



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 3, 2014

The Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on May 15, 2013. We apologize for our delay and hope that this information is of assistance to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "PKA".

Peter J. Kadzik  
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.  
Ranking Member

**Questions for the Record**  
**Attorney General Eric H. Holder, Jr.**  
**Committee on the Judiciary**  
**United States House of Representatives**  
**May 15, 2013**

**Questions Posed by Representative Bachus**

**Cases Against Package Delivery Companies**

**1. Attorney General Holder, it is my understanding that DOJ is pursuing cases against package delivery companies regarding the shipment of prescription drugs – including Schedule II painkillers.**

**A) Has the DOJ supplied these shippers with a list of offending pharmacies that would allow the package delivery companies to identify the bad actors?**

**Response:**

Please see the Non-Prosecution Agreement [Attachment A] regarding the investigation and its resolution concerning United Parcel Service, Inc. (UPS). In particular, please see paragraphs 5, 22, 24, and 25 of the Non-Prosecution Agreement. UPS was notified by its own employees and met with the DEA and other law enforcement agencies between January 2004 and June 2006 regarding the issue. Pursuant to Federal Rule of Criminal Procedure 6(e), the Department of Justice (DOJ or Department) cannot confirm, deny or comment on the existence of a grand jury investigation into any parcel delivery company or reveal any information that may have been gathered pursuant to such an investigation.

**B) The DOJ action regarding these package delivery companies concerns me, because it appears the DOJ is subjecting these companies to new regulations. What specific statutory authority is DOJ using in this instance?**

**Response:**

Please see the Non-Prosecution Agreement [Attachment A] regarding the statutes and regulations at issue in the investigation and resolution concerning UPS. In particular, please see paragraph 1 of the Non-Prosecution Agreement. The Department of Justice is not subjecting shipping companies to new regulations.

**C) If these are indeed new requirements, does DOJ intend to put out a notice and comment period for rulemaking so all affected stakeholders can have input in the process?**

**Response:**

Please refer to the response to Question 1(B), above.

## Questions Posed by Representative King

### Keepseagle Case

2. As you know, the government settled the *Keepseagle* case regarding Native American farmers to the tune of \$760 million in 2010. According to the New York Times, Justice Department lawyers argued that that \$760 million “far outstripped the potential cost of a defeat in court.” Agriculture officials said that not enough Native American farmers would file claims to justify a \$760 million settlement.

Are you aware of internal DOJ disagreements regarding that settlement? If so, please describe those disagreements.

### Response:

The settlement in *Keepseagle* ended more than a decade of hard-fought litigation and freed up limited federal resources by providing farmers who believed that they suffered discrimination the opportunity to have their claims evaluated in a streamlined administrative process. The settlement was informed by the litigation risk and other substantial burdens that the federal government faced in this class action lawsuit. In resolving *Keepseagle*, we followed the Department’s normal practice, which involves obtaining input from relevant Department components and other interested agencies. The Department has substantial confidentiality interests in its internal deliberations regarding litigation matters; we can advise you, however, that we believe that the settlement we reached to resolve this case was in the best interests of all parties.

3. According to the New York Times, the concerns of the career officials at DOJ about the size of the \$760 million *Keepseagle* settlement were not unfounded, as only 3,600 claimants won compensation at a cost of \$300 million. That leaves \$460 million, roughly \$400 million of which must be given to “nonprofit groups that aid Native American Farmers” under the settlement (the remaining \$60.8 million will go to the plaintiffs’ lawyers). However, the Intertribal Agricultural Council, which is perhaps the largest eligible organization to receive this \$400 million, has an annual budget of just \$1 million.

- A) Please explain the status of the remaining \$400 million-or-so in money that has been settled for the *Keepseagle* case.

### Response:

A neutral party has awarded more than \$227 million to the approximately 3,600 Native American ranchers and farmers who submitted successful claims. We understand that class counsel and the entities that they hired to administer the settlement are finishing the payment process for estate claims and for prevailing claimants who have not cashed their checks. The settlement agreement, which the district court approved after a fairness hearing, contains a

provision addressing how to handle funds that remain after the claims process is complete. The Department is currently in discussions about how best to implement that provision.

**B) What does the government plan on doing with this money?**

**C) Given that it was not anticipated that such a sum of money would be remaining after the payment of individual claims, does the DOJ have any intention of going back to the Court to request a change in the terms of the *Keepseagle* settlement?**

**Response to 3(B) and (C):**

Pursuant to the parties' agreement, shortly after the district court granted final approval of the *Keepseagle* settlement, the funds were transferred to class counsel for the benefit of the class (i.e., to pay successful claims and attorneys' fees). The settlement agreement contains a provision addressing how to handle funds that remain after the claims process is complete. The Department is currently in discussions about how best to implement that provision in a way that benefits Native American ranchers and farmers consistent with the public interest and the goals of the settlement.

**Pigford USDA Discrimination Cases**

**4. In the 2008 Farm Bill (P.L. 110-246), Congress included a provision permitting claimants who had submitted a late-filing request under *Pigford I* and had not received a final determination on the merits of their claims to bring a civil action in federal court to obtain such a determination. The legislation made available a maximum of \$100 million for payment of successful claims. Subsequently, 23 separate complaints were filed, representing approximately 40,000 individual claims, which were consolidated as *Pigford II*. Despite the \$100 million maximum prescribed by Congress, on February 18, 2010, you, along with USDA Secretary Tom Vilsack, announced a \$1.25 billion settlement agreement for *Pigford II*.**

**A) Please describe the process by which you and USDA Secretary Vilsack negotiated the \$1.25 billion settlement for *Pigford II*.**

**Response:**

In 2008, Congress created a new cause of action for African American farmers whose claims under the *Pigford I* Consent Decree were rejected because they were untimely, and appropriated \$100 million to pay successful farmers. In 2010, Congress appropriated an additional \$1.15 billion to pay awards to African American farmers whose claims were encompassed by the cause of action created in 2008, provided that all such claims were resolved through a class action settlement. The settlement, which attorneys at the Department of Justice and the Department of Agriculture (USDA) negotiated with attorneys for the class of African American farmers, was approved by the district court in October 2011, after a fairness hearing.

- B) Were there any concerns from career lawyers, agency officials, or other employees of the DOJ or the USDA about the magnitude of this settlement agreement? If there were concerns, please explain who raised those concerns and what those concerns were, specifically.**

**Response:**

The Department has substantial confidentiality interests in its internal deliberations regarding litigation matters. We can advise you, however, that we believe that the settlement we reached to resolve this case was in the best interests of all parties.

- 5. As you know, claims for *Pigford II* had to be filed by May 11, 2012. Those claims had to reference previously late-filed *Pigford I* claims that should have been submitted before June 19, 2008. Those claims had to reference discrimination that occurred before December 31, 1996.**

**Are there any cases going forward, or any efforts being made by the DOJ, or, to your knowledge, the USDA, to expand the class of individuals or extend the statute of limitations for cases involving alleged discrimination by the USDA, in other words to have a "*Pigford III*" or a second round of any of the other USDA discrimination cases?**

**Response:**

There are no efforts being made at the Department of Justice or, to our knowledge, at USDA, to create *Pigford III* or additional rounds of settlements for Hispanic, women, or Native American farmers.

**The Judgment Fund**

- 6. Right now the Judgment Fund it is a permanent, infinite appropriation by Congress. The government can negotiate settlements and pay out taxpayer dollars and Congress can be left entirely out of the loop. David Aufhauser, the Treasury's general counsel from 2001 to 2003, said that the Judgment Fund, if used inappropriately, can be a "license to raid the till."**

**Would you suggest any statutory reforms to the Judgment Fund?**

**Response:**

The Department of Justice does not believe statutory reforms are necessary at this time. For more than half a century, the Judgment Fund has operated as intended by Congress. Prior to the enactment of the Judgment Fund in 1956, judgments against the United States could be paid only when specifically authorized by Congress. In 1956, Congress enacted the Judgment Fund, a

permanent, indefinite appropriation for the payment of final judgments that were “not otherwise provided for” by another source of funds. In 1961, Congress amended the Judgment Fund to authorize payment of compromise settlements of actual or imminent litigation entered into by the Attorney General. Subsequently, Congress has authorized payment from the Judgment Fund for a number of administrative claim settlements, including settlements that do not require the approval of the Attorney General.

The Judgment Fund is accessible only where legally authorized. The Judgment Fund establishes the legal criteria for payment. The Department has regulations and procedures to ensure that only judgments and settlements that meet those criteria are submitted for payment. Except where Congress has authorized another agency to settle a claim against the United States without the approval of the Attorney General, Department regulations require careful review and approval at appropriate levels of litigative and administrative settlements before payments are authorized. Under Department regulations, settlements below certain amounts can be authorized by U.S. Attorneys, experienced directors of Department of Justice litigating offices, and certain officials at other agencies. Settlements in excess of the amounts delegated to these officials must be approved by senior Department of Justice officials, whether the appropriate Assistant Attorney General or the Associate Attorney General. Likewise, a judgment against the United States cannot be paid from the Judgment Fund unless and until the Solicitor General of the United States has determined that no further judicial review is warranted.

Lastly, pursuant to Section 530D(a)(1)(C) of Title 28, United States Code, the Department submits a quarterly report to Congress “of any instance in which the Attorney General or any officer of the Department of Justice . . . approves . . . the settlement or compromise (other than in bankruptcy) of any claim, suit, or other action against the United States (including any agency or instrumentality thereof) for a sum that exceeds, or is likely to exceed, \$2,000,000, excluding prejudgment interest . . . .”

7. **Do you have any concerns that the Judgment Fund could be used as a way to funnel money to preferred special interest groups, especially if political appointees override the legal judgment of career government officials?**

**Response:**

No. As noted in the response to Question 6, the Judgment Fund and the regulations and procedures of the Departments of Treasury and Justice are effective checks on attempts to use the Judgment Fund for unauthorized payments. Our experience has shown that the extensive reviews undertaken of each settlement – and particularly the largest settlements, which require review by senior Department officials – work well to protect the public fisc. Through reviews and candid assessments by litigators closest to each case, and recommendations from Department officials with a broad perspective on the government’s litigating interests across the country, the Department seeks to achieve resolutions that are both appropriate in an individual case and consistent with other resolutions across the country.

Garcia and Love Cases

8. According to the Congressional Research Service, the Judgment Fund can only pay for “actual or threatened litigation.” In other words, “the Judgment Fund is limited to litigative awards, meaning awards that were or could have been made in court. Litigative awards are distinguished from administrative awards...[f]or settlement awards to be considered litigative, the settlement must be negotiated by the Department of Justice (or any person authorized by the Attorney General) and based on a claim that could have resulted in a monetary judgment in court.” As the New York Times puts it, some government officials argued that “it was legally questionable to sidestep Congress and compensate the Hispanic and female farmers out of a special Treasury Department account, known as the Judgment Fund. The fund is restricted to payments of court-approved judgments and settlements, as well as to out-of-court settlements in cases where the government faces imminent litigation that it could lose. Some officials argued that tapping the fund for the farmers set a bad precedent, since most had arguably never contemplated suing and might not have won if they had.” Court after court dismissed the plaintiffs’ claims in *Garcia and Love* and on January 19, 2010, the Supreme Court declined to hear their appeal, effectively ending ability of the cases to become class action lawsuits. At that point, according to court records, the DOJ argued that the cases for the 91 named plaintiffs should be sent back to the local jurisdictions to be handled individually. The DOJ had also argued in court that some of the cases had no merit and the DOJ had no intention to settle those cases.

A) With the *Garcia and Love* cases being denied class action status, what reason did the government have to agree to pay claims for tens of thousands of individuals?

