TRANSPARENCY AND INTEGRITY IN CORPORATE MONITORING

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTENTS

NOVEMBER 19, 2009

Page

OPENING STATEMENTS

The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Chairman, Subcommittee on Commercial and Administrative Law 1
The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Ranking Member, Subcommittee on Commercial and Administrative Law 2
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary, and Member, Subcommittee on Commercial and Administrative Law 4

WITNESSES

Mr. Anthony Barkow, Executive Director, Center on the Administration of Criminal Law, New York University School of Law
Oral Testimony 6
Prepared Statement 9
Ms. Eileen R. Larence, Director of Homeland Security and Justice, U.S. Government Accountability Office
Oral Testimony 32
Prepared Statement 34
Mr. Gil M. Soffer, Partner, Katten Muchin Rosenman, LLP
Oral Testimony 55
Prepared Statement 57
Mr. Brandon L. Garrett, Associate Professor of Law, University of Virginia School of Law
Oral Testimony 64
Prepared Statement 67

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on Commercial and Administrative Law 4

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Chairman, Subcommittee on Commercial and Administrative Law 96

TRANSPARENCY AND INTEGRITY IN CORPORATE MONITORING

THURSDAY, NOVEMBER 19, 2009

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

The Subcommittee met, pursuant to notice, at 11:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Johnson, Franks, and Coble.

Staff present: (Majority) Carol Chodroff, Counsel; Adam Russell, Professional Staff Member; and (Minority) Zachary Somers, Counsel.

Mr. COHEN. Good morning. This hearing of the Committee on the Judiciary Subcommittee on Commercial Administrative Law will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing, and I will now recognize myself for a brief statement.

This morning the subcommittee revisits the selection and use of independent corporate monitorships, an issue that was first raised in the 110th Congress. This issue was considered again in this Congress in a hearing on the use of deferred or non-prosecution agreements, a.k.a. DPAs, in criminal cases involving criminal corporate defendants.

With the growth in the use of corporate deferred and non-prosecution agreements in the last decade, it became evident over time that there were no meaningful standards governing when the government could or should enter into such agreements or what the scope of such agreements should be. Even more troubling was the complete lack of guidance with respect to the selection and use of and the compensation for corporate monitors to implement such agreements.

The absence of standards governing how corporate monitors were to be selected and what the scope of their authority led to disturbing suspicions of abuse. Caesar's wife came into our Committee once again with issues concerning the propriety of appointment of certain individuals and the multi-million dollars that they received.

One notorious example, which we explored in our previous hearings, was the Zimmer case. That is when Caesar's wife was very disturbed. U.S. Attorney then, now governor-to-be Christopher

Christie, selected former Attorney General John Ashcroft to serve as a corporate monitor, for which Mr. Ashcroft collected a fee of up to or in the neighborhood of or resembling or within the margin of error of $52 million. A tidy sum, it could pay for some drycleaning for Mrs. Caesar's robes.

The circumstances surrounding his appointment and service as a monitor were not made public at the time of his selection, and no provision was ever made for oversight or accountability concerning his performance as monitor. This lack of transparency was troubling to our subcommittee and to the corporate world and to the public, as articulated in several articles and media reports. That was Caesar himself, yes.

These concerns prompted the subcommittee to hold hearings on this issue and to request the Government Accountability Office to investigate the matter. Their report will be released in the next few weeks, and I look forward to learning what the Government Accountability Office discovered.

The Department of Justice has also provided some guidance with respect to the selection of corporate monitors. Although I appreciate the steps they have taken, they are not etched in stone or statute, and more, therefore, is needed. There must be a fundamental change in the monitoring process so that we can ensure greater transparency and integrity and safeguard against the abuses or appearance of abuse in the past.

The perception of unfairness and cronyism undermines governmental authority and integrity in the judicial justice process, and the selection of corporate monitors to oversee pretrial agreements must be fair, and it must be perceived as fair. Public trust and confidence are essential elements of an effective justice system. Sometimes the appearance of justice is just as important as justice itself, the reality thereof.

Congress has a critical role to play in this area, and I believe the guidance governing the selection and use of corporate monitors should be codified in Federal statute, therefore not leaving it to the whims and caprices of future Administrations.

Accordingly, I have drafted, or had drafted, the Transparency and Integrity in Corporate Monitoring Act, which will protect against actual and perceived conflicts of interest with respect to Federal prosecutors who leave the U.S. attorney's office to work as corporate monitors. I believe this bill will fill an important gap in providing accountability and transparency and avoiding abuse with respect to the selection and use of corporate monitors.

There are revolving doors in most areas of government, in most states as well as Federal systems, and a revolving door is not a bad thing, for if you move with it, you don't get hit on the rear as you leave. I look forward to discussing these corporate monitoring issues and thank our witnesses for being here today.

I now recognize my colleague, Mr. Franks, the distinguished Ranking Member of the Subcommittee from the State of Arizona, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

I thank all of you for being here.

Mr. Chairman, deferred prosecution agreements are an invaluable tool in the Justice Department's arsenal for combating cor-

porate crime. These agreements allow the government to achieve all the benefits of a criminal prosecution without subjecting the companies, their employers, their employees and shareholders to the collateral consequences of a prosecution and conviction.

In contrast to the far more rigid criminal sentencing process, deferred prosecution agreements permit the Justice Department and corporate defendants to work together in a more flexible environment to remedy past violations and prevent future illegal conduct. They serve to rehabilitate the company, root out illegal and unethical conduct, discipline culpable employees, help promote good citizen corporate citizenship going forward, and they allow prosecutors to achieve more than they could through the court-imposed fines and restrictions alone.

The benefits of deferred prosecution agreements have been recognized by Bush I, Clinton, Bush II and Obama Justice Departments. In some cases part of an effect of a deferred prosecution agreement is the use of a corporate monitor to oversee the implementation of and compliance with the agreement's provisions.

Corporate monitors help ensure that companies institute meaningful changes and develop the best compliance programs possible. Additionally, corporate monitors can verify that companies are fulfilling the obligations of the deferred prosecution agreement to a much greater extent than the department could accomplish on its own.

Now, despite the benefits of corporate monitors, their use has engendered criticism in recent years in the press and from some Members on the other side of the aisle. Much of this criticism was levied, in my opinion, to an attempt to derail the gubernatorial campaign of former New Jersey U.S. Attorney Chris Christie.

As hearings before the subcommittee demonstrated, however, the criticism of Governor-elect Christie's use of corporate monitors was unjustified. Yet we are here today to consider whether legislation is needed to avoid conflicts of interest in the appointment of compliance monitors.

And honestly, I do believe the case has been made that congressional legislation is needed. I think that it is not needed in this area. I don't see the case. It is not to say that I believe that the appointment of corporate monitor should be ungoverned. I just don't think there is credible reason to believe that Justice Department has or has not or cannot develop sufficient internal regulatory guidance on the appointment of corporate monitors.

It seems to be an area where we are majoring on a minor, and maybe taking the risk of having to minor on majors. Over the past 10 years since the initial Holder memo on deferred prosecution agreements, the department has continually fine-tuned its rules for these agreements.

And at this point, I think the Nation's corporate law enforcement goals would be best served by continuing to leave it to the department to ensure transparency and integrity in corporate monitoring. We do not need to unnecessarily tie the department's hands with legislation at this point, in my opinion.

So in closing, let me just say that I find it disappointing that the Committee is once again revisiting the subject of the appointment of corporate monitors when we have yet to take a look at the

Obama administration's appointment of countless policy czars. Certainly, these czars, who are not subject to Senate confirmation, wield far greater power than any corporate monitor.

And I hope that in future the Chairman will direct this Committee's oversight efforts to these constitutionally questionable, yet highly powerful czars to the same degree that we have investigated corporate monitors.

And I look forward to the witnesses' testimony, and I thank the Chairman and yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Franks. And as soon as the Chairman gives me jurisdiction over czars, right now we are just dealing with, like, you know, Roman times and their wives, but once we get up to czarist Russia and the Chairman gives me that authority, well, we might look into that.

Mr. Chairman, is that something you would like to get into—czarist Russia?

Mr. CONYERS. Would that jurisdiction come to your Committee?

Mr. COHEN. I tend to doubt it.

Mr. CONYERS. Well, if it doesn't——

Mr. COHEN. Commercial and—well, that was kind of a commercial. That was infomercial against the Obama campaign, so it could be considered commercial.

Mr. CONYERS. If it would come to your Committee, I would be more disinclined to——

Mr. COHEN. Moving right along with our bombastic review, thank you, Mr. Chairman.

I thank the gentleman from Arizona for his statement.

I now recognize Mr. Conyers, the distinguished Chairman of this Committee, distinguished Member of this subcommittee, and a icon and lion in the legislative world of the United States of America.

Mr. CONYERS. Thank you, Chairman Cohen, Mr. Frank, Ranking Member.

I have asked for the notebooks. Mr. Christie left the hearing rather abruptly the last time, and I just wanted to try to refresh my memory to see if there could be any useful purpose in asking him to rejoin the Committee. And I will put my statement in the record. Thank you.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Today's hearing will focus on the selection and use of independent corporate monitors to oversee deferred prosecution and non-prosecution agreements.

In January of 2008, media reports detailing questionable appointments of independent monitors by the Justice Department under the prior Administration began to surface. In response, the Judiciary Committee conducted an investigation into the Department's use of deferred prosecution and non-prosecution agreements.

We soon learned that the lack of guidelines in this area had led to vast discrepancies across jurisdictions in the terms of agreements and in the selection of corporate monitors to oversee them.

To address these concerns, the Department issued guidelines on monitor selection in March 2008, and mandated the collection and tracking of these agreements.

Last fall, the Government Accountability Office commenced an examination of the Department's use and oversight of deferred prosecution agreements and non-prosecution agreements, including a focus on the selection and use of corporate monitors.

I understand that report is due to be released by mid-December. I look forward to reading the report, and to hearing testimony from our GAO witness and our other witnesses this morning.

I am pleased to hear that, by most accounts, there has been positive progress in this Administration with respect to greater transparency, uniformity, and accountability in this area.

It is important to consider, however, what more remains to be done, and what role Congress can and should play in terms of codifying guidance to ensure greater transparency and fairness in the process.

There are three key areas I would like to focus on in particular today.

First, whether the guidelines issued last year by the Department in the Morford Memorandum are sufficient for providing accountability, transparency, and uniformity.

As a reminder, on the eve of this Subcommittee's March 2008 hearing on corporate settlement agreements, the Justice Department issued a memorandum from then-Acting Deputy Attorney General Craig S. Morford to the heads of Department components and United States Attorneys, regarding the selection and use of monitors in deferred prosecution agreements and non-prosecution agreements with corporations.

This memorandum articulated nine principles covering three areas: (1) the selection of monitors, (2) the scope of their responsibilities, and (3) the duration of monitorships.

It also advised prosecutors to consider both a monitor's potential benefits to the corporation and to the public, as well as a monitor's cost and impact on corporate operations.

While I applaud the Department for developing these guidelines, I would like to hear today about whether they quelled the controversy by ensuring sufficient accountability, transparency, and fairness.

As we discussed at the last hearing, the guidance does not address whether a deferred prosecution agreement or a non-prosecution agreement should be used, or how the agreements should be structured.

Also, it fails to rein in the tremendous leverage that the government and the monitor have over the corporation entering into an agreement.

Corporations facing criminal prosecution are faced with a very difficult choice: they can either risk a conviction and a possible corporate death sentence after trial, or be coerced into accepting the terms and fees the monitor and prosecutor dictate.

It is important for us to remember that, no matter how helpful the Morford Memorandum guidance might be, it is only internal Department of Justice guidance. It is not binding in any court of law.

The second area we should examine concerns the compliance of prosecutors with the Morford Memorandum guidelines. For example, I want to know:

Who are the monitors who have been selected since the Morford Memorandum was issued?

What is the prior professional experience of these monitors?

Have there been actual, potential or perceived conflicts of interest in the selection of monitors since the Morford Memorandum was issued?

I would also like to hear whether adherence to those guidelines has been documented. It is one thing to claim compliance; it is another thing to demonstrate it.

I don't wish to steal our GAO witness Ms. Larence's thunder, but she has been working diligently on the GAO's report, and I anticipate she will be able to shed some light on the compliance issue, and what still remains unaddressed.

I would also like to explore whether we even have enough information at this point to determine whether the Morford Memorandum guidance is sufficient.

From what I understand, since 2008 there have only been four deferred prosecution agreements and non-prosecution agreements that have resulted in the appointment of corporate monitors.

Are four cases enough to give us an accurate picture of whether the abuse or the appearance of abuse in the system has been completely eliminated?

Finally, the third area I want to examine is the role of Congress in ensuring transparency and integrity in the selection and use of corporate monitors.

Although the Morford Memorandum is clearly a positive step, codification of that guidance might be necessary to ensure the continuation of positive progress, and to prevent future abuses.

In the last two hearings, we discussed New Jersey U.S. Attorney (and now Governor-elect) Christopher Christie's appointment of former Attorney General John Ashcroft to be a corporate monitor in the Zimmer Holdings case, which was very troubling.

That appointment was made without public notice, without any bidding, and without any input from a neutral judge or the company subject to the monitoring.

Mr. Ashcroft reportedly received $52 million for 18 months of work as a result of this appointment—fees that were apparently non-negotiable.

In light of the fact that Mr. Ashcroft supervised Mr. Christie when he was Attorney General, this arrangement presented the strong appearance of cronyism.

Last May, The New York Times reported that at least 30 of the 41 monitors appointed in deferred prosecution agreements since 1994 were former government officials, and 23 were former prosecutors.

Congressional action might be warranted to ensure that such cronyism—or the appearance of it—does not happen in future cases.

I also understand that the Chair of this Subcommittee, Steve Cohen, plans to introduce legislation to create greater transparency and integrity in the appointment of corporate monitors.

I hope that today's testimony will illustrate the best path forward for Congress and the Justice Department to ensure that the corruption of the past stays in the past, and that the selection and use of corporate monitors will be transparent and fair, in this new Administration and beyond.

I thank the witnesses for coming today, and I look forward to your testimony about this important issue.

Mr. COHEN. Thank you, Mr. Chairman.

Other Members' opening statements will be included in the record.

Now I would like to welcome the witnesses for today's hearing and thank you for your willingness to participate. Without objection, your written statement will be placed in the record. We have asked you to limit your remarks to 5 minutes. There is a lighting system there. It starts with the green light. After 4 minutes it turns yellow, and then after 1 more minute it turns red. And at that time you should try to conclude your remarks.

After each witness has presented his or her testimony, subcommittee Members will be permitted to ask questions under the same 5-minute limitation, although it won't be as strictly enforced.

Our first witness is Mr. Anthony Barkow. Mr. Barkow is an executive director of the Center on the Administration of Criminal Law, NYU School of Law. Prior to establishing the center in 2008, he was assistant United States attorney in the Southern District of New York, where he primarily prosecuted terrorism and white-collar criminal cases. From 1998 through 2002, Mr. Barkow was assistant United States attorney for the District of Columbia, and from 1996 to 1998 he was trial attorney in the attorney general's honors program, the Department of Justice's Office of Consumer Litigation.

Mr. Barkow, we appreciate your service and appreciate your being with us. And would you proceed with your testimony?

TESTIMONY OF ANTHONY S. BARKOW, EXECUTIVE DIRECTOR, CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. BARKOW. Thank you, Chairman Cohen. Chairman Cohen, Ranking Member Frank and Chairman Conyers and Members of the Subcommittee, thank you for inviting me to testify before you today. It is an honor to appear before you to discuss these issues.

I would like to discuss briefly why I think that this proposed legislation is beneficial and offer three suggestions for possible improvement. The proposed legislation would take steps to fill a gap

in the current law that governs the post-employment activity of former Federal prosecutors.

Current law prohibits former DOJ employees from litigating the same matters in which they personally and substantially participated while in government service. However, current law does not expressly prohibit a former prosecutor from serving as a monitor for a company that he himself investigated and prosecuted, nor does it clearly prohibit a former prosecutor from serving in a monitorship that arose out of a deferred prosecution or non-prosecution agreement that she herself negotiated. The proposed legislation remedies these gaps.

This proposed legislation is important for several reasons. First, it would target the problem of revolving door monitoring employment and the perception of self-dealing by prosecutors. Actual self-dealing, of course, is corrupt and criminal, but public confidence in government is undermined even by the mere appearance of self-dealing.

If it looks like there is a revolving door between government service as a prosecutor and a monitorship for a private company, there is a real danger that it will foster public cynicism about government by feeding the public's belief that government actors are not always looking out for the public's interest, but rather their own. Even if government actors are not in fact corrupt, the perception of corruption in government activities has a dispiriting and corroding effect.

Under current law, there is a risk that prosecutors who have worked on a DPA or NPA will later serve as monitors because of DOJ's power to select those monitors and the fact that monitors are often DOJ or SEC alumni. After searching public documents, I am unaware of any monitors who have been appointed who previously worked on the same matter that they later monitored. Nonetheless, the proposed legislation would impose prophylactic measures that would eliminate the possibility of such appointments.

Second, the proposed legislation would be appropriately tailored to address this danger. If an apparent scrivener's error that I will mention in a moment is corrected—or would be corrected—the proposed legislation would bar former prosecutors from acting as or working for a monitor only on the same matters in which they worked while in government. Former prosecutors could still serve as monitors, as long as they had no involvement with the investigation or prosecution of the company subject to the DPA or NPA.

Third, the proposed legislation appropriately would apply not only to U.S. attorneys, but also to AUSAs. Given that the proposal's primary policy benefit would be to prevent actual self-dealing and to avoid any appearance of impropriety, no substantive distinction should be made between political appointees and those who serve under them.

Report of an award of a lucrative monitorship in a no-bid contract would have an equally deleterious effect on public confidence, whether it identified the contract recipient as a U.S. attorney who oversaw the prosecution that created the employment opportunity as it would if the contract recipient were the AUSA who handled the prosecution from day to day.

Fourth, the proposed legislation would find analogues in other areas, which I discuss further in my written testimony.

Fifth, the proposed legislation would have few significant costs. It would not reduce the actual quality of monitoring. The supply of available monitors would still include the thousands of former prosecutors who had not previously worked on the particular case, as well as people with experience in corporate America, independent private sector inspector generals or others, who in many situations might in fact be better monitors than former prosecutors.

I have three brief suggestions for the subcommittee's consideration. First, the subcommittee may want to consider whether the time period of the proposed bar should be lengthened. The most analogous current provision to the legislative proposal is the prohibition on advocacy and representation in the same matter in which the former government employee participated. That prohibition is permanent. Similarly, the justifications for the proposed legislation do not seem to diminish with the passage of time.

Second, the subcommittee may want to consider whether the scope of the persons covered under the proposed legislation should be expanded. As it is currently being considered, it would apply only to former prosecutors of U.S. attorneys offices, but not to former political appointees or other lawyers in main Justice, who may also work on NPAs or DPAs as monitors. There is no apparent reason to exempt DOJ's criminal division, which is responsible for more than one-third of monitor appointments or top DOJ officials from these prohibitions.

Third and finally, the proposed legislation has what appears to be a scrivener's error that I recommend correcting that makes it overbroad in one respect. The proposal would bar monitorships arising out of DPAs only to which a former employee has a connection, but would bar monitorships arising out of any NPA, whether the former employee has any connection to the underlying matter or not.

Thank you again for allowing me to testify and to share my thoughts on these issues. I would be happy to answer any questions that you might have.

[The prepared statement of Mr. Barkow follows:]

PREPARED STATEMENT OF ANTHONY S. BARKOW

Statement of Anthony S. Barkow

Executive Director, Center on the Administration of Criminal Law

New York University School of Law

"Transparency and Integrity in Corporate Monitoring"

Before the House Subcommittee on Commercial and Administrative Law

November 19, 2009

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to testify before you regarding the Transparency and Integrity in Corporate Monitoring Act of 2009 ("Transparency and Integrity Act" or "Act"). It is an honor to appear before you to discuss this legislation.

The Act would fill a gap in the current law that governs the post-employment activity of former federal prosecutors. Specifically, it would close a loophole in current law by prohibiting former United States Attorneys and Assistant United States Attorneys from acting as or working for corporate monitors in matters on which they worked while in government service. As such, it would close a revolving door that, although seemingly not subject to current or past abuse, holds the potential to undermine public confidence in the criminal justice system and the Department of Justice ("DOJ").

Prosecutors have tremendous and significantly unchecked power and leverage over corporations facing possible indictment. This power and leverage typically leads corporations to agree to negotiated settlements rather than to proceed to trial. The negotiated settlements are regulatory in nature and frequently require the corporation to be overseen by a monitor who himself or herself possesses regulatory power over the company subject to the monitorship. The monitors are essentially selected by the DOJ. The current process of selection is not competitive, insufficiently transparent, not subject to adequate recordkeeping, and open to the possibility of nepotism. And the actual output of the process is often that DOJ selects DOJ or Securities and Exchange Commission ("SEC") alumni to serve as monitors.

These factors combine to create the potential for a classic revolving door situation and, at the very least, for the appearance of self-dealing. If left unchanged, the process of

corporate monitor selection poses a risk of breeding public cynicism about the process specifically and the enforcement of white collar crimes in general.

