ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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JUNE 25, 2009

ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS

THURSDAY, JUNE 25, 2009

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

The Subcommittee met, pursuant to notice, at 11:17 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (acting Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Delahunt, Watt, Sherman, Maffei, Lofgren, Johnson, Scott, Franks, Jordan, Coble, Issa, Forbes, and King.

Also present: Representative Jackson Lee.

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

Mr. CONYERS. Good morning, ladies and gentlemen. I have been invited by Subcommittee Chair Steve Cohen, to begin our important hearing this morning, and I call the Committee on the Judiciary, the Subcommittee on Commercial and Administrative Law to order.

Welcoming our guests, we are very pleased to have Eileen Larence, the Honorable Christopher Christie, the Honorable Gary Grindler, the Honorable Chuck Rosenberg, Vikramaditya Khanna, and on the second panel we have two of our colleagues, the Honorable Frank Pallone and the Honorable Bill Pascrell.

Because of the time limitations of some of the members in panel one, the Members of Congress who normally precede the regular witnesses we have, by agreement, allowed the panel to go first because of time constraints.

We welcome you all and let me just say that——

[Pause in hearing.]

Today, this Subcommittee revisits a matter that was first considered last year, the Department of Justice's use of deferred or non-prosecution agreements in criminal cases involving corporate defendants.

These deferred prosecution agreements, which we will be examining today, originally were created as an alternative to the prosecution of non-violent juvenile and drug offenders. Under these types of agreements the government agreed to refrain from pros-

ecuting in exchange for a defendant's agreement to admit wrongdoing, provide restitution and abide by certain other obligations.

The government's use of such agreements as a prosecutorial tool with respect to corporate defendants, however, grew in the aftermath of the Arthur Andersen case in the earlier part of this decade.

Thousands of people now deemed to be innocent lost their jobs after the company collapsed in the face of criminal charges, the outcome of which was reversed in the higher court hearing on appeal.

The thinking was that pre-trial agreements might allow the government to achieve a better balance between the competing imperatives of seeking justice from corporate wrongdoers on one hand and protecting innocent bystanders to corporate malfeasance on the other.

But with the growth in the use of these deferred and non-prosecution agreements, it became evident that there were frequently not meaningful standards governing the circumstances under which the government might enter into such agreements or even what the scope of some of these agreements should be.

Sometimes there was a lack of guidance with respect to the selection and the use of corporate monitors to implement such agreements, and so that is what brings us here today.

One of the cases that are going to be discussed is the Zimmer case, in which then the former U.S. attorney for that area, Christopher Christie, selected former Attorney General Ashcroft to serve as a corporate monitor, and also we note that the former attorney general came before this Committee in the discussion of these matters.

And so the Committee was prompted to hold a hearing last year, and the Department has taken some steps, which we will find out about, to revise some of the activity, but we are here to examine these questions, and I would like now if I can——

Oh, all right. Mr. Franks has a legislative responsibility on the House and we will hold—you will defer your statement until you return, sir.

Mr. FRANKS. Until after the speakers have been around?

Mr. CONYERS. Whenever you get back.

Is there anybody on the Republican side that would have an opening comment in lieu of Mr. Franks' absence?

Steve King is usually so reticent that I hesitate to invite him to make a comment, but I will at this time. The gentleman is recognized.

Mr. KING. Thank you, Mr. Chairman. I do appreciate your demeanor and tone and your gentlemanliness, and I would be ashamed not to accept an invitation from the Chairman of the Judiciary Committee.

And so I will though adjust my tone to the tone that the Chairman has delivered this morning. And I am, of course, interested in the information we will be gathering here this morning and the testimony of all of the witnesses on the panels that will come forward.

And as I frame my outlook on this issue, I would just seek to frame for this Committee that we have seen many of the members

of the former Bush administration before this Committee during his tenure as President of the United States and then after.

And some of the subject of this is John Ashcroft, whom as I watched him testify before this Committee, it was an exemplary display of how a witness can come before this Committee fully informed, giving direct answers soundly based in legal analysis and theory, and having their recollection that was so impressive to me.

If I had him for a client or if I had evaluated his professionalism I couldn't raise it any higher than what I have seen in his full career and before this Committee as well. There have been a number of other members of the Bush administration that have been before this Committee, David Addington comes to mind. Doug Fife comes to mind. There are a number of others.

And you know, I would just suggest that we have a lot of important issues before this country, and we are on the precipice of going forward, perhaps in this Congress, with some irrevocable decisions. I think at this point we are at the reversible point. The things that have happened so far during this Administration are reversible should the American people decide to do so.

Once we cross this Rubicon into the three big issues that are ahead of us in this Congress, I don't know that we can go back to the place where we are today, or the place, my preference, which was where we were before.

But I would suggest that we should be forward-looking, rather than backward-looking, and the data that I have looked at indicates to me that there has been a positive result from some of these negotiations that have taken place.

And if we are going to be looking backwards and I reflect backwards on some decisions that have been made by the Department of Justice agreements not to prosecute entities that are significantly engaged in affecting the political decisions on this Capitol Hill.

So if we are going to look backwards, I may want to dig through some papers back into the history quite a ways and without specifying particularly what they are, in the meantime, hopefully this will be a balanced hearing and we can hear from the witnesses and we can evaluate this information without bias.

And if there is a constructive result that has come and if the right things are done for the right reason, I am hopeful that in a bipartisan way we can congratulate the people who participated in that and move forward into the future rather than looking back.

I think especially, gentlemen, Mr. Christie is part of the future leadership in this country, and hopefully this will enhance his ability to contribute to American society, and I would yield back the balance of my time and thank the Chairman.

Mr. CONYERS. I want to thank you, Steve King, for striking such an appropriate and sensitive note. Now, would some of your reflections as you look back over history, would this be before the Compromise of 1876 or after the Compromise of 1876?

Mr. KING. Being so junior on this Committee, Mr. Chairman, I would have to defer to your experience and seniority for the judgment call on that, and I will bring those issues up and you will be able to make that decision at the appropriate time.

Mr. CONYERS. Well, let us work on it together.

Mr. KING. Thank you, Mr. Chairman.

Mr. CONYERS. I am very pleased now to call upon the Subcommittee Chairman himself, Steve Cohen. Steve Cohen who—the gentleman from Tennessee has a remarkably long career as a state legislator, a state senator and is now already the Chairman of one of the most important Committees in the Judiciary, Commercial and Administrative Law, and he has kindly allowed me to sit in the Chair for a short period of time, and I am very honored to call on him at this moment.

Mr. COHEN. Thank you, Mr. Chairman. I do appreciate your time that you have extended and the fact that we reciprocate on time as I have sat in the Chair for you.

This hearing is one that my Subcommittee is very eagerly anticipating. There are several issues before us. One is whether or not deferred prosecutions are a good idea in general. Some in the Justice Department, I believe, still believe that they are good and they may be good.

I understand that corporations are different than individual citizens in that they represent a large number of stockholders, and to punish a corporation in a certain way, and possibly with a death sentence if there is a criminal conviction, affects not just the corporation but all of its shareholders.

On the other hand, corporations should abide by the law, and shouldn't necessarily get a sweetheart deal because they are a corporation and be subjected to a different set of justice than an individual would.

As a private practicing attorney you have an individual, sometimes a first offender, there is a deferred prosecution. And that gives that person a second chance and I hope that in some of the cases, and in most of them, that they are first offenders. I suspect that they are.

But nevertheless, the offenses that the corporations are generally alleged to have committed, are more serious than the minor misdemeanor that a person might have committed as a first criminal offense.

In the circumstance of an individual in a criminal court there is a public hearing, and there is public notice of what has happened even though the person can generally get their record expunged.

In these corporate situations sometimes the public never knows of the wrongdoing of the corporation, and the public is harmed. And that is an issue we need to look into, what is the public good in having these agreements be private, in camera rather than public and giving notice to the public of possible wrongdoing and possible ramifications that could occur to an individual by these problems?

The deferred prosecution agreements have really risen in the last few years, a lot more use of them. One of the cases of the most notoriety, I guess, is the medical devices in Zimmer and a corporate citizen in my community, Smith & Nephew.

Issues have arisen, and I am aware of on how the monitors are chosen, and that is a serious issue. I think at all times that public monies are expended, no matter how they are done, they should be done in a transparent manner and in a fair manner, to where every

person has an opportunity to participate, to do justice and to be compensated for that justice.

In these situations over three-fourths of the monitors, so says *The New York Times* in a current report, have been former government officials, and over half of them have been prosecutors which seems like it is an in-house shop for folks who have left their roles with Justice or left their roles in U.S. Attorneys' Offices to get lucrative business once they leave.

Maybe they have the expertise, maybe they are getting an advantage of knowing the right people in the right place, and that is not the way justice should work—Government shouldn't, never. But Justice should be like Caesar's wife and beyond reproach. Circumstances in these cases make us think that Caesar's wife would be blushing even more so than some governors' wives might blush.

The fact is when you select a monitor you ought to be selecting somebody from a panel of people who make themselves available. It should be publicly known, I believe, and I think that an independent third party like a judge should be involved in selecting the monitors to make sure that there is fairness, equal protection, due process and not just political influence.

The companies are in a no-win position. They have the opportunity not to be convicted and they go through this monitor situation. But the monitor has them by very special, unique and tender posture, and accordingly the corporations can't say a lot when they think they are wrong.

And there should be some type of ombudsman there for the corporation to say, "The fees are outrageous. What they are doing is outrageous. It is unnecessary. The expenses are too great," but they really can't do it.

And what happens is the monitors are put in a position where they can extract their own individual largesse at the expense of the corporation. And the corporation can't complain because they are in a particularly special situation of avoiding prosecution, and in essence they are paying baksheesh to the monitors. They have no ombudsman to go to to complain, to see that the fees are appropriate or right.

In the Zimmer case, it is my understanding that Mr. Ashcroft's firm was paid $52 million. To me, that is outrageous. I don't care what you did. It is not worth $52 million. Even if you took steroids and hit 70 home runs, it is not worth $52 million.

In the case with Zimmer, there was not an opportunity to review the fees. As I understand it there were fees that the company were just told, "You are going to pay this up front. You have no choice," and they had to do it. That is not America. That is not fair justice.

I believe there needs to be a change in the way that the monitors are chosen, an impartial, fair manner. I think there needs to be an ombudsman to make sure that the corporations have an opportunity to voice their concerns and see that the fees are fair and right.

And they need to be disclosed publicly so the public knows what fees are being paid and the relationships between the appointing authority, if there is one, whether it is a judge in a situation like I would suggest or in the past the U.S. attorney and possible con-

flicts of interest that might exist in the appointments or in the relationship that exist.

These are most important issues that we need to look at and see if there is reform that needs to take place that this Committee can recommend and the full Judiciary Committee and this Congress can pass to see that justice is, indeed, respected, justice is blind, justice is fair. That is the hope that I have that this Committee will come out with.

I look forward to the testimony. Mr. Christie has most experience, I think, of almost any U.S. attorney in this country on these issues. He has been involved in quite a few of them, and can give us some information which I look forward to.

And I don't mean to cast an issue, but if there is some information I have—Bristol-Myers Squibb—that U.S. Attorney Christie required them to endow a chair in business ethics at his alma mater, Seton Hall.

I am interested to hear about this because if a Member of Congress required anybody to endow a chair at a school there would be outrageous response. There would be outrage and a response from the public.

And on the other side there would be questions for ethics and the idea that it is an ethics chair is indeed ironic. I think we have to have arm's length transactions, and we have to know that we have to sometimes take our own personal interests and put them secondary to the public interest.

I am sure that we will learn more about what has happened in the matters in past hearings, past monitors and hopefully come up with some recommendations that protect the public.

Mr. Chairman, I appreciate the opportunity to make this statement, and I hope that all the past corporate or political papers that are brought forth by Mr. King will be after Hayes-Tilden because that way we can rely on you for experience. Thank you, sir.

Mr. CONYERS. Thank you, Chairman Cohen. We deeply appreciate the exhaustive research that you put into this matter for today, and I am now pleased to recognize briefly a senior Member of the House Judiciary Committee who has been a Chairman, the Ranking Member, and extremely active across the years with our Committee, Howard Coble of North Carolina.

Mr. COBLE. Mr. Chairman, I just wanted to tell you how much I enjoy the frequent and pleasant verbal exchanges between you and the gentleman from Iowa. You two keep us on our toes. Mr. Chairman, I won't take the 5 minutes. I have a transportation hearing I am going to have to attend back and forth.

But I just wanted to, for the benefit of the Committee Members who may not know it, and I think I am right about this, and I think deferred prosecutions were inaugurated by the Bush one administration, continued thoroughly by the Clinton administration.

Furthermore continued thoroughly by Bush two, and, I believe, continuing presently under the Obama administration, so deferred prosecution is by no means a case of first impression before us. They have been around a pretty good while and I just wanted to put that on the record, Mr. Chairman, and I thank you for having recognized me.

Mr. CONYERS. It is a pleasure, indeed.

I would like to inquire if our former prosecutor from Massachusetts and Chairman of the Foreign Affairs Subcommittee, Bill Delahunt, had an opening comment. If he does, he is recognized for it.

Mr. DELAHUNT. Well, I might as well take advantage of the time then. The gentleman from Iowa talked about a Rubicon and I think it is important to understand that our justice system enjoys a reputation that is unparalleled in terms of the justice systems elsewhere in this world.

And I think much of that can be attributed to the fact that there is a level of confidence in the integrity of that system by the American people. Now, that level of confidence fluctuates. At times it is diminished and at times it is at a high standard.

Now, as the Chairman indicated to the full Committee, I myself was a prosecutor, an elected prosecutor, states attorney, district attorney in the Greater Boston area for 22 years, so I support the concept of prosecutorial discretion. I know that can be important so that injustices do not occur.

But there have been a number of concerns that have been expressed regarding so-called deferred prosecutions, and by that I interpret that deferred prosecutions are in lieu of indictments. In other words, one could argue that there is a different set of standards, a different justice system, if you will, for one class that is American corporations that are accused of wrongdoing, and the vast majority of Americans who are accused of other crime.

As I read through the briefing material and listening or reading RABA, the order of magnitude of improper gain apparently some corporations managed to realize, and the discretion was exercised by the prosecutor not to prosecute, or at least not to seek an indictment. And then I thought of many of the young men, particularly, that appeared in my courts who we prosecuted and sent to jail for long periods of time.

What the view of the community at large would be to send a young man into the state prison system for maybe 4 or 5 years in the case of an unarmed robbery, and yet corporations who were committing crimes that impacted thousands of people were not indicted but managed to reach an agreement to avoid that indictment.

You know, there are other options that are available to the government, but I don't know if they have been seriously considered. A prosecutor and, Mr. Christie, I note that you are a former U.S. attorney, and I think there are others on the panel, a prosecutor can indict.

So this is a statement to the public that that corporation has probably committed a crime. And then, if there is a decision that is in the best interest of the United States or an individual state, they can be diverted, a pre-trial diversion concept.

But that, again, obviates, eliminates the need for, I think, the appearances that people question. I heard the Chair of the Subcommittee talk about fees of $52 million. I mean, I would like to see the billing on that. That is a high hourly rate and I am certainly not one that doesn't believe that lawyers should be well paid, but it does raise issues.

And again, you know, and I am not suggesting or impugning anyone's integrity here, but when the prosecutor makes the decision as to who the monitor is and I am sure that the monitors of those that are reviewing these agreements, presumably, are people of solid credentials and high integrity, but they are friends of former associates.

Then the public is going to infer something, that it is the good old boy network at work or good old girl network at work, whatever the case may be. And these are appearances I would suggest that we want to avoid because, as I said at the beginning, our justice system depends on the confidence of the American people in terms of the integrity.

You know, I am looking at some of the briefing material here and, you know, I am sure, I hope, that these decisions were made in good faith, but they reek of favoritism, high fees, and it is not a good situation, and secrecy.

If you are going to have a viable justice system you need transparency. You have got to lay it out, and I would suggest, Mr. Chairman that it ought not to be the prosecutor. It ought to be the court that makes these assignments and enunciates and promulgates whatever guidelines are necessary.

I see Mr. King is taking his glasses off. I am getting nervous. Maybe he will agree with me. But why not have the court, an independent body, rather than having the prosecutor who in the end has ultimate responsibility for the investigation and making charging decisions appoint someone that he may or may not have a relationship with.

I read your testimony, Mr. Christie, and you keep referring to the office and I understand that, what you mean by that term, but in the end it is the individual United States attorney. It is not the office that makes that decision.

Sure, U.S. attorneys, like I did when I was the states attorney, we always listen, but in the end it is going to be myself that makes that decision, and appearances, even if there is nothing improper, impact the confidence of the people in the system.

So I know we have legislation pending, and I know it deals with guidelines, but I guess I would conclude by saying I would ask everyone on the panel why not have the court, as it should appropriately through the probation offices, and the courts appoint masters, not at $52 million. If it was $52 million, sign me up. I am ready to move for $52 million.

But we have masters that take on these kind of tasks that can do them, that are people of great expertise time and time again to handle matters that are complex because this issue is, I think, has the potential to seriously erode confidence in terms of the administration of justice in this country if not reformed. And with that, I yield back. I thank the gentleman.

Mr. CONYERS. Representing the Government Accountability Office (GAO), is Ms. Eileen Larence, Director for Justice Issues. As such, she manages congressional requests to assess various law enforcement and Department of Justice issues and has been at the GAO for some period of time. We have her and all of your statements that will be entered into the record, and we will allow you to proceed at this moment. Welcome to the Committee.

TESTIMONY OF EILEEN R. LARENCE, DIRECTOR OF HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. LARENCE. Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss the preliminary results of our review of Justice's use and oversight of deferred and non-prosecution agreements.

Increasing use of these tools as alternatives to prosecuting companies for criminal conduct is both topical, given concerns about corporate behavior leading to the economic downturn, and controversial, as some question whether the tools let companies off the hook. They give prosecutors too much power.

Their use also raises questions about balancing the tradeoffs of uniformity, consistency and transparency with prosecutor discretion and flexibility to address unique cases.

Given these issues, we have work underway to answer four questions about these tools. First, what factors do justice prosecutors consider when deciding whether to use the tools and what company requirements or terms to impose?

Second, how do the prosecutors oversee company compliance with these terms? Third, how do they select independent monitors, and fourth, what do companies think of monitor's costs and responsibilities?

I would now like to briefly summarize our preliminary answers to these questions. As for the first question on deciding whether to use these tools and what terms to include, justice prosecutors we interviewed consistently said they consider the nine principles of Federal prosecution of business organizations, especially how well the company is cooperating with investigators, what collateral consequences third parties, such as shareholders and employees might face with prosecution, and what remedial actions the company had already taken to fix its problem.

Justice offices we contacted also consistently issued press releases about agreements reached or required that some be posted to Web sites promoting transparency. Justice offices were less consistent, however, in deciding which of the two tools to use and on labeling agreements as either a DPA or NPA, despite recent guidance calling for consistency so that justice can track their use and identify best practices.

We in the Department are continuing to review whether further guidance on the documentation of and supervisory review over these decisions may be important. Most agreements we reviewed required monetary payments ranging from $30,000 to $615 million, and were based on sentencing guidelines as well as case specific factors.

The agreements lasted from 3 months to 5 years, depending on the amount of time prosecutors believe the company would need to fix its problems. Most agreements also required companies to improve their ethics and compliance programs to prevent and deter criminal conduct, unless the companies were already doing so for their regulators, for example.

While prosecutors stated that companies could appeal unfavorable terms to Justice, some companies were reluctant to do so for fear of retaliation.

Turning to the second question on ensuring compliance with agreements, in about half of the agreements we reviewed Justice required the company to pay for an independent monitor because the offices did not have the resources or expertise in-house.

Almost all monitors had to provide written reports of their findings to Justice. For the other half of the agreements, Justice relied on regulators to ensure compliance or required companies to certify they complied, among other things.

Addressing the third question about selecting monitors, Justice typically chose the monitor but gave companies the opportunity for input, although to varying degrees. Justice and companies generally relied on personal knowledge and colleagues' recommendations to identify potential monitors with expertise.

They did check for conflicts of interest, used an in-house committee to make a final decision, and coordinated with regulators if they already had monitors in place in order to avoid duplication and extra costs.

Companies and prosecutors thought developing a national list of potential monitors to avoid favoritism could provide consistency and pre-screened, qualified candidates, as well as expedite selection. But others thought it might not provide the needed expertise and might result in more conflicts of interests, less company input and more favoritism if justice created the list.

Recent Justice guidance begins to address some of these issues by requiring the use of selection committees and final monitor approval by the deputy attorney general among other things. We are recommending that prosecutors also document the process and reasons for monitor selection to avoid favoritism, and provide an audit trail for accountability and transparency, and Justice agreed with this recommendation.

Finally, in terms of monitor fees and responsibilities, while a couple of companies said their fees were high, others thought they were customary and were more concerned that monitors did more work than necessary and beyond the scope of the agreement, driving up costs.

Companies felt they had little leverage to fight these costs and so would like more help from Justice such as negotiating monitor responsibilities in the agreements, requiring upfront monitor work plans and budgets and periodically meeting with companies to discuss monitor activities.

Mr. Chairman, we are continuing to work on a number of these issues, including the need for additional guidance or improvements and the role of courts in this process, and plan to issue a final report this fall. That concludes my statement. I would be happy to answer any questions.

[The prepared statement of Ms. Larence follows:]

PREPARED STATEMENT OF EILEEN R. LARENCE

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

For Release on Delivery
Expected at 11:00 a.m. EDT
Thursday, June 25, 2009

CORPORATE CRIME

Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements

Statement of Eileen R. Larence, Director
Homeland Security and Justice

GAO-09-636T

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Accountability • Integrity • Reliability

Highlights

Highlights of GAO-09-636T, a testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

June 25, 2009

CORPORATE CRIME

Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements

Why GAO Did This Study

Recent cases of corporate fraud and mismanagement heighten the Department of Justice's (DOJ) need to appropriately punish and deter corporate crime. Recently, DOJ has made more use of deferred prosecution and non-prosecution agreements (DPAs and NPAs), in which prosecutors may require company reform, among other things, in exchange for deferring prosecution, and may also require companies to hire an independent monitor to oversee compliance. This testimony provides preliminary observations on (1) factors DOJ considers when deciding whether to enter into a DPA or NPA and setting the terms of the agreements, (2) methods DOJ uses to oversee companies' compliance, (3) processes by which monitors are selected, and (4) companies' perspectives regarding the costs and role of the monitor. It also includes the results of GAO's recently completed work on DOJ's efforts to document the monitor selection process (discussed in objective 3). GAO reviewed DOJ guidance and 57 of the 140 agreements negotiated from 1993 (when the first 2 were signed) through May 2009, and interviewed DOJ officials, officials from 17 companies, and 6 monitors. While not generalizable, these results provide insight into decisions about DPAs and NPAs.

What GAO Recommends

GAO recommends that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions. DOJ agreed with our recommendation.

View GAO-09-636T or key components. For more information, contact Eileen Larence at (202) 512-8777 or larencee@gao.gov.

What GAO Found

Prosecutors in all 13 DOJ offices with whom GAO spoke said that they based their decision on whether to enter into a DPA or NPA on DOJ's principles for prosecuting business organizations, particularly those related to the company's willingness to cooperate, collateral consequences to innocent parties, and remedial measures taken by the company. However, prosecutors differed in their willingness to use DPAs or NPAs. In addition, prosecutors' varying perceptions of what constitutes a DPA or NPA has led to inconsistencies in how the agreements are labeled. In March 2008, DOJ issued guidance defining DPAs and NPAs, but this guidance is not consistently followed, in part because not all DOJ offices view it as mandatory. DOJ plans to determine the need to take additional steps to require consistency in the use of the labels DPA and NPA. While DOJ and companies generally negotiated the terms of DPAs and NPAs—such as monetary payments and compliance requirements—DOJ also considered other factors in its decisions, such as monetary gains to the company as a result of the criminal misconduct.

To ensure that companies were complying with the terms of the DPAs and NPAs, DOJ employed several oversight mechanisms, including the use of independent monitors, coordination with regulatory agencies, and other means. Of the 57 agreements GAO reviewed, 26 required the company to hire, at its own expense, an independent monitor. In the remaining agreements, DOJ relied, among other things, on reports from regulatory agencies or from monitors hired by companies under separate agreements with these agencies, and company certifications of compliance.

For the DPAs and NPAs GAO reviewed, even though DOJ was not a party to the contracts between companies and monitors, DOJ typically selected the monitor, and its decisions were generally made collaboratively among DOJ and company officials. Monitor candidates were typically identified through DOJ or company officials' personal knowledge or recommendations from colleagues and associates. In March 2008, DOJ issued guidance stating that for monitor selection to be collaborative and merit-based, committees should consider the candidates and the selection must be approved by the Deputy Attorney General. However, because DOJ does not require documentation of the process used or the reasons for particular monitor selection decisions, it will be difficult for DOJ to validate whether its monitor selection guidance—which, in part, is intended to instill public confidence—is adhered to.

Some company officials GAO spoke with reported that they had little leverage to address concerns about the amount and scope of the monitors' work and, therefore, would like DOJ to assist them. GAO in its ongoing work will assess this and other issues about the use and oversight of DPAs and NPAs.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate in today's hearing to discuss the Department of Justice's (DOJ) use and oversight of deferred prosecution and non-prosecution agreements. According to DOJ, one of its chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. Recent high-profile cases of fraud and mismanagement in the financial services sector have heightened the need for the government to determine the most appropriate tools it can use to punish and deter corporate crime. Federal prosecutors continue to prosecute company executives and employees, as well as companies themselves, for crimes such as tax evasion, securities fraud, health care fraud, and bribery of foreign officials, among others. However, over the past decade, DOJ has recognized the potential harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior. The failure of the accounting firm Arthur Andersen, and the associated loss of thousands of jobs following its indictment and conviction for obstruction of justice for destroying Enron-related records,[1] has been offered as a prime example of the potentially harmful effects of criminally prosecuting a company. To avoid serious harm to innocent third parties, DOJ guidance allows prosecutors to negotiate agreements that require companies to institute or reform corporate ethics and compliance programs,[2] pay restitution to victims, and cooperate with ongoing investigations of individuals in exchange for prosecutors deferring the decision to prosecute. These types of agreements have been referred to as deferred prosecution (DPA) and non-prosecution (NPA) agreements. As part of these agreements, prosecutors may also require a company to hire, at its own expense, an independent monitor to oversee the company's compliance with the agreement. Based on our analysis of DOJ data, DOJ has made more frequent nse of DPAs and NPAs in recent years, entering into 3 agreements in 2002 compared to 41 agreements in 2007 and 22 agreements in 2008.

[1] The conviction was ultimately overturned by the Supreme Court. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). In a unanimous decision, the Court held that the jury instructions used to convict Arthur Andersen were impermissibly flawed. *Id.* at 705-07.

[2] The U.S. Sentencing Guidelines define a compliance and ethics program as "a program designed to prevent and detect criminal conduct. "U.S. Sentencing Guidelines Manual § 8B2.1 cmt. n.1.

DOJ views DPAs and NPAs as appropriate tools to use in cases where the goals of punishing and deterring criminal behavior, providing restitution to victims, and reforming otherwise law-abiding companies can be achieved without criminal prosecution. The use of these tools, however, is not without controversy. Some commentators view the use of DPAs and NPAs as encouraging disrespect for the law and failing to deter corporate crime. Others have suggested that the threat of an indictment gives prosecutors excessive power by which they can force companies to agree to highly unfavorable terms to avoid criminal prosecution.

Considering the balance that DOJ must achieve when determining the most appropriate way in which to address corporate misconduct, my testimony today includes preliminary observations on (1) the factors DOJ considers when deciding whether to enter into a DPA or NPA and setting the terms of the agreements, (2) the methods DOJ uses to oversee companies' compliance with DPAs and NPAs, (3) the process by which independent monitors are selected, and (4) companies' perspectives regarding the costs and responsibilities of the monitors. My comments are based on our ongoing review of DPAs and NPAs requested by you as well as the Chairman of the Senate Judiciary Committee, Patrick Leahy; the Chairman of the House Judiciary Committee, John Conyers; Congressman Frank Pallone, Jr.; Congressman Bill Pascrell, Jr.; and Congresswoman Linda T. Sanchez. The final results of this review will be issued later this year. My comments also include the results of our recently completed work related to DOJ's efforts in documenting the monitor selection process (which is discussed as part of objective three above).

To address our objectives, we reviewed DOJ guidance regarding the prosecution of business entities and the selection and use of independent monitors. To date, we also reviewed the terms of 57 of the 140 agreements we have identified that were negotiated from 1993 (when the first 2 were signed) through May 2009.[5] The specific terms we reviewed include the monetary penalty imposed, the duration of the agreement, the compliance program required, and the reporting requirements for the company, and, if applicable, the independent monitor. We discussed these 57 agreements with DOJ, and compared the processes that DOJ used when entering into

[5] When we issue our final report, we plan to have reviewed the terms of all DPAs and NPAs that, to our knowledge, had been executed since 1993. However, for the purposes of this testimony, we decided to review the terms of the 57 agreements we discussed with officials at the 13 DOJ offices we selected for our site visits and interviews. The criteria we used to select these offices, and thus the 57 agreements, are described later in the statement.

and overseeing these agreements with criteria in standards for internal control in the federal government relating to appropriate documentation of transactions[4] and prior GAO work that suggests documenting the reasons for selecting monitors avoids the appearance of favoritism.[5] We interviewed officials from 13 DOJ offices that are responsible for prosecuting criminal cases, including DOJ's Criminal Division and 12 U.S. Attorneys Offices. We selected the Criminal Division because it had negotiated the vast majority of agreements entered into by prosecutors at DOJ headquarters, and we selected 12 specific U.S. Attorneys Offices because they were the only ones that had negotiated at least 2 agreements, of which at least 1 had been completed. To date, we have also interviewed representatives of 17 of the 25 companies that signed DPAs or NPAs that met the following criteria: the agreement required the company to improve or institute an ethics or compliance program; the agreement had been completed; and we had discussed the agreement with DOJ.[6] Fifteen of these 25 companies were also required to hire an independent monitor, and, to date, we have interviewed 6 of these monitors. Since we determined which DOJ officials, company representatives, and monitors to interview based on a nonprobability sample, the information we obtained from these interviews is not generalizable to all DOJ litigating units and all companies and monitors involved in DPAs and NPAs. However, the interviews provided insights into the negotiation and implementation of DPAs and NPAs.

We conducted this performance audit from September 2008 to June 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objectives.

[4] GAO, *Internal Control: Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

[5] GAO, *Structured Settlements: The Department of Justice's Selection and Use of Annuity Brokers*, GAO/GGD-00-15 (Washington D.C.: Feb. 16, 2000).

[6] DOJ required 45 companies, as part of these agreements, to improve or institute an ethics or compliance program. As part of our ongoing review, we selected representatives from 25 of these companies to interview because the DPAs or NPAs these companies were involved in were completed, and these agreements were the same ones that were entered into by the DOJ offices we visited or interviewed by phone.

In summary, DOJ prosecutors with whom we spoke have based their decisions on whether to enter into a DPA or an NPA and setting the terms of these agreements on the Principles of Federal Prosecution of Business Organizations[7]—which includes guidance, for example, on factoring in a company's cooperation and collateral consequences that may result from prosecution—as well as input from companies and regulatory agencies and other factors. In addition, 10 of the 13 DOJ offices we included in our review have made efforts to be transparent in their decision making by issuing press releases that explain the reasons why they entered into these agreements. However, prosecutors differed in their willingness to use DPAs or NPAs. For instance, 3 of the 13 DOJ offices exclusively entered into DPAs, and a prosecutor from 1 of these offices asserted that entering into an NPA would be too lenient on the company. In addition, different perspectives among DOJ officials regarding the definition of DPAs and NPAs has led to inconsistent labeling of the agreements. For example, DOJ offices differ in whether they consistently file agreements they refer to as DPAs and the associated criminal charges in court, a key distinguishing factor that is of concern to companies which prefer to enter into NPAs because formal charges are not filed with the court. DOJ issued guidance in March 2008 that defined DPAs as agreements that are filed in court and NPAs as agreements that are not. However, of the 27 DPAs and NPAs entered into since DOJ issued this guidance, 3 are not labeled in accordance with the guidance and 7 are labeled as something other than DPA or NPA; one reason for this is that not all DOJ offices view this guidance as mandatory. DOJ plans to determine whether there is a need to take additional steps to require consistency in the use of labels across offices. We will continue to assess prosecutors' willingness to use DPAs or NPAs as part of our ongoing work.

Furthermore, to help ensure that companies were complying with the terms of the DPAs and NPAs, DOJ employed several oversight mechanisms, including requiring companies to hire an independent monitor, who in most cases would periodically report to DOJ on the company's progress; or relying upon a monitor who was already hired by the company as part of a civil or administrative agreement reached with a federal regulatory agency. Although DOJ was not a party to the contracts between companies and monitors, DOJ generally took the lead in selecting and approving the monitors. DOJ's process for selecting monitors typically

[7] U.S. Department of Justice, *United States Attorneys' Manual* § 9-28.000, Principles of Federal Prosecution of Business Organizations.

involved collaboration among DOJ and company officials, and monitor candidates were generally identified as a result of these officials' personal knowledge of individuals whose reputations suggested they would be effective monitors, or recommendations given to these officials by colleagues and professional associates who were familiar with monitorship requirements. DOJ issued guidance in March 2008 to help ensure that the monitor selection process is collaborative and the selection is based on merit; this guidance also requires prosecutors to obtain Deputy Attorney General approval for the monitor selection. While the guidance established policies for the selection of independent monitors, it does not require documentation of the process used or the reasons for particular monitor selection decisions. Internal control standards require that significant events, which could include how and why monitors are selected, be clearly documented and the documentation be readily available for examination. In addition, our prior work suggests that documenting the reasons for selecting a particular monitor avoids the appearance of favoritism.[8] Without requiring documentation, it will be difficult for DOJ to validate whether its monitors have been selected in a manner that is consistent with the guidance. Moreover, documenting its process and reasons for selecting monitors could enhance DOJ's ability to instill public confidence in the monitor selection process.

While most of the companies we interviewed were satisfied with the monitor selections, officials from 6 of the 12 companies we have spoken with thus far that were required to hire a monitor took issue with the scope of the monitor's work, which seemed too expansive, thus making the overall cost of the monitorship higher than the companies expected. Four of these companies did not feel as if they had enough leverage to address this issue with the monitors because, for example, the companies felt that the monitors' roles and responsibilities were not always clearly defined in the DPA or NPA, thus limiting the basis on which companies could assert that the monitor had expanded the scope of work. Some companies preferred that DOJ assist them in addressing any concerns they had about monitors. We have not yet been able to obtain the perspectives of DOJ and monitors regarding these concerns, but plan to do so in our ongoing review.

To enhance DOJ's ability to ensure that monitors are selected according to DOJ's guidelines, we recommend that the Deputy Attorney General adopt

[8] GAO/GGD-00-45.

internal procedures to document both the process used and reasons for monitor selection decisions. We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, on June 18, 2008, DOJ's liaison stated that DOJ agreed with our recommendation. DOJ also provided technical comments, which we incorporated into the statement, as appropriate.

DOJ Based the Use and Terms of DPAs and NPAs on Principles of Federal Prosecution and Other Factors, but Prosecutors' Different Perspectives on DPAs and NPAs Led to Inconsistent Use and Labeling

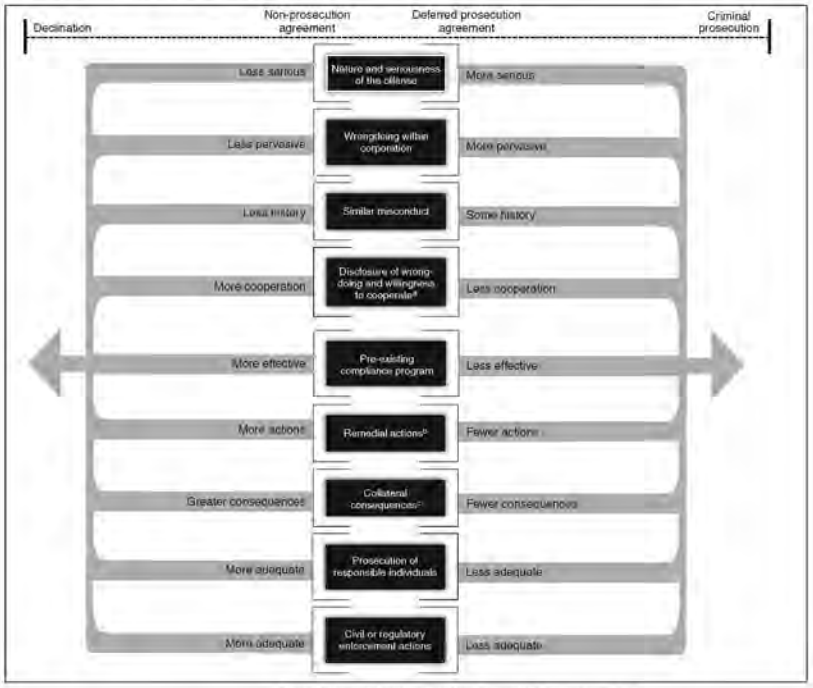
DOJ prosecutors cited the Principles of Federal Prosecution of Business Organizations as a major factor in their decision on entering into a DPA or an NPA, and considered other factors, such as the Federal Sentencing Guidelines, in determining the terms of these agreements. Prosecutors also said that they generally negotiated these decisions with companies. However, in making these decisions, prosecutors differed in their willingness to use DPAs or NPAs. In addition, prosecutors' different perspectives on the definitions of DPAs and NPAs led to inconsistencies in how they labeled the agreements. DOJ is continuing to determine the need to require consistency in the use of the labels DPA and NPA.

DOJ Prosecutors Cited Principles of Federal Prosecution as Influential in Their Decision on Entering into a DPA or NPA but Were Inconsistent in their Use and Labeling of Agreements

Prosecutors in all 13 DOJ offices we included in our review consistently said that they based their decision on whether to enter into a DPA or NPA rather than prosecute the company or decline to do so on the Principles of Federal Prosecution of Business Organizations. First issued in 1999, these principles are DOJ's guidance to federal prosecutors on investigating, charging, and negotiating a plea or other agreement with respect to corporate crimes. The principles instruct prosecutors to consider nine factors when determining how to treat a corporation suspected of criminal misconduct and provide a number of actions prosecutors may take, including declining to prosecute, entering into a DPA or NPA, or criminally prosecuting, the corporation. The principles also include guidance on when the nine factors most appropriately apply. The factors, and examples of the manner in which they influence prosecutors' choice of action, are shown in figure 1 below.[9]

[9] GAO analysis based on the Principles of Federal Prosecution of Business Organizations. The examples given are illustrative of the manner in which prosecutors consider each factor, and the circumstances of each case will determine the relevance and weight placed on each factor.

Figure 1: How the Principles of Federal Prosecution of Business Organizations Influence Prosecutors' Decisions to Decline Prosecution, Enter into a DPA or NPA, or Prosecute



Source: GAO analysis of DOJ's Principles of Federal Prosecution of Business Organizations.

[a]Willingness to cooperate includes cooperation in the government's investigation of the company's agents.

[9]Remedial actions include efforts to implement or improve an effective compliance program, pay restitution, or discipline wrongdoers, among other things.

[9]Collateral consequences include disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, and any impact on the public arising from prosecution.

While the prosecutors with whom we spoke said that many of these factors may have influenced their decision on entering into a DPA or NPA in each case, they most frequently cited the company's cooperation with the investigation, the collateral consequences of a criminal prosecution, and any remedial measures the company had taken or planned to take as most important in their decision on entering into a DPA or NPA. For instance, one prosecutor told us that the company's cooperation is an important factor in cases involving violations of the Foreign Corrupt Practices Act[10] because obtaining the evidence from foreign countries in these types of cases is a cumbersome and lengthy process that could take up to 10 years. However, with the company's cooperation, which may entail assisting DOJ in tracing bribe payments through multiple overseas accounts, DOJ may be able to obtain the evidence it needs in a matter of weeks. With regard to collateral consequences, some DOJ prosecutors explained, for example, that the potential harm that prosecution and conviction of health care companies can have on innocent third parties may be a key factor in their decision on entering into a DPA or NPA with these kinds of companies. Federal law provides for health care companies convicted of certain crimes to be debarred from—or no longer eligible to participate in—federal health care programs.[11] Prosecutors in one office said that they chose to enter into DPAs and an NPA simultaneously with five orthopedic device companies that provided kickbacks to physicians because, combined, these companies comprised the vast majority of the market for hip and knee replacements; therefore, conviction and debarment of these companies would have severely limited doctor and patient access to replacement hips and knees. In terms of remedial measures, prosecutors cited enhancements companies made to their

[10] 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff.

[11] The Medicare and Medicaid Patients and Program Protection Act requires the Secretary of Health and Human Services (HHS) to exclude—or debar—individuals or entities convicted of certain program-related crimes or patient abuse, or convicted of certain felonies related to health care fraud or a controlled substance, from participating in any federal health care program. 42 U.S.C. § 1320a-7. The act also permits the secretary to exclude, at the secretary's discretion, individuals or entities convicted of other offenses, including those related to fraud, obstruction of an investigation, or paying or receiving kick-backs, among others. *Id.*

compliance programs, the termination of employees responsible for the wrongdoing, and the company's willingness to make payments to the victims of the crime as influential in their decision on entering into a DPA or NPA, rather than prosecute.

Our preliminary analysis suggests that officials from many of the DOJ offices we met with have made efforts to be transparent about the basis for their decisions on entering into DPAs or NPAs. For example, 10 of the 13 DOJ offices issued press releases explaining how they applied the Principles of Federal Prosecution of Business Organizations when deciding whether to enter into these agreements.[12] According to an official in the Criminal Division's Fraud section, its policy is to issue press releases upon entering into DPAs and NPAs with companies related to the Foreign Corrupt Practices Act, which helps to increase transparency. As part of our ongoing review, we will determine the extent to which DOJ offices have additional policies—including supervisory review and documentation of the reasons for their decisions to enter into a DPA or NPA—that promote transparency and accountability regarding these agreements.

DOJ's reliance on the Principles of Federal Prosecution of Business Organizations was also apparent to many of the companies involved in the DPAs and NPAs. Ten of the 17 company officials with whom we spoke as of June 5, 2009, said that they were aware that DOJ based its decision on whether to enter into a DPA or NPA on the factors articulated in the Principles of Federal Prosecution of Business Organizations.[13] Moreover, officials from 6 of these 10 companies reported making presentations to DOJ based on the nine factors in order to influence prosecutors' decisions on using agreements in their cases, although companies generally reported that the prosecutors made the ultimate decision about whether to enter into a DPA or an NPA.

DOJ prosecutors also made decisions about which of these agreements—DPA versus NPA—the office would enter into. A commonly accepted

[12] Three additional DOJ offices issued press releases announcing that they had entered into a DPA or NPA with a company, but the press releases did not discuss DOJ's reasons for entering into the agreements.

[13] Three of these 17 companies did not provide information about their understanding of DOJ's consideration of the Principles of Federal Prosecution of Business Organizations in its decision whether to enter into a DPA or NPA or prosecute the company.

distinction between these two types of agreements is that a DPA involves the filing of a charging document with the court, while, for an NPA, charges are not filed with the court. Officials from 12 of the 17 companies with whom we spoke preferred an NPA, largely because they viewed NPAs as more advantageous from a public relations perspective for the company. Some of these officials explained that, because a charge is not filed in court in association with an NPA, companies are able to report that they were not charged or prosecuted in the case; a DPA, on the other hand, involves the filing of charges in court, which can result in greater negative publicity for the company.

In choosing between a DPA and an NPA, prosecutors most frequently reported considering the same factors they did when deciding whether to enter into an agreement at all—namely, cooperation, collateral consequences, and the companies' remedial actions. For example, prosecutors at 6 of the 13 DOJ offices said that they considered the company's cooperation in their investigation when deciding between a DPA and an NPA. Prosecutors from one DOJ office said that once the company learned it was the target of the office's investigation, its lawyers immediately called the office seeking to cooperate and continued to cooperate extensively throughout the office's ensuing 3-year investigation, remaining in daily contact with the office and assisting in its investigation. As a result, the DOJ office chose to enter into an NPA rather than a DPA with the company. Not all of the 13 DOJ offices we included in our review reported entering into both types of agreements. For instance, 3 of the 13 DOJ offices we included in our study, including one section of the Criminal Division, exclusively entered into DPAs with companies. A prosecutor from one of these offices said that he did not consider entering into NPAs in any of its cases because he viewed NPAs as too lenient on the company. We will continue to assess this issue as part of our ongoing work.

Officials from 11 of the 17 companies with whom we spoke said that the decision between a DPA and an NPA was exclusively made by DOJ, and officials from 4 of these companies reported that DOJ's reasons for choosing between a DPA and an NPA were not made clear. On the other hand, officials from 4 other companies said that the decision was a result of negotiations between DOJ and the company.[14] Companies' opinions

[14] Two of the 17 companies did not discuss DOJ's decision whether to enter into a DPA versus an NPA.

varied on whether guidelines for choosing between a DPA and an NPA would be beneficial. Officials from 5 of the 17 companies we interviewed said that such guidelines would assist the companies in negotiating between a DPA and an NPA with DOJ, whereas officials from three companies believed that guidelines would make DOJ's decision between a DPA and an NPA more transparent to the company. Officials from 6 companies cited reasons why guidelines may not be useful, such as concerns that such guidelines may not address the unique circumstances of each case, would not be binding on DOJ prosecutors, and were not necessary because DOJ's rationale for choosing a DPA versus an NPA was made clear to the company.[15] Prosecutors at 4 of the 13 offices we spoke with stated that these guidelines would not be beneficial because they need the flexibility to choose between a DPA and an NPA based on the unique circumstances of each case.