Response:

Although it is true that class certification was denied in *Love* and *Garcia*, the district court had tolled the statute of limitations, meaning that the United States was facing the prospect of many thousands of individual Hispanic and women farmers filing new lawsuits in jurisdictions across the country. In addition to the federal government’s monetary exposure from so many lawsuits, such litigation would have imposed substantial burdens on the Department of Justice and USDA. To address the litigation risk and associated burdens, and to settle claims as appropriate, the Department worked with USDA to craft a resolution that gives Hispanic and women farmers the opportunity to have their claims heard in a *voluntary* administrative process. In fact, over 47,000 timely claims were filed under the *Garcia and Love* administrative framework. The decision to create the administrative process was made by the government alone.

B) Did the DOJ conclude that the federal government faced a potential liability large enough to justify a \$1.33 billion resolution to the *Garcia and Love* cases? If so, please provide the analysis that justifies that conclusion.

**Response:**

Please refer to the response to Question 8(A), above.

- C) Did the USDA urge the DOJ to change its initial position following the Supreme Court's denial of the plaintiffs' appeal (that the cases should be decided individually by the lower courts)?**

**Response:**

Please refer to the response to Question 8(A), above.

- D) Did the USDA urge the DOJ to resolve these cases in the manner in which they were ultimately resolved?**

**Response:**

Please refer to the response to Question 8(A), above.

- E) If the answer is "no" to the previous two questions, please explain why the DOJ reversed its initial position about sending the *Garcia* and *Love* cases to the lower courts following the Supreme Court's denial of appeal. If the USDA did urge the DOJ to change its position, please explain who, specifically, made those requests, and what the USDA's arguments for resolving the case in this manner were.**

**Response:**

Please refer to the response to Question 8(A), above.

- 9. What criteria does the DOJ use to determine whether or not to use the Judgment Fund to make payments?**

**Response:**

The Department relies on the criteria identified in section 1304 of Title 31, United States Code.

- 10. Please explain what basis was used to justify using the Judgment Fund for payments under the *Garcia* and *Love* cases, considering the action was an administrative decision, not a litigative settlement, and there did not appear to be a plausible threat of significant litigation threat to the federal government after the Supreme Court denied the plaintiffs' appeal for class status.**

**Response:**

The Judgment Fund is available to pay judgments, awards, or settlements in a variety of circumstances, including where such funds are payable pursuant to 28 U.S.C. 2414. *See* 31 U.S.C. 1304(a)(1)(A). Under section 2414, if the Attorney General determines that the United States faces the threat of “imminent litigation,” he or she can settle the underlying claim without having to wait until litigation over the claims commences. Although the government did not face the threat of suits by *classes* of women or Hispanic farmers at the time it implemented the Alternative Dispute Resolution (ADR) process for those groups, the government still faced the prospect of potentially tens of thousands of individual suits filed by women and Hispanic farmers in district courts around the country. The Attorney General and the Secretary of Agriculture determined that the government’s, and the public’s, interests would best be served by creating a voluntary ADR process that would allow the discrimination claims and potential discrimination claims of Hispanic and women farmers to be resolved promptly and fairly, while avoiding the substantial cost the government would have faced if it simultaneously litigated (and potentially lost) thousands of separate discrimination actions.

- 11. Has the Judgment Fund ever been used to pay administrative claims in bulk and in a non-adversarial process such as the government has now set up for *Garcia* and *Love* claimants? If so, please provide the relevant circumstances.**

**Response:**

In *Pigford I* and *Keepseagle*, the government entered into settlements with classes of African American farmers and Native American farmers, respectively, that created ADR processes that bear some similarity to the one that is available to Hispanic and women farmers in *Garcia* and *Love*.

**The New York Times cites “senior officials,” presumably from the DOJ, saying that resolving the various discrimination lawsuits “averted potentially higher costs from an onslaught of new plaintiffs or losses in court.”**

- 12. Please provide the DOJ’s analysis on the possible outcomes of pursuing each of the USDA discrimination cases in court. In addition, please explain how the DOJ typically weighs the legal risks of losing class action and other cases filed against the government with the cost of negotiating settlements for these cases.**

**Response:**

Although there is no single formula that the government employs whenever it considers settling litigation, the government takes into account a number of factors in assessing whether the government’s interests would best be served by settling rather than litigating claims, or potential claims, it faces. These factors include the strength of the government’s legal position, its ability to gather and be prepared to introduce at trial evidence that would support its position, the costs

in time and resources it would have to bear if it litigates a claim, and the cost of an adverse decision. When deciding whether to settle pending or threatened litigation, the Department is not limited to considering only litigative probabilities. In *Garcia* and *Love*, for example, the United States was facing the prospect of many thousands of individual Hispanic and women farmers filing lawsuits in jurisdictions across the country. In addition to the federal government's monetary exposure from so many lawsuits, such litigation would have imposed substantial burdens on the Department and USDA. To address the litigation risk and associated burdens, and to settle claims as appropriate, the Department worked with USDA to craft, on their own initiative, a resolution that gives Hispanic and women farmers the opportunity to have their claims heard in a *voluntary* administrative process.

**In the matter of the *Garcia* case, the New York Times has reported that, as the deadline for filing claims approached and the government was facing far fewer claimants than expected, the USDA instructed processors to call about 16,000 people to remind them that time was running out. Some government officials worried that the government was virtually recruiting claims against itself.**

**13. Are there any restrictions on federal government employees that prevent them from inviting claims against the government in a class action lawsuit?**

**Response:**

The rules of professional conduct governing Department attorneys, including in their supervision of agents, would not prohibit the USDA agents from reminding potential claimants about an upcoming deadline in a proposed settlement program, such as the voluntary claims process established for Hispanic and women farmers.

## Questions Posed by Representative Franks

### Olmstead Decision

14. **What is your interpretation of Title II of the Americans with Disabilities Act (ADA) and the 1999 U.S. Supreme Court decision in *Olmstead v. L.C.* as it pertains to the choice of institutional care facilities for persons with cognitive and developmental disabilities?**

#### Response:

The Department is charged with enforcing the Americans with Disabilities Act (ADA), including the integration mandate of Title II. Title II prohibits disability discrimination by public entities, including states. Title II's integration mandate requires public entities to administer services, programs, and activities for people with disabilities in the most integrated setting appropriate to their needs. The Americans with Disabilities Act regulations define an integrated setting as one that enables persons with disabilities to interact with non-disabled persons to the fullest extent possible.

In *Olmstead v. L.C.*, the Supreme Court held that unnecessary institutionalization is discrimination under the ADA and Title II's integration mandate. The Supreme Court held that public entities must provide community services to people with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity. In so holding, the Supreme Court explained that unnecessary institutionalization perpetuates unwarranted assumptions that people with disabilities are incapable or unworthy of participating in community life and diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

The Department has issued a technical assistance document explaining the requirements of Title II of the ADA and *Olmstead* entitled "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*" This technical assistance document is attached. [Attachment B]

Protecting the civil rights of individuals with disabilities is a top priority of the Department, including ensuring that all persons with disabilities – regardless of the severity of their disability – have a real and meaningful option to live in the community. The Department has entered into *Olmstead* settlement agreements with New York, Rhode Island, Virginia, Delaware, North Carolina, and Georgia, each of which provides relief to thousands of people with disabilities who are in, or are at risk of entering, institutions statewide. The Department has other ongoing investigations into other states' practices and policies that unnecessarily institutionalize people with disabilities or place them at risk of unnecessary institutionalization. All of the Department's settlement agreements and findings letters are available online at <http://www.ada.gov/olmstead/>.

The Department has engaged in *Olmstead* enforcement actions to ensure that persons in institutions are given an option of community-based alternatives and that people in the community are provided the critical supports they need to avoid being placed unnecessarily in an institution. In each of these matters, the Department's work has focused on people whose needs can be met in the community and on ensuring that those people are given the information necessary to make an informed choice about community-based treatment, as required by the first two prongs of *Olmstead*.

Individuals with disabilities – along with their family members, and in some cases their legal guardians – often are most familiar with the needs and preferences of persons with disabilities. The role of individual choice and input from family members and, where applicable, authorized representatives or guardians, is reflected in the Department's *Olmstead* enforcement work. For example, the Department's agreements in Virginia and Georgia require that legal guardians and family members of persons with disabilities be included in placement decisions and that persons with disabilities, their family members, and where applicable, their authorized representatives or guardians be provided with sufficient information about the options to make an informed choice. Both agreements include opportunities for legal guardians and family members to obtain information about possible community placements, including through meetings with potential providers, visits to placements, and connecting with other families with loved ones with similar needs. These agreements permit individuals, with legal guardians and family members where appropriate, to make an informed choice for institutional care.

- 15. Specifically, does your Department recognize that qualified persons, by law, are given the choice of institutional or home and community based care? (42 CFR 441.302(d)).**

**Response:**

42 C.F.R. § 441.302(d) is a Medicaid regulation and is enforced by the Department of Health and Human Services. Individuals eligible for Medicaid can choose institutional residential care to the extent that state offers Medicaid institutional services. The ADA does not change that. The ADA simply ensures that public entities also provide community-based services as appropriate.

- 16. Do you believe that the *Olmstead* decision requires a movement from institutional care facilities for persons with cognitive and developmental disabilities?**

**Response:**

Title II's integration mandate, as interpreted by the Supreme Court in *Olmstead*, requires a public entity to transition individuals with disabilities, including those with cognitive and developmental disabilities, from institutions when the person does not oppose the transition, when community services are appropriate for the person, and when community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.

The Department's *Olmstead* enforcement work seeks to ensure that all people with developmental disabilities, including people with the most complex needs, are offered a real and meaningful choice of community services that are safe and meet their needs. After being presented with options, residents and their guardians may choose to continue to receive care in an institution. The Department's enforcement efforts do not seek to undermine and eliminate institutions, but rather require the states to expand and improve a range of critical community-based services.

### **Department Policies in the Civil Rights Division**

#### **17. Why is there a Department Policy to:**

- A) Allow the Civil Rights Division to investigate and sue states' institutional care facilities that are homes to persons living with the most severe forms of developmental disabilities when no resident, resident's legal representative, staff member, or federal or state inspector has requested such actions be taken or has joined with the Department in alleging civil rights violations?**

#### **Response:**

The Department may become aware of potential *Olmstead* matters through a variety of sources. The Department may receive complaints from people who believe their rights have been violated; be contacted by disability groups, family groups, or legal organizations with concerns; or identify potential violations through data, public reports, or the media. It may also learn of potential *Olmstead* violations in the course of investigating publicly owned or operated institutions, pursuant to its authority under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997. The federally funded protection and advocacy system created by Congress to protect the rights of individuals with disabilities also plays an important role in bringing complaints to the attention of the Department. Such local organizations are important partners in the Department's ADA enforcement work because they have insight into the issues that are most important to individuals with disabilities in their geographic areas and to the barriers that are most affecting local disability communities.

- B) Permit its Civil Rights Division attorneys to "partner" with organizations that work assiduously to undermine and eliminate the option of licensed institutional care facilities for persons with profound and severe cognitive-developmental disabilities?**

#### **Response:**

Please refer to the response to Question 17(A), above.

## Questions Posed by Representative Poe

### 26 USC §7217

18. **26 USC §7217 states that, “It shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer” and this section covers “the President, the Vice President, any employee of the executive office of the President, and any employee of the executive office of the Vice President”.**

**Should evidence come to light that a covered individual directly or indirectly encouraged this behavior; will you direct your agency to prosecute such individuals for violating this section of the US Code?**

#### Response:

Please be assured that the Department of Justice takes very seriously alleged wrongdoing by public officials. All such matters are reviewed carefully by career prosecutors and law enforcement agents and if a prosecutable violation of federal law is found, appropriate action is taken. As the Department has previously acknowledged, there is an ongoing federal criminal investigation of alleged misconduct involving the activities of the Internal Revenue Service. Since the criminal investigation is ongoing, no further information can be provided at this time.