My testimony proceeds in four parts. First, I discuss the larger context of the problem that the Act targets: the revolving door between government and private sector jobs and the reality or appearance of self-dealing that occurs as a result. The revolving door and the appearance of self-dealing undermine public confidence in government, and there is virtually universal agreement that the evils associated with these phenomena should be eradicated. Second, I discuss the role of prosecutors, including white collar prosecutors, in the criminal justice system today. Prosecutorial power in general is largely unchecked, and prosecutorial power over corporations is no exception. Included in this power is the control that federal prosecutors currently exercise over the monitoring selection process. Third, I discuss current law governing post-employment activity by former federal prosecutors, particularly focusing on the gap in current law that would allow former federal prosecutors to act as or work for a monitor even in a case he or she investigated or prosecuted while in the government. Fourth, I address how the Act would close that loophole and point out several policy benefits that would be achieved as a result.

In the course of discussing the Act, I point out several changes to it that I recommend that the Subcommittee consider. First, the Subcommittee should consider extending the bar, currently set at one or two years, to a permanent bar. Second, the Subcommittee should consider expanding the scope of the Act's application to DOJ Criminal Division personnel and to the highest-ranking DOJ officers, rather than merely to United States Attorneys and Assistant United States Attorneys. Third, the

Subcommittee should correct what seems to be a scrivener's error in the current draft of the Act.

I. The Revolving Door And Self-Dealing, And Their Corrupting Effect On Public Trust In Government

The well-documented phenomenon of a "revolving door" between agencies and the industries they regulate is universally recognized as a barrier to good government. The revolving door "can provide a vehicle for public servants to use their office for personal or private gain," "casts grave doubts on the integrity of official actions and legislation," and the resulting "appearance of impropriety exacerbates public distrust in government."[1] The phenomenon can play out in the regulatory context when current agency heads think about their private sector job prospects after expiration of their agency terms. This outlook may make these officials reluctant to impose regulations that an industry views as too aggressive or obtrusive. It may dim an official's job prospects or make that job more difficult if the official has to live with the rules upon leaving the agency.[2] Thus "[t]he danger with revolving-door employment is that government regulators might work with an eye toward pleasing their future private employers."[3]

The "revolving door" can manifest itself in the form of actual or perceived "self-dealing." Self-dealing for personal advantage is corrupt and criminal. But public

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[1] Doric Apollonio, Bruce E. Cain & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 28 (2008).

[2] JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 16 (1990) (noting that agency officials may take into account "social and business relations and the prospects of further career opportunities in the private sector").

[3] Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 159 (2009). For example, the effect of the revolving door is often cited as one of the reasons why the SEC failed t address some pressing problems in the trading industry. John C. Coffee, Jr., *A Course of Inaction*, LEGAL AFF Apr. 2004, at 46; Jonathan R. Macey, *State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 128 (2004); Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM: USIN CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow & Rachel Barkow, eds., NYU Press forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428934.

confidence in government is undermined even by the appearance of self-dealing. Indeed, this is an age-old concern since the Founding of the Republic, as "[t]he Framers were concerned about the creation of a self-perpetuating national government in which members of Congress and the executive branch would collaborate to separate the governing elite from the people. Even the appearance of self-dealing undermines the relation between representatives and the people."[4] The Supreme Court has stated the opinion that that the main problem with corruption is in fact not corruption itself, but the dispiriting impact the perception of corruption has on the public. As the Court has observed in the campaign finance context, democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[5]

In either manifestation, then, the "revolving door" contributes to public cynicism about government by feeding the public's belief that its government is corrupt. Therefore, even if our government is not in fact corrupt, the perception of corruption in government activities has a dispiriting and corroding effect on the polity and the subjects of regulation.

II. Prosecution By Regulation: The Regulatory Role Of Prosecutors Over The Criminal Justice System And Over Corporate Crime

Just as the revolving door is a concern with agencies and the industries they regulate, so, too, is it an issue with prosecutors when they function in a regulatory capacity, particularly in the corporate arena.

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[4] Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV 1, 3-4 (1996).
[5] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (quoting United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961)).

Several factors give prosecutors the power and leverage to act as regulators.[6] First, many criminal laws are broad, and often more than one law covers a defendant's conduct.[7] These laws often authorize different sentences, so by selecting which law to enforce, a prosecutor drives the determination of the sentence or applicable sentencing range.[8] As a result, prosecutors have enormous bargaining power because more serious charges, and commensurately higher sentences, can be threatened if a defendant goes to trial. Second, judicial sentencing authority is limited in many jurisdictions, and particularly in the federal system, by mandatory minimum sentences or sentencing guidelines. Thus, the prosecutor's charging decision can dictate a particular sentence or narrow sentencing range. Third, many jurisdictions, including the federal system, offer defendants substantial incentives, via sentencing reductions, for cooperating with the government or accepting responsibility by way of guilty pleas. Prosecutors typically control whether defendants get these reductions.

The result of this framework is that virtually all defendants—more than 95%—plead guilty rather than go to trial. In these cases, prosecutors function as adjudicators, because prosecutorial decisionmaking often drives and determines a defendant's liability and sentence.[9]

Corporate criminal liability is an extreme example of this phenomenon. Corporate criminal liability is incredibly broad. Under currently prevailing law,

> A corporation is criminally liable even if the criminal conduct is undertaken without the knowledge of top management; the criminal activity was performed by a low level employee; the primary purpose was to benefit only the miscreant employee; there

[6] The following discussion is adapted from Barkow, *supra* note 3.
[7] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).
[8] *Id.* at 552.
[9] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, 61 STAN. L. REV. 869 (2009).

> was no actual benefit to the corporation; the criminal acts were performed in direct violation of instructions from the company; there is a rigorous compliance program in place; no single individual had the requisite intent or knowledge sufficient to violate the law; it is never possible to identify the actual employee or agent responsible for the crime; or the offending employees are all acquitted of the same offense.[10]

This low threshold for liability makes it easy for prosecutors to win at trial, which in turn makes it more likely that corporate defendants will plead guilty or agree to negotiated settlements such as deferred prosecution agreements ("DPAs") or nonprosecution agreements ("NPAs") to avoid harsher consequences if the case proceeds to an indictment, trial, or conviction.

Indeed, corporations are "inherently vulnerable"—"in a manner of speaking 'eggshell defendants'"[11]—for whom the slightest touch by criminal prosecution is equivalent to destruction. Some companies can survive an indictment and even a conviction; for these companies, the imposition of a financial penalty is ultimately written off as a cost of doing business. But for other corporations, a criminal conviction is a death sentence because the company loses its eligibility to be licensed. Indeed, for "many companies," even an indictment can be "a matter of life and death" because of the reputational damage an indictment can cause.[12] "The corporate corpses of Arthur Andersen, E.F. Hutton, Drexel Burnham Lambert, and others, lend force to these observations."[13] Thus, the combination of a corporation's broad liability and "eggshell"

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[10] Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 64-65 (2007).
[11] *Id.* at 73.
[12] United States v. Stein, 435 F. Supp. 2d 330, 381-82 (S.D.N.Y. 2006).
[13] Bharara, *supra* note 10, at 73.

vulnerability makes it "particularly ill-equipped to defend itself" to resist prosecutorial leverage.[14]

As a result, prosecutors have enormous power to demand that, in order to avoid indictment, corporations cooperate with government investigations and enter into DPAs and NPAs. Recent years have shown a dramatic increase in the use of DPAs and NPAs by federal prosecutors, rising from a mere 11 agreements negotiated between 1993 and 2001 and 23 agreements between 2002 and 2005, to 13, 37, and 16 agreements in 2006, 2007, and 2008 respectively.[15] The number of such agreements in 2009 is on track to match, if not surpass, the number of 2008 agreements, standing at 10 in July.[16]

These agreements typically impose new regulations and demands on the companies as part of their terms. In the words of one Assistant United States Attorney ("AUSA"), prosecutors are able to "get[] the sort of significant reforms you might not even get following a trial and conviction."[17] Indeed, the Chair of the Attorney General's White Collar Crime Subcommittee informed Congress that the express goal of these agreements is "to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet *or exceed applicable legal and regulatory mandates*."[18] In the words of Mary Jo White, the former United States

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[14] *Id.* at 70-71.
[15] Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 167 (2008).
[16] *See* Gibson Dunn - 2009 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, *available at* http://www.gibsondunn.com/Publications/Pages/2009Mid-YearUpdate-CorpDeferredProsecutionAgreements.aspx.
[17] Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 861 (2007) (discussing the statement of an AUSA).
[18] Statement of David E. Nahmias, United States Attorney, Northern District of Georgia, and Chairman, White Collar Crime Subcomm., Attorney General's Advisory Comm. of United States Attorneys, United States Dep't of Justice, Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, on "Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines," March 11, 2008 (emphasis added).

Attorney for the Southern District of New York, these agreements effectively turn federal prosecutors into "super-regulators."[19]

III. The Monitoring Selection Process Today

When prosecutors act as "super-regulators," the problem of the revolving door is just as grave as it is when any other agency regulates. In the case of prosecutors, the revolving door would be between working for the government on a DPA or NPA and then working for the company as a monitor of the agreement.

A. The Regulatory Power And Increasing Use Of Monitors

The job of a monitor is to oversee compliance with the terms of the DPA or NPA. As noted, these agreements often directly regulate the company's operations going forward. For example, after engaging in a fraudulent scheme to inflate its earnings, Bristol-Myers Squibb signed a DPA that required the company to submit specific financial disclosures that go beyond the requirements currently imposed by law and to establish a training and education program—all to be overseen by a monitor who was also empowered to require additional operational changes. Zimmer Holdings, another medical device manufacturer, signed a DPA that regulated its relationship with medical consultants, including setting caps on the number of consultants that could work on a product development team and establishing hourly wage rates. These conditions were also to be overseen for compliance by monitors. This type of employment of monitors to oversee DPAs and NPAs has become more common. The number of monitors selected to oversee these agreements was 2 (out of 6 agreements) in 2003, 5 (out of 6 agreements)

[19] Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, PLI Order No. 6063 (Nov. 2005).

in 2004, 9 (out of 11 agreements) in 2005, 7 (out of 18 agreements) in 2006, 17 (out of 35 agreements) in 2007, and 6 (out of 16 agreements) in 2007.[20]

B. Selection And Appointment

To date, monitor selection has been tainted by the appearance that prosecutors are appointing people based on personal connections. The mere fact that the population of monitors and their staffs are comprised of former prosecutors is not an indicator that the appointments were flawed or that corruption infected the selection process. After all, although it is not clear that former prosecutors always make the best—or even good[21]—monitors in all cases, they certainly sometimes do. Thus, I am not taking the position that monitoring appointments are corrupt or unwise simply because a former prosecutor is selected. Nonetheless, the monitoring appointment process thus far has shown characteristics that are associated with the revolving door and the appearance (even if not the reality) of self-dealing. And the process, at least anecdotally, has shown it can generate questionable appointments. The most notorious of these was the appointment of former Attorney General John Ashcroft by Christopher J. Christie, the former U.S. Attorney for the District of New Jersey and now the Governor-elect of the State. Ashcroft, Christie's former boss, was awarded a no-bid contract worth tens of millions of dollars. That appointment sparked public outrage and congressional hearings into the appropriateness of the arrangement, including a hearing before this Subcommittee.[22]

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[20] Hon. Ruben Castillo, Vice Chair, U.S. Sentencing Comm'n, Compliance Goals in 2009: Given Anticipated DOJ Priorities in a New Economic Regulatory Environment, Address Before the 2009 Compliance & Ethics Institute at 13 (Sept. 14, 2009), *available at* http://www.complianceethicsinstitute.org/handouts/2009/conference/twoslides/GenSesTuePart1twoslides.pdf.

[21] *See* Garrett, *supra* note 17, at 926-27.

[22] Press Release, House Judiciary Committee, Conyers and Sánchez Demand Ashcroft Testimony About $52 Million No-bid Contract (Jan. 30, 2008), *available at* http://judiciary.house.gov/news/013008.html;

Under the current system, prosecutors dominate the selection of monitors. Given the leverage prosecutors possess over potential corporate defendants, the rational corporation will not resist appointment of a monitor generally or of a particular monitor identified by DOJ. Data regarding actual monitoring appointments bear out the expectation that prosecutors exercise significant control over the selection of corporate monitors. As of its June 25, 2009 testimony before this Subcommittee, the Government Accountability Office ("GAO") had reviewed 26 agreements that required a company to hire a monitor. Even though DOJ was not a party to the contracts between the companies and the monitors, DOJ not only "generally took the lead in approving the monitors," but also had "had the final say in selecting the monitor for all but one of these agreements."[23]

The monitorships are extremely lucrative. Monitors' work is akin to an internal investigation,[24] the type of work that supports the white collar litigation departments of the nation's largest law firms. Monitorships are long-term, typically lasting from eighteen months up to three years, with the possibility of extension.[25] The staffing of a monitorship can be structured to maximize its economic value to the monitor, and the monitor can have essentially unchecked power to choose the components and activities of the company he or she will monitor.[26] Indeed, former Attorney General Ashcroft's appointment under a no-bid monitoring contract was worth as much as $52 million.[27]

David Kocieniewski, *In Testy Exchange in Congress, Christie Defends His Record as Prosecutor*, N.Y. TIMES, June 26, 2009, at A19.

[23] Statement of Eileen R. Larence, Director, Homeland Security, General Accounting Officer, Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, on "Justice Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements," June 25, 2009, at 23 [hereinafter "GAO Testimony"].

[24] *See* Garrett, *supra* note 17, at 897.

[25] *See id.* at 898.

[26] For example, the GAO reports that one company for which DOJ required a monitor complained 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

Corporations seem to have little power to object to the monitor's costs, once the monitor is appointed. Although complaints by regulated entities themselves, particularly entities that were subjects of criminal investigations, are obviously not indicators free of bias, companies report concerns about the fees charged by monitors. The GAO surveyed 12 companies for which DOJ required a monitor. Three companies complained that the monitor's rate was too high.[28] Six companies reported concerns regarding aspects of the monitorship that affected the monitor's overall compensation. Specifically, six 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 that they could adequately address their concerns by discussing them with the monitors."[29] Two companies reported "that they had little leverage to negotiate fees, monitoring costs, or the monitor's roles and responsibilities because the monitor had the ability to find that the company was not in compliance with the DPA or NPA."[30] It is possible that recent DOJ guidelines established in the March 2008 "Morford Memo"[31] have had the effect of giving companies greater say in monitor selection and of reducing the economic burdens on companies—and the commensurate value to monitors—of monitoring appointments. The data are insufficient to judge, however, as GAO's audit

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responsibilities delineated in the agreement." "As a result, the company believe[d] that the overall cost of the monitorship was higher than it needed to be." And "[w]hile 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." GAO Testimony, *supra* note 23, at 28.

[27] Press Release, House Judiciary Committee, *supra* note 22.

[28] GAO Testimony, *supra* note 23, at 28.

[29] *Id.* at 28.

[30] *Id.* at 30.

[31] U.S. Dep't of Justice, U.S. Attorneys' Manual, Title 9, Criminal Resource Manual § 163 (Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm [hereinafter "Morford Memo"].

identified only two monitors selected after these guidelines took effect and documentation of the selection process used in these instances is not comprehensive.[32]

Prosecutors are currently selecting monitors for these lucrative positions through a process that suffers from insufficient competition in selection and from a lack of transparency. In all the agreements that the GAO identified in which DOJ officials identified monitor candidates, the candidates were identified based on the DOJ officials "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."[33] DOJ frequently selects monitors from the ranks of alumni of DOJ or of the SEC, DOJ's sister agency in much of its prosecution of white collar crime.[34] Although reliance upon personal knowledge or recommendations of suitable candidates is not necessarily incompatible with the selection of quality candidates, it raises the specter of nepotism.

The selection process is also insufficiently transparent. Although the Morford Memo creates guidelines that direct that the monitoring selection process be collaborative and establishes various procedural mechanisms to regulate monitor selection, there still appear to be transparency gaps. The GAO observed that the Morford Memo does not require documentation of the process used or the reasons for selecting a specific monitor.[35] GAO concluded that this inadequate documentation diminishes DOJ's ability

[32] GAO Testimony, *supra* note 23, at 26-27.
[33] *Id.* at 24.
[34] Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1722 (2007) (the "vast majority" of monitoring appointments go to "former judges, prosecutors, or SEC attorneys").
[35] *See* GAO Testimony, *supra* note 23, at 25-26.

to avoid the appearance of favoritism in monitor selection or to verify that selection processes are followed.[36]

Most relevant to the proposed legislation, nothing in the Morford Memo—or elsewhere in federal law including DOJ rules and regulations—bars former prosecutors from monitoring companies that they investigated or prosecuted.

IV. Current Law And The Proposed Legislation

Current law prohibits former DOJ employees from litigating the same matters in which they personally and substantially participated while in government service. But neither the most relevant operative prohibition, 18 U.S.C. § 207(a)(1), nor any other related statute clearly stops former prosecutors from acting as or working for monitors where the monitorship arose out of a matter in which they so participated. The proposed legislation would address this obvious flaw in current law.

This section of my statement surveys current law and the scope of its coverage. It then analyzes the efficacy of the legislation in addressing the problems of the revolving door and the appearance of self-dealing.

A. Current Law

1. Post-DOJ Work In The Same Matter In Which The Former Employee Worked When In Government Service

Several current statutes prohibit DOJ prosecutors from post-government work on matters in which they participated or over which they had supervisory authority while in government service. First, and most relevant to the proposed legislation, after leaving DOJ, no former employee can ever "knowingly make[ ], with the intent to influence, any communication to or appearance before" any court or government agency "on behalf of

[36] *See id.* at 26.

any other person (except the United States or the District of Columbia) in connection with a particular matter" in which the former employee "participated personally and substantially" during their government employment.[37] Second, for a period of two years after leaving government service, prosecutors with supervisory responsibilities cannot "knowingly make[ ], with the intent to influence, any communication to or appearance before" any court or government agency "on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter" over which the person had supervisory authority during the last year of their government service.[38] Third, for one year after leaving their positions, Presidentially-appointed and Senate-confirmed personnel cannot "knowingly make[ ], with the intent to influence, any communication to or appearance before" any court or government agency "on behalf of any other person (except the United States or the District of Columbia) in connection with any matter on which such person seeks official action."[39] Roughly stated, this prohibition applies to matters within the former employee's sphere of power, *i.e.*, executive-level employees are barred from appearing before any part of DOJ, and Senior Executive Service-level[40] and other similar senior employees are barred from appearing before their own former component. Finally, for two years after leaving a cabinet-level position, former cabinet-level officials cannot communicate to or appear before, with the

[37] 18 U.S.C. § 207(a)(1). This statute permits behind the scenes assistance and counseling. But the ABA's Model Rules on Professional Conduct extends the prohibition to all aspects of representation and counseling. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11 (1983). It is unlikely that the Model Rule would bar monitoring because monitoring is not typically consider representation or counseling.
[38] 18 U.S.C. § 207(a)(2).
[39] 18 U.S.C. § 207(c).
[40] 5 U.S.C. § 3132(a)(2).

intent to influence, any executive-level official in the Executive Branch or anyone in the official's former Department or agency.[41]

None of these provisions clearly bar former prosecutors from appointment as or working for a monitor in a matter on which he or she worked or over which he or she had supervisory authority while in the government. First, monitoring does not involve an agency relationship between the monitor and either the government or the company being monitored, even though there will be a contractual relationship between the monitor and the company. "A monitor is an independent third-party, not an employee or agent of the corporation or of the Government."[42] "The monitor is not the corporation's attorney" and does not represent the company.[43] Thus, any "communication" or "appearance" likely would not be made "on behalf of any other person." Second, although monitoring typically involves "communication to" or "appearance before" DOJ (or a court), such communication is not necessarily made with the "intent to influence."

2. A Current Prohibition Applying To Current DOJ Employees Who Are Seeking Post-DOJ Employment

Another rule prohibits prosecutors from working, while in government service, on matters in which entities are involved with which they are seeking or have arranged employment. Specifically, no DOJ employee can work on a matter while employed at DOJ that involves an entity with which he or she is negotiating or has arranged for employment.[44] On its express terms, however, this provision does not bar a former

[41] 18 U.S.C. § 207(d).
[42] Morford Memo, *supra* note 31, at § 3(A)(2).
[43] *See id.*
[44] 18 U.S.C. § 208 (prohibiting any government employee from "participat[ing] personally and substantially as a Government officer or employee" in any "particular matter in which" "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment"

prosecutor from appointment as or working for a corporate monitor in a matter on which he or she worked while in the government, so long as the monitoring appointment or employment is arranged after the DOJ employee leaves government service.

B. The Transparency And Integrity Act

1. The Act's Effect

The proposed legislation takes steps to fill the gap in current law. It would extend the relevant prohibitions to apply to former prosecutors' post-government service monitoring employment. Specifically, it would prohibit former United States Attorneys and Assistant United States Attorneys from "act[ing] as or [being] employed by a corporate monitor" with respect to a DPA or NPA that arose out of an investigation or prosecution of an organization in which he or she "participate[d]."[45] The prohibition would apply for 2 years for former United States Attorneys and for 1 year for former Assistant United States Attorneys.[46] These prohibitions would expressly prohibit covered persons from acting as or working for corporate monitors if they worked while in government service on the investigation or prosecution out of which the monitorship arose.