In addition, prosecutors differ in whether they called their agreements DPAs and NPAs. For example, prosecutors from 2 of the 13 offices with whom we spoke told us that they are reluctant to file agreements in court because of their understanding that some judges do not want the case to be open on their dockets for the length of the deferral period.[16] While prosecutors from one of these offices called the agreements it did not file in court NPAs, the other office still labeled its agreements DPAs because it viewed DPAs as agreements in which the company admits guilt, regardless of whether charges are filed in court. Recognizing the inconsistent use of the labels DPA and NPA, in March 2008, then Acting Deputy Attorney General Craig Morford issued a memorandum—also known as the "Morford Memo"—which stated that a DPA is typically predicated on the filing of both a formal charging document and the agreement with the appropriate court, while an NPA is an agreement maintained by the parties, rather than being filed with the court. The Morford Memo also states that clear and consistent use of these terms will help DOJ more effectively identify and share best practices and track the use of DPAs and

[15] Officials from the remaining four companies did not provide opinions on the usefulness of such guidelines. An official from one company is counted in both the count of company officials who believed that guidelines were useful and not useful because the official cited both advantages and disadvantages to the guidelines.

[16] Under 18 U.S.C. § 3161(h)(2), courts have the authority to approve the deferral of a prosecution pursuant to a written agreement between the government and the defendant. The court's approval of such an agreement tolls the period during which an indictment must be filed or a trial must commence, and the criminal charges remain on the court's docket for the deferral period.

NPAs.[17] However, based on our analysis of the agreements entered into after DOJ issued this guidance, not all the agreements were labeled in accordance with the definitions provided. Of the 27 agreements entered into after DOJ issued this guidance, 20 were labeled as DPAs or NPAs in the agreement or the press release announcing the agreement. Of these 20 agreements, 3 were not labeled in accordance with the definitions in the guidance.[18] The remaining 7 agreements were labeled as agreement, case disposition agreement, or pretrial diversion agreement. One reason for the differences in the manner in which agreements are labeled is that not all prosecutors believe that the use of the definitions of DPAs and NPAs in the guidance is mandatory. For instance, a prosecutor at one office told us that the office believed that the definitions were provided only for the purposes of reading the Morford Memo and not as guidance for labeling DPAs and NPAs going forward, while a prosecutor at another office believed that the Morford Memo was intended as mandatory guidance on the use of the definitions of DPAs and NPAs in the future. According to the Office of the Deputy Attorney General, DOJ intends for the definitions in the Morford Memo to be mandatory and followed consistently by prosecutors for the purpose of internal reporting and tracking of these agreements. However, DOJ does not intend for the definitions to inhibit prosecutors' ability to externally label these agreements in accordance with the unique circumstances of a particular case or the practices and preferences of a particular DOJ office, company, or judge. For instance, the company may prefer that an agreement be labeled as "agreement" rather than "deferred prosecution agreement" because companies believe this label is less severe. Thus, the prosecutor may negotiate with the company over the external label. Regardless of the external label on the agreement, DOJ intends for prosecutors to track the agreement either as a DPA or NPA in accordance with Morford Memo definitions. In addition,

[17] *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations,* (March 7, 2008).

[18] In addition, for 2 of the remaining 17 agreements, it is not clear how DOJ intends for the agreements to be labeled. In these cases, the companies were indicted and the charges were dismissed pursuant to the agreements; however, the agreements were not filed with the court. As the Morford Memo defines DPAs and NPAs based on two elements: (1) the filing of a formal charging document, which was done in these cases, and (2) the filing of the agreement with the court, which was not done in these cases, it is unclear whether these agreements should be labeled as DPAs or NPAs. In other cases where agreements were executed after an indictment was filed and the charges were dismissed, prosecutors have filed the agreements with the court. According to the Senior Counsel to the Deputy Attorney General, DOJ has not yet assessed how it intends for such agreements to be labeled.

DOJ is aware that there may be agreements that share some of the elements of DPAs and NPAs but may not readily fit the Morford Memo definitions—for instance, the Office of the Deputy Attorney General explained that in one case the company had already been indicted on some of the criminal charges associated with the agreement prior to the agreement being reached, but had not been indicted on other charges associated with the agreement, and therefore it was not clear whether the agreement fit the definition of a DPA—in which charges are filed—or an NPA—in which charges are not filed. Taking into account external circumstances such as these, DOJ plans to determine whether there is a need to take additional steps to require the use of the definitions, to ensure consistency in the use of labels across offices.

DOJ Considers Input from Company Negotiations and Other Factors, such as the Sentencing Guidelines, When Setting the Terms of DPAs and NPAs

Prosecutors in 11 of the 13 offices and officials from 14 of the 17 companies with whom we spoke reported that they negotiated at least one of the terms in their DPAs and NPAs, including monetary payments to victims or the government, the duration of the agreement, or compliance program requirements, as well as additional terms, such as monetary donations to foundations or educational institutions.[19] Furthermore, according to prosecutors in all 13 DOJ offices, they considered other factors, such as guidance provided in the Federal Sentencing Guidelines[20]

[19] We conducted content analysis of our interviews to identify the factors considered in setting the terms and whether negotiations occurred. In both DOJ and company interviews, some officials were not able to discuss the process for setting each specific term, or did not provide responses. The numbers presented represent those officials who specifically reported information on the process they used in setting the terms of the DPA or NPA.

[20] Pursuant to the Sentencing Reform Act of 1984, the *United States Sentencing Guidelines Manual* ("Sentencing Guidelines") was developed by the United States Sentencing Commission, an independent body within the judicial branch of the federal government charged with promulgating guidelines for federal sentencing. 28 U.S.C. § 994. In 2005, the Supreme Court found the Sentencing Guidelines, which had previously been binding for federal judges to follow in sentencing criminal defendants, to be advisory in nature. *See United States* v. *Booker*, 543 U.S. 220 (2005). Regardless of their advisory nature, judges are still required to calculate properly and consider the Sentencing Guidelines and other sentencing goals, and sentences properly calculated within the guidelines range are entitled to a presumption of reasonableness upon appellate review. *See* 18 U.S.C. § 3553(a); *United States v. Rita*, 551 347-48 (2007); *Booker*, 543 U.S. at 264; *see also Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 596 (2007) (stating that "the Guidelines should be the starting point and the initial benchmark"). The Sentencing Guidelines contain promulgated sentencing guidelines, policy statements, and commentary applicable to business organizations, such as ranges and considerations for applying fines and requirements for an effective compliance and ethics program. *See* U.S. Sentencing Guidelines Manual §§ 8B21, 8C1.1-4.11.

or the terms included in other DPAs or NPAs as examples, when determining the terms of their agreements.

Monetary payments: Of the 57 DPAs and NPAs we reviewed, 45 required monetary payments—which may include restitution to victims of the crime, forfeiture of the proceeds of the crime, and monetary penalties imposed by DOJ—ranging from $30,000 to $615 million. While the remaining 12 agreements did not require such payments, in 3 agreements the companies were required to make payments to organizations or individuals that were not directly affected by the crime;[21] for 7 agreements the company had already agreed to make payments as part of a separate agreement with another agency or DOJ division, such as the Securities and Exchange Commission or DOJ's Civil Division; and for 1 agreement, two of the company's subsidiaries had already agreed to make monetary payments as part of a plea agreement and a DPA. In the remaining agreement, the company was not required to make a payment and did not to enter into a civil settlement in order to obtain release from its civil liability in the case. In setting the payment amounts in DPAs and NPAs, prosecutors reported that they considered the following: (1) the section of the Federal Sentencing Guidelines on determining fines for business organizations, which includes consideration of the seriousness of the offense, culpability of the organization, and the company's cooperation, among other factors; (2) monetary gains to the company or losses to its victims as a result of its crime; and (3) the company's ability to pay. Prosecutors in 6 of the 12 offices with whom we spoke whose DPAs and NPAs included monetary payments reported that they negotiated the monetary payments with the other party. [22] While representatives of 8 of the 13 companies we interviewed that were required to make monetary payments told us that they were able to negotiate the monetary payment with DOJ, representatives of 4 companies told us that they were not able

[21] Payments or donations required to be paid to charitable, educational, community, or other organizations or individuals that were not victims of the crime or do not provide services to redress the harm caused by the crime are classified and discussed in this report as extraordinary restitution and, although they involve monetary payments, are not included in the count of agreements with monetary payments reported here.

[22] None of the DPAs or NPAs entered into by one office with which we spoke included monetary payments.

to negotiate the payment.[23] Representatives from 2 of these companies did not express concern over the lack of negotiation—1 said that DOJ's reasons for setting the payment were made clear to the company, while the other said that the company had no reason to question the payment figure DOJ set. One of these companies reported that DOJ did not provide its rationale for the monetary payment, and the remaining company did not provide opinions about the process by which the payment was set.

Duration: The durations of DPAs and NPAs have ranged from 3 months to 5 years.[24] Prosecutors at 9 of the 13 DOJ offices with whom we spoke based the duration of the agreement on the amount of time they believed was necessary for the company to correct the problems underlying the criminal conduct. For instance, one prosecutor said that the company was replacing its old computer billing system, which had overbilled a federal agency, resulting in the criminal conduct underlying the DPA. The prosecutor set the duration at 27 months in order to allow the company to install the new billing system and ensure it was functioning appropriately, and not continuing to overbill the agency. Prosecutors at 5 of the 13 offices we visited also reported that they negotiated with companies over the duration of the agreement.[25] On the other hand, companies that had agreements with 5 other DOJ offices told us that they did not negotiate the duration, although none of these companies expressed concern over the duration of the agreement. For instance, an official from one of these companies said that the company would have preferred a shorter duration, but was satisfied with the duration DOJ set. Prosecutors in 3 DOJ offices also told us that they considered the duration of other DPAs or NPAs as examples when setting the duration of their agreements.

Compliance program requirements: Forty-five of the 57 DPAs and NPAs we reviewed included requirements that the company improve or enhance its compliance program, while 12 did not include this type of requirement. According to prosecutors in 6 of the 13 DOJ offices we met

[23] Officials from the two remaining companies did not discuss DOJ's process for setting monetary payments in the DPA or NPA. Four of the companies we interviewed were not required to make payments to the government, to compensate victims of the crime, or to forfeit ill-gotten gains as a result of the crime, and therefore did not discuss DOJ's process for setting monetary payments in the DPA or NPA.

[24] One of the 57 agreements we reviewed did not specify the duration.

[25] Prosecutors at the remaining eight DOJ offices told us that they could not recall the process by which the duration of the agreement was determined or we did not obtain a response from them on this issue.

with, they required companies to enhance or implement a compliance program in order to reform the company, prevent further misconduct, or help establish and publicize a compliance program standard for the industry.[25] In deciding not to include compliance requirements, prosecutors reported that they considered whether the company that committed the wrongdoing could engage in such criminal conduct again. For instance, one prosecutor said that a compliance program was not required as part of an agreement because the company's violations occurred during its participation in the United Nation's Oil-for-Food Program, which was no longer in existence when the agreement was signed. In addition, prosecutors were aware that 2 of the companies involved in DPAs or NPAs that did not include compliance program requirements had entered into agreements with other regulatory agencies that did include such requirements. When developing compliance requirements in DPAs and NPAs, prosecutors most commonly (8 of 13 offices) worked with regulatory agencies with relevant jurisdiction over the companies—such as Immigration and Customs Enforcement for issues related to the hiring of illegal immigrants, the Environmental Protection Agency for environmental crimes, or the Securities and Exchange Commission for issues involving accounting and financial fraud—to develop the compliance requirements included in the agreement. Several prosecutors and company officials also reported that they negotiated over the compliance requirements in the DPA or NPA. For instance, one company official said that DOJ initially developed the compliance program requirements, but when the company raised concerns about the practicality and effectiveness of the requirements, DOJ worked with the company to revise them. In the end, the official felt that the company's enhanced program was a best practice in the industry.

Extraordinary restitution: DPAs and NPAs have also included additional terms, such as payments or services to organizations or individuals not directly affected by the crime; these payments are sometimes referred to as extraordinary restitution. Of the 57 DPAs and NPAs we reviewed, 4 included such terms. Prosecutors and companies with whom we spoke about these provisions generally reported that the provisions were determined through negotiations between the two parties. In addition, these prosecutors were supportive of including extraordinary restitution provisions in DPAs and NPAs because, for example, they

[25] Prosecutors in the remaining seven DOJ offices did not comment specifically on why they included compliance program requirements in DPAs or NPAs.

believe such terms can help improve the availability of services in the community and prevent similar misconduct from occurring in the future, not just within the company, but in a larger context. For instance, 1 DPA required the organization to provide uncompensated medical care to the state's residents, while an NPA required the company to provide funding for a not-for-profit organization to support projects designed to improve the quality and affordability of health care services in the state. Another DPA required a company that had not complied with water treatment regulations to provide an endowment of $1 million to the U.S. Coast Guard Academy for the purposes of enhancing the study of maritime environmental enforcement, with an emphasis on compliance, enforcement, and ethics issues. In May 2008, DOJ issued guidance prohibiting the use of terms requiring payments to charitable, educational, community, or other organizations or individuals that are not the victims of the criminal activity or are not providing services to redress the harm caused by the criminal conduct because the use of such terms could create actual or perceived conflicts of interest or other ethical issues. Based on our preliminary analysis, none of the 25 DPAs and NPAs that were entered into since this guidance was issued required companies to make payments or perform services for individuals or organizations that were not directly harmed by the crime.[57]

While most company officials stated that they had input into, or were able to negotiate over, whether to enter into a DPA or NPA and the terms of the agreements, officials from nine of these companies reported that DOJ had greater power in the negotiations than the company because, for instance, if the negotiations were not successful, DOJ could have proceeded with prosecution. However, prosecutors at 4 of the 13 offices with whom we spoke noted that if companies had concerns about the terms of their DPAs

[57] Although three agreements included payments to third parties to fund environmental projects, enforcement efforts, and initiatives, they appear to be encompassed by the exception for the use of community service as a condition of probation for environmental prosecutions, pursuant to guidance from DOJ's Environmental and Natural Resources Division. *See* U.S. Department of Justice, *United States Attorneys' Manual* § 9-16.325, Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements, and "Extraordinary Restitution." We will review this guidance to understand the nature of these payments. DPAs and NPAs have also included additional terms other than the ones discussed in this testimony, such as the provision that if the company complies with the agreement, not only would the specific DOJ office that entered into the agreement not prosecute the company, but the company would not be prosecuted by any DOJ office; or a provision that the company would conduct public training workshops throughout the state. As part of our ongoing work, we will assess the extent to which these additional terms were included in DPAs and NPAs.

or NPAs, they could express them to their office, or appeal them to a higher level within DOJ. Representatives from six companies expressed reluctance to appeal any concerns they had with the terms of the agreement. Officials from two of these companies explained that appealing to a higher level in DOJ could negatively affect their interactions with the prosecutors involved in the case. On the other hand, officials from four companies told us that they would have been comfortable appealing the terms, if needed.[28] As part of our ongoing review, we will continue to assess the extent of the companies' role in setting the terms of the agreements and obtain DOJ's perspective on this issue.

DOJ Oversaw Companies' Compliance through the Use of Independent Monitors, Coordination with Regulatory Agencies, and Other Means

In 26 of the 57 DPAs or NPAs we have reviewed to date, prosecutors required that the company hire, at its own expense, an independent monitor to assist the company in establishing a compliance program, review the effectiveness of a company's internal control measures, and otherwise meet the terms of the agreements. In the remaining cases, DOJ coordinated with the relevant regulatory agency already monitoring or overseeing the company, or used other means, such as requiring companies to certify their compliance, to ensure the terms were met.[29]

When deciding whether a monitor was needed to help oversee the development or operations of a company's compliance program, DOJ considered factors such as the availability of DOJ resources for this oversight, the level of expertise among DOJ prosecutors to monitor compliance in more technical or complex areas, and existing regulatory oversight.[30] Of the 13 DOJ offices we met with, 9 utilized monitors.

[28] Three additional companies did not believe an appeals process was available to them. We did not discuss the option of appealing the terms of the agreement with the remaining five companies. One company is counted twice because the official would have been comfortable appealing to the U.S. Attorney, but expressed reluctance to appeal concerns with the agreement to DOJ.

[29] One agreement required the company to retain the services of its outside counsel as a non-independent compliance consultant for the duration of the agreement. The responsibilities of the consultant were similar to those of the independent monitors required in other agreements, and the consultant reported directly to DOJ, but we did not include this agreement in our count of agreements with independent monitors.

[30] The Morford Memo states that monitors 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. In addition, the guidance requires that—prior to executing an agreement that includes a monitor—prosecutors must, at a minimum, notify the appropriate U.S. Attorney or Department Component Head.

Prosecutors in four of these nine offices cited as a reason for requiring an independent monitor the limited time and resources their offices had to oversee a company's compliance program, make appropriate recommendations, and reform the company's compliance behavior, whereas monitors often have an entire staff available to them to perform these activities. Prosecutors in five of the nine DOJ offices we met with that had utilized monitors, cited as a reason for requiring an independent monitor the limited expertise the office had in overseeing company compliance in a particular area of misconduct. For example, prosecutors in one office stated that part of the company's wrongdoing dealt with commodities trading, and while they did not have this background, the monitor selected by the office had commodities trading experts on his staff. Other prosecutors cited the need for technical expertise regarding misconduct in a particular geographic region to oversee company compliance effectively—resources and skills which DOJ prosecutors did not have—as the reason to require that a company hire a monitor.

In nearly all these agreements, the monitor was required to file written reports with DOJ prosecutors.[31] The frequency of reporting to DOJ prosecutors varied by agreement, with 12 monitors required to report every 3 or 4 months, 3 monitors required to file semiannual reports, 9 monitors required to file annual reports or an initial report and a final report, 1 monitor required to report within 120 days of entering into the agreement, and 1 monitor required to report within 6 months and then at an unspecified frequency until the end of the agreement. For two of the three agreements overseen by an independent monitor where the agreement did not specifically require written reports, the prosecutors we spoke with said that they typically met frequently with the monitor themselves to discuss the company's progress towards fulfilling the agreements.[32] We have not assessed whether the monitors' reports were filed in a timely fashion or covered the elements required by the

[31] The Morford Memo advises U.S. Attorney Offices and other DOJ litigation divisions that it may be appropriate for the monitor to report in writing periodically to the government and the company regarding the monitor's activities and the company's compliance with the agreement, but does not require written reports nor does it specify the frequency of reporting. The Morford Memo requires, however, that the monitor have discretion to communicate with the government as he or she deems appropriate.

[32] Prosecutors involved in one of these two agreements said that they also received written reports from the monitor. Prosecutors involved in the remaining agreement did not provide information on whether the monitor had submitted reports or the extent of DOJ communication with the monitor.

agreements, but plan to obtain information on monitor reporting as part of our ongoing review.

In one instance, the district court judge was responsible for reviewing reports filed with federal prosecutors by the independent monitor because, in that district, the office typically involved the court in the selection of the independent monitor, and the judge had issued an order requiring quarterly reporting to the court. We are in the process of collecting information from federal judges who have approved DPAs and NPAs to determine the extent to which judges received monitor reports, or assessments of these reports provided by DOJ, in their oversight of DPAs.

In 18 of the 57 agreements we reviewed to date, there was a requirement for companies to make improvements to existing ethics and compliance programs or implement new programs, but there was no requirement for companies to hire an independent monitor to review the effectiveness of these programs or the companies' compliance with the terms of the agreement. In 6 cases, the company had signed a civil or administrative agreement with a federal regulatory agency as part of a settlement related to the underlying criminal misconduct, which required the company to hire a monitor or examiner. In such cases, DOJ officials said that they depended on the reports of the regulatory monitors to assure themselves of companies' compliance in part to avoid unnecessary duplication. In the other 12 cases, where the company had not signed a settlement agreement with a regulatory agency requiring an independent monitor, DOJ officials stated that they typically depended on the regulatory agency to inform them if, in the course of its regulatory oversight, the agency discovered the company was violating any of the provisions of the agreement. For example, in the 3 DPAs we reviewed where financial institutions failed to maintain effective anti-money laundering programs, DOJ prosecutors said that they communicated frequently with financial regulators, reviewed reports submitted to the regulators, and spoke to the regulators before the agreements were completed.

For the remaining 12 of the 57 agreements that did not require companies to improve or expand ethics and compliance programs, DOJ offices conducted oversight through various mechanisms, including:

- Assuring that monetary penalties or restitution payments were paid in a timely manner. For example, an accounting firm agreed in its DPA to make restitution payments to a fund established to repay wronged investors, and to pay an administrator to administer the fund. The administrator provided

reports to the office on the names of victims that received payments from the fund, and the amount received.

- Assuring that the company cooperated with DOJ in continuing investigations, including responding to information requests from federal prosecutors. For example, an energy trading company in a DPA with one office agreed to continue to cooperate with federal prosecutors by providing information relevant to ongoing investigations in the energy industry.
- Requiring the company to certify that it had followed certain requirements in the agreement. For example, one pharmaceutical company was required to certify that it had not filled prescriptions for off-label uses of one of its drugs. In that case, the prosecutors stated that it would be easy to examine the company's records at the end of the agreement to determine if they were accurate. They stated that the individual company executives had a strong incentive to comply, since they could be individually prosecuted for perjury for falsely certifying compliance.

Prosecutors We Contacted Varied in the Extent to which They Involved Companies in the Monitor Selection Process, and DOJ Does Not Require Documentation of the Process and Reasons for Selecting Monitors, Making It Difficult to Determine whether Monitor Selection Guidance Is Followed

We reviewed 26 agreements that required the company to hire a monitor. Although DOJ was not a party to the contracts between companies and monitors, DOJ generally took the lead in approving the monitors. Specifically, according to officials in the nine DOJ offices we contacted that entered into DPAs and NPAs that required monitors, DOJ had the final say in selecting the monitor for all but one of these agreements. However, according to these officials, the monitors were not selected by any one individual; rather, the decision was made among several DOJ officials and, in most instances, companies were able to provide input to DOJ on who the monitor should be, although the extent of company involvement varied.[33]

- For 12 of the agreements we reviewed, DOJ prosecutors said that the companies proposed a single monitor or a list of several monitors from which DOJ could choose. In all of these cases, DOJ officials said they were able to select an appropriate monitor for the DPA or NPA based on the company's suggestions.[34]
- For three of the agreements we reviewed, DOJ prosecutors said that they and the company developed separate lists of monitor candidates, shared their lists with one another, and worked together to choose the monitor.
- For seven of these agreements, DOJ prosecutors said that they chose the monitor. For five of the seven agreements, according to DOJ officials, the prosecutors selected the monitors and later provided the companies with the opportunity to meet with the selected individual. According to the prosecutors, they gave companies the option to object to DOJ's monitor selection, but none of the companies did so. However, our preliminary work suggests that at least one company reported that they did not have this opportunity. For one of these agreements, DOJ officials said that they sought the companies' input on monitor qualifications before making their selection. For another of these agreements, it was unclear whether the company had any discussion with DOJ regarding monitor qualifications before DOJ selected the monitor.[35]

[33] Representatives from 7 of the 10 companies we interviewed that had monitors confirmed that they had some input in monitor selection. Representatives from the 3 remaining companies said they were not involved in monitor selection.

[34] In two cases, the monitor has not yet been selected.

[35] In one agreement, the company selected the monitor with no involvement from DOJ. Prosecutors involved in the three remaining agreements did not provide information on the extent of company involvement in the monitor selection process.

For the agreements we reviewed where DOJ officials identified monitor candidates, the selection processes employed across these offices were similar. DOJ officials generally stated that in these instances, they identified monitor candidates based on their personal knowledge of individuals whose reputations suggest they would be effective monitors, or through recommendations from colleagues or professional associates who were familiar with requirements of a monitorship. After identifying several candidates, the prosecutors established a committee, which generally consisted of individuals such as the prosecutors involved in the case, the DOJ office section chief, and sometimes the Chief Assistant U.S. Attorney or a Deputy U.S. Attorney. The committees were responsible for evaluating the candidates and selecting a monitor. Prosecutors said they evaluated candidates based on whether they had any conflicts of interest with the company and their qualifications and expertise in a particular area.

Officials from the five companies we interviewed who identified monitor candidates for DOJ approval used a similar process as DOJ. For example, officials from one company reached out to their associates who they believed could help them identify individuals who would be effective monitors. Company officials said that they were looking for a monitor with experience working with DOJ and knowledge of the specific area of law that the company violated. From these suggestions, the company developed a list of candidates to interview, and based on the results of the interviews, generated a shorter list of candidates from which DOJ would choose the monitor.

In selecting the monitors, DOJ sometimes sought input from federal regulatory agencies. According to prosecutors in DOJ's Criminal Division, it is not uncommon for the division to collaborate with agencies such as the Securities and Exchange Commission to select a monitor to serve under agreements both agencies have reached with a company, particularly if the agreements contain similar requirements for the company. The prosecutors said having two different monitors could be cost-prohibitive and result in duplication of effort.

Courts were rarely involved in monitor selection. Of the 26 agreements we reviewed that had monitor requirements, 2 required court approval of the selected monitor.[36] One of the 13 DOJ offices included in our review has a

[36] Of these 26 agreements, 7 were not filed in court.

formal monitor selection policy. According to the prosecutors in this office, court involvement in monitor selection limits the possibility of favoritism in monitor selection by the office. The policy requires prosecutors to compile a list of potential monitor candidates and submit the list to the court, where a district judge would then appoint a monitor from this list. We plan to solicit input on court involvement from the judiciary as a part of our ongoing review.

When we asked DOJ officials, company representatives, and monitors about other methods to prevent the appearance of favoritism in monitor selection, such as developing a national list of prescreened monitors from which DOJ would make its selection, they identified both advantages and disadvantages. Some of the advantages identified were (1) assurance that the monitors have been prescreened and are considered qualified by the government, (2) increased consistency in the monitor selection process, and (3) the ability to expedite the monitor selection process. The disadvantages they cited were (1) not all of the monitors on the list would have the specific expertise required for certain cases, such as commodities trading expertise; (2) based on their own experiences searching for monitors, it is likely that many of the monitors on a prescreened list will have conflicts of interest with the companies—such as the monitor having previously provided services for the company in an unrelated matter; (3) use of the list would limit company input in monitor selection; and (4) use of the list may actually increase the likelihood of favoritism because DOJ officials could populate the list with their associates, and could exclude other qualified monitor candidates. As a part of our ongoing work, we will continue to identify other models that aim to reduce favoritism in monitor selection. For example, one company official with whom we spoke cited the International Association of Independent Private Sector Inspectors General (IAIPSIG) as a possible model for developing a national pool of monitors. Members of this association are individuals or private sector firms with legal, auditing, investigative, and management skills who are available to be employed by an organization to ensure compliance with relevant laws and regulations. According to IAIPSIG, members—who may be retained by the government to prevent fraud in contracting and by private firms condncting internal investigations—must also adhere to the principles and standards in IAIPSIG's code of ethics which require, among other things, that its members remain independent of both the monitored entity and the entity to which it is reporting, and refrain from accepting or performing work involving an actual or potential conflict of interest.

In March 2008, the Acting Deputy Attorney General issued the Morford Memo to help ensure that the monitor selection process is collaborative,

results in the selection of a highly qualified monitor suitable for the assignment, avoids potential and actual conflicts of interest, and is carried out in a manner that instills public confidence.[37] The guidance requires U.S. Attorneys Offices and other DOJ litigation divisions to establish ad hoc or standing committees, consisting of the office's ethics advisor, criminal or section chief, and at least one other experienced prosecutor to consider the candidates for each monitorship. DOJ components are also reminded to follow federal conflict of interest guidelines[38] and to check monitor candidates for potential conflict of interest relationships with the company. In addition, the names of all selected monitors must be submitted to the Office of the Deputy Attorney General for final approval. According to the Senior Counsel to the Deputy Attorney General, this approval is required in order to ensure public integrity in the monitor selection process.

While the Morford Memo established policies and guidance for the selection of independent monitors, including that the Office of the Deputy Attorney General approve the monitor selection, the memo does not require documentation of the process used and the reasons for selecting a specific monitor. Standards for internal control in the federal government state that all transactions and significant events, which could include the selection of monitors, should be clearly documented and that the documentation be readily available for examination. In addition, our prior work suggests that documenting the reasons for selecting a particular monitor helps avoid the appearance of favoritism and verify that selection processes and practices were followed.[39] Since the release of the Morford Memo, we have identified two DPAs and NPAs that DOJ entered into for which monitors have been selected.[40] According to the Office of the Deputy Attorney General, which is responsible for approving monitor selections, the United States Attorneys Offices involved in these two cases submitted e-mails to predecessors in the Office of the Deputy Attorney

[37] The Morford Memo was released after most of the agreements we reviewed were entered into.

[38] *See* 18 U.S.C. § 208 and 5 C.F.R. pt 2635.

[39] GAO/GGD-00-15.

[40] At the time of our review, we identified an additional four DPAs and NPAs that were entered into since the Morford Memo and required the selection of a monitor. According to DOJ, monitors have not yet been selected for these agreements. For one additional DPA, the department has determined that the agreement, which requires an external auditor, is not subject to Morford Memo guidelines regarding monitor selection.

General regarding their proposed monitor selections. DOJ provided us with a summary of the correspondence from the prosecutors seeking Deputy Attorney General approval. While the correspondence in one case included information describing how prosecutors adhered to the processes required by DOJ guidance, the correspondence in the other case did not. For instance, the correspondence did not describe the membership of the committee that considered the monitor candidate. In addition, because the approval of one of the monitors was relayed via telephone and no documentation was readily available at the Office of the Deputy Attorney General, DOJ officials had to reach out to the individuals who were involved in the telephone call to obtain information regarding the monitor's approval. As this example demonstrates, without requiring documentation of the process used and the reasons for selecting a particular monitor, it may be difficult for DOJ to validate whether its monitors have been selected and approved across DOJ offices in a manner that is consistent with the Morford Memo, which established monitor selection principles intended to instill public confidence.

In commenting on a draft of this report in June 2009, the Office of the Deputy Attorney General agreed that documenting the process used and reasons for monitor selection would be beneficial. However, because the office has not had to approve any monitor selections since the presidential transition in January 2009, the office did not believe it was in a position to determine exactly what internal procedures should be adopted to document the monitor selection process until it had reviewed more selection proposals. From January 2009 through May 2009, DOJ had four ongoing agreements that required the appointment of a monitor where, to date, the monitors have not yet been selected. We expect that when the Office of the Deputy Attorney General reviews the monitor proposals for these agreements, once they are submitted, the office will be in a better position to establish procedures for documenting monitor selection decisions.

Companies We Contacted Reported that Monitors Generally Charged Their Customary Rates but Raised Concerns about Scope of Monitors' Work; Companies Would Like DOJ to Help Them Address Issues with Monitors

Of the 12 companies we have met with so far for which DOJ required a monitor, 6 told us that they did not have any concerns about the rate charged by the monitor, 3 expressed concern that the monitor's rate was high, and the remaining 3 did not comment on the monitor's rate.[41] Officials from 6 of the 12 companies perceived that the monitors were either charging their customary rates or, in two additional cases, lower rates because the companies could not afford the customary rates.[42] While the companies we met with generally did not express concern about the monitors' rates, they reported concerns with other aspects of the monitorship that affected the overall compensation to the monitor. Specifically, 6 of the 12 companies raised concerns about the scope of the monitor's responsibilities or the amount of work completed by the monitor; and four of the six companies reported that they did not feel they could adequately address their concerns by discussing them with the monitors. For instance, 1 company said that the monitor had a large number of staff assisting him on the engagement, and he and his staff attended more meetings than the company felt was necessary, some of which were unrelated to the monitor responsibilities delineated in the agreement. As a result, the company believes that the overall cost of the monitorship was higher than it needed to be. While the company reportedly tried to negotiate with the monitor over the scope of work and number of staff involved, the company stated that the monitor was generally unwilling to make changes. The company did not feel that there was a mechanism at DOJ whereby it could raise concerns regarding monitor costs because the costs were not delineated in the agreement. Instead, the costs were identified in an agreement between the company and the monitor and, therefore, DOJ was not responsible for overseeing the costs of the monitorship. Another company reported that its monitor did not complete the work required in the agreement in the first phase of the monitorship, which necessitated the monitor completing more work than the company anticipated in the final phase of the monitorship. This led to unexpectedly high costs in the final phase. The company official believed it was DOJ's responsibility, not the company's, to address this issue because the monitor had failed to complete the requirements DOJ had delineated in the agreement. As part of our ongoing review, we plan to obtain the perspectives of DOJ officials and monitors, in addition to

[41] An official from one of these companies did not comment on the monitor's rate specifically because this individual was not involved in early negotiations with the monitor.

[42] The companies we spoke with did not always have precise information on the monitor's customary rates.

companies, regarding the amount and scope of the monitors' work and the most appropriate mechanisms companies can use to address any concerns they may have related to this issue.

Two company officials reported that they had little leverage to negotiate fees, monitoring costs, or the monitor's roles and responsibilities with the monitor because the monitor had the ability to find that the company was not in compliance with the DPA or NPA. Officials from three companies suggested that DOJ should play a larger role in helping companies address concerns with their monitors. For example, one company official said that DOJ may need to develop a mechanism for companies to raise issues regarding their monitors without fear of retribution, while another company official suggested that DOJ meet routinely with the company to allow for a conversation between the company and DOJ about the monitoring relationship. Two companies felt that having a sense of the potential overall costs at the beginning of the monitorship, such as developing a work plan and estimated costs, would be beneficial for companies. For instance, one of these officials said that this would help establish clear expectations for the monitor and minimize unanticipated costs. DOJ has taken some actions which may address these concerns. For instance, in 2 of the 26 DPAs or NPAs we discussed with DOJ that had monitoring requirements, the monitor was required to submit a work plan prior to the monitor's first review of the company. Additionally, an official in the Criminal Division Fraud Section said that it is the section's general practice to meet with the monitor to discuss the monitor's work plan. The Morford Memo also instructs DOJ prosecutors to tailor the scope of the monitor's duties to address the misconduct in each specific case, which the memo indicates may align the expense of the monitorship with the failure that led to the company's misconduct covered by the agreement. However, we have not yet been able to evaluate how these actions may address companies' concerns. We will continue to obtain information on the ways in which company concerns regarding the monitors' responsibilities and workload can be addressed.

We are conducting a survey of companies to solicit more comprehensive information on monitors' fees, total compensation and roles and responsibilities, as well as the companies' perceptions of the monitor costs in relation to the work performed. We will integrate these survey results into our final report. In addition, we are continuing to assess the potential need for additional guidance or other improvements in the use of DPAs and NPAs in our ongoing work.

Conclusions

One of DOJ's chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. DOJ has increasingly employed the tools of DPAs and NPAs in order to carry out this mission, and has recognized the potential long-term benefits to the company and the public of assigning an independent monitor to oversee implementation of a DPA or NPA. On the other hand, DOJ has also acknowledged concerns about the cost to the company of hiring a monitor and perceived favoritism in the selection of monitors, and thus the resultant need to instill public confidence in the monitor selection process. DOJ has made efforts to allay these concerns by issuing guidance requiring prosecutors to create committees to consider monitor candidates; evaluate potential conflicts of interest the monitor may have with the government and the company; and obtain approval of selected candidates from the Office of the Deputy Attorney General. Nevertheless, more could be done to avoid the appearance of favoritism. Requiring that the process and reasons for selecting a specific monitor be documented would assist DOJ in validating that monitors were chosen in accordance with DOJ's guidance that is intended to help assure the public that monitors were chosen based on their merits and through a collaborative process.

We are continuing to assess the potential need for additional guidance or other improvements in the use of DPAs and NPAs in our ongoing work.

Recommendations

To enhance DOJ's ability to ensure that monitors are selected according to DOJ's guidelines, we recommend that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions.

Agency Comments and Our Evaluation

We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, on June 18, 2009, DOJ's liaison stated that DOJ agreed with our recommendation. DOJ also provided technical comments, which we incorporated into the statement, as appropriate.

GAO Contact and Staff Acknowledgments

For questions about this statement, please contact Eileen R. Larence at (202) 512-8777 or larencee@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be fonnd on the last page of this statement. Individuals making key contributions to this statement include Kristy N. Brown, Jill Evancho, Tom Jessor, Danielle Pakdaman,

and Janet Temko as well as Katherine Davis, Sarah Kaczmarek, Amanda Miller, Janay Sam, and Mandana Yousefi.

Mr. CONYERS. Thank you so much. We are now pleased to have the former U.S. attorney for the District of New Jersey who has for 6 years had been the U.S. attorney for his state and has left his post as of December 1st, 2008.

He has been an advisor of one of the 17 lawyers that advised former Attorney General Alberto Gonzales and has had a long career of experience in the law, and we are very pleased that he could make time out of his schedule to be with us today. Mr. Christie, welcome.

TESTIMONY OF THE HONORABLE CHRISTOPHER J. CHRISTIE, FORMER UNITED STATES ATTORNEY, DISTRICT OF NEW JERSEY

Mr. CHRISTIE. Thank you, Mr. Chairman, and thank you very much to you for the invitation today, to the Members of the Committee. Thank you also for the flexibility that you showed in terms of the scheduling of this hearing, recognizing that I am in the middle of a campaign for governor of New Jersey.

Your willingness to be able to be flexible regarding the scheduling has made it possible for me to prepare adequately and to be here to spend time with all of you today and answer your questions, and I appreciate it.

A number of key points to make, without repeating some of the things that were already pointed out by the GAO, first and foremost, deferred prosecution agreements were utilized by my office during my tenure in the 7 years that I was United States attorney to achieve results of justice for the public.

When wrongdoing was committed, people involved in corporations, both individuals who were charged and companies who were dealt with, needed to be dealt with firmly, directly and strongly to make sure that people understood that there were integrity in the system.

Let us talk about how these agreements work. First and foremost, there is absolutely in the discussion of the monitors, zero—zero taxpayer dollars spent on these monitors. It is important to note because there seems to be some confusion on that so I want to be clear.

Zero taxpayer dollars are spent on these monitors. They are all incurred, these costs, by the companies who were involved in the wrongdoing in order to reform the culture in that corporation.

Secondly, in the case of the medical device prosecutions, there is already nearly a half a billion dollars in savings returned to the Federal Government. Let me be specific on how that was done. Four of the companies paid $311 million back to the Federal Government at the time of the settlement of this matter.

In addition, in just the first year of these agreements, payments to consultant surgeons by these companies dropped by $150 million. Those costs were costs that were past directly onto the consumers and onto the Federal Government predominantly through the Medicare system, who was paying for these costs through the companies. So now, nearly half a billion dollars has been returned, and counting, to the government because of these agreements.

Third, collateral consequences were mentioned by the GAO. I will tell you, I was a member of the Justice Department during the Arthur Andersen matter. Each one of the United States attorneys was affected significantly by the loss of nearly 75,000 jobs at Arthur Andersen, in a case that ultimately was reversed by the United States Supreme Court. The case was reversed, but those jobs were not reversed back into the American economy.

The artificial hip and knee medical companies employ 47,000 American citizens, providing innovation and products that improve the health of our country. Indictment of those companies would have—all of them whom are publicly traded—most certainly would have led to their debarment from the Medicare program, and since

two-thirds of all of those replacement surgeries are paid for by Medicare, this would have put those companies out of business, companies that controlled 94 percent of the market in artificial hips and knees in our country.

Those collateral consequences, in my view, were absolutely something that needed to be avoided. In addition, it is an $80 billion industry and there was no harm done to the company's shareholders during this entire time. In fact, during the time of the deferred prosecution agreements, three of these companies saw growth in their shareholder value instead of diminution.

These products are vital to the health of our citizens—absolutely vital to the health of our citizens. And if they had been eliminated from the marketplace, 94 percent of these devices, this would have caused great harm—great harm to the people of our country who rely upon them.

All of these monitors were proposed to the companies, interviewed by the companies and then accepted by the companies, and they were made clear by our office that they had the opportunity to object and if they did we would propose another monitor.

Lastly, Mr. Chairman, we also have shown great transparency in this because at the time that these agreements were put into place, not only were they announced publicly, not only were the agreements put up on our Web site, not only were they required to be put up on the Web site of the companies, but also criminal complaints were filed, reviewed by a Federal judge, approved by a Federal judge along with approving the agreements, and all of that was placed into the public record.

So there is transparency. There is no taxpayer dollars being spent. There is nearly half a billion dollars being returned to the Federal Government, Mr. Chairman, and so I look forward to a good conversation about this and to have the opportunity to talk to all of you about the great work that the office of the United States attorney for the district of New Jersey did on behalf of the American citizens on these and other prosecutions.

Thank you.

[The prepared statement of Mr. Christie follows:]

PREPARED STATEMENT OF THE HONORABLE CHRISTOPHER J. CHRISTIE

Prepared Statement by Christopher J. Christie, Former United States Attorney, District of New Jersey, June 25, 2009

During the corporate fraud scandals of the early part of this decade, the Department of Justice was confronted with egregious violations of federal criminal law by corporate officers that, in many cases, infected entire corporate entities. The public and elected officials uniformly demanded (and rightfully so) that stern action be taken against these offenders given the magnitude of the losses sustained by the public.

This set of circumstances led the Department of Justice to a series of difficult prosecutorial judgments. During the Enron scandal, it was alleged that their auditors, Arthur Andersen, had engaged in the fraud which led to the collapse of Enron and the loss of billions of dollars in investor equity. When it came time for prosecutorial decisions to be made, the Department decided to seek an indictment against Arthur Andersen from a federal grand jury. Once that indictment was returned and announced, Arthur Andersen went out of business. Nearly 75,000 innocent people lost their jobs and any partnership equity they had in the firm. While initially convicted of these crimes, Arthur Andersen prevailed on appeal to the United States Supreme Court. But the irreparable damage had been done. The collateral consequences of the decision to indict were enormous. The question left for DOJ was this: Is there a way to punish corporate wrongdoing short of an indictment that will bring real cultural change to the offending corporation but not result in the loss of thousands of jobs and billions in shareholder

value? The answer to that question became the wider use of deferred prosecution agreements (DPAs) by DOJ and its components.

In contrast to the more rigid criminal sentencing process, DPAs allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.

The first recorded DPA was executed during the early 1990s in the George H.W. Bush Administration. Every subsequent administration (both Republican and Democrat) has approved the use of DPAs, including the Obama Administration under Attorney General Eric Holder, which has approved five DPAs in their first five months in office.

The DOJ increased the use of DPAs after the issuance of the Holder Memo on the Principles of Corporate Prosecution (by then Deputy Attorney General and current Attorney General Eric Holder) during the Clinton Administration and became more prevalent still after the issuance of the Thompson Memo on Corporate Prosecution issued by Deputy Attorney General Larry Thompson, who served from 2001 to 2003 in the Bush Administration. These memos detailed a much tougher policy against corporate entities than had been previously mandated by DOJ policy. In order to implement these policies and avoid harsh collateral consequences to innocent parties, the use of DPAs came to the fore.

In 2002, the U.S. Attorney's Office in the District of New Jersey ("the Office") opened an investigation into potential accounting and disclosure irregularities at Bristol Myers Squibb ("BMS"). The three year investigation resulted in the indictment of the former CFO and the former chief of worldwide medicine sales. In addition, it was determined by the investigation that BMS itself was infected with a corporate culture that led to the violation of federal laws. BMS, during the course of the investigation, hired former New Jersey United States Attorney and former federal judge Frederick B. Lacey as a special advisor to the CEO and Board of Directors at BMS. Judge Lacey's charge was broad and defined by the company: he was to get to the bottom of what caused the cultural breakdown at BMS and recommend changes that he deemed were necessary to the company.

In 2005, the Office, at the request of the Company, began negotiations to resolve the investigation against the corporation through a deferred or non-prosecution agreement rather than by way of grand jury indictment and trial. These negotiations lasted for several months and were vigorously contested on both sides. Ultimately, the parties agreed to a two year DPA, $300 million in restitution to injured shareholders, and the appointment of a monitor to assure compliance with the reforms required by the DPA. At the company's request, the Office consented to the appointment of Judge Lacey as the monitor. This was done in order to assure that there was no waste of corporate resources while a different monitor got "up to speed" on the situation at BMS. In addition, the Office had complete faith and confidence in Judge Lacey's ability to strictly monitor the

terms of the agreement on behalf of DOJ. Any impartial examination of Judge Lacey's performance over the ensuing two years, which included his recommendation to terminate the CEO and General Counsel for failure to enforce compliance with the DPA, supports the Office's decision to agree to the retention of Judge Lacey by BMS at the DPA monitor.

BMS successfully completed the DPA in June 2007. All reviews from company personnel including the new CEO and General Counsel confirm that the corporate culture had indeed been changed and done so without the loss of a single job by an innocent employee.

The process of negotiating and executing this DPA was not shrouded in mystery as some claim. In fact, I authored (along with former Assistant United States Attorney Robert Hanna, the lead prosecutor in the BMS matters) an extensive law review article detailing every aspect of the BMS agreement, the rationale for DPAs in general, the monitor selection process and the reform measures put in place to assure that such conduct would recur at BMS. This article also reviewed a brief history of the use of DPAs by the Department of Justice. I would like to incorporate into my testimony, by reference, the entire law review article. It is entitled "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 American Criminal Law Review 1043 (Summer 2006).