19. **26 USC §7217 also states that: “Any officer or employee of the Internal Revenue Service receiving any request prohibited by subsection (a) shall report the receipt of such request to the Treasury Inspector General for Tax Administration.” Based on the facts that have been made public so far, numerous IRS employees clearly knew of this targeted enforcement and based on what we know now, did not report this conduct as required under this section.**

**Do you believe the IRS employees who knew of this conduct (some knew as far back as June 2011) should be prosecuted under 26 USC §7217?**

#### Response:

Given the ongoing federal criminal investigation of this matter, it would not be appropriate under Department of Justice policy or the rules of professional conduct governing prosecutors to make any comment on any potential criminal liability.

20. **Will you call for the Department of Justice to open an investigation as to IRS employees who violated 26 USC §7217? If not, why not?**

**Response:**

In accord with the Principles of Federal Prosecution, the Department will follow the facts and evidence wherever they lead in determining both the scope of its ongoing investigation and whether to commence a criminal prosecution. The Department of Justice is conducting a thorough and independent investigation and will take any action that is appropriate under the law.

**The Hatch Act**

**21. 5 USC §7323, commonly known as the Hatch Act, states that a covered federal employee may not “use his official authority or influence for the purpose of interfering with or affecting the result of an election.”**

**A) Do you think that specifically targeting conservative groups for increased scrutiny by the IRS prior to the 2012 election violates this statute? If not, why not?**

**Response:**

In light of the ongoing federal criminal investigation of this matter, it would not be appropriate under Department of Justice policy or the rules of professional conduct governing prosecutors to make any comment on the scope of potential criminal liability arising from the investigation. In accord with the Principles of Federal Prosecution, the Department will follow the facts and evidence wherever they lead in determining both the scope of its ongoing investigation and whether to commence a criminal prosecution.

**B) Do you believe, as I do, that the intent of this targeting and harassment was to disrupt the work that these organizations were doing to promote their political beliefs prior to the election?**

**Response:**

As stated above, given the ongoing federal criminal investigation of this matter, it would not be appropriate under Department of Justice policy or the rules of professional conduct governing prosecutors to make any comment on the scope of potential criminal liability arising from the investigation. In accord with the Principles of Federal Prosecution, the Department will follow the facts and evidence wherever they lead in determining both the scope of its ongoing investigation and whether to commence a criminal prosecution.

- C) As you know, the U.S. Office of Special Counsel has jurisdiction to investigate and prosecute alleged violations of the Hatch Act. Would you support a special investigation by the U.S. Office of Special Counsel into possible violations of the Hatch Act by employees of the IRS or other Administration officials who encouraged such behavior?

**Response:**

The Office of Special Counsel is an independent agency with authority to conduct administrative proceedings, but the Department of Justice typically strives to complete a criminal investigation prior to administrative proceeding by other agencies. Should the Office of Special Counsel commence a parallel investigation involving this matter, the Department would follow Department of Justice guidelines concerning the effective conduct of parallel criminal and administrative investigations.

**Decision to Exercise Discretion to Not Take Certain Enforcement Actions**

22. The U.S. Supreme Court Case *Heckler v. Chaney*, 40 US. 821 (1985), addressed the question of to what extent an administrative agency's decision to exercise its discretion to not take certain enforcement actions is subject to judicial review under the Administrative Procedures Act. While the Court held that an agency's determination not to enforce a law was generally unreviewable, the Court also stated that this un-reviewability was rebuttable in the situation where an agency "consciously and expressly" adopts a policy that is so extreme that it represents an abdication of its statutory responsibilities.
- A) Do you believe that a situation where the IRS decided, in a systematic and widespread fashion, to selectively enforce our nation's tax laws against groups who had certain political beliefs would qualify as an example where an agency is "consciously and expressly" adopting a policy that is directly opposite of their constitutional duty to equally enforce the laws and Constitution of the United States? If not, why not?
- B) Would your analysis change if facts were to come to light that this enhanced IRS targeting was also directed towards religious groups that may have had different political views than the Administration?

**Response to 22(A) and (B):**

The Department is unable to pre-judge a particular case without having all of the pertinent facts before us.

## Equal Protection

23. As you know, the U.S. Supreme Court has held that selective prosecution exists where the enforcement or prosecution of a Criminal Law<sup>1</sup> is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the administration of the criminal law amounts to a practical denial of Equal Protection<sup>2</sup> of the law (*United States v. Armstrong*, 517 U.S. 456 (1996), quoting *YICK WO V. HOPKINS*, 118 U.S. 356 (1886)).

A) If, as the IRS has indicated they were guilty of doing in their recent apology, it is proved that the IRS specifically targeted conservative groups for additional scrutiny in the application of the laws of the United States, do you believe that the agency (and all those in the Administration who were involved) would be guilty of violating the equal protection rights of the individual Americans who make up the membership of the targeted groups? If not, why not?

### Response:

In light of the ongoing federal criminal investigation of this matter, it would not be appropriate under Department of Justice policy or the rules of professional conduct governing prosecutors to make any comment on the scope of potential criminal liability arising from the investigation. In accord with the Principles of Federal Prosecution, the Department will follow the facts and evidence wherever they lead in determining both the scope of that investigation and whether to commence a criminal prosecution. Please be assured that we will take whatever actions are warranted by the facts and that we will examine all viable theories.

B) Given the seriousness of these crimes, the threat to our democratic process which arises from the alleged conduct, and the potential for high level members of the Administration being involved in the initial conduct and the ensuring cover-up; will you call for a special prosecutor to be appointed to investigate these allegations? If not, why not?

### Response:

The Department is confident that experienced federal investigators, working with experienced federal prosecutors, will be able to fully investigate these allegations. Given the ongoing federal criminal investigation of this matter, it would be inappropriate and premature to speculate as to whether any referrals might be appropriate in the future, but for the present it is important to let investigators fulfill their fact-finding mission.

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<sup>1</sup> <http://legal-dictionary.thefreedictionary.com/Criminal+Law>

<sup>2</sup> <http://legal-dictionary.thefreedictionary.com/Equal+Protection>

## Questions Posed by Representative Chaffetz

### Geolocational Information

24. Does the Department of Justice believe that probable cause is the correct standard for law enforcement to access geolocation information?

A) If no, what is the appropriate standard?

B) If yes, does the Department advise FBI agents and U.S. Attorneys to always obtain a warrant based on probable cause when seeking geolocation information?

### Response:

In considering the standard for law enforcement access to geolocation information during ordinary criminal investigations, it is important to bear in mind that there is no single category of "geolocation information." For example, the types of data that law enforcement can compel a wireless carrier to disclose can vary widely in precision, and the data may be provided prospectively (revealing the location of a phone in real time) or on a historical basis, to the extent a provider maintains records of such data. Other third-party transactional records, unrelated to cell phones, may also have a location component. For example, when an individual withdraws money from an ATM, uses a credit card at a store, or boards a plane, the business (the bank, credit card company, or the airline) generates a record that, among other things, places the individual at a specific place at a specific time. Each of these different types of information has different privacy implications.

In ordinary criminal investigations, the Department uses an order obtained from a court to compel a wireless carrier to disclose location information. The showing required increases with the implications for an individual's privacy interests. For comparatively imprecise historical cell-site information, which carriers maintain as records in the ordinary course of providing service, the Department relies on court orders under 18 U.S.C. § 2703(d), which requires a court to find "specific and articulable facts showing that there are reasonable grounds to believe" that the information sought is relevant and material to an ongoing criminal investigation. To obtain prospective cell-site information, a court must issue an order based on a finding that the Department has satisfied the requirements of both the pen register/trap and trace statute and 18 U.S.C. § 2703(d). Finally, to obtain prospective GPS information, the Department's general practice is to seek and obtain from a court a warrant based on probable cause.

25. Does the Department of Justice believe that there should be a lower/different standard for law enforcement to access geolocation information from smartphones and other mobile devices than the standard for attaching tracking devices to cars under *Jones*?

A) If yes, why?

B) If no, why not?

**Response:**

In *Jones*, the Supreme Court held that the attachment of a GPS device to the defendant's vehicle, and the use of the device to monitor the vehicle's movements, constituted a Fourth Amendment search because law enforcement had obtained information by physically intruding on a constitutionally protected area. The Court did not address whether the search at issue in *Jones* required a probable cause warrant or could have been based upon a lesser showing of reasonable suspicion. Nor did the Court address how the Fourth Amendment governs law enforcement access to location information that is obtained from a wireless carrier. Accordingly, practices for obtaining location information from wireless carriers, as explained in response to Question 24, have not changed. And although *Jones* did not address the procedures for obtaining prospective cell phone GPS information from a provider, the Department continues to recommend using a warrant to obtain that information.

**26. Does the Department of Justice believe there should be different standards for historical geolocation data and prospective, real time data?**

A) If no, again, what is the appropriate standard?

B) If yes, why? Is it really less privacy invasive to look at someone's past movements as opposed to their current movements?

**Response:**

As noted in response to Question 24, there is no single category of "geolocation information," and location information can vary across many axes, one of which is whether that data is prospective (revealing the location of a device in real or near-real time) or historical, to the extent a third party collects and maintains records of such data. Other axes include, for example, how precise a piece of data is, whether the data was collected in response to a request from law enforcement or by a third party in its ordinary course of business, and whether the data is collected continuously or sporadically. Where a given piece of location information falls on each of these axes has implications for an individual's privacy interests, such that whether a piece of information is historical or real-time might not be determinative of the appropriate standard.

**27. There has been a lot of concern about the investigative technique called "cell tower dumps"—that's when law enforcement gets from a phone company a list of all the phone numbers that connected to a particular cell tower in a particular place around a particular time—because it reveals the location of so many innocent people who are irrelevant to the crime being investigated.**

- A) What rules does the DOJ have in place to protect privacy when it comes to cell tower dumps?
- B) What legal process is used, what limits are there on how you use all of that information and how long you keep it, and what procedures, if any, are in place to notify all of those people that the government has collected these records?

**Response:**

Records of calls made through a specified cell tower at a specified time can be critical to solving serious crimes. For example, in the High Country Bandits case, two men engaged in a series of more than a dozen armed bank robberies in New Mexico, Arizona, Colorado, and Utah. The Federal Bureau of Investigation (FBI) obtained records of all cell phone calls that were handled by cell towers near several of the banks at the time of the robberies. By comparing these records, they identified the robbers and solved the case.

The Department compels disclosure of cell tower records only pursuant to judicial authorization or customer consent. The Department may obtain these records pursuant to a court order under 18 U.S.C. § 2703(d), which requires a court to find that the government has presented specific and articulable facts that the records sought are relevant and material to an ongoing criminal investigation. The Stored Communications Act does not require notice to a customer when a government entity obtains non-content information. *See* 18 U.S.C. § 2703(c)(3). This rule is consistent with established Supreme Court precedent: the Supreme Court has held that the Fourth Amendment does not require notice of a subpoena directed to a third party. *See SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743, 750 (1984).

The Department takes seriously the protection of individuals' personal information that is collected during lawful investigations, and it operates under regimes that strictly control the treatment, retention, and dissemination of such information. These regimes also protect privacy interests. Indeed, the same authorities that the Department relies upon to obtain mobile phone location records also ensure that those records are protected once in the Department's custody. For instance, an improper disclosure of records obtained under the pen register/trap and trace statute or the Stored Communications Act can lead to administrative discipline or provide grounds for a civil action. *See* 18 U.S.C. § 2707(d), (g).