The proposed legislation has what appears to be a scrivener's error that makes it overbroad in one respect. The Act prohibits covered persons who "participate[ ] in the investigation or prosecution of an organization for a criminal offense with respect to which a deferred prosecution agreement or a nonprosecution agreement is made" from "act[ing] as or employ[ment] by a corporate monitor with respect to *that* deferred

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"has a financial interest"). The Model Rules are in accord. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11(d)(2)(ii).

[45] The Transparency and Integrity in Corporate Monitoring Act of 2009, H.R. ___, 111th Cong. § 2(a) (2009).

[46] *See id.*

prosecution agreement or *a* nonprosecution agreement."[47] Thus, as currently drafted, the Act bars monitorships arising out of DPAs only to which a former employee has a connection, but bars monitorships arising out of *any* NPA, whether the former employee has any connection to the underlying matter or not. Deletion of the "a" that immediately precedes "nonprosecution agreement" in the last clause of section 2 of the Act would correct this scrivener's error if, in fact, this is not intentional. And, even if this nonparallel treatment is not an error, I recommend that the Subcommittee consider making this change.

2. The Act's Benefits

The proposed legislation would have several benefits.

First, and most significantly, it would target the problem of "revolving door" monitoring employment and the possibility or perception of self-dealing. The American public is deeply concerned about white collar and corporate crime: it wants more resources devoted to combat it[48] and white collar criminal defendants punished more harshly.[49] To give the public confidence in white collar crime enforcement, it is critical that the government's white collar crime apparatus itself be free of corruption. As I have noted, it is not clear that bad monitoring appointments have actually been made, or that corruption has actually tainted the appointment process. Moreover, after searching public documents, I am unaware of any monitors who have been appointed who previously

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[47] *See id.* (emphasis added).

[48] *See* National White Collar Crime Center, *The 2005 National Public Survey on White Collar Crime* (2005) (noting that 56.7% of individuals surveyed indicated that they believed that the government is not allocating enough resources to combat white collar crime).

[49] *See* James D. Unnever, Michael L Benson & Francis T. Cullen, *Public Support for Getting Tough on Corporate Crime: Racial and Political Divides*, 45 J. RES. CRIME & DELINQ. 163, 177 (2008) ("77.7 percent of Americans strongly support stricter penalties, including longer prison terms and higher fines for corporate executives who conceal their company's true financial condition. Only 6.5 percent of Americans either 'oppose strongly' or 'oppose somewhat' punishing corporate criminals more severely.").

worked on the same matter they later monitored, so it does not appear that this is currently a significant issue. Nonetheless, the proposed legislation would impose prophylactic measures that would reduce the possibility of such problems. Thus, the proposed legislation would maintain and increase public confidence in the criminal justice system, especially in the white collar arena, and in government operations. It would send a healthy message to the public, including the regulated entities themselves, that the monitoring appointment process is above-board and free from corruption.

Second, the proposed legislation is narrowly-tailored. If the scrivener's error that I identify were corrected, it would bar former prosecutors from acting as or working for a monitor only on the same matters on which they worked while in the government, and only for a short period of time. If anything, the length of the bar may be too short. The most analogous current provision to the legislative proposal is 18 U.S.C. § 207(a)(1)'s prohibition on communication or appearing on behalf of a person in the same matter in which the former employee participated.[50] That prohibition is permanent. The justifications for barring former prosecutors from acting as or working for a monitor in a matter in which he or she participated while in the government do not seem to diminish with the passage of time.

The proposed legislation also appropriately applies not only to United States Attorneys but also to line-level Assistant United States Attorneys. Given that the primary policy benefit of the proposal is its effect on public perception, no substantive distinction should be made between political appointees and those who serve under them. Reports of an award of a lucrative monitorship in a no-bid contract would have an equally deleterious effect on public confidence whether it identified the contract recipient as the

[50] 18 U.S.C. § 207(a)(1).

United States Attorney who oversaw the prosecution that created the employment opportunity as it would if the contract recipient were the line AUSA who handled the prosecution from day-to-day.

Indeed, if anything, the scope of covered persons under the proposed legislation is too narrow. It applies only to former employees of United States Attorneys' offices, but not to former political appointees, supervisors, and line prosecutors in Main Justice. DOJ's Criminal Division is responsible for more than one-third of monitor appointments[51] and there is no apparent reason to exempt them—or top DOJ officials like the Attorney General, Deputy Attorney General, and their staffs—from these prohibitions.

Third, the proposed legislation finds analogs in other areas. For example, the Federal Board of Governors imposes post-employment restrictions on its members, making them "ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank."[52] Similarly, members of the Board of the Farm Credit Administration are ineligible to work for "any institution of the Farm Credit System" while they are in office and for two years thereafter.[53] And the rules of the Supreme Court of the United States bar former law clerks from "participat[ing] in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court" for two years after the end of a

[51] Garrett, *supra* note 17, at 938-57.
[52] 12 U.S.C. § 242. This restriction does "not apply to a member who has served the full term for which he was appointed." *Id.*
[53] 12 U.S.C. § 2242(a). Legislation creating the Public Company Accounting Oversight Board (PCAOB) charges the PCAOB with "establish[ing] ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the [SEC], with respect to Board-related matters) for 1 year for former members of the Board, and an appropriate period (not to exceed 1 year) for former staff of the Board." 15 U.S.C. § 7211(g)(3). Although it is not clear that this "practice" bar would prohibit monitoring-like activity, it does have the advantage of addressing this phenomenon not just at the Board level, but at the staff level as well.

clerkship and ever "participat[ing] in any professional capacity in any case that was pending in this Court during the employee's tenure."[54]

Fourth, the proposed legislation has few significant costs. Most significantly, it would not reduce the actual quality of monitors. In every case, there will be thousands of former prosecutors who will not be subject to the legislation's prohibitions who could act as or work for monitors. Just as the white collar bar competes vigorously to obtain representations in every white collar investigation, despite the fact that some former prosecutors are barred from that competition because they worked on the investigation while working in the government, the supply of available lawyers nonetheless vastly exceeds the number of individuals needing representation. Moreover, the proposed bar lasts only one to two years. Thus, even those former prosecutors to whom the bar applies can act as or work for monitors after the expiration of the exclusion period. Finally, it is not entirely clear that former prosecutors are always the best choice for all monitoring assignments. Individuals with experience in corporate America, Independent Private Sector Inspector Generals,[55] former compliance officers, investigation firm personnel, former government officials outside of DOJ or the SEC, or accountants or other professionals, might be better monitors in many situations.

Moreover, the minimal benefits that might obtain from allowing the prosecutors subject to the proposed legislation's bar to serve as monitors are insufficient to justify the

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[54] SUP CT. R. 7. Legislation creating the Public Company Accounting Oversight Board (PCAOB) charges the PCAOB with "establish[ing] ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the [SEC], with respect to Board-related matters) for 1 year for former members of the Board, and an appropriate period (not to exceed 1 year) for former staff of the Board." 15 U.S.C. § 7211(g)(3). Although it is not clear that this "practice" bar would prohibit monitoring-like activity, it does have the advantage of addressing this phenomenon not just at the Board level, but at the staff level as well.

[55] *See* GAO Testimony, *supra* note 23, at 25; *see also* International Association of Independent Private Sector Inspectors General, *available at* http://www.iaipsig.org/.

cost of such appointments to public trust and confidence. The prosecutors who worked on a particular case certainly know more about the case than most other people. But this informational advantage, and even the reduction in costs it might entail because it might reduce the amount of time necessary for the monitor and his or her staff to become familiar with a subject company, is inherent in any revolving-door situation. It is virtually always true that the person who just worked on a matter while in the government knows that matter better than virtually anyone outside the government. But such people are routinely prohibited from working on the same matter when they leave government service for the reasons I identified at the outset of my testimony.

The fact that monitors are typically not in adversarial relationships with the government, in contrast to former government lawyers who might work as advocates in particular matters, does not change the analysis. The primary benefit of the proposed legislation is its restorative impact on the public trust. The public cynicism that perceived self-dealing breeds is not mitigated depending on the nature of the relationship between the self-dealing party and the government. Many members of the public would undoubtedly view a monitor who worked on the prosecution that created the monitorship as having used his or her government position to create a job opportunity. That is the essence of the perceived corruption of the revolving door. Moreover, the regulated entity itself may be distrustful of such a monitor. Given that the main purpose of a monitorship is to improve the company's compliance with the law, in order to foster respect for the law, it is important in this context that the government is beyond reproach.

V. Conclusion

Thank you for allowing me to testify and share my thoughts on this legislation. I would be happy to answer any questions that you might have.

Mr. COHEN. Thank you, Mr. Barkow. I appreciate your observing the red light. And recently deceased and former person that sat at that chair, Mr. William Safire, would have appreciated your testimony as well, I think.

Our second witness is Ms. Eileen Larence. Is it Lawrence or Larence?

Ms. LARENCE. Larence.

Mr. COHEN. Larence? Ms. Larence currently serves as director for homeland security and justice issues at the U.S. Government Accountability Office. In this capacity she manages congressional requests to assess the various law enforcement and DOJ issues as well as state of terrorism related information sharing since 9/11.

Ms. Larence, will you begin your testimony?

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

Ms. LARENCE. Chairman Cohen, Ranking Member Franks and Chairman Conyers, I am pleased to provide the results of our ongoing review of Department of Justice practices in using deferred and non-prosecution agreements rather than prosecution to address some corporate crime.

My testimony today will focus more specifically on the department's use of independent monitors to ensure company compliance with these agreements. Concerns about monitors and their independence have been raised, especially when U.S. attorney offices require companies to hire certain monitors, such as former Attorney General Ashcroft.

For our work, we interviewed or surveyed companies, monitors and department officials on their views about how monitors are selected, what experience the monitors have, and how companies can resolve concerns about their monitors. In 40 cases to date, Justice has required the companies hire and pay an independent monitor. Justice does this when it does not have the time, resources or requisite technical expertise to conduct the monitoring, among other reasons.

Companies usually, but not always, play some part in identifying and selecting monitors, although Justice approves the ultimate decision. Company and Justice officials say they typically use personal knowledge and colleague recommendations to identify monitors and are usually looking for expertise, including former Justice experience or certain legal or industry knowledge, as well as assurance that the monitor is free of any conflict of interest.

In March 2008 Deputy Attorney General Morford issued guidelines calling for the department and companies to collaborate on selecting monitors and to ensure they are qualified and did not have conflicts, among other things. Each litigating unit is to use an internal committee to select monitors and obtain the deputy attorney general's approval on this decision.

Justice has selected four monitors since the memo and complied with these guidelines in each case. However, Justice does not always document its compliance, and in June testimony to you, we recommended that Justice do so to ensure accountability. In response, since August, Justice now requires that the Office of the

Deputy Attorney General use a checklist showing compliance with the guidelines.

So what experience did the monitors provide? Companies have hired 42 individual monitors so far, and more than half had previously worked with Justice, although only a few were selected within 3 years of leaving the department. Eight worked in the same Justice unit that issued the DPA or NPA. The remaining monitors had experience in state or local government, the private sector, and other Federal entities and agencies, among other areas.

Eight of 13 company representatives we contacted, most of whom had monitors who worked with Justice, valued and did not have concerns about the monitor's Justice experience. But five representatives, including several whose monitors worked at Justice, said this experience could appear to compromise the independence, although they did not have this concern with their individual monitor. The Criminal Division requires monitors and others to certify they are free of conflicts, which could be one way to address concerns about favoritism.

Finally, we looked at how companies resolve concerns about their monitors. Seven of 13 raised concerns about the scope and performance of their monitors, three about the monitor's total compensation, and three about the monitor's rates, which range from about $300 to $900 an hour for companies in our survey.

But some companies were not certain how they could resolve these concerns or what role Justice could play in this. Justice officials said the department could help in some instances, but would be limited, once a company and a monitor signed a contract, since Justice is not a party to that contract. Justice officials said it would then generally be up to the company to ensure the monitor is performing.

Justice also said companies could incorporate the monitor requirements spelled out in the DPA or NPA into the monitor's contract and include a provision to terminate the contract if the monitor didn't perform. But only one of 13 companies we surveyed had such a provision. And it is not certain what leverage companies may have to include one, given that Justice ultimately selects monitors.

The fraud section of the Criminal Division and at least one U.S. attorneys office include in the DPA or NPA itself an explanation of the role they will play in resolving specific monitor concerns. We are recommending that the attorney general direct all litigating components and use the training offices to do this, depending on the facts and circumstances of each case.

Mr. Chairman, that concludes my statement, and 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

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CORPORATE CRIME

Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts

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

GAO-10-260T

November 19, 2009

CORPORATE CRIME

Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts

GAO Accountability • Integrity • Reliability

Highlights

Highlights of GAO-10-260T, a testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

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 addresses (1) the extent to which prosecutors adhered to DOJ's monitor selection guidelines, (2) the prior work experience of monitors and companies' opinions of this experience, and (3) the extent to which companies raised concerns about their monitors, and whether DOJ had defined its role in resolving these concerns. Among other steps, GAO reviewed DOJ guidance and examined the 152 agreements negotiated from 1993 (when the first 2 were signed) through September 2009. GAO also interviewed DOJ officials, obtained information on the prior work experience of monitors who had been selected, and interviewed representatives from 13 companies with agreements that required monitors. These results, while not generalizable, provide insights into monitor selection and oversight.

What GAO Recommends

GAO recommends that DOJ clearly communicate its role in resolving conflicts between companies and monitors. DOJ provided technical comments, which GAO incorporated.

View GAO-10-260T or key components. For more information, contact Eileen R. Larence at (202) 512-8777 or larencee@gao.gov.

What GAO Found

Prosecutors adhered to DOJ guidance issued in March 2008 in selecting monitors required under agreements entered into since that time. Monitor selections in two cases have not yet been made due to challenges in identifying candidates with proper experience and resources and without potential conflicts of interests with the companies. DOJ issued guidance in March 2008 to help ensure that the monitor selection process is collaborative and based on merit; this guidance also requires prosecutors to obtain Deputy Attorney General approval for the monitor selection.

For DPAs and NPAs requiring independent monitors, companies hired a total of 42 different individuals to oversee the agreements; 23 of the 42 monitors had previous experience working for DOJ—which some companies valued in a monitor choice—and those without prior DOJ experience had worked in other federal, state, or local government agencies, the private sector, or academia. The length of time between the monitor's leaving DOJ and selection as a monitor ranged from 1 year to over 30 years, with an average of 13 years. While most of the companies we interviewed did not express concerns about monitors having prior DOJ experience, some companies raised general concerns about potential impediments to independence or impartiality if the monitor had previously worked for DOJ or had associations with DOJ officials.

Representatives for more than half of the 13 companies with whom GAO spoke raised concerns about the monitor's cost, scope, and amount of work completed—including the completion of compliance reports required in the DPA or NPA—and were unclear as to the extent DOJ could be involved in resolving such disputes, but DOJ has not clearly communicated to companies its role in resolving such concerns. Companies and DOJ have different perceptions about the extent to which DOJ can help to resolve monitor disputes. DOJ officials GAO interviewed said that companies should take responsibility for negotiating the monitor's contract and ensuring the monitor is performing its duties, but that DOJ is willing to become involved in monitor disputes. However, some company officials were unaware that they could raise monitor concerns to DOJ or were reluctant to do so. Internal control standards state that agency management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals. While one of the DOJ litigating divisions and one U.S. Attorney's Office have made efforts to articulate in the DPAs and NPAs what role they could play in resolving monitor issues, other DOJ litigation divisions and U.S. Attorney's Offices have not done so. Clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors would help increase awareness among companies and better position DOJ to be notified of potential issues related to monitor performance.

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) selection and use of independent monitors in corporate deferred prosecution and non-prosecution agreements. According to the DOJ, one of its chief missions is to ensure the integrity of the nation's business organizations and protect the public from corporate corruption. In light of this goal, DOJ has prosecuted 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. In particular, 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, and as an alternative to criminal prosecution or declination of prosecution, DOJ guidance allows prosecutors to negotiate agreements—referred to as deferred prosecution (DPA) and non-prosecution (NPA) agreements. These agreements may 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. As part of DPAs and NPAs, prosecutors may also require a company to hire, at its own expense, an independent monitor to oversee the company's compliance with the agreement. DOJ and companies have generally worked together to select monitors, but DOJ leaves it up to the company to enter into a contract with a monitor that specifies the monitor's fees, among other things.

DOJ views DPAs and NPAs as appropriate tools to use in cases where the goals of punishing and deterring criminal behavior, providing restitution to

[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.

victims, and reforming otherwise law-abiding companies can be achieved without criminal prosecution. The use of these agreements and the associated monitors, however, is not without debate. Some commentators have acknowledged monitors' value in ensuring company compliance with the terms of DPAs and NPAs and in instituting corporate reform, but have also pointed to challenges associated with monitorships, such as concerns regarding potential favoritism in the monitor selection process and questions about monitor accountability, oversight, and costs.

In June 2009, we testified before this subcommittee regarding our ongoing work on DOJ's use and oversight of DPAs and NPAs.[3] With regard to the selection and use of monitors, we reported that DOJ used independent monitors as one mechanism to ensure that companies were complying with the agreements, where monitors were typically required to file written reports with prosecutors on the companies' progress. Also, we reported in our testimony that DOJ generally took the lead in selecting monitors and varied in the extent to which it involved companies in monitor selection decisions. In cases where DOJ officials identified monitor candidates, they generally did so based on their personal knowledge of individuals whose reputations suggested that they would be effective monitors, or through recommendations from colleagues or professional associates who were familiar with the requirements of a monitorship. We reported that DOJ had acknowledged concerns about the cost to companies of hiring a monitor and perceived favoritism in the selection of monitors, and thus issued guidance in March 2008 to help ensure that its monitor selection process is collaborative and merit-based. Lastly, we reported that companies we spoke with identified concerns about the amount and scope of the monitors' work, but believed that they had little leverage to resolve these issues, and therefore would like DOJ to assist them in doing so.

My testimony today includes additional findings since our June 2009 testimony on aspects relating to the selection and use of independent monitors in DPAs and NPAs, including: (1) the extent to which prosecutors adhered to DOJ guidelines regarding selecting monitors for

[3] GAO, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution Agreements and Non-Prosecution Agreements*, GAO-09-636T (Washington, D.C.: June 25, 2009). This statement provided preliminary observations on factors DOJ considered when entering into and setting the terms of the agreements, methods DOJ used to oversee companies' compliance, the monitor selection process, and companies' perspectives regarding the costs and role of the monitor.

DPAs and NPAs, (2) what previous professional experience monitors had and what were company perspectives on monitors' experience, and (3) to what extent, if at all, companies raised concerns about their monitors, and whether DOJ has defined its role in resolving any concerns. 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.

To address all 3 objectives, we identified 152 DPAs and NPAs that DOJ prosecutors had negotiated from 1993 (when the first two were signed) through September 2009 (which was the end of our review period), and reviewed copies of all but one of the agreements.[4] Of the 152 agreements, 48 required the appointment of an independent monitor. We interviewed prosecutors from DOJ's Criminal Division and 12 U.S. Attorneys Offices (USAO) that had negotiated most (119) of the 152 agreements. 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 USAOs because they were the only ones that had negotiated at least 2 agreements, of which at least 1 had been completed as of September 30, 2008. During our interviews, we discussed 57 agreements. Of these 57, 25 were completed agreements that required companies to institute an ethics or compliance program. In addition, DOJ required 15 of the 25 companies to hire an independent monitor; we interviewed or obtained written responses from legal representatives or compliance officials from 13 of these 15 companies.[5] Since we determined which DOJ officials and company representatives to interview based on a nonprobability sample, the information we obtained is not generalizable to all DOJ litigating components, U.S. Attorneys Offices, and companies

[4] This agreement was sealed by order of the court. We obtained a DOJ press release describing the key terms in the agreement.

[5] Two companies declined to participate in interviews.

involved in DPAs and NPAs.[6] However, the interviews provided insights into the selection and use of independent monitors in DPAs and NPAs.

To assess whether DOJ had selected monitors according to DOJ's March 2008 guidelines, we reviewed the six agreements that required companies to hire a monitor that had been entered into since the issuance of the guidelines. We also reviewed documentation maintained by the Office of the Deputy Attorney General (ODAG) on the procedures used to select the four monitors that had been selected as of October 2009, and discussed the status of the selection process for the other two agreements with DOJ. We compared the selection processes for the six agreements to the requirements of DOJ's March 2008 guidelines.

To assess the prior experience of DOJ-appointed monitors for the 46 agreements where monitor selections had been completed, we obtained the names of the monitors from DOJ or company representatives and reviewed publicly available biographies that detailed these monitors' prior work experience.[7] We also spoke with the 13 selected company legal representatives and compliance officials regarding companies' perspectives on monitors' prior experience.

To assess companies' concerns, if any, with their monitors, and DOJ's role in resolving conflicts between companies and monitors, we conducted a Web-based survey of legal representatives or compliance officials from the 23 companies with agreements that required monitors, where the agreement had been completed, to obtain company views on the monitoring process. We obtained responses from 13 of the 23 companies we surveyed. Since we surveyed company officials involved with agreements that had been completed, the information we obtained is not

[6] DOJ's litigating components and the U.S. Attorneys Offices, among other things, litigate on behalf of the U.S. government by enforcing the law and defending the interests of the United States according to the law. The litigating components include the Criminal Division, Antitrust Division, Civil Division, Civil Rights Division, Environment and Natural Resources Division, National Security Division, and Tax Division. Seven of these litigating components—excluding the U.S. Attorneys Offices—are based at DOJ headquarters in Washington, D.C. In addition, the Office of the Solicitor General conducts all litigation on behalf of the U.S. in the Supreme Court and supervises the handling of litigation in the federal appellate courts.