In 2005, the Office opened an investigation into the five major manufacturers of artificial hips and knees in the worldwide market. These five companies controlled approximately 95% of the entire domestic market. There were allegations that the companies were violating the Anti-Kickback statute, the Stark Act and other criminal laws by paying orthopedic surgeons kickbacks disguised as consulting fees in order to obtain the exclusive use of their products. In 2007, more than 700,000 hip and knee replacements were performed in the United States alone, with more than two-thirds of those procedures funded by Medicare. It was obvious that significant federal tax dollars were at stake if, in fact, the law was being violated by these companies.

Over the course of the next two and one-half years, a massive investigation was undertaken of all five companies. In May 2007, the Office opened negotiations with all five companies regarding resolution of these matters by way of DPA or NPA. By this time, Stryker Corporation had become a cooperator with DOJ in the investigation into the other four companies. The remaining four companies vigorously contested the allegations being made by DOJ. The companies employ 47,000 people in the United States and accounted for nearly the entire production market in these vital medical products. If the Office sought an indictment from a federal grand jury which was ultimately returned and announced, it is certain that these companies would have been suspended and debarred from the Medicare programs. That exclusion would have certainly caused each of the five companies to go out of business with the resulting loss of 47,000 American jobs and cutting edge devices which improve the lives of millions of Americans.

Given all of those factors, the Office was determined to reach an agreement, if possible, which sufficiently punished the corporations for their bad acts, mandated changes in corporate culture, and did not result in collateral damage to innocent parties,. Given the competitive nature of this business, all of the companies insisted that they would only agree to a DPA if all five companies were to be governed by the same set rules and requirements on a going forward basis. Guaranteeing that all five companies would obey the same set of rules and requirements was going to be a difficult job, but critical to a successful result. Negotiating these agreements was akin to landing five airplanes on the same runway at the same time. On September 27, 2007, the four non-cooperating companies executed DPAs with DOJ. Stryker Corporation executed an NPA with DOJ. The four non-cooperating companies also entered a civil settlement with DOJ and an administrative settlement with HHS, requiring that $311 million be returned to the federal government with reimbursement to the Medicare program, and a five year corporate integrity agreement with HHS. One element of the DPAs was the hiring of DPA monitors agreeable to the Office and the companies to insure that all the companies were complying with the same rules.

Two weeks before the execution of the agreements, as the parties neared an agreement in principle, the Office began discussions with the companies on monitor identification and recommendation. Months prior to that, in anticipation of a potential agreement, the Office began internal discussions to identify potential monitors that would be ultimately

recommended to the companies. These discussions included the U.S. Attorney, his executive staff (including the Office ethics officer), and the AUSAs in charge of the investigation. It was determined that the Office wanted monitors who had experience with corporate fraud, either from the prosecutorial or defense perspective. The Office also wanted monitors who they had worked with before, had developed professional trust and respect with, and who understood the complexities of the issues involved in this investigation. From that process, the Office came up with a list of names to recommend to the companies.

The Office attempted to match the monitor to the conduct of the offending corporation, their corporate culture, and the status of their reform efforts to date. The Office identified and recommended a monitor to each of the companies. It was made clear to the companies that company personnel and legal counsel were to interview the recommended monitor prior to execution of the DPAs. It was also made clear that if the companies had serious objection to their proposed monitor after the interview process, they could raise that objection with the Office and that a new monitor would be recommended. After the interviews were conducted, all five companies accepted the monitors proposed by the Office. It was then left to the companies and the monitors to negotiate the fee structure for the work to be done by the monitor pursuant to the requirements of the DPA. The Office was not involved in the fee negotiations. Intervention by the Office would only occur if the company and the monitor were at a genuine impasse in fee negotiations. No such impasse occurred.

It is important to note that not one dollar of taxpayer money was used to pay these monitors or achieve compliance with the law through their supervision. All of the fees and expenses connected with the monitoring process were borne by the criminal corporations which had engaged in the wrongdoing.

The results of the DPA on this industry have been truly extraordinary. In the first year of the DPA, which lasted for a total for 18 months, consulting payments to physicians were reduced by more than $150 million, a 77% reduction. The total number of physicians receiving payments dropped by more than 1,000, a 63% reduction. Those costs had previously been passed on to consumers, their private insurance companies, and/or the Medicare system. Therefore, between the $311 million in restitution and the more than $150 million in reduced payments to physicians, nearly half a billion dollars was restored to the public through the resolution of this investigation by DPA.

No jobs were lost during this period of time, and, in fact, most of the companies continued to see earnings growth during the DPAs while reforming a previously corrupt corporate culture under strict federal supervision. The companies themselves, after initially reluctantly admitting their conduct, have come full circle in their appreciation of the results. David Dvorak, CEO of Zimmer, Inc., the leader in the industry, has said "While the expiration of the DPA is an important milestone, the Company remains committed to operating transparently on a global basis to preserve the trust required for productive professional collaboration that ultimately benefits patients." The DPA only required the companies to change their practices in their domestic markets for hip and

knee replacement products, yet a number have now voluntarily agreed to apply the principles of the DPA to their global businesses.

Other notable achievements include:

- The companies overhauled their practices concerning the selection and engagement of physician consultants and disengaged them from the influence of their sales and marketing teams;
- The companies have reorganized and added staff to their compliance departments in order to establish a comprehensive and effective compliance policy;
- The companies disclosed the names of all their consultants on their company websites, and the amounts paid to each of them, updated quarterly;
- The practice of posting consulting payment information has also been picked up by other companies voluntarily in the wake of these agreements, including Pfizer, Medtronic, Eli Lilly, Merck, and GlaxoSmithKline;
- The companies established confidential hotlines for employee compliance complaints;
- The companies required certifications from all consultants to verify services rendered;
- The companies began funding medical education programs, including fellowships and residencies, through third party administrators in an effort to eliminate any real or perceived conflict of interest;
- The companies improved ethics and compliance training and trained thousands of employees, directors, contractors, consultants, distributors, sales agents, and other

individuals who do business with or on behalf of the companies on federal health care laws and compliance requirements;

- The companies have moved to eliminate give-aways and in-kind payments to attendees at training and educational events;
- In December 2008, the Advanced Medical Technology Association (AdvaMed) revised its Code of Ethics based on the provisions set forth in the DPAs. All the companies have committed to adopting the revised Code driven by the DPAs.

In addition, the companies will remain under the supervision of HHS/OIG, pursuant to the September 27, 2007 Corporate Integrity Agreement, until September 2011 in order to insure continued compliance with the law.

These accomplishments are in addition to the fact that there was no loss of products critical to the health of senior citizens in the United States and globally. Also, no harm was done to the shareholders in this $80 billion industry. If indictments had been pursued, it is certain that they would have resulted in the loss of 47,000 jobs in the United States, the ruination of shareholder value and the loss of these cutting edge products to American citizens in need of relief.

In the end, prosecutorial decisions such as the ones outlined above are never easy. I firmly believe based upon my seven years of experience in one of the busiest corporate crime offices in America that these decisions should be left in the hands of the professional prosecutors in the Department of Justice. In the course of the last fifteen

years, the Department of Justice under six different Attorneys General, have entered into more than 120 deferred and non-prosecution agreements to resolve corporate wrongdoing. In fact, the Obama Administration under Attorney General Holder has, in five instances in its first five months, also seen fit to utilize DPAs to resolve complex corporate criminal investigations. Just recently, in the matter of United States vs. Well Care in the United States District Court for the Middle District of Florida, the Obama Justice Department has approved the use of a DPA and the utilization of a monitor selected by the Department of Justice in conjunction with the company to be monitored. That now makes four successive administrations (two Democrat and two Republican) that have approved of this tool in the way it is currently being utilized by career DOJ prosecutors. The unnecessary politicization of this process will, in my opinion, only cause undue harm to the Department's ability to effectively utilize these tools in the future. With the potential of significant corporate prosecutions arising from the recent stock market decline, mortgage crisis, and bank failures, the use of DPAs under the supervision of informed, capable and nonpartisan professional prosecutors is a tool that every Department component will want and need in its toolbox. I urge the committee to consider the totality of all the facts regarding the use of these agreements, not just the political rhetoric, in determining what is the best course of action for oversight of the use of deferred prosecution agreements in the future.

ATTACHMENT

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THE STATE OF FEDERAL PROSECUTION: ARTICLE: 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.

NAME: Christopher J. Christie * and Robert M. Hanna **

BIO:

* United States Attorney for the District of New Jersey.

** Assistant U.S. Attorney, District of New Jersey; Chief, Securities & Health Care Fraud Unit. This essay reflects the views of the authors alone. Their views do not represent Department of Justice Policy.

SUMMARY:
... Corporate fraud cases present prosecutors with a particularly complex mix of considerations to analyze and ultimately balance in order to appropriately resolve allegations of corporate wrongdoing. ... The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection. ... By including provisions relating to transparency, our intent was to address both specific failings uncovered in the investigation and an equally disturbing corporate culture that favored secrecy over openness. ... Regardless, this increased internal accountability should go a long way toward achieving the goal of good corporate citizenship. We believed, however, that more was needed from outsiders to insure compliance with the agreement and a change in corporate culture. ... When a corrupt corporate culture fosters criminal conduct, federal prosecutors contemplating remedial actions under a deferred prosecution arrangement must be concerned and do their best to remedy it. ... The $ 839 million amount represents a reasonable calculation of full restitution to shareholder victims, and is based on the precipitous drop in the price of Bristol-Myers common stock in April 2002, when the marketplace first learned of Bristol-Myers' programmatic channel stuffing. ...

TEXT:

[*1043] Corporate fraud cases present prosecutors with a particularly complex mix of considerations to analyze and ultimately balance in order to appropriately resolve allegations of corporate wrongdoing. The range of options available to prosecutors in the corporate context is broad. Charging options include indictment, negotiated plea agreements and, increasingly, deferred prosecution agreements. Other options include non-prosecution agreements, deference to purely civil resolutions (such as compliance agreements and consent decrees with regulatory agencies), and unadorned declinations of prosecution.

In contrast to the far more rigid criminal sentencing process, deferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.

In June 2005, the United States Attorney's Office for the District of New Jersey entered into a deferred prosecution agreement n1 with Bristol-Myers Squibb Company, n2 a Fortune 100 pharmaceutical company and a major New Jersey employer. n3 The agreement resolves allegations of a fraudulent earnings management scheme involving, among other things, a practice commonly referred to as channel stuffing. n4 The Bristol-Myers' deferred prosecution agreement, we believe, achieves the goals of general and specific deterrence, full disclosure to the investing public, [*1044] carefully targeted reform of a corrupted corporate culture, and restitution to victim shareholders, while minimizing collateral consequences on tens of thousands of Bristol-Myers' law-abiding employees and current shareholders. No fine was imposed; the intent was to avoid penalizing innocent employees and shareholders any further. Importantly, the agreement achieves these aims without interfering with Bristol-Myers management's ability and obligation to run its business in the best interests of all Bristol-Myers stakeholders.

This essay also reveals our view that, in an investigation like Bristol-Myers, the personal involvement of the U.S. Attorney, in this case Christopher J. Christie, is both advisable and warranted. When dealing with a major corporation accused of significant felonies, where the issues of attorney-client privilege and the failure of the corporation to compile a comprehensive internal investigative report are implicated, the U.S. Attorney needs to determine how to proceed regarding such major policy concerns. Counsel for the corporation are going to want opportunities to personally argue their client's positions to the U.S. Attorney. Finally, if any resolution of the investigation includes a significant commitment by the board of directors to the requirements of the deferred prosecution agreement, the U.S. Attorney may want to meet personally with the board to gauge their resolve to implement the proposed remedies. n5 This was done in the case of Bristol-Myers and gave us invaluable insight into the workings and mind-set of the board. It also gave us great insight into the role of the board in both the creation of the issues involved in the investigation and the failure to uncover the conduct sooner.

This essay explores this particular exercise of prosecutorial discretion. It starts by discussing the framework -- most notably the Thompson Memo n6 -- that federal prosecutors use during the decision-making process. Second, the paper provides background on the Bristol-Myers case and the eventual deferred prosecution agreement. An analysis of the decision-making process of the U.S. Attorney's Office in this case serves as a vehicle for discussion of the issues and goals prevalent in corporate criminal prosecutions, including transparency, corporate culture and governance, outside oversight, public notice, and restitution. Lastly, the essay draws conclusions about the unique value of deferred prosecution agreements and the advantages that they offer the government and corporate America.

At a minimum, the answers to these and other questions about the Bristol-Myers deferred prosecution agreement will provide insights into the process of negotiating a deferred prosecution agreement. Corporations and their counsel should [*1045] understand that prosecutors view such an agreement as a unique opportunity to right a listing corporate ship and strengthen the economic engines of our federal districts and nation. This essay also provides guidance to the corporate community about how to prevent corporate misdeeds from occurring in the first place and, in the event wrongdoing nevertheless occurs, how to deal with it swiftly and effectively. After all, negotiating favorable terms for deferral of prosecution comes in a distant second to altogether avoiding discussions about prosecution, deferred or otherwise.

THE STARTING POINT: DOJ's THOMPSON MEMO

Federal prosecutors look to the Thompson Memo for guidance in corporate fraud investigations. While the Thompson Memo does not attempt to detail circumstances and factors that should lead a prosecutor to choose deferral of prosecution, or discuss appropriate terms for a deferred prosecution agreement, its analytical framework applies in all corporate fraud investigations. The Thompson Memo urges federal prosecutors to carefully consider whether a business organization should bear criminal responsibility for the wrongdoing of its directors, officers, employees or agents. n7 It lays out nine factors that should be considered in assessing corporate responsibility: n8

1. The nature and seriousness of the offense, including the risk of harm to the public.

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management.

3. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.

4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.

5. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it.

6. The existence and adequacy of the corporation's compliance program.

7. Collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable, and impact on the public arising from the prosecution.

8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

[*1046] 9. The adequacy of remedies such as civil or regulatory enforcement actions.

The Thompson Memo is a useful tool to both prosecutors and corporate counsel. By identifying and discussing the factors federal prosecutors should consider in the corporate fraud context, the Thompson Memo promotes thoroughness and consistency throughout the far-flung Department of Justice and allows corporate counsel to take action to prevent wrongdoing from occurring in the first place. Where wrongdoing does occur despite a corporation's best efforts, the Thompson Memo lays out a framework to respond promptly and effectively. Broadly considered, the Thompson Memo defines a model of good corporate citizenship that all business organizations would do well to follow.

The core message of the Thompson Memo is that good corporate citizenship should be rewarded and bad corporate citizenship should be punished. Good corporate citizens, for example, encourage and reward their employee's ethical behavior. Their compliance programs are not merely unused manuals gathering dust, but rather active, companywide commitments to train employees about doing the right thing. If allegations of wrongdoing surface, a good corporate citizen promptly and thoroughly investigates and, where warranted, takes appropriate remedial action.

In stark contrast to good corporate citizens, bad corporate citizens are often business organizations whose upper echelons direct criminal activity. These are companies that respond to law enforcement investigations by destroying documents and other evidence. They turn a blind eye to corporate compliance in favor of the bottom line. They stonewall external investigations; they give perfunctory attention to internal investigations; they cooperate with investigators in name only. In the real world, of course, there are infinite shades of gray between good corporate citizens and bad corporate citizens. Our job as prosecutors is to decide where the conduct falls within that spectrum, and what the appropriate remedy is for the conduct at hand.

Many options are available to federal prosecutors when dealing with corporate wrongdoing. If no criminal conduct can be proven, then coordination with the Securities and Exchange Commission on a civil remedy, such as a combination of restitution and fine, may be the most appropriate resolution. When criminal conduct by certain individuals can be proven, but that conduct is neither taken by senior office holders nor does it comprise a systemic part of the organization, then indictments against the culpable individuals may be the only appropriate course of action. When criminal conduct by senior corporate offices establishes a culture of criminal behavior in the corporation, then charges against the corporation must be considered in addition to individual indictments.

The Thompson Memo directs federal prosecutors to evaluate all pertinent facts and circumstances, measuring the conduct of the corporation's directors, officers, employees and agents against norms of good corporate behavior. n9 The greater the deviations from those norms, the more severe the criminal sanction will be. A [*1047] prosecutor's openness to considering deferred prosecution often will reflect a desire to avoid the collateral consequences of conviction and the judgment that the corporation, while guilty of past sins, is likely to return to good corporate citizenship with the firm guidance and watchful eyes provided under a deferred prosecution agreement.

We turn now to the terms of the June 15, 2005, deferred prosecution agreement between the U.S. Attorney's Office for the District of New Jersey and Bristol-Myers. n10

THE BRISTOL-MYERS DEFERRED PROSECUTION AGREEMENT SOME BACKGROUND

To appreciate the terms of the Bristol-Myers deferred prosecution agreement, a basic understanding of the conduct it seeks to remedy is necessary. We refer the reader to the Statement of Facts set forth as Appendix A of the deferred

prosecution agreement for a fuller description of the facts and circumstances that brought Bristol-Myers to the attention of federal law enforcement. n11 Some highlights are summarized here. Bristol-Myers, one of the world's leading pharmaceutical concerns, reported sales of about $ 18 billion and net earnings of $ 4.7 billion in 2000. The reported figures for 2001 were about $ 19 billion and $ 5.2 billion. Its widely held, and actively traded, common stock is listed on the New York Stock Exchange. Bristol-Myers has upwards of 40,000 employees worldwide, with over 5000 working in the District of New Jersey.

The criminal investigation conducted by the U.S. Attorney's Office, the FBI and the U.S. Postal Inspection Service revealed what is sometimes euphemistically referred to as "earnings management" but is, in reality, fraud on the investing public. The chief technique for this deception was quarter-after-quarter channel stuffing. Throughout 2000 and 2001 Bristol-Myers offered financial inducements to the wholesalers who distributed its products to buy and hold greater quantities of prescription drugs than was warranted by the demand for those products. This undisclosed practice led to ever-increasing excess inventory at the wholesalers and, more to the point, made Bristol-Myers' reported sales and earnings figures false and misleading. It also concealed the adverse effect on future sales that necessarily results from channel stuffing: the so-called "work-down" n12 in which wholesaler inventory levels are reduced to normal levels by selling less than current demand. Channel stuffing at Bristol-Myers was supplemented by other [*1048] deceptions: deliberately failing to accrue for rebates associated with excess inventory at wholesalers and manipulating reserve accounts, both in an effort to "hit the numbers" expected by Wall Street analysts.

The backdrop for this fiscal chicanery was a set of aggressive targets set by Bristol-Myers' uppermost management. In 1994, Bristol-Myers announced what became known as the "Double-Double" goal: to double Bristol-Myers' sales and earnings in a seven-year period. The last year of the Double-Double was 2000, at the end of which Bristol-Myers announced that it had achieved the doubling of earnings and that it "virtually" doubled its sales since 1993. In September 2000, Bristol-Myers became even more aggressive, announcing a "Strategy for Growth," which incorporated what became known as the "Mega-Double" goal. The Mega-Double goal was a plan to double year-end 2000 sales and earnings by the end of 2005, only a five-year period. The Double-Double and Mega-Double were accompanied by a "top-down" budget process at the company, with Bristol-Myers' senior executives setting aggressive targets for the company as a whole and for individual business units, consistent with the publicly announced Double-Double and Mega-Double goals. However, Bristol-Myers' reported financial performance in 2000 and 2001, was an illusion. Without channel stuffing, Bristol-Myers would have missed its budget targets and the consensus estimates set by Wall Street analysts. When Bristol-Myers first disclosed some of its excess inventory problems in April 2002, its stock price took a significant tumble.

The above is an abbreviated description of the state of affairs confronting us as federal prosecutors. Securities fraud is, to say the least, a serious offense carrying with it a grave risk of harm to the public. In a world that has seen corporate debacles at Enron, WorldCom, Adelphia, Cendant and others, no one should need reminding that millions of people depend on American corporations -- and their financial disclosures -- for their personal financial well-being. Jobs, investments, retirement funds and, indeed, the health of our economy depend on publicly traded companies doing what Congress mandated in the 1930s: disclosing all material facts so that financial risk can be assessed and financial decisions can be made with eyes wide open. The creation of President George W. Bush's Corporate Fraud Task Force and the Sarbanes-Oxley legislation in July 2002, drives home the point that federal prosecutors will take securities fraud very seriously. This, together with concerns about how Bristol-Myers' top corporate management (at the very least) failed to detect and prevent such a long-lasting and material deception, led us to the conclusion that Bristol-Myers should bear some form of criminal sanction.

Deciding what course of action to pursue against the corporation (in addition to individual indictments of the former chief financial officer and head of worldwide sales) was the product of significant internal debate and disagreement in our office. Once significant investigative and grand jury work had been done, the U.S. Attorney required that the Assistant U.S. Attorneys primarily responsible for the investigation prepare a detailed prosecution memorandum. That memo provided a detailed recitation of the facts uncovered and the prosecutorial options available. [*1049] Those options ranged from the indictment of various individuals within the corporation up to and including the indictment of the corporation itself. The memo served as a launching point for the internal debate.

A series of meetings were held that included the following members of the office: the U.S. Attorney, his front office members, the chief and deputy chief of the criminal division, the chief of the securities and health care fraud unit, and the Assistant U.S. Attorneys prosecuting this matter. Input was also sought from the investigating agencies. Many in the meetings believed that the most warranted action was an indictment of the corporation and sweeping indictments of culpable corporate officers. Others argued vigorously that a corporate indictment was inadvisable in light of the pro-

posed indictments of certain individuals and because some remedial actions had been taken by the corporation. These meetings were often loud and emotional. This should not seem unusual. Each of the participants had strongly held beliefs and had worked very hard on the investigation. A Fortune 100 company was involved, with the future of more than 40,000 employees potentially in the balance. With the stakes that high, the debate should be complete and animated. The U.S. Attorney has a management style that encourages this type of lively debate.

Concurrent with these internal discussions, there were frequent meetings and telephone conversations with counsel for Bristol-Myers, a former U.S. Attorney from a different district. Having a former U.S. Attorney as an adversary created other issues as well. Counsel had overseen some of the largest corporate fraud cases in the country and was well versed in both the facts of this matter and the history of how the Department of Justice had dealt with these issues. Counsel's negotiating points, which were discussed in the multiple internal meetings discussed above, provided an additional dynamic in those meetings.

The final complicating factor was the fact that our office had never before executed a deferred prosecution agreement. We 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.

While prepared to seek an indictment, (and securely feeling we had the facts to ask a grand jury to return one) our judgment was that a period of deferred prosecution was the best outcome for all concerned. As the deferred prosecution agreement recites, Bristol-Myers had already undertaken some remedial actions in response to the investigation and it was willing to go a good deal further. Confident that our goals of notice to the corporate community, deterrence, full disclosure to the investing public, calibrated reform of a corrupted corporate culture, and restitution to victim shareholders could be achieved without visiting undue collateral consequences on Bristol-Myers' business, its law-abiding past and present employees and its current shareholders, we engaged in extensive discussions and negotiations over a three-month period with Bristol-Myers management, its board of directors and its counsel, ultimately arriving at the June 15, 2005 deferred prosecution agreement. We discuss the deferred prosecution agreement's [*1050] more important terms below.

TRANSPARENCY OF DISCLOSURE

One issue we faced was how to reverse Bristol-Myers' failures to disclose facts underlying its channel stuffing, accruals for rebates, and manipulation of reserves. The deferred prosecution agreement deals with the most obvious aspect of this problem by mandating specific disclosures in Bristol-Myers' public filings with the SEC and its annual report to shareholders:

> Bristol-Myers agrees that it shall include in its quarterly and annual public filings with the SEC and its annual report to shareholders financial disclosures concerning the following: (a)(i) for the Company's U.S. Pharmaceuticals business, estimated wholesaler/direct-customer inventory levels of the top fifteen (15) products sold by such business and (ii) for major non-U.S. countries, estimated aggregate wholesaler/direct-customer inventory levels of the top fifteen (15) pharmaceutical products sold in such countries taken as a whole measured by aggregate annual sales in such countries; (b) arrangements with and policies concerning wholesalers/direct customers and other distributors of such products, including but not limited to efforts by Bristol-Myers to control and monitor wholesaler/distributor inventory levels; (c) data concerning prescriptions or other measures of end-user demand for such top fifteen (15) Bristol-Myers pharmaceutical products sold within the U.S. and in major non-U.S. countries; (d) acquisition, divestiture, and restructuring reserve policies and activity; and (e) rebate accrual policies and activity. The CEO shall, at the annual Bristol-Myers shareholder meeting, report to the shareholders on these topics. n13

Requiring specific disclosures, however, is somewhat akin to treating the symptoms of a disease and not its causes. Therefore, we sought a more fundamental change in Bristol-Myers' attitude toward the investing public. To that end, the deferred prosecution agreement includes Bristol-Myers' commitment "that it will at all times strive for openness and transparency in its public reporting and disclosures" and "that it will continue to review and improve, where necessary, the content of its public financial and non-financial public disclosures, including periodic SEC filings, annual and other shareholder reports, press releases, and disclosures during analyst conference calls, as well as during meetings with investors and credit ratings agencies." n14

The deferred prosecution agreement also calls for Bristol-Myers to utilize the expertise of its outside auditors on disclosure and accounting matters:

> Bristol-Myers shall encourage the free flow of information between its employees and its external auditor, and encourage its CFO and senior finance [*1051] personnel to seek advice from the external auditor. The CEO, CFO, General Counsel, and Chief Compliance Officer shall meet quarterly with the Company's external auditors . . . prior to the Company's scheduled quarterly analyst call. At the quarterly meeting, the Bristol-Myers attendees shall discuss business and financial reporting developments, issues and trends with the external auditor, as well as provide information to the external auditor concerning the subjects described in paragraph 24 above, and shall respond to inquiries from the external auditor. n15

By including provisions relating to transparency, our intent was to address both specific failings uncovered in the investigation and an equally disturbing corporate culture that favored secrecy over openness. For example, by requiring regular quarterly meetings among senior management and their independent auditors, our expectation is that if future law breaking were to occur, it would be much more difficult for top management and the auditors to claim ignorance. The goal is that Bristol-Myers should report all material facts, good and bad, to the investing public. With respect to unfavorable news, Bristol-Myers must get into the habit of disclosure, not concealment; if there is a question about whether or not to disclose something, the deferred prosecution agreement clearly calls for more information, not less.

CORPORATE GOVERNANCE AND ACCOUNTABILITY CHANGES

Perhaps the most difficult issue to address in this matter was reforming Bristol-Myers' corporate governance in ways that would give some assurance that the failures of 2000 and 2001 would not be repeated. At the very least, Bristol-Myers' remaining top management failed to detect and prevent the wrongdoing of 2000 and 2001. Yet federal prosecutors must tread warily in the area of corporate governance. Plainly, federal prosecutors have no business telling corporate executives what business judgments to make or otherwise intruding into business decisions. It was clear to us, however, that Bristol-Myers' board of directors and top executives had to be more involved in governing the company and therefore more accountable to all its stakeholders. This greater involvement of top management, together with a healthy dose of outside oversight, would provide confidence that Bristol-Myers will not repeat past sins.

Bristol-Myers, like many U.S. companies, had historically allowed its top leader to hold both positions of chairman of the board of directors and chief executive officer (CEO). This structure undoubtedly has its own benefits and risks: a strong chair/CEO is quite likely a more efficient structure than splitting those jobs, yet it provides fewer checks and balances. We determined there were three options to deal with the failure of the CEO and the board of directors to address the wrongdoing that occurred on their watch. The first was to leave the governance [*1052] structure intact and hope the other provisions of the deferred prosecution agreement (along with the presence of the federal monitor) would solve the problem. The second alternative was to demand the resignation of the chairman and CEO for failure to discover and address the wrongdoing. The third was a hybrid of the first two options, which was formulated during negotiations with corporate counsel. The reasoning behind this provision was two-fold: to have an active, experienced non-executive chairman act as an effective check on the CEO; and to insure that the CEO's office would not act as a bottleneck for information between the corporate officers and the board of directors. We believed this change would enhance the openness and effectiveness of the governance of Bristol-Myers. Eventually, management agreed with our assessment.

The Bristol-Myers deferred prosecution agreement requires the company to split the roles of board chair and chief executive:

> Bristol-Myers shall establish the position of non-executive Chairman of the Bristol-Myers Board of Directors (the "Non-Executive Chairman"), to advance and underscore the Company's commitment to exemplary corporate citizenship, to best practices of effective corporate governance and the highest principles of integrity and professionalism, and to fostering a culture of openness, accountability and compliance throughout the Company. Bristol-Myers shall retain the position of Non-Executive Chairman at least throughout the term of this Agreement. n16

This approach, we feel, provides maximum board involvement in and accountability for Bristol-Myers' business decisions, including its public disclosures. The deferred prosecution agreement deliberately avoids any temptation to micro-manage the role of the non-executive chairman. Instead, it sets forth aspirational goals for the company and mandates information sharing with the non-executive chairman. n17 It also gives the non-executive chairman a limited role in preparing for and monitoring quarterly conference calls with Wall Street analysts and investors. n18 The Board selected James D. [*1053] Robinson III, a long-time Bristol-Myers Director, to fill this role.

In addition to splitting the roles of board chair and chief executive, the deferred prosecution agreement also requires Bristol-Myers to appoint an additional non-executive Director acceptable to the U.S. Attorney's Office. n19 Our 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. Accordingly, Bristol-Myers selected, and the U.S. Attorney's Office approved, Louis J. Freeh, a former federal judge, federal prosecutor, and Director of the FBI, as the additional director.

Our conclusions regarding these governance issues were informed by meetings with both the CEO and the entire board of directors. The U.S. Attorney, along with the other prosecutors on the investigation, met a number of times with the CEO. One of the purposes of these meetings was to gain insight into the way management actually worked at Bristol-Myers. That knowledge helped us to intelligently and comprehensively negotiate a deferred prosecution agreement that dealt with the real problems at Bristol-Myers. The CEO gave us a real insider's view of how these events unfolded from his perspective.

We questioned the CEO regarding his relationship with his other senior officers, the board of directors, and his external auditors. We were attempting to find out every detail we could as to why the governance structures at Bristol-Myers had failed. By the very nature of the questions, these conversations were at times contentious. We discovered, however, that one of the root causes of the failures was the lack of timely and relevant information reaching all the decision makers at the top of the corporate chain of command. This led us to the conclusion that alternative information pipelines had to be opened in addition to the pipeline into the CEO's office. This further reinforced our conviction that the splitting of the chairman and CEO positions was a good idea.

Once we decided that the separation of the chairman and CEO's position was advisable, we felt that a meeting with the entire board of directors was necessary. We traveled to a regularly scheduled board meeting in Wilmington, Delaware and engaged in a ninety-minute open exchange with the Board. It was an opportunity to discuss previous conduct, and our ideas for future remediation, with the board. The Board shared with us their concerns about a deferred prosecution agreement and the potential effect on their business plans. Most importantly, we were able to gauge the commitment of the Board to real change in governance. The meeting also gave us the chance to assess each board member in light of our desire to potentially find a non-executive chairman who had a deep knowledge of Bristol-Myers and a real desire to be an agent of change of the corporate culture, which created these issues in the first place.

These corporate governance changes, along with the other governance measures [*1054] Bristol-Myers adopted prior to the deferred prosecution agreement are no guarantee of perfectly smooth sailing during the term of the agreement. Regardless, this increased internal accountability should go a long way toward achieving the goal of good corporate citizenship. We believed, however, that more was needed from outsiders to insure compliance with the agreement and a change in corporate culture.

OUTSIDE OVERSIGHT

The maxim "trust but verify" applies in deferred prosecution agreements. From the prosecutor's point of view, it would be highly irresponsible to allow a corporation whose prosecution is being deferred to go unsupervised during the deferral period. Bristol-Myers, to its credit, recognized at the inception of the investigation, and long before we began to negotiate the terms of the deferred prosecution agreement, that outside help would benefit the company. The company retained as an independent advisor the Honorable Frederick B. Lacey, a former U.S. Attorney and federal judge in the District of New Jersey, and gave him a broad mandate to review the company's internal controls, financial reporting, disclosure, compliance, and budget processes. We requested, and Bristol-Myers agreed, to expand Judge Lacey's role to become the independent federal monitor at Bristol-Myers.

The independent monitor has wide authority to oversee Bristol-Myer's compliance with the deferred prosecution agreement and strengthen its ongoing remediation efforts. Paragraph five of the agreement charges the monitor to perform the following tasks, among others: n20

> (a) Monitor Bristol-Myers' compliance with this Agreement, and have authority to require Bristol-Myers to take any steps he believes are necessary to comply with the terms of this Agreement;
>
> (b) Continue the review, reforms and other functions undertaken as the Independent Advisor;
>
> (c) Report to the Office, on at least a quarterly basis . . . as to Bristol-Myers' compliance with this Agreement and the implementation and effectiveness of the internal controls, financial reporting, disclosure processes and related compliance functions of the Company.

(d) Monitor Bristol-Myers' compliance with applicable federal securities laws, and in his quarterly reports make recommendations necessary to ensure that the Company complies with applicable federal securities laws.

The monitor's power is also significantly bolstered by his authority to make recommendations that Bristol-Myers must adopt "unless Bristol-Myers objects to the recommendation and the Office agrees that adoption of the recommendation [*1055] should not be required." n21 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. Monitors are able to observe and understand the business they oversee, along with its personnel and processes, in ways that federal prosecutors never could or should. If the company views their monitor as a force for positive change and not as an unwanted burden, all sides benefit.

The central role of Judge Lacey in ensuring successful adherence to the spirit and letter of the deferred prosecution agreement by no means ends the role of the U.S. Attorney's Office in this matter. The agreement makes it clear that all participants -- Bristol-Myers, the independent monitor, and the U.S. Attorney's Office -- should treat the agreement as an opportunity to work together toward the common aim of making Bristol-Myers a model corporate citizen. The agreement provides for regular communication among the parties, requiring Bristol-Myers' CEO, non-executive chairman, and general counsel to meet quarterly with the U.S. Attorney's Office and the monitor. n22 The quarterly meetings are an opportunity to discuss the monitor's quarterly reports and any other issues and concerns that may arise, to keep the lines of communication open, and to remind all of the importance of compliance with the agreement and the serious consequences breach of the agreement would have for the company, its shareholders, and employees.

The regular quarterly meetings have already proven to be useful and interesting. Prior to each meeting, we are provided with a 400-500 page quarterly progress report by the independent monitor. The report provides updates on Bristol-Myers' business operations, new legal issues arising in any of its operating entities, compliance with the deferred prosecution agreement, and a forward-looking section on issues Bristol-Myers will confront in the next quarter. We also exchange draft agendas prior to meeting so that all topics of interest to both parties are addressed. The attendees at the meeting include the non-executive chairman, the chief executive officer, the general counsel, the U.S. Attorney, his counsel, and the Assistant U.S. Attorneys who prosecuted the matter. The independent monitor presides at the meeting. To further emphasize the post-deferred prosecution agreement sense of partnership between the parties, the site of the meeting is alternated between our offices and Bristol-Myers.'

In addition, to impress upon Bristol-Myers' top managers and finance personnel the seriousness of the company's situation, the deferred prosecution agreement also provides for "a meeting . . . of its senior executives and any senior financial personnel, and any other Bristol-Myers employees who the Company desires to attend, such meeting to be attended by the United States Attorney and other [*1056] representatives of the Office for the purpose of communicating the goals and expected effect of this Agreement." n23

PUBLIC NOTICE: CRIMINAL COMPLAINT, POSTING ON WEBSITE

The filing of a criminal charge is not a prerequisite to a deferred prosecution agreement, but we believe the public lodging of a criminal complaint or information promotes both general and specific deterrence. The criminal complaint against Bristol-Myers filed in the U.S. District Court for the District of New Jersey gives clear notice to Bristol-Myers and the world that the channel stuffing and other misconduct described in the complaint constitutes securities fraud. Bristol-Myers is on notice of the specific charge it will face in the unwelcome event of a breach of the deferred prosecution agreement -- conspiracy to commit securities fraud contrary to Title 15, United States Code, Sections 78j(b) & 78ff(f) and *Title 17, Code of Federal Regulations, Section 240.10b-5*, in violation of Title *18, United States Code, Section 371*, during the period of 2000 through 2001.

More broadly, any business executive contemplating similar conduct has been warned. While it may be difficult to measure the deterrent effect of filing such a criminal charge, we do not doubt that corporations and their counsel have gotten the message that deceiving the investing public -- whether by channel stuffing or by other means and methods -- will be dealt with severely. To the extent undisclosed channel stuffing might have been viewed as non-criminal conduct, the Bristol-Myers criminal complaint stands out as a tangible contradiction.

As a final point regarding notice and deterrence, the deferred prosecution agreement requires Bristol-Myers to post the agreement prominently on its website. By the end of 2005, Bristol-Myers reported to the U.S. Attorney's Office that the deferred prosecution agreement had been downloaded from their site more than 56,000 times.

CORPORATE CULTURE

When a corrupt corporate culture fosters criminal conduct, federal prosecutors contemplating remedial actions under a deferred prosecution arrangement must be concerned and do their best to remedy it. The corporate culture that existed at Bristol-Myers in 2000 and 2001 greatly contributed to the criminal conduct that occurred there. The much-touted "Double-Double" and "Mega-Double" goals to double sales and earnings in seven years (1994 - 2000) and then in five years (2001-2005) led to a culture of deception. Hitting the targets set through a "top-down" budget process by senior management was paramount. To maintain the illusion of achieving these targets and hitting Wall Street expectations, channel stuffing and other trickery became the norm.

It is important to note that Bristol-Myers had gone through a channel-stuffing [*1057] problem in the early 1990s. Significant controls were put in place at that time to avoid repetition of the illegal conduct, controls that eventually failed. While the earlier channel stuffing was certainly not equal in scope to the 2000-2001 conduct, it did indicate a corporate attitude that placed earnings ahead of honesty. Our investigation uncovered the slow unraveling of the aforementioned safeguards, as top-down pressure increased to meet Wall Street expectations and internal goals beginning in the mid-1990s. Interviews with current and former Bristol-Myers employees substantiated our concerns regarding the abandonment of the controls put in place in the aftermath of the first scandal. While prior conduct is not proof positive of current allegations, it did make us believe that such conduct was possible at Bristol-Myers.

The deferred prosecution agreement recognized that Bristol-Myers had taken steps to change its budget process, to assure that appropriate consideration is given to input and analysis from the bottom to top, and not exclusively from top to bottom, and to adequately document that process. n24 The agreement requires that Bristol-Myers management keep informed about its budget process and the perils of top-down budgeting, but does leave budgeting to Bristol-Myers management. Paragraph 24 of the deferred prosecution agreement provides for high-level reporting on issues that will reflect whether the old culture of hitting the numbers at all costs still lingers. It provides as follows: n25

> The CEO and CFO shall prepare and submit to the Non-Executive Chairman, Chief Compliance Officer and the Monitor described in paragraph 11 written reports on the following subjects:
>
> (a) all non-standard transactions with major U.S. wholesalers, such written report to be submitted within fifteen (15) days of such transaction;
>
> (b) an overview and analysis of Bristol-Myers' annual budget process for its major business units, including description of significant instances of any top-down changes to business unit submissions, such written report to be submitted together with the proposed budget submitted for approval to the Board of directors;
>
> (c) sales and earnings forecasts or projections at the corporate or major business unit level which indicate a quarterly target will not be met, together with a description of steps subsequently taken, if any, to achieve the budget target, such written report to be submitted quarterly and at least ten (10) business days prior to the Company's scheduled quarterly analyst call;
>
> (d) description of significant instances in which the preliminary quarterly closing of the books of any major business unit indicated that the business unit would not meet its budget target for any sales or earnings measure.

The agreement also requires Bristol-Myers to develop and implement a "training [*1058] and education program, which shall be reviewed and approved by the board of directors, designed to advance and underscore the Company's commitment to exemplary corporate citizenship, to best practices of effective corporate governance and the highest principles of integrity and professionalism, and to fostering a culture of openness, accountability and compliance throughout the Company." n26 The agreement specifies that the training is mandatory for, among others, all Bristol-Myers personnel "involved in accounting and financial reporting functions, or the oversight thereof" and all "Bristol-Myers legal division [personnel] with responsibility for finance, business risk or disclosure issues." n27 The training must cover four areas, at a minimum: (a) disclosure and other obligations imposed by the federal securities laws; (b) internal accounting controls and procedures; (c) recognizing accounting practices that do not conform to Generally Accepted Accounting Principles or that are otherwise improper; and (d) expected responses upon discovering improper, illegal or potentially illegal acts relating to Bristol-Myers' accounting and financial reporting. n28

Many of the remedial measures in the deferred prosecution agreement -- the top-level structural and governance changes, the reporting by senior management, and the training and education programs for key financial and legal per-

sonnel -- are designed to spread knowledge and responsibility for doing the right thing throughout the Bristol-Myers organization. n29 Blind fealty to "hitting the numbers," we hope, will be replaced by a far different mindset -- an organization that will truly live its pledge -- "to extend and enhance human life by providing the highest-quality pharmaceutical and related health care products. We pledge -- to our patients and customers, to our employees and partners, to our shareholders and neighbors, and to the world we serve -- to act on our belief that the priceless ingredient of every product is the honor and integrity of its maker." n30 A top-down commitment to honor and integrity, coupled with an educated and empowered workforce, undoubtedly will help Bristol-Myers demonstrate its commitment to exemplary corporate conduct during and after the two-year term of the deferred prosecution agreement.

|*1059| RESTITUTION ONLY; NO FINE OR PENALTY

The Bristol-Myers deferred prosecution agreement requires the company to pay an additional $ 300 million to aggrieved shareholders, bringing its total restitution payments to $ 839 million. n31 The $ 839 million amount represents a reasonable calculation of full restitution to shareholder victims, and is based on the precipitous drop in the price of Bristol-Myers common stock in April 2002, when the marketplace first learned of Bristol-Myers' programmatic channel stuffing. n32 Consistent with the federal sentencing scheme, n33 payment of full restitution will always receive priority over imposition of fines and penalties.

The Bristol-Myers deferred prosecution agreement is notable in that it does not require Bristol-Myers to pay a fine or penalty. While punitive fines and penalties undoubtedly provide a measure of deterrence, n34 we believed that form of fiscal punishment was unnecessary to achieve our prosecutorial goals. The amount of restitution, while completely compensating injured shareholders, had no role in our decision not to seek additional fines or penalties. The criminal complaint and the terms of the agreement itself provide adequate deterrent effect; a fine or penalty would punish the company's shareholders and exact a toll on a company trying to get its corporate house in order. We also believed that Bristol-Myers' board of directors, with whom we had the opportunity to meet prior to entering into the deferred prosecution agreement, knew what was expected of them and was willing to lead the company in the direction of good corporate citizenship. In these circumstances, millions of dollars in fines or penalties would have accomplished little; we would much rather have Bristol-Myers spend those millions developing a new cancer or diabetes drug. Our goal was to seek the appropriate balance between aiding the victims of the crime and preventing any future criminal conduct. If we were to err on either side, we chose to err towards restitution to the victims and a |*1060| solid company in the aftermath of the deferred prosecution agreement for Bristol-Myers' employees and customers around the world.

TWO-YEAR TERM

The term of the Bristol-Myers deferred prosecution agreement is two years, from June 2005 to June 2007. The two-year term was chosen for two main reasons. First, in our judgment two years is the minimum period necessary to allow the structural, governance and other changes mandated by the agreement to take root and truly change the corporate culture at Bristol-Myers. A shorter term, one year, for instance, posed the risk that the company would adhere to the literal terms of the agreement but not absorb the lessons and principles of good corporate governance embedded in those terms. Our goal was not to have Bristol-Myers "grin and bear it" for the term of the agreement and then revert to old ways. We seek a deep, broad and durable commitment to good corporate behavior. Two years gives some assurance that cultural improvements at Bristol-Myers will be pervasive and long lasting if not permanent.

The second reason for the two-year term relates to Bristol-Myer's particular business prospects. Bristol-Myers has made a series of business decisions, both during and after the events under investigation, about its future business direction. For example, Bristol-Myers decided to shed many of its non-pharmaceutical businesses and to concentrate its research and development efforts within the pharmaceutical sector on certain disease categories. At the same time, the company faces challenges from loss of patent protection on some of its top-selling products, including the cholesterol drug Pravachol (R) and the blood thinner Plavix (R). The upshot of these business considerations is that the company forecasted a "rough patch" where sales and earnings would remain flat at least until new products from its R&D pipeline came on line around the end of 2006. The term of the deferred prosecution agreement is intended to coincide with this rough patch in Bristol-Myers's business; it is a pointed reminder that financial results should be reported as they are, not as corporate executives or Wall Street analysts want them to be. To the extent business difficulties might tempt anyone at Bristol-Myers to resort to channel stuffing or any other type of financial chicanery, the deferred prosecution agreement, we hope, will banish any such thought.

In our judgment, two years seemed to be the right term for the Bristol-Myers deferred prosecution agreement. It is long enough to engender meaningful, lasting change and guide Bristol-Myers through a period of business risk. Yet a term longer than two years ran the risk of undue burden on Bristol-Myers and its top executives, who doubtless prefer to

run their business rather than attend quarterly meetings with the U.S. Attorney and respond to the queries of the independent monitor. Two years, in sum, strikes a reasonable balance between these competing considerations.

[*1061] CONCLUSION

The last few years have been difficult times in light of the numerous corporate fraud scandals that rocked United States financial markets. Scandals at Enron, WorldCom, Adelphia, Cendant and others presented new challenges to federal law enforcement. President Bush established the Corporate Fraud Task Force, led by Deputy Attorney General Larry Thompson, to help guide federal prosecutions across the country.