Moreover, like all federal agencies, the Department operates under the Privacy Act, 5 U.S.C. § 552a, which limits the Department's ability to disclose personal records except in twelve delineated circumstances. The Department has National Archives and Records Administration schedules in place that require the destruction of most records, including information obtained in the course of an investigation, within prescribed time periods. The Department also has internal policies in place – such as the FBI's Domestic Investigations and Operations Guide – that limit access to personal information for unauthorized purposes and impose standards of conduct on Department employees that govern their use of and access to such information. Finally, it is important to note that the Department is obligated under *Brady v. Maryland*, 373 U.S. 83 (1963), to retain certain information so that it can be disclosed to criminal defendants in accordance with

the requirements of the Constitution. The internal and external regimes under which the Department operates ensure that *Brady* material and other personal information are protected.

## Questions Posed by Representative Scott

### Defending Childhood

28. **What is the Administration's response to the "Defending Childhood" report issued by your National Task Force on Children Exposed to Violence just before the shootings in Newtown regarding the lasting effects that exposure to violence has on children?**

#### Response:

Every year, millions of children and adolescents in the United States are victimized and exposed to violence in their homes, schools, and neighborhoods. With the proper help and opportunities, children can overcome even serious early-life trauma to become successful and productive members of society. Without proper screening, assessment, and evidence-based treatment and the support of informed adults throughout the community, however, these children are far more likely to become future victims or offenders, or to suffer from other difficulties such as substance abuse, educational failure, or mental health problems.

Last year, the Task Force issued its final report and made policy recommendations. The report highlighted the importance of identifying and treating children exposed to violence as victims and witnesses, providing access to support services and positive, nurturing adult relationships within the home and community, and routine screening for trauma for children in the child welfare and the juvenile justice systems.

The Attorney General has prioritized and approved the implementation of key Task Force recommendations including: the launch of a public awareness and education campaign; a comprehensive education and training effort for diverse groups of professionals who work with children; continued support for research and national data collection; the development of public policy initiatives in state, tribal, and local governments; and the creation of a task force to examine the needs of American Indian and Alaska Native children.

The creation of the Attorney General's Task Force on American Indian/Alaska Native Children Exposed to Violence was officially announced on August 12, 2013 and is anchored by a federal working group that includes U.S. Attorneys and officials from the Departments of Interior and Justice, as well as a federal advisory committee of experts. These experts were appointed to examine the scope and impact of violence facing American Indian and Alaska Native children and to make policy recommendations to the Attorney General. The Advisory Committee is co-chaired by former U.S. Senator Byron Dorgan and Iroquois composer and singer, Joanne Shenandoah.

## Effect of Sequester

### **29. What is the effect of the sequester on criminal and civil trial proceedings?**

#### **Response:**

The results of sequestration were felt throughout the Department. To avoid furloughs and remain solvent in Fiscal Year (FY) 2013, the Department took aggressive steps to generate savings, such as cutting training and contracts, and continuing a managed hiring freeze. Between January 2011 and September 2013, the Department lost more than 3,500 staff Department-wide due to budget constraints. The greatest impact of sequestration falls on our most valuable resource – our people. The Department’s litigating components are staff intensive operations with the majority of their budgets devoted to payroll expenses. The greatest impact of sequestration falls on our most valuable resource – our people. The Department’s loss in agents, attorneys, paralegals, and other critical support staff negatively affects our capacity to carry out the Department’s mission, as the Department will prosecute fewer criminals, pursue fewer affirmative cases, and collect less money on behalf of the government.

One example that is illustrative of the impact on litigation across the Department can be seen in our United States Attorneys’ Offices. The U.S. Attorney community absorbed a \$139 million budget cut in FY 2013 and was required to continue the hiring restrictions that began in January 2011. High vacancy rates have an impact on each U.S. Attorney’s ability to maintain prosecutorial efforts achieved prior to the implementation of sequestration, resulting in fewer cases being prosecuted and an increase in the number of pending cases. Since defensive civil cases must be defended by the U.S. Attorneys, affirmative civil litigation will be the area that suffers the most impact under any budget shortfall. The U.S. Attorneys’ Offices will have reduced capacity for affirmative litigation, which translates to less litigation in which the United States, as plaintiff, initiates actions to assert and protect government interests. Examples of affirmative cases include those that help ensure environmental protections, foster greater protection of our citizens’ civil rights, and recover funds in cases of fraud against the government. In addition, fewer affirmative civil cases and criminal cases filed will have a significant impact on monies collected by the U.S. Attorney community, which translates into less monies deposited into the U.S. Treasury.

In sum, the negative impact of sequestration and the hiring freeze translated into a situation where the Department was less well-positioned during FY 2013 and FY 2014 to conduct criminal investigations and prosecute fraudsters, gang members, child pornographers, and serious drug traffickers. However, the FY 2014 Appropriations Act provides sufficient resources to lift the hiring restrictions put in place on January 21, 2011. During the remainder of FY 2014, filling current staff vacancies while keeping pace with attrition will be a priority.

## Drones and Kill Lists

**30. According to the Washington Post, two thirds of those sentenced to death have their convictions overturned.**

**A) Why should we have confidence that those who are put to death by drones are not actually innocent?**

### Response:

As the President stated in his remarks at the National Defense University addressing the use of force outside the United States and outside the area of hostilities, the United States “does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured--the highest standard we can set.” The United States is in an armed conflict with al-Qa’ida, the Taliban, and associated forces, in which it may use force in accordance with the laws of war. The government may also use force consistent with its inherent right of national self-defense, as it did in responding to the 9/11 attacks. The United States takes extraordinary care to ensure that its uses of force – including targeted strikes – conform to all applicable laws, including the law of war. This includes the principle of distinction, under which only lawful targets – such as combatants, civilians directly participating in hostilities, and military objectives – may be intentionally targeted. The Administration has put in place a rigorous process for reviewing and approving operations to employ lethal force against terrorist targets outside the United States and outside areas of active hostilities.

**B) What are the rules for considering evidence for determining who is put on the kill list?**

### Response:

As explained at greater length in past statements by the Administration, decisions to use force against individual terrorists outside the United States and outside areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. The decision-making process takes into account a broad analysis of an intended target’s current and past role in plots threatening U.S. persons. The analysis also addresses, among other factors, the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection. The officials who participate in the review process consider, in a deliberate and responsible manner, the most up-to-date intelligence. Reflecting the rigor of the process, review by senior officials often generates requests to clarify existing information or to obtain new information to provide the best available intelligence and analysis to inform the decisions.

**C) Is hearsay considered?**

**Response:**

As explained above, the Administration has put in place an extensive and rigorous review process to ensure that these decisions are made at the highest levels after full consideration of the best available intelligence. The process is designed to ensure that senior officials are fully informed and that targeting decisions are based on accurate and reliable intelligence. But as John Brennan, the former Assistant to the President for Homeland Security and Counterterrorism, made clear in his 2012 speech at the Wilson Center, the analogy to criminal proceedings is misplaced: these operations are not undertaken to “punish[] terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat – to stop plots, prevent future attacks, and save American lives.”

**D) Is illegally obtained evidence considered?**

**Response:**

As explained above, the Administration has established detailed procedures to ensure that these decisions are made based on the best available intelligence and that targeting decisions are made in a manner faithful to the rule of law and our values.

**E) If someone is on the kill list, can they be put to death by methods other than by drone?**

**Response:**

As explained above, decisions to use force against individual terrorists outside the United States and outside areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. Further, as Harold Koh noted in his 2010 speech at the American Society of International Law, “the rules that govern targeting ‘do not turn on the type of weapon system used,’ ... so long as they are employed in conformity with applicable laws of war.”

**F) What opportunity is there for someone put on the kill list to be heard in order to present evidence that he or she should not be on the list?**

**Response:**

The United States is in an armed conflict with al-Qa’ida, the Taliban, and their associated forces, and it may also use force consistent with its inherent right of national self-defense. The U.S. government undertakes lethal action in counterterrorism operations outside the United States and outside areas of active hostilities only against lawful targets. As is true in any war, those who

join the enemy in this armed conflict and plot attacks from regions abroad where they cannot be captured do not enjoy the rights of a criminal suspect inside the United States. But as indicated above, the Administration has gone to extraordinary lengths to ensure that decisions to use lethal force are undertaken after a rigorous review by senior officials on the basis of the best available intelligence and in accordance with all applicable law. Moreover, and as has been stated many times, the policy of the United States is not to use lethal force when it is feasible to capture an individual who is part of those enemy forces outside a theater of active hostilities.

### **Retroactive Resentencing**

**31. The Sixth Circuit ruled that the Fair Sentencing Act must be applied retroactively.**

**What is the Administration's position on applications for retroactive resentencing and is it consistent with the Sixth Circuit's interpretation of the law and the legislation?**

#### **Response:**

In *Dorsey v. United States*, 132 S. Ct. 2321 (2012), the Supreme Court held that the Fair Sentencing Act (FSA) applies to all sentencing that takes place after August 3, 2010, the date of the FSA's enactment. *Id.* at 2326. The Court's reasoning indicated that the FSA does not apply retroactively to previously imposed sentences. As the Court explained, Congress routinely draws lines when it "enacts a new law changing sentences," and it did so here. *Id.* at 2335.

The Department of Justice adheres to the Court's decision in *Dorsey*, which accords with the decisions of every regional circuit including the Sixth Circuit, which recently issued an *en banc* decision on this issue. In *United States v. Blewett*, --- F.3d ---, 2013 WL 6231727, at \*1 (6th Cir. Dec. 3, 2013) (en banc) ("Consistent with a 142-year-old congressional presumption against applying reductions in criminal penalties to those already sentenced, 1 U.S.C. § 109, consistent with the views of all nine Justices and all of the litigants in [*Dorsey*], consistent with the decision of every other court of appeals in this country, and consistent with dozens of our own decisions, we hold that the Act does not retroactively undo final sentences.").

### **Exemptions from Federal Laws Prohibiting Religious Discrimination in Employment**

**32. The 2007 OJP policy allows faith-based recipients of taxpayer dollars to be granted certificates of exemption from federal laws prohibiting religious discrimination in employment.**

**What the basis and process used to award these exemptions?**

**Response:**

In response to the June 29, 2007, opinion of the Office of Legal Counsel entitled *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, commonly referred to as the "World Vision opinion," DOJ's Office of Justice Programs (OJP) developed a policy that allows for a case-by-case review of applicants seeking a similar exemption. Under this policy, a religious organization that applies for funding and requests an exemption under the Religious Freedom Restoration Act to enable it to prefer coreligionists in employment is required to submit documentation to the DOJ grant-making component from which it has applied for funds, either OJP or the Department's Office on Violence Against Women (OVW), certifying to each of the following statements:

- a) The Applicant will offer all federally-funded services to all qualified beneficiaries without regard for the religious or non-religious beliefs of those individuals, consistent with the requirements of 28 C.F.R. Part 38, Equal Treatment for Faith-Based Organizations;
- b) Any activities of the Applicant that contain inherently religious content will be kept separate in time or location from any services supported by direct federal funding, and, if provided under such conditions, will be offered only on a voluntary basis, consistent with the requirements of 28 C.F.R. Part 38; and
- c) The Applicant is a religious organization that sincerely believes that providing the services in question is an expression of its religious beliefs; that employing individuals of a particular religion is important to its religious exercise; and that having to abandon its religious hiring practice in order to receive the federal funding would substantially burden its religious exercise.

## Questions Posed by Representative Watt

### Megaupload Investigation

33. As the Ranking Member of the Subcommittee on Intellectual Property, I'm concerned with safeguarding creative and intellectual property and the Americans who work in various creative industries, including film and TV production. I want to commend you and the Department for the work done in the *Megaupload* investigation.

Not only does the indictment of Megaupload's founder and several of his employees on charges of criminal copyright infringement and racketeering represent important enforcement of our laws to protect U.S. intellectual property and jobs, but it has had meaningful results. Megaupload was one of the most popular sites on the Internet. It hosted popular creative content produced by U.S. workers providing millions of dollars in advertising and subscriptions to the operator of the site while the creators received no benefit.