[7] We obtained the name of the monitor for one company from that company's required report to the Securities and Exchange Commission covering major events that shareholders should know about, and the name of a monitor for another company from the October 2007 edition of *Corporate Counsel*.

generalizable; however, the survey responses provided useful insights into company perspectives on monitor contracts and performance. We also spoke with companies' legal representatives and compliance officials regarding the types of issues that may arise between companies and monitors in negotiating the monitor contracts and carrying out the monitorship. We discussed with Senior Counsel to the ODAG what role, if any, DOJ should play in resolving any conflicts between companies and monitors. We compared our findings on DOJ's role in resolving conflicts between companies and monitors with criteria on internal control standards in the federal government.[8]

We conducted this performance audit from September 2008 to November 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.

In summary, DOJ issued guidance in March 2008—known as the Morford Memo—to help ensure that the monitor selection process is collaborative and merit based. DOJ prosecutors adhered to the Morford Memo in selecting 4 of the 6 monitors required under agreements entered into since March 2008; DOJ has not yet selected the remaining 2 monitors. For all 48 DPAs and NPAs where DOJ required independent monitors, companies hired a total of 42 different individuals to oversee the agreements. Twenty-three of the 42 monitors had previous experience working for DOJ, and the 13 monitors who were not former DOJ employees had experience working in other federal, state, or local agencies, the private sector, the military, or academia.[9] Representatives from some of the companies we interviewed sought monitors with DOJ experience, whereas others raised general concerns about potential impediments to independence or impartiality if the monitor had previously worked for DOJ or had associations with DOJ officials. Representatives for more than half of the

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

[9] Four monitors hired by companies as required by a DPA or NPA are consulting firms or firms with technical expertise, rather than individuals, and we were, therefore, unable to determine which individuals worked on the monitorship and whether any had previous DOJ experience. We were unable to obtain information on the previous experiences of two monitors.

13 companies with whom we spoke or from whom we obtained written responses raised concerns about the monitor's cost, scope, and amount of work completed and were unclear as to whether DOJ could be involved in resolving such disputes s. However, given that DOJ is not a party to the contract between the company and monitor, DOJ and companies have different perceptions about the extent to which DOJ can help to resolve conflicts between companies and monitors. Internal control standards state that agency management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals. Clearly communicating to companies the role DOJ will play in addressing companies' disputes with monitors would help better position DOJ to be notified of potential issues related to monitor performance.

To provide clarity regarding DOJ's role in resolving disputes between companies and monitors, we recommend that the Attorney General direct all litigating components and U.S. Attorneys Offices to explain in each corporate DPA or NPA what role DOJ could play in resolving such disputes, given the facts and circumstances of the case. We requested comments on a draft of this statement from DOJ. DOJ did not provide official written comments to include in the statement. However, in an email sent to us on November 17, 2009, DOJ provided technical comments, which we incorporated into the statement, as appropriate.

Prosecutors Have Selected Monitors in Accordance with DOJ Guidelines, but Have Experienced Delays in Selecting Some Monitors

In March 2008, then Deputy Attorney General Craig Morford issued a memorandum—also known as 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 conflicts of interest, and is carried out in a manner that instills public confidence. [10] The Morford Memo requires USAOs 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—which may be proposed by either prosecutors, companies, or both—for each monitorship. DOJ components are also reminded to follow specified federal conflict of interest guidelines and to check monitor candidates for

[10] Deputy Attorney General Craig Morford, DOJ, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations* (Mar. 7, 2008).

potential conflicts of interest relationships with the company.[11] In addition, the names of all selected monitors for DPAs and NPAs must be submitted to ODAG for final approval.

Following issuance of the Morford Memo, DOJ entered into 35 DPAs and NPAs, 6 of which required the company to hire an individual to oversee the company's compliance with the terms of the DPA. As of November 2009, DOJ had selected monitors for 4 of the 6 agreements.[12] Based on our discussions with prosecutors and documentation from DOJ, we determined that for these 4 agreements, DOJ made the selections in accordance with Morford Memo guidelines. Further, while the Morford Memo does not specify a selection process that must be used in all cases, it suggests that in some cases it may be appropriate for the company to select the monitor or propose a pool of qualified candidates from which DOJ will select the monitor. In all 4 of these cases, the company either selected the monitor, subject to DOJ's approval, or provided DOJ with proposed monitor candidates from among which DOJ selected the monitor. However, while we were able to determine that the prosecutors complied with the Morford Memo based on information obtained through our interviews, DOJ did not fully document the selection and approval process for 2 of the 4 monitor selections. The lack of such documentation will make it difficult for DOJ to validate to an independent third-party reviewer, as well as to Congress and the public, that prosecutors across DOJ offices followed Morford Memo guidelines and that monitors were selected in a way that was fair and merit based. For example, for 1 of these 2 agreements, DOJ did not document who in the U.S. Attorney's Office was

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

[12] For one additional DPA, the company was required to retain an external auditor. According to one of the prosecutors for this case, the external auditor was responsible for fulfilling and accelerating the duties outlined in another agreement between the company and the Internal Revenue Service. Given that the Internal Revenue Service would be primarily responsible for oversight of the company, and given the limited mandate of the external auditor, the prosecutors determined that the external auditor would not be considered a monitor as described in the Morford Memo, and therefore, would not be subject to DOJ's monitor selection guidelines. The prosecutor also noted that the external auditor was responsible for ensuring that the company fully ceased to operate an area of the company's business where the criminal misconduct occurred; the Morford Memo identifies the situation in which a company has ceased operations in the area where the criminal misconduct occurred as one where a monitor may not be necessary. ODAG concurred with the prosecutor's assessment, noting that the external auditor would not be undertaking a vast array of activities that monitors have typically undertaken related to internal controls, such as setting up an audit committee within the company, reviewing corporate decisions, or monitoring the entire company to detect misconduct.

involved in reviewing the monitor candidates, which is important because the Morford Memo requires that certain individuals in the office be part of the committee to consider the selection or veto of monitor candidates in order to ensure monitors are not selected unilaterally. For the second agreement, the Deputy Attorney General's approval of the selected monitor was relayed via telephone and not documented. As a result, in order to respond to our inquiries, DOJ officials had to reach out to individuals who were involved in the telephone call, one of whom was no longer a DOJ employee, to obtain information regarding the monitor's approval.

Documenting the reasons for selecting a particular monitor helps avoid the appearance of favoritism and verifies that Morford Memo processes and practices—which are intended to instill public confidence in the monitor selection process—were followed. Therefore, in our June 25, 2009, testimony, we recommended that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions.[15] DOJ agreed with our recommendation and, in August 2009, instituted such procedures. Specifically, DOJ requires ODAG to complete a checklist confirming receipt of the monitor selection submission—including the process used and reasons for selecting the monitor—from the DOJ component; ODAG's review, recommendation, and decision to either approve or reject the proposed monitor; the DOJ component's notification of ODAG's decision; and ODAG's documentation of these steps. For the two monitors selected during or after August 2009, DOJ provided us with completed checklists to confirm that ODAG had followed the new procedures.

While DOJ selected monitors in accordance with the Morford Memo, monitor selections have been delayed for three agreements entered into after the Morford Memo was issued. The selection of one monitor took 15 months from the time the agreement was signed and selection of two monitors, as discussed above, has been delayed for more than 17 months from the time the agreement was signed. According to DOJ, the delays in selecting these three monitors have been due to challenges in identifying candidates with proper experience and resources who also do not have potential conflicts of interest with the company. Further, DOJ's selection of monitors in these three cases took more time than its selection of monitors both prior to and since the issuance of the Morford Memo—

[15] GAO-09-636T.

which on average was about 2 months from the time the NPA or DPA was signed or filed.[13]

According to the Senior Counsel to the Assistant Attorney General for the Criminal Division, for these three agreements, the prosecutors overseeing the cases have communicated with the companies to ensure that they are complying with the agreements. Further, DOJ reported that the prosecutors are working with each of the companies to extend the duration of the DPAs to ensure that the duties and goals of each monitorship are fulfilled and, as of October 2009, an agreement to extend the monitorship had been signed for one of the DPAs. Such action by DOJ will better position it to ensure that the companies are in compliance with the agreements while awaiting the selections of the monitors.[15]

[13] For nine agreements, the monitor was selected prior to the agreement's execution. DOJ was unable to provide data on the timing of the monitors' selection in three cases. We recognize that the Morford Memo requires additional steps in the monitor selection process—including the establishment of a committee to consider candidates and the approval of the Deputy Attorney General—which were not required prior to the memo's issuance. However, according to the Senior Counsel to the Assistant Attorney General for the Criminal Division, monitor selections do not take longer as a result of the Morford Memo requirements.

[15] Because the agreements for which monitor selections have been delayed are ongoing, we did not interview representatives from the companies that entered into these agreements to obtain their perspectives on what impact, if any, delayed monitor selection might have on the company.

More Than Half of the Monitors Had Prior DOJ Experience; Some Companies Said Such Experience Was Valuable While Others Noted That It Might Impede Monitors' Independence or Impartiality

For the 48 DPAs and NPAs where DOJ required independent monitors, companies have hired a total of 42 different monitors, more than half of whom were former DOJ employees.[16] Specifically, of these 42 monitors, 23 previously worked at DOJ, while 13 did not.[17] The 23 monitors held various DOJ positions, including Assistant U.S. Attorney, Section Chief or Division Chief in a litigating component, U.S. Attorney, Assistant Attorney General, and Attorney General. The length of time between the monitor's separation from DOJ and selection as monitor ranged from 1 year to more than 30 years, with an average of 13 years. Five individuals were selected to serve as monitors within 3 years or less of being employed at DOJ. In addition, 8 of these 23 monitors had previously worked in the USAO or DOJ litigating component that oversaw the DPA or NPA for which they were the monitor. In these 8 cases, the length of time between the monitor's separation from DOJ and selection as monitor ranged from 3 years to 34 years, with an average of almost15 years.

Of the remaining 13 monitors with no previous DOJ experience, 6 had previous experience at a state or local government agency, for example, as a prosecutor in a district attorney's office; 3 had worked in federal agencies other than DOJ, including the Securities and Exchange Commission and the Office of Management and Budget; 2 were former judges; 2 were attorneys in the military; 3 had worked solely in private practice in a law firm; and 1 had worked as a full-time professor.[18]

[16] As of October 2009, a total of 48 companies were required to hire monitors to oversee their compliance with a DPA or NPA. Monitors have not been selected in 2 cases. Four companies required to hire monitors hired 2 individuals to serve as monitor. Also, in 2 cases, a parent company and its subsidiary companies entered into agreements at the same time and used the same monitor—in 1 case, the parent company and 1 subsidiary did so, while in the other case the parent company and 2 subsidiaries did so. In addition, 5 companies that were required to hire monitors hired monitors who had previously served as a monitor for a different company—in 1 case, 1 individual served as monitor for a total of 3 companies, while 3 additional individuals served as monitors for a total of 2 companies.

[17] Four monitors hired by companies as required by a DPA or NPA are consulting firms or firms with technical expertise, rather than individuals, and we were, therefore, unable to determine which individuals worked on the monitorship and whether any had previous DOJ experience. We were unable to obtain information on the previous experiences of two monitors.

[18] Four of the monitors had experience in more than one of these categories, therefore these numbers do not add to 13.

Of the 13 company representatives with whom we spoke who were required to hire independent monitors,[19] in providing perspectives on monitors' previous experience, representatives from 5 of these companies stated that prior employment at DOJ or an association with a DOJ employee could impede the monitor's independence and impartiality, whereas representatives from the other 8 companies disagreed. Specific concerns raised by the 5 companies—2 of which had monitors with prior DOJ experience—included the possibility that the monitor would favor DOJ and have a negative predisposition toward the company or, if the monitor recently left DOJ, the monitor may not be considered independent; however, none of the companies identified specific instances with their monitors where this had occurred. Of the remaining 8 company representatives who did not identify concerns, 6 of them worked with monitors who were former DOJ employees, and some of these officials commented on their monitors' fairness and breadth of experience. In addition 5 company representatives we spoke with who were involved in the monitor selection process said that they were specifically looking for monitors with DOJ experience and knowledge of the specific area of law that the company violated.

Companies Have Raised Concerns about the Scope and Cost of Monitors' Duties, and DOJ Has Not Communicated Its Role in Resolving Such Concerns

Officials from 8 of the 13 companies with whom we spoke raised concerns about their monitors, which were either related to how monitors were carrying out their responsibilities or issues regarding the overall cost of the monitorship. However, these companies said that it was unclear to what extent DOJ could help to address these concerns. Seven of the 13 companies identified concerns about the scope of the monitor's responsibilities or the amount of work the monitor completed.[20] For example, 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, such as a community service organization meeting held at the company when

[19] We spoke with representatives of one additional company that was required to hire a monitor, but, with DOJ's approval, the company was allowed to hire a monitor who was not independent. Specifically, the monitor who was selected had represented the company during a previous compliance investigation. Therefore, we did not discuss with these company representatives how, if at all, prior DOJ experience could affect a monitor's independence and impartiality.

[20] Two of the 13 companies did not provide information about the scope of the monitor's responsibilities or the amount of work completed by the monitor.

the DPA was related to securities fraud. As a result, the company believes that the overall cost of the monitorship—with 20 to 30 lawyers billing the company each day—was higher than necessary.[21]

Another company stated that its monitor did not complete the work required in the agreement in the first phase of the monitorship—including failing to submit semi-annual reports on the company's compliance with the agreement to DOJ during the first 2 years of the monitorship—resulting in the monitor having to complete more work than the company anticipated in the final phase of the monitorship. According to the company, this led to unexpectedly high costs in proportion to the company's revenue in the final phase, which was significant because the company is small. Further, according to a company official, the monitor's first report contained numerous errors that the company did not have sufficient time to correct before the report was submitted to DOJ and, thus, DOJ received a report containing errors.[22]

While 6 of the 13 companies we interviewed did not express concerns about the monitor's rates, 3 companies expressed concern that the monitor's rate (which ranged from $290 per hour to a rate of $695 to $895 per hour among the companies that responded to our survey)[23] was high.[24] Further, while 9 of the 13 companies that responded to our survey believed that the total compensation received by the monitor or monitoring firm was reasonable for the type and amount of work performed (which, according to the companies that responded to our

[21] We were unable to obtain the monitor's perspective regarding the company's concerns because the monitor declined our request for an interview.

[22] We identified 24 agreements that required monitors to submit periodic reports to DOJ—and in some instances the company—describing the company's progress in meeting the terms of the agreement. Of the total 129 reports that were required as a result of these 24 agreements, DOJ provided us with 117. DOJ reported that it could not produce the remaining 12 of the 129 required reports from 7 different monitors because they were either not submitted by the monitor, were misplaced by DOJ, the reporting was completed orally but DOJ was unable to provide documentation confirming the completion of the oral reports, or—in the case of two agreements entered into in 1996 and 2000—DOJ was not able to obtain them from the federal records center.

[23] The hourly rates presented are those associated with the highest compensated individuals at the monitoring firm. Seven of the 13 companies that responded to the survey provided the monitors' hourly rates, while the remaining 6 did not.

[24] The remaining four companies did not comment on the monitor's rates.

survey, ranged from $8,000 to $2.1 million per month),[25] 3 companies did not believe it was reasonable.[26]

When asked how they worked to resolve these issues with the monitor, companies reported that they were unaware of any mechanisms available to resolve the issues—including DOJ involvement—or if they were aware that DOJ could get involved they were reluctant to seek DOJ's assistance. Specifically, three of the eight companies that identified concerns with their monitor were not aware of any mechanism in place to raise these concerns with DOJ. Four companies were aware that they could raise these concerns with DOJ, but three of these companies said that they would be reluctant to raise these issues with DOJ in fear of repercussions. Another company did not believe that DOJ had the authority to address their concerns because they were related to staffing costs, which were delineated in the contract negotiated between the company and the monitor, not the DPA.

However, DOJ had a different perspective than the company officials on its involvement in resolving disputes between companies and monitors. According to the Senior Counsel to the ODAG, while DOJ has not established a mechanism through which companies can raise concerns with their monitors to DOJ and clearly communicated to companies how they should do so, companies are aware that they can raise monitor-related concerns to DOJ if needed. Further, it was the Senior Counsel's understanding that companies frequently raise issues regarding DPAs and NPAs to DOJ without concerns about retribution, although to his knowledge, no companies had ever raised monitor-related concerns to ODAG. The Senior Counsel acknowledged, however, that even if companies did raise concerns to DOJ regarding their monitors, the point in the DPA process at which they did so may determine the extent of DOJ's involvement. Specifically, according to this official, while he believed that DOJ may be able to help resolve a dispute after the company and monitor enter into a contract, he stated that, because DOJ is not a party to the contract, if a conflict were to arise over, for instance, the monitor's failure to complete periodic reports, DOJ could not compel the monitor to

[25] Eight companies we surveyed provided information on the reported overall costs of their monitorships. These reported costs were: $38.7 million; $12 million; $9.2 million; $5.7 million; $3.9 million; $3 million; $2.7 million; and $200,000.

[26] One company did not know if the total compensation received by the monitor was reasonable for the type and amount of work performed.

complete the reports, even if the requirement to submit periodic reports was established in the DPA or NPA.

In contrast, the Senior Counsel said that if the issues between monitors and companies arise prior to the two parties entering into a contract, such as during the fee negotiation phase, DOJ may be able to play a greater role in resolving the conflict. However, the mechanisms that DOJ could use to resolve such issues with the monitor are uncertain since while the monitor's role is delineated in the DPA, there is no contractual agreement between DOJ and the monitor. DOJ is not a party to the monitoring contract signed by the company and the monitor, and the monitor is not a party to the DPA signed by DOJ and the company. We are aware of at least one case in which the company sought DOJ's assistance in addressing a conflict with the monitor regarding fees, prior to the monitor and company signing their contract. Specifically, one company raised concerns about the monitor to the U.S. Attorney handling the case, stating that, among other things, the company believed the monitor's fee arrangement was unreasonably high and the monitor's proposed billing arrangements were not transparent. The U.S. Attorney declined to intervene in the dispute stating that it was still at a point at which the company and the monitor could resolve it. The U.S. Attorney instructed the company to quickly resolve the dispute directly with the monitor—noting that otherwise, the dispute might distract the company and the monitor from resolving the criminal matters that were the focus of the DPA. The U.S. Attorney also asked the company to provide an update on its progress in resolving the conflict the following week. A legal representative of the company stated that he did not believe he had any other avenue for addressing this dispute after the U.S. Attorney declined to intervene. As a result, although the company disagreed with the high fees, it signed the contract because it did not want to begin the monitorship with a poor relationship with the monitor resulting from a continued fee dispute.

The Senior Counsel to the ODAG stated that because the company is signatory to both the DPA or NPA and the contract with the monitor, it is the company's responsibility to ensure that the monitor is performing the duties described in the agreement. However, 5 of the 7 companies that had concerns about the scope of the monitor's responsibilities or the amount of work the monitor completed did not feel as if they could adequately address their issues by discussing them with the monitors. This is because two companies said that they lacked leverage to address issues with

monitors and two companies feared repercussions if they raised issues with their monitors.[27] The Senior Counsel stated that one way the company could hold the monitor accountable is by incorporating the monitor requirements listed in the DPA into the monitoring contract and additionally include a provision in the contract that the monitor can be terminated for not meeting these requirements. However, the companies that responded to our survey did not generally include monitor termination provisions in their contracts. Specifically, 7 of the 13 companies that responded to our survey reported that their monitoring contract contained no provisions regarding termination of the monitor, and another 3 companies reported that their contract contained a clause that actually prohibited the company from terminating the monitor.[28] Only 1 company that responded to our survey reported that the contract allowed it to terminate the monitor with written notice at any time, once the company and DOJ agreed (and subject to the company's obligation to pay the monitor).[29] This contract also included a provision allowing for the use of arbitration to resolve disputes between the company and the monitor over, for instance, services rendered and fees. In order to more consistently include such termination clauses in the monitoring contracts, companies would need the monitor's consent. Given that DOJ makes the final decision regarding the selection of a particular monitor—and that DOJ allows for, but does not require, company involvement in the monitor selection process—it is uncertain how much leverage the company would have to negotiate that such termination or dispute resolution terms be included in the contract with the monitor.

Because monitors are one mechanism that DOJ uses to ensure that companies are reforming and meeting the goals of DPAs and NPAs, DOJ has an interest in monitors performing their duties properly. While over the course of our review, we discussed with DOJ officials various mechanisms by which conflicts between companies and monitors could be resolved, including when it would be appropriate for DOJ to be involved,

[27] GAO-09-636T. An official from the remaining company did not discuss whether the company had leverage to address issues with its monitor or feared repercussions from doing so.

[28] In addition, in our broader review of the 26 DPAs or NPAs that required companies to hire a monitor, none contained clauses that allowed the company to terminate the monitorship for any reason.