The Thompson Memo, mentioned earlier in this essay, set out the guidelines for prosecution that have been used by all ninety-three United States Attorneys to help restore faith in our markets and order to corporate boardrooms across America. n35 While this has been, at times, a naturally adversarial period between Corporate America and the Department of Justice, the results have led to a renewed confidence by the public in both the financial markets and law enforcement. The question raised in this essay is: Can the use of deferred prosecution agreements achieve the goals of improved corporate governance and renewed market confidence without destroying a corporation and losing American jobs in the process?

We believe the answer is a resounding "Yes." The deferred prosecution agreement between Bristol-Myers and the United States Attorneys Office for the District of New Jersey has all of the elements necessary to achieve those goals. Wrongdoing was identified and admitted to by the company. Specific failures of governance were identified and remedies were suggested by both parties and agreed to by the company. A respected federal monitor was appointed to insure adherence to the agreement. Major steps were taken to change the corporate culture through educational programs for employees and directors and a new approach to the corporate budgeting process. Restitution was made to those shareholders who were harmed by the corporate crimes.

We did not impose any fines. We did not demand any firings. We did not make any element of the agreement so onerous that it would unduly punish innocent employees. We crafted each part of the agreement with the idea of avoiding collateral damage to innocent parties. The action by the government was firm, decisive and geared towards rehabilitating a damaged corporation. The actions were not punitive. It was important that wrongdoing was identified and punished without destroying a vital American company in the process.

Deferred prosecution agreements like the one employed in the Bristol-Myers case can achieve the goals of the President and the Department of Justice while, at the same time, lower the temperature among prosecutors, defense counsel and corporate executives. Justice in the context of corporate fraud can be achieved on a company wide level without destroying companies in the process. Bristol-Myers is a prime example of that principle.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePreliminary ProceedingsPretrial DiversionCriminal Law & ProcedureSentencingRestitutionLegal EthicsProsecutorial Conduct

FOOTNOTES:

n1 Bristol-Myers, Deferred Prosecution Agreement, http://www.Bristol-Myers.com/static/pdf/dpa.pdf (last visited Mar. 22, 2006) [hereinafter DPA].

n2 Hereinafter referred to as Bristol-Myers.

n3 The Bristol-Myers DPA requires that the agreement be posted prominently on the Bristol-Myers website.

n4 Bristol-Myers manufactures pharmaceutical products and distributes their products through wholesalers. These wholesalers generally seek to maintain inventories of prescription drug products sufficient to satisfy normal prescription demand from their retail customers. Inventory levels in excess of normal levels result in greater carrying costs for the wholesalers, which the wholesalers seek to avoid. The practice known as channel stuffing

refers to Bristol-Myers' use of financial incentives to spur wholesalers to buy pharmaceutical products in excess of actual or normal prescription demand, in order for the company to report artificially higher sales and earnings.

n5 This assumes, of course, that no members of the Board are targets of any ongoing investigation, and that prosecutors are at a stage in the investigation where that determination can be made definitively by the prosecutor's office. The integrity of the investigation must always be the paramount consideration.

n6 Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components, United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

n7 *Id.*

n8 *Id.* at II.

n9 *See generally id.* at II.

n10 *See* DPA, *supra* note 1.

n11 *Id.*

n12 Bristol-Myers' channel stuffing practices led to above-normal levels of inventory at the wholesaler level. A reduction of this excess inventory at the wholesaler level to levels closer to normal was often referred to as a "work-down," and involved Bristol-Myers selling less than prescription demand during the work-down period, while wholesalers sold excess inventory down to normal levels. This practice had a corresponding adverse effect on sales and earnings.

n13 *See* DPA, *supra* note 1, at 7.

n14 *Id.* at 7.

n15 *Id.* at 7-8.

n16 *Id.* at 8.

n17 *See id.* at 3:

The Company's CFO, General Counsel, and Chief Compliance Officer regularly shall brief and provide information to the Non-Executive Chairman, in a manner to be determined by the Non-Executive Chairman. In addition, the Non-Executive Chairman shall have the authority to meet with, and require reports on any subject from, any officer or employee of the Company.

See also id. at 5 (The DPA also provides that the Non-Executive Chairman, together with the Compensation Committee of the Board of directors, will evaluate and recommend compensation for the CEO).

n18 *See* DPA, *supra* note 1, at 6:

For a period of one year from the execution of this Agreement, the Non-Executive Chairman, CEO, and General Counsel shall contemporaneously monitor either in person or telephonically Bristol-Myers' quarterly conference calls for analysts ("analyst calls"), and the Non-Executive Chairman shall attend and participate in any preparatory meetings held among the CEO, the CFO, the General Counsel and other members of Bristol-Myers senior management in anticipation of the analyst calls. The General Counsel shall ensure that representatives of the Bristol-Myers legal division are informed and consulted regarding, at a minimum, issues relating to disclosure or securities law that may arise in the course of preparing for the analyst calls.

n19 *Id.* at 3.

n20 *Id.* at 1-3.

n21 *Id.* at 4.

n22 *Id.*

n23 *Id.* at 6.

n24 *See* DPA, *supra* note 1, at 2.

n25 *Id.* at 6-7.

n26 *Id.* at 5.

n27 *Id.*

n28 *Id.*

n29 Another step taken by Bristol-Myers to try to change the corporate culture was the endowment of a chair in business ethics at Seton Hall University School of Law. The professor occupying that endowed chair is required to conduct an annual ethics seminar for Bristol-Myers management and other interested industry members. The idea for endowing the chair originated with counsel for Bristol-Myers. The only requirement from our Office was that the chair was endowed at a New Jersey law school. Rutgers University School of Law already had a chair in business ethics endowed by Prudential. Bristol-Myers, after the signing of the deferred prosecution agreement, entered into discussions with the Dean of Seton Hall Law School and formally endowed the chair in December 2005.

n30 Bristol-Myers, Pledge: A Living Statement, http://www.bms.com.ph/pledge.htm (last visited Apr. 18, 2006).

n31 *See* DPA, *supra* note 1, at 6.

n32 Bristol-Myers first paid $ 150 million in its civil settlement with the Securities and Exchange Commission, and later paid $ 300 million to settle consolidated shareholder class action lawsuits and $ 89 million to settle claims of shareholders who had opted out of those class actions. Interestingly, the consolidated shareholder class actions had been dismissed with prejudice by the United States District Court for the Southern District of New York, and were settled while on appeal to the Second Circuit. In *In re Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549 (S.D.N.Y. 2004),* the district court dismissed the class actions against Bristol-Myers and its ex-

ecutives in their entirety and with prejudice, holding that plaintiffs had not pleaded fraudulent intent with the particularity required by *Rule 9(b) of the Federal Rules of Civil Procedure* and the Private Securities Litigation Reform Act of 1996, *15 U.S.C. § 78u-4*(b)(1). *Id. at 560.*

n33 *See 18 U.S.C. § 3572*(b) (2000)

If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the 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.

n34 The alternative fine provision of *18 U.S.C. § 3571*(d) applies to organizational defendants. *See 18 U.S.C. § 3571*(c)(2) (2000). Section 3571(d) provides that "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. . . ."

n35 *See* Thompson Memo, *supra* note 6.

Mr. CONYERS. Thank you, sir. We are now pleased to welcome from the Department of Justice, Deputy Assistant Attorney General of the Department of Justice's Criminal Division since March 2009, Attorney Gary Grindler.

He has been working on, and previously, on special matters in Governmental Investigations Practice Group in his former law firm of King and Spalding. Welcome this afternoon to our hearing, sir.

TESTIMONY OF THE HONORABLE GARY G. GRINDLER, DEPUTY ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. GRINDLER. Good afternoon, Mr. Chairman and to the Members of this Committee. I thank you for your invitation to address this Committee on this very important topic.

I am privileged to serve the Department of Justice as a Deputy Assistant Attorney General in the Criminal Division, and in my private practice in my past involvement with the Department, I have had the opportunity to observe the Department's impressive efforts over the last several years to combat corporate fraud and other corporate malfeasance.

Since 2002, the Department has obtained approximately 1,300 corporate fraud convictions. This includes convictions of more than 370 senior corporate officers. In addition, between 2004 and 2008, the Department has secured over 940 guilty verdicts or pleas from corporate defendants.

During that same time, the Department resolved approximately 80 corporate cases with the use of deferred prosecution agreements and non-prosecution agreements which comprises approximately 8 percent of the total number of corporate criminal convictions during that period.

In order for corporate enforcement efforts to be effective, Federal prosecutors must be permitted the discretion to fashion appropriate agreements with business organizations to resolve investigations and those decisions have to be made on the unique facts and circumstances of a particular case.

The Department will continue to bring criminal charges against business organizations where the conduct is egregious, pervasive and systemic. At the same time, however, the Department recognizes that charging and convicting a corporation runs the risk of triggering significant negative consequences for innocent third parties who played no role in the criminal conduct, including employees, pensioners, shareholders and customers.

These collateral consequences may be unjustified where the corporation has fully cooperated, disciplined the culpable individuals, implemented comprehensive compliance reforms and made restitution to all victims. These are issues that must be considered when determining whether to charge a business organization.

Prosecutors may use a variety of tools other than an indictment and a prosecution to bring justice to the victims and to the public, and among those tools are DPAs, NPAs, and the use of independent monitors.

The Department last year in the United States Attorneys' Manual issued clear guidance on the principles that must be considered when evaluating the appropriate resolution of a corporate criminal investigation.

The use of DPAs and NPAs and independent monitors, indeed, has increased over the last 5 years, and while they avoid the collateral consequences that I just described, the companies nevertheless will face serious consequences for their criminal violations.

Typically, during the time period of a DPA and NPA, the corporation will be required to fulfill requirements, certain requirements, including the payment of restitution to victims, the pay-

ment of financial penalties, full cooperation by the business organizations which may enable additional prosecutions both of companies and individuals and the implementation of an effective compliance program.

In appropriate cases, DPAs and NPAs may also require the retention of an independent compliance monitor. And last year, as you know, the Department issued guidelines regarding the selection and use of monitors that identified a series of principles to be followed in using these monitors in connection with these agreements.

The guidelines are designed to ensure that well qualified independent monitors are selected, that the process is free from potential conflicts of interest and that the monitors focus on reducing the risk of a corporation's future misconduct.

The Department of Justice recognizes this Committee's interest in the use of DPAs, NPAs and independent monitors. However, we do have serious concerns about the provisions contained in H.R. 1947 entitled The Accountability in Deferred Prosecution Act of 2009, and we do oppose this proposed legislation.

This bill, if passed, will diminish the ability of Federal prosecutors to fully exercise their prosecutorial judgment and discretion which is a core prerogative of the executive branch. And I want to emphasize that the Department's written guidance governing the principles that apply to prosecutive decisions that involve DPAs and NPAs were carefully developed with input from a number of people, and that we believe they adequately address the issues that are covered by the bill.

Finally, requiring courts to approve a non-prosecution agreement before they can take effect raises separation of powers issues, and could impede and delay the government's enforcement efforts against corporate fraud.

The Department is committed to using all of the tools at its disposal to root out corporate fraud, and our experience has shown that DPAs and NPAs must be tailored to the specific needs of a particular case and provide sufficient flexibility to achieve real results.

It is important that we preserve the ability of experienced prosecutors to balance all of these concerns and resolve the criminal matters in the best interest of the public and the victims. I would be pleased to answer any questions that the Committee may have. Thank you.

[The prepared statement of Mr. Grindler follows:]

PREPARED STATEMENT OF THE HONORABLE GARY G. GRINDLER

Department of Justice

STATEMENT OF

GARY G. GRINDLER
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

HEARING ENTITLED

"ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS"

PRESENTED

JUNE 25, 2009

Good morning Mr. Chairman, Ranking Member, and members of the Committee. Thank you for your invitation to address the Committee concerning the Department of Justice's use of corporate Deferred Prosecution and Non-Prosecution agreements. It is an honor to appear before you today.

Introduction

I am privileged to be serving the Department of Justice (the Department) as the Deputy Assistant Attorney General for the Criminal Division. In that capacity, I supervise, among other things, the Criminal Division's enforcement of the Nation's anti-fraud laws. Although I am new to this position, I am not new to the Department, as I previously served the Department during the Clinton Administration as Counselor to the Attorney General, Principal Associate Deputy Attorney General, and Deputy Assistant Attorney General in the Civil Division. Most recently, I served as a partner at a law firm in Washington, D.C.

Based on my experience as a government attorney and a private practitioner, I have had the opportunity to observe the Department's impressive efforts over the last several years to combat corporate fraud. As you know, in the wake of several major corporate scandals in 2001 and 2002, the Corporate Fraud Task Force was established and led by the Department. Since the Task Force's inception in 2002, United States Attorneys' Offices and the Department components have obtained approximately 1,300 corporate fraud convictions. This includes convictions of more than 200 corporate chief executives or presidents, more than 120 vice presidents, and more than 50 chief financial officers. Though this track record is impressive, the Department's commitment to vigorously identifying and pursuing wrongdoing in our corporate boardrooms has only grown stronger in recent months. Our prosecutors and agents are

determined to ensure that wrong-doers are punished and that victims are made whole – efforts which we believe are critical to restoring investor confidence in the markets and ensuring that our corporate citizens play fair.

The Department's extensive experience prosecuting massive corporate fraud has taught that in order for corporate and financial fraud enforcement efforts to be effective, Federal prosecutors must be permitted sufficient discretion to fashion appropriate agreements with business organizations to resolve criminal investigations, based upon all the facts and surrounding circumstances of a particular case and in light of the often unique features of certain businesses and areas of criminal law. The Department, through the United States Attorneys' Offices, the Criminal Division, Tax Division, and other components, has and will continue to bring criminal charges against business organizations where the criminal conduct is egregious, pervasive and systemic, or when a business organization is incapable or refuses to discipline culpable individuals or reform its culture and practices to prevent recidivism. At the same time, however, the Department recognizes that criminally charging and convicting a company or corporation runs the risk of triggering significant negative consequences for innocent third parties 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 public as a whole. Furthermore, in certain circumstances, the collateral consequences of such prosecutions -- such as the exclusion from government contracting pursuant to debarment rules -- may be unjustified where a corporation has fully cooperated with the government's investigation, appropriately disciplined culpable individuals, implemented comprehensive compliance reforms and other remedial measures, and made restitution to all the victims.

The impact of a corporate criminal conviction on individuals, entities, and the Nation's economic stability are all real issues that are borne in mind by the Department and must be carefully evaluated and weighed in every corporate prosecution. Accordingly, Federal prosecutors carefully consider the consequences of a criminal conviction in determining whether to charge a business organization, and may use a variety of tools other than indictment and prosecution to bring justice to innocent victims and the public. Deferred Prosecution Agreements (DPAs), Non-Prosecution Agreements (NPAs), and Independent Compliance Monitors are among the most powerful and effective of these tools. Today, I want to address how the Department uses these invaluable tools in combating corporate and financial fraud.

Deferred Prosecution Agreements and Non-Prosecution Agreements

The Department has spoken clearly about the principles that must be considered when evaluating the appropriate resolution of a corporate criminal probe. These corporation-specific principles have been followed by the Department since 1999 and were recently updated in August 2008 and formalized in the U.S. Attorney's Manual at Section 9-28.000 *et seq.*[1] *See* Exhibit 1. All Federal prosecutors are required to follow these principles in determining whether a DPA or NPA is appropriately used in a particular case, a complex decision which requires a careful analysis of a variety of factors. These agreements are subject to multiple levels of review in the Department and, in most instances, are made available to the public to ensure transparency.

DPAs and NPAs in corporate cases provide the Department with a powerful alternative to outright prosecution or declination, and have been used effectively by the Department for many

[1] U.S. Attorney's Manual 9-28.000, Principles of Federal Prosecution of Business Organizations.

years. DPAs typically involve the filing of a formal charging document, such as a Criminal Information of complaint, by the Government. The Criminal Information and the DPA are then submitted to the appropriate court. As a part of the DPA, the government typically files a statement of facts that describes the basis of the criminal charges. Thus, although there are criminal charges pending against the business organization, the government agrees to defer the prosecution of those charges for a period of time. During the deferral period, the business organization is typically required to pay a fine and take remedial and compliance actions. Ultimately, if the business organization fails to abide by the conditions outlined in the DPA, the Department has the right to proceed on the criminal charges that were previously filed but deferred, file additional charges, and use the statement of facts that were filed with the court as an admission against the business organization. In this way, a DPA is a powerful mechanism for the Department to ensure that corporations make restitution and take affirmative remedial actions.

The Department has also entered into NPAs with business organizations. The principal distinction between DPAs and NPAs is that the latter agreements are not accompanied by the filing of formal charges. In cases involving NPAs, the Government has reviewed the facts of the case, considered the appropriate course of action, and decided not to file criminal charges; instead, it has opted to reach a resolution short of criminal prosecution.

Importantly, whether the Government has entered into a DPA or NPA with a business organization, the corporation is subject to specific conditions that serve justice, help to ensure victims are compensated, exact fines, and seek to prevent future illegal conduct. Pursuant to a DPA or an NPA, the corporation essentially undertakes a period of probation, by agreement with the Department, rather than be subjected to a criminal conviction, with the attendant collateral

consequences. The obligations imposed upon a business organization 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 business organization with ongoing Government investigations of potentially culpable individuals and/or other business organizations; and
3. the implementation of a remedial ethics and compliance program, including internal controls that will effectively prevent, deter, detect, and respond to possible future misconduct.

This type of alternative disposition is beneficial for a variety of reasons. First, as noted above, DPAs and NPAs often require the payment of restitution to victims and/or financial penalties. Because a DPA or NPA is the result of a negotiated disposition, the payments to the victims can be accomplished more quickly and efficiently as the restitution can be obtained without the delays resulting from the formal charging of a company, the protracted litigation, post-conviction restitution hearings and administration, and, then, inevitable appeals.

Second, DPAs and NPAs promote the public interest in ferreting out crime more quickly by requiring corporate cooperation. DPAs and NPAs require companies to cooperate with the government in obtaining evidence necessary to prosecute individuals and other corporations who have engaged in misconduct, including culpable individual corporate executives and employees. Notably, prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals, and corporate cooperation has proved to be invaluable in a variety of corporate and financial fraud cases against individual defendants.

Third, many DPAs and NPAs benefit the public by requiring the corporation to initiate comprehensive ethics and compliance programs. The agreements help ensure that going

forward, the business organization roots out illegal and unethical conduct, appropriately disciplines culpable employees, prevents recidivism, and adheres to business practices that meet or exceed applicable legal and regulatory mandates. There is a dual benefit to this approach: it helps to prevent future illegal conduct and helps to restore the integrity and preserve the financial viability of a corporation that had been mired in corruption or fraud.

Fourth, DPAs and NPAs benefit the public and industries by providing guidance on what constitutes improper conduct. A vast majority of the DPAs and many NPAs are made available to the public by the Department or by the corporation. DPAs are typically filed with a court and are available to the public through the local clerk's office (or may be available electronically as most courts now post pleadings online). Further, copies of DPAs and NPAs are frequently made available by the Department online or are otherwise available upon request. Because the agreements typically provide a recitation of the improper conduct at issue, the agreements can serve as an educational tool for other companies in a particular industry. Furthermore, the agreements contain information about the type of remedial efforts the Department and, in certain circumstances our regulatory partners, will require the company to take.[2] This is beneficial in helping companies to determine what may be considered "best practices" in their industry.

Finally, DPAs and NPAs allow us to achieve these benefits without necessarily subjecting companies to the collateral consequences of prosecution and conviction. These collateral consequences can include the debarment of a company which can result in the potential dissolution of a company, loss of jobs, elimination of beneficial products from the market, and

[2] The Department and a regulatory agency (for example, the U.S. Securities and Exchange Commission or the Commodities Futures Trading Commission) will conduct a parallel investigation and frequently the Government will resolve the civil and criminal cases simultaneously. In many instances, the regulatory agency and the Department will entered into agreements that are similar in nature, require similar compliance reforms, and may call for the use of the same monitor. In those cases, the regulatory agencies are instrumental in helping to identify the types of reforms that are appropriate in the particular matter and what is appropriate within a given industry.

loss of confidence in the company leading to large shareholder losses. These are just a few of the potentially substantial economic consequences. Undoubtedly, corporations that commit improper conduct should be subject to severe and appropriate punishment, but the use of a DPA or a NPA can serve to rehabilitee a company and promote ethical conduct rather than subjecting the company to potential closure.

Furthermore, it should be noted that the DPAs achieve many of the goals that a guilty plea can achieve and, aside from the form of the agreement, the outcome may have little practical effect. In a criminal case against an individual, a guilty plea versus an alternative disposition can mean the difference between a jail sentence and no incarceration. Obviously, corporations cannot be sentenced to jail so the distinction in the outcome of a corporate case is truly tied to the potential collateral consequences that can result from a guilty plea as opposed to a DPA or NPA. And, as describe above, the use of a DPA can achieve the same, if not better, results for the victims of a corporations' crime.

Importantly, all of this is achieved while preserving the Department's ability to prosecute the business organization, using a set of facts to which the organization has already admitted, if the agreement is materially breached. For these reasons, since 1992, the Department has used DPAs and NPAs in a variety of corporate cases involving a range of financial crimes, including securities 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 business organizations has expanded in recent years, it is still a relatively limited practice. Indeed, the use of DPAs and NPAs to resolve corporate cases is minimal compared to the overall prosecutions the Department has pursued against business organizations. Between

2004 and 2008, the Department indicted over 1,480 business entities. In comparison, since 1992, the Department has entered into a total of approximately 150 DPAs and NPAs. Furthermore, the Department's use of DPAs and NPAs does not mean that the Department has stopped bringing criminal charges against individuals who have committed fraud. To the contrary, we continue to vigorously prosecute corporate officers who have caused their companies to suffer harm.

Independent Compliance Monitors

In appropriate cases, DPAs and NPAs also may require the retention of an independent compliance monitor. A compliance monitor is an individual or entity – independent from the business organization and the Government – selected to oversee the implementation of and compliance with the provisions of the negotiated agreement. The compliance monitor is retained by the business organization, which pays for the monitor and for the other costs of implementing the DPA or NPA.

Understanding that the use of independent monitors is a complex undertaking, the Department issued guidelines regarding the selection and use of monitors.[3] These guidelines identify a series of principles to be followed in using monitors in connection with DPAs and NPAs – including the selection of a monitor; ensuring the independence of a monitor; monitoring compliance with the underlying agreement; the communications and recommendations of a monitor; reporting of previously undisclosed or new misconduct; and the duration of a monitorship. The guidelines were drafted after careful consideration of existing agreements, relevant case law, and academic literature on the subject, and were formulated with full input from career employees of the Criminal Division and the Attorney General's Advisory Committee

[3] *See* Memorandum from Craig S. Morford, then-Acting Deputy Attorney General, U.S. Dep't of Justice, to Heads of Dep't Components, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations" (March 7, 2008). Attached as Exhibit 2.

of U.S. Attorneys. The guidelines are designed to ensure that qualified monitors are selected, that the process is free from any potential conflicts of interests, and that the monitors are used appropriately to address and reduce the risk of a corporation's future misconduct.

Compliance monitors can be an invaluable tool in fighting corporate corruption and helping to rehabilitate a company. First, the use of a compliance monitor helps to ensure that, going forward, a company institutes meaningful changes. Because of limited resources, probation officers may simply be unable to ensure ongoing, comprehensive oversight of compliance measures by a company. By contrast, a monitor, who has a singular focus on monitoring compliance, can ensure that companies make the changes required to alter a corrupt corporate culture.

Second, a compliance monitor can ensure that a company institutes the best possible compliance program. Initially, a monitor can provide a company an independent and candid evaluation of a corporate compliance program by evaluating the program from inside the company. With this access, the monitor can typically provide specialized expertise and advice to help improve and implement a broad ethics and compliance program and relevant internal controls designed to meet the needs of the specific company.

Third, a monitor can verify whether a business organization is fulfilling the obligations to which it has agreed. Although the Department certainly works to ensure this is done, the presence of an independent monitor within a corporation provides necessary insight and oversight that the Department may not be otherwise able to accomplish on its own.

The Department receives the benefit of the monitor's access and oversight through written reports. In nearly all monitorships, the monitor is required to submit reports to the Department regarding the company's compliance with the agreement, any potential breaches of

the agreements, and the company's remedial efforts. In addition to the reports, in most cases, the Department maintains an open dialogue with the monitor and will meet with the monitor frequently to receive updates. These written and oral reports frequently contain information about ongoing criminal investigations and/or contain confidential proprietary information. For these reasons, the reports are designated as confidential. The confidentiality of these reports ensures that law enforcement investigations are protected and that the corporation feels free to provide the monitor access to its operations without fear that the process could be exploited by the corporation's competitors to acquire confidential or proprietary business information.

Notably, compliance monitors retained under 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 business organization and the monitor. The Government is not – and should not be – a party to these arrangements. Each case is unique and the requirements of the monitor will differ from case to case, depending upon the nature and scope of the wrongdoing by the business organization, the scope of the monitor's duties in the underlying agreement, the type of expertise needed, the associated expenses such as travel and additional consultants, the prevailing compensation levels for subject-matter expertise and geographic scope, and many other factors. Regardless of the compensation arrangement between the company and the monitor, the key is that this system places the cost of compliance squarely on the defendant company rather than on the taxpayer.

Our experience teaches us that the use of monitors has been and should continue to be a tool that is used in appropriate corporate cases. Because no two monitor agreements will be alike given the varying facts and circumstances of each case, however, the use of monitors will be approached with care and an appreciation for the complexity of a given case.

H.R. 1947, the "Accountability in Deferred Prosecution Act of 2009"

The Department understands the Committee's interest in the use of DPAs and NPAs. We oppose H.R. 1947, entitled the "Accountability in Deferred Prosecution Act of 2009," for several reasons. The legislation constitutes an intrusion upon the powers of the Executive Branch, specifically, it encroaches on the judgment and discretion of Federal prosecutors, a core prerogative of the Executive Branch. The bill would regulate DPAs and NPAs in a uniform fashion, although we believe it is improvident to proscribe rigid rules relating to the resolution of complex corporate criminal cases, which vary greatly and rightly depend on the exercise of judgment by the Federal prosecutors. Further, in the current climate of the economic crisis, the bill would impede the Government's enforcement efforts against corporate and financial frauds by limiting our discretion in appropriately prosecuting cases. We also believe H.R. 1947 is unnecessary in light of the Department's pre-existing written guidance governing the principles that apply to prosecutive decisions regarding Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs).[4]

In addition, the Department has concerns about specific provisions of the legislation. Importantly, by requiring judicial review of NPAs, this bill would impose limitations on prosecutorial discretion concerning whether, when, and under what circumstances to conduct a criminal prosecution.

[4] For example, the U.S. Attorney's Manual already requires the review of the factors listed in Section 4 of the H.R. 1947 bill – *e.g.*, the monetary resolutions in an agreement (Section 4(b)(2)), the joint involvement of regulatory agencies (Section 4(b)(6)), what constitutes cooperation (Section 4(b)(8)), and when to use an NPA (Section 4(b)(9)). These concepts are fully incorporated into the existing Principles of Federal Prosecution of Business Organizations, and, therefore, the provision is unnecessary.

Section 5(d), imposes a national fee schedule for monitors. As discussed above, the monitor's fees are typically based upon a contractual relationship between the monitor and the underlying business organization. To unnecessarily impose constraints and limitations on a monitor's fees may interfere with the legitimate contract discussions between the two parties. Furthermore, because each case is unique and the requirements of the monitor will differ from case to case, a pre-determined "fee schedule" would not be feasible to accommodate the numerous variations of monitorships.

Section 6(b), prohibits prosecutors involved in the prosecution of the relevant case from a role in the selection of the monitor. Attorneys prosecuting a particular case frequently have the most extensive knowledge of the underlying criminal conduct committed, a keen awareness of the problems facing the business organization, an understanding of compliance or other deficiencies that may have played a contributing role, and a deep appreciation for the negotiations with defense counsel. Furthermore, prosecutors also have an understanding of the qualifications and credentials required for an effective monitor to address the needs of the business organization. To exclude the prosecutor from such a process would be imprudent and would significantly curtail the inclusion of valuable information in the monitor selection process. The Department believes that the knowledge, experience, expertise, and understanding of a prosecutor are not only invaluable to the monitor selection process, but they are essential. Such input should be an integral part of the process.

The Department has additional concerns about the legislation and welcomes the opportunity to work with the Committee to address the myriad of issues that the proposed legislation raises.

Conclusion

In these difficult economic times, the Department is committed to using all of the tools at its disposal – including DPAs and NPAs – to root out corporate fraud, ensure the vitality and integrity of the marketplace, and make victims whole. DPAs and NPAs have been used effectively in a wide variety of cases – tax schemes, international bribery conspiracies, financial fraud cases, and Medicare fraud matters – to name just a few. Our experience in these cases has shown us that these agreements must be tailored to the specific needs of a particular case and provide sufficient flexibility to achieve real results – corporate rehabilitation and reform, prompt payment of penalties and restitution to victims, and prosecution of culpable individuals – all while limiting the loss of jobs and investments that can result from a company's collapse after criminal indictment or conviction. It is important that we avoid imposing an inflexible policy that restricts the ability of prosecutors to balance all relevant concerns and resolve criminal matters in the best interests of the public and victims.

As the Department continues to root out corporate fraud, we recognize that we will face evolving threats. The Department is committed to drawing upon its substantial experience in handling corporate crime 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 the United States and its citizens.

I would be pleased to answer any questions that the Committee might have. Thank you.

Mr. CONYERS. We thank you for your testimony. Chuck Rosenberg is a partner at Hogan & Hartson, has served as the U.S. attorney for the Eastern District of Virginia and as the U.S. attorney for the Southern District of Texas.

He has also served in several post-senior ones at the Department of Justice, as chief of staff to Deputy Attorney General Jim Comey, as counsel to Attorney General John Ashcroft and counsel to FBI

Director Bob Mueller. From 1994 to 2000 he was an assistant U.S. attorney in the Eastern District of Virginia.

We welcome you here this afternoon, and we will listen carefully to your testimony.

TESTIMONY OF THE HONORABLE CHUCK ROSENBERG, FORMER UNITED STATES ATTORNEY, EASTERN DISTRICT OF VIRGINIA, HOGAN & HARTSON, LLP

Mr. ROSENBERG. I was simply thanking the Committee for the invitation. It is a pleasure and an honor to be here today. Thank you, Mr. Chairman.

I joined the Department of Justice out of law school. I went to law school because I wanted to be an assistant U.S. attorney and I should tell you that I consider it still the greatest professional privilege of my life including the opportunity to have served as U.S. attorney.

I work with wonderful men and women of great integrity and dedication and intelligence. I miss it every day. These men and women of the Department struggle with how best to handle corporate crime.

Corporate crime presents a very difficult dilemma. How do you punish corporate criminal behavior without harming innocent third parties? One solution tool that we found, that works and works well, has worked well for a long time, are deferred prosecution agreements. I have just three points to make about them. I am going to be brief, and then I am going to be quiet.

First, prosecutors need to strike a balance between doing too much and doing too little. We struggle with that all the time. We want crime to be punished, obviously. We need specific and general deterrents for the bad actors, but we also need a level playing field for the vast majority, vast majority of corporations that do it by the book.

The collateral consequences of prosecuting a corporation, Mr. Grindler alluded to that, even the bad corporate actor that does not play by all the rules can devastate individual lives, and we have seen that, employees, shareholders and so on, who had absolutely no role in the corporate criminal wrongdoing and no ability to prevent it.

Also, in highly regulated industries, a prosecution can mean the debarment of a corporation and therefore its demise. In some cases that is appropriate. In many cases it is not. So point one, we need a balanced approach.

Point two, we got one. We have a balanced approach. The Department has a very sensible approach in place. I have been with the Department—I had been with the Department for a very long time. I know what that approach is, and I think they have it right.

So I guess it is not very interesting for me to show up here and tell you that the system is not broken, but actually, I am not very interesting, and that is why I am here, to tell you that the system is not broken.

DOJ has struck the right balance, has the right safeguards in place and handles deferred prosecution agreements, including the appointment of corporate monitors in a thoughtful, careful and proper manner. There are two key documents here. I respectfully

refer the Committee to both, although I am sure you are quite familiar with them.

The first is the March 2008 guidance by then Acting Deputy Attorney General Craig Morford, like me also a career guy in the Department of Justice, regarding DPAs and the selection of corporate monitors.

The second key document articulates the current Justice Department principles in place right now regarding the prosecution of business organizations, found at Title 9, Chapter 9-28 of the U.S. Attorneys' Manual. A lot of very smart and experienced prosecutors spent a lot of time constructing this guidance. I think they got it right. It is not broken. It doesn't need tinkering.

Third point, and final point, there are a couple of proposals floating around, split the oversight of deferred prosecution agreements and the selection of corporate monitors in the hands of the Federal judiciary.

I completely understand the impulse. I spent a lot of time in front of Federal judges and, by and large, they are terrific. They are very, very good at what they do. So we are tempted to tap into their experience and independence to imbue DPAs with the same integrity associated with all the other proceedings in Federal court.

Here though, I believe, that the participation of the judiciary would be a mistake. Deciding who and how to prosecute, or whether to prosecute at all, is a core executive function. Judges do many, many things well, no dispute, but there are a bunch of things that judges should not do, and acting as prosecutors is one of them.

Mr. Chairman, thank you for inviting me here today. It is a privilege. I am pleased to answers questions of the Committee.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF THE HONORABLE CHUCK ROSENBERG

Statement of Chuck Rosenberg

Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

United States House of Representatives

June 25, 2009

Chairman Cohen, Ranking Member Franks, and other distinguished Members of the Subcommittee.

Thank you for the opportunity to testify today regarding Deferred Prosecution Agreements.

I am a partner with the law firm of Hogan & Hartson, in Washington, D.C. Private practice, however, is a relatively new venture for me.

For almost 17 years, I was with the Department of Justice and the FBI. I joined the Department of Justice in 1990, right out of law school, through the Attorney General's Honors Program. I subsequently served as an Assistant United States Attorney in the Eastern District of Virginia, in Norfolk and in Alexandria, prosecuting cases that ranged from white collar crime, to espionage, to crimes of violence. From 1998 - 2000, I was Chief of the Major Crimes Unit in Alexandria.

I later served as Counsel to FBI Director Bob Mueller (2002 - 2003); Counselor to Attorney General John Ashcroft (2003 - 2004); and Chief of Staff to Deputy Attorney General Jim Comey (2004 - 2005).

After working for Mr. Comey, I served as the United States Attorney for the Southern District of Texas (2005-2006) and as the Senate-confirmed United States Attorney for the Eastern District of Virginia (2006-2008). I went to law school because I wanted to be an Assistant United States Attorney. The opportunity to be the United States Attorney was something I never expected; I am beyond grateful for that opportunity.

Working for the Department of Justice was a great privilege. It is an extraordinary institution, comprised of women and men of outstanding character, integrity, and intelligence. I am deeply proud of their dedication to our country, its citizens, and the rule of law.

Their continued dedication is on full display in the work of the Department of Justice to prevent, deter, and punish corporate crime.

Corporate crime presents a difficult quandary: how do prosecutors appropriately punish corporate criminal behavior without inflicting unnecessary pain on innocent third parties?

One tool frequently used to resolve this dilemma is the Deferred Prosecution Agreement (DPA). I will briefly describe DPAs, and explain why and how they are used. At the outset, let me note that with respect to DPAs, the Department has struck the right balance, has the right safeguards in place, and handles DPAs - including the appointment of corporate monitors - in a thoughtful, careful, and proper manner.

Corporate crime is one of the Department's highest priorities. This is

largely because corporate crime touches, directly and indirectly, the lives of so many people. As the U.S. Attorneys' Manual indicates, the investigation and prosecution of corporate crime promotes vital public interests: it protects the integrity of our economic and capital markets as well as consumers, investors, and businesses that compete in our free markets.[1]

Because nearly every American is a consumer, an employee, an investor, or a business owner, the consequences of corporate crime can touch a staggering number of citizens.

For instance, the prosecution of a corporation can have devastating collateral consequences for individuals who had neither a role in corporate criminal wrongdoing nor the power to prevent it, including employees, shareholders, creditors and customers. In highly regulated industries, or in industries where corporate integrity is vital to a corporation's ability to remain solvent, a prosecution can effectively mean its demise. In some cases, that may be appropriate. But in other cases, that could constitute a punishment that does not fit the crime.

Here is the problem: a decision not to prosecute means that corporate criminal misconduct goes unpunished, and therefore undeterred. But, pursuing charges could mean staggering collateral costs to innocent parties that far exceed the benefits of the prosecution itself. In these situations, the Department needs a middle ground. DPAs offer that middle ground.

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[1] U.S. Attorneys' Manual, Title 9, Chapter 9-28.000, Principles of Federal Prosecution of Business Organizations.

The agreements themselves can be relatively simple. They are contracts between the corporation and the government, in which the government agrees not to prosecute or indict the corporation during a specified period of time. In return, the corporation agrees to follow certain requirements. The specifics will vary with each case, but generally include: 1) remedial measures in company policy, such as stricter hiring controls or changes to the company's compliance processes; 2) an admission of wrong-doing, with a stipulation that the admission may be introduced as evidence in the event of the company's breach of the agreement; 3) a waiver of the right to a speedy trial and the statute of limitations; 4) the payment of restitution to victims and/or financial penalties to the government; 5) a fixed term for the DPA, sometimes with an option to extend; and 6) the appointment of an independent monitor for the duration of the agreement. If the corporation satisfies the obligations imposed by the agreement within the specified time period, then the government will drop the prosecution.

Corporate Monitors

In many DPAs, the corporation and the Department of Justice agree to the appointment of a corporate monitor to oversee and implement the Agreement. As former Deputy Attorney General Craig Morford noted, the monitor provides value to the corporation, its shareholders, and the public through the "reduced recidivism of corporate crime and the protection of the integrity of the marketplace."[2] The

[2] Memorandum from Craig Morford, Acting Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008).

monitor works with the corporation, through the term of the DPA, to safeguard the agreement, assist the corporation, and ensure that the corporation remains true to its obligations.

To ensure process integrity, the Morford guidelines require that all monitors be selected strictly on the merits of their ability to carry out their work. Additionally, the guidelines mandate that: 1) the DOJ conflict of interest policies, as outlined in the Code of Federal Regulations, be honored throughout the process; 2) an ad hoc or standing committee within the Department will consider monitor candidates, making a U.S. Attorney or Assistant Attorney General's unilateral approval or veto of a candidate impossible; 3) the Office of the Deputy Attorney General will approve the monitor; 4) the Department will reject a monitor who has an interest in or relationship with the corporation, its board, or employees; and 5) the corporation shall agree not to employ or become affiliated with the monitor for a period of one year following the end of the DPA. The process that governs the selection of the corporate monitor must balance the need for the Department to enforce the law and hold corporations accountable, and the need to ensure that monitors are selected without favoritism or impropriety, in appearance or in fact. Simply put, the Morford Memo and the Department strike the right balance.

Some have suggested that the integrity of the selection process can only be

preserved by placing it in the hands of the federal judiciary.[3] These proposals come from an understandable impulse: our federal judges do an extraordinary job as independent adjudicators, and so the proposals seek to tap into their knowledge, experience, and independence to imbue the monitor selection process with the same integrity associated with so many other proceedings in our federal courts.

Here, though, the participation of the judiciary is inappropriate and unwise. The Judicial Branch cannot "be assigned nor allowed tasks that are more appropriately accomplished by [other] branches."[4] Deciding who and how to prosecute - or whether to prosecute at all - is a core executive function. Judges do many things well, but acting as prosecutors is not one of them.

Conclusion

When used properly, DPAs can prevent and deter corporate crime. They can also mitigate or eliminate the collateral costs to innocent third parties that an indictment or prosecution inflicts. And, they can help otherwise good companies get back on track, by strengthening compliance procedures. The Morford Memo, now in its second year, provides a sound and sensible structure to DPAs and the selection of monitors.

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[3] See Testimony of The Honorable Frank Pallone, Jr., U.S. House of Representatives, Committee on the Judiciary, March 11, 2008.

[4] *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988).

Mr. CONYERS. We are very glad you are part of our panel. I am now pleased to call on Professor Vikramaditya Khanna of the University Michigan Law School faculty and before that the Boston University School of Law faculty, and he has been visiting faculty—a fellow at the—no, he has been at Harvard Law School, a

senior research fellow at Columbia Law School and a visiting scholar at Stanford Law School.

And this is not to indicate that he can't stay in more than one place for any length of time. We are very impressed by your career. His areas of research and teaching include corporate law, securities fraud and regulation, corporate crime, corporate and managerial liability, and corporate governance in emerging markets.

And so we have your prepared statement and we will now listen to you to conclude this panel, sir. Welcome.

TESTIMONY OF VIKRAMAADITYA S. KHANNA, PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. KHANNA. Thank you and good afternoon Chairman Conyers, Chairman Cohen and other distinguished Members of the Subcommittee. Thank you for inviting me here today to testify.

I will primarily focus my comments on the growth and functioning of corporate monitors as part of corporate deferred and nonprosecution agreements. In particular, I would like to address three issues today in my testimony.

First, when is it desirable to impose a corporate monitor on a firm as part of the DPA? My response is essentially that in instances where the potential cash fines that we can impose on a corporation seem unlikely for whatever reason to obtain the level of deterrence we desire, we should consider the use of a corporate monitor.

This helps to ensure that monitors are only appointed when they are socially desirable, and helps to reduce concerns that a monitor is a way to avoid imposing serious sanctions on the firm.

Second, if a corporate monitor is to be used, then what steps should be taken to reduce the concerns associated with the appointing of such monitors?

My response is that we should try to encourage the growth of a market, of sorts, for monitor services, because that will not only enhance the accountability and the transparency of the monitor, but also provide a strong competitive impetus for good performance. This will help reduce concerns both about the selection process and about the compensation levels, as well as potentially enhancing performance.

Third, what steps, in addition to those proposed in the recent House bills and the Department of Justice memo may be worth exploring to enhance the functioning of corporate monitors?

My response here is that I applaud the efforts, both taken in the House and by the Department of Justice, as important steps in this area. These reforms are broadly consistent with my analysis on corporate monitors as I suggest in my written testimony. In addition to these steps, however, I would suggest some further steps that might help to enhance the functioning of corporate monitors.

In particular, first, explicit discussion by the Department of Justice when deciding to go forward with a corporate monitor about why a cash fine or other sanction would not suffice for deterrence, and why a monitor with frequent ongoing contact with the firm would be a desirable thing to have on the facts of this case?

Second, some oversight on monitor compensation might indeed be desirable, but the pure flat fee being suggested in the House

bill, should be adopted very cautiously. Instead, I might suggest judicial review triggered by perhaps the fees crossing some hourly threshold that makes us wonder a little bit about their size.

In addition, maybe open competitive bidding for the position of a monitor, or maybe even an alternative, such as multiple flat fees that might apply at different levels depending on the kind of expertise you are expecting from the monitor.

For example, in certain monitoring instances, to address the concerns of the firm may require a great deal more skill and investment of time than, say, in others, and having a flat fee for both might be somewhat troublesome in terms of being able to generate the kind of expertise you might want. You wouldn't necessarily want to pay your neurosurgeon the same amount as you pay your primary care physician.

Third, the groups of people who are qualified to act as monitors, I think, should be expanded to include, of course, not only former enforcement officials, but also attorneys with substantial litigation experience and others who have experience in compliance matters.

Sometimes, compliance issues, particularly, in the area of financial and securities fraud, don't necessarily require tremendous litigation experience as much as experience with looking through financial statements and knowing where the skeletons might be buried.

Fourth, in terms of arranging for some degree of judicial oversight, I think that can be useful, but perhaps in limited doses. For some of the concerns already raised by members of the panel, but also because of the notion that judicial oversight is a precious thing to have. We should use it where we think it is most important, perhaps when the DPA is being finalized rather than ongoing oversight, unless some triggering event occurs that might merit greater interest for the judge.

Finally, in terms of public disclosure of monitor's reports, so far, the approach seems to be that monitor's reports would be disclosed, to the government, the Department of Justice, and potentially to the court.

But I would suggest that maybe public disclosure should be something we should consider as a norm with the power of the court and the Department to redact out information that might be troublesome or potentially competitively problematic for firms.

This will help both in terms of the ability to inform victims of potential wrongdoing of the potential harm they may suffer, and that would help to reduce, maybe the harm they suffer, as well as potentially informing other companies about steps they can take to avoid future wrongdoing in similar industries or in similar contexts.

With that, I will end my testimony. I will be happy to elaborate on any of these matters. Thank you again for inviting me to testify today.

[The prepared statement of Mr. Khanna follows:]

WRITTEN STATEMENT OF

VIKRAMADITYA KHANNA

PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN LAW SCHOOL

BEFORE

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

REGARDING

HEARING ON ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS

JUNE 25, 2009

Chairman Cohen, Congressman Franks, Chairman Conyers, Congressman Smith, and distinguished Members of the Subcommittee, thank you very much for inviting me to testify today at the hearing on Accountability, Transparency and Uniformity in Corporate Deferred and Non-Prosecution Agreements.

My remarks will primarily focus on corporate monitors who are often appointed to oversee behavior at firms subject to Deferred or Non-Prosecution Agreements (DPAs). In particular, I examine when it is desirable to appoint corporate monitors and methods for addressing concerns that arise with the use of monitors as sanctions. I conclude with recommendations for enhancing the institution of the corporate monitor. The discussion is largely based on the analyses in my articles on corporate monitors and on-going research in this area.[1]

My overall conclusions are that corporate monitors may be beneficial in a number of instances and that it is important to take steps to strengthen the market for their services to help assuage concerns that are already beginning to be discussed in the media and in Congress. In this statement I also put forward a series of suggestions that help to clarify when monitors are desirable and that detail what steps we can take, and have been taking, to further the development of a market for monitor services.