We now have evidence that the closure of Megaupload has had a real positive impact. A research study released by Carnegie Mellon University found that the closure of Megaupload last year led to more legitimate digital sales and rentals by a factor of 6-10%. The study concludes that customers shifted from cyberlocker-based piracy to purchasing or renting through *legitimate* digital channels, providing compensation to U.S. workers and companies. Although the Megaupload indictment is significant, similar sites continue to operate with impunity.

- A) Given the effectiveness this enforcement action represented for consumers and creators, and the real world impact of the action, is the Department pursuing other similar investigations/cases related to similar sophisticated criminal enterprises?

### Response:

The Department appreciates the support that you and your colleagues in Congress have provided to the Department's intellectual property criminal enforcement efforts. As you point out, targeted criminal enforcement efforts can have a significant economic impact by deterring criminals from engaging in intellectual property crime and by encouraging consumers to use legitimate alternatives to infringement. The Department has aggressively pursued intellectual property crime in all its forms, including by bringing cases against sophisticated criminal enterprises engaged in online copyright piracy and trademark counterfeiting. As noted in the Administration's 2013 Joint Strategic Plan on Intellectual Property Enforcement, the Department will continue to play a leadership role in national law enforcement efforts to protect intellectual property rights. See 2013 Joint Strategic Plan, at 20-21.

While the Department cannot comment on pending investigations, recently the Department successfully prosecuted a number of other significant online piracy cases. For example, in April 2013, the last of five defendants was convicted for leading “IMAGiNE,” an organized online piracy group that had become the premier source for “first release” Internet copies of new movies only available in theaters. According to industry, the IMAGiNE Group was the most prolific motion picture piracy “release group” operating on the Internet from September 2009 through September 2011. Sentences for IMAGiNE defendants ranged up to 60 months in prison, among the strongest sentences ever imposed for P2P piracy. Similarly, in August 2012, law enforcement officials undertook the first comprehensive law enforcement action targeting widespread infringement of mobile device applications, dismantling three of the most prolific websites involved in illegally distributing infringing copies of Android cell phone applications.

In addition to these specific examples, in February 2010, the Attorney General reestablished the Department’s Task Force on Intellectual Property (Task Force) as part of a Department-wide initiative to confront the growing number of domestic and international intellectual property crimes. The Task Force provides high-level support and policy guidance to the Department’s overall IP enforcement efforts. Through the Task Force, we not only have prioritized the investigation and prosecution of large-scale online piracy and counterfeiting, but have also sought to reduce intellectual property crime through domestic and international outreach and training.

For example, through the Office of Justice Programs, the Department collaborated with the National Crime Prevention Council on a public awareness campaign to educate consumers on the consequences of intellectual property crime. In addition, we have provided substantial capacity building and technical assistance in many countries around the world. These efforts have resulted in greater and better enforcement in, for example, Mexico, where training for investigators, customs officials, and prosecutors has led to an unprecedented number of seizures of counterfeit and pirated products, an increase in the number of referrals for criminal prosecution, and an increased prosecutorial presence at the major ports in Mexico.

**B) What challenges does the Department face in seeking to prosecute such egregious cases of American IP theft?**

**Response:**

The most difficult types of IP crimes to counter are increasingly international, exploit global communications networks, and involve conduct and organizations that span national boundaries. Many of the same technological factors that have revolutionized the global economy, enabled more efficient transportation and shipment of goods, and reduced barriers to trade also present challenges to law enforcement. Advances in technology have led to extraordinary new forms of artistic, cultural, and political expression and new commercial ventures, yet these advances have also presented new methods for infringing intellectual property. The fast pace of technological change means criminals can operate at a fast pace too, and investigators and prosecutors must address and understand ever-greater volumes of evidence to build a case.

Cases with a substantial international component provide an extra layer of complexity for investigators and prosecutors in attempting to obtain evidence, interview witnesses, and locate and apprehend criminal suspects. Many IP cases also involve the need to obtain complex electronic evidence in multiple jurisdictions. A lack of adequate laws or enforcement capacity in some countries can impede cooperation on investigations, and in the most serious instances, these deficiencies can create a safe haven for IP criminals, leaving the Department without effective means to bring such criminals to justice. It is for these reasons that the Department uses every tool at its disposal, such as utilizing INTERPOL Red Notices to locate and seek the arrest and extradition or other lawful return of fugitives.

**C) What additional tools would assist the Department in curtailing these illegitimate foreign operators?**

**Response:**

In March 2011, the Administration transmitted to Congress a range of legislative recommendations aimed at improving intellectual property enforcement in its “White Paper on Intellectual Property Enforcement Legislative Recommendations.” The Department made significant contributions to those proposals, which seek to strengthen enforcement tools to combat intellectual property crime. We appreciate the efforts of your Subcommittee and others in Congress in enacting laws over the past two years that implement many of those recommendations. There are a number of recommendations, such as the proposal to provide felony penalties for criminal copyright offenses involving Internet “streaming,” that have not yet been enacted. We continue to believe these are important tools in the fight against new forms of intellectual property crime, and we look forward to continuing to work with Congress as it considers the Administration’s current and future legislative recommendations.

As noted in the Administration’s 2013 Joint Strategic Plan on Intellectual Property Enforcement, released by the U.S. Intellectual Property Enforcement Coordinator on June 20, 2013, the Department and other federal components involved in IP enforcement will be undertaking a review of existing IP laws to assess their effectiveness and to determine what changes might be made to improve enforcement efforts. We look forward to making additional recommendations to Congress in the future.

Another valuable tool that would greatly enhance the Department’s ability to investigate and prosecute large-scale international IP infringement is the deployment of International Computer Hacking and Intellectual Property coordinators, or “ICHIPs,” in key locations around the world. President Obama has requested funding for an ICHIP program in his 2014 budget request. In today’s environment, where virtually every significant IP crime investigated and prosecuted in the United States has an international component, it is impossible to address IP crime adequately without significant and strong international engagement. The ICHIP program would maintain and build upon the Department’s highly successful IP Law Enforcement Coordinator program (IPLEC), which has been a critical component of the Department’s international IP enforcement efforts since its creation in 2006. Under IPLEC, the Department has deployed experienced federal prosecutors overseas to take the lead on our IP protection efforts in key regions:

Southeast Asia and, until March of this year, Eastern Europe. The ICHIP program will serve to enhance the Department's multilateral enforcement efforts on intellectual property in key regions around the world, and the Department's ability to address the role of transnational organized crime in IP violations, online fraud, and large-scale data breaches.

## Questions Posed by Representative Cohen

### Marijuana-Respecting the States and Issuing DOJ Guidance

34. **General Holder, you and I have had several conversations over the years about federal policy towards marijuana. In particular, I've expressed my disappointment in the federal government's continued targeting and prosecution of individuals and businesses who are acting in compliance with their state laws legalizing medical marijuana.**

**Since you last testified before our Committee, two major events have happened: (1) a Pew Research poll found that a majority of Americans favor legalizing marijuana and (2) the voters of Colorado and Washington voted to legalize marijuana for personal use. Since then, both states have asked for guidance from the Justice Department about whether it intends to respect their laws but they're still awaiting answers. I understand that you've been looking into this issue and have said you will report something soon.**

- A) With all of the other priorities of the Justice Department, not to mention the significant cuts it took due to sequestration, why does it make sense for the federal government to use its resources to target marijuana?**

#### Response:

Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the Controlled Substances Act (CSA) consistent with those determinations. To that end, on August 29, 2013, the Deputy Attorney General issued a memorandum that guides the exercise of prosecutorial discretion against individuals and organizations who violate any of our stated federal priorities related to marijuana, no matter where they live or what the laws in their states may permit.

- B) Is it a good use of resources for the federal government to deprive someone of their liberty because of marijuana use?**

#### Response:

Please refer to the response to Question 34(A), above.

**C) Does marijuana pose as great or any greater risk to public safety than alcohol?**

**Response:**

Please refer to the response to Question 34(A), above.

**D) Can you tell me when you expect to issue guidance on whether the Justice Department will respect Colorado and Washington's laws?**

**Response:**

The Department issued guidance to federal prosecutors on August 29, 2013.

**E) Wouldn't it be a waste of federal resources to prosecute those who are acting in full compliance with the laws of their states?**

**Response:**

The August 29, 2013 memorandum guides the exercise of prosecutorial discretion against individuals and organizations who violate any of our stated federal priorities related to marijuana, no matter where they live or what the laws in their states may permit. It is the responsibility of the Department of Justice to enforce the CSA in all States. Moreover, in providing this updated guidance to prosecutors, the Department is trying to make charging decisions regarding federal drug laws more uniform across all 50 states. No matter whether a state has enacted laws to legalize marijuana for purported medical or other use, or not at all, the Department of Justice's guidance to federal prosecutors is the same: continue to prioritize those cases that implicate one or more of the stated federal priorities, and leave lower-level or localized activity to state and local authorities.

**F) And shouldn't we encourage the states to be the laboratories of democracy?**

**Response:**

U.S. Supreme Court Justice Louis Brandeis famously wrote in favor of States serving as laboratories for social and economic experiments. However, regardless of individual state action regarding the legalization of marijuana for purported medical or other use, Congress enacted the CSA and thereby prohibited the sale and distribution of marijuana. The Department of Justice enforces the CSA in all States.

**G) Would you support a national blue ribbon commission that looks at these issues and our federal marijuana policy more broadly?**

**Response:**

I am happy to work with Congress on this or any other issue.

**Conflict with State Laws, Particularly Banking Laws**

**35. One of the major issues that Colorado and Washington are confronting is that businesses that intend to sell marijuana in full compliance with their state laws are unable to open bank accounts because of risks that the banks will be subject to scrutiny by the federal government for money laundering violations.**

**A) Would the DOJ be willing to issue a policy statement declaring that for the purposes of determining whether money laundering has occurred, state-legal marijuana activity shall not be considered “unlawful activity” or “specified unlawful activity”?**

**Response:**

The memorandum issued on August 29, 2013, provided guidance to all Department attorneys and law enforcement agents, including special agents of the Drug Enforcement Administration, regarding the Department’s eight enforcement priorities under the CSA. Authorities in jurisdictions that have legalized certain types of marijuana sales alerted federal law enforcement authorities and policy makers to the dangers posed by the lack of access to the formal financial system by these businesses. In particular, they have raised serious concerns that the largely cash nature of the emergent industry in these states could fuel derivative criminal conduct such as theft and associated violent crimes. On February 14, 2014, the Department issued guidance to all Department attorneys and law enforcement agents that harmonizes the enforcement of money laundering and related statutes with the eight enforcement priorities identified in the Department’s August 2013 guidance. On the same day, the Department of Treasury’s Financial Crimes Enforcement Network (FinCEN) sent guidance to financial institutions to clarify Bank Secrecy Act (BSA) expectations for financial institutions seeking to provide services to marijuana-related businesses.

**B) The federal government would retain the ability to charge an individual for the predicate offense of drug trafficking, if that is deemed necessary. But it would ensure that individuals who are not trying to conceal their activities -- or the activities of their customers -- are not prosecuted under statutes intended to prevent such concealment. Otherwise, aren’t you actually fostering a greater risk of money laundering by forcing these businesses to engage in all cash transactions and taking hundreds of millions of dollars out of the regulated financial system?**

**Response:**

Please refer to the response to Question 35(A), above.