[29] Two companies did not know whether their monitoring contracts contained any provisions related to termination of the monitorship.

DOJ officials acknowledged that prosecutors may not be having similar discussions with companies about resolving conflict. This could lead to differing perspectives between DOJ and companies on how such issues should be addressed. Internal control standards state that agency management should ensure that there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals. According to DOJ officials, the Criminal Division Fraud Section has made some efforts to clarify what role it will play in resolving disputes between the company and the monitor. For example, 11 of 17 DPAs or NPAs entered into by the Fraud Section that required monitors allowed companies to bring to DOJ's attention any disputes over implementing recommendations made by monitors during the course of their reviews of company compliance with DPAs and NPAs. In addition, 8 of these 11 agreements provide for DOJ to resolve disputes between the company and the monitor related to the work plan the monitor submitted to DOJ and the company before beginning its review of the company. Additionally, in 5 agreements entered into by one USAO, the agreement specified that the company could bring concerns about unreasonable costs of outside professionals—such as accountants or consultants—hired by the monitor to the USAO for dispute resolution. While the Criminal Division Fraud Section and one USAO have made efforts to articulate in the DPA or NPA the extent to which DOJ would be willing to be involved in resolving specific kinds of monitor issues for that particular case, other DOJ litigating divisions and USAOs that entered into DPAs and NPAs have not. Clearly communicating to companies and monitors in each DPA and NPA the role DOJ will play in addressing companies' disputes with monitors would help better position DOJ to be notified of potential issues companies have identified related to monitor performance.

Conclusions

According to DOJ, DPAs and NPAs can be invaluable tools for fighting corporate corruption and helping to rehabilitate a company, although use of these agreements has not been without controversy. DOJ has taken steps to address concerns that monitors are selected based on favoritism or bias by developing and subsequently adhering to the Morford Memo guidelines. However, once the monitors are selected and any issues—such as fee disputes or concerns with the amount of work the monitor is completing—arise between the monitor and the company, it is not always clear what role, if any, DOJ will play in helping to resolve these issues. Clearly communicating to companies and monitors the role DOJ will play in addressing companies' disputes with monitors would help better position DOJ to be made aware of issues companies have identified

related to monitor performance, which is of interest to DOJ since it relies on monitors to assess companies' compliance with DPAs and NPAs.

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 provide clarity regarding DOJ's role in resolving disputes between companies and monitors, the Attorney General should direct all litigating components and U.S. Attorneys Offices to explain in each corporate DPA or NPA what role DOJ could play in resolving such disputes, given the facts and circumstances of the case.

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, in an email sent to us on November 17, 2009, DOJ 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 found on the last page of this statement. Individuals making key contributions to this statement include Kristy N. Brown, Jill Evancho, Tom Jessor, Sarah Kaczmarek, Danielle Pakdaman, and Janet Temko, as well as Katherine Davis and Amanda Miller.

Mr. COHEN. Thank you very much.

Those annoying bells mean we are supposed to vote, but the 15-minute vote really becomes like a 20-minute vote, so we can probably get both of your testimonies in, if you are nice with the red light, and I get this introduction done quickly.

Our third witness is Mr. Gil—is it Soffer?

Mr. SOFFER. Yes.

Mr. COHEN. Soffer, co-chair of the firm of Katten Muchin Rosenman—white collar. He joined the firm in August 2000, 6

years Federal prosecutor prior to that, concentrates his practice in white-collar criminal litigation, corporate fraud litigation, corporate investigations, insurance litigation and anti-fraud, counsel to the deputy attorney general in D.C., and shortly thereafter appointed as associate deputy general.

During his year-long term with the Department of Justice, he has played an integral part in drafting the department's corporate monitor principles and corporate charging principles and provided training on the latter policy to U.S. attorneys offices nationwide, previously served in DOJ as assistant U.S. attorney in Chicago from 1994 to 2000.

Will you proceed with your testimony, Mr. Soffer?

TESTIMONY OF GIL M. SOFFER, PARTNER, KATTEN MUCHIN ROSENMAN, LLP

Mr. SOFFER. Yes, thank you. Chairman Cohen, Ranking Member Franks and Chairman Conyers, thank you very much for the opportunity to testify today about an issue of great importance to prosecutors, corporations and the public alike.

As you mentioned, I served last year as associate deputy attorney general, and in that capacity I have played a role in formulating the department's corporate monitor principles. We had one overarching goal in mind with respect to the selection of monitors, and that was to formulate a selection process designed to produce both a high-quality and conflict-free corporate monitor. I believe the department's corporate monitor principles achieve that goal.

The very first principle goes to the matter before the subcommittee today. Simply put, principle number one is designed to ensure integrity in monitor selection. It lays out several key requirements toward that end.

First, government lawyers involved in the selection process must comply with all existing conflict of laws guidelines—conflict of interest guidelines. Second, the government must establish a committee to review monitor candidates. And third, the deputy attorney general's office must approve the selection of the monitor.

Principle one also directs that monitors be selected, where possible, from a pool of at least three qualified candidates. Now, these requirements have teeth. That is particularly true with respect to concerns over perceived cronyism by a prosecutor's office. Requiring that monitors be vetted by a committee diminishes the influence of any one person over the selection process, be that a U.S. attorney or assistant attorney general or even a line prosecutor.

Likewise, requiring that monitors be selected, if possible, from a pool of candidates makes it even less likely that monitors will be cherry-picked by government officials seeking to reward friends or former colleagues.

Even more significant, requiring the approval of the Office of the Deputy Attorney General provides an extraordinary check and balance against the selection of monitors for inappropriate reasons. And I use the word "extraordinary" without exaggeration. There are few matters at the department that require consultation with the deputy attorney general's office. There are even fewer that require the approval of the deputy attorney general's office, and there are fewer still that require approval on individual criminal cases.

Now, I have seen the proposed legislation that would restrict the ability of former prosecutors to serve as monitors on cases in which they were involved while employed by the government. A limitation of this sort would certainly mitigate the perception that government lawyers might choose to work on a given case with the intent of angling for a monitorship after their government service expires. It would also reduce the appearance of favoritism in the selection of monitors.

These are worthy goals, and in fact they would complement the precautions that are already set forth in the department's monitor principles. But even assuming that such restrictions are appropriate, the question remains who should impose them and when.

Legislation has many virtues, including the force of law, the imprimatur of this body, and a permanence unlike any guidance that the executive branch can issue. But it also poses a risk where the practices in question are evolving and where a sufficient record of experience has not yet developed on which to fashion immutable policy. In such matters care must be taken to avoid imposing an inflexible set of rules that may fit one type of case, but that restrict the ability of prosecutors and corporations alike to handle other cases with maximum effectiveness.

Now, there are clearly sound arguments in favor of imposing a cooling off period on government lawyers before they become eligible to serve as monitors. It is not inconceivable, though, that an unusual case would warrant the involvement of a former prosecutor with experience in the same matter. All parties would arguably benefit from having a monitor with knowledge of the matter at hand and from the efficiencies that such a monitor would bring to the engagement.

Alternatively, even if the monitor herself did not work on the same matter previously, she might wish to partner with the former prosecutor who did for the purpose of accelerating her own learning curve and tapping into the expertise of her partner.

Now, it may well be that any benefits of this sort simply are outweighed by the problems created by engaging former prosecutor as monitors on the same matters they handled while in government service, but that issue has not arisen in any monitor engagements to date.

Over time, as more cases involving monitors develop, principle one may require adjustment to ensure that its purposes are satisfied. At that point, the department, in the exercise of its law enforcement authority and with its ability to fine-tune any changes that may be appropriate for existing policy, would be well suited to make any necessary modifications. At present, however, the department's corporate monitor principles appear to have worked.

I thank you again for the opportunity, and I look forward to any questions that may be asked.

[The prepared statement of Mr. Soffer follows:]

PREPARED STATEMENT OF GIL M. SOFFER

STATEMENT OF

GIL M. SOFFER

CO-CHAIR, NATIONAL WHITE COLLAR PRACTICE
KATTEN MUCHIN ROSENMAN LLP

FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

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

CONCERNING

"TRANSPARENCY AND INTEGRITY IN CORPORATE MONITORING"

PRESENTED

NOVEMBER 19, 2009

Mr. Chairman and members of the Subcommittee, I am pleased to offer my views on transparency and integrity in the selection of corporate monitors. The issue is of great importance to prosecutors, defense counsel, and corporations alike. It is also an issue with which I am closely familiar. During my tenure last year as Associate Deputy Attorney General at the Department of Justice, it was my privilege to play a role in formulating the Department's Principles Concerning the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (the "Corporate Monitor Principles"). Those Principles were designed, in part, to address the very issues of transparency and integrity that are now under consideration by this Subcommittee.

Introduction

The meaning and use of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) have been the subject of much study, and indeed the subject of at least two hearings before this Subcommittee. For purposes of today's hearing, and to establish the appropriate context for a discussion of corporate monitor selection, two features of DPAs and NPAs bear emphasis. The first is the critical role they play in resolving corporate criminal cases. DPAs and NPAs occupy an important middle ground between declining prosecution, on the one hand, and charging and convicting a corporation, on the other. The options at either extreme involve serious drawbacks. Declination means that corporate criminal conduct goes unpunished, an obviously undesirable result, while charging and convicting a corporation may have ruinous consequences for shareholders, employees, pensioners, and the general public. DPAs and NPAs offer an alternative approach that takes into account both corporate malfeasance and the rights of innocent third parties.

A second feature of nearly all DPAs and NPAs is particularly relevant here: the obligation these agreements impose on corporations to implement effective compliance programs, or to enhance compliance programs already in existence. By imposing this requirement, DPAs and NPAs encourage companies to identify and eliminate unlawful behavior, prevent similar behavior from recurring, and generally restore a culture of compliance. Often companies can accomplish these goals on their own, without the assistance of outside counsel or consultants, and without the need for verification by third parties. Sometimes they cannot. When circumstances do call for outside assistance, DPAs and NPAs may call for corporate monitors.

Generally speaking, corporate monitors oversee and verify the implementation of compliance programs. Monitors represent neither the company nor the government, but rather are independent of both. They are retained and paid by the corporation, not the government, and their fees are negotiated with the corporation, not the government. As noted in the Corporate Monitor Principles, a monitor may be appropriate where a company "does not have an effective internal compliance program, or where it needs to establish necessary internal controls." Corporate Monitor Principles, § I. Corporate monitors may also be especially useful in cases involving complex or esoteric industries, where prosecutors are ill-equipped to perform a key task assigned to monitors: to "assess and monitor a corporation's compliance with the terms of the [DPA or NPA] specifically designed to address and reduce the risk of recurrence of the corporation's misconduct...." *Id.*

Monitor Selection

The Corporate Monitor Principles offer guidance on these and other issues relating to the use of corporate monitors, including the submission of reports by the monitor and the duration of

monitor engagements. But the first issue addressed by the Principles is one of paramount importance, and it goes directly to the matter before this Subcommittee today: namely, the integrity and transparency of the process by which monitors are selected.

Principle 1 is designed to ensure integrity in monitor selection. It requires that monitors be selected "based on the merits." To emphasize the point, Principle 1 demands a selection process that, "at a minimum," is designed to "(1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle." *Id.*

Having thus set out its purpose, Principle 1 lays out five requirements to ensure the integrity of the monitor selection process: (1) government lawyers involved in the selection process must comply with all existing conflict-of-interest guidelines; (2) the government must create a standing or *ad hoc* committee to review monitor candidates, meaning that individual United States Attorneys or Assistant Attorneys General – the politically appointed heads of their respective offices – cannot approve or veto monitors unilaterally; (3) the Office of the Deputy Attorney General must approve the monitor; (4) the government should not accept a monitor if he or she has an interest in, or relationship with, the corporation at issue; and (5) the corporation should agree not to employ or become affiliated with the monitor for at least one year after the monitorship expires. *Id.*

These requirements have teeth, particularly with respect to concerns over favoritism or perceived cronyism by a prosecutor's office. Requiring the selection of monitors by committee diminishes the influence of any one United States Attorney or Assistant Attorney General over the selection process. Even more significant, requiring the approval – not merely consultation,

but approval – of the Office of the Deputy Attorney General provides an extraordinary check and balance against the selection of monitors for inappropriate reasons. What is more, the Comment to Principle 1 directs that monitors be selected, where practicable, from a pool of at least three qualified monitor candidates. That directive reduces even further the possibility that monitors will be cherry-picked by government officials seeking to reward friends or former colleagues.

To be sure, Principle 1 leaves room for flexibility in the selection process. It notes explicitly that "there is no one method of selection that should necessarily be used in every instance." *Id.* Indeed, as noted in the Principle, "the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable," while in other cases "the facts may require the Government to play a greater role in selecting the monitor." *Id.* But the overarching goal remains constant: "Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, *and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence*." *Id.* (emphasis added).

Post-Employment Bar

Some have suggested that a "cooling-off" period be imposed on former prosecutors after they leave government service and before they become eligible to serve as corporate monitors. That restriction may indeed be sensible. Such a period would reduce the appearance of favoritism in the selection of monitors, and thereby complement the precautions set forth in the Corporate Monitor Principles. Likewise, it may make sense to limit the ability of former prosecutors to serve as monitors with respect to matters in which they were involved while employed by the government. A limitation of this sort would, among other things, mitigate the

perception that government lawyers might choose to work on a given case with the intent of angling for a monitoring engagement after their government service expires.

Even assuming that such restrictions are appropriate, however, the question remains: Who should impose them, and when? Legislation has among its many virtues the force of law, the imprimatur of Congressional authority, and a permanence unlike any or most guidance issued by the Executive Branch. But it also poses a risk where the practices in question are still evolving, and where a sufficient body of experience has not yet developed on which to fashion immutable policy. In such matters, care must be taken to avoid imposing an inflexible set of rules that may fit one type of case, but that restrict the ability of prosecutors and corporations alike to handle other cases with maximum effectiveness.

Consider, for example, the question of whether former prosecutors should be barred from serving as monitors on matters in which they were involved while in government service. It is beyond dispute that lawyers may not appear before the Department of Justice or other agency *on behalf of another person* with regard to matters in which they were involved as prosecutors. That restriction, set forth in 18 U.S.C. § 207(a)(1), targets an obvious conflict of interest, and, not coincidentally, implicates long-established canons of professional conduct. But corporate monitors represent neither the corporation, nor the government, nor any other person; rather, as set forth in the Corporate Monitor Principles, they are "independent from both the corporation and the Government." Corporate Monitor Principles, § IIIA2. Neither Section 207 nor various state rules of professional conduct specifically address the propriety of former government personnel serving as corporate monitors.

As noted, there are sound arguments in favor of restricting the ability of former government lawyers to become monitors in the same cases they handled as prosecutors. It is not

inconceivable, however, that an unusual case (perhaps one involving an esoteric industry) would warrant the involvement of a former prosecutor with experience in the same matter. Both the corporation and its shareholders, the government, and the general public would arguably benefit from having a monitor with knowledge of the matter at hand, and from the efficiencies that such a monitor would bring to the engagement. Alternatively, even if the monitor herself did not work on the same matter previously, she might wish to partner with a former prosecutor who did, for the purpose of accelerating her learning curve and availing herself of her partner's expertise.

Conclusion

It is an open question whether any such benefits outweigh the problems created by engaging former prosecutors as monitors on the same matters they handled while in government service. But the question does not appear to have arisen in any monitor engagements to date, and certainly not between the issuance of the Corporate Monitor Principles and my departure from the Department in January 2009. Neither, to my knowledge, have problems emerged, after the Principles were issued, from the selection of recent government attorneys as monitors. Over time, as more cases involving monitors develop, it may be that Principle 1 will require adjustment to ensure that its purposes are satisfied. At that point the Department – in the exercise of its law enforcement authority, and with its ability to fine-tune any changes to existing policy – would be well suited to make any necessary modifications. At present, however, the Department's effort to formulate guidance designed to ensure integrity and transparency in the selection process appears to have worked.

Thank you.

Mr. COHEN. Thank you, Mr. Soffer.

Although I believe we probably could get Professor Garrett's testimony in and get to vote on time, counsel has suggested that probably we should go ahead and amble up there and save Professor

Garrett for when we come back, which should be give or take 30 minutes.

This isn't an attempt to, like, freeze you and make it difficult to kick the field goal. We are not calling a timeout for that reason. We are just calling a recess so we can amble up there. And we will recess and come back. Thank you.

[Recess.]

Mr. COHEN. We are back. And our next witness will be Professor Garrett—Mr. Garrett. Professor Brandon L. Garrett, UVA Law School faculty and 2005 was associate professor, area is research and publication, include criminal procedure, wrongful convictions, habeas corpus, corporate crimes, civil rights, civil procedure, con law, and new forms of public governance. Prior to joining the UVA school, he worked as an associate at Cochran, Neufeld & Scheck.

NSS project? Good. So should New York City.

Wrongful conviction, DNA exoneration, and police brutality cases. I just got the book with all the exonerated. Very nice.

Professor Garrett, will you proceed with your testimony?

Mr. GARRETT. Thank you, Chairman Cohen, Ranking Member Franks and distinguished Members of the Subcommittee, for the opportunity to testify before you.

Mr. COHEN. Apparently, you have to push the button. Thank you.

Mr. GARRETT. It is pushed.

Mr. COHEN. You should draw it close to you.

Mr. GARRETT. Draw it closer.

Mr. COHEN. You have to embrace it.

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

Mr. GARRETT. Thank you. I will keep it very close to my mouth.

I am an associate professor of law at the University of Virginia School of Law. My scholarship focuses on criminal procedure, and I have studied the growing phenomena of Federal organizational prosecution agreements.

Federal prosecutors have adopted what is a creative and forward-looking approach to corporate prosecutions by entering agreements designed to avoid dire consequences of an indictment while implementing what I have called structural reforms. Attention to these complex agreements is largely because of their national importance, and this subcommittee has played a crucial role by examining these agreements.

In response to scrutiny of monitor selection practices, in March 2008, as we have heard, the Department of Justice issued new internal guidelines. Those guidelines are useful. However, they do not go far enough. The GAO has suggested that the guidelines be supplemented, and I am encouraged that the DOJ is apparently in the process of reconsidering those guidelines, perhaps to some extent.

Since the 1990's, but mostly the past decade, Federal prosecutors have entered more than 120 pre-indictment prosecution agreements, typically labeled as deferred or non-prosecution agreements. Of those, at least 48 required the firm to retain an independent monitor.

Most agreements also include detailed provisions for the creation or improvement of compliance programs, and monitors are tasked with supervising the implementation of compliance measures, often in very large corporations and over a period of many months and years. They do not possess duties to shareholders, nor do they represent the firm or prosecutors. They are independent, and they wield enormous influence and power, particularly where their duties are often broadly defined.

The selection of these powerful monitors is the subject of some concern. Most agreements provide that the prosecutor primarily select the monitor, perhaps with input from the firm. I have argued that a judicial role in selecting the monitor could avoid any lingering perception that these highly lucrative positions could be awarded as political plums. In only a handful of cases, however, did a court select the monitor.

Existing regulations do bar the appearance of favoritism or providing favorable or preferential treatment. On the other hand, those prohibitions do not specifically address employment of former prosecutors. The proposed legislation does address that problem.

Putting potential conflicts to one side, we should also be skeptical that a former prosecutor is always necessarily the right choice, particularly one who recently left government service or lacks extensive compliance or industry experience. Strong familiarity with the industry and with implementation and analysis of corporate compliance is a crucial qualification. We should consider other ethical and professional obligations of these monitors as well.

Monitors should be committed to evenhandedness and a neutral evaluation of the evidence. They should adhere to the scope of their retention agreement. They should be impartial. They should be efficient and prompt. They should be not just competent generalists, but have strong familiarity with the industry and experience and with best practices for implementing compliance.

Proposed additions to the American Bar Association rules of professional conduct would create additional and far more detailed obligations for third-party neutrals. And another model for an effort to adopt such a set of professional standards for monitors is in their organization of independent private secretary inspectors general, or IPSIGs.

Another important area for further inquiry is the fees charged by monitors. I take it that the GAO is examining this issue. Their preliminary report highlights how firms may have little recourse, should the monitor not exercise sound billing judgment. One advantage of judicial oversight would be to permit the court to periodically review billing or respond to any complaints.

Finally, the effectiveness of monitors remains unexamined. From the outside we can't tell whether monitoring is ineffectual, effective, or excessive and overly burdensome. Few agreements required, as per the United States Sentencing Guidelines, that a compliance program be itself continually and carefully evaluated.

As the Guidelines recognize, simply creating a compliance program is not enough, if no one is rigorously auditing its effectiveness. Absent such ongoing assessments, we can't be confident that a compliance program is not a mere paper program. And this is not a hypothetical problem. Last year we had an instance of a repeat

violator, a firm that pleaded guilty to a violation of a prior deferred prosecution agreement.

Improved guidelines regarding selection of monitors will be a useful first step. However, the need for ever more complicated guidelines could be avoided by simply involving courts not just in selecting the monitor, but in approving agreements, evaluating monitors' effectiveness, and adjudicating any disputes regarding implementation or a claim of a breach. Federal courts already do this. They supervise similar efforts during organizational probation.

So I hope that this subcommittee, the GAO and the DOJ continue to examine corporate prosecutions and potential improvements and as well as reforms. And I thank you for the opportunity to speak. I look forward to any questions.