1. The Growth of Corporate Monitors

Over the last decade we have witnessed an increase in the appointment of corporate monitors as part of DPAs between law enforcement agencies and firms to address claims of alleged corporate wrongdoing.[2] Monitors have been appointed in a wide range of areas with often quite broad powers.[3] Further, even though most monitors have been former government enforcement officials or

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[1] *See, e.g.*, Vikramaditya Khanna, *Reforming the Corporate Monitor?, in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT *forthcoming* (ANTHONY S. BARKOW & RACHEL E. BARKOW, EDS, 2009); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 – 55 (2007); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 858 (2007).

[2] *See* Lawrence D. Finder & Ryan D. McConnell, *Annual Corporate Pre-Trial Agreement Update 2007*, available at: http://ssrn.com/abstract=1080263; *See* 2008 YEAR-END UPDATE ON CORPORATE DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, GIBSON, DUNN & CRUTCHER LLP PUBLICATIONS, Jan. 06, 2009 [*hereinafter* Gibson Dunn]. Available at: http://www.gibsondunn.com/publications/pages/2008Year-EndUpdate-CorporateDPAs.aspx [*hereinafter* GIBSON DUNN].

[3] *See* Khanna & Dickinson, *supra* note 1 (noting use of monitors in DPAs alleging securities fraud, health care fraud, and Foreign Corrupt Practices Act violations amongst others); Khanna, *supra* note 1.

judges,[4] their tasks have been crafted quite flexibly. Indeed, in many instances important issues were left unsettled including how, if at all, could the monitor be removed, how compensation should be set, and what reports (and disclosure) should the monitor provide?[5]

The flexibility of the corporate monitor seems matched by the speed with which it was adopted.[6] In particular, the growth in monitoring assignments accelerated after the Enron series of scandals. This was due, in part, to concerns that indictments of corporate entities might lead to substantial "collateral damage" (e.g., the demise of Arthur Andersen and the effect on its employees) and that the increase in prosecutions placed a substantial strain on enforcement resources.[7] The DPAs and monitors provided a way to address both concerns by avoiding the indictment and saving enforcement resources while still being able to impose changes on the firm. Although there was little regulation of monitors and DPAs, the Department of Justice (DoJ) provided guidance in the form of a series of memos with the Thompson Memo (2003) receiving the most attention.[8]

The impressive growth and flexibility of DPAs and monitoring assignments has recently generated criticism and controversy. In particular, concerns have been raised that DPAs and monitors may be used to avoid stronger more effective sanctions, that waiving attorney-client privilege was considered a requirement before a firm could obtain a DPA, that the selection and compensation of monitors was not very transparent,[9] that monitors face limited accountability for their own behavior even though their powers to make firms accountable seem far-reaching,[10] and that there seems little independent

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[4] Monitors are, in theory, selected by both the Department of Justice (DoJ) and the firm, but it seems the actual choice was heavily influenced by the DoJ's preferences. *See* Khanna & Dickinson, *supra* note 1.

[5] *See id.*

[6] The first corporate monitor was appointed in the 1994 *Prudential Securities* case. *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). Although monitors are relatively new, the use of an outside supervisor or expert as part of a resolution of enforcement proceedings has a lengthy history. *See* Khanna & Dickinson, *supra* note 1.

[7] *See* GIBSON DUNN, *supra* note 2.

[8] *See* U.S. DEPARTMENT OF JUSTICE MEMORANDUM ON PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, [*hereinafter* Thompson Memo], January 20, 2003. Available at: http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. This was followed by further memos.

[9] *See* Eric Lichtblau, *In Justice Shift, Corporate Deals Replace Trials*, NEW YORK TIMES, Page A1, April 9, 2008 (available at: http://www.nytimes.com/2008/04/09/washington/09justice.html?_r=1&scp=4&sq=vikramaditya&st=cse&oref=slogin); John C. Coffee Jr., *Deferred Prosecution: Has it gone too far?*, NAT'L L.J., July 25, 2005 at 13.

[10] *See* Khanna & Dickinson, *supra* note 1.

oversight of the DPA and monitoring process. Examining these important concerns requires us to take a step back and ask – at a more general level – when is it desirable to appoint monitors and how should we oversee that process?

2. When is it Desirable to Appoint a Corporate Monitor?

As a starting point, the question of whether to have a DPA and whether to appoint a monitor are conceptually distinct questions. For example, there are DPAs that do not require monitors. Thus, the reasons to consider a DPA (e.g., to minimize collateral damage) are a necessary, but not sufficient condition for appointing a monitor.[11] To examine when a corporate monitor is desirable we need to identify the core attributes that differentiate it from the other kinds of sanctions we could use and then inquire when those attributes are desirable. Further, understanding when monitors are desirable will help us address concerns about monitors being used to avoid imposition of stronger and potentially more effective sanctions on firms.

Let us then begin with the core attributes of monitors. Monitors are appointed prior to judgment, by agreement between the government and the firm, and tend to have frequent on-going contact with the firms they are monitoring.[12] Thus, the monitor represents the imposition of a supervisor as a sanction (as compared to a cash fine) and then within the universe of possible supervisors it represents someone who provides frequent oversight. It is when these two features are desirable that a monitor may be warranted.

The first question is then when is it desirable to impose a supervisory sanction in addition to a simple cash fine?[13] After all, if the prospect of a cash fine alone would induce a firm to take compliance-enhancing measures (including hiring its own compliance experts) to reduce the chances of future wrongdoing, then there appears little need to *impose* a monitor or other supervisor. Moreover, we generally prefer using cash fines to deter wrongdoing because they are socially cheaper than relying on supervisory sanctions.[14] The social costs of cash fines are those costs involved with transferring cash from one party to the other.[15] However, the social costs of a monitor can include larger

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[11] *See* Khanna, *supra* note 1.

[12] *See* Khanna & Dickinson, *supra* note 1.

[13] *See id.*

[14] *See id.*; V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

[15] *See* Khanna, *supra* note 14.

costs, such as the costs involved with a business being under supervision and the costs associated with estimating the deterrent effect of a monitor.[16] Given these higher costs we should prefer to rely on the socially less costly cash fines until their deterrence potential is exhausted and then, if greater deterrence is desired, to explore the higher costs sanctions like monitors.[17]

Generally, cash fines provide insufficient deterrence when the firm does have not enough assets to pay the desired fine or when the magnitude or effect of the desired fine is so large that it is not politically acceptable (e.g., collateral consequences become large).[18] This seems likely in at least two instances. First, as the harm caused increases it is more likely that the fine necessary for deterrence will exceed the firm's ability to pay or pass the politically unacceptable threshold. Second, recidivist corporations might, at times, merit the imposition of supervisory sanctions. For example, when a firm repeatedly violates the law because it receives large socially unacceptable gains from doing so, then it is less likely that a cash fine will obtain the desired level of deterrence.[19]

A final, but somewhat unrelated, justification is that supervisors could help to save government enforcement resources, which can then be used in pursuing other cases. The government saves resources by not having to litigate the case and by not paying the monitor (who is paid by the firm).[20]

If a supervisor sanction is preferred then the question becomes when will a supervisor with frequent on-going contact be desirable? Such contact is most valuable when the wrongdoing is difficult to detect.[21] In addition, such frequent contact provides monitors with substantial information about the firm and

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[16] *See* Khanna & Dickinson, *supra* note 1. Compliance experts also generate benefits (e.g., reduced wrongdoing) to be weighed against their costs. However, if a monitor provides more benefits than costs for the firm, then the firm should be willing to voluntarily retain a compliance expert (as some already do). Indeed, even if firms were reluctant to voluntarily hire a compliance expert, a large cash fine might motivate them to do so rather than relying on a smaller cash fine plus the government imposing a monitor. This issue is explored in Khanna & Dickinson, *supra*, but does not significantly change the analysis presented above.

[17] *See id;* Khanna, *supra* note 14. The monitor sanction would be preferred when we desire greater deterrence than the cash fine and the net benefits of the monitor (i.e., additional deterrence less additional costs of the sanction) exceed those of other sanctions.

[18] *See* Khanna & Dickinson, *supra* note 1.

[19] *See id.*

[20] *See id.* It is plausible that firms agree to a DPA and monitor because that evades liability for certain corporate agents (e.g., the Chief Executive Officer (CEO)). *See* Lichtblau, *supra* note 9. Such an agency cost story is possible, but perhaps unlikely. The reason is that prosecutors often opt for a DPA when the firm provides information on other culpable individuals within the firm.

[21] *See* Khanna & Dickinson, *supra* note 1.

allows them to advise firms more accurately, which is important if the costs of bring "wrong" are high (e.g., the harm caused would be large).[22] Supervisors with frequent on-going contact are then well suited to deter and prevent large harms as well as harms that are difficult to discover.

In light of this, before a monitor is appointed there should be an affirmative determination (after open discussion) by the DoJ or a court about why cash fines are not sufficient for deterrence or why enforcement savings justify the appointment of a monitor as well as why the frequent on-going contact is beneficial. Such a determination serves two functions. First, it helps to ensure that monitors are appointed when they are desirable. Second, it makes it less likely that someone will be able to use a monitor to avoid imposing a cash fine that the firm can pay because if the firm could pay the fine then that would weaken the justification for appointing a monitor.

In addition to discussing when monitors may be desirable, we also need to explore what powers and duties they should have. Monitoring assignments have tended to grant monitors powers over compliance matters, but some assignments seem to have gone quite a bit farther.[23] Generally, there is a relationship between these powers and duties – the greater the power the greater the accountability (e.g., duties or other checks on their power).

I would thus recast the discussion over duties to be one about what kinds of fiduciary duties, if any, should monitors owe to shareholders. Because monitors' decisions may, at times, impact shareholder returns that places them in a position analogous to that of a corporate fiduciary (e.g., a director or top corporate officer). We can use that as our starting point of inquiry.

In the standard fiduciary context (e.g., firms' managers) market forces and fiduciary duties interact to hold the firms' managers accountable, in some measure, for their behavior. For example, if the market for managerial services is competitive, then managers would have little incentive to divert corporate assets or be slack on the job because that may lead to their removal, a denial of a promotion or some other penalty.[24] Similar arguments apply in the context of competitive product markets.[25] However, these market forces have their limits.

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[22] *See id.*

[23] *See id.*

[24] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 90–92 (1991).

[25] *See id.*; Khanna & Dickinson, *supra* note 1.

When markets do not register certain slack or where the gains to managers from misbehavior are so great that they are willing to bear the market's negative consequences then the markets have limited ability to constrain managers.[26] In such circumstances, fiduciary duties can provide a helpful disciplining influence.

In contrast, monitors face few market pressures. This is because it is difficult to remove monitors, which in turn weakens the force of any market pressures that might exist.[27] In theory, the monitor's reputation may serve as a constraint, but here too the absence of a developed market for monitor services serves to weaken any reputational penalties a monitor may suffer for poor performance.[28] Indeed, until a more functioning market for monitor services is developed (something I would encourage), one might be inclined to impose some kinds of fiduciary duties on monitors to fill the gaps left by the absence of significant market forces. [29]

This last point suggests that one way in which we can reduce the need for fiduciary duties is by facilitating the development of a market in monitor services. Such a market would, however, be beneficial along other multiple dimensions as well. For example, such a market would enhance competition in the provision of monitor services. In addition, this market could help assuage concerns about the selection and compensation of monitors because the decisions would be more transparent and monitors would face some constraints as well.

How might one facilitate such a market in monitor services? Prior research suggests that we can facilitate such markets by increasing the accountability of monitors to shareholders (or other appointing entity) and by selecting monitors from a pool of qualified individuals (or entities).[30] Information on who is qualified could be housed in some kind of central clearinghouse.[31] Such a market would help enhance the likelihood that monitors were competent, cognizant of their impact on shareholders, and subject to a market for their services, which generates pressures for good performance.[32]

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[26] *See* EASTERBROOK & FISCHEL, *supra* note 24; Khanna & Dickinson, *supra* note 1.

[27] *See* Khanna & Dickinson, *supra* note 1.

[28] *See id.*

[29] One could provide for the possibility of insurance and indemnification so that monitors do not face crushing liability risks and place limits on shareholders suits to assuage concerns about frivolous suits.

[30] *See* Khanna, *supra* note 1; Khanna & Dickinson, *supra* note 1; Ronald J. Gilson & Reinier H. Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, STAN. L. REV. 863 (1991).

[31] *See* Gilson & Kraakman, *supra* note 30.

[32] *See* Khanna & Dickinson, *supra* note 1.

Until such a market develops, however, we may need to rely on some version of fiduciary duty. The content of such duties should vary depending on the influence the monitor has at the firm – if the monitor has powers similar to that of a high level executive then their duties should be similar to those on the executive.[33] If the monitor serves in a purely advisory capacity then the duties of an advisor seem more appropriate.[34]

Table 1 summarizes some recommendations for the better functioning of monitors from this analysis that can be used to examine recent reform efforts.

TABLE 1 [35]

DECISION TO MAKE	FACTORS TO CONSIDER
Whether to Appoint a Monitor?	1. Harm caused is large such that cash fines to deter it are considered too large to impose (i.e., the firm's assets are insufficient or the collateral consequences of the fine are too great). 2. The firm's gains from wrongdoing are large and socially unacceptable. 3. There are enforcement savings by opting for a monitor. 4. A supervisor with frequent on-going contact is desirable. ** There should be explicit and open discussion of these issues to ensure that monitors are being appointed when cash fines are no longer a useful option for additional deterrence. This discussion makes it more difficult for someone to appoint a monitor to avoid a higher fine that can be paid. **
How to Appoint a Monitor?	1. The creation of a "market" of sorts for monitor services with the presence of a central clearinghouse. 2. Monitors may owe some duties to shareholders or be subject to increased agency or judicial oversight until the market functions better or until the monitor's sphere of influence at the firm is limited to compliance matters.
Powers of a Monitor?	1. Monitor's powers should vary depending on what is necessary for the task at hand. 2. Greater specificity at the beginning (when negotiating

[33] *See id.*

[34] *See id.*

[35] *See* Khanna, *supra* note 1.

	the DPA) seems desirable especially as it relates to: (a) the scope of the monitor's powers, (b) the reporting chain between the monitor, firm, firm's internal players and government, (c) termination of monitoring assignment upon triggering events (e.g., acquisition), and (d) third party liability. 3. Referral back to appointing agency or court to resolve critical issues that arise.
Duties of a Monitor?	1. The greater the monitor's powers the greater the extent of fiduciary duties or oversight by the appointing agency or the judiciary (especially with the power to remove the monitor).

3. Recent Steps Toward Reform

The concerns surrounding monitors have culminated in the issuance of the Morford Memo and in at least two draft Bills in Congress.[36] These reforms propose to make changes in at least 3 aspects of corporate monitors.

1. Guidelines on when corporate monitors should be appointed and how they should be selected.
2. Judicial oversight of monitoring assignments.
3. Disclosure obligations of monitors.

A. Guidelines on Appointing Corporate Monitors

The Morford Memo 2008 puts forward 3 broad categories of factors to consider in appointing monitors.[37] First, monitors should be appointed only if their benefits exceed their costs (including their impact on the firm's business operations).[38] Second, the monitor's primary mandate should be to enhance

[36] Another important reform was the Filip Memo which clarifies that waiver of attorney-client privilege by the firm is not a prerequisite to obtaining a DPA. *See* U.S. DEPARTMENT OF JUSTICE MEMORANDUM ON PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, [*hereinafter* Filip Memo], August 28, 2008.

[37] *See* U.S. Department of Justice Memorandum on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations [*hereinafter* Morford Memo], March 7, 2008. Available at: http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[38] *See* Morford Memo, *supra* note 37.

current and future compliance.[39] Finally, the Memo lists 9 more specific factors (provided below), which should be applied flexibly given the variety of cases before the DoJ.

1. Before selecting a monitor the firm and government should discuss the monitor's qualifications, avoid conflicts of interest and select someone on the basis of merits only. To avoid conflicts the DoJ will set up *ad hoc* committees to consider candidates. The Office of the Deputy Attorney must approve the selection and the monitor must be impartial.
2. A monitor is not an agent for either the firm or the government.
3. A monitor should focus on assessing and monitoring a firm's compliance with the DPA as it relates to reducing future wrongdoing (i.e., its compliance programs).
4. The monitor's obligations should be no more than necessary to reduce the risk of future offending.
5. In some situations it may be desirable to have the monitor make periodic reports to both the government and the firm.
6. If a firm declines to follow a monitor's recommendations then it should provide reasons for that choice, which the Government can rely on to decide whether the firm has met its obligations under the DPA.
7. The DPA should identify "any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government".[40] The monitor should have discretion as to what to report to the Government.
8. The duration of the DPA should be targeted to the concerns that exist at the firm and to remedial measures being taken.
9. Finally, the DPA "should provide for an extension of the monitor provision(s) at the discretion of the Government in the event that the corporation has not successfully satisfied its obligations under the agreement. Conversely, in most cases, an agreement should provide for early termination if the corporation can demonstrate to the Government that there exists a change in circumstances sufficient to eliminate the need for a monitor."[41]

[39] *See id.*
[40] *See id.*
[41] *Id.*

In addition to the Morford Memo, two House Bills add further details to the process of monitor selection.[42] In particular, they require the selection of monitors to occur from a public national pool of pre-qualified candidates and that the final selections receive judicial approval.[43] Further, and in contrast to the Morford Memo, the House Bills require monitors to have "experience in criminal and civil litigation"[44] rather than being individuals with compliance expertise (even if they are not attorneys).[45] The House Bills also envisage an open and competitive selection process where, like the Morford Memo, monitor's powers are limited to compliance concerns thereby reducing the need for fiduciary duties. Finally, the House Bills also impose some structure on the compensation of monitors by requiring that it be based on a pre-determined fee table.[46] This stands in contrast to the Morford Memo's silence on this issue.

Taken together the Morford Memo and the House Bills appear consistent with measures to facilitate a market for monitor services and are broadly consistent with the analysis presented earlier with respect to when monitors are desirable. There are, however, important differences as well.

First, the Morford Memo emphasizes the importance of comparing the costs and benefits of monitors before appointing them and includes in the measure of costs the impact on the firm's business. This seems a good proxy for the costs associated with supervisor-type sanctions (e.g., disruption to firm business) discussed earlier and appears to be a positive development.[47] However, there is no discussion of whether a cash fine might obtain the desired level of deterrence thereby avoiding the need for a monitor. A useful reform would then be to have the DoJ or other enforcement authority state why they think a cash fine would be insufficient. This will aid clarity in decision making as well as reducing concerns that monitors are being appointed to avoid a higher cash fine because if that were true (i.e., there was a higher cash fine the firm could pay) then the above analysis suggests that the monitor sanction would not be used.

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[42] *See* ACCOUNTABILITY IN DEFERRED PROSECUTION ACT OF 2008, H.R. 6492, 110TH CONGRESS, 2D SESSION (July 15, 2008), available at: http://www.govtrack.us/congress/billtext.xpd?bill=h110-6492; ACCOUNTABILITY IN DEFERRED PROSECUTION ACT OF 2009, H.R. 1947, 111TH CONGRESS, 1ST SESSION (APRIL 2, 2009), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1947ih.txt.pdf

[43] *See* H.R. Bill 6492 (and HR 1947), *supra* note 42.

[44] *See id.*

[45] *See* Morford Memo, *supra* note 37.

[46] *See* H.R. Bill 6492 (and HR 1947), *supra* note 42.

[47] The Morford Memo suggests a monitor is unnecessary when a firm sells off an offending division. This suggests that non-compliance can be isolated to the division that was sold off. This is a questionable assumption for firms where managers move between divisions or where members of top management may use a particular division to engage in illegal acts (corruption raises such concerns).

Second, the House Bills envisage a process where the monitor is selected from a national pool of qualified candidates with final approval by the court. This seems broadly consistent with the suggestion to have a central clearinghouse with information on likely monitors. Further, the House Bills require monitors to have substantial litigation experience (civil or criminal). Although this helps broaden the pool of monitors from former government officials to other attorneys with litigation experience, it may still be a bit too narrow. The reason is that compliance work is only partly about litigation experience, it also often involves understanding how firms operate and how items are produced at a firm (e.g., products or financial statements) which may be expertise more often seen with non-attorneys (e.g., forensic accountants, product specialists). In this respect, qualifications indicating expertise in compliance or risk management may be more desirable. The Morford Memo also assists in facilitating a market for monitor services by discussing the notion of removing the monitor which may enhance market pressures on the monitor.

Third, the Morford Memo encourages the government and the firm to discuss in detail the scope of the monitoring assignment and attempts to narrow it to compliance efforts (rather than broader firm activities). This helps to reduce the need for fiduciary duties on monitors. In addition, the call to have firms actively involved in the process of appointing the monitor (and setting up ad hoc Committees at the DoJ) helps to make monitors not only more accountable to firms, but also more independent from the DoJ.

Fourth, the House Bills also require that monitors receive payments based on a flat and fixed fee structure.[48] Although such a step helps to constrain excessive compensation, it does so at the risk of hampering the development of a market for monitor services. The key concern with a flat fee is that it treats each expert's time as if it were fungible. This is generally not true. For example, the skills required to be a compliance expert on issue X may be different (and more expensive to obtain) than the skills to be a compliance expert on Y. Flattening out the differences may hurt the development of a market for monitor services especially for expertise requiring greater time and investment to develop.

Nonetheless, avoiding a flat fee does not mean we have no ways to limit excessive compensation. One option may be to require open competitive bidding for monitoring assignments. Alternatively, we could envisage judicial

[48] *See* H.R. Bill 6492 (and HR 1947), *supra* note 42.

review for fees above a certain amount (e.g., $2000 per hour) where the monitor and firm bear the burden of proving why this rate is appropriate. We could even consider having multiple flat fees (one flat fee for all experts in X and another for experts in Y). Although no option is perfect, they do allow some oversight on compensation while allowing for the development of a market.

B. What Role Should the Judiciary Play in the Monitoring Process?

The House Bills seem to indicate a preference for judicial oversight of the monitoring process (something the Morford Memo does not discuss in depth).[49] Judicial oversight can be useful, but it may be a matter of timing and degree. For example, requiring judicial approval before finalizing a DPA and monitoring assignment (e.g., on monitor compensation) may avoid many problems at fairly little additional cost, as the issues will be fresh in the memories of prosecutors and firms. However, once the monitoring assignment is underway judicial oversight may be more costly because the parties (and the court) would need to gather further information and get "up to speed" all over again. Moreover, frequent judicial oversight over the course of the monitoring assignment could undermine one of the benefits of monitors – economizing on enforcement resources. One way to address these concerns might be to have well drafted DPAs and monitoring assignments and judicial oversight triggered by certain limited events (e.g., an acquisition, repeated instances of wrongdoing) so that the costs of the review arise only in some instances.

C. Should the Reports of Monitors Be Made Available to the Public?

Finally, should the monitor's reports be made public? After all, a criminal prosecution (a matter of public interest) was averted through the DPA and it seems that the public has an interest in knowing what the monitor found.

The House Bills presume that monitors' reports will be available, at least to the court, but are silent on public disclosure.[50] The Morford Memo expects monitors to disclose evidence of credible wrongdoing to the Government, but says little about public disclosure.[51] Generally, disclosure of the monitors' reports is preferable because it provides information about firm wrongdoing (thereby informing victims and potentially helping to reduce the severity of the

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[49] *See id.*

[50] *See* H.R. Bill 6492 (and HR 1947), *supra* note 42.

[51] *See* Morford Memo, *supra* note 37.

harm) and also about ways to reduce this kind of wrongdoing. However, some parts of the reports may not be essential to enhance the chances of reducing wrongdoing or informing victims, but rather may be more embarrassing to the firm or undermine its competitive position. Such situations may call for some power (either with the court or the DoJ) to redact parts of the monitors' reports.[52]

From this discussion it appears that substantial steps have been taken via the Morford Memo and the House Bills to facilitate the development of a market for monitor services. Further steps as discussed above may also be warranted to enhance the development of this market which helps to enhance the functioning of monitors as well as add transparency to the process of their appointment.

Overall, my analysis suggests that in addition to the Morford Memo and the House Bills the following steps may prove particularly advantageous.

1. Explicit discussion by the DoJ about why a cash fine would not suffice for deterrence and why a monitor with frequent on-going contact with the firm would be desirable.
2. Some oversight on monitor compensation is desirable, but a pure flat fee should be adopted very cautiously. Instead, judicial review (triggered by fees crossing some specified threshold), open competitive bidding, or multiple flat fees may be a good balance between encouraging development of compliance expertise and reducing excessive compensation concerns.
3. The groups of people who are qualified to act as monitors should be expanded to include not only former enforcement officials, but also attorneys with substantial litigation and others who have experience in compliance matters.
4. Arranging for some judicial oversight before a DPA and monitoring assignment are finalized may be desirable. However, on-going oversight may be quite costly and should be limited to only certain triggering events (e.g., acquisition of the firm).
5. Public disclosure of monitor's reports should be the norm subject to the power of the court or the DoJ to redact certain information.

Finally, further study on how to encourage the development of a market for monitors would be useful. Indeed, one may be able to learn more about how

[52] Of course, firms should not be permitted to take public positions that are inconsistent with the monitor's reports without clear explanation.

to facilitate this market by examining the development of other affiliated markets. Such markets might include the market for Independent Private Sector Inspector Generals in the New York area and the general market for independent directors.[53] Further, the development of a market for monitor services may have important consequences for corporate governance. If we think of boards as serving two functions – strategic advisors and watchdogs – then the presence of monitors may reduce the need for the board to act as a watchdog. This may be a beneficial development because the board's two roles operate in some tension with each other and a monitor may be better suited to the watchdog role. [54] Thus, the development of a market for monitors may help to clarify and simplify the role of the board and thereby enhancing its functioning as well.

4. Concluding Remarks

The growth of corporate monitors as an institution for enhancing compliance has been rapid. However, in the last year or so, the rather unregulated growth of corporate monitors has come in for criticism from many corners. In this statement I examine the structure of corporate monitoring assignments and explore how the use of the monitor can be improved. My analysis suggests that many of the recent developments (e.g., the Morford Memo and House Bills) are steps in the right direction to facilitate the growth of a market for monitor services and to enhance the impartiality and transparency of this new enforcement tool in the fight against white collar crime. However, some further steps may be useful as the market for monitor services begin to develop. In particular, requiring explicit discussion of why other sanctions are not sufficient for deterrence and why monitors are beneficial seems important as does opening up the market for monitor services to more groups of experts. Further, restrictions on compensation should be considered cautiously to avoid impeding the growth of the market, but oversight with disclosure may prove to be a beneficial approach. Moreover, the impact of the development of this market on compliance and corporate governance is an area rich for further inquiry. In particular, how the development of a market for monitor services may help to clarify and simplify the role of corporate boards and our expectations of them could in the long run prove to be a valuable development.

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[53] *See* Ronald Goldstock & James B. Jacobs, *Monitors and IPSIGS: Emergence of A New Criminal Justice Role*, 43 CRIMINAL LAW BULLETIN 217 (2007).

[54] Monitors who have substantial compliance expertise and frequent on-going contact with the firm are better placed to be watchdogs for wrongdoing than the board which may not have that level of compliance expertise and who meet only a dozen or less times a year.

Mr. CONYERS. Thank you so much, Professor Khanna, and I thank all five of you, lady and gentlemen. And I want to observe, before I turn to Chairman Steve Cohen, I can't help but wonder—does this application of a non-statutory piece of work, does it have

any relation or any possibility to non-corporate prospectively criminal cases, because, we are here looking at one thing?

There are those, and it has not been articulated, that want to end this system. There are others that think it is working fairly well, perfectly okay, and then there is another school that would like to modify it.

And so I turn now to the Chairman of this Committee to begin inquiry.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Christie, you mentioned that the defendants had an opportunity to turn down monitors. Did Zimmer turn down Mr. Ashcroft?

Mr. CHRISTIE. No. In fact, sir, let me give you a complete answer to that.

Mr. COHEN. That is the complete answer.

Mr. CHRISTIE. No, no, it is not sir. It really isn't because I think it is important for you to know, that Zimmer first came to our office to suggest that the one thing they wanted to make sure they had in a monitor, since they were a company from Warsaw, Indiana and in the Midwest, what they did not want a large New York law firm. They did not want a large northeastern law firm. They said they wanted someone with Midwestern sensibilities.

We then sent them Mr. Ashcroft's name, who, I think everyone is aware, is from the Midwest, and they had an opportunity to interview him, and were told that if they had an objection they should come back and express it.

When they came back, counsel for Zimmer and their CEO said, "We are thrilled. We think we got the best monitor."

Mr. COHEN. Did any other entity in the medical devices lawsuit turn down the monitor?

Mr. CHRISTIE. No sir, they did not.

Mr. COHEN. They didn't. Has any monitor that you have recommended been turned down by the defendant?

Mr. CHRISTIE. In the instances of, in terms of other deferred prosecution agreements, the operation of the selection of the monitors worked differently, and options were not given in those instances. I would——

Mr. COHEN. So it was——

Mr. CHRISTIE [continuing]. Relate to you why. It was different.

Mr. COHEN. So let me ask you this then. You can then tell me then, based on your testimony that nobody ever objected to the monitor. In your testimony you said, "All the defendants could turn them down," but in reality nobody turned them down. Is that right?

Mr. CHRISTIE. No, they all agreed after interviews——

Mr. COHEN. They all agreed.

Mr. CHRISTIE [continuing]. They all agreed after interviews with their monitors and the opportunity to meet with them——

Mr. COHEN. Right.

Mr. CHRISTIE [continuing]. They all agreed.

Mr. COHEN. The answer is, they all agreed.

Mr. CHRISTIE. Yes, sir.

Mr. COHEN. The bottom line is you made them an offer they couldn't refuse.

Mr. CHRISTIE. I don't agree with that sir.

Mr. COHEN. That is what happened, sir, I believe.

Mr. CHRISTIE. No, sir, I don't—you were not——
Mr. COHEN. That is the problem.
Mr. CHRISTIE. Excuse me, sir. You were not in the room. Let me answer the question. You were not in the room——
Mr. COHEN. I have got the microphone, sir.
Mr. CHRISTIE. Sir, you have said that I gave them an offer you couldn't refuse——
Mr. COHEN. That is right.
Mr. CHRISTIE. First of all, it is an ethnically insensitive comment by you, first of all, to an Italian-American. And secondly——
Mr. COHEN. I had no idea you were Italian——
Mr. CHRISTIE [continuing]. And secondly sir, let me finish.
Mr. COHEN. Mr. Christie, I have no idea and I——
Mr. CHRISTIE [continuing]. Secondly sir——
Mr. COHEN [continuing]. That you are suggesting——
Mr. CHRISTIE [continuing]. You were not in the room when the negotiations took place, sir, and I was. And these folks came back and were not under duress. They came back and said that they appreciated the monitors that were selected, and they accepted the monitors they were selected.
Mr. COHEN. Right.
Mr. CHRISTIE. And I don't appreciate, unfortunately sir, the implication that you make in the question.
Mr. COHEN. Well, the facts speak for themselves. Nobody turned one down. In your testimony, you made the point to say they could turn them down, like this is a very open-ended process——
Mr. CHRISTIE. And it was.
Mr. COHEN. The fact is, none of them turned them down, because they couldn't afford to because, otherwise——
Mr. CHRISTIE. The fact is——
Mr. COHEN [continuing]. They were about to be prosecuted. Stop, Mr. Christie. Otherwise, they were going to be prosecuted.
Mr. CHRISTIE. No. That is not the case.
Mr. COHEN. You had them in a situation. You offered them a deal that they couldn't refuse.
Mr. CHRISTIE. No. You are wrong sir. The fact of the matter is, that they didn't turn them down because the career prosecutors in my office who prosecuted this case, along with my executive staff, along with our ethics officer and myself, took great time, and great care to analyze the facts inside each company, to analyze the monitors that were suggested, to make sure that both their experience and their approach would be compatible with the companies that we had been investigating for 3 years——
Mr. COHEN. All right, that is why.
Mr. CHRISTIE. The alternative answer, Mr. Cohen, to your question is, not because they thought they were under duress, but because the Department of Justice, through the United States attorneys' office for the district of New Jersey, did their job by putting proper monitors in place for each company.
Mr. COHEN. Did you or anyone in the New Jersey U.S. Attorneys' Office ever send any e-mails about fee negotiations?
Mr. CHRISTIE. Yes, there were e-mails that were sent to me regarding Zimmer that I responded to during the time they were negotiating fees with the Ashcroft Group.

Mr. COHEN. And Zimmer objected. They thought the fees were outrageous. They were supposed to pay $750,000 up front to Mr. Ashcroft and his two other senior executives just as a retainer fee. Is that accurate?

Mr. CHRISTIE. I was not the least bit shocked, sir, to receive e-mails from high priced lawyers arguing over fees.

Mr. COHEN [continuing]. Over the defendants.

Mr. CHRISTIE. No, it was not, sir. The e-mails were from the defendant's counsel——

Mr. COHEN. Right. And they were——

Mr. CHRISTIE [continuing]. Who, by the way, was being paid handsomely by the hour to argue as he had been arguing with us for the last 4 months before the agreements were executed in order to get the best deal that he possibly could for his client.

He is a partner at Fulbright & Jaworski, an incredibly competent health care lawyer who argued vehemently and got great concessions from our office for his client. He then raised issues regarding the fees proposed by the Ashcroft Group, and I told him in my e-mails to him to go back—and I also told the Ashcroft Group—to go back and resolve whatever differences they had regarding fees without intervention by the office.

If they could not I would have intervened and within a week's time, after I sent them back to begin negotiating again, they had agreed to fees.

Mr. COHEN. On October 17, 2007, did Attorney Rick Robinson say, "The parties have reached an impasse on certain key issues," the first issue being a flat fee provision? And did you refuse to intervene when they had reached an impasse, Mr. Christie?

Mr. CHRISTIE. Mr. Cohen, he sent me that e-mail, and I am looking for them now, he sent me that e-mail and when you read the totality of the e-mail I think you come to the conclusion that there wasn't an impasse that was reached.

And I instructed him back to go and try to resolve it as I did instruct the Ashcroft Group to go back and attempt to resolve it in good faith. If the United States attorney gets involved in every dispute between their monitors and the companies they are monitoring, the United States attorney would have no time to do anything else in his office but litigate those disputes. Within 1 week after the sending of that e-mail, they came to an agreement on fees by compromising with each other.

Mr. COHEN. Well, I don't—I am not sure if the attorneys for Zimmer would agree with that, but nevertheless let me go to the——

Mr. CHRISTIE. Well, he was no longer the attorney after this, Mr. Cullen. So I don't know which attorneys you are talking about.

Mr. COHEN. Let me go to the Bristol-Myers Squibb situation. Why did you not suggest that it would be wrong for a contribution at—the chair to be endowed at the school that you attended? We in the public life have to be beyond Caesar's life, too.

Mr. CHRISTIE. Yes, sir, and I suggest to you that neither you nor I have cornered the market on that. So let me be very clear with you about what you are saying.

Mr. COHEN. It is an admission on your part——

Mr. CHRISTIE. No, it is not an admission on my part, sir. Let me tell you exactly how it happened. Bristol-Myers Squibb was rep-

resented by Mary Jo White, the former United States attorney for the southern district of New York and one of the most respected prosecutors and private practice attorneys in this Nation.

It was in fact the suggestion of counsel for Bristol-Myers Squibb that one of the things they wanted to do in order to ensure an ethical culture in their company was to endow a chair at a New Jersey law school on ethics.

I told them if that was their idea that was fine, and they were to handle it. They came back and told me that their—Rutgers Law School in New Jersey all ready had an endowed chair in ethics by the Prudential Corporation and they were then going to move to Seton Hall to have discussions with them.

I was not involved in those discussions. It was not my idea. It was not my initiative. It was the idea, initiative and suggestion of the Bristol-Myers Squibb Corporation and they still today participate in twice annual seminars on corporate ethics run by Seton Hall Law School, financed by Bristol-Myers Squibb.

It was not my idea, it was not my suggestion, I did not suggest Seton Hall. I did not suggest this whole idea. It was suggested by Mary Jo White and management of Bristol-Myers Squibb. It was their decision, sir, not mine.

Mr. COHEN. Mr. Chairman, if I can only respond. I would submit to you, sir, that even though the suggestion might have been by the defendant, who may not have been made an offer they couldn't refuse, but that it was the position of a U.S. attorney to rise above that and to understand the appearance of impropriety, and to refuse it and to say, "I suggest you pick Princeton or Montclair State—"

Mr. CHRISTIE. Well, sir, if Princeton had a law school I am sure they might have looked at them. If Montclair State had a law school——

Mr. COHEN. They have a business school.

Mr. CHRISTIE. Sir, they do not. This was to be done—this was their idea. There are two law schools in the state of New Jersey, sir, Rutgers and Seton Hall. Rutgers already had a corporate chair for corporate ethics funded by the Prudential Corporation. That is what moved Bristol-Myers Squibb to go to Seton Hall.

Your implication that there is something inappropriate about a corporate citizen deciding that they wanted to endow a chair in the study of corporate ethics given the corporate climate in this country is surprising to me.

What the public needs to know is that it was not my idea, it was not my initiative, and it was something that they asked for in the agreement. It was a concession we made to them as part of their overall agreement. It was not an offer I made, rather it was an offer they made, sir.

Mr. COHEN. Thank you, Mr. Chairman.

Mr. CONYERS. The Chair recognizes the distinguished gentleman from Iowa, Steve King, acting Ranking Member of this Subcommittee, who has removed his glasses again.

Mr. KING. And I had agreed with Mr. Delahunt, but I thank the Chairman for recognizing me, and it sounded as I listened to the witnesses that there is a significant amount of unanimity with re-

gard to the subject that is before us, deferred prosecution agreements.

And there is a significant amount of disagreement and the clash that has just taken place between Mr. Cohen and Mr. Christie, and so I would like to direct my attention to that and ask Mr. Christie if you are aware where the genesis of this allegation about the endowment might have originated?

Mr. CHRISTIE. Sir, there was no discussion of this at the time. When the agreement was made it was made public. Allegations of this came up much, much later on in a much more political context.

Mr. KING. And I accept that and I suspect that, and I just reiterate that this is turning into a political issue, and hopefully we could examine the issue in front of us and still let the public know, Mr. Chairman, about the political components of this.

And it got my attention as I listened to Mr. Cohen's opening remarks, when he made this allegation about the endowment at Seton Hall, and so it occurred to me instantly that when he said that Members of Congress wouldn't do something like that. No, Members of Congress instead just simply offer earmarks for their endowments.

And I can think of some in my district there are Harkin Grants. My junior senator—he has his name clearly over these things. Those are endowments that go into the educational institutions all over the country with the name Harkin Grant on them. There are buildings named after living members of the United States Senate, and we try not to do that for living members of the House of Representatives.

But I would ask the panel is anyone aware—first I would ask Mr. Christie, could you name the five businesses that were the subject of the agreement?

Mr. CHRISTIE. On the medical devices, sir?

Mr. KING. Yes.

Mr. CHRISTIE. Okay, the five companies were the Zimmer Corporation, the DePuy Corporation, which is a subsidiary of Johnson & Johnson, the Smith & Nephew Corporation, the Stryker Corporation which is out of Kalamazoo, Michigan and the Biomet Corporation which is also out of Indiana.

Mr. KING. Okay, I thank you. And is there anyone on the panel that is aware of any earmarks that have been provided to these companies that are the subject of our testimony today? None at all? Well then into the record I would suggest that I am reading what we understand to be a press release that lays out a case that there is an $800,000 earmark for Smith & Nephew for developing a new trauma hemostat surgical tool.

Do you have any knowledge of that anyone on the Committee? And apparently no one on the Committee does, and I would ask unanimous consent to introduce at the appropriate time, the original press release that identifies this earmark to this company called Smith & Nephew by the gentleman from Tennessee, Mr. Cohen, an $800,000 earmark.

Mr. CONYERS. Without objection, does the gentleman object?

Mr. COHEN. I don't know what—I just heard my name which I was reviewing some material to prepare for the second round, and I heard my name or reference to me.

Mr. CONYERS. Well, let me do this. If we have agreement with both of the Steves on the Committee, let me reserve that, and I will examine it and make a comment about it later in terms of putting it into this record.

Mr. KING. I appreciate it, Mr. Chairman.

Mr. CONYERS. Thank you.

Mr. KING. And I thank the Chairman for his indulgence and we will produce the original documents and we will have that deliberation at that another time. I make this point because it is easy to point fingers. It is easy to make allegations. It is much more difficult to make a cogent case against deferred prosecution agreements.

No one on this panel has made a case against them. They have raised the issue about unintended consequences. And so I would then, rather than go down the list of things I would like to see reiterated here by the witnesses, and the record is relatively replete, but I am reflecting upon a part of Mr. Christie's written testimony that I didn't hear in his oral presentation about the difficulty of reaching this agreement with five companies simultaneously.

And the language that jumps off the page when I read the written testimony is, "Negotiating these agreements was akin to landing five airplanes on the same runway at the same time." I would ask Mr. Christie if he would speak to the difficulty of this agreement.

Mr. CHRISTIE. Thank you, sir. This was a 4½-month long negotiation with some of the best lawyers, corporate health care lawyers in America. This is an $80 billion industry, the medical device sensors, an $80 billion industry that has significant resources to hire outside counsel in order to be adversarial, as they need to be with our office.

We engaged in a 4½-month long negotiation, and understand these are competitive companies. They are competing with each other every day. They were willing to agree to reforms but only if everyone was going to play by the same set of rules going forward.

So imagine now, you have five of the biggest law firms in America who each get a chance to make comments on a 30, 40 plus page long agreement that will govern the conduct of their client going forward for the next number of years.

We went through nearly a dozen drafts of that agreement which meant 60 copies of it because each was times five, with different negotiation requests. These were incredibly contentious negotiations that literally, sir, were not resolved until 9 a.m. on the morning that we announced these agreements at 11 a.m., is when the last issues were resolved.

And all five of the companies kept calling in to me to say, "Is everybody agreeing to exactly the same thing? Is everybody doing exact—because if they are not, I am not signing." So literally it was akin to trying to land five jets on the same runway at the same time without them crashing.

The reform that they achieved in my view was extraordinary. In the first year after this agreement, payments to surgeon consultants by these companies dropped by $150 million. There were more than 1,000 fewer consultants at the end of the first year of this agreement than there had been when we entered the agreement.

Imagine, they were still functioning, still being profitable, with 1,000 less consultants.

Those reforms were achieved as well as a transparency that has been discussed in this country for a long time with medical device and pharmaceutical companies. This agreement required that each and every one of those companies post on their Web site and update quarterly the names of all the surgeons they were making consulting payments to, where those surgeons were located and how much they were paid.

So a citizen in your district, sir, if they were considering an artificial hip or knee replacement and their doctor recommended a device from a particular company, they could go on the Web site and see if that doctor was in fact being paid by that company so they could judge whether their advice was objective or not.

This is an area of transparency that now was, as you can see in my written testimony, replicated in the pharmaceutical industry after we instituted these changes in the medical device industry. Those are the kind of things we were negotiating.

Mr. KING. Thank you, Mr. Christie. And in conclusion if, with some deference from the Chair, I would like to just summarize this that I have not been able to get two opposing attorneys to agree on anything. The only way I can get them to agree is if they are paid by the same client.

And the difficulty of bringing this together over massive dollars—an $80 billion industry and 94 to 95 percent of the industry controlled by these five entities depending on whether it is written or oral testimony, but that is a huge number.

And saving the public $450 million at least, $150 million of that from the costs of these services and saving 47,000 jobs seems to me to be an extraordinary accomplishment, and I cannot for the life of me divine why you would be in the public eye unless it would be for adulation.

And so I would suggest, Mr. Chairman, with that disagreement that we are discussing that at the end of this hearing we could take that issue up, and I would suspend it until that time, and I would yield back the balance of my time, and I thank you.

Mr. CONYERS. Are you referring to your attempt to put something into the record?

Mr. KING. Yes. Yes, I am.

Mr. CONYERS. I would like to ask you to reflect on withholding that from the record because I would like to notify all of our Committee Members that the five companies, Zimmer and four other medical device companies, that agreements can be examined on our own Web site judiciary.house.gov. And I think that would go a long way and I would appreciate your cooperation to that respect.

Mr. KING. Mr. Chairman, I am not suggesting to introduce an agreement into the record. I am just asking unanimous consent to introduce Mr. Cohen's press release into the record.

Mr. FRANKS. Mr. Chairman.

Mr. CONYERS. I would take that under advisement. Let me ask our Ranking Subcommittee Member, Trent Franks of Arizona, who has returned, if he would care to make his opening statement now, or would he like to reserve it until a later point in time?

Mr. FRANKS. Mr. Chairman, if you would afford me that courtesy I would appreciate it.

Mr. COYERS. Would you? All right. By unanimous consent I would ask that the gentleman be allowed to make his opening statement at this point in time, and he is recognized for that purpose.

Mr. FRANKS. Mr. Chairman, I certainly appreciate the courtesy here. I apologize. I was out trying to save the world and the vote——

Mr. CONYERS. Again.

Mr. FRANKS. Yes, sir. We don't know whether I was successful yet. The vote will be taken a little bit later, but thank you very, very much.

Mr. Chairman, I obviously would welcome the witnesses, and it sounds like you have all done a wonderful job here today, and I particularly want to express my welcome to one of our colleagues from New Jersey, a distinguished former U.S. attorney from the district of New Jersey.