**Pardons and Commutations**

**36. As we have discussed, I am very concerned about the leadership of the Pardon Office and the slow pace of pardons and commutations we have seen from the Obama Administration. It is not only individual applications that call out for pardons and commutations, but there are entire classes of people sitting in prison serving sentences that no longer comport with public policy or public opinion.**

**A) Do you think it would be a good idea to create a special unit within the Pardon Office to review current prison sentences and recommend equitable group commutations?**

**Response:**

The Department shares the goal of ensuring a just, rationale, and efficient approach to pardons and commutations. We are committed to exploring ways to better achieve that goal, as evidenced by the President's executive clemency announcement on December 19, 2013 and the Deputy Attorney General's speech to the New York Bar Association on January 30, 2014. The Department agrees with the President's statement that lawmakers should act on the bipartisan sentencing reform measures underway in Congress to ensure that our taxpayer dollars are spent wisely, and that our justice system keeps its basic promise of equal treatment for all. In the meantime, we are employing the means we have available internally.

In December 2013 the President granted clemency to 21 individuals, consisting of 8 commutations and 13 pardons. There are more individuals, like those whose sentences the President commuted, who are low-level, non-violent drug offenders and remain in prison, but would likely have received a substantially lower sentence if convicted of precisely the same offenses today. To help correct this disparity, the Department has begun an initiative to identify additional clemency candidates who are similarly situated to the eight granted commutations last year and meet our criteria including no ties to gangs or cartels, no threat to public safety, and a life or near-life sentence that is excessive under current law.

**37. Would you consider recommending commutations for people who were sentenced under the old crack cocaine laws and are serving a longer sentence than they would if they were sentenced today under the Fair Sentencing Act?**

**A) Shouldn't their sentences be considered void for public policy reasons because they run counter to the policy that Congress has now determined is appropriate?**

**B) Would you support granting commutations to other classes of drug offenders who are imprisoned under laws that the public no longer supports? For example, a majority of Americans now support legalization of marijuana but many people continue to serve sentences for crimes related to marijuana that make no sense under today's standards.**

**C) Wouldn't it be appropriate to grant equitable commutations to people who are serving time for crimes that the public no longer supports?**

**Response to 37 (A)-(C):**

Please refer to the response to Question 36, above.

**Transporting Pharmaceuticals**

**38. Mr. Holder, according to recent press reports, the Justice Department has been investigating common carriers for their role in transporting pharmaceuticals that may not have been prescribed legally.**

**A) Given that the Controlled Substances Act gives these companies a safe harbor, can you tell me the legal theory under which you are operating?**

**Response:**

Please see the attached Non-Prosecution Agreement [Attachment A] between the United Parcel Service, Inc. (UPS) and the Department. Pursuant to Federal Rule of Criminal Procedure 6(e), we cannot confirm, deny, or comment on the existence of a grand jury investigation into any other parcel delivery company or reveal any information that may have been gathered pursuant to such an investigation. However, the Department would not seek to bring charges in the absence of evidence sufficient to demonstrate the elements of the relevant offenses. While not a safe harbor provision, the CSA does contain a provision, 21 U.S.C. § 822(c)(2), that exempts contract carriers (among others) from the *requirement of registration* when they possess controlled substances in the usual course of their business. Importantly, being exempt from the registration requirement does not immunize a person from liability if such person engages in criminally culpable conduct. All persons – including common carriers and others who are exempt from the registration requirement – are subject to criminal liability under the CSA if they knowingly or intentionally facilitate violations of the Act.

**B) How can these companies be expected to know whether the contents of the packages were validly prescribed?**

**Response:**

Please refer to the response to Question 38(A), above. Shipping companies that have actual knowledge that they are delivering illegally dispensed drugs, or that are willfully blind to this conduct, are subject to criminal liability under federal law.

**C) What sort of investigation or due diligence do you expect of them?**

**Response:**

Please refer to the responses to Questions 38(A) and 38(B), above. In addition, generally, all shipping companies should implement and maintain policies and procedures designed to ensure that illegal online pharmacies will not be able to distribute drugs through the companies' shipping services. UPS has been a leader in implementing such policies. These practices and procedures should include processes for detecting, reporting to law enforcement, and closing the accounts of online pharmacies where the shipping companies are aware of a high likelihood that the pharmacies are shipping drugs that have not been lawfully prescribed or are otherwise being unlawfully distributed.

## Questions Posed by Representative Johnson

### 28 CFR 50.10

#### 39. What is the standard for issuing a subpoena under 28 CFR 50.10?

##### Response:

In May 2013, at the President's direction, the Attorney General initiated a comprehensive evaluation of the Department of Justice's policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations. As part of this process, the Attorney General convened a series of meetings to solicit input from a wide range of news media stakeholders, First Amendment academics and advocates, and Members of Congress. On July 12, 2013, the Attorney General issued a report outlining several key reforms to the Department's protocols. In February 2014, the Department issued a revised version of 28 C.F.R. § 50.10, with updates consistent with the changes described in the July 2013 report. The Department's policy revisions strengthen protections for members of the news media by, among other things, requiring more robust oversight by senior Department officials and by clarifying and expanding the presumption of negotiations with, and notice to members of the new media when Department attorneys request authorization to seek newsgathering records. The Department will also take steps to incorporate these policy revisions into the United States Attorneys' Manual.

Department policy provides:

(1) Except as set forth in paragraph (c)(3) of this section, members of the Department must obtain the authorization of the Attorney General to issue a subpoena to a member of the news media; or to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media.

See 28 C.F.R. § 50.10(c)

(4) *Considerations for the Attorney General in determining whether to authorize the issuance of a subpoena to a member of the news media.*

(i)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation or prosecution. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of

substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(ii) The government should have made all reasonable attempts to obtain the information from alternative, non-media sources.

(iii)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. Where the nature of the investigation permits, the government should have explained to the member of the news media the government's needs in a particular investigation or prosecution, as well as its willingness to address the concerns of the member of the news media.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as required in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(iv) The proposed subpoena generally should be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(v) In investigations of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation and prosecution, the Attorney General may authorize the Department, in such investigations, to issue subpoenas to members of the news media. The certification will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(vi) Requests should be treated with care to avoid interference with ordinary newsgathering activities or claims of harassment.

(vii) The proposed subpoena should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, should avoid requiring production of a large volume of material, and should give reasonable and timely notice of the demand.

*See* 28 C.F.R. § 50.10(c)(4)

*(5) Considerations for the Attorney General in determining whether to authorize the use of a subpoena, 2703(d) order, or 3123 order to obtain from third parties the communications records or business records of a member of the news media:*

(i)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has been committed, and that the information sought is essential to the successful investigation or prosecution of that crime. The subpoena or court order should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(ii) The use of a subpoena or court order to obtain from a third party communications records or business records of a member of the news media should be pursued only after the government has made all reasonable attempts to obtain the information from alternative sources.

(iii)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as set forth in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(iv) In investigations of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation and prosecution, the Attorney General may authorize the Department, in such investigations, to use subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain communications records or business records of a member of the news media. The certification will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(v) The proposed subpoena or court order should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of material.

(vi) If appropriate, investigators should propose to use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

*See* 28 C.F.R. § 50.10(c)(5).

**A) Does it involve judicial oversight?**

**Response:**

Although 28 CFR § 50.10 provides meaningful protections for members of the media in light of their essential role in fostering government accountability and an open society, there are additional protections, such as judicial oversight, that only Congress can provide. For that reason, the Department of Justice continues to support the passage of media shield legislation.

**Obtaining a Warrant Under the Fourth Amendment**

**40. When is a warrant required for investigations of electronic communications?**

**Response:**

Law enforcement may be required to obtain a warrant for electronic communications either by statute or by the Fourth Amendment. Two statutes include warrant requirements to obtain electronic communications in specified circumstances: the Wiretap Act, 18 U.S.C. §§ 2510-2522, and the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. The Wiretap Act requires a warrant to collect the content of electronic communications prospectively unless one of several statutory exceptions applies, such as obtaining the consent of a party to the communication. *See* 18 U.S.C. §§ 2511, 2516, 2518. The SCA requires a warrant to compel disclosure of the contents of an electronic communication in electronic storage for 180 days or less. *See* 18 U.S.C. § 2703(a). The Department agrees that some of the lines drawn by the SCA that may have made sense in the past have failed to keep up with the development of technology and the ways in which companies and consumers use, and increasingly rely on, electronic and stored communications. We agree, for example, that there is no principled basis to treat emails less than 180 days old differently than emails more than 180 days old. Similarly, it makes sense that the statute not accord lesser protection to opened emails than it gives to emails that are unopened.

The current rules for the compelled disclosure of the contents of communications have led to statutory and constitutional uncertainty in the courts, and the Supreme Court has not addressed the specific issue. In a civil case later vacated on ripeness grounds, the Sixth Circuit held that a subpoena could not be used to compel disclosure of personal email from an ISP unless the account holder was given prior notice and an opportunity to obtain judicial review of the subpoena before the production of any email. *See Warshak v. United States*, 490 F.3d 455, 482 (6th Cir. 2007), *vacated by* 532 F.3d 521 (6th Cir. 2008) (*en banc*). In a subsequent criminal case in which the government obtained Warshak's email without a warrant and without prior notice to Warshak, the Sixth Circuit held that the government had violated the Fourth Amendment. *See United States v. Warshak*, 631 F.3d 266, 283-288 (6th Cir. 2010).

Whether the Fourth Amendment requires a warrant to compel a service provider to disclose electronic communications depends on the particular facts and circumstances of any given case. For example, if a business provides an email account to its employees for use in the ordinary course of business, the business usually retains authority over the employees' email accounts, and the government may be able to subpoena the business for employee emails relevant to an investigation without violating the Fourth Amendment.

The Department believes that updating the SCA to create a rule requiring law enforcement to obtain a warrant based on probable cause to compel disclosure of all stored email and other similar content information from service providers has considerable merit, provided that Congress consider contingencies for certain, limited functions for which this may pose a problem. In particular, the Department hopes to work with Congress to ensure that any amendments to the SCA appropriately account for the work conducted by civil regulators and litigators, who lack the authority to obtain criminal search warrants, and for investigations of non-public providers, such as corporations that provide email to their employees.

**41. What is the standard for obtaining a warrant under the Fourth Amendment, and how does this differ from obtaining a subpoena?**

**Response:**

Under the Fourth Amendment, a warrant must satisfy three criteria: it must be issued by a neutral magistrate; it must be based on a showing of probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense; and it must describe with particularity the place or persons to be searched. *See Dalia v. United States*, 441 U.S. 238, 255 (1979). Once a warrant is issued, the owner of property targeted by the warrant has no opportunity to contest the warrant prior to its execution: a warrant does not give a property owner "license to engage the police in a debate over the basis for the warrant." *United States v. Grubbs*, 547 U.S. 90, 99 (2006).

The Fourth Amendment imposes a different set of requirements on subpoenas. The subpoena power is grounded in the historical obligation of every person to appear and give evidence before the grand jury when called upon to do so. *See United States v. Dionisio*, 410 U.S. 1, 9-10 (1973). An administrative subpoena must be "sufficiently limited in scope, relevant in purpose, and

specific in directive so that compliance will not be unreasonably burdensome.” *See v. City of Seattle*, 387 U.S. 541, 544 (1967). Unlike with a warrant, the recipient of a subpoena “may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.” *Id.* at 545. Thus, the compulsion exerted by a subpoena “remains at all times under the control and supervision of a court.” *Dionisio*, 410 U.S. at 10 (quoting *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972)).

### **Espionage Act of 1917**

- 42. Would the Espionage Act of 1917 authorize the prosecution of a journalist, or anyone else who leaked or disseminated national security information?**

#### **Response:**

The Espionage Act of 1917 (the Act) sets forth various offenses. Among those offenses, the Act provides that whoever, lawfully or unlawfully having possession of documents or information relating to the national defense, willfully communicates those documents or that information to a person not entitled to receive it is subject to prosecution. Although there is no provision in the statute that would exclude journalists from its application, to the Department’s knowledge, no journalist has ever been prosecuted under the Act for the unauthorized disclosure of national defense information. Moreover, it has been and remains the Department’s policy that members of the news media will not be subject to prosecution based solely on newsgathering activities.