[The prepared statement of Mr. Garrett follows:]

PREPARED STATEMENT OF BRANDON L. GARRETT

WRITTEN STATEMENT OF
BRANDON L. GARRETT
ASSOCIATE PROFESSOR OF LAW
UNIVERSITY OF VIRGINIA SCHOOL OF LAW

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

"TRANSPARENCY AND INTEGRITY IN CORPORATE MONITORING"

November 19, 2009
11:00 a.m.
2141 Rayburn Office Building

Thank you Chairman Cohen, Congressman Franks, Chairman Conyers, Ranking Member Smith, and distinguished Members of the Subcommittee, for the opportunity to testify before you today. I am an associate professor of law at the University of Virginia School of Law. My scholarship focuses on criminal procedure, and I have studied the growing phenomenon of federal organizational prosecution agreements.

Federal prosecutors have adopted a creative and forward-looking approach to corporate prosecutions by entering agreements designed to implement structural reforms while avoiding the potentially dire consequences of an indictment. Attention to these complex agreements is warranted because of the national importance of the cases. This Subcommittee has played a crucial role by examining issues related to the agreements during a time in which there have been a series of important changes in the practices surrounding these agreements. In March 2008, the Department of Justice (DOJ) issued new internal guidelines concerning the selection and use of monitors in organizational prosecution agreements, the "Morford Memo."[1] Those guidelines provide useful guidance and procedures. However, those guidelines do not go far enough. Apparently the DOJ is in the process of reconsidering those guidelines. I am encouraged by the GAO's ongoing work and by the DOJ's ongoing consideration of these issues.

The DOJ's Morford Memo guidelines were drafted following public discussion of the manner in which monitors were selected. Concerns were raised that high profile as well as highly lucrative positions could be awarded as "political plums" to allies or

[1]Craig Morford, Memorandum for Heads of Department Components United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, March 7, 2008 at http://www.justicc.gov/dag/morford-uscofmonitorsmcmo-03072008.pdf ("Morford Memo").

former colleagues. More fundamentally, the question arose as to assurances that the most talented experts were appointed to these complex positions of great public importance.

Monitors serve a crucial function in many of these pre-indictment organizational prosecution agreements. I have gathered and analyzed data concerning these agreements, with the invaluable help of the University of Virginia Law Library.[2] Since the 1990's, but mostly in the past decade, federal prosecutors have entered more than 120 organizational pre-indictment agreements, typically labeled as deferred or non-prosecution agreements. Of those, 48 agreements required the firm to retain an independent monitor. Most agreements also include detailed provisions for the creation or improvement of compliance programs. Monitors are tasked with supervising the implementation of compliance measures, often in very large corporations, and over a period of many months or years. They do not possess duties to shareholders. Nor do they represent the firm or prosecutors. They wield enormous influence and power, particularly where their duties are often broadly defined.[3] Monitors must earn the trust of employees as they assess what solutions are the most effective to prevent recurrence of the misconduct. At the same time, monitors must accurately report to prosecutors.

Despite the importance of these monitors, little can be ascertained about the nature of the monitor selection process or, perhaps more important, the nature and quality of their work. What we can observe from the text of the agreements suggests that organizations often do not play a substantial role in the selection of the monitor. Most

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[2] Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007). The agreements themselves have been posted on a UVA Law Library resource website, together with updated data concerning the agreements. *See* University of Virginia School of Law – Library, http://www.law.virginia.edu/agreements.

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

agreements provide that the prosecutor primarily selects the monitor, perhaps with input from the firm. In only a handful of cases, a court selected the monitor. Many of those monitors selected whose names have been made public were former prosecutors. Apart from the text of the agreements themselves, and limited information gleaned from news reports and press releases, much about these cases remains non-public. Given the public importance of their work, a fair process for selection involving public notice and judicial approval is appropriate. I note that guilty plea agreements have received less attention, but they sometimes also require retention of independent monitors.

I have argued that there should be greater attention to transparency in the retention and use of independent monitors in corporate prosecution agreements. I have argued that courts should play a role, although a limited role, in overseeing entry, implementation and termination of these agreements. I have also argued that a judicial role in selecting a monitor would avoid any lingering perception of cronyism in the selection of monitors.[4] A monitor position could be publicly announced, and a judge could select from amongst choices offered by the organization, prosecutor, and any collaborating regulatory agency. I have also argued that greater attention should be paid to evaluating the effectiveness of monitors and compliance reforms. I am glad to see that the GAO is now studying these issues as well.

Today we are focused on a narrower topic, that of conflicts of interest. I will discuss the problem of conflicts. I will then briefly touch on other related matters: selection of monitors, fees charged, scope of duties, transparency and effectiveness.

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[4] *See* Written Testimony of Brandon L. Garrett, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, "Deferred Prosecution: Should Corporate Settlement Agreements Be Without Guidelines, March 11, 2008, at http://judiciary.house.gov/hearings/pdf/Garrett080311.pdf; *see also* Garrett, *supra* note 2 at III.B.

Third Party Neutrals

Potential conflicts of interest can be assessed from two perspectives – that of the monitor candidate and that of the prosecutors involved in selecting the monitor. The ethical duties of the monitor, even if she is a lawyer, are limited. After all, as the Morford Memo describes, the monitor is retained by the firm but has no client.[5] The monitor is defined as independent: neither an agent of the firm nor an agent of the prosecutor. The monitor does not provide legal advice. Instead, the monitor serves like a third party neutral. A third-party neutral has an ethical obligation under the ABA Model Rules of Professional Conduct to disclose that they do not represent those they assist.[6]

Proposed additions to the Model Rules would create additional and far more detailed obligations for third-party neutrals. The proposed additions would impose, among other things: a requirement that a third-party neutral maintain confidentiality; an ethical obligation to act "diligently, efficiently and promptly"; an obligation to "decline to serve in those matters in which the lawyer is not competent to serve"; and to be "impartial" as well as to disclose any potential "interests and biases" that might affect impartiality.[7] Some of those subjects may be covered in monitor retention agreements. Monitors are retained and paid by the target firms, and presumably have certain contractual duties, including that of confidentiality. They also have obligations to report to prosecutors. If the monitor reported instead to a court, some problems associated with these poorly defined and non-public obligations could be avoided. Regardless, far more detailed rules are needed to establish the ethical obligations of corporate monitors.

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[5] *See* Morford Memo, *supra* note 1, at 4.

[6] *See* ABA Model Rules of Prof. Conduct, Rule 2.4(b) ("A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them…").

[7] *See* Model Rule for the Lawyer as Third-Party Neutral, 189 PLI/NY 429 (2009) (presenting a proposed Model Rule 4.5 drafted by the Commission on Ethics and Standards in ADR).

Conflicts of Interest

Since the monitor acts as a third-party and does not represent the firm, the most directly applicable ethics rules governing their selection apply to prosecutors. The Morford Memo calls on prosecutors to select highly qualified persons or entities, avoid potential and actual conflicts of interest, and to act so as to "otherwise instill public confidence."[8] On this point, the Memo refers to federal conflict of interest rules, citing to 18 U.S.C. § 208 and 5 C.F.R. 2635. The Morford Memo comment notes that participation by a government personnel that "creates, or appears to create, a potential or actual conflict in violation of 18 U.S.C. § 208 and 5 C.F.R. Part 2635" may result in recusal of those involved in the selection process.[9]

First, 18 U.S.C. § 208 creates penalties for acts of current employees that further financial interests that the current employee has in a proceeding. The section also provides that the employee may not act to further an interest in an organization, particularly with regard to "prospective employment."[10]

Second, 5 C.F.R. §2635 provides a set of general principles concerning conflicts of interest. For example, 2635.101(b) includes prohibitions on obtaining "private gain" and on giving "preferential treatment" to any organization or individual or taking actions providing the "appearance" of doing so.

Those prohibitions do not specifically address employment of former prosecutors. The proposed legislation does address that problem. The existing regulations do bar the appearance of favoritism or providing "preferential treatment," however, which should include the hiring of former colleagues.

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[8] *See* Morford Memo, *supra* note 1, at 3.
[9] *Id.* at 3-4.
[10] 18 U.S.C. § 208(a).

Neither existing rules nor the proposed statute bars the hiring of former prosecutors as monitors, nor should they. A former prosecutor's expertise can provide valuable benefits to both the firm and prosecutors. Nevertheless, prosecutors do not always have the compliance expertise or industry familiarity that can be particularly valuable. Putting potential conflicts to one side, we should be skeptical that a former prosecutor is always necessarily the right choice, particularly a prosecutor who recently left government service and does not have extensive compliance or industry experience. If the monitor is serving in effect as an agent of the prosecutor, then perhaps a former prosecutor fits the intended role. However, agreements contemplate a far broader and more important role for monitors.

Monitors are intended to implement structural reforms. If the monitor is to effectively supervise the creation of an improved compliance program, then strong familiarity with the industry and with implementation and analysis of corporate compliance is a crucial qualification. Monitors should be individuals versed in best practices for implementing particular types of compliance programs. The state of the art for implementing a Foreign Corrupt Practices Act compliance program is very different from the state of the art for implementing a program to prevent securities fraud. Monitors would also benefit from a set of ethical guidelines, together with standards for evaluating efficacy of compliance efforts, and for the accurate and impartial reporting of results. Compliance professionals have developed practices geared towards effective establishment of compliance programs in particular industries. Regulatory agencies may define the compliance practices expected of firms in a particular industry. Both prosecutors and regulatory agencies could promote the dissemination of best practices.

In addition, because these monitors ideally do not serve as agents either of the firm or of the prosecutor, their ethical obligations should be more carefully defined, perhaps along the lines of the proposed Model Rule for Third-Party Neutrals. Corporate monitors have far more complex obligations than many third-party neutrals tasked with evaluating a matter or facilitating a settlement. Monitors should be committed to evenhanded and neutral evaluation of evidence, prompt and impartial reporting of violations to the firm and to the prosecutors or other agencies, and diligent efforts to implement and assess compliance reforms, while adhering to the scope of their retention agreement. One model for an effort to adopt a set of professional standards for monitors is in the organization of Independent Private Sector Inspectors General (IPSIGs).[11]

Selection of Monitors

In its preliminary report, the GAO recommended "that the Deputy Attorney General adopt internal procedures to document both the process used and reasons for monitor selection decisions."[12] The report noted that the DOJ agreed with the recommendation and is considering adoption of such procedures. The internal reforms adopted by the Morford Memo create additional levels of review before a monitor selection is approved. The Memo also recommends that where possible, three candidates should be considered, and if the Government is the primary selecting party, then the corporation should have an opportunity to select a candidate from the pool.[13] Those largely procedural requirements do not, as the GAO noted, provide particularly clear

[11] James B. Jacobs and Ronald Goldstock, Monitors & IPSIGS: Emergence of a New Criminal Justice Role, 43 No. 2 Crim. Law Bulletin 1 (2007).

[12] Statement of Eileen R. Larence, Director Homeland Security and Justice, *Corporate Crime: Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, June 25, 2009 ("GAO Report").

[13] Morford Memo, *supra* note 1, at 4.

standards for selection of monitors. They do not require that monitor positions be publicly announced so that candidates could apply. Nor do they require documentation of decisions made or reasons for those decisions. The GAO Report concluded that "documenting the reasons for selecting a particular monitor helps avoid the appearance of favoritism and verify that selection processes and practices were followed."[14]

Fees

Another important area for further inquiry is the fees charged by monitors. I take it the GAO is examining this issue.[15] The fee scales of monitors may vary along with their expertise. However, firms may have little recourse should a monitor not exercise sound billing judgment. One advantage of retaining judicial oversight would be to permit a court to periodically review billing.

Scope of Duties

Monitors are often given sweeping "blank check" discretion to gather information, promulgate policies, oversee compliance, and recommend changes to corporate governance. The Morford Memo made clear their role should not be historical, but rather forward looking and geared towards implementing measures to prevent future misconduct. However, these agreements do not always define whether the monitor is to address the specific subject of the initial investigation, or broader compliance concerns.

Transparency and Evaluating Effectiveness

Leaving the scope of a monitor's duties flexible might be less problematic if there was some reason to think that the monitor's work was being carefully evaluated and tailored to the needs of a particular case. Assume that far more comprehensive guidelines

[14]GAO Report, *supra* note 12, at 26.
[15]*Id.* at 28-29.

and procedures are adopted, either by statute or by the DOJ. Unless more about the process surrounding these agreements is made transparent, the public has no way to know whether the new guidelines or procedures are complied with. For example, we have no reason to think that monitors have been retained who formerly worked as a prosecutor on the same matter – but then again, we do not know the names of all monitors appointed, much less how they were selected, how they are paid and how effective they were.

That last concern with effectiveness is particularly troublesome. As it stands, the public cannot tell whether monitoring was ineffectual, achieved the sought after compliance, or was excessive and overly burdensome. Few federal organizational prosecution agreements require, as per the U.S. Sentencing Guidelines, that a compliance program itself be continually and carefully evaluated to assess its effectiveness.[16] As the Guidelines recognize, simply creating a compliance program is not sufficient if none engage in rigorous auditing of the effectiveness of the compliance program. Absent such ongoing assessments, we cannot be confident that a compliance program is not a mere "paper program" that can not effectively prevent a repetition of the misconduct. This is not a hypothetical problem. Last year we had an instance of a repeat violator, a firm that pleaded guilty to a violation of a prior deferred prosecution agreement.[17]

The monitoring process is not transparent, in part for good reason, as confidentiality in many aspects of such work is important. However, it would be reassuring to hear that the DOJ, together with regulatory agencies involved, are assessing

[16] *See* U.S. Sentencing Guidelines § 8B2.1(b)(5) ("The organization shall take reasonable steps--(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct; (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program.")

[17] *See* Press Release, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines ("Aibel Group admitted that it was not in compliance with a deferred prosecution agreement it had entered into with the Justice Department in February 2007 regarding the same underlying conduct."), at http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html.

the work of monitors to develop a set of practices for when monitors are needed and effective. Alternatively, if a court was involved, the judge could periodically evaluate and report on a monitor's progress. The court could solicit view of regulators or compliance experts. The court could intervene to prevent a monitor's term from expiring before the compliance reforms were successfully implemented.[18] The court could similarly intervene to limit the scope of the monitor's action if the monitor was hiring unnecessary staff or performing unnecessary work. Federal courts already supervise similar efforts during organizational probation following a conviction. It is worth considering whether the process could be simplified by involving courts not just in selecting the monitor, but in approving these agreements, and in adjudicating any disputes regarding implementation or a claim of a breach.

Now that independent monitors have assumed a central role in remedying corporate crime, their selection, ethical obligations, professional obligations, together with best practices and the supervision of their work, should all be carefully considered. I hope that this Subcommittee, the GAO and the DOJ continue to examine corporate prosecutions and potential improvements and reforms.

[18] *See* Garrett, *supra* note 2, at III.B.2.

Mr. COHEN. Thank you, Professor Garrett. I appreciate your testimony.

And we will now have opportunities for Members to ask questions, and I will begin by recognizing myself.

The—and I hate to use this phrase, but in a way I want to use the phrase, because it is the right phrase, even when it might be interpreted incorrectly, the 300-pound elephant that is in the room, a little-bitty elephant. What is it? A 3,000-pound elephant? Is that was it is? A 3,000-pound elephant. It is the Christie situation. And——

Mr. FRANKS. Back off here, buddy. [Laughter.]

Mr. COHEN. You said he was three——

Mr. FRANKS. Don't throw your weight around here.

Mr. COHEN. I can see the story now. Franks says he is 2,700 pounds heavier.

There was a lady in his office, Ms. Brown, and she was—the New York Times wrote about this; this is why it is the elephant—former assistant U.S. attorney. And she resigned her office and got involved in some things, and she took a job with a law firm that represented one of the companies that had a monitor in a deferred prosecution agreement. She went to work for this firm that represented DePuy Orthopedics Inc., one of five companies identified as a target in this litigation of kickbacks among the makers of artificial hips and knees.

My question to the panel—I guess I will start with Mr. Barkow and go just down the line—do you think that there should be a limitation on an assistant U.S. attorney going to work for a law firm that represented a monitor in a—not a monitor, but represented a company that was monitored, that she or he had something to do with the selection of the monitor or the decision to have a DPA?

Mr. BARKOW. Mr. Chairman, without having thought deeply about this, my initial reaction to that is no.

I think that, first of all, there is in current law a prohibition on a person while in government employment, and including DOJ, working on a matter while negotiating a plan with a particular company or with a law firm that has an interest or financial interest in matters that they are working on. So while the AUSA or Federal prosecutor would be working in government, they wouldn't be able to work on a case that the ultimate future employer was involved in.

When a former prosecutor ultimately lands at a law firm that is actually working on matters before their former office, I think that wall procedures whereby those former prosecutors could be kept from working on a particular matter—at first blush, I would think that those are probably sufficient, but this is an initial reaction without having studied this that deeply.

Mr. COHEN. Thank you.

Ms. Larence?

Ms. LARENCE. Well, what we can speak to is what we found during the course of our audit is that the selecting committees themselves, as well as the approval from the deputy attorney general, require that they scrutinize whether or not the monitor has a conflict of interest, and so there are internal controls in the current

process that Justice uses to try to ensure against those kinds of concerns.

Mr. COHEN. Mr. Soffer? What is your thought as a former prosecuting or U.S. attorney, and I guess it could extend to a criminal case, if you had made a deal, made an offer? But I don't—you know, should there be some kind of line there—some, 6 months, 1 year, something?

Mr. SOFFER. Well, let me begin by saying I second Mr. Barkow, and I only come to it from the perspective of a partner at a firm who hires people out of government and was just rehired himself some 9 months ago.

Anytime a new matter comes into the firm that touches on any work involving the Department of Justice, I am asked, "Did you have anything to do this matter?" If the answer is yes, a very solid and very high wall is built so that I don't touch it, I don't go near it, I am not consulted. In no way do I play any role in it.

I think I—first, that is the standard approach, I think. And I do believe it has been effective, just judging from my own experience.

Mr. COHEN. I am trying to recall, and I should. There was something in Los Angeles with one of the U.S. attorneys, and they came up in the firing of the U.S. attorneys that——

What was it—did a——

Yes, Ms. Yang. And she took a job with a law firm, left, that was——

Where it was stated the firm had some litigation before them?

Mr. FRANKS. Gibson Dunn you are thinking of, maybe?

Mr. COHEN. Maybe.

Mr. FRANKS. Was this Ms. Yang?

Mr. COHEN. You know the situation? What was that? Do you want to brief that for me and give me the issue?

Mr. SOFFER. All I knew is that Ms. Yang went to Gibson Dunn.

Mr. COHEN. But didn't Gibson Dunn have some action going on when she——

Mr. SOFFER. I don't know.

Mr. COHEN. Professor Garrett?

Mr. GARRETT. I believe she is a monitor or was a monitor in these agreements.

But I mostly want to second what Tony Barkow said, that existing rules do, you know, provide that one can't be acting as a government employee to further an interest in future employment. And, you know, conflicts rules might prevent one from working on matters in which one, you know, might conflict with one's former role representing a client being the government.

Monitors are sort of a special situation, because they don't have a client. They are not representing anyone. They are not providing legal advice. They are acting like third-party neutrals.

I also think that there is really a separate issue where unless someone had extensive, you know, compliance experience or, you know, doing corporate governance work before becoming a prosecutor, someone who recently left a job as a prosecutor really may not be the right person. And they may not have industry experience or the kind of skills that you need to really administer something, which is incredibly complex.

To build a compliance program, to measure its effectiveness—that is a very difficult work, and you really would want someone who had that kind of specialized experience and not someone who is new to that kind of industry work.

Mr. COHEN. I am going to take it one further step, and then we are going to yield to Mr. Franks.

Last year the New York Times reported at least 30 of the 41 monitors appointed under deferred prosecution agreements since 1994 were government officials, and 23 were former Federal prosecutor. Would you find that strange?

Mr. GARRETT. The data that I have collected gibes with that. Certainly, many of these monitors have been former prosecutors. And from what the GAO tells us, it is not strange at all, because it is the prosecutors, the current prosecutors, who are primarily involved in this selection.

And when you don't have an open process where talented and qualified people can apply, if you are depending on word-of-mouth, you know, you would expect that former colleagues would be the ones who would have a leg up in a word-of-mouth process, which maybe is a reason that the entire selection should be made more transparent.

Mr. COHEN. And, Mr. Soffer, you said something about the suggestion that U.S. attorneys might not be skilled in certain areas and therefore they needed these monitors. But if they weren't skill when they were prosecutors, how do they get skilled when they are former prosecutors?

Mr. SOFFER. Well, I would say that one of the—a key thought behind our promulgation of these guidelines when I was in the department was precisely that. It will not always be the case that a former prosecutor is the right choice. Let me begin with that. And I think there is some large number of monitors who in fact did not have prior ties with the department.

But the second observation is former prosecutors do have a skill which, I think, is very useful in monitoring, and that is particularly after, frankly, they enter private practice and then get into the business of internal investigations, they become expert at conducting internal investigations, and they become expert at ferreting out wrongdoing, identifying wrongdoing, devising ways to correct wrongdoing. And so they do bring that skill to an engagement.

