted in the ability to maintain the confidentiality of criminal investigations. The downsides of the premature or unauthorized disclosure of information relating to these investigations are substantial. Such disclosure would likely:

- harm persons who have decided to assist law enforcement;
- harm the reputations of subjects or targets of investigations, particularly when prosecutors subsequently determine that the prosecution of such persons or entities is unwarranted;
- harm innocent employees, investors, customers, business partners, and other stakeholders of a business or other organization under investigation;
- subject Department charging decisions to potentially improper outside influences, risking the formation of constituencies for or against the prosecution of specific individuals or organizations; and, not least,
- interfere with or impede ongoing investigations.

The Legal System Reflects the Reality of Such Costs

Not willing to tolerate these costs, our legal system has developed several mechanisms to secure the confidentiality of criminal investigations. For example, the confidentiality of pending criminal investigations is protected by statute,[1] regulation,[2] and Department policy.[3] Additionally, the legal profession has made the maintenance of such confidentiality a necessary element of the ethical practice of law.[4] Furthermore, as part of the larger effort to protect the confidentiality of criminal investigations generally, the law specifically affords additional protection to the confidentiality of grand jury proceedings.[5] Ultimately, the Department, tasked by Congress with the responsibility for prosecuting violations of federal law,[6] bears the burden of both protecting the confidentiality of pending investigations and prosecuting breaches of the same.

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[1] *See, e.g.*, 18 U.S.C. § 1905 (2007) (prohibiting, generally, the disclosure of confidential information by government employees or agents). *See also* 18 U.S.C. § 2 (2007) ("tipping off" targets of an investigation obstructs justice); 18 U.S.C. § 1510 (2007) (insurance companies, bank officials, and employees may not notify suspects that they are under investigation).

[2] 28 C.F.R. § 50.2 (2007) (concerning the release of information relating to criminal and civil proceedings).

[3] U.S. Dep't of Justice, United States Attorneys' Manual, § 9-65.140 ("The United States Attorney must carefully consider the possible adverse effect before releasing information to the public . . . ."); *id.* at § 1-7.000, *et seq.* (proscribing guidelines governing the public release of information relating to criminal and civil cases); *id.* at § 1-8.000, *et seq.* (establishing procedures for handling congressional requests for information relating to investigations).

[4] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004).

[5] FED. R. CRIM. P. 6(e)(2) (prohibiting grand jurors, government attorneys, and government personnel from disclosing grand jury matters).

[6] 28 U.S.C. § 516 (2007) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). *See also* Act of June 22, 1870, 41st Cong. 2d Sess., ch. 150, 16 Stat. 162 (1870) (establishing the Department of Justice).

Congressional Oversight

I respectfully submit that congressional oversight of decisions to defer prosecution should be weighed against the value of protecting the confidentiality of criminal investigations and the costs of failing to do so. Congress certainly has an important role in conducting oversight over the Department and has an interest in ensuring that the Department evaluates and considers appropriate criminal charges resulting from crimes of broad public significance.

Respectfully, however, effective oversight does not require that Congress or this Subcommittee exercise real-time oversight of charging decisions generally, or decisions to defer prosecutions specifically. Congressional oversight during the investigative process would be akin to an autopsy of a live body, and would likely impose costs on society similar to the costs, mentioned above, of the premature or unauthorized disclosure of information relating to criminal investigations. Even if oversight were conducted in closed session, charging decisions would still be exposed to outside influences and the subjects or targets of investigations would still suffer the opprobrium of being suspected of criminal activity. Finally, real-time oversight would unnecessarily, and unconstitutionally, entangle Congress in the exercise of prosecutorial discretion entrusted exclusively to the Executive Branch.[7]

Effective oversight also does not require the collection of sworn testimony from career, line officers who exercise prosecutorial discretion. As explained below, subjecting line prosecutors to congressional inquiry on the exercise of discretion would inhibit its free exercise. Rather, the appointed heads of the Department's offices, boards, and divisions have traditionally been the persons to respond to oversight inquiries and it would be wise to have it remain so.

A prosecutor's most difficult decision as to whether to prosecute an individual or organization is in the close cases, where acquittal may be more likely than conviction. If the prosecutor, faced with a close case, declines to prosecute an individual or organization widely believed to be culpable and then has to justify the decision not to prosecute in an oversight hearing, the lesson for the future will be to instead charge in the case and avoid the questioning and criticism of a decision not to prosecute.