### **Closing of Guantanamo Detention Facility**

- 43. As a member of both the Judiciary and House Armed Services Committees, I also have serious concerns with Republicans’ opposition to closing the Guantanamo detention facility.**

- A) Of the 166 detainees housed in the Guantanamo detention facility, how many are cleared for release?**

#### **Response:**

On May 15, 2013, 86 out of the 166 detainees held at the Guantanamo detention facility were approved for transfer. These detainees were either “approved for transfer subject to appropriate security measures” or otherwise eligible for transfer subject to certain conditions as determined by the Executive Order Task Force (EOTF) review of Guantanamo detainees, a review ordered by President Obama on January 22, 2009 and concluded in January 2010. In the March 7, 2011, Executive Order (EO) 13567, President Obama also mandated a Periodic Review Board (PRB) process, a discretionary, administrative interagency process, to review whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States. The departments and agencies that conducted the EOTF review and participate in the PRB process continue to examine on a

case-by-case basis whether it is possible to transfer those current detainees who have been approved for transfer in a manner that is consistent with our national security interests, legislative restrictions on detainee transfers that remain in place, and any conditions imposed by the EOTF. Of these 86 detainees, 55 detainees, including 30 who are subject to conditions on their transfer, are from Yemen. A Presidential moratorium on all transfers to Yemen was imposed on January 5, 2010 and was lifted on May 23, 2013.

As of March 28, 2014, 76 out of the 154 detainees currently held at the Guantanamo detention facility are approved for transfer. These detainees were either “approved for transfer subject to appropriate security measures” by the EOTF; otherwise eligible for transfer specific to certain conditions as determined by the EOTF; or approved for transfer with conditions by the PRB. Of these 76 detainees, 55 detainees, including 31 who are subject to conditions on their transfer, are from Yemen.

**B) Does “cleared for release” mean that these detainees are being held unlawfully or pose no threat to the public? Or does it mean risk certain detainees posed could be managed by means other than detention?**

**Response:**

The EOTF established by President Obama on January 22, 2009, did not designate detainees as “cleared for release,” but instead designated certain detainees as “approved for transfer subject to appropriate security measures.” As the Task Force’s final report emphasized, “a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee...and does not reflect a decision that the detainee poses no threat or no risk of recidivism.” Rather, the designations reflected the unanimous judgment of the departments and agencies involved in the EOTF review that the risks posed by the detainees designated for transfer could be sufficiently mitigated by appropriate security measures, and that transferring the detainees subject to such security measures would be in the national security and foreign policy interests of the United States, and in the interests of justice.

**44. Does Section 1027 of the NDAA strictly prohibit using any funds to transfer detainees to the United States?**

**Response:**

Section 1027 of the National Defense Authorization Act (NDAA) for FY 2013 provided that “[n]one of the funds authorized to be appropriated by this Act” for the fiscal year “may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who . . . is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.” On December 26, 2013, the President signed the NDAA for Fiscal Year 2014. Section 1034 of that Act renews the bar against using Department of Defense funds to transfer Guantanamo detainees into the United States for any purpose.

**A) And doesn't Section 1028 of the NDAA also prohibit transferring detainees to foreign countries unless these countries can prevent the detainees from committing any terrorist activity?**

**Response:**

Section 1028 of the FY 2013 NDAA did not impose an outright prohibition on transferring detainees to countries unless those countries could prevent the detainees from committing terrorist activity. Section 1028, however, did impose several onerous and unnecessary security-related conditions on the use of funds to implement any transfer, many of which could not be waived.

Section 1035 of the FY 2014 NDAA explicitly repeals section 1028 of the FY13 NDAA and gives the Administration additional flexibility to transfer detainees abroad. However, it does not eliminate all of the unwarranted limitations on foreign transfers. Even in the absence of statutory restrictions, the Administration would transfer a detainee only if any threat the detainee poses can be sufficiently mitigated and only when consistent with our humane treatment policy.

Section 1035 of the FY 2014 NDAA authorizes two procedures for the transfer or release of Guantanamo detainees to their country of origin or another country other than the United States. The first part of the provision authorizes such transfers or releases: (1) if following a review by a Periodic Review Board, established by EO 13567, the detainee is determined to no longer be a threat to U.S. national security; or (2) in order to effectuate a court order. The second part of the provision allows the Secretary of Defense to transfer Guantanamo detainees overseas only if he determines, following an evaluation of a number of specified factors, that doing so would be in the U.S. national security interest and that steps have been or are planned to be taken to mitigate the risk of recidivism by the individual to be transferred. The factors that the Secretary of Defense must consider include the security situation in the country to which the detainee would be transferred, including the presence of foreign terrorist groups in the recipient country, and whether the recipient country is a state sponsor of terrorism, as well as, if the detainee has been tried, whether he has been acquitted or convicted and completed his sentence. The provision requires the Secretary of Defense to notify Congress of a determination to transfer or release a Guantanamo detainee no later than 30 days prior to the transfer or release, and specifies the information that must be provided as part of such notifications.

**B) What prevents a country like Yemen from meeting this standard?**

**Response:**

In his speech at the National Defense University, the President stated that he was lifting the moratorium on transfers to Yemen, which was imposed after the 2009 Christmas Day bombing. Thus, relevant departments and agencies will review carefully on a case-by-case basis whether the government can transfer eligible Yemeni detainees consistent with the national security interests of the United States and applicable law.

**C) So by enacting these sections of the NDAA, Congress has effectively stripped the Executive's power to close the detention facility at Guantanamo?**

**Response:**

The transfer restrictions in the FY 2013 NDAA imposed unnecessary obstacles to closing the detention facility at Guantanamo and are contrary to our national security interests. As the Department of Justice has stated many times, those transfer restrictions should be removed. The President called on Congress to lift these unwarranted and burdensome transfer restrictions, and Congress took a positive step in that direction in the FY 2014 NDAA.

**45. We must find a way to resolve the status of detainees who are not charged but are too dangerous to release or whom other countries will not accept.**

**A) If established, wouldn't these courts assist in the effort to close the detention facility at Guantanamo?**

**Response:**

The Department would require additional context to adequately respond to this question.

**B) What barriers exist to establishing these courts?**

**Response:**

The Department would require additional context to adequately respond to this question.

**Reduction in Funding for Justice Department**

**46. This hearing also raises many important questions concerning Congress' role in ensuring the Justice Department upholds its mission to promote and establish justice. In March, this body failed to come together to prevent sequestration. The Republican leadership failure is already being felt nationwide, and its impact on my home state of Georgia continues to be a grave concern to me. It arbitrarily took billions out our economy, cost jobs, valuable programs, and stunting our economic recovery. As a result of sequestration, Congress reduced the Justice Department's funding by \$1.655 billion.**

**A) How has this affected the mission of the Justice Department to promote and establish justice?**

**Response:**

Sequestration reduced the Justice Department's budget authority by \$1.66 billion, which is effectively a nine percent cut in the remaining months of FY 2013. The continued loss of our staff was sequestration's biggest impact on the Department. The Department was conservative in its hiring, through use of a managed hiring freeze instituted in January 2011. Despite efforts on our own initiative to reduce personnel spending, the budget uncertainty continued throughout the remainder of the Fiscal Year.

The Department's mission and its employees are inextricably linked: the Department cannot fulfill its mission without its employees. Beyond the loss of valuable personnel, our remaining staff face limits on the investigations and prosecutions they would have otherwise pursued, and their work has been negatively affected by Department-wide reductions in operational travel, training, overtime, and critical contract support. Further, the Department was forced to limit the state, local, and tribal assistance it would have otherwise offered. The negative impact of sequestration and the hiring freeze translated into a situation where we have been less well-positioned to conduct criminal investigations and prosecute fraudsters, gang members, child pornographers, and serious drug traffickers. Our ability to protect our nation's security is weakened when we have fewer people able to track, investigate, and prosecute cyber-attacks and terrorist activity. Our ability to affirmatively protect the environment, to protect our citizens' civil rights to be free from discrimination, and to protect innocent citizens from health care, mortgage, and housing fraud were reduced. Not only does compromising our abilities to carry out our mission negatively impact the safety and rights of ordinary citizens across the country, but it also limits our ability to prosecute and bring civil actions, which in turn directly curtails our contribution to the U.S. Treasury. Beyond weakening the Department's ability to pursue criminal and civil litigation, fewer attorneys and support personnel may translate into diminished recoveries and forfeitures, thereby reducing overall federal revenue collected by the Treasury. As but one example of the Department's recoveries, during FY 2012, the U.S. Attorneys' Offices collected \$13.1 billion in criminal and civil actions. By working with partner agencies, the U.S. Attorneys collected an additional \$4.4 billion in asset forfeiture actions.

**B) How has this meat-cleaver approach threatened long-term programs critical to law enforcement?**

**Response:**

The laws and regulations governing sequestration placed significant restrictions on how the Department had to apply the \$1.66 billion in sequestration cuts imposed in FY 2013. As enacted by Congress, the Budget Control Act does not provide any specific exemption for law enforcement agencies and the cuts must be applied across-the-board to all non-exempt accounts and to each "program, project, and activity" within those accounts.

The Department managed in FY 2013 with significant hiring restrictions, deep cuts to our operational expenses and by using residual balances. However, significant cuts to areas such as training, IT, and infrastructure cannot be sustained in the longer term, and we will not have these

balances to use again. We must continue to train our law enforcement personnel on issues such as emerging cyber threats, new investigative techniques, and civil rights and rights to privacy; we must continue to train them on ways to keep themselves and the citizens they protect safe. We must ensure that our information technology capabilities are secure enough to withstand hackers and attacks; and we must ensure that our information technology can allow us to keep up with the sophisticated online crimes that we protect our citizens' against, such as theft of trade secrets, child pornography, and cyber threats. Cuts in these areas will continue to have a long-term detrimental effect on the ability of the Department to perform its mission, on the administration of justice in communities nationwide, and on our support for partners across America's law enforcement community.

The Department lost over 3,500 employees from January 2011 through September 2013 due to a managed hiring freeze. If this trajectory were to continue the Department's law enforcement work would be curtailed and would suffer, as we would handle fewer cases and collect less money on behalf of the government. There would be delayed access to justice in general, not only due to the cuts to the Department, but also due to deep and continuing cuts to the federal courts and to assistance to state, local, and tribal partners, all of whom are key participants in the criminal justice system. The FY 2014 Appropriations Act provides sufficient resources to lift the hiring restrictions put in place on January 21, 2011. The Department intends to begin filling essential vacancies because, as we have noted on many occasions, the Department's mission and its employees are inextricably linked: we cannot fulfill our mission without our employees.

**C) Wouldn't eliminating justice programs negatively affect local communities?**

**Response:**

While some of the effects of sequestration were felt in Washington, D.C., the impact was most severe at the local level, across the nation. As an initial matter, the Department's field investigative offices, prosecutors, U.S. Marshals, and the federal courts had to work to implement the FY 2013 spending reductions in coordination with each other. An enormous amount of time was spent planning and re-prioritizing our efforts in an attempt to meet the sequestration limitations and constantly anticipating and dealing with the threat of furloughs last Fiscal Year. We need Department employees on the job to respond to emergencies and safeguard the American people. That is why the Attorney General acted to reduce the negative impacts on the Department's mission and staff by avoiding furloughs in FY 2013. The Department of Justice's 115,000 employees work across the nation, in every state, in large cities and small towns alike. The FY 2014 Appropriations Act provides sufficient resources to lift the hiring restrictions put in place on January 21, 2011.