In the wake of the Enron scandal in 2001, our corporate landscape changed dramatically. One of those changes, really, is what has led us to today's hearing. Arthur Andersen, Enron's accounting firm, was swept into scandal by allegations of accounting improprieties, and it was indicted, prosecuted and convicted in the southern district of Texas.

As a result, it had to surrender its accounting license, effectively destroying the business. Seventy-five thousand jobs were lost. Innocent people had held virtually all of them. The Supreme Court later unanimously overturned Arthur Andersen's conviction; I know that has been part of the record thus far, the damage, however, was irreparable.

Arthur Andersen and its jobs never came back from the damage inflicted by the trial court proceeding. As a result, the Department of Justice took a long, hard look at whether or not there was a better way to pursue wrongdoing by companies without prosecuting companies out of business and innocent jobholders out of jobs.

This decision was to begin using deferred prosecution agreements more frequently to avoid needless damage to the economy while still policing and correcting wrongdoing. One the great success stories following that change, of course, occurred in New Jersey under U.S. Attorney Chris Christie.

Mr. Christie and his office, uncovered a major kickback scheme, a scandal, involving doctors in all five major U.S. manufacturers of hip and knee replacements. The problem, Mr. Chairman, was huge. These companies represented almost 95 percent of the U.S. market.

In 2000 alone, more than 700,000 hip and knee replacements were performed in the United States of America. Medicare paid more than two-thirds of those procedures. The five companies employed 47,000 people in the United States. If prosecuted and convicted, they would have been debarred from the Medicare program.

The U.S. industry would have simply imploded. It would have been Arthur Andersen all over again, but with this time, and with the entire—and, of course, in this case it would have the entire U.S. sector. And it was critical the Department clean up this scandal, but it was equally critical that the Department not destroy

10,000 jobs and wreck an important part of our economy and our health care system.

Chris Christie met both of those needs, obtaining deferred prosecution and non-prosecution agreements with all five firms, a very challenging achievement. Under the terms of the agreements, the companies lived under the intense scrutiny of corporate monitors and the threat of prosecution until their acts were cleaned up.

They struck 5-year corporate integrity agreements with the U.S. Department of Health and Human Services. They repaid $311 million to the United States. They stopped $150 million in shady payments to doctors in the first year. These agreements worked, Mr. Chairman.

The companies cleaned up their acts, jobs were preserved, a U.S. industry was saved, and nearly half a billion dollars was restored to the public at no cost to the taxpayers because the companies themselves paid for the corporate monitors that were crucial to these results.

Chris Christie deserves, in my judgment, a medal for his achievements like these, and so do other U.S. Attorneys who obtained similar results. Our hearing today should therefore focus on how the Department can replicate, and if possible, improve on this kind of success.

The Obama administration, evidently, concurs because its Justice Department substantially replicated Mr. Christie's terms in the WellCare agreement recently negotiated by the U.S. attorney for the middle District of Florida, and we will hear more from that Department if we haven't already today.

In January 2008, *The New York Times* and New Jersey democrats tried to kick up a controversy over the hiring of former Attorney General John Ashcroft as the corporate monitor for Zimmer, the most powerful company subject to Mr. Christie's agreements.

Critics and partisans overlooked that it was Zimmer and the other corporations subject to an agreement, not Mr. Christie that selected General Ashcroft and all of the other monitors. They overlooked that the companies, not Mr. Christie and the taxpayers, had hired General Ashcroft and the other monitors and negotiated and paid all fees and costs for the monitors. Taxpayers did not pay anything for those monitors.

And they overlooked that General Ashcroft was immensely qualified for the job of serving as the monitor for Zimmer. Testimony at our hearing last spring laid this controversy to rest until the press and New Jersey democrats recently attempted to stir it up again, but the monitors for Mr. Christie's agreement did a terrific job in the New Jersey case.

I take hope from these clear results from the caption of our hearing today and from the composition of our expert witnesses on the panel today, that today's hearing will not go down the dead-end road trodden by some democrats and New Jersey press.

I also have confidence that our Committee and Subcommittee Chairman will appreciate the effectiveness of the New Jersey agreements in rectifying the underlying wrongdoing while saving workers' jobs.

Because of Mr. Christie's good work, Mr. Chairman, and because these companies complied with agreements Mr. Christie negotiated,

those jobs are still in existence today, and I thank the Chairman for especially going beyond the call of duty to allow me this opportunity to go ahead and give my statement.

Thank you, and I yield back.

Mr. CONYERS. Well, it is my pleasure, and I apologize to our other Chairman, Bill Delahunt, who has postponed or is trying to rearrange his other activity.

Mr. DELAHUNT. Well, thank you, Mr. Chairman.

Mr. CONYERS. With pleasure I call upon——

Mr. DELAHUNT. Yes, I understand that we will have several rounds, so I have to go and introduce a foreign dignitary, but at least I will be here for the first round. You know, I want to tell you, Mr. Christie, until today I did not realize that you were a candidate for governor. So I want you to understand that, you know, I am a very, you know, ardent democrat, but I want you to be very clear, I had no idea you were a candidate.

But I think your case does illustrate the problems. Having that power invested in the U.S. attorney and after serving in that office to develop a political ambition, then one begins to attract, and you will discover this I am sure during the course of your campaign, a certain scrutiny.

And that reflects on what I said earlier about the issues of confidence in the integrity of the criminal justice system. I am not impugning any of your motives or what you did during the course of this particular case, but what I am suggesting is the authority ought to be moved from prosecutor's offices—I disagree with Mr. Rosenberg—to the judiciary.

We wouldn't be having these hearings today. You wouldn't be questioned about whether you, you know, sought to have Mr. Ashcroft, you know, made the monitor in this particular case. You know, there are appearances, and I think you would agree with me—well, I will ask you a question. Appearances in terms of conflict of interest are important, do you agree with that?

Mr. CHRISTIE. Actual conflicts are most important and appearances are also important, sir, yes.

Mr. DELAHUNT. Thank you. But I, you know, you could be a democrat up in Massachusetts and I am sure——

Mr. CHRISTIE. That is not likely, but I guess anything could happen.

Mr. DELAHUNT. Anything can happen. Anything is possible. I mean the reality is $52 million is a lot of money. $52 million to the former Attorney General whom you work for—did you work during—did you serve——

Mr. CHRISTIE. I was proud to serve for 3 years under General Ashcroft. Yes, sir.

Mr. DELAHUNT. That is fine. So what is the public going to say? The public is going to say $52 million for what? For what? For one single case. And I am not suggesting you did anything improper, but appearances are important. Now, if the court was the—clearly, a separate and independent branch of government appointed any monitor, whether it be the former attorney general or whomever, these questions would not occur.

I wouldn't be asking you, nor would anyone else, whether you had any—did you display favoritism? I have no idea. Did you appoint Attorney General Ashcroft?

Mr. CHRISTIE. As I said in my written testimony, sir, it was part of a process that we went through in our office——

Mr. DELAHUNT. Okay.

Mr. CHRISTIE [continuing]. And that involved the lead prosecutors who investigated the matter.

Mr. DELAHUNT. I understand.

Mr. CHRISTIE. My executive staff, but I would like to finish——

Mr. DELAHUNT. Sure.

Mr. CHRISTIE [continuing]. Because I think a point you made before is apt, and I don't want to back off from that.

Mr. DELAHUNT. Okay.

Mr. CHRISTIE. At the of the day, sir, we discuss that as an office, we put enormous amount of time into it, but in the end the buck stops with me in terms of my recommendation to the company.

And so I took all the input that I got from all of my career prosecutors, career members at the Department of Justice, fine people, and we picked the five best people we thought to recommend to these companies.

These companies interviewed those people and came back and told us that they were acceptable to them. And in fact, in the case of Zimmer, and I don't remember if you were in the room were not when I said this so I want to repeat it. Zimmer came back and said, "We believe we got the best monitor in General Ashcroft, " after they had interviewed him. So——

Mr. DELAHUNT. In other words, was the former attorney general one of five that you referred?

Mr. CHRISTIE. Yes, sir.

Mr. DELAHUNT. Okay.

Five—oh, in other words you recommended former Attorney General Ashcroft to Zimmer. Is that an accurate statement?

Mr. CHRISTIE. Yes, sir. Yes, sir.

Mr. DELAHUNT. Okay. Now, having said that, and I am not questioning his talent, his abilities, but here we are. Let's think of the people of New Jersey, the people in Massachusetts that might be interested in these kind of issues.

Here you are, and I am sure there was no actual conflict of interest, appointing a former attorney general who did testify here, and I have a vague memory as to his appearance, and then it surfaces later that the fee was $52 million. That is a lot of money.

Mr. CHRISTIE. Sir, first of all——

Mr. DELAHUNT. Do you agree it is a lot of money?

Mr. CHRISTIE. I don't know where you get the number from, first of all, because I do not know how much his total fees were. That comes from an estimate, from a range of estimates, that is the high end of the range of estimates——

Mr. DELAHUNT. What is the low? What is the low?

Mr. CHRISTIE. I think the low end was in the $20's somewhere.

Mr. DELAHUNT. So somewhere between $20 and $50 million.

Mr. CHRISTIE. Right, and in March of 2008 *The New York Times* reviewed this——

Mr. DELAHUNT. Right.

Mr. CHRISTIE [continuing]. And they put together a group of experts and they said, *The New York Times* said that "outside lawyers who have reviewed Mr. Ashcroft's fee structure said it was not out of line for this work."

And so, while I don't know what the exact fees turned out to be because those were between Zimmer and the Ashcroft Group, *The New York Times* looked at in March of 2008 and said that outside experts they consulted said that the Ashcroft fee structure was not out of line, nor did the Zimmer folks.

Not only did they enter the agreement with Mr. Ashcroft, but it is important to note, they then voluntarily retained the Ashcroft Group to do other matters inside the company that they were concerned about might have raised issues of violations of law, and they paid them additional fees for that in order to make sure that they were doing these things the right way. That was the company's choice. The company didn't have to do that. They must have thought it was reasonable, sir.

Mr. DELAHUNT. Well, but at the same time, let us be very practical, and we all understand the real world. You send the recommendation over. The recommendation is the former attorney general. One can imagine the conversation within Zimmer. Listen, the U.S. attorney sends him over and he served under the former attorney general. I am not saying this is in your thinking, but let me tell you, if I was counsel at that table I would say this could work for us.

That counsel doesn't have an obligation to the American public, doesn't have an obligation to the Department of Justice, but to make the best decision for the interests of that client.

Let me tell you, if I was attorney for Zimmer and a recommendation came from you that the former attorney general under whom you served you can bet that I would have said, "He is our guy, bingo." That would have been my advice. I am not asking you for an opinion. I go back to what I said earlier about appearances.

Mr. CHRISTIE. Well, I wish you had been there, sir, because if you had have been there I suspect, given that attitude, we would have had a lot less arguing with Zimmer and the counsel than we actually did because, as I detailed earlier for Mr. King, we had months and months of contentious negotiation with one of the largest law firms in America, Fulbright & Jaworski, and one of their top partners and a slew of associates who argued over every word of every line that ultimately wound up in those agreements——

Mr. DELAHUNT. But that was——

Mr. CHRISTIE [continuing]. Argued—no, sir, let me just finish—who argued also with us over every aspect of enforcement as we moved forward. And so——

Mr. DELAHUNT. But that was the agreement, Mr. Christie. I am talking about the appointment of the monitor.

Mr. CHRISTIE. Part of the agreement, sir. It was all part of the agreement. The agreement to go with the monitor was part——

Mr. DELAHUNT. I understand, but the——

Mr. CHRISTIE [continuing]. But it was, sir, the monitor was appointed as part of the agreement before the agreement was signed. It was something that we gave them the opportunity to do before they agreed to the resolution in order to make it part of the overall

negotiation. And so it was just one of the many issues that they argued over. It was just one of many issues——

Mr. DELAHUNT. But Mr. Christie, but the reality is that was a non-contentious piece of the agreement.

Mr. CHRISTIE. It turned out to be that way, sir.

Mr. DELAHUNT. Because it was an agreement because you sent over the recommendation.

Mr. CHRISTIE. No, sir.

Mr. DELAHUNT. I mean you can talk. Was there a contention? Was there a debate——

Mr. CHRISTIE. No. There was——

Mr. DELAHUNT [continuing]. Between your office and——

Mr. CHRISTIE [continuing]. Contentious—there was contentious argument about a lot of things.

Mr. DELAHUNT. No. Mr. Christie, you have got to understand, we have rules here.

Mr. CHRISTIE. I understand.

Mr. DELAHUNT. The time is my rule. I am asking you a question, and I am asking it respectfully.

Mr. CHRISTIE. And I am trying to answer it.

Mr. DELAHUNT. Fine. And what I am asking you is, was there any contention on the issue of Mr. Ashcroft serving as the monitor?

Mr. CHRISTIE. There turned out not to be——

Mr. DELAHUNT. Okay. Thank you.

Mr. CHRISTIE [continuing]. In the context of all the other contentious nature. I don't know why the lawyer decided to argue about something that might have been in paragraph 34 versus the appointment of General Ashcroft.

Mr. DELAHUNT. Right, but my point is that wasn't even a debate and it goes back to——

Mr. CHRISTIE. I don't know if it wasn't a debate.

Mr. DELAHUNT. Well, it wasn't contentious. You just admitted it was.

Mr. CHRISTIE. It was not a debate between me and Zimmer. I don't know what kind of debate happened inside Zimmer.

Mr. DELAHUNT. Well, let me tell you, I mean, I am just hypothecating. I don't know but I would have said, let's get Christie's guy. I mean, that is me. I am not suggesting that was your motive, but what I am suggesting is it really creates a problem with an appearance.

Mr. CHRISTIE. Sir, I——

Mr. DELAHUNT. And——

Mr. CHRISTIE. I disagree with you, sir and I——

Mr. DELAHUNT. And I can understand that you can disagree with me. And you know, I respect that we can disagree, but what I am saying is that I would prefer, and you heard my opening observations, about having the authority of appointment in the court, not in the prosecutor.

You can create internal procedures and internal vetting, et cetera, but in terms of the perception of the public, the public is now hearing this term 52 million, maybe it is 30 million. We don't even know. I mean, that is rather interesting. We don't know, and yet there is an agreement that somehow precludes the American public, the people in New Jersey, from knowing what the cost was.

Mr. CONYERS. Before the——

Mr. DELAHUNT. I yield back. I thank the gentleman.

Mr. CHRISTIE. If I could just answer that last part of it, Mr. Chairman, with your indulgence, is just to say this, that what we achieved in doing this and what the public does know about this is that no taxpayer money was spent on any of these monitors, not a nickel of taxpayer money was spent on these monitors.

The monitors were paid for by the companies that were engaged in wrongdoing that was defrauding the American public. That nearly half a billion dollars to date and counting has been saved because of these agreements, and transparency has been brought to this process. And so that is what the public does know about this.

Mr. DELAHUNT. Mr. Chairman, if I can, because I do want to respond, and I hear what the gentleman is saying. I think we all want to see positive results. What I am suggesting to you is there is another method that is far superior than vesting the authority in the executive without any check of balance.

Mr. CHRISTIE. And sir, and I agree.

Mr. DELAHUNT. Would you just give me a little time?

Mr. CHRISTIE. I will let you go on. I am sorry.

Mr. DELAHUNT. No, I wasn't. I mean I hear things about saving jobs. Of course, everybody—we don't want collateral damage whether it is war or peace, okay? And the reality is, I don't really think that in an indictment and then a pre-trial diversion subject to an agreement would in any way threaten those jobs.

You make the point that jobs were saved. You know, I daresay okay, that we don't know whether those jobs were saved or if there would have even been any risk to those jobs if we proceeded differently.

With that, I yield back.

Mr. CHRISTIE. The history tells us, sir. History tells us after the Arthur Andersen debacle that jobs were lost. And secondly——

Mr. DELAHUNT. But you know——

Mr. CHRISTIE. Secondly——

Mr. DELAHUNT. Mr. Christie, I am going to continue to because, you know, I am up here and you are there and the game is here that I get to have the last word, right? So I mean——

Mr. CHRISTIE. I understand, sir, but a charging document was filed.

Mr. DELAHUNT. A charging document is not an indictment. You know, you can go out and seek an indictment and demonstrate to the American people that we are serious about deterrence, and that every——

Mr. CHRISTIE. We did, sir——

Mr. DELAHUNT. No, you didn't.

Mr. CHRISTIE [continuing]. Because the Federal judge signed off on a criminal complaint. An independent Federal judge signed off on a criminal complaint that was filed with——

Mr. DELAHUNT. Then it is not—on prosecution.

Mr. CHRISTIE. Yes, it is. And then the judge signs an order deferring prosecution based upon her review of the agreement and only the process——

Mr. DELAHUNT. And if there is a violation of the, and if there is a violation of the—I guess what I would do is suggest that the court, if there is an indictment, through its probation officer in its capacity to appoint masters could do it for a lot less than $52 million or $25 million. You know, we both are practitioners of the law. We know these kinds of cases. I have never heard——

Mr. CONYERS. The time of the gentleman may have expired and the Chair wishes to observe that during his inquiry, Trent Franks and I have been talking about the importance of the ability to obtain some transparency about the nature of the work product that came out of the relationship between the former attorney general and the five medical device companies.

And to that we will ask our staffs to do an inquiry into that which may hopefully throw further light upon this subject. Does the gentleman agree?

Mr. FRANKS. Mr. Chairman, I am always for transparency. I would respectfully submit that any of the negative intonations cast on Mr. Christie today seem to be totally without any evidence and seem to be sort of a manufactured effort, but I will try to deal with that when we get to questions, but I certainly support transparency.

Mr. CONYERS. I thank the gentleman and I call upon the distinguished Member of the Committee from North Carolina, Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman. Good to have you panelists with us today. Mr. Christie, in my opening statement I gave some background on deferred prosecution. I wanted to make it clear that you don't hold the patent on deferred prosecution. You didn't invent it.

Mr. CHRISTIE. No, sir, I did not.

Mr. COBLE. And I think it has served us well. You mentioned the half billion dollar return. Elaborate very briefly, if you will, Mr. Christie, on the 47,000 jobs. I didn't follow that.

Mr. CHRISTIE. Sure. Yes, sir. These companies employ 47,000 people in the United States. If in fact we had indicted these companies, they would have most certainly been debarred from the Medicare program, and two-thirds of all of these hip and knee replacements are paid for by the Medicare system. It would have put these folks out of business and those jobs would have been lost.

Mr. COBLE. I didn't tie that together. Mr. Rosenberg, you said you were not interesting. I found your testimony very interesting. You and Mr. Grindler have indicated you have some concerns about H.R. 1947. Give us some hypothetical cases where the impediments to effective law enforcement might come into play if enacted.

Mr. ROSENBERG. Certainly, Congressman. My objection, my concern was general in nature, and Mr. Grindler might be able to speak more to the specifics, but I have always believed that prosecutors who work the case, who know the case, know the history and have a broad base of experience, perhaps even prosecuting cases in that industry, bring the best knowledge to bear to the problem.

And so it is not that judges aren't smart. They are very smart, and they do a wonderful job judging. But now we are asking them

to do something that they really shouldn't be doing which is making prosecution decisions.

A deferred prosecution agreement is essentially an agreement not to charge a company. Sometimes complaints are filed, as Mr. Christie described, sometimes they are not. If they are and the company meets all of the terms, they can be dismissed.

But that is a very important prosecutive, excuse me, prosecutorial function, and I just don't think our judges, as good as they are, should be doing that, sir.

Mr. COBLE. Mr. Grindler, do you concur with that?

Mr. GRINDLER. I do, Congressman. I would add that your inquiry about some examples. One aspect of this bill would require a non-prosecution agreement to be filed with the court. Now, a non-prosecution agreement, which is different than a DPA, does not involve the filing of criminal charges.

It is a decision really not to prosecute with any filing with a court, so if you have to file with the court to get approval of a non-prosecution agreement that is the core discretionary function of the prosecutors.

Mr. COBLE. Yes, I understand that.

Mr. GRINDLER. And if you have to then educate a court on all of the details of a criminal investigation and have the court then look at the nine principles that are being applied and how, then that will delay matters.

Mr. COBLE. I thank you both for that.

Ms. Larence is it?

Ms. LARENCE. Larence.

Mr. COBLE. Ms. Larence, there has been talk about a gubernatorial race to the north of here and timing the release of the GAO's report later this year in order to avoid actual or apparent attempt to perhaps the gubernatorial election in New Jersey. Do you intend to comply with the constraints such as those described in the U.S. Attorneys' Manual for the announcement of politically charged or fraud cases prior to that election?

Ms. LARENCE. Mr. Coble, in order for the companies and monitors to participate in our review, with the Subcommittee's approval, we entered into confidentiality agreements with all of the companies and monitors, so our report will not discuss individual cases or companies. We won't be reporting information that you can use to identify individual companies or monitors.

Mr. COBLE. I thank you for that.

Mr. Chairman, as I always try to do with you, I try to yield back before that red light illuminates, and I see my record is intact today.

Mr. CONYERS. That is just for today. We don't know about the rest of the week or the month of July either.

Mr. COBLE. I repeat, I yield back. Thank you, gentlemen, for being with us.

Mr. CONYERS. I thank the gentleman very much. We turn now to the gentleman from North Carolina who is a Chair of the Subcommittee in the Finance Committee and a veteran Member of this Committee, Mel Watt, for inquiry.

Mr. WATT. Thank you, Mr. Chairman, and I want to yield briefly to the gentlelady from California, who has a time urgency here.

Ms. LOFGREN. I appreciate that. Yes, I have to go to the White House for the immigration meeting and I am very interested in this. I do have questions but I will be unable to ask them if I am going to make the meeting.

So I did want to offer my apologies and perhaps I can submit my questions in writing, and I thank the gentleman for yielding.

Mr. WATT. Mr. Chairman, I have listened to the questions and answers, responses that Mr. Conyer, the Chair of the Subcommittee and part of the questions and responses that Mr. Delahunt got, and I think they point up a real problem here.

I don't much care about Mr. Christie or his political ambitions or his history here. I am really more interested in the public policy implications here which he seems to be tone deaf to. There is an appearance of impropriety, whether there is impropriety or not.

And the appearance of impropriety sometimes is more powerful to the public than actual impropriety. And when I read that somebody offered to do this job for $3 million, and somebody was paid $52 million for doing it, that goes beyond the appearance of impropriety. It goes to somebody having paid for that.

And you can protest to me all you want that the taxpayers didn't pay for it, but if somebody paid $52 million for a service, it got passed along to taxpayers or customers in some way. That having been said, I really want to focus on the policy implications and really everybody seems to have an opinion about this that is sitting here other than the first witness and the last witness, so I am going to go to the last witness and maybe I can get some policy things out on the table.

It seems to me, I guess I am old fashioned, that most of what we are talking about here in this corporate area is distinct from what you are talking about in the individual area.

When I hear people talking about who is going to be the monitor, I guess nobody on the private side, the individual side, gets to negotiate who is going to provide the monitor that keeps them in their house if they are home-confined. Who is going to be the prison warden? Who is going to be the probation officer?

So obviously there are two different standards here that are very troubling to me, and the interplay here between what the U.S. attorneys here are doing and the private individual or class action litigation on the civil side, comes into this discussion very heavily from a public policy perspective.

The question I want to ask, professor, is the extent to which in these corporate settings the use of deferred prosecutions or nonprosecution agreements with monitors has grown contemporaneously with the time in which the rights of individual private attorneys' general have been lessened and lessened and lessened so that individual attorneys general can play some of these roles that these gentlemen sitting to your right have been playing?

Is there some correlation that you are aware of or am I missing something here?

Mr. KHANNA. Thank you, Congressman Watt. It is not an area that I have specifically studied, but it is certainly something of a trend to see more deferred prosecution agreements in the corporate context. I think one of the motivating factors for that is of course

the concern about collateral damage to other entities or other groups of people like employees and so forth.

Mr. WATT. Well I mean do you perceive it as the prosecutor's role to be monitoring, spending a bunch of time entering into agreements about matters that are quasi criminal versus civil, or I mean I am missing something here.

Mr. KHANNA. The entire area of corporate liability as it is divided between criminal and civil has substantial amount of overlap, so I think you are correct to note that a lot of what appears to be going on might be something that could be seen in the civil side, too.

Mr. WATT. So is there an obligation under any of these regs that have been written up, Mr. Rosenberg? Mr. Grindler, I think you are in charge of the regulations that implement this. Do you share any of this information with private attorneys general so that people can be compensated who have been wronged?

Is there any obligation on your part to share this information that you are gathering at taxpayer expense with people have been wronged on the civil side?

Mr. GRINDLER. I am not sure, Congressman Watt, that I fully understand the question.

Mr. WATT. You don't understand the concept of private attorneys general and this interplay with U.S. attorneys and, you know, you don't understand the interplay between what is civil and what is criminal?

Mr. GRINDLER. No, no, I do, Congressman. I mean on the civil side, for example, in the False Claims Act area individuals through private counsel can bring actions in the name of the United States in order to deal with frauds upon the United States.

So in that instance those lawyers are involved——

Mr. WATT. But weren't there some individuals other than the United States wronged in this criminal process in Bristol-Myers, in Zimmer, in all of these things? Where did the individuals come into this or have we given over all of our individual prerogatives in the civil context to U.S. attorneys to handle and negotiate monitoring agreements and pay $52 million to people to do what appears to me to be a civil function? Am I missing something?

Mr. GRINDLER. Well, let me try to respond. First in terms of victims of a crime, there are obligations that the Department of Justice has to comply with even in the context of a deferred prosecution agreement to address the needs of the victims and the losses of the victims, and because with the deferred prosecution agreement there is actually the filing of a charge with a court, those responsibilities are triggered so——

Mr. WATT. But no transparency about what your findings are? Didn't you make a determination that this person has engaged in some criminal conduct and some civil fraud?

Mr. GRINDLER. Typically, Congressman, with a deferred prosecution agreement what is filed with the court includes a statement of facts which is a public record of findings of facts that are typically admitted to by the corporation, which is in the public record.

And it could, if it formed the basis or would allow a private litigation, that would be a source of factual information in which an individual could then review the facts, retain counsel and bring litigation against the company. Parallel to that is the Department of

Justice dealing with the responsibility to get restitution to the victims which is also part of what has to be addressed——

Mr. WATT. Who got restitution in the Bristol-Myers case?

Mr. GRINDLER. Congressman Watt, I am not familiar with the case. I wasn't here at the time.

Mr. WATT. All right. My time has expired. This is very frustrating because I think this is a failure to recognize the interplay between the U.S. attorneys' responsibility to the public and the responsibility to individual claimants.

And I think we have erred way on the side of criminalizing things that could be more appropriately handled if we quit beating up on the civil litigation system and making it sound like everybody who files a lawsuit is filing a frivolous lawsuit.

It sounded to me like $52 million was paid out to anybody to do anything is a frivolous waste of taxpayer money to me, especially when we have the e-mails that suggested the same services could have been provided for $3 million. Go figure.

I yield back, Mr. Chairman.

Mr. COHEN. [Presiding.] Thank you, sir.

Recognize the gentleman from Virginia, Mr. Forbes, for 5 minutes?

Mr. FORBES. Thank you. Mr. Chairman, I request unanimous consent to have entered in the record a press release from your office dated October 17, 2008, indicating that you obtained an earmark in the amount of $800,000 for one of the five companies involved in these deferred prosecution matters.

Mr. COHEN. There won't be unanimous consent because Mr. Chairman Conyers thought that the Committee Members should be more civil to each other and——

Mr. FORBES. Then Mr. Chairman——

Mr. COHEN [continuing]. Didn't want to set a precedent. I don't feel comfortable ruling on it because Mr. Conyers took a different position than me. I am proud of the earmark, but Mr. Conyers thought for the Committee's sake that it shouldn't be entered. Therefore, there will not be unanimous consent.

Mr. FORBES. Mr. Chairman, then I move to have entered into the record a press release from the Chairman of the Subcommittee holding this hearing today indicating that he obtained an $800,000 earmark for one of the firms involved in the deferred compensation——

Mr. COHEN. You are recognized for questioning, sir. You are out of order.

Mr. FORBES. I appeal the ruling of the Chair.

Mr. Chairman, if you would like for me to address it I will. Mr. Delahunt talked earlier today about it——

Mr. COHEN. You know, Mr. Forbes, if you would please refrain for a moment. You know, I am the Chairman of this Subcommittee. I am proud of my earmark. I hope you will enter all of the earmarks I get from my district.

This is so extraneous and illogical that it makes no difference, and I am happy to have it entered into the record and I hope you will enter all the other earmarks that I have received for my district. Thank you, sir.

[The information referred to follows:]

MATERIAL SUBMITTED INTO THE RECORD BY THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

September 25, 2008

Press Release
For Immediate Release

CONGRESSMAN COHEN GETS $800,000 IN FUNDING FOR SMITH & NEPHEW MEDICAL RESEARCH

Washington, D.C. – On Wednesday, Congressman Steve Cohen (TN-09) voted with an overwhelming, bipartisan majority in the House to pass H.R. 2638, the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act. This bill included an $800,000 appropriation for Smith & Nephew in Memphis in partnership with the University of Memphis and the Campbell Clinic. Congressman Cohen requested the appropriation in a letter to Appropriations Committee Chairman Dave Obey (WI-07) on March 18, 2008.

This funding will be used to develop a new trauma hemostat, a surgical tool used to manage blood loss. Smith & Nephew has developed trauma hemostat prototypes which are now ready for laboratory and field testing.

"This important surgical tool is critical for our troops and battlefield medics, and this program seeks to improve it," said Congressman Cohen. "The prototypes were submitted to senior U.S. Armed Forces officers and medics at a medical conference last year and received very favorable reviews, so we are optimistic about the prospects for this new trauma hemostat. The medical expertise of the doctors and scientists at the University of Memphis and the Campbell Clinic will be essential for immediate research and development of the tool."

The Consolidated Security, Disaster Assistance, and Continuing Appropriations Act included an additional $2.4 million for other projects in the 9th District requested by Congressman Cohen, including: $1.6 million for the University of Memphis for a battlefield nursing training program, and $800,000 for the University of Tennessee Health Science Center to be used to for a study into new drugs for battlefield treatment of hemorrhagic shock.

H.R. 2638 is a type of bill known as a Continuing Resolution (CR), which will fund at current levels the budgets of certain Cabinet departments and federal agencies until March 6, 2009. To ensure that federal programs and services continue, Congress routinely passes CRs to extend federal appropriations at the current year's levels. In addition to continuing current programs, this CR also includes FY 2009 funding requests for the Departments of Defense, Homeland Security, and Military Construction/Veterans Administration.

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Contact:
Marilyn Dillihay, Press Secretary, 202-225-3265
Charlie Gerber, Communications Assistant, 202-225-3265

Mr. COHEN. And now that it has been entered into the record, you can proceed with your questioning. You have——

Mr. FORBES. Thank you, Mr. Chairman.

Mr. COHEN [continuing]. Three minutes and 17 seconds.

Mr. FORBES. Yes, sir, Mr. Chairman. I can do it in that time.

Mr. Christie, I don't need a lot of time up here because we have got witnesses here to testify and unfortunately we oftentimes do more testifying than they do. You were a U.S. attorney during all these procedures that you are asked to testify about today. Is that true?

Mr. CHRISTIE. Yes, sir.

Mr. FORBES. And as such when you do these deferred prosecution agreements, do you have guidelines that you have to go by in filing those?

Mr. CHRISTIE. Yes, sir.

Mr. FORBES. Was one of those guidelines issued by the current Attorney General of the United States, Mr. Holder——

Mr. CHRISTIE. Yes, sir, it was the Holder Memo. It was issued before I was in the Department in 1999. It was expanded upon by Deputy Attorney General Thompson.

Mr. FORBES. Now, you don't get to write the legislation to guide these deferred prosecution agreements. You have to go by the guidelines, memos that you are given. And did you comply with all of those and——

Mr. CHRISTIE. Yes, sir, I did.

Mr. FORBES. And in addition to that, one of the things in the agreement that apparently the judge looks at, it talks about a monitor. Is there any language in there about the competency of the monitor or any language at all that would give some guidance as to the qualifications or the ability of the monitor that might be in those agreements?

Mr. CHRISTIE. Sir, I don't remember whether those were in the agreements or not as I am sitting here today. I haven't reviewed those agreements in a while.

Mr. FORBES. The agreement though in totality would be viewed by a judge? Is that correct?

Mr. CHRISTIE. Yes, sir, both the criminal complaint and the agreement have to be reviewed and approved by a Federal judge before deferring the prosecution.

Mr. FORBES. And in that review when you look at it, and there has been a lot of talk about Mr. Ashcroft, was he part of a larger firm?

Mr. CHRISTIE. He is a part of a larger firm, sir.

Mr. FORBES. Any idea about how many attorneys they had in there?

Mr. CHRISTIE. I know that at any one time they had about 40 different people working on this matter.

Mr. FORBES. And Mr. Ashcroft has, just the record that we have been given, was a state auditor. Is that correct?

Mr. CHRISTIE. Yes, sir.

Mr. FORBES. And he was also state attorney general.

Mr. CHRISTIE. Yes, he was, sir.

Mr. FORBES. He was also the governor of the state.

Mr. CHRISTIE. Yes, sir.

Mr. FORBES. He was also a senator.

Mr. CHRISTIE. Yes, sir.

Mr. FORBES. He was also attorney general of the United States.

Mr. CHRISTIE. Yes, he was, sir.

Mr. FORBES. Anybody ever question his competence to do this job?

Mr. CHRISTIE. No, sir.

Mr. FORBES. Okay, anything that you haven't had time to respond to because we have cut you off that you would like to do at this time?

Mr. CHRISTIE. Sir, all I would say is this, that we talk about, Mr. Delahunt and I were talking about the role of the judiciary in all of this, I wanted to just make two points really clear. First, one that you just raised which is a Federal judge is involved in all this.

The criminal complaint and the deferred prosecution agreement is presented to a Federal judge for their approval before the agreement can be finalized because only a Federal judge can, in fact, enter that order that allows the criminal complaint to be deferred for prosecution until the conclusion of the agreement.

Then at the conclusion of the agreement, we sit down with the Federal judge to review and request the dismissal of the criminal complaint if in fact the company has complied with all the terms of the agreement. Only that Federal judge can ultimately sign that dismissal.

And lastly in terms of judicial involvement in these selection processes, I just happen to agree with the attorneys general in the Bush administration 41, in the Clinton administration, in Bush 43 administration and in the Obama administration, all of whom believe that these, with proper guidelines, that these decisions are best placed in the hands of the prosecutors who are prosecuting the case because they know these companies and the cases best.

So I agree with all of those attorneys general who have looked at this and the great people inside the Justice Department who have looked at this over four different Administrations and have concluded this is the best way to go.

Mr. FORBES. Thank you, Mr. Christie.

And I yield back, Mr. Chairman.

Mr. COHEN. Mr. Sherman of California, you are recognized.

Mr. SHERMAN. Mr. Chairman, we have got so many conflicts of interest and so little time.

Professor, you put forward the idea that we shouldn't prosecute corporations because there is "collateral damage." I would point out that we prosecute husbands and fathers and wives, and their children are the collateral damage, and we have—creating a society where the big corporations are allowed to do anything they want as long as they are willing to pay big fees to the big, established law firms.

Mr. Christie, the Committee is aware of five, rather seven, of the monitors that were appointed under your tenure, Ashcroft, Kelley, Lacy, Sampson, Stern, Yang and Carley. Are there any others?

Mr. CHRISTIE. No, sir.

Mr. SHERMAN. Now turning to the Zimmer situation, you put forward the idea that, "Oh, we are going to lose 47,000 jobs if you prosecute." The fact is there is money to be paid for the devices they make. If you had prosecuted they would have sold their assets to legitimate managements that hadn't committed fraud.

Instead you left those factories, those employees and most importantly the consumers of those products at the whim of a manage-

ment that you had determined had committed fraud. You may not agree with that, but you will at least agree that the Zimmer factories and the Zimmer Company, rather, deserved monitoring and needed monitoring, and yet you deliberately created a circumstance where there was an enormous conflict of interest.

Let me point it out. If you are running a bar you have got to look at the local cop on the beat who is going to make sure that you not a nuisance to the community. You are monitored by that cop. If you gave that cop a couple of hundred bucks worth of a few drinks over a couple of weeks that would be a conflict of interest.

Ashcroft not only got tens of millions of dollars of fees from Zimmer, but they were free under your agreement to hire him for tens of millions of dollars. There was no limit. Was there any limit on the total amount of money that Zimmer could give to the Ashcroft and his law firm under your agreement?

And why are we upset if a cop takes a few hundred bucks in free drinks from a bar, but Ashcroft's firm is not only able to charge its full fee for tens of millions of dollars, but provide unlimited additional services for unlimited additional amounts of money?

Mr. CHRISTIE. Because I don't believe, sir, that the analogy is an apt one.

Mr. SHERMAN. Is there any limit to the amount that Zimmer could pay Ashcroft?

Mr. CHRISTIE. I do not know because I didn't see the agreement between Zimmer and Ashcroft.

Mr. SHERMAN. Well they are free to enter into as many agreements as they want to for Ashcroft to provide whatever services at whatever amount——

Mr. CHRISTIE. No, sir, not under the terms of the deferred prosecution agreement——

Mr. SHERMAN. Under the deferred prosecution agreement, sir, you bragged that Ashcroft's firm was retained to provide additional services——

Mr. CHRISTIE. That all were part of what needed to be done to make sure they complied with Federal law.

Mr. SHERMAN. No, well, you bragged that Zimmer voluntarily retained Ashcroft for services outside——

Mr. CHRISTIE. That is not what I said, sir.

Mr. SHERMAN. Okay. Is there anything in the deferred prosecution agreement that prevents Zimmer from retaining the Ashcroft firm to provide a variety of services?

Mr. CHRISTIE. No, sir. There is nothing that prevents them from doing a whole bunch of things.

Mr. SHERMAN. Okay. A whole bunch of things, tens of millions of dollars, and then you are going to rely on that firm to protect my constituents from fraud that has already occurred and might occur again while the monitor is getting unlimited tens of millions of dollars.

Mr. CHRISTIE. Yes, sir, because what the record shows is that over the first year of this agreement across those five companies that consulting fees were reduced by $150 million and that more than 1,000 consultants were, excuse me, were fired by those companies.

Mr. SHERMAN. I am going to reclaim my time. I have so many questions. What process did you have to make sure that minority and women owned business were eligible for these lucrative monitoring contracts?

Mr. CHRISTIE. There is no—the process that was put into place was for all of us to be able to do that and in fact one of the monitors in the hip and knee case was a minority woman. So you had a formal process.

Mr. SHERMAN. What process did you have to invite people you didn't know to apply for these monitoring jobs or were these lucrative contracts limited to people that you and your staff had a relationship with?

Mr. CHRISTIE. These contracts were limited to people who were qualified for the job——

Mr. SHERMAN. Oh, but what about somebody——

Mr. CHRISTIE [continuing]. And we picked the five best qualified people that we could find to do this job.

Mr. SHERMAN. Did you invite people you didn't know, who might be smarter than the people you do know, to apply?

Mr. CHRISTIE. Sir, there is no process within the Department of Justice——

Mr. SHERMAN. So you did not create a——

Mr. CHRISTIE. Excuse me, sir. There was no process within the Department of Justice to do that, and it is not my position to set up guidelines for the Department of Justice. It is the job of main Justice, sir.

Mr. SHERMAN. Sir, how many of the seven monitors involved have helped you with your election campaign?

Mr. CHRISTIE. Sir, I have gotten no help from people in my election campaign, with the exception, with the exception of former Federal judge, Herbert Stern, who is not involved in the agreements that we are talking about today.

Mr. SHERMAN. And his law firm and their partners and spouses have not donated to your campaign, and Mr. Ashcroft has not endorsed you for governor?

Mr. CHRISTIE. Mr. Ashcroft has not endorsed me for governor, no, sir.

Mr. SHERMAN. And none of the other monitors have provided any assistance?

Mr. CHRISTIE. I said with the exception of former Federal judge, Herbert Stern.

Mr. SHERMAN. Okay. Now——

Mr. CHRISTIE. Mr. Chairman, I just would like to let you know that as I said to you in the letter that I sent to you, I had to depart at 1:30 today because of pressing business that I have back in New Jersey. I have been here since 11 o'clock and available and so I don't want to cut anybody off, but I need to go and catch a train, sir.

Mr. SHERMAN. Then, sir, I would like you to answer for the record whether you think there was a perception of a quid pro quo when you retained Mr. Kelley and gave him a lucrative contract when just 2 years prior he had declined to prosecute your brother, even though your brother was on a list of people involved in trad-

ing and those both above him and below him were subject to prosecution.

Mr. CHRISTIE. No, sir, because my brother committed no wrongdoing and was found not to have committed any wrongdoing, both by the southern district of New York and the SEC. Thank you, Mr. Chairman, for the opportunity to testify.

Mr. FRANKS. Would it be possible for 5 more minutes?

Mr. COHEN. The Ranking Member would like to ask——

Mr. FRANKS. Just 5 minutes? I will cut it as quick as I know you are——

Mr. CHRISTIE. I will try. I will try.

Mr. FRANKS. Let me just first ask Mr. Rosenberg. Mr. Rosenberg, I understand that you have looked over this agreement. Was there anything that was inappropriate or illegal about this agreement?

Mr. ROSENBERG. Mr. Franks, I have not looked over that agreement.

Mr. FRANKS. Okay. I am misinformed.

Mr. ROSENBERG. But no, not to my knowledge.

Mr. FRANKS. Not to your knowledge.

Mr. ROSENBERG. I don't believe anything was inappropriate.

Mr. FRANKS. All right. Mr. Christie, let me just ask you this, if you had failed to accomplish what you did, isn't it possible that there would be five lengthy lawsuits that would still be going on today?

Mr. CHRISTIE. Yes, sir.

Mr. FRANKS. Okay. I was just doing a little calculation. Even if the $52 million is correct, the high end, and neither of us knows that, from my calculations of 47,000 jobs that comes out to about $1,100 per job that you saved and the taxpayers never paid for a penny of it.

And when I compare that to the stimulus $780 billion, that should give us approximately 711 million jobs for America and might I just ask you as just a personal request, please do not consult with the Obama administration because if they figure out how you are able to save this many jobs at so little they might get reelected.

Mr. CHRISTIE. Thank you, sir.

Mr. FRANKS. So with that, I wish you the best. I think you have done a fantastic job here today and I am sorry that you were subjected to some of the insinuations, but you have done a great job and I might endorse you for governor.

Mr. CHRISTIE. Thank you, sir.

Mr. COHEN. Mr. Christie, what time is your train?

Mr. CHRISTIE. My train is a little bit before 2:00, sir, and I have to go.

Mr. COHEN. You are not going to make a 2 o'clock, so——

Mr. CHRISTIE. Well, sir, I am——

Mr. COHEN. Mr. Johnson, you are recognized.

Mr. CHRISTIE. Sir, I am going. I said I had to leave at 1:30 and I will.

Mr. COHEN. Mr. Johnson, you are recognized for your questions.

Mr. KING. The agreement was——

Mr. COHEN. Five minutes.

Mr. KING. There was an agreement with the gentleman, Mr. Chairman. Is that not correct, an agreement at 1:30?

Mr. COHEN. Mr. Johnson, you are recognized.

Mr. JOHNSON. Yes, I am not going to have any questions——

Mr. KING. Parliamentary inquiry, Mr. Chairman.

Mr. JOHNSON [continuing]. For Mr. Christie.

Mr. KING. Parliamentary inquiry.

Mr. JOHNSON. I will not have any questions for Mr. Christie.

Mr. COHEN. Mr. King, what is your parliamentary inquiry?

Mr. KING. Parliamentary inquiry, I would ask if you would respond. Was there an agreement with Mr. Christie that he would leave at 1:30 and why would you resist that?

Mr. COHEN. I didn't. I asked Mr. Johnson for his time. There is four panelists with information he wasn't going to ask Mr. Christie. I hope you are satisfied. Mr. Johnson, continue.

Mr. KING. I am unsatisfied.

Mr. JOHNSON. Thank you and what I think we have done is turn this into a partisan matter and it is really not. This is a situation involving prosecutorial discretion with respect to how to dispose of a case that is in the best interest of the public.

And I would cite to you the case of T.I., done in the northern district of Atlanta, and T.I. was charged formally indicted actually, for some firearms offenses, and as a consequence there were plea negotiations between his lawyers and also the U.S. Attorney Nahmias.

And as a result of those negotiations an agreement was reached, and the agreement provided for T.I. to be able to do something that was very important for young people who listen to him. And so I thought that was—I wanted to commend first of all the U.S attorney for the northern district for having the courage to do that, because we are talking about blue collar crime right there.

Now, white-collar crime should get a similar analysis by prosecutors and so I have no problem with that basic tool. I will say, however, that I appreciate Mr. Bill Pascrell, who is from the great state of New Jersey, as well as my friend Mr. Frank Pallone also from New Jersey and their motives have been very sincere.

And I want to ask you all whether or not you have any problems with let us see, H.R., what is that, Mr. Pascrell, H.R.—your bill, H.R. 1947, which has been introduced by Mr. Pascrell and also has a number of co-sponsors.

And you all didn't ask me if I wanted to sign it as an original co-sponsor, but I certainly would have signed on, and I believe I am signed on now, as a matter of fact, as a co-sponsor, so I wish to commend you and I want to ask you, starting with you, ma'am, do you have any problems with H.R. 1947 is it? Mr. Pascrell's bill?

Ms. LARENCE. We don't take positions——

Mr. JOHNSON. And the way I want you to answer this question yes or no, each one of the panelists. And then, depending on the response, I will ask for a follow up. Yes, ma'am.