There is a real-world example of this effect that, in particular, aptly illustrates this point in the context of congressional oversight. In September 1992, the House Energy and Commerce Committee, Subcommittee on Oversight and Investigations, began investigating whether or not the EPA had sufficient criminal investigative resources.[8] Chairman John Dingell believed that the EPA's criminal enforcement record, under legislative pressure, had improved only to be

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[7] *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996) (separation of powers doctrine reserves broad prosecutorial discretion to federal prosecutors who "are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'"); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 976 (D.C. Cir. 2005) ("the exercise of prosecutorial discretion is at the very core of the executive function"); *see also Prosecutorial Discretion*, 36 Geo. L.J. Ann. Rev. Crim. Proc. 209, 209 n.646 (2007) (collecting cases).

[8] LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 82-84 (2004), *citing EPA's Criminal Enforcement Program: Hearing before the Subcomm. on Oversight and Investigations, H. Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 1 (1992).

stifled by the Department.[9] Chairman Dingell criticized the Department for failing to prosecute "responsible corporate officials or for entering into plea bargains that collected only modest monetary fines."[10] Attorney General Janet Reno initiated an internal review upon taking office, but also took the ill-advised step of permitting the Subcommittee "broad access" to Department personnel, including line attorneys.[11] The Clinton Administration was reported, nonetheless, to be "leery of the chilling effect . . . on lawyers and supervisors who make sensitive decisions in criminal cases."[12]

In March 1994, an impatient Subcommittee subpoenaed the records of six cases handled by the Department's Environment and Natural Resources Division ("ENRD") and requested that the Senate Judiciary Committee delay Lois J. Schiffer's confirmation as Assistant Attorney General for ENRD.[13] As a result of this dispute, Chief of the Environmental Crimes Section Neil S. Cartusciello – a career Department attorney – was forced to testify about specific cases in an "atmosphere of distrust" and under sustained congressional scrutiny.[14] He eventually resigned, maintaining that such an atmosphere was impeding his Section's effectiveness and adversely affected the morale of its staff."[15] The fact that the Department's internal review cleared the line prosecutors involved, as well as Mr. Cartusciello, failed to stop the episode from descending into what one commentator called "a fiasco" that caused irreparable harm "to the revered principle of prosecution free from politics . . . [and] in which the Justice Department, for the first time in history, breached the wall between branches of government and subjected its career employees to a congressional witch hunt."[16]

Recounting this unfortunate episode is not to suggest, however, that Congress cannot exercise appropriate oversight over the exercise of prosecutorial discretion while keeping prosecution free from politics. Such oversight should be done through political appointees because they are ultimately accountable for the exercise of the President's law enforcement policies. The subject matters of such oversight might include ensuring:

- that federal resources for law enforcement are efficiently allocated and used;
- that prosecutors have the substantive and procedural legal authorities needed to perform their tasks;
- that the decision-making in the field by U.S. Attorneys is subject to sufficient oversight and supervision by the Department leadership so as to ensure that similar cases are treated alike on a national basis, even while accounting for regional or more localized public safety and criminal justice needs;

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[9] *Id.*
[10] *Id.*
[11] Jim McGee, *House Panel Subpoenas Justice; Documents Sought on Environmental Crime Cases, Policy Change*, WASH. POST, Mar. 12, 1994, at A4.
[12] *Id.*
[13] *Id.*
[14] Jim McGee, *Chief of Environmental Crimes Section Quits*, WASH. POST, Apr. 2, 1994, at A4.
[15] *Id.*
[16] Mark C. Hansen, Editorial, *Smear at Justice*, WASH. POST, Apr. 8, 1994, at A21.

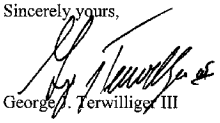
- that the use of monitors and similar arrangements at the expense of putative defendants in cases involving businesses is done in a manner which returns value to a company and its owners, including stockholders, for the expenditures made and is not used as merely a punitive measure;

- that the use of criminal laws and penalties against legally fictitious persons, such as corporations and other business organizations, does not place U.S. companies and issuers listed on U.S. exchanges at a competitive disadvantage with foreign peers or non-U.S. issuers;

- that companies which choose to perform internal investigations and/or to disclose voluntarily their own wrongdoing receive favorable consideration in connection with any subsequent exercise of prosecutorial discretion as to the matter disclosed and whether the Department should undertake a formalized program to recognize such corporate cooperation and to ensure that favorable consideration is given on the basis of objective criteria in all cases.

I thank you and the Subcommittee again for inviting me to testify on March 11, 2008, and thank you and Representative Cannon for the opportunity to submit these additional views for the record.

Sincerely yours,



George J. Terwilliger III

cc: Honorable Christopher B. Cannon
Honorable Mark Filip, Deputy Attorney General of the United States
Honorable Brian A. Benczkowski, Principal Deputy Assistant Attorney General for Legislative Affairs