If it is a complex or esoteric industry or some subject matter which is not within their ken, then it does make sense for them, and they often do partner up with experts, such as corporate lawyers often do or criminal lawyers often do when they engage Ernst & Young or Price Waterhouse or other forensic accountants, just to cite one example, to assist them with the difficult subject matter. So they do bring a skill. It may not be a skill that encompasses all that is required, and for that reason they may partner with others.

Mr. COHEN. Thank you, sir.

I now yield to Mr. Franks for his questioning.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Soffer, I will start with you, sir. Can you illustrate an example or even a hypothetical as to what the impediments to effective compliance monitoring would be if Congress passed legislation to limit the department's authority to select former U.S. attorneys or

assistant U.S. attorneys to serve as compliance monitors? In other words, what would be—what are the impediments that would be created if we legislate in this direction?

Mr. SOFFER. Well, I see two problems, essentially. The first is conceptual. The second is a more practical one.

The conceptual problem is that I think it involves an encroachment on turf and that constitutionally the department's—that is constitutionally the executive branch's, because fundamentally the selection and use of a monitor involves making decisions about prosecution and whether there should be prosecution and how to resolve a case short of prosecution, which is at its core an executive function. That is a conceptual problem.

More practically, I believe there would be situations where you would very much want as a monitor, as a corporation, as the government, to engage someone who had previously served in government service, I think for just the reasons that I was just articulating to the Chairman.

And finally, I would just note beware of the law of unintended consequences. And here is an example. One of the considerations that we tossed about in thinking about these guidelines is whether there should be a bar against monitors who had a prior relationship with the corporation.

Now, at first blush it might conclude, well, of course, someone who had a prior relationship with the corporation ought not serve as a monitor, because that suggests conflicts. But we wanted to allow for the possibility that the corporation may have engaged a lawyer or an outsider, a monitor prior, previously, who came to know the compliance program, who perhaps launched the compliance program, and therefore it made a great deal of sense to continue using as a monitor.

And I see from the GAO's report that there is at least one such case just like that, where the corporation and the government agreed to engage a monitor who had a prior relationship with the corporation, the point being you don't know what you are going to get when you pass a very broad and far-reaching piece of legislation or bar. You may have circumstances that you don't want to rule out.

Mr. FRANKS. So do you believe that, at a minimum at least, that we should allow more time for the department to gain the experience under the Morford memo and inform us about the results of their experience in that regard before we proceed to consider legislation?

Mr. SOFFER. I do, but I want to make clear it may be that the suggestions that are built into this legislation are very sound policy. There is no question they could be. But let us find out. Let us not look for a solution in search of a problem.

Mr. FRANKS. Okay. Is it your perspective that the department's efforts to formulate guidance designed to ensure the integrity and transparency and the selection of corporate monitors—do you think that those efforts have been successful?

Mr. SOFFER. Well, I do, and I think that is borne out by the GAO's report, which finds that since the promulgation of those guidelines, the department has abided by and complied with those principles.

Mr. FRANKS. Well, thank you, sir. I appreciate your testimony.

Ms. Larence, I guess I would sort of take off the same general idea there. Based on your work studying the selection of compliance monitors, do you have any reason to believe that the Justice Department will not follow its own guidance and procedures with regard to compliance monitors or deferred prosecution agreements in general?

Ms. LARENCE. Well, it has found to date of the four monitors selected since the Morford memo, all four did comply with the guidelines, and I think if Justice responds to a recommendation to make sure they have transparency and accountability that they are complying with those guidelines, that will also help.

I did want to note that of those four monitors, three did have former Justice experience in their backgrounds, but on average it had been anywhere from 18 to 20 some years since they had been employed at the department.

Mr. FRANKS. Thank you.

Mr. Barkow, don't you believe that there are perhaps benefits to leaving the guidelines for the use and selection of compliance monitors up to the department rather than setting them into stone through legislation? Do you think there is any advantage there?

Mr. BARKOW. I think that it is certainly possible that the Department of Justice might promulgate rules and regulations that address this, but I guess I would point out that most of the rules that I discussed in my written testimony and that I mentioned here today are congressionally enacted and presidentially signed laws. They are statutes. And I see this network of laws that govern post-government service employment as arising in significant part out of congressional action, so I think it is appropriate for Congress to set the terms of post-employment, post-government service employment for executive branch and other government officials.

Mr. FRANKS. All right. Well, thank you.

Well, let the record show that when I mentioned the 300-pounds as rather small for an elephant, that there was no other entendre involved, okay?

Mr. COHEN. Thank you, Mr. Franks.

And now to Mr. Johnson, the distinguished Chairman of the subcommittee On constitutional law—not constitutional law—courts and antitrust, from the State of Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman. And thank you for holding this hearing.

Mr. Soffer, you said something that kind of got mine attention, and you said legislation on this issue could become a solution to a problem that—or a solution looking for a problem.

But, you know, I must respectfully take issue. I think that the public sees how the government has coddled these firms, particularly financial services firms, and how we have, due to lack of regulation, allowed these firms to become too big to fail. And that is a issue that Chairman Cohen's CAL Committee, as well as my subcommittee on competition policy, we have been looking at.

And I think the American people probably assume that, if they knew anything about these deferred prosecution agreements, I would think if they knew that I would assume they would be thinking that these kinds of agreements are monitored by the courts,

and there is a criteria that is established that would allow for certain firms to have the benefit of the deferred prosecution agreement.

How many of these deferred competition—excuse me, deferred prosecution agreements been invoked? When was the first one that was done? And how much money has been charged in fees by the firms that are given the work of monitoring?

And also whether or not there are any—I know a lot of people assume that African-American or minority law firms are not capable of handling business on this level, but I would take issue with that. There are a lot of people who have come out of large firms, worked in this area, and know exactly how to perform on something like this. Is there—and if you would give me a number of minority firms that have gotten some of this business?

Mr. SOFFER. Let me begin with the third question and agree wholeheartedly with the notion that it is entirely unsupportable to believe that African-American owned firms or minority owned firms are not up to the task of this work.

As to the question of have there been any and how many? I don't know.

Mr. JOHNSON. Does anybody else on the panel know?

Okay. That is a problem.

And by the way, are these financial services firms generally that get these deferred prosecution agreements?

Mr. SOFFER. Are those that get deferred prosecution agreements generally financial services firms? I don't think so, because they have fallen in several areas, including health care, foreign corrupt practices, and other areas, frankly, one of my co-panelists probably can speak to even more directly than I. But my recollection is that the majority are not financial services firms.

Mr. JOHNSON. How would the public ever be able to validate what you just said?

Mr. SOFFER. Well, there are actually——

Mr. JOHNSON. I am still wanting those numbers, too, in responses to my other questions.

Mr. SOFFER. We have a record of virtually every, if not every deferred prosecution agreement that has been issued. And in fact, my co-panelist to my left, Professor Garrett, has assembled a list of those on a Web site. So you can actually have access to those, and we can see what those agreements provide.

Mr. JOHNSON. Some are done prior to indictment. Others are done after indictment. If the deferred prosecution agreement is entered into prior to indictment, is there any way for the public to be able to assess the numbers of those and which firms got the work? Any transparency?

Mr. SOFFER. I believe there is transparency as to deferred prosecution agreements, which by definition at some point involve the filing of charges and in almost every instance the filing or publication of the document that represents the agreement.

With respect to some number of non-prosecution agreements, it may be that there is not disclosure of those agreements to the public at large. And I must confess to being at something of a disadvantage. I am no longer in the department, so I can't track this information, but I believe that is accurate.

Mr. JOHNSON. All right. And anyone else is—please feel free to respond to any of the questions that I have posed.

Ms. LARENCE. I have some data for you, sir. The first agreement that we track started in 1993, and to date there have been 152 of those.

In terms of transparency, GAO was able to identify the monitors that were selected in 46 of the 48 cases, and we were able to look at the background, publicly available information about the backgrounds of those monitors, and so we could see their employment history. So that type of information is available.

But we also found, similar to what Mr. Soffer said, a deferred prosecution agreement would be available because of the filings in court, but it is unclear to what extent non-prosecution agreements are publicly available.

Mr. JOHNSON. Do we have numbers on how many deferred prosecution agreements were entered into prior to indictment? And could that be the reason why you were only able to get information on—what—48 of the 152 deferred prosecutions—or the GAO, that they looked at?

Ms. LARENCE. Sorry, sir. I just wanted to clarify. There were 152 agreements in total. Of those 152 agreements, 48 of them required a monitor. And the department has selected 46 monitors to date. There's still two cases that they haven't selected, so we were able to obtain publicly available information on all 46 of the monitors.

Mr. JOHNSON. Okay. I understand.

Ms. LARENCE. I don't have a response, sir, to your earlier question about pre-indictment.

Mr. COHEN. Thank you.

We will do a second round, and I will obviously start.

We are looking at two areas of legislation, which I would like your help on. One is the idea of having a more transparent and check and balance type of system in selecting the monitors. And the other is the question on the revolving door.

And so, you know, Mr. Soffer, you said these are executive, and it is a system of balances and checks in the government. But, as Mr. Barkow mentioned, most of the prohibitions on revolving doors are statutory. And there are other statutory limitations on executive power. And if you don't have some type—I mean the executive——

It is an interesting situation here. We have got a Member here on the Republican side, who is more or less defending and saying we don't want to restrict the Obama administration from all these situations, and yet we have got Democrats that think, well, it would be a good idea to have general restrictions, because it is, you know, get goose and gander.

And, you know, I just—don't you think that there has to be—the legislative has to find ways, because whether it is Obama or whether it is Bush, the executive has a tendency to take care of their own. That is just politics and human nature.

And there should be some way that there is a check and balance on that natural tendency to try to take care of either friends who are prosecutors or friends who have contributed or whatever. You don't see that as a necessary part of the system?

Mr. SOFFER. Well, you know, I do as a general matter see that as an important part of the system, but I think here we are dealing with a very unusual circumstance, almost sui generis. And that is, a, it is in the realm of criminal prosecution, which is a different animal to begin with. So many of the dimensions of criminal prosecution are not transparent. There is an exquisite sensitivity, in fact, to if not secrecy, at least to confidentiality in the criminal process.

And it is also, perhaps more than any other function, a core function of the executive branch. So I would argue that it is a slightly different scenario than the norm in that there has to be a greater sensitivity to imposing requirements on a process that is fundamentally prosecutive.

Mr. COHEN. Well, like probation—the executive can decide to give probation, but nevertheless the probation system and the option is created by the Congress.

Mr. SOFFER. That is true. Of course, there are many features of the probation system which are also not for public view, including reports provided by the probation officer to the court that the public cannot see.

So again, as a conceptual matter, I don't disagree with you, Mr. Chairman. But when it comes to the selection of a monitor himself or herself, because it is so much fundamentally a part of the prosecutor decision, I just think great care has to be taken.

Mr. COHEN. What about the idea of the judge being involved in it? I mean that is, again, the judge is a judicial official.

Mr. SOFFER. Yes.

Mr. COHEN. You don't get into the—I know the prosecutor is the executive, but the judge has got ultimate discretion over the case, and when it comes into that type of situation, the judge is who is—you know, don't you see that it may be good for the judge to check off on something as a check and balance?

Mr. SOFFER. Here, too, I would be very cautious, because the—first, as a practical matter, to involve judges in proceedings that have not yet ripened into a court matter, and after all, some of what we are talking about here are negotiations between the government and a defendant or a target that may never reach the point of a plea agreement, of criminal charges being filed and pursued, so you already involve judges stepping beyond the normal bounds.

As a practical matter, too, that may impose serious delays. Judges are very good at what they do, but they are very overloaded. And to present more matters to them, which would involve and would have to involve, if they are going to do the job right, a careful look at who the monitors are, what the facts of the case are, what are the needs of the case, what are the qualifications of these monitors, could impose a serious delay.

Mr. COHEN. Professor Garrett, what about the executive having total autonomy here?

Mr. GARRETT. I respectfully disagree with—I do disagree with Mr. Soffer. I think that having courts involved would make sense and would actually simplify the process. You know, there are some agreements where judges were involved in the selection of the mon-

itor. There were only three of them, but it wasn't a burdensome, cumbersome process, really.

The firm submitted a few names. The prosecutor submitted a few names. And I think in at least one the regulatory agency submitted names of people they thought would be qualified. And the judge picked the one that seemed the most appropriate.

You know, given the number of agreements that we have each year—you know, in the 20's in a good year; there have been 14 so far this year—we are not talking about an enormous number of agreements that would impose a substantial burden on the judiciary.

And this is not a fundamentally prosecution driven decision here. There are many, many contexts in which courts are the ones that appoint a special master or a monitor as part of a corporate probation agreement like you mentioned, Mr. Chairman. So this is already the type of decision that is often made by a judge and not by a prosecutor.

You know, the only issue would come up in non-prosecution agreements where no document is filed with the court, and for a court to be involved, they would have to be pursued as deferred prosecution agreements, because there there at least is a charging document filed.

Mr. COHEN. Mr. Barkow, do you have a thought?

Mr. BARKOW. Yes, Mr. Chairman. I think that it is important to keep in mind that prosecutors today in the criminal justice system, particularly the Federal system, have a great deal of what would ordinarily be viewed as regulatory power. Ninety-five percent or more of defendants in criminal cases plea. The pleas are largely driven by prosecutive charging decisions because of the penalties that apply and the incentives that are provided to defendants to plead guilty rather than go to trial.

And it is no different in the corporate arena. In fact, it may even be a more extreme example, as I discussed in some more detail in my written testimony. And so prosecutors have tremendous power to put a case in a corporate defendant, or potential corporate defendant, in a situation where they really, acting rationally, need to accept one of these deferred prosecution or non-prosecution agreements, and they need to accede to the appointment of a monitor.

And I think that that is really akin to classic regulatory activity. And when we look at regulatory activity, we are concerned about the appearance of self-dealing. We are concerned about the revolving door. And so I think that congressional oversight over the activities of executive branch officials who are involved in regulatory activities is very important.

Mr. COHEN. Under Mr. Soffer's theory, you would have no check and balance. I mean this is an executive function. They can just decide we are going to give you a call. Hey, we got this thing, and we maybe can handle this in a little bit different way, and here is who is going to be your monitor. And here we do it, and there is no check and balance. It is as if they think they are being gouged or overly scrutinized.

Mr. BARKOW. I think that is right, Mr. Chairman. I mean there are certain areas where the executive needs more authority and needs to have more discretion. I don't think that this is one of

them, where it is necessary to the carrying out of the executive function.

Mr. COHEN. Thank you.

I now yield to the defender of the Administration, Mr. Franks.

Mr. FRANKS. So, Mr. Soffer, you talked about the divisions between the executive branch and the judicial branch and the—even maybe in this case—the legislative branch. That is something we try not to talk about too much—the Constitution in the Judiciary Committee. It is kind of been a hands-off subject most of the time.

But isn't there a separation of powers issue with involving judges in the process? I mean can you expand that and tell us why?

Mr. SOFFER. Well, there is. And I begin by—I began by observing a separation of powers issue even with this branch. But there certainly is with involving judges. Again, judges are entrusted with the job of adjudicating disputes. They do that. They do it well. And only they can do it.

Prosecutors are entrusted with the job of law enforcement, which includes within it the decision about whom to prosecute, how to prosecute, whether to prosecute. And so the key question simply becomes, in my view, what are we talking about here?

Is the selection of a monitor more akin to an adjudication of a dispute between two rival parties, or is it more akin to a question of how to resolve a criminal case and how best to do it and through what mechanism to do it? And I submit that it is the latter, rather than the former. And because it is the latter, it is at its core an executive function, not a judicial one.

Mr. FRANKS. Well, you may have probably figured out that I agree with you. But, you know, whenever we bring the judge and, you know, usually in the regular judicial process, if it were a judicial matter, there would be some type of, you know, oversight of another judge.

I mean what would be the review in this setting, if the legislation passed as written? If the judge, say, made a decision on a monitor that some of the participants disagreed with, would there be the standard judicial review process? Or would the legislation lock it in?

Mr. SOFFER. If this legislation passed now, it would have the force of laws. I don't know what review process there would be. It would——

Mr. FRANKS. I am talking about the judge's action under the legislation. If the judge chose a monitor that someone didn't like, do you just go ahead and review that? I mean would we be able to appeal that judge's decision?

Mr. SOFFER. And it is hard to know, frankly, because there is no process that is laid out for that issue.

Mr. FRANKS. I think that was really my point.

Mr. SOFFER. Oh.

Mr. FRANKS. But from your perspective, how well—the department's deferred non-prosecution agreements—how well have they worked over the years? Given the track record of the criminal justice system in general, how—do you think these stick out like a sore thumb somehow, or an 800-pound gorilla or anything like that?

Mr. SOFFER. Yes, I—no, I don't. I think they have worked well. And it is worth remembering what was the impetus behind these, or certainly behind their expanded use. And that was the prospect of an Arthur Andersen, just to be blunt.

To prosecute a corporation, if the choice is between declining and prosecuting, and the fact, say, you really need to prosecute, because there was some wrongdoing here, and that is your only choice as a prosecutor, and you prosecute, you potentially bring down a corporation, and you harm shareholders and pensioners and the public and employees.

That is not a result anyone should want, so deferred prosecution agreements, non-prosecution agreements really do hit the middle ground, which is critical, because it both observes law enforcement needs and the needs of the public.

Mr. FRANKS. Well, I mean I think everyone here wants to try to arrive at the most just, you know, place. But I agree with you these monitors and the deferred prosecution agreements put another tool in the hands of law enforcement in a way that I believe can serve the overall cause of justice pretty significantly, especially in these complex corporate involvements.

And I guess I—if it is all right, Ms. Larence, let me just ask you one question.

And then I will yield back, Mr. Chairman.

The main problem you identify in your written testimony seems to be with regard to the lack of clarity in the Justice Department's role in resolving disputes between the company and the monitor. How would you suggest that the department address that concern?

Ms. LARENCE. We are making a recommendation to the department that they require the litigating units in U.S. attorney offices to clearly specify in the DPA or NPA itself the role that the Justice Department will take in that specific case, what kinds of conflicts do they feel they can address and what process the company can use to raise these concerns to Justice so that the company knows at the beginning whether they can look to Justice for help on these issues or not.

Mr. FRANKS. Well, thank you.

Mr. Chairman, sometimes, you know, it is amazing how perspectives change depending on what the subject is and which side which party is on. But, you know, a lot of times we have the debate as to, say, drug users, where they get caught abusing drugs. And a lot of times those on the Democrat side of the aisle say that, well, we need to have the ability to put them in treatment with the threat of prosecution later. But I actually think there is a place for that. I really do.

But, you know, seems like we are kind of switching roles here a little bit. There is a tremendous place for these deferred prosecution agreements. They offer a new tool, and I think that to push them more in the direction of—a litigious—to try to press it into litigation is not a good move, unless there was some major problem with where we are right now, and I just don't see that. So I have already expressed that, and I yield back.

Mr. COHEN. Thank you, Mr. Franks. And I am not against deferred prosecution agreements or drug users who—whether they

are on the radio or not—having an opportunity to clean up their act. Either way, it is fine with me.

But I do think there needs to be some controlling of the system to make sure that people are selected for the right reasons to be the monitors. And I don't think that having a judge involved or some other way to make sure that there are not cronyism involved is an important thing to make this system work.

Mr. Barkow, Ms. Larence indicated only four monitors have been selected after the guidelines of the Morford memorandum, since it took effect. And the selection process was documented in only two of those cases.

In light of that, please respond to this statement Mr. Soffer made—or his written testimony—"The Justice Department's effort to formulate guidance designed to ensure integrity and transparency in the selection process appears to have worked." How do we know it has worked, when we have only had two cases?

Mr. BARKOW. I think it—Mr. Chairman, I think it is hard to tell. The GAO report discussed almost exclusively monitorships that were entered into before the writing of the Morford memo, and it revealed that in those instances DOJ essentially selected the monitors and that DOJ selected those monitors largely from a pool of people that the decision-makers themselves knew.

And as of the time of the GAO report, written report, there were two, and now I guess there are four. And so I don't know that we have sufficient data to really determine exactly how the Morford memo is working. But as I pointed out, the Morford memo itself may not have been intended to, but it doesn't actually target exactly what this proposed legislation might target.

Mr. COHEN. Mr. Soffer, the fifth requirement of the first principle in the Morford memorandum is that corporations should agree not to employ or become affiliated with the monitor for at least a year after the monitorship expires. If that makes sense, why doesn't it make sense that an AUSA shouldn't go to work for a monitor for a year?

Mr. SOFFER. Well, two observations. The first is the impetus behind that restriction our suggestion is that you don't want the possibility that the monitor, while working as a monitor, was all along angling for employment by the corporation afterwards.

Mr. COHEN. Right.

Mr. SOFFER. And understood. And there is no question that animates the same concern that we have been discussing today, which is don't we worry that an AUSA will likewise be so motivated? The short answer is it may well be so in policy, and I want to come back to that point.

I am not disagreeing that there is validity to these concerns and that it may be appropriate to impose that restriction. My point is simply that it hasn't reached the level now where it is clear that it is a problem or that it would be a problem. And if it does reach that point, then let the department do exactly what it is done in these principles, which is to formulate a suggestion and to put it out as guidance. There is no reason why it can't do the same if the issue arises in this outher context.

Mr. COHEN. Well, let me ask you this. We started out appointing these monitors in what year—1994, 1996? When did we start with DPAs and monitors?