Ms. LARENCE. Mr. Johnson, GAO doesn't endorse particular legislation——

Mr. JOHNSON. All right.

Ms. LARENCE [continuing]. But we might have information on particular provisions in the bill that would be helpful.

Mr. JOHNSON. All right, thank you.

Mr. GRINDLER. Congressman, yes, the Department of Justice does have some serious concerns with a number of the provisions of the bill.

Mr. JOHNSON. How about you, Mr. Rosenberg?

Mr. ROSENBERG. Yes.

Mr. JOHNSON. Do you support it?

Mr. ROSENBERG. No.

Mr. JOHNSON. All right, and how about you, Mr. Khanna?

Mr. KHANNA. I support a number of provisions but I have some concerns with some.

Mr. JOHNSON. Okay, and let me ask this question. Are these deferred prosecution agreements and also the agreements not to charge, non-prosecution agreements, in other words should there not be—I don't think you all are saying there should not be guidelines. I think what you are saying is you would like to see some tweaking of this bill so that it could pass. Is that correct?

Mr. GRINDLER. Congressman, the Department of Justice opposes this legislation.

Mr. JOHNSON. Now, the legislation simply calls for guidelines to be established that directs the attorney general to issue public written guidelines for deferred prosecution and non-prosecution agreements within 90 days of the enactment date. Do you have a problem with that, Mr. Grindler, is it? I am sorry——

Mr. GRINDLER. Yes, Congressman.

Mr. JOHNSON [continuing]. My eyes are going bad. Do you have a problem with that?

Mr. GRINDLER. If I may explain——

Mr. JOHNSON. Yes or no first, before you explain. Do you have a problem with H.R. 1947, which directs the attorney general to issue public written guidelines for deferred prosecution and non-prosecution agreements within 90 days of the date of enactment? I mean, who could have a problem with that?

Mr. GRINDLER. In the context of the entire bill, yes, I do, Congressman.

Mr. JOHNSON. All right. Well, let me ask you but that particular stipulation you have no problems with, correct?

Mr. GRINDLER. Some of the paragraphs under the guideline provision we do have problems with.

Mr. JOHNSON. Okay.

Mr. GRINDLER. If you are talking about guidelines as a separate piece of legislation——

Mr. JOHNSON. You have said that repeatedly. I am trying to pin you down. It also directs the attorney general to establish rules for the selection of independent monitors. Who could be in disagreement with that and why?

It also provides that a national list of possible monitors from which the Justice Department must appoint an independent monitor, and must establish a fee schedule for compensation of independent monitors and their support staff. I mean, what could be wrong with that? I have no idea. Nobody will answer the questions.

The bill also sets out certain restrictions relating to deferred prosecution and non-prosecution agreements and it provides for judicial oversight of such agreements. It doesn't take any prosecutorial discretion away.

Although I might add that we have done just that with our Federal court judges by limiting their discretion on certain things like imposing sentencing guidelines and also mandatory minimums, which have resulted in a lot of low level folks in the drug business being incarcerated for long periods of time like 20, 30 years, those kinds of things.

We have taken away our discretion of our Federal judges and I certainly am opposed to those kinds of schemes which treat everybody the same way. I just don't understand why anybody would be opposed to H.R. 1947, and with that I will yield back.

Mr. COHEN. Thank you, Mr. Johnson.

I believe Mr. Scott is next.

Mr. SCOTT. Thank you, Mr. Chairman. Ms. Larence, generally speaking, do the U.S. attorneys' offices have the expertise to handle these kinds of contracts?

Ms. LARENCE. What they reported to us is oftentimes they will choose an independent monitor because they don't have either the resources or the technical expertise for that particular industry.

Mr. SCOTT. Well, in contracting with a monitor, I mean normally if you are building a courthouse or something like that there would be a fair process including public request for proposals.

There would be a process to select and oversee a multimillion dollar contract and does the U.S. attorneys' office have that kind of expertise to draft and oversee and select an appropriate person to be awarded the contract.

Ms. LARENCE. What is interesting that we have found in our review is that different U.S. attorney offices have different practices. One office actually did go through a competitive bidding process to identify candidates and open up opportunities.

Other offices have the companies themselves go through a nomination process, and the companies are allowed to bring monitor nominations to the Department of Justice. In other cases the Department of Justice presents the monitor and the company pretty much has a yes or no decision at that point.

Mr. SCOTT. Is that Department of Justice or U.S. attorneys' office.

Ms. LARENCE. Individual U.S. attorneys' offices.

Mr. SCOTT. And this could be a sole source contract?

Ms. LARENCE. I am not sure I have an answer to that one, sir.

Mr. SCOTT. Well, let me ask Mr. Grindler, I mean according to this contract—I mean on an hourly rate that seems excessive, is there a limit to how much a monitor can make on these contracts before somebody has committed a crime?

Mr. GRINDLER. Congressman, I think the limit stems from what is agreed upon between the government and the defendant as to the scope of what the monitor should do, and under the memorandum issued by the Deputy Attorney General in 2008, the scope should be limited to whether the company is complying with the agreement, and whether it has instituted a compliance program in sufficient internal controls to ensure that there is not criminal conduct going forward.

But the contract——

Mr. SCOTT. Well, no, I mean——

Mr. GRINDLER [continuing]. Between the company and the monitor, they actually are the ones that do the negotiating of the contract between those two entities.

Mr. SCOTT. Well, does the company have—in this case it just appeared that the escrow firm had been picked, and the company was kind of stuck with them, and the rate in the e-mail traffic there seemed to be some question about what the hourly rate was. Do you know what the hourly rate was that Mr. Ashcroft was getting?

Mr. GRINDLER. Congressman, I do not.

Mr. SCOTT. Does anybody know what the hourly rate was? Could it be calculated? Was he guaranteed a certain amount?

Mr. GRINDLER. Congressman, I just don't know.

Mr. SCOTT. E-mail traffic suggests at least $1,000 an hour. Is that what monitors are suppose to be making?

Mr. GRINDLER. Congressman, under this memorandum from the Deputy Attorney General the decision as to who the monitor should be is no longer with a United States attorney or the Assistant Attorney General for the Criminal Division in the context of a DPA or an NPA.

It now rests ultimately with the Office of the Deputy Attorney General, and the memorandum issued by Mr. Morford in 2008 states explicitly that the Assistant Attorney General for the Criminal Division or any other division, and the United States attorneys do not have approval or veto authority with respect to a recommendation for a lot of them.

Mr. SCOTT. And why was that change made?

Mr. GRINDLER. That was in March 2008.

Mr. SCOTT. Why was it made?

Mr. GRINDLER. My understanding, I was not with the Department of Justice when this discussion began, but my understanding from conversations I have had actually with David Nahmias, was that this process began in 2005 in the summer, and to look at monitor relationships and to look at best practices and try to develop guidance.

And that there were meetings within the Department of Justice with U.S. attorneys and with the criminal division to discuss it, and that there was a meeting with outside counsel, private lawyers to get their input. And then yes, at the end of 2007 because of interest by Congress, and the public, that process was escalated and the memorandum was issued in March of 2008.

Mr. SCOTT. And what was so upsetting about this contract that caused the change to be made?

Mr. GRINDLER. Congressman, I just can't speak about that. I have been able to talk to David Nahmias who is still the United States attorney in Atlanta, but I have not, you know, communicated with people who are no longer with the Department about that.

Mr. SCOTT. Is there kind of a general kind of range that monitors should cost? I mean because this contract cost us $50 some million?

Mr. GRINDLER. I don't know the details of the contract.

Mr. SCOTT. Do you know what other monitors generally make in other situations?

Mr. GRINDLER. I do not. In the two instances and they are still under review where there is a monitor possibility, we have made

specific inquiries of the monitor about the financial arrangements and whether or not the subject corporation is satisfied with it and whether that been addressed.

And certainly under this memorandum from the deputy attorney general it encourages companies that come and talk about issues that may arise in the context of both the monitors and the deferred prosecution agreements.

Mr. SCOTT. But before this was picked the U.S. attorney, local U.S. attorney, had pretty much carte blanche authority to pick whoever he wanted and award essentially unlimited fees.

Mr. GRINDLER. My only response, Congressman, is that before March of 2008, the United States attorneys throughout this country would have had the authority within the cases brought in those jurisdictions to make decisions about how to resolve criminal cases.

Mr. SCOTT. And we have—because of what has happened the way they used that authority we had to change the process is that right?

Mr. GRINDLER. Again, the process was already under review prior to the events that gave rise to expediting the issuance of the memorandum, based on what I was told.

Mr. SCOTT. Well, you weren't there, so I mean they had—anybody looking at the situation knows that something is wrong when local U.S. attorneys' sole source of $50 million contract for someone who has political connections.

Mr. COHEN. Thank you, sir.

Mr. GRINDLER. Okay.

Mr. COHEN. Mr. Grindler this might have been where he was going. You are at the Justice Department now, and as I understand it, now, you can confirm or not confirm, there was internal guidance since this time in the Justice Department that prohibits the type of extraordinary restitution that was imposed in the Bristol-Myers Squibb agreement because of actual or perceived conflict of interest or other ethical considerations emanating from such a provision. Is that not true? Are you aware of those changes?

Mr. GRINDLER. What I am aware of, Mr. Chairman, is that in May of 2008, a provision was added to the United States Attorneys' Manual that said that, "With respect to plea agreements DPAs and NPAs that they should not include terms requiring a defendant to pay funds to a charitable educational community or other organization or individual that is not a victim of the crime or is not providing services to redress the harm caused by the defendant's criminal conduct." That was put into the United States Attorneys' Manual in May of 2008.

Mr. COHEN. And do you know of any situation, other than that of Mr. Christie and his alma mater, Seton Hall, where this occurred?

Mr. GRINDLER. I don't, but I was not with the Department of Justice then.

Mr. COHEN. Right, I know you weren't. You weren't, you know, with Davy Crockett at the Alamo, but you know they all died. So let me ask you this—do you know of any situation in the Department of Justice where somebody had such an agreement, other than Mr. Christie where he gave was part of this deferred prosecution and somebody gave money to his law school.

Mr. GRINDLER. I don't think so, Congressman.

Mr. COHEN. In that type of arrangement or that type of settlement would be not permitted any longer is that right?

Mr. GRINDLER. That is correct unless the law school is somehow providing services that redress the harm caused by the criminal conduct.

Mr. COHEN. So if the law school was doing knee-jerk reaction in this, you know, type of thing there was some kind of bodily deal, medical device work, that would be one thing, but there weren't.

Mr. GRINDLER. I mean I have no knowledge of that. I would add, Mr. Chairman, that there are also statutes and regulations that address the requirement of disqualification in circumstances in which there is personal or political relationship.

Mr. COHEN. And would you explain what those are, those came about after Mr. Christie's situation with Seton Hall, is that correct?

Mr. GRINDLER. I don't think they did. I think they were——

Mr. COHEN. Before that?

Mr. GRINDLER. I am not sure about that, Mr. Chairman, but I think they were already in place at the time.

Mr. COHEN. They were in place, and what are those policies?

Mr. GRINDLER. One of the provisions, and by the way these are provisions that, in terms of the current process as a result of the Deputy Attorney General's memorandum, when monitorships are reviewed there is explicit reference to the need to have an ethics official within the group of people, the Committee that has to review the decisions on those monitors.

But one provision is 45 CFR Section 45.2, it is titled Disqualification from Personal or Political Relationship, and it says basically that, "No employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution."

And then there is a provision relating to personal relationship, which is somewhat more subjective because it can extend to friends, but it really gets back to——

Mr. COHEN. Wouldn't Mr. Christie's selection of his former employer, Attorney General Ashcroft, for this lucrative monitoring contract be a direct violation of that Federal rule that is what is considered a special—what is the word of art—special relationship or is that not accurate? Wouldn't that be such?

Mr. GRINDLER. I just don't know enough about the situation to be able to respond to you, Mr. Chairman.

Mr. COHEN. Well, the important, the "shall not participate in the matter unless he has informed the agency, received authorization of the agency designee, employs a covered relationship with any person for whom the employee has within the last year served as officer, director, trustee, general, partner, agent, attorney, consultant, accountant or employee.

In this situation Mr. Christie was an employee of Mr. Ashcroft. Therefore, he is covered in your policy under b(1)(iii) as a covered relationship, and under the guidelines in affect at the time that was improper.

Mr. GRINDLER. Mr. Chairman, I just don't have sufficient information about that matter to be able to come to a conclusion.

Mr. COHEN. Assuming those facts are true, that was he was his previous employer, would that not be in a hypothetical come within a covered relationship?

Mr. GRINDLER. I would just have to look at it in the context of the language of it. I just don't know enough about it.

Mr. COHEN. All right. Let me ask you this. In the wake of these monitor appointments, did the Department issue the Morford Memo which provides some guidance on monitor selection?

Mr. GRINDLER. I am sorry?

Mr. COHEN. The Morford Memo.

Mr. GRINDLER. Yes.

Mr. COHEN. You are familiar with that? Was that a response to the situation in New Jersey?

Mr. GRINDLER. My only knowledge of that comes from some conversations I have had because I wasn't there, but I was told that the an effort began at the Department of Justice in the summer of 2005 to begin to look at monitor relationships and develop best practices, and that meetings occurred both within the Department and in one instance with outside private counsel to begin to develop those best practices.

And then at the end of 2007 there were inquiries from Congress, and there were also public concerns raised which expedited that process, and then the memorandum was issued in March of 2008. And again, that is what I have been told about it. I wasn't at the Department at the time, so I wasn't involved.

Mr. COHEN. Okay. I want to just ask you this, there were five defendants in the medical devices cases, and one of them was from my district, and the world should know that I am an effective Congressman I got an earmark in my district, and I am pleased that the word is going out now, but that had nothing to do with this hearing.

In fact that company said Mr. Christie was a reasonable guy. They spoke well of him. I had a good impression of him until today, and the fact is they did think that there should be some type of ombudsman, that there were times when their monitor went and did certain travels and went certain places and spent certain amounts of money on top flight hotels and first class airfare, et cetera, et cetera things like that, and they objected.

Do you not think that there should be somebody looking in on that circumstance because they didn't feel like they could say anything?

Mr. GRINDLER. Well, Mr. Chairman, I believe that the corporation in the first instance, which is negotiating these agreements with the monitors, and I think some of those discussions can take place before decisions are made on monitors, that they in the first instance with the lawyers they have should attempt to put some restraints on what the costs are some appreciation of what it is from the Department of Justice's point of view under the Morford Memo.

We are encouraging companies to talk to us about these relationships and concerns that arise, and I would think that if concerns

arise in which a monitor was going beyond the scope of his or her charge as a monitor, then those issues should be brought to us.

And we would be interested in having discussions about it because the Morford Memo itself recognizes the importance of looking at the cost and impact of monitorships on the company, both in terms of making the decision to have a monitor and in terms of what the scope of the monitor's duty should be.

Mr. COHEN. Anybody on this side have another round of questions?

Mr. King of Iowa?

Mr. KING. Thank you, Mr. Chairman. I really take the opportunity to thank all the witnesses and glad to have the chance to do so. I remarked to one or more of my colleagues at the conclusion of all of your testimony that the filter that you all went through to get here must have filtered out anybody that didn't happen to have significant intelligence because all of your testimony to me seems to be very well informed and very measured and very accurate and precise.

And I, but it is not that we don't get good panels of witness here, but you certainly rank among the best we have seen. And I am struck by that unanimity, the view that you bring for the deferred prosecution agreements that are the subject of this.

And as I recall, Mr. Grindler, you spoke I think in the most depth with regard to the unintended consequences that might come, although I don't recall that this panel has examined those unintended consequences as deeply as you may prefer or as I may prefer, and I would ask if you could expand upon the unintended consequences?

Mr. GRINDLER. Well, I mean it is always a difficult valuation when you are faced with a company that has engaged in criminal activity, but you do have to look beyond that and I think part of that stems from the fact that a corporation cannot be put into jail.

So from a deterrent point of view I think that is one reason why the collateral consequences do come into play, so you see what the impact may be of going forward with a prosecution where you tend to get a guilty verdict.

And that is, of course, on the employees, on the shareholders, on pensioners and even on the public. But having said that, if you have a corporation that is a recidivist, or where the criminal activity goes across the culture of the company and is systemic, then I think the pendulum typically would swing the other direction where a prosecution may be necessary.

And so these are the sort of balancing act that we try to go through when we review what our choices are in prosecuting a corporation.

Mr. KING. I thank you, Mr. Grindler, and I just would ask if you have any knowledge of any deferred prosecution agreement that would have put a limit on the amount that might be paid a consulting firm?

Mr. GRINDLER. I don't have a knowledge where there is a provision that says you are capped at a certain amount, but I started at the Department in March of this year so I am beginning to review proposals for deferred prosecution agreements, and so I don't have a real base to——

Mr. KING. If I could then defer that questioning to Mr. Khanna to respond?

Mr. KHANNA. Thank you, Congressman King. We have looked at almost about 30 deferred prosecution agreements and tried to get information about the pay. There doesn't appear to be any explicit limit on the hourly rate that monitors might get paid.

I think the sense—we have spoken to a few monitors, too—the sense is that they try to charge their normal hourly rate, whatever that might be, but there doesn't appear to be any explicit limit on how much that might be per case.

Mr. KING. And in your professional judgment would there be any motivation for a company to pay an additional amount so that might justify putting a cap on, or a limit on?

Mr. KHANNA. Well, it is hard to imagine why a company would want to pay more. Of course, the——

Mr. DELAHUNT. Would the gentleman yield?

Mr. KING. I would yield.

Mr. DELAHUNT. Would the company wish to maintain a good rapport with the monitor, given the fact that——

Mr. KHANNA. Yes.

Mr. DELAHUNT [continuing]. If there was a violation of the agreement then the process would stop and the case would be brought in front of a judge. So in terms of leverage, to my good friend from Iowa, I would suggest that the alternative, in terms of payment to the monitor by the company, the company has zero leverage.

Mr. KING. I reclaim my time. I appreciate the gentleman's view on this and an opportunity to restate it. It just occurs to me that of the people I have hired, when I paid them what was agreed to in the contract that that has always been satisfactory, and I don't remember ever feeling that urge to write an extra check to them if they were satisfied with the compensation for the services that they had rendered.

I would also point out that there is such a thing as contract agreements, and I think we should adhere to them, even up to the point of allowing a witness to leave when the agreement is that the witness be allowed to leave.

I would also point out that the gentleman from Massachusetts has stated that he supports prosecutorial discretion, and I think that has been explored to some extent here at least, and the question becomes how much discretion?

But the important point is I think made by Mr. Rosenberg, that if we are going to accept some of the suggestions about turning that prosecutorial discretion over to the judiciary branch, we are asking judges to do jobs that overloads them and they may or may not be, however qualified they are to do the jobs they are assigned.

So I appreciate the witnesses, the testimony, and some of the things that happened in this hearing today, but political lynchings are not among those things I appreciate.

Mr. COHEN. One minute.

Mr. KING. I yield back.

Mr. COHEN. Thank you. Mr. Pallone and Mr. Pascrell would like to testify on the second panel before we go in for votes. We are supposed to go in for votes between 2:15 and 2:30. Well, I don't have any questions for my two colleagues.

Could you have a quick question before the panel before we dismiss them?

Mr. DELAHUNT. Well, I would like to point out that, you know, contracts should be respected, but the problem seems to be that within that contract there are no guidelines. There are no caps in terms of what compensation is.

It is open-ended and clearly, at least from my perspective, any legal services or services that are rendered in the amount—let us just presume that that $52 million figure is accurate—I would say that would be hard to justify.

But could I just offer you one hypothetical? If I were the United States attorney and I will pose this to the panel, and I came to you and I indicated that I had a relative, a close relative that was accused, only accused, of a certain crime and not in a formal sense but was a suspect, and a colleague, professional colleague, another district attorney or another prosecutor, declined to prosecute presumably on good solid reasons.

If I came to you and I was working for you, Mr. Rosenberg or you in your capacity Mr. Grindler, and say, "I am considering appointing the individual prosecutor who declined to prosecute as a monitor in a particular matter that would generate sufficient revenue, what would your advice be to me?

And again, I go back to my original comments about appearances and confidence of the people and the integrity of the system.

Mr. GRINDLER. I think what I would do is consult with an ethics expert at the Department of Justice and get specific advice as to how I should proceed.

Mr. DELAHUNT. Thank you.

Mr. Rosenberg? Now remember, this is a close relative——

Mr. ROSENBERG. I understand.

Mr. DELAHUNT [continuing]. Who 2 years prior, the individual that I intend to appoint as a monitor, which may or may not generate millions of dollars of revenue, declined to prosecute, what would you do?

Mr. ROSENBERG. I understand the hypothetical, sir. I have a little bit of difficulty separating it from the underlying situation from which I believe you are referring.

Mr. DELAHUNT. Well, I don't want to refer to anything. This is me coming to you. You are a district attorney, or you were. I am the current sitting state's attorney up in Boston, and I had a close relative. You reviewed the case and made a decision not to prosecute, and now I am looking to you to become a special monitor whereby you have the potential to generate hundreds of thousands of dollars, if not millions.

Mr. ROSENBERG. I agree with Mr. Grindler.

Mr. DELAHUNT. You would go to an ethics expert? Okay.

Mr. ROSENBERG. I would.

Mr. DELAHUNT. Okay.

Professor Khanna?

Mr. KHANNA. Certainly nothing wrong with going to an ethics expert. I would——

Mr. DELAHUNT. On its face.

Mr. KHANNA. I am sorry?

Mr. DELAHUNT. But I am just giving you this. You don't have time to go to an ethics expert.

Mr. KHANNA. Oh, Okay. Rarely do professors run out of time, but all right. I would be somewhat squeamish about agreeing——

Mr. DELAHUNT. You would have concern about appearances?

Mr. KHANNA. Yes.

Mr. DELAHUNT. Thank you, Mr. Chairman, and I yield back.

Mr. COHEN. Thank you. If there is no other questions of the panel we thank each of the members of the panel and we excuse you, and thank you for your contributions, and there are some written questions from Ms. Lofgren that may be going to one of you, and if you would be kind enough to respond to them in writing they will be made part of the record.

And Members of the Committee have 5 days to submit further questions to you which could be posed, and we would appreciate you responding to those in an expeditious manner. With that, the panel is dismissed.

Without objection, the record will remain open for 5 legislative days for further additional material. Thank you.

Thank you, sirs. Normally we come down and shake hands and all those things, but we are going to pass up all those typical congressional niceties because we have the congressional votes to come very soon, and they trump niceties, so the second panel?

I am now pleased to introduce the witnesses for our second panel for today's hearing. Our first witness will be Mr. William Pascrell, Jr., representing the 8th District of New Jersey, elected to Congress in November 2006. I think everybody knows about his record. He introduced H.R. 1927, Accountability and Deferred Prosecution Act of 2009 this past April 2.

Congressman, would you please proceed with your testimony?

TESTIMONY OF THE HONORABLE BILL PASCRELL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PASCRELL. Mr. Chairman, I am honored to be here today and thank the entire Committee and Ranking Member. We are here to eliminate deferred prosecutions. That was—no part of the bill says that. We are simply here to elevate their application.

Every citizen in this esteemed Committee should understand how deferred prosecutions have become part of the justice system. As I study this issue, Mr. Chairman, I believe that deferred prosecutions are related to the larger issue of corporate prosecutions in the post-Enron era. What I have come to realize is that these agreements are actually even more relevant to the type of corporate malfeasance that cost millions of Americans their jobs.

They are gone. Those jobs are gone. I do not know, the prior witness, what jobs he was talking about, that led our Nation to the brink of the greatest economic crisis since the Depression. Quite simply, corporate greed, collusion and illusion have become legion.

The executive branch and the Congress have for the most part stood aside, witnessed a significant collapse of oversight, justice and professed American values. I would contend, after examining the volumes of evidence before us, that the sentinels at the gate,

a fair number of U.S. attorneys, have been handmaidens to the fleecing of our citizens.

However, as we saw in the Zimmer case, older Americans were the ones who suffered the physical and mental consequences of bribery and fraud. We witnessed the bribery of physicians so that they would advocate for a specific prosthetics device, regardless of whether it was defective or not. Not one person before us today on the first panel talked about the victims.

These perpetrators of Medicare fraud are the lowest of the low in my opinion, and yet, because they entered into a deferred prosecution these corporate criminals have never had to even admit guilt to the consumers they cheated, and thanks to Mr. Christie they never will.

Mr. Chairman and the Members of this Committee, there has been an erosion of confidence, as Mr. Delahunt talked about earlier. Not only in the financial system but in the justice system which failed to bring the bad actors to justice. Pay a fine, avoid jail. Promise you will do better next time and no one gets prosecuted. The fine simply becomes the price of doing business.

In fact, many corporations as part of their business brief, the captains of corporate America who did our Nation wrong, look to the very justice system that is supposed to protect citizens, to bail themselves out. We are here today seeking legislation to help right the ship of justice.

This goes way beyond one conflict of interest concerning a $52 million no-bid contract. Mr. Christie and Mr. Ashcroft should not flatter themselves. Our bill, the Accountability in Deferred Prosecution Act of 2009, yes, Mr. Johnson, what could be wrong with that? Accountability. You are right.

It simply brings accountability and transparency to this process for the first time. I want to literally show all of you just one example of why we need transparency on this issue. Here are the files of one monitor, Debra Wong Yang. These are files we obtained from the Senate Committee on the Aging, which held its own Medicare fraud investigation in the case in question.

This bill, from DePuy Orthopaedics, sent to DePuy Orthopaedics, which had former U.S. attorney Debra Yang selected as its monitor, is about 200 pages long. I have read every page and it is so detailed that even documents—every time Ms. Yang had to charge a cab fare, which is standard billing practice for law firms.

However, the bill sent to Zimmer, Incorporated by Ashcroft, the Ashcroft Group, which charged many millions more in expenses, does not include any information about the services provided. It gives us no information whatsoever. No billable hours, no reimbursable expenses.

In fact, it is just on one page, a bill listing the total amount due. The bank information about where to wire the bank—I think that is fitting by the way—and nothing more. This is a ransom note not a billing statement. Please examine both of them. You come to your own conclusion about transparency.

Mr. Cohen, it should come as no surprise that the executive branch will always prefer to alter its own procedures at its own pace, but as Members of Congress, I believe we have a solemn to

oversee these practices and take corrective action when it is called for.

The Zimmer case merely highlights the lack of oversight of deferred prosecutions. In this case, there existed a clear outright conflict of interest as Mr. Christie set out to hire his former boss, Attorney General Ashcroft.

We know of at least 120 different deferred prosecution agreements, and as the GAO pointed out, many of them were undertaken by Federal prosecutors who had the diligence to seek a transparent and fair process for entering into these agreements and selecting monitors.

We are not just talking about the manager. We are not talking about a manager of a baseball team, and I happen to be playing on that baseball team, I am talking about the manager of justice in the United States of America who left his position and was hired by one of the fellows, one of the people on his team to do this job.

Mr. Christie, and many of his acolytes, will trumpet the deferred prosecution system. They expand it as a fail-proof method to cleanse corporations. To them I need cite only one example, AIG, 2004, 2006—two deferred prosecutions and it worked well, didn't it?

This former insurance giant, which is now synonymous with corporate greed and public deceit, received two deferred prosecution agreements and paid a monitor $20 million. For what? In accepting deferred prosecution, Mr. Greenberg, now disgraced, too late—the horse is out of the barn—said this.

"This comprehensive deal brings finality to the claims raised by the SEC and the Department of Justice. The role of an independent consultant complements our own transaction review processes. We welcome this enhancement," he said.

Today, the records of AIG sets asunder the ruined dreams and hopes of so many Americans who literally had their planned futures taken away from them. I wonder how many of those lost their jobs and lifelong savings, would say that the deferred prosecution system did its job?

Mr. Chairman, thank you for listening. I have more to say, but time is of the essence.

[The prepared statement of Mr. Pascrell follows:]

PREPARED STATEMENT OF THE HONORABLE BILL PASCRELL, JR.,
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

I want to thank Full Committee Chairman Conyers and Subcommittee Chairman Cohen for allowing me to testify before the Subcommittee on Commercial and Administrative Law on the issue of deferred prosecution agreements. 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.

I believe it is important that Mr. Christie has agreed to appear before the 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 deferred prosecution agreements. Furthermore, Mr. Christie has thus far failed to shed any light on his selection of federal monitors in this case.

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. 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.

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 fed-

eral 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.

I, along with my colleague Frank Pallone have introduced the *Accountability in Deferred Prosecution Act of 2009,* H.R. 1947. This legislation lays out four main principles, which I believe are key to bringing forth transparency and accountability in deferred prosecution agreements:

1) Provides Real Guidelines on Deferred Prosecution Agreements—Requires the Attorney General to provide public written guidelines for deferred prosecution agreements and nonprosecution agreements in order to promote uniformity and to assist prosecutors and organizations as they negotiate and implement deferred prosecution agreements and nonprosecution agreements.

2) Restores Judicial Oversight of Deferred Prosecution Agreements—Requires government prosecutors to file each and every deferred prosecution agreement in an appropriate United States district court, which must then approve the actual agreement between the parties.

3) Takes the Selection of Federal Monitors Out of the Hands of U.S. Attorneys—Sets forth rules for an open, public, and competitive process for the selection of such monitors through the creation of a national list of organizations and individuals who have the expertise and specialized skills necessary to serve as independent monitors.

4) Requires Full Disclosure of Deferred Prosecution Agreements—Requires the Attorney General to place the text of these agreements on the public website of the Department of Justice, together with all the terms and conditions of any agreement or understanding between an independent monitor appointed pursuant to that agreement and the organization monitored.

I can not stress more strongly the need to pass this 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.

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 Chairman Cohen for allowing me to testify before this Subcommittee. I look forward to continued investigation of this critical issue and moving the *Accountability in Deferred Prosecution Act of 2009* forward through this Committee

Thank You.

Mr. COHEN. Thank you, sir.

We have got 8 minutes until the next vote. Our next witness will be Congressman Pallone, 6th District, distinguished Member and messenger. You would like some time.

TESTIMONY OF THE HONORABLE FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman, and thank you and the Committee for holding this hearing and it is a very serious matter. I will try to be brief. You have my written testimony, which I will ask you to include in the record in its entirety. What led Congressman Pascrell and me to introduce legislation is because we saw all the inconsistencies and lack of proper oversight of monitors.

And I believe that without a legislative fix, basically U.S. attorneys will continue to write their own rules, and that leads to a broad spectrum of practices, often bad practices from U.S. attorneys, dictating to the company who the monitor will be, how much they will charge, and all the other things that have come up today.

The troubling thing is that Federal prosecutors have too much 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.

Now, I want to mention briefly, Congressman Pascrell and I went to a day at NYU Law School that was totally devoted to this issue, and the interesting thing about it was they were talking about all kinds of deferred prosecutions. There was no question that the poster child for abuse was Mr. Christie.

The fact that he hired his former boss, Mr. Ashcroft in one case, that another former Federal judge who was retired was hired as a monitor in another case and then basically kicked back or sent thousands of dollars in election contributions to his campaign in the second case, and the third case with Seton Hall Law School that had nothing to do with the actual case in front of her with the deferred prosecution, was given an endowed professorship.

These are the kinds of abuses if there is unfettered discretion. In other words someone just comes in and says, "Look, I can do whatever I want and I will do these kind of things unless there is some kind of limitations."

And if anybody tells you that somehow, you know, he wasn't in charge of how much money was going out, I mean that e-mail that you saw between Zimmer Holdings, you know, and the Ashcroft case, where they were complaining to Christie and his assistant about how, you know, we are not getting paid enough, was a perfect example of what is going on; actually going back to the U.S. attorney and saying, "We are not getting paid enough and can you intercede here to try to resolve this so that ultimately we get paid more."

When Mr. Pascrell talked about the bills, this came up at the NYU conference that day, and it was just unbelievable how the one woman, Debra Yang, who was actually there, talked about how she had itemized her bills to justify the time and the billable hours that she put in.

But in Ashcroft's case he just submitted a memo and basically didn't justify it at all. So I mean this is the problem that we are having. If you don't step in and we don't pass some kind of legislation, you are going to have these kinds of abuses continue, and I think they can only get worse if you have somebody as U.S. attor-

ney who feels that he can do whatever he wants in almost dictatorial fashion.

Now, I am just going to end with this, Mr. Chairman, there is so many unanswered questions in the case of these cases that were handled by Christie and I just want to list some of them if I can, and then I will conclude.

How much was John Ashcroft paid after you selected him as a monitor? Why did you fail to disclose how much Ashcroft and other monitors were paid? How did you decide to give Ashcroft the contract? Did you use any objective criteria, such as the bidding process?

How many candidates did you have for the Ashcroft deal and for the other monitors? What were their names? What kinds of due diligence were performed on each candidate to avoid conflicts of interest? What types of billing records did you require of Mr. Ashcroft and the other monitors? What criteria is in place to determine if a monitor does the job right?

Why do you believe there is no conflict of interest in granting David Kelley a monitoring contract after he decided not to prosecute your brother? Are you going to return the campaign contributions from John Inglesino? Are you going to return the contributions to Herb Stern? Why aren't these forms of pay-to-play? What sets you apart from the other prosecutors who use competitive bids, judges and a written criteria to select monitors?

When we were at NYU that day there were many other U.S. attorneys who actually use transparency, went to a judge to approve it, chose from a list of experts. Didn't use their friends, didn't give the money to their own alma mater, didn't supervise, you know, how much money they were getting, as you saw in these e-mails.

So the problem is if you don't move on some sort of legislation like what we are proposing, yes, you will have good U.S. attorneys that use a transparent process that pick from a list of experts, that don't hire their friends, but then you will have the Chris Christie's who will do exactly the opposite because it is in their political interest to select their friends, make sure they get big fees and continue these unfettered practices.

So all we are asking is that you consider this legislation. I know you are seriously considering it, because we are really concerned that without it there is no objectivity and there is a lot more potential for abuse. Thank you, Mr. Chairman.

[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 REP. FRANK PALLONE, JR.

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

"ACCOUNTABILITY, TRANSPARENCY, AND UNIFORMITY IN CORPORATE DEFERRED AND NON-PROSECUTION AGREEMENTS"

JUNE 25, 2009

Thank you Mr. Chairman - and thank you to the members of the subcommittee for holding this hearing and giving this issue the serious consideration it deserves. And thank you for inviting me to testify today. I also appreciate the attention Chairman Conyers and the full Judiciary Committee have devoted to this issue.

This is the second public hearing over the course of 15 months. The second public hearing since we learned about the prolific use and possible abuse of deferred prosecution agreements (DPAs) more than 18 months ago.

Over the course of these 18 months we have gained only piecemeal information about DPAs - that is one of the problems.

And what we have learned has been troubling; what we have learned raises more questions. The previous public hearing was an opportunity for those who have used DPAs, for those who have benefited from DPAs and for those who were supposed to have management responsibility over DPAs, to give a full, honest accounting. Unfortunately, they didn't. In fact, John Ashcroft, the former Attorney General, who profited enormously, was downright defiant in his refusal to be accountable. There were others who refused to testify and others who did testify but weren't equipped to offer the information Congress needs to meet its oversight responsibilities. I hope this pattern changes.

Over the last few years, it has come to light that some federal prosecutors are using their powerful positions to steer monitoring contracts to former employers and other influential people with which they have close ties. Some are no-bid contracts. Some appear to have no objective standards. Some, at the least, give the appearance of conflicts of interest.

With all that I have learned since I became involved with the issue in late 2007, when several cases in New Jersey surfaced, there are many unanswered questions, many empty explanations.

What we have learned about monitors and their lucrative contracts shows a lack of regulation, insufficient guidelines and no oversight. The first and most well-known example of this occurred when a consulting firm led by former Attorney General Ashcroft received a monitor contract from then-U.S. Attorney Chris Christie, his former employee.

This led Congressman Pascrell and me to introduce legislation that would eliminate the inconsistency and lack of proper oversight of monitors. Without a legislative fix or improved guidance from the Justice Department, U.S. Attorneys are writing their own rules. This leads to a broad spectrum of practices - often bad practices - from a U.S. Attorney dictating to the company who the monitor will be, to other U.S. Attorneys that merely reserve their right to veto the company's monitor choice.

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.

I am encouraged that former U.S. Attorney Chris Christie has joined us today to give his perspective on the issue. As one of the most prolific practitioners of this method of prosecution, there are many unanswered questions about the process he used to select and oversee these monitors.

The use of deferred prosecution agreements and corporate monitors has increased exponentially over the last few years. Without a strong set of guidelines to limit the politicization of the process, our justice system is suffering. I believe that the reforms offered in the legislation that Congressman Pascrell and I have authored 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.

Mr. COHEN. Thank you, sir.

There is a minute 56 to go, so if—I would like to adjourn the panel so that we can go vote. Mr. Franks, you have a question? I don't know if we are going to come back to you.

Mr. FRANKS. Well, Mr. Chairman, We can defer coming back or just not come back at all, but I would like to say that, you know, there has been a lot of statements here made that Mr. Christie hired—this is just all nonsense and I am sorry that it has to be that way, but I suppose it would take us all day to try to correct all the nonsense that has been put forth here from these two New Jersey members, whom I respect, but I am sorry that there is always a witch hunt on this Committee.

And with that——

Mr. PASCRELL. Mr. Chairman?

Mr. FRANKS [continuing]. If we are going to come back I would be glad to come back.

Mr. COHEN. Mr. Pascrell?

Mr. PASCRELL. Chairman?

Mr. COHEN. Yes.

Mr. PASCRELL. Mr. Pallone and I set out on this journey a year and a half ago. This has nothing to do with politics. All we want is answers to questions and we put legislation before the Committee in good faith. We are ready to defend the legislation, particularly in terms of what you hear if you step back from the politics of the—you want transparency.

I know, Mr. Franks, you have always talked about transparency. That is what we want, and we are willing to work with you on this legislation. This system is not working, I can assure you. Forget about us. You make the judgment. You look at the materials. Thank you.

Mr. DELAHUNT. I move we now adjourn.

Mr. COHEN. Move that we adjourn. I would like to thank the witnesses. Without objection, 5 days to write here. Adjourned.

[Whereupon, at 2:26 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE CHRISTOPHER J. CHRISTIE, FORMER UNITED STATES ATTORNEY, DISTRICT OF NEW JERSEY

July 31, 2009

The Honorable Christopher J. Christie
Former United States Attorney for the District of New Jersey
46 Corey Lane
Mendham, NJ 07945-3309

Dear Mr. Christie:

On behalf of the Subcommittee on Commercial and Administrative Law, I would again like to express our sincere appreciation for your participation in the hearing on "Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements" on June 25, 2009. Your testimony was informative and will assist us in future deliberations on the important issues addressed during the hearing.

Please find a **verbatim** transcript of the hearing enclosed for your review. The Judiciary Committee's Rule III(e) pertaining to the printing of transcripts is as follows:

> *The transcripts...shall be published in* ***verbatim form*** *.... Any requests by ...witnesses to correct any errors other than errors in the transcription, or disputed errors in transcription, shall be appended to the record, and the appropriate place where the change is requested will be footnoted.*

Please send your transcript edits via email to Adam Russell, Subcommittee on Commercial and Administrative Law, at adam.russell@mail.house.gov or via fax to (202) 225-3746.

Enclosed you will also find additional questions from the Subcommittee to supplement the information you provided at the hearing. Please send your written responses via e-mail to Mr. Russell no later than **Friday, August 21, 2009**.

If you have any questions, please contact Mr. Russell at (202) 226-7162. Thank you, again, for your testimony.

Sincerely,

Steve Cohen
Chairman, Subcommittee on Commercial
and Administrative

Christopher J. Christie
46 Corey Lane
Mendham, NJ 07945

August 20, 2009

VIA REGULAR AND
ELECTRONIC MAIL

The Honorable Steve Cohen, Chairman
Subcommittee on Commercial and
Administrative Law
Congress of the United States
House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515-6216

Dear Representative Cohen:

I am in receipt of your letter dated July 31, 2009 expressing your appreciation for my recent appearance before your committee. Thank you for your kind words regarding my appearance, and I am glad that you believe it will assist the Committee in future decision-making regarding the issues addressed during the hearing.

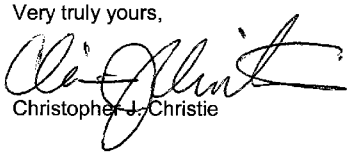
I am also in receipt of the 28 additional questions (there are seven numbered questions with multiple subparts) to which you have requested that I respond. I respectfully submit that, with the exception of questions 7(A) and 7(B), I have already answered all of these questions through the detailed written statement that I submitted to the Committee in advance of the June 25, 2009 hearing, and through my extensive oral testimony delivered to the Committee on June 25, 2009. For example, you and I had an opportunity at the hearing to specifically discuss the issues raised in questions 1-4 on pages 48-54 of the official transcript. Mr. Delahunt and I discussed the issues raised in Question 2 on page 74 of the official transcript. Finally, Mr. Forbes and I discussed the issues raised in questions 5 and 6 on pages 94-97 of the official transcript. I am confident that if the Committee carefully examines my written statement and my oral testimony, the Committee will conclude that I have already answered the written questions submitted with your letter.

I note that a number of the written questions, specifically questions 2(G), 2(H), 3(B), and 3(D), address future policies to be adopted and implemented by the Department of Justice. I have already addressed these issues in my written submission and oral testimony. However, since I am no longer a member of the Department of Justice, I do not believe that it would be appropriate for me to comment any further or

offer any additional opinions regarding the future policies to be implemented at the Department of Justice. I respectfully suggest that these questions should be presented to the appropriate current members of the Department of Justice for their consideration, as they are in the best position to address these issues going forward.

Finally, I offer the following response to questions 7(A) and 7(B). In question 7(A), you have asked whether or not "any members of the monitors' firms [have] contribute[d] to [my] campaign." As has been widely reported in the New Jersey press, Herbert Stern, John Inglesino, and Kevin Kilcullen each made contributions to my campaign. However, to the best of my knowledge, the campaign has not accepted any other contributions from any federal monitors or from a federal monitors' firm. In fact, I am aware of at least two occasions on which my campaign has refunded checks from attorneys who were affiliated with law firms providing legal services to the federal monitors. In 7(B) you have asked whether or not any "family members of any of the monitors contribute[d] to [my] campaign." Mr. Stern's wife, Mr. Inglesino's wife and Mr. Kilcullen's wife have each made a contribution to my campaign. I am not aware of any other family members of monitors who have contributed to my campaign. However, as you may be aware, based upon the information a campaign is required to obtain from a contributor, there is no way for any campaign in New Jersey, including my campaign, to be in a position to identify all of the familial relationships of a donor.

Very truly yours,



Christopher J. Christie

August 28, 2009

The Honorable Christopher J. Christie
Former United States Attorney for the District of New Jersey
46 Corey Lane
Mendham, NJ 07945-3309

Dear Mr. Christie:

The Committee on the Judiciary Subcommittee on the Commercial and Administrative Law is in receipt of your letter, dated August 20, 2009, responding to the Subcommittee's follow-up questions to your testimony at the hearing on June 25, 2009 entitled "Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements."

I was a bit surprised at your view that answering most of the questions was unnecessary in light of your written statement and oral testimony. A witness' statements, testimony, and answers to questions are required by law to be accurate. Follow-up questions provide an important opportunity for both Subcommittee Members and witnesses to clarify and supplement testimony provided at a hearing. This helps ensure a complete and factually accurate record, while avoiding the necessity of keeping witnesses at the hearing for successive rounds of questioning or bringing them back for successive days of hearings.

The cooperation of our witnesses is essential to our efforts to accomplish that goal, which is in not only the Subcommittee's interest, but the witnesses' interest as well. We would think that, as someone who asked for the Subcommittee's indulgence regarding your unusual time constraints on that day, leaving before even one round of questioning could be completed, you would be particularly appreciative of those efforts.

Given your background as a U.S. Attorney for the District of New Jersey who prominently used deferred and non-prosecution agreements as tools to dispense with corporate prosecutions, you were a key witness, whose answers we expected would be of particular benefit in helping inform the Subcommittee as it considers whether or not to reform the use of these tools.

So the manner in which you responded is particularly unsatisfactory. For all but two of the questions, you responded with a general assertion that the questions were answered in your oral and written testimony. At times you cited page numbers in the unofficial hearing transcript, which on further inspection appear not to contain anything responsive, and which in any event will be confusing to those who will have only the official published hearing record, of which your letter will be a part. Finally, even for the two questions for which you provided answers, the answers are incomplete.

I would respectfully request that you carefully review the questions submitted and provide complete answers to each of them. As considerable time has now passed, I would ask that you provide your answers no later than September 4, 2009. Responses and any questions should be directed to the Judiciary Committee Subcommittee on Commercial and Administrative Law office, H2-362 Ford House Office Building, Washington, DC 20515 (tel: 202-226-7680; fax: 202-225-3746).