Mr. SOFFER. DPAs started in 1993, 1994. I can't recall when the first monitor was selected.

Mr. COHEN. But whatever. It has been a while ago.

Mr. SOFFER. It has been a while.

Mr. COHEN. And when was the Morford memorandum issued?

Mr. SOFFER. March of 2008.

Mr. COHEN. So we relied on the Clinton administration and the Bush administration to monitor themselves, and yet they didn't do it till 2008. The legislative branch might have been slumbering in not coming up with something, or maybe they proposed something that made this all of a sudden become a front burner issue for the Justice Department.

But if the Justice Department has come up with the Morford memorandum—let us assume they hadn't, because they hadn't done it in the previous umpteen years—should the legislative, even if they think—and you think the Morford memorandum is a good thing——

Mr. SOFFER. I do.

Mr. COHEN. Well, should the legislature not say we want to pass such a law? We should just wait on the U.S. attorney to do it and the attorney general? And if the attorney general doesn't do it, well, that is their business. They are not doing it. So we think it is good government, we think it is a grand thing, but they are not doing it, so we are not going to do it. That is not—doesn't make sense, does it?

Mr. SOFFER. Well, I think, put in those terms, no, it doesn't make sense. I think——

Mr. COHEN. That is enough. [Laughter.]

Go ahead.

Mr. SOFFER. No, I think that the Morford—candidly, the Morford memo had its genesis at a time when there was some concern about one particular instance. What I worry about is it is an example of bad facts making bad laws, lawyers like to say.

The Morford memo—although, frankly, not spurred entirely by that incident—nevertheless arose around the same time. It tried to look beyond just the moment and tried to take into account all relevant principles and tried to consider all possible permutations down the road.

What I worry about is that if we take that same incident, and we were moved by the moment to pass legislation—which is fundamentally immutable; it takes an act of Congress to undo an act of Congress—then we are going to regret what we have done.

And if there is no pressing need to do it, because the monitors are in effect and because—or rather, the principles are in effect and because at least on the—granted, it is not a great body of evidence thus far, but on what we know, it has worked, or the department has abided by, then I don't think we take the next step and make it immutable.

Mr. COHEN. I am going to ask one more question.

I didn't see Mr. Johnson come in before I started asking questions, and I apologize to you for that.

But he brought up the issue about the fees that have been paid some of the monitors, and the Ashcroft is the 800-pound gorilla—and $52 million. Have any of you all looked at that or had any opportunity—maybe Ms. Larence—to look at exactly what he charged? And you said $300 to $900 an hour is a typical fee.

Ms. LARENCE. We surveyed——

Mr. COHEN. Shouldn't somebody monitor the dollar amount? I mean that corporations are kind of afraid. This person has got them, you know, in their grip, and they can't question the charges. Shouldn't there be kind of an omsbudsperson?

Mr. SOFFER. Well, let me just offer a plug, then, for Ms. Larence's report, which included—at least the earlier report, or it is actually the most recent—a recommendation that the department make clear its role in the deferred prosecution agreements and make clear its role in serving as an ombudsman between the corporation and the monitor and in seeking to resolve disputes. It is an excellent recommendation. That is one I believe the department is likely to follow.

Mr. COHEN. And did you—Ms. Larence, do you want to—you are all going to be saved in a few minutes by the buzzer, but do you have any—want to follow up on that all?

Ms. LARENCE. We did survey a number of monitors. And of the 13 that we surveyed, they reported that the hourly fees ranged from $300 to $900 an hour. We did not have access to the Zimmer agreement to be able to look at the charges in that individual case.

Mr. COHEN. Does anybody have familiarity with the Zimmer agreement?

Professor?

Mr. GARRETT. I think this subcommittee tried that without success, to get more information about the billing and that agreement. My understanding was that what the subcommittee found out was that it was a retainer, and so there wasn't hourly billing records. And so that again raises the question of what recourse the company has if a monitor isn't exercising good judgment in terms of billing or if there is a retainer that at the outset seems excessive.

Ms. LARENCE. We do know in that case that the company did go to the U.S. attorney office to raise concerns about the fees, but the U.S. attorney office sort of said you need to work it out between the monitor, and the company felt like they had obviously no leverage to do that, so they did feel like they didn't have an avenue in that case.

Mr. COHEN. Right.

Mr. Soffer, don't you think there needs to be somebody out there to be the good guy or the good girl?

Mr. SOFFER. Well, if now we are talking about engaging, for example, a judge for the purpose of flyspecking agreements for the legitimacy of the fees that are being charged and to moderate disputes in real time as that goes forward, I think we really are trodding too much—we are demanding too much of judges, and I think we are encroaching too much on the executive function. I think we are imposing delays.

And so I come back to Ms. Larence's suggestion in her report that let there be a fully collaborative process, including the Depart-

ment of Justice, if there are genuine disputes about fees or other issues.

Mr. COHEN. But it didn't work. The U.S. attorney told them, "Go work it out. I am not getting—I am not going to mess with this. You go work it out with the firm." And they tried the firm. The monitor had gone and—the firm had gone to the monitor, and they couldn't work it out. It never happened.

And they are just kind of—and I have had consultations with a couple of these folks, and they just say they have no choice. And some of the expenses are outlandish. Doesn't the Congress have a duty to represent these corporate interests? I mean I know some people don't care about corporations, but some people do.

Mr. SOFFER. Oh, I represent them, and I care deeply about them. But I don't think that their interests are ill served or underserved by the current structure. My experience has been they are not shy about expressing their concerns.

And the scenario that we are now describing obviously predated the Morford memo, and it certainly has predated the GAO's directive, or recommendation rather, that the department consider inserting itself more aggressively. So I think it may be a different picture going forward.

Mr. COHEN. Mr. Johnson, with apologies for overlooking you, you are recognized.

Mr. JOHNSON. Thank you, Mr. Chairman.

These deferred prosecution agreements—I don't disagree with them in principle. I think that prosecutors should have that ability to use when legitimately necessary. And insofar as criminal cases go, I have always thought that it is a great idea for prosecutions to be deferred for first offenders, should it be a logical and useful step and in society's best interests.

And by the way, all of those types of agreements are subject to public records, although you may not be able to get pre-sentence investigation reports. But you go to the clerk's office, and you can find out all about these kinds of agreements.

And I believe that there should be the same kind of mechanism on the top end. When I say the top end, I mean the corporations that can afford to pay a $7 million fee of a monitor. And so my purpose today is just simply to raise some issues that legislation may need to address.

Can you tell me—and I know that deferred prosecution agreements are entered into to maintain stability of a company that is could be the non-financial or financial that has a crucial role in the American and perhaps world economy. Are there any other purposes that you see as legitimate for these agreements to be invoked?

Mr. Garrett? Professor Garrett?

Mr. GARRETT. Yes, I mean many of the companies that have been subject to these agreements were large corporations that have, you know, public importance. And I think, you know, the department has said that one of the purposes of these agreements is to focus sort of in a forward-looking way on creating reforms to make sure that whatever the misconduct that was, that it didn't repeat.

And so that is a laudable purpose, and I suppose the notion is simply punishing the firm, fining the firm may not be sufficient if

reforms aren't in place, and second, that an indictment and the consequences that could flow from an indictment or conviction might be overkill, over deterrence, and they might indeed cause an Andersen-type situation.

Mr. JOHNSON. Don't you think that that is a good thing, if a too big to fail entity is brought to justice and given the death penalty, if you will, strapped in an electric chair, fried to death like we had here in Virginia this week? Or their choice could be to do the—you know, the—of the poison peel kind of thing in being executed. But don't you think it is good for the public to see that this large entity is not above the law?

Mr. GARRETT. You know, I suppose that is what the organizational prosecution guidelines, the Thompson memo, was about. Not all companies receive these agreements. There are certainly still plenty of corporations that are indicted and sign plea agreements. Some of those plea agreements require the imposition of monitors just like deferred prosecution agreements do, except the company then has the consequence of that conviction.

Mr. JOHNSON. Well, certainly, and once they are indicted, that becomes public information, unless it is under seal, which does not occur in the overwhelming majority of cases, correct?

Mr. GARRETT. It certainly has been a struggle sometimes to get copies of some of these deferred and non-prosecution agreements. I think in particular because of the work of this subcommittee, the department has made them public, and it has been much easier lately to get copies of them.

But what you also bring up in terms of just making sure that the work of sort of remedying misconduct occurs in fact, you know, we really do want to make sure that not only are appropriate monitors being selected, but we want to make sure that they are really doing their jobs effectively so that we don't have any more misconduct in these organizations.

And so I am also concerned not about monitors just doing too much work or billing too much, but you want there to be some check if the monitor is not doing enough. And that is something we don't know about. I think that is something that the GAO may be looking at. But we want to really be sure that these monitors are effective. And I don't know what sort of assessment is being done so that we can have some sense that these monitors really are doing effective work.

Mr. JOHNSON. Thank you. And I really do believe that this kind of business that is sent to law firms to become deferred prosecution monitors should be opened up to minority firms. I have a feeling that it is not.

Thank you.

Mr. COHEN. Thank you.

Professor Garrett, you said that you thought that this agreement memorandum came about after the subcommittee started its work. Did you say that? Or maybe it was Mr. Soffer in his written testimony.

Mr. Soffer, you were there. You were there when the memorandum came about. What case was it or what subcommittee hearing triggered this?

Mr. SOFFER. It actually preceded the subcommittee hearing. So as I recall the sequence of events, some time in the early to mid, perhaps, 2007, the department began its work considering whether monitor principles would be appropriate. In November, I think it was, of 2008 the now governor or Governor-elect Chris Christie situation came into full view. And then it was in March of—November 2007, I am sorry—March of 2008 that the principles were promulgated, and then very shortly thereafter there was the first hearing on this matter.

Mr. COHEN. Well, I thank each of you for coming and giving your testimony. I think we have had a great panel. We have all learned a lot, and we will try to—if you have any other thoughts you would like to submit, we would appreciate it in helping us to come through with our legislation or where we should go.

Without objection, Members have five legislative days to submit any additional written questions to you, which we would forward to you and ask you to answer as promptly as possible. They will be made part of the record. Without objection, the record will remain open for 5 legislative days for the submission of any other materials.

And I thank everyone for their time and patience.

The hearing of the Subcommittee of Commercial and Administrative Law is promptly adjourned.

[Whereupon, at 1:21 p.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

MATERIAL SUBMITTED BY THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 7, 2008

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS

FROM: Craig S. Morford
Acting Deputy Attorney General

SUBJECT: Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations[1]

I. INTRODUCTION

The Department of Justice's commitment to deterring and preventing corporate crime remains a high priority. The Principles of Federal Prosecution of Business Organizations set forth guidance to federal prosecutors regarding charges against corporations. A careful consideration of those principles and the facts in a given case may result in a decision to negotiate an agreement to resolve a criminal case against a corporation without a formal conviction – either a deferred prosecution agreement or a non-prosecution agreement.[2] As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor.[3] The corporation benefits from expertise in the area of corporate compliance

[1] As used in these Principles, the terms "corporate" and "corporation" refer to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

[2] The terms "deferred prosecution agreement" and "non-prosecution agreement" have often been used loosely by prosecutors, defense counsel, courts and commentators. As the terms are used in these Principles, a deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court. In the non-prosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court. Clear and consistent use of these terms will enable the Department to more effectively identify and share best practices and to track the use of such agreements. These Principles do not apply to plea agreements, which involve the formal conviction of a corporation in a court proceeding.

[3] Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.

The purpose of this memorandum is to present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements (hereafter referred to collectively as "agreements") with corporations.[4] Given the varying facts and circumstances of each case – where different industries, corporate size and structure, and other considerations may be at issue – any guidance regarding monitors must be practical and flexible. This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers, trustees, or perform other functions.

A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals. A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.

In negotiating agreements with corporations, prosecutors should be mindful of both: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation. Prosecutors shall, at a minimum, notify the appropriate United States Attorney or Department Component Head prior to the execution of an agreement that includes a corporate monitor. The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

This memorandum does not address all provisions concerning monitors that have been included or could appropriately be included in agreements. Rather this memorandum sets forth nine basic principles in the areas of selection, scope of duties, and duration.

This memorandum provides only internal Department of Justice guidance. In addition, this memorandum applies only to criminal matters and does not apply to agencies other than the

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[4] In the case of deferred prosecution agreements filed with a court, these Principles must be applied with due regard for the appropriate role of the court and/or the probation office.

Department of Justice. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

II. SELECTION

1. Principle: Before beginning the process of selecting a monitor in connection with deferred prosecution agreements and non-prosecution agreements, the corporation and the Government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case. The monitor must be selected based on the merits. The selection process must, at a minimum, be designed to: (1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle.

To avoid a conflict, first, Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict-of-interest guidelines set forth in 18 U.S.C. § 208 and 5 C.F.R. Part 2635. Second, the Government shall create a standing or *ad hoc* committee in the Department component or office where the case originated to consider monitor candidates. United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally. Third, the Office of the Deputy Attorney General must approve the monitor. Fourth, the Government should decline to accept a monitor if he or she has an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality. Finally, the Government should obtain a commitment from the corporation that it will not employ or be affiliated with the monitor for a period of not less than one year from the date the monitorship is terminated.

Comment: Because a monitor's role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance. For example, the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable. In other cases, the facts may require the Government to play a greater role in selecting the monitor. Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence. If the Government determines that participation in the selection process by any Government personnel creates, or appears to create, a potential or actual conflict in violation of 18 U.S.C. § 208 and 5

C.F.R. Part 2635, the Government must proceed as in other matters where recusal issues arise. In all cases, the Government must submit the proposed monitor to the Office of the Deputy Attorney General for review and approval before the monitorship is established.

Ordinarily, the Government and the corporation should discuss what role the monitor will play and what qualities, expertise, and skills the monitor should have. While attorneys, including but not limited to former Government attorneys, may have certain skills that qualify them to function effectively as a monitor, other individuals, such as accountants, technical or scientific experts, and compliance experts, may have skills that are more appropriate to the tasks contemplated in a given agreement.

Subsequent employment or retention of the monitor by the corporation after the monitorship period concludes may raise concerns about both the appearance of a conflict of interest and the effectiveness of the monitor during the monitorship, particularly with regard to the disclosure of possible new misconduct. Such employment includes both direct and indirect, or subcontracted, relationships.

Each United States Attorney's Office and Department component shall create a standing or *ad hoc* committee ("Committee") of prosecutors to consider the selection or veto, as appropriate, of monitor candidates. The Committee should, at a minimum, include the office ethics advisor, the Criminal Chief of the United States Attorney's Office or relevant Section Chief of the Department component, and at least one other experienced prosecutor.

Where practicable, the corporation, the Government, or both parties, depending on the selection process being used, should consider a pool of at least three qualified monitor candidates. Where the selection process calls for the corporation to choose the monitor at the outset, the corporation should submit its choice from among the pool of candidates to the Government. Where the selection process calls for the Government to play a greater role in selecting the monitor, the Government should, where practicable, identify at least three acceptable monitors from the pool of candidates, and the corporation shall choose from that list.

III. SCOPE OF DUTIES

A. INDEPENDENCE

2. Principle: A monitor is an independent third-party, not an employee or agent of the corporation or of the Government.

Comment: A monitor by definition is distinct and independent from the directors, officers, employees, and other representatives of the corporation. The monitor is not the

corporation's attorney. Accordingly, the corporation may not seek to obtain or obtain legal advice from the monitor. Conversely, a monitor also is not an agent or employee of the Government.

While a monitor is independent both from the corporation and the Government, there should be open dialogue among the corporation, the Government and the monitor throughout the duration of the agreement.

B. MONITORING COMPLIANCE WITH THE AGREEMENT

3. Principle: A monitor's primary responsibility should be to assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating (and where appropriate proposing) internal controls and corporate ethics and compliance programs.

Comment: At the corporate level, there may be a variety of causes of criminal misconduct, including but not limited to the failure of internal controls or ethics and compliance programs to prevent, detect, and respond to such misconduct. A monitor's primary role is to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.

A monitor is not responsible to the corporation's shareholders. Therefore, from a corporate governance standpoint, responsibility for designing an ethics and compliance program that will prevent misconduct should remain with the corporation, subject to the monitor's input, evaluation and recommendations.

4. Principle: In carrying out his or her duties, a monitor will often need to understand the full scope of the corporation's misconduct covered by the agreement, but the monitor's responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct.

Comment: The scope of a monitor's duties should be tailored to the facts of each case to address and reduce the risk of recurrence of the corporation's misconduct. Among other things, focusing the monitor's duties on these tasks may serve to calibrate the expense of the monitorship to the failure that gave rise to the misconduct the agreement covers.

Neither the corporation nor the public benefits from employing a monitor whose role is too narrowly defined (and, therefore, prevents the monitor from effectively evaluating the

reforms intended by the parties) or too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).

The monitor's mandate is not to investigate historical misconduct. Nevertheless, in appropriate circumstances, an understanding of historical misconduct may inform a monitor's evaluation of the effectiveness of the corporation's compliance with the agreement.

C. COMMUNICATIONS AND RECOMMENDATIONS BY THE MONITOR

5. Principle: Communication among the Government, the corporation and the monitor is in the interest of all the parties. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation.

Comment: A monitor generally works closely with a corporation and communicates with a corporation on a regular basis in the course of his or her duties. The monitor must also have the discretion to communicate with the Government as he or she deems appropriate. For example, a monitor should be free to discuss with the Government the progress of, as well as issues arising from, the drafting and implementation of an ethics and compliance program. Depending on the facts and circumstances, it may be appropriate for the monitor to make periodic written reports to both the Government and the corporation regarding, among other things: (1) the monitor's activities; (2) whether the corporation is complying with the terms of the agreement; and (3) any changes that are necessary to foster the corporation's compliance with the terms of the agreement.

6. Principle: If the corporation chooses not to adopt recommendations made by the monitor within a reasonable time, either the monitor or the corporation, or both, should report that fact to the Government, along with the corporation's reasons. The Government may consider this conduct when evaluating whether the corporation has fulfilled its obligations under the agreement.

Comment: The corporation and its officers and directors are ultimately responsible for the ethical and legal operations of the corporation. Therefore, the corporation should evaluate whether to adopt recommendations made by the monitor. If the corporation declines to adopt a recommendation by the monitor, the Government should consider both the monitor's recommendation and the corporation's reasons in determining whether the corporation is complying with the agreement. A flexible timetable should be established to ensure that both a monitor's recommendations and the corporation's decision to adopt or reject them are made well before the expiration of the agreement.

D. REPORTING OF PREVIOUSLY UNDISCLOSED OR NEW MISCONDUCT

7. Principle: The agreement should clearly identify any types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. The agreement should also provide that as to evidence of other such misconduct, the monitor will have the discretion to report this misconduct to the Government or the corporation or both.

Comment: As a general rule, timely and open communication between and among the corporation, the Government and the monitor regarding allegations of misconduct will facilitate the review of the misconduct and formulation of an appropriate response to it. The agreement may set forth certain types of previously undisclosed or new misconduct that the monitor will be required to report directly to the Government. Additionally, in some instances, the monitor should immediately report other such misconduct directly to the Government and not to the corporation. The presence of any of the following factors militates in favor of reporting such misconduct directly to the Government and not to the corporation, namely, where the misconduct: (1) poses a risk to public health or safety or the environment; (2) involves senior management of the corporation; (3) involves obstruction of justice; (4) involves criminal activity which the Government has the opportunity to investigate proactively and/or covertly; or (5) otherwise poses a substantial risk of harm. On the other hand, in instances where the allegations of such misconduct are not credible or involve actions of individuals outside the scope of the corporation's business, the monitor may decide, in the exercise of his or her discretion, that the allegations need not be reported directly to the Government.

IV. DURATION

8. Principle: The duration of the agreement should be tailored to the problems that have been found to exist and the types of remedial measures needed for the monitor to satisfy his or her mandate.

Comment: The following criteria should be considered when negotiating duration of the agreement (not necessarily in this order): (1) the nature and seriousness of the underlying misconduct; (2) the pervasiveness and duration of misconduct within the corporation, including the complicity or involvement of senior management; (3) the corporation's history of similar misconduct; (4) the nature of the corporate culture; (5) the scale and complexity of any remedial measures contemplated by the agreement, including the size of the entity or business unit at issue; and (6) the stage of design and implementation of remedial measures when the monitorship commences. It is reasonable to forecast that completing an assessment of more extensive and/or complex remedial measures will require a longer period of time than completing

an assessment of less extensive and/or less complex ones. Similarly, it is reasonable to forecast that a monitor who is assigned responsibility to assess a compliance program that has not been designed or implemented may take longer to complete that assignment than one who is assigned responsibility to assess a compliance program that has already been designed and implemented.

9. **Principle: In most cases, an agreement 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.**

Comment: If the corporation has not satisfied its obligations under the terms of the agreement at the time the monitorship ends, the corresponding risk of recidivism will not have been reduced and an extension of the monitor provision(s) may be appropriate. On the other hand, there are a number of changes in circumstances that could justify early termination of an agreement. For example, if a corporation ceased operations in the area that was the subject of the agreement, a monitor may no longer be necessary. Similarly, if a corporation is purchased by or merges with another entity that has an effective ethics and compliance program, it may be prudent to terminate a monitorship.