Sincerely,

Steve Cohen
Chairman
Subcommittee on Commercial and Administrative Law

cc: The Honorable Trent Franks

Enclosure

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements
June 25, 2009

The Honorable Christopher J. Christie, Former United States Attorney for the District of New Jersey

Questions from the Honorable Steve Cohen, Chairman

1. **In an email from Zimmer attorney Rick Robinson to you on October 17, 2007, Mr. Robinson states that "the parties have reached an impasse on certain key issues." The first issue he mentions is the "Flat Fee Provision."**

   A. **How do you reconcile that email with your written statement on page 7, where you state: "Intervention by the Office would only occur if the company and the monitor were at a genuine impasse in fee negotiations. No such impasse occurred."**

   B. **Under what circumstances would you have considered a dispute between a monitor and a corporation to have reached a "genuine impasse"? Who makes such a determination? Please explain.**

2. **In an e-mail on October 15, 2007 from Zimmer attorney Rick Robinson to Michele Brown in the New Jersey U.S. Attorney's Office, Zimmer's attorney indicates that he is "shocked by the proposed fee agreement." Two days later in an October 17, 2007 email from Mr. Robinson to you, he further states that the proposed fee agreement would require "Zimmer pay to the Ashcroft Group a monthly flat fee of $750,000 as compensation for the time of its three senior executives: General Ashcroft, David Ayres and Stacy Taylor. ... We believe that this request, in both concept and amount, is unreasonable."**

   A. **How did you respond to the October 17, 2007 email from Mr. Robinson? Please explain.**

   B. **Did you raise the conflict between Zimmer and the Ashcroft Group over fees with anyone in the Justice Department, including staff of the New Jersey U.S. Attorney's Office? Please provide the dates of communications, who participated in the communications, and the content of the communications.**

   C. **How was the impasse regarding fees between Zimmer and the Ashcroft Group resolved?**

D. **In your view, was Zimmer forced to accede to the Ashcroft Group's demands on fees because Zimmer had no other avenue to challenge what they considered to be an unjustified fee?**

E. **Did any other corporations that entered into a deferred or non-prosecution agreement ever raise concerns to you or your staff about the fees charged by the monitor you selected? Please list the corporations and describe the nature of the concerns.**

F. **What opportunity did Zimmer or the other corporations that entered into deferred or non-prosecution agreements with the New Jersey U.S. Attorney's Office have to appeal or object to any of Mr. Ashcroft's or the other monitors' decisions regarding monitor fees or implementation of the deferred or non-prosecution agreement?**

G. **Should a disinterested third party rather than the Department of Justice be available to resolve disputes and impasses between monitors and corporations in deferred and non-prosecution agreements? Please explain.**

H. **Should monitor fees be standardized or capped at particular rates? Do you support a fee schedule? Please explain.**

3. **In an October 17, 2007 email to you, Mr. Robinson also criticized the lack of transparency with respect to the Ashcroft Group's bills, writing that the bills contained "absolutely no detail regarding the number of hours spent, what tasks were performed to justify the aggregate fee or who performed those tasks."**

A. **How did you respond to Zimmer's complaint?**

B. **In order to promote transparency, should monitors be required to provide detailed billing records to justify fees?**

C. **Do you believe the Ashcroft Group's billing method justifying millions of dollars of fees was appropriate?**

D. **What role should the Justice Department have in assuring that monitor billing is transparent?**

4. **For the seven deferred and non-prosecution agreements that the U.S. Attorney's Office in the District of New Jersey entered into during your tenure as U.S. Attorney, how were the monitors selected?**

A. **Did you unilaterally select the monitors?**

B. Was there public notice or bidding prior to the selection?

C. What was the basis for your selection?

D. Please name all of candidates considered for each monitorship.

E. How did you determine which monitor would be assigned to which company?

F. What reporting requirements were in place for each federal monitor appointed?

G. What criteria were used to ensure that monitors completed all of their responsibilities under the deferred or non-prosecution agreement?

H. What performance standards and oversight were used to ensure the monitors where doing their job?

5. With respect to the selection of corporate monitors, you stated in your law review article that the monitor should be strong and independent. Can a monitor truly be either strong or independent if he or she had a longstanding prior relationship with one of the parties to a deferred or non-prosecution agreement?

A. What was the nature of your relationship with Mr. Ashcroft at the time that you recommended him to be the monitor in the Zimmer case? What was the nature of your relationship with the other monitors you selected?

B. In light of your position that a corporate monitor should be strong and independent, how do you justify the selection of your former superior, Mr. Ashcroft, to be a monitor in the Zimmer case?

6. Prior to your appointment as U.S. Attorney, did you have any experience as a prosecutor or criminal defense attorney? Did you have any prior experience in formulating pre-trial diversion agreements like deferred or non-prosecution agreements?

How did you know which provisions should be in the agreements?

7. You testified that Herbert Stern was the only monitor that you appointed who subsequently donated money to your gubernatorial campaign.

A. **Did any members of the monitors' firms contribute to your campaign? If so, please identify the individual and the total amount contributed.**

B. **Did family members of any of the monitors contribute to your campaign? If so, please identify the individual and the total amount contributed.**

Lawrence S. Schwartz[2,6]
Stephen J. Edelstein
Nathanya G. Simon[4]
Nicholas Celso, III
Burton Zitomer[1,7]
Paul H. Green
Andrew B. Brown
Marc H. Zitomer[3]
Stefani C Schwartz[3]
Denis G. Murphy
Matthew I. Kane[3]
Brad M. Kaplan[3]
David J. Raitenberg
Nuris E. Portuondo[1,8]
Hope R. Blackburn
John E. Croot, Jr.[1]

Counsel
Alan J. Schnurman
John G. Geppert, Jr.
Patrick D. Tibia
Rachel A. Davis[3]
Robin S. Ballard[4]
Ira J. Hammer[3]
David L. Blank[3]
Joshua I. Savitz[3]

Associates
John E. Horan
Mark H. Arnowitz
Kimberly E. Lomax
Melanie J. Perez-Vellon[4]
Jeffrey A. Kopec[3]
Joseph L. Roselle
Melissa A. Silver
Katherine A. Gilfillan[1,8]
Nicholas D. Blablias
Jennifer Pagano[3]
Nicholas J. Dotoli[3]
Sandra D. Woolcock[4]
Andrew W. Li
Ariel S. Pelker[3]
Christine M. Yearing[3]
Marc G. Macciolo
Eileen M. Fitzgerald
Mark A. DiBisa
Alison L. Kenny
Beth P. Zoller[3]

Counsel to the Firm
Allan P. Dawilowski
Martin R. Packman
Jonathan B. Bressman
Lucille LaCosta-Davino
Robert H. Greenwood[3]
Philip B. Whitcomb[1,4]

Of Counsel
Jacob Green
Glenn C. Gurzsky (1954-2008)
Joan M. Dantora
Heidi M. F. Hanley
Scott A. Elk[2]
Miguel A. Mata[5]

1-Also member of FL Bar
2-Member of FL Bar only
3-Also member of NY Bar
4-Also member of PA Bar
5-Also member of PR Bar
6-Also member of D. C. Bar
7-1-40 Qualified Mediator
8-Also member of MA Bar

SSEC Z Schwartz Simon Edelstein Celso & Zitomer LLC
ATTORNEYS AT LAW

44 Whippany Road ▪ Suite 210 ▪ P.O. Box 2355 ▪ Morristown, New Jersey 07962
Tel: 973.301.0001 ▪ Fax: 973.993.3152 ▪ www.ssecz.com
Please Reply to Morristown Office

Newark Office:
45 Bleeker Street
Newark, New Jersey
07102
973.623.6838

New York Office:
845 Third Avenue
17th Floor
New York, New York
10022
212.752.5258

sedelstein@ssecz.com

September 4, 2009

VIA FAX AND FIRST CLASS MAIL

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial and Administrative Law
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Cohen:

Please be advised that I represent Christopher J. Christie.

I am in receipt of your letter of August 28, 2009, following Mr. Christie's letter to you of August 20, 2009. I am well aware of the need for witnesses to be cooperative, and, of course, Mr. Christie has been fully cooperative with you and with the Subcommittee.

Mr. Christie's pre-testimony written submission, oral testimony before the Subcommittee, and August 20 letter were all thoughtful and complete, and all of your follow-up questions have been answered. However, even though the questions posed by the Subcommittee have been asked and answered previously, I submit the following on behalf of Mr. Christie.

Once again, in response to Question 1, no impasse in the fee negotiation occurred between Zimmer and the Ashcroft Group. It is important to note that the United States Attorney's Office was not involved in the fee negotiations between Zimmer and the Ashcroft Group. It was left to all of the companies and monitors to negotiate fee structures for the work to be done pursuant to the requirements of the deferred prosecution agreements (DPAs). [Written testimony, page 7]. Zimmer's counsel, a

partner at Fulbright & Jaworski, negotiated the fee arrangement with the Monitor. Mr. Christie directed both Zimmer's counsel and the Monitor to go back and attempt to resolve any disputes in good faith. [lines 1163-1169]. At page 54 of the transcript, you and Mr. Christie discussed the October 17, 2007 email. He stated then that "when you read the totality of the e-mail I think you come to the conclusion that there wasn't an impasse that was reached." [lines 1163-1167]. He went on to point out that "[w]ithin 1 week after the sending of the e-mail, they came to an agreement on fees by compromising with each other." [lines 1173-1175].

In light of this testimony, some of the Subcommittee's assumptions in Question 2 are incorrect. For example, as Mr. Christie pointed out, there was no impasse between Zimmer and the Ashcroft Group. He did, however, testify that the fee issues were resolved to the parties' mutual satisfaction and noted at page 74 of the transcript that experts assembled by the New York Times said that "outside lawyers who have reviewed Mr. Ashcroft's fee structure said it was not out of line for this work." [lines 1162-1165]. Proof that Zimmer was satisfied with their arrangement with the Ashcroft Group lies in the fact that the company voluntarily retained the Ashcroft Group to do additional work in attempting to go beyond the requirements of the DPA to insure international compliance with the law. Mr. Christie testified, "Not only did they enter the agreement with Mr. Ashcroft, but it is important to note, they then voluntarily retained the Ashcroft Group to do other matters inside the company that they were concerned about might have raised issues of violations of law, and they paid them additional fees for that in order to make sure that they were doing these things the right way. That was the company's choice. The company didn't have to do that. They must have thought it was reasonable, sir." [lines 1671-1679]. The other issues raised by Question 2 were also discussed on the record, although, as Mr. Christie pointed out in his letter of August 20, Questions 2(G) and 2(H) should be addressed by the Department of Justice, since Mr. Christie is no longer a member of that Department. No other corporations raised any concerns about fees with the Office. The DPAs provided for the right to an appeal to the U.S. Attorney's Office on any DPA issues in the event of any irresolvable dispute between the parties.

As for Question 3, as stated above, Mr. Christie previously testified that the United States Attorney's Office was not involved in the fee negotiations between the companies and their respective monitors. In the event a company was unable to reach an agreement with its monitor concerning billing methods and reached a genuine impasse, it could have been brought to the office for resolution. That did not occur. Questions 3(B) and 3(D) should be addressed by the Department of Justice because Mr. Christie is no longer a member of the Department of Justice. He did, however, address these issues in his original written submission.

As for Question 4, the monitor selection process and the monitors' roles and responsibilities in the deferred prosecution agreements has been discussed at length in Mr. Christie's written submission, his oral testimony, and his law review article on the topic, which was incorporated into the record at the time of his testimony. Please see "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 American Criminal Law Review (2006) at 1054-1065; Prepared Statement at pages 3-4, 6-7, 8-10; Testimony at pages 48-52, 62-63 78-79. In addition, the terms of the deferred prosecution agreements required all monitors to submit quarterly reports to the companies and the Untied States Attorney's Office to discuss the companies' compliance with the requirements of the agreements and the monitors' progress in ensuring that the goals of the agreements were being met. The United States Attorney's Office and the monitors in the orthopedic device cases also had regularly scheduled weekly telephone conversations to discuss compliance by the companies and enforcement by the Monitors. A number of qualified candidates were considered for monitorships including former federal and state prosecutors, former leaders of the Federal Bureau of Investigation (FBI) and former General Counsels in large corporations.

As for Question 5, all the monitors selected were men and women of impeccable professional reputations with experience in law enforcement or executives with deep knowledge of the operation of large organizations. All were known to the Office as people of great personal integrity who the Office trusted would undertake their monitorships professionally and with distinction. All had either worked with the Office as part of law enforcement or as a leader in a corporate citizen in the District. As Mr. Christie stated in his testimony, "I took all the input that I got from all of my career prosecutors, career members at the Department of Justice, fine people, and we picked the five best people we thought to recommend to these [orthopedic device] companies. These companies interviewed those people and came back and told us that they were acceptable to them. . . . Zimmer came back and said, 'We believe we got the best monitor in General Ashcroft,' after they had interviewed him." [lines 1621-1631]. All were judged by the Office to be strong and independent and their performance in these roles supported the Office's original confidence in each of them.

As for Question 6, Mr. Christie's experience and previous credentials before being nominated for U.S. Attorney and confirmed by the United States Senate are well known and part of the existing public record. His law review article (which was incorporated into the record through his written testimony) discusses at length how the Office determined which provisions should be included in the agreement with Bristol-Myers Squibb, which was the first DPA executed during Mr. Christie's tenure. Many of the provisions of the BMS agreement were incorporated into the later agreements. See

"A Push Down the Road" at 1049-1058. See also Prepared Statement at pages 5-6.

The Subcommittee's questions 7(A) and 7(B) were fully answered. Herbert Stern, John Inglesino and Kevin Kilcullen, as well as their wives, made contributions to Mr. Christie's campaign. We are not aware of any other monitors or their family members who have contributed. The campaign has refunded checks from attorneys who were affiliated with law firms providing services to the monitors on at least two occasions.

I also wish to highlight one other portion of Mr. Christie's testimony in an effort to be fully responsive and give a complete picture of the measure of his cooperation with the Subcommittee to date. At pages 96 and 97 of the transcript he stated:

> Sir, all I would say is this, that we talk about, Mr. Delahunt and I were talking about the role of the judiciary in all of this, I wanted to just make two points really clear. First, one that you just raised, which is a federal judge is involved in all this.
>
> The criminal complaint and the deferred prosecution agreement is presented to a federal judge for their approval before the agreement can be finalized because only a federal judge can, in fact, enter that order that allows the criminal complaint to be deferred for prosecution until the conclusion of the agreement.
>
> Then, at the conclusion of the agreement, we sit down with the federal judge to review and request the dismissal of the criminal complaint if in fact the company has complied with all the terms of the agreement. Only that federal judge can ultimately sign that dismissal.
>
> And lastly in terms of judicial involvement in these selection processes, I just happen to agree with the attorneys general in the Bush administration 41, in the Clinton administration, in Bush 43 administration and in the Obama administration, all of whom believe that these, with proper guidelines, that these decisions are best placed in the hands of the prosecutors who are prosecuting the case because they know these companies and the cases best.
>
> [lines 2203-2226][emphasis added]

It is also important to emphasize that the current Department of Justice, under President Obama and Attorney General Holder, opposes the legislation which is being considered by your Subcommittee and believes that the current system of guidelines used by the Department of Justice is the best way to approach these types of corporate prosecutions. Mr. Christie agrees with the Obama Justice Department.

I emphasized at the outset of this letter the need for the Committee's work to be non-partisan. In this context, I am sure that you, as Chairman, are aware that Mr. Christie is a candidate for the office of Governor of New Jersey with a General Election to be held on November 3, 2009, 60 days from today. You may also be aware that his appearance before your Subcommittee was videotaped, edited, mischaracterized and then broadcast in negative television commercials directed against him by his opponent, New Jersey Governor Jon Corzine, within days of his voluntary appearance.

In addition, your August 28, 2009 response to Mr. Christie's August 20, 2009 letter to you was unilaterally released to the media on August 31, 2009 by two Democratic Congressmen from New Jersey who are not even members of the Subcommittee. In fact, Congressman Pallone serves as statewide Co-Chairman of Governor Corzine's re-election campaign against Mr. Christie. I trust you can see why these two actions raise concerns about the politicization of the congressional hearing process and whether some are using an opportunity for serious policy examination to score political points in an impending election. I respectfully request you to take all prudent steps to assure that the Subcommittee's consideration of pending federal legislation is insulated from partisan efforts to influence a state election in New Jersey.

Very truly yours,

Schwartz Simon
Edelstein Celso & Zitomer LLC

STEPHEN J. EDELSTEIN
A Member Of The Firm

SJE:APHL

cc: The Honorable Trent Franks, Ranking Member

POST-HEARING QUESTIONS SUBMITTED TO THE HONORABLE GARY G. GRINDLER, DEPUTY ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE*

Questions for the Record
Subcommittee on Commercial aud Admiuistrative Law
Hearing on Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreemeuts
June 25, 2009

The Honorable Garv Grindler, Deputy Assistant Attorney General for the Criminal Division, U.S. Department of Justice

Questions from the Honorable Steve Cohen, Chairman

1. **Why is the current core of monitors primarily limited to former government officials and not other compliance experts? Is that a pattern the Justice Department would support continuing in the future? Please explain.**

2. **GAO has reported that for one of the agreements the Justice Department has entered into in recent months, the company was required to hire an "external auditor," which it did. However, there appears to be uncertainty as to whether the external auditor should have been subjected to the monitor selection guidance in the Morford Memo.**

   A. **What are the differences between an "external auditor" and a "monitor"?**

   B. **Does the Department expect external auditors to be selected in accordance with the Morford Memo?**

3. **Should monitors have tasks and powers that extend beyond advising on compliance issues (e.g., the monitor who allegedly recommended and obtained the removal of high level executives at Bristol Myers Squib)?**

   A. **GAO has reported that firms would like for the Department to play a greater role in addressing concerns they have regarding monitors who seem to have an expansive scope of work. Is that an appropriate role for the Department to play? Please explain.**

4. **What steps does the Department suggest for strengthening the market for monitor services so that market pressures may enhance performance of monitors?**

5. **What kinds of costs and benefits does the Department consider in deciding whether to go forward with a deferred or non-prosecution agreement and a monitoring assignment (as suggested in the Morford Memo)?**

*The Subcommittee had not received a response to their post-hearing questions prior to the printing of this hearing.

6. **Should monitor reports be made public? If so, what limits, if any, should accompany pnblic disclosnre of monitor reports?**

7. **Does the presence of a monitor reduce the burden on the board to be a corporate watchdog? Please explain.**

8. **How shonld monitors interact with the board and management of the firm?**

9. **When firms aud the Department are negotiating a deferred or non-prosecution agreement aud a monitoring assignment, what factors should the parties explicitly address np front in the written agreement?**

10. **Does the Department plan to issne further guidelines on deferred and non-prosecutiou agreements or on monitors? If so, please explain the areas that will be addressed and when guidance will be issued. Are there parts of the Morford Memo that the Department plans to reconsider? Please explain.**

11. **To whom do independent monitors owe duties? The Justice Department? The firm? The public?**

12. **What process is involved in deciding if a corporation has successfully satisfied the terms of a deferred or non-prosecution agreement?**

13. **Who is tasked with "monitoring the monitor" - i.e. who ensures that monitors complete all of their responsibilities nnder the deferred or non-prosecntion agreement? What mechanisms are in place to hold the monitor accountable and ensure that the monitor is doing his or her job effectively?**

14. **Who would have the authority to terminate a monitor if the monitor is not performing effectively? If monitors cannot be easily removed or terminated, what constraints or duties, if any, would the Department suggest for monitors to ensure that they perform their tasks well?**

15. **In November 2004, AIG and the Justice Department entered into a deferred prosecution agreement arising from certain structured financial transactions that AIG, through its Financial Products group, sold to a financial services company to remove troubled loans and investments from that company's balance sheet. In February 2006, AIG entered into a second deferred prosecntion agreement with the Justice Department in connection with misstatements that AIG made in periodic financial reports it filed with the Securities and Exchange Commission (SEC) between 2000 and 2004. Despite the fact that Attorney James Cole was appointed to monitor AIG in 2005 pursuant to these agreements, the same Financial Products group that was subject to the monitoring undertook high risk transactions that led AIG to the brink of financial collapse and caused massive economic instability.**

    A. Are firms such as AIG too large and complex to monitor?

B. Please describe the compliance plan implemented by AIG and under the direction of Mr. Cole. Was it snfficient to accnrately assess AIG's risk?

C. Given the near collapse of AIG becanse of qnestionable activities in the Financial Prodncts gronp, were the two deferred prosecntion agreements or the corporate monitoring deficient? Please explain. In retrospect, shonld the Department have pnrsned a different conrse with AIG? Please explain.

16. The Department has stated that by entering into deferred and non-prosecntion agreements, it expects to pnnish and deter corporate crime and reform corporations that have engaged in criminal miscondnct.

A. How does the Department determine whether it has achieved these goals?

B. If a company that has entered into a deferred or non-prosecntion agreement recidivates, what does that suggest about the effectiveness of the agreement?

17. GAO has reported that the Department entered into four agreements between May 2008 and May 2009 for which monitors are reqnired bnt have not yet been selected.[1] This is of concern to because three of these companies are a year or more into their agreemeuts with seemiugly no monitor to oversee compliance.

A. Why haven't monitors been selected in these cases?

B. In the interim, what actions is the Department taking to ensure compliance with these agreements?

18. GAO has reported that at least one Justice Department office refuses to enter into non-prosecution agreements with firms because the office believes that by doing so, they would be too lenient on the firm. Is this acceptable to the Department, or does the Department expect that all U.S. Attorneys Offices and litigation units consider non-prosecution agreements as an option for addressing corporate criminal misconduct?

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[1] **Error! Main Docnment Only.**These cases include a deferred prosecution agreement between the Criminal Division Fraud Section and Willbros Group, Inc. and Willbros International Inc. signed in May 2008; a deferred prosecution agreement between the Criminal Division Fraud Section and AGA Medical Corporation signed in June 2008; a non-prosecution agreement between the Criminal Division Fraud Section and Faro Technologies, Inc. signed in June 2008; and a deferred prosecution agreement between the U.S. Attorney's Office for the Middle District of Florida and WellCare Health Plans, Inc. signed in May 2009.

POST-HEARING QUESTIONS SUBMITTED TO THE HONORABLE CHUCK ROSENBERG, FORMER UNITED STATES ATTORNEY, EASTERN DISTRICT OF VIRGINIA, HOGAN & HARTSON, LLP*

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements
June 25, 2009

Chuck Rosenberg, Hogan & Hartson LLP

Questions from the Honorable Steve Cohen, Chairman

1. **Do you have any concerns with the idea of a national list (or other national database) of people qualified to be monitors? Please explain.**

2. **What steps do you suggest for addressing concerns that deferred and non-prosecution agreements allow firms to avoid larger and more serious penalties (i.e., get away with a "slap on the wrist")?**

3. **What steps do you suggest for addressing concerns about monitor compensation and selection?**

4. **Do you support the idea of a flat fee structure for monitor compensation subject to judicial oversight? Why?**

5. **Why do you think that the current core of monitors have been primarily limited to former government officials and not other compliance experts? Is that a pattern you would support continuing in the future and why?**

6. **If monitors cannot be easily removed or terminated, then what constraints or duties, if any, would you suggest for monitors to ensure that they perform their tasks well?**

7. **Should monitors have tasks and powers that extend beyond advising on compliance issues (e.g., the monitor who allegedly recommended and obtained the removal of high level executives at Bristol Myers Squib)?**

8. **What steps do you suggest for strengthening the market for monitor services so that market pressures may enhance performance of monitors?**

9. **What kinds of costs and benefits should the Justice Department consider in deciding whether to go forward with a deferred or non-prosecution agreement and a monitoring assignment (as suggested in the Morford Memo)?**

*The Subcommittee had not received a response to their questions prior to the printing of this hearing.

10. Should judicial approval of the selection and compensation of the monitor be required? In every case or only some?

11. Should monitor reports be made public? If so, what limits, if any, should accompany public disclosure of monitor reports?

12. Does the presence of a monitor reduce the burden on the board to be a corporate watchdog? Please explain.

13. How should monitors interact with the board of the firm? With the management of the firm?

14. When firms and the Justice Department are negotiating a deferred or non-prosecution agreement and a monitoring assignment, what factors should the parties explicitly address up front in the written agreement?

15. Are there parts of the Morford Memo you think should be reconsidered? Please explain.

16. To whom do independent monitors owe duties?

17. What process is involved in deciding if a corporation has successfully satisfied the terms of an agreement?

18. Who is tasked with "monitoring the monitor" - i.e. who ensures that monitors complete all of their responsibilities under the deferred or non-prosecution agreement?

RESPONSE TO POST-HEARING QUESTIONS FROM VIKRAMADITYA S. KHANNA, PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements
June 25, 2009

Professor Vikramaditya S. Khanna, The University of Michigan Law School

Questions from the Honorable Steve Cohen, Chairman

1. **Do you have any concerns with the idea of a national list (or other national database) of people qualified to be monitors? Please explain.**

   Response: The idea of a national list (or a central clearinghouse) containing information on people qualified to be monitors can be a helpful development depending on how it is implemented. One amendment to consider is expanding the people qualified to be monitors (and hence on the list) to be anyone who has significant compliance experience whether that experience is obtained through engaging in compliance work, criminal or civil litigation experience, prosecutorial or judicial experience or otherwise. Also, the process for being part of the list should be transparent.

2. **What steps do you suggest for addressing concerns that deferred and non-prosecution agreements allow firms to avoid larger and more serions penalties (i.e., get away with a "slap on the wrist")?**

   Response: An initial step is to require that prosecutors examine whether the imposition of a cash fine would be sufficient to achieve the desired level of deterrence before deciding to go forward with a monitor. This is because monitors should only be imposed if the maximum imposable cash fine would not be sufficient. If this is true, then we can be quite confident that the monitor is not a "slap on the wrist" because the presence of a monitor, under this requirement, means that the maximum cash fine we can impose on the firm would not be enough for deterrence.

3. **What steps do you suggest for addressing concerns abont monitor compensation and selection?**

   Response: One can consider a number of steps, but if we facilitate the growth of a market for monitor services then that should help to reduce concerns about compensation levels and selection processes. Particular steps might include the national list mentioned above (with a broader range of people considered qualified to be monitors), competitive bidding to be monitors and some degree of judicial oversight if the level of compensation exceeds some threshold that might raise questions (e.g., greater than $3000 per hour). Broader steps to facilitate a market for

monitor services could include involving the firm and its shareholders more in the selection of monitors (thereby increasing some accountability to the firm), having a system in place to remove a monitor, facilitating the growth of reputational markets (e.g., having more information on monitor's activities and their reports, limiting their powers so assessment of their performance is easier) and perhaps some residual duties to shareholders.

4. **Do you support the idea of a flat fee structure for mouitor compeusatiou subject to judicial oversight? Why?**

   Response: A flat fee structure is one way to address concerns on compensation levels, but there are other ways that may help to facilitate the development of a market for monitors better than a flat fee structure. A flat fee assumes that compliance expertise per hour is largely fungible, but that is unlikely to be true. Some compliance activities may require considerably more expertise than others and that would, one expects, be reflected in the hourly rate. Consequently, a simple flat fee may not be the best alternative. Alternatives that may reign in concerns with excessive compensation yet maintain incentives to invest in expertise include competitive bidding, multiple flat fees depending on type of compliance work and some residual judicial oversight for compensation structures that exceed some threshold.

5. **Why do yon think that the cnrreut core of mouitors have been primarily limited to former government officials and not other compliance experts? Is that a pattern yon wonld snpport continning in the fntnre and why?**

   Response: There could be a number of reasons for the relatively uniform backgrounds of current monitors, but one quite plausible and justifiable one is that former government officials have considerable experience with prosecutions and compliance issues and are people whose reputation is well known to current prosecutors.

   In the future, I think that monitors should include a greater set of compliance experts for a number of reasons including, importantly, to be able to benefit from their expertise and also to avoid appearances of impropriety.

6. **If monitors cannot be easily removed or terminated, then what constraints or duties, if any, would you suggest for monitors to ensure that they perform their tasks well?**

   Response: If monitors cannot be easily removed then three potential sets of constraints/duties may be useful. First, circumscribing the scope of their activities by narrowly defining their powers in the initial DPA would reduce concerns with limited removals. Second, the presence of fiduciary duties that monitors might owe to shareholders could be another measure to consider. Third, taking steps to facilitate more comparison across monitors (thereby facilitating the development of a

reputational market) would be useful. This third option could be enhanced if monitors' reports were more available and one could compare across monitors reports.

7. **Should monitors have tasks and powers that extend beyond advising on compliance issues (e.g., the monitor who allegedly recommended and obtained the removal of high level executives at Bristol Myers Squib)?**

   Response: The extent of a monitor's powers should depend in large part on what duties and constraints they face. The greater power a monitor has the more we should expect in terms of accountability. Thus, if the wrongdoing is such that quite detailed oversight over many operations is needed then broad powers may be necessary. But with these broad powers, we would prefer some kinds of measures of accountability (e.g. fiduciary duties, a functioning reputational market, clear bases for monitor removal). Absent such measures, it is probably better to have more narrowly described duties. Given that the constraints listed above are not that easy to develop (or perhaps implement) the more cautious course of action may be to limit monitors' powers at the beginning and broaden them as we gain more experience with the constraints listed above. This seems to be current direction at the Department of Justice as described by the Morford Memo 2008.

8. **What steps do you suggest for strengthening the market for monitor services so that market pressures may enhance performauce of monitors?**

   Response: There are a number of steps that could be taken to enhance the market for monitor services. In particular, the national list mentioned above (expanded to include a broader set of potential monitors), the possibility to remove monitors, involving the firm and shareholders more in the selection of monitors, enhancing the reputational market for monitors (e.g., more disclosure of their reports, narrower duties) and facilitating the development of different kinds of compliance expertise in order to get a broader range of compliance experts.

9. **What kinds of costs and benefits should the Justice Department consider iu deciding whether to go forward with a deferred or non-prosecution agreement and a monitoriug assignment (as suggested iu the Morford Memo)?**

   Response: The Morford Memo identifies a series of important factors to consider. In addition, some other factors to consider are: (i) explicit discussion of why cash fines are not sufficient for deterrence before appointing a monitor and (ii) discussion of why selling off an offending unit may be a reason to avoid/remove a monitor (seeking proof that wrongdoing is isolated to that unit before avoiding/removing a monitor).

10. **Should judicial approval of the selection and compensation of the monitor be reqnired? In every case or only some?**

Response: Judicial approval can be very helpful in certain circumstances. In particular, at the time of forming a DPA and appointing a monitor the courts can serve helpful roles both because the information will be before them and fresh in their memories and because some things may be better addressed at the beginning than later (e.g., monitor duties). Even here some targeting may economize on judicial resources (e.g., judicial approval if compensation exceeds some threshold, but not otherwise). After the start of the assignment judicial oversight can be costly in terms of the information gathering and processing it may require and hence having more limited and targeted oversight seems valuable (e.g., triggered by some precipitating event).

11. Should monitor reports be made public? If so, what limits, if any, should accompany public disclosure of monitor reports?

Response: As a general matter, monitor reports should be public both because their activities relate to public wrongs and transparency is important and because such reports may help others (potential victims, other firms, and other monitors) to learn valuable information. Further, the information provided in reports may assist in comparing monitor performance and facilitate a reputational market for monitors. In some instances the information in the reports may be of such a nature (e.g., competitive business information) that it should be redacted. Thus, some limited redaction power should be retained by the monitor in cooperation with law enforcement and the courts.

12. Does the presence of a monitor reduce the burden on the board to be a corporate watchdog?

Response: The presence of a monitor, with specialized compliance expertise and frequent on-going contact with the firm is probably better positioned than the board to act as a watchdog. If a market for monitor services develops then the presence of such monitors should be able to reduce the burden on the board to be watchdog which it is not as well placed as a monitor to do. If boards do then focus more on strategic matters that might have an overall beneficial effect on corporate governance because currently boards are perceived to fulfill both the strategic advisor and watchdog functions, which do not always sit easily with each other. Boards may still retain some general oversight of compliance (as they do with most activities they delegate) and this balance may be better overall. Predicting the exact effects of monitors on governance is an area of future research and hence there is still quite a lot open for discussion and thought.

13. How should monitors iuteract with the board of the firm? With the management of the firm?

Response: The interaction of monitors with the board and with management is matter that requires some degree of contextualization and may be difficult to predict in advance. For example, if the wrongdoing is such that top management is implicated

in the wrongdoing then the relationship between management and a monitor may have a different focus than if top management seems largely uninvolved in the wrongdoing. In any case, the monitor is not meant to be a representative of the board or management – the monitor is to be independent of them.

14. When firms and the Justice Department are negotiating a deferred or non-prosecution agreement and a monitoring assignment, what factors should the parties explicitly address up front in the written agreement?

Response: A number of factors are worthy of discussion early on in the DPA/monitoring process. These include (i) the scope of the monitor's duties, powers, and goals (preferably written in a manner that is quite clear), (ii) the roles and powers of each party involved (law enforcement, monitor, the firm and its management), (iii) reporting obligations and powers between all parties, especially reporting up the chain of authority at the firm, (iv) whether and to what extent the monitor's work is privileged while in the assignment, (v) termination or removal of monitors, especially on triggering events like acquisition of the firm, (vi) any liability that monitors may face and how that is to be addressed, (vii) the duration of the monitoring assignment, (viii) the selection of the monitor (ix) how to address disputes between the monitor and the firm, and (x) post-monitoring obligations.

15. Are there parts of the Morford Memo you thiuk should be reconsidered? Please explain.

Response: Some potential changes to the Morford Memo include (i) the selection process for monitors (ii) explicit discussion of why a cash fine is insufficient for deterrence and how this leads to the need for a monitor (iii) discussion of whether selling off an offending unit is a reason to not have a monitor or remove one (iv) have grounds for termination of a monitor besides acquisition of the firm (v) and leave open the possibility that monitors could owe some measure of fiduciary duty to the shareholders, especially at this early stage in the development of monitors. The reasons for (ii), (iii) and (iv) were discussed in response to questions 2, 9 and 3 and 8 respectively. For item (i), the selection process should be designed to facilitate the development of a market for monitors and hence a more transparent system may be desirable as well as expanding the sets of people considered for monitoring assignments.

16. To whom do independent monitors owe duties?

Response: At present, it is not entirely clear to whom monitors owe duties. One could imagine that they owe some duties to the firms and to law enforcement. However, the nature of those duties is not entirely clear (e.g., fiduciary duties to shareholders, attorney-client duties to the firm). Greater clarification on this matter is worthy of discussion, especially in the DPA.

17. What process is involved in deciding if a corporation has successfully satisfied the terms of an agreement?

Response: At present, it is not entirely clear how one would know if a corporation has satisfied the terms of an agreement. This is another matter that would benefit from clarification, especially in the DPA. Clear goals should assist both in assessing whether the terms have been satisfied as well as in facilitating the development of a reputational market for monitor services.

18. **Who is tasked with "monitoring the monitor" - i.e. who ensures that monitors complete all of their responsibilities under the deferred or non-prosecution agreement?**

Response: At present, this is not entirely clear. One anticipates that the law enforcement agency which negotiated the DPA/NPA engages in some degree of monitoring or perhaps the courts, but it is not entirely clear how the process works. Greater clarification of this would be desirable, especially in the DPA.

LETTER FROM JOHN WESLEY HALL, PRESIDENT,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

John Wesley Hall
PRESIDENT

June 25, 2009

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

Re: Hearing on Deferred Prosecution Agreements

Dear Chairman Cohen and Mr. Franks:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing regarding the Department of Justice's use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) for business organizations. The Department of Justice does not publish statistics regarding its use of these agreements. However, an analysis of publicly available sources demonstrates that the Department of Justice has dramatically increased its use of such agreements to obtain monetary penalties and other concessions from business organizations since 2003. These agreements often lack avenues for judicial review of alleged breaches, exact large fines, contain vague terms requiring unlimited cooperation (including waiver of the organization's attorney-client privilege), and encourage or require violations of the rights of the organization's employees.

Despite the flaws in many of these agreements, they can serve a valuable function. In the current regime of vicarious corporate criminal liability, such agreements can be an important alternative for a corporation that would otherwise be criminally charged and suffer ruinous criminal sanctions and collateral consequences from a conviction. Moreover, these agreements can be used to pinpoint areas in which an organization is in need of compliance reform. Accordingly, DPAs and NPAs, when properly deployed, serve laudatory goals of criminal law enforcement. Since it is rarely, if ever, in the interests of justice to incapacitate a legitimate business organization, DPAs and NPAs can serve as appropriate alternatives to criminal prosecution while furthering the goals of deterrence, restitution, and reformation.

1660 L Street, NW ◆ 12th Floor ◆ Washington, DC 20036
202-872-8600 Fax 202-872-8690 forhall@aol.com www.nacdl.org

DPAs and NPAs between the Department of Justice and business organizations should not be used, however, as substitutes for civil remedies or declinations of criminal prosecution. Many federal civil enforcement agencies have expertise in helping regulated firms develop compliance and corporate governance programs, in extracting restitution, in imposing civil fines, and in administering other elements of settlements. In many cases, it is more appropriately the role of these agencies, rather than DOJ, to oversee forward-looking remedies.

NACDL believes that the following principles represent best practices for government enforcement officials and defense counsel when drafting DPAs or NPAs for organizations. These principles are necessary to protect the rights of shareholders and private business owners, while insuring that U.S. markets are safe from fraud and other criminal wrongdoing:

1. Monetary penalties that are extracted as a result of DPAs and NPAs should be in amounts that are commensurate with actual harm or actual gain, and should be no greater than necessary to achieve restitution and deterrence.

2. DPAs and NPAs should be available to business organizations regardless of size, type of organization, or ability to pay criminal fines.

3. DPAs and NPAs should have well-defined terms that govern an organization's cooperation. Agreements should be drafted to avoid undue interference with the day-to-day workings of the organization. The terms that should be drafted with care and specificity include, but are not limited to, the scope of documents that are required for government or monitor review, the organization's future obligations for reporting types of internal wrongdoing, the oversight responsibilities of a monitor if one is appointed, the extent of any compliance-related reforms, and the presence of corporate governance reforms.

4. DPAs and NPAs should not contain terms that are likely to cause violations of the rights of current and former employees. The waiver of the organization's attorney-client privilege, which results in the production of employees' non-immunized statements to the government, should not be a prerequisite to entering into a DPA or NPA. Additionally, agreements should not include promises to "cure" statements by employees who allegedly contradict facts to which the organization has agreed by firing or otherwise punishing the employee. Agreements should not include promises to fire or otherwise sanction employees who assert their rights during government investigations, and they should not require organizations to cease paying the attorneys' fees of their employees.

5. DPAs and NPAs should provide for judicial review by an Article III court only in the event of breach. Pre-approval by an Article III court and continued supervision of a DPA or NPA is not preferable and should not be required.

6. Monitors should be selected based on their experience within the organization's industry and with the particular violation at issue. The individual selected to be a monitor should avoid all actual or apparent conflicts of interest. Monitors should have duties that are no broader than necessary to accomplish specific compliance-related reforms.

7. Monitors should not have the authority, actual or constructive, to fire employees of the organization or members of the organization's governance team.

8. An organization's objection to any part of the compliance reform that is recommended by the monitor should not *ipso facto* be considered as part of the organization's compliance with the agreement. Rather, proposed compliance reform should be structured in consultation with the organization's board of directors or ownership. If any objections or differences remain, the Department of Justice's role should be that of a mediator, not an enforcement body. Ideally, compliance reform should be negotiated *before*, and set forth in, a DPA or NPA.

9. Monitors should not be required to have unfettered access to the organization's material, including material that is protected by the attorney-client privilege or work-product doctrine.

In addition to the aforementioned principles, NACDL is troubled by the lack of transparency relating to DPAS and NPAs. The Department of Justice does not release information regarding these agreements to the public. While recent studies conducted by defense attorneys find that the number of deferred prosecution agreements have dramatically increased since 2003, the Department of Justice has not released information that educates the public as to the true number of such agreements, nor any relevant data relating to these agreements. NACDL believes that the Department of Justice should publicly disclose relevant information relating to its use of DPAs and NPAs, including, but not limited to, the length of such agreements, the specific nature of the alleged crimes, the amount of fines levied, the compliance terms, and information relating to the use of monitors.

Respectfully,

John Wesley Hall
President, National Association of Criminal Defense Lawyers

LETTER FROM CYNTHIA HUJAR ORR, PRESIDENT,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

November 25, 2009

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial
and Administrative Law
House of Representatives
Washington, DC 20515

Re: H.R. 1947 and the Hearing on Transparency and Integrity in Corporate Monitoring

Dear Chairman Cohen and Ranking Member Franks:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing to supplement our letter, dated June 25, 2009, regarding the Department of Justice's use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) for business organizations, and to re-emphasize two specific concerns highlighted by H.R. 1947, the pending Accountability in Deferred Prosecution Act of 2009.

NACDL does not oppose H.R. 1947 generally. We believe that this legislation could result in more uniform decision-making by the Department of Justice as to how and when to use DPAs and NPAs, as well as the standardization of agreement terms. Since this bill would require the Attorney General to establish certain procedures to ensure the independence and accountability of corporate monitors, NACDL also believes that H.R. 1947 could positively address some of the well-publicized problems of overcompensated or ethically conflicted monitors. We do have concerns, however, regarding the mandates contained in Sections 7 and 8 of this bill.

First, Section 7 of H.R. 1947 mandates judicial approval and oversight of all DPAs and NPAs. Specifically, this bill requires that a court determine whether a DPA or NPA is consistent with the guidelines that will be established concerning such agreements and further whether the agreement is "in the interests of justice." The phrase "in the interests of justice" is undefined by the bill.[1] Section 7

[1] While the phrase "in the interests of justice" is completely undefined, NACDL believes that the term must, at a minimum, be interpreted as requiring a determination as to whether the government's choice of the use of a DPA or NPA in lieu of a declination of prosecution altogether is appropriate. In the current regime of vicarious corporate criminal liability, DPAs

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also requires the parties to file quarterly reports with the court detailing "progress made toward the completion of the agreement" and describing any "concern . . . about the implementation of the agreement." While the bill does not explicitly so state, the bill would seem to require the court to review such reports and involve itself in assessing the parties' progress toward completion, as well as adjudicating or otherwise involving itself with any "concern" raised in such reports. Finally, this section mandates that, on motion of any party or the monitor, the court review and take any appropriate action "to assure that the implementation or termination is consistent with the interests of justice."

DPAs and NPAs reflect what are, in effect, decisions by the Executive Branch to decline prosecution. NACDL believes that Article III judicial review of such inherently executive decisions would be inappropriate. In addition, judicial oversight is unnecessary because DOJ and a corporation that is the subject of an investigation are themselves in the best position to determine whether the terms of a DPA or NAP are appropriate. Further, inasmuch as DPAs and NPAs are often the culmination of complex and long-term investigations, mandatory judicial oversight would result in a significant burden on the judiciary. In fact, the extensive evidentiary hearings, court filings, and judicial exercises of fact-finding and decision-making that would likely be required could lead the government or a company under investigation to reject an otherwise appropriate and desirable DPA or NPA.

Second, Section 8 of H.R. 1947 mandates public disclosure of all DPAs and NPAs on the Department of Justice's website. While NACDL appreciates Congress' desire to create a level of transparency regarding these agreements, we are not in favor of the wholesale mandated public dissemination and disclosure that would be required by this bill. Avoiding the economically destructive effects of an indictment and lengthy criminal proceedings is one of the main motivations for a business organization to enter into a DPA. Automatic publication of all of the terms of these agreements is contrary to that purpose and would likely diminish some of a business organization's incentive for entering into such an agreement.

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and NPAs can be an important alternative for a corporation that would otherwise be criminally charged and suffer ruinous criminal sanctions and collateral consequences from conviction. Moreover, these agreements can be used to pinpoint areas in which an organization is in need of compliance reform. Since it is rarely, if ever, "in the interests of justice" to incapacitate a legitimate business organization, DPAs and NPAs should serve as a legitimate alternative to criminal prosecution to further the goals of deterrence, restitution, and reformation. DPAs and NPAs between the Department of Justice and business organizations should not be used, however, as substitutes for civil remedies or for declining criminal prosecution. While there are certainly cases in which organizations should be punished, criminal sanctions should be reserved for cases in which there is serious, widespread fraud that involves criminal intent, and in which civil remedies are insufficient to affect a just result. The overbroad use of criminal sanctions, whether through indictment or alternative resolution like DPAs and NPAs, dilutes the deterrent effect and devalues the prescriptions of criminal enforcement.

With respect to NPAs, there is an even greater concern about the automatic disclosure requirement.[2] An NPA is a decision to *not* prosecute a company or individual. If the government has chosen not to prosecute, the public disclosure of the fact that the government had investigated the person or entity is harmful to the reputation of the person or entity, without any clear benefit to anyone else.

NACDL believes that the Department of Justice can and should publically disclose relevant information relating to its use of DPAs and NPAs but believes that this can be done without actually publishing all agreements in their entirety. For example, DOJ could release statistics and data on the number of such agreements, the specific nature of the alleged crimes, the amount of fines levied, the compliance terms, and information relating to the selection and use of monitors. This would satisfy the desire for transparency in a useful manner without sacrificing a significant incentive for business organizations to enter into DPAs and without undermining the privacy and reputational concerns of those who enter into NPAs.

As expressed above, NACDL does not oppose this legislation generally. Rather, we believe that it could result in positive changes to the manner of entering into and executing DPAs and NPAs. We are deeply concerned, however, about the potentially negative effects that the mandates in Sections 7 and 8 could have on this system. NACDL believes that revising these sections to provide judicial review only in the event of a breach and mandated publication only of general statistics, not DPAs and NPAs in their entirety, will fully satisfy the goals of this legislation without sacrificing the effectiveness and efficiency provided by DPAs and NPAs generally.

On behalf of NACDL, I encourage you to consider these recommended revisions as this bill moves through the legislative process. Thank you for considering our views.

Respectfully,

Cynthia Hujar Orr
President, National Association of Criminal Defense Lawyers

[2] It is arguably unclear whether H.R. 1947 requires public disclosure of NPAs. Section 8 only specifically references the public disclosure of DPAs. Section 3 of the bill, however, states that an NPA is subject to *all* the Act's requirements and is legally equivalent to a DPA, so therefore Section 8 could be reasonably interpreted as requiring the public disclosure of all NPAs.