In addition, and just as importantly, eliminating justice programs or using an indiscriminate cutting approach such as sequestration negatively affects local communities. Federal funds, on a daily basis, support local communities across the country; when the federal funds available for assistance programs are reduced, local communities cannot get the services they need. Sequestration already cut over \$148 million from Department programs that support state, local, and tribal organizations during FY 2013. Grant programs have been cut across the board,

including such programs as the Office on Violence Against Women's Services\*Training\*Officers\*Prosecutors\* (STOP) Program, which funds support services for domestic violence victims, and the Office of Community Oriented Policing Service's Hiring Program, which provides grant funding directly to cities and counties to hire sworn law enforcement personnel. Other programs whose federal funds were reduced include Second Chance grants, for state and local reentry programs and related technical assistance; Justice Assistance Grants, the primary source of federal criminal justice funding to state, local, and tribal jurisdictions for law enforcement, prosecution and courts, crime prevention and education, corrections and community corrections, drug treatment and enforcement, planning, evaluation, technology improvement, and crime victim and witness initiatives; and Juvenile Justice Formula Grants, which is the core program that supports state, local, and tribal efforts to improve the fairness and responsiveness of the juvenile justice system and to increase accountability of the juvenile offender.

**D) This Committee has not yet answered the call from the families of the Newtown victims by acting to prevent gun violence. Won't cuts to ATF funding impede criminal investigations and firearms tracing?**

**Response:**

Yes, continuing the FY 2013 sequester cuts to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) would have impeded criminal investigations and firearms tracing. As stated previously, the laws and regulations governing sequestration do not provide any specific exemption for law enforcement agencies and place significant restrictions on how the Department can apply sequestration cuts.

As a result of sequestration, during FY 2013, ATF was unable to fill vacancies. ATF was also required to and cut millions from critical programs including reducing equipment for its National Response Teams, training for its Certified Explosives Specialists and Certified Fire Investigators, and system improvements from the National Integrated Ballistics Imaging Network (NIBIN). These cuts are in addition to across the board reductions in operational costs affecting all of ATF's investigative and public safety programs. Fortunately, the FY 2014 appropriation provides sufficient resources to lift the hiring restrictions first instituted in January 2011. ATF will be able to fill essential vacant positions to continue federal law enforcement efforts to combat gun violence and other violent crimes.

## Questions Posed by Representative Pierluisi

### Drug-Related Violence in Puerto Rico

47. The most recent CJS bill specifically addressed the issue of a DOJ surge of personnel and resources to Puerto Rico. In it, the Committee states that “efforts by Federal law enforcement to reduce drug trafficking and associated violence in the Southwest border region have affected trafficking routes and crime rates in the Caribbean.” The Committee says that it “expects the Attorney General to address these trends by allocating necessary resources to areas substantially affected by drug-related violence, and reporting such actions to the Committee.” The murder rate in Puerto Rico is far higher than any state, and most murders are linked to the drug trade. In 2012, drug seizures or disruptions by the Coast Guard, CBP and DEA increased very significantly while the price of drugs in Puerto Rico has decreased. This is a problem of national scope, because most drugs that enter Puerto Rico are transported to the U.S. mainland.

A) Can the DOJ describe what concrete steps it has been taking to respond to the sharp increase in drug-related violence in Puerto Rico in recent years?

#### Response:

Although violent crime levels in Puerto Rico have decreased since 2011, the Department continues to devote all available resources to address drug-related violent crime on the island, and works in close cooperation with its federal and local partners to confront this ongoing threat to public safety. The Department’s efforts include:

*Illegal Firearms and Violent Crime Reduction Initiative:* This initiative, which involves the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), United States Attorney’s Office (USAO), Homeland Security Investigations (HSI), United States Postal Inspection Service (USPIS), and the Puerto Rico Department of Justice (PRDOJ), has been in effect since November of 2011 in five judicial regions in Puerto Rico. The main objective of the initiative is to halt the use of illegal firearms by immediately detaining persons prohibited from possessing them (including convicted felons). Through a memorandum of understanding – and unprecedented cooperation with the PRDOJ – the USAO has primary jurisdiction over all cases involving carjackings, firearms offenses, and Hobbs Act violations in the judicial regions of San Juan, Bayamon, Carolina, Caguas, and Ponce. The PRDOJ has assigned six assistant district attorneys, who have been designated as Special Assistant United States Attorneys, to help prosecute the cases generated by the initiative. To date, the initiative has resulted in more than 900 arrests and the seizure of 750 firearms and 20,000 rounds of ammunition. Notably, more than a third of those arrested had prior convictions.

*Regional Strike Forces:* Working in concert with the Puerto Rico Police Department (PRPD), 10 regional strike forces have targeted, investigated, and federally prosecuted violent criminals and criminal organizations, focusing on violent drug trafficking organizations (DTOs) operating in

Puerto Rico's public housing projects and low income areas. This comprehensive strategy focuses on the eradication of the entire drug trafficking organization from owner to lookout. Approximately 2,670 people have been arrested by the strike forces in the last seven years.

*Caribbean Corridor Strike Force (CCSF):* The CCSF is an Organized Crime Drug Enforcement Task Force (OCDETF) Co-located Strike Force involving DEA, FBI, HSI, Coast Guard Investigative Services (CGIS), Customs and Border Protection (CBP), and the PRPD. The CCSF, which seeks to disrupt maritime drug trafficking in the Caribbean, relies on tactical assets from local law enforcement agencies, CBP, the United States Coast Guard (USCG), the Department of Defense Joint Interagency Task Force-South, and the naval forces of partner nations. Since its inception in 2005, CCSF operations have netted 42,902 kilograms of cocaine, 1,655 kilograms of marijuana, 241 kilograms of heroin, and \$15,296,554 in cash. In addition, CCSF activities have resulted in the arrest of 293 individuals.

*Puerto Rico Violent Offenders Fugitive Task Force (PRVOFTF):* Led by the United States Marshals Service (USMS) with assistance from the PRPD, San Juan Municipal Police Department, Puerto Rico Treasury Department, Puerto Rico Department of Corrections, the Puerto Rico Bureau of Special Investigation, and the Puerto Rico National Guard, this task force is responsible for executing federal and state arrest warrants within the District of Puerto Rico, and conducting fugitive investigations of state and local cases involving violence, major drug-related crimes, and sex offenses. Since 1997, the PRVOFTF has arrested over 10,000 fugitive felons.

*Save Our Streets Carjacking Initiative (SOS):* The SOS initiative, staffed by the FBI, PRPD, and San Juan Police Department, has significantly reduced the number of violent carjackings that terrorized Puerto Ricans, and has led to the apprehension of individuals who were also involved in robberies, home invasions, and murders. Since its inception in May of 2012, SOS has produced 162 arrests and led to the discovery or disruption of multiple criminal enterprises. Moreover, the initiative has provided invaluable investigation training to the local officers involved in the program, and will help to build local capacity to address carjackings in the future.

DOJ components participate in a variety of other activities directly impacting drug-related violent crime in Puerto Rico, including participation in the High Intensity Drug Trafficking Area (HIDTA) Task Force; the Public Safety Working Group of the President's Task Force on Puerto Rico; and many ongoing OCDETF investigations and initiatives in the OCDETF Florida/Caribbean Region. The FBI recently set aside OCDETF funds to pay for specific initiatives on the island, including the August 2013 operation executed in Caguas by the ATF, DEA, FBI, HSI, Immigration and Customs Enforcement; PRPD; and USAO. The operation culminated in the indictment of 139 individuals involved in various aspects of the drug trade.

The Department also funds a number of law enforcement grants that provide technical assistance, training, and equipment to law enforcement agencies in Puerto Rico. By way of example, DOJ components have recently provided training to the PRPD on a wide array of subjects from narcotics and homicide investigations to community oriented policing services.

Finally, the importance of the USAO's role in supporting all federal law enforcement agencies on the island cannot be overstated. The USAO investigates and prosecutes cases initiated by all federal law enforcement agencies, as well as many offenses brought under state or local law in other jurisdictions. The Department's Criminal Division supports these efforts. The Criminal Division has provided prosecutorial assistance and resources to the United States Attorneys' Offices in the Districts of Puerto Rico and the Virgin Islands in the prosecution of drug trafficking and violent crimes, including three recent capital prosecutions.

**B) Are additional steps planned going forward?**

**Response:**

In addition to the law enforcement activities described above (which are ongoing), Department agencies continue to devote significant time and resources to violent crime initiatives in Puerto Rico. For example, the Department is engaged in an interagency effort to develop a comprehensive, data-driven strategy for improving the quality of life and security in Puerto Rico's public housing units. Moreover, the Department continues to oversee more than \$100 million in grants provided to Puerto Rico. By way of example, these grants include funds for victim compensation, information, and notification programs; law enforcement equipment and training; juvenile justice and delinquency prevention programs; DNA backlog reduction projects; and community oriented policing programs.

In addition to these operational initiatives and grants, the Department is reinstating PRPD participation in the equitable sharing program. The Department suspended PRPD in 2010 after a routine audit revealed that it used equitable sharing funds for unauthorized purposes. The reforms required by the Department's settlement agreement with the PRPD, as well as measures the PRPD has already adopted, have restored the Department's confidence in Puerto Rico's capacity to comply with the requirements of the program. The Department is crediting Puerto Rico's account with \$10 million (reflecting Puerto Rico's share of assets seized and liquidated since 2010) that may be used to pay permissible costs of reforming the PRPD as required by the settlement agreement. These monies, in addition to Puerto Rico's share of assets seized and liquidated in the future, will provide an important source of funds for defraying the cost of modernizing and reforming the PRPD.

**C) Is the possibility of a surge still under consideration?**

**Response:**

Although sequestration seriously limited the Department's ability to dispatch additional funds and personnel to Puerto Rico, the Department continues to examine ways in which it can provide more help to reduce violent crime while increasing local capacity to address it. For example, the DEA has created a new task force, supported by more than fifty PRPD officers, to enhance gun and drug interdiction efforts on the island and in its airports. In the first two weeks of this initiative, the task force arrested four people and seized fifteen kilograms of cocaine and

\$350,000 at a single airport in Puerto Rico. The ongoing operation is designed to impact short-term violent crime rates, generate actionable leads to drug trafficking and money laundering organizations operating on the island and the mainland, and provide the local officers critical training to share with their colleagues, thereby building local capacity to address Puerto Rico's public safety needs.

The Department will continue to coordinate its activities with local law enforcement agencies, the Department of Homeland Security, Department of Defense, and Office of National Drug Control Policy in order to maximize the impact of its law enforcement initiatives in this budget-constrained environment.

# **Attachment A**



U.S. Department of Justice

United States Attorney  
Northern District of California

11th Floor, Federal Building  
450 Golden Gate Avenue, Box 36055  
San Francisco, California 94102-3495

(415) 436-7200  
FAX: (415) 436-7234

March 29, 2013

Eugene Illovsky  
Morrison Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2842  
Eillovsky@mofo.com

Re: *United Parcel Service*

Dear Mr. Illovsky:

This letter sets forth the Non-Prosecution Agreement ("Agreement") between the United States Department of Justice (the "Government") and United Parcel Service, Inc., a Delaware Corporation headquartered in Atlanta, Georgia, and any and all subsidiaries of United Parcel Service (collectively "UPS, Inc." or the "Company"). UPS, Inc., by its undersigned attorney, pursuant to the authority granted by UPS, Inc.'s Board of Directors, enters into this Agreement with the Government. As used in this Agreement, "UPS, Inc." shall be read to include UPS, Inc. and all of its subsidiaries, unless otherwise stated.

The Government has notified UPS, Inc. that, based upon an investigation by the Government and the Drug Enforcement Administration ("DEA"), in its view, UPS, Inc., engaged in the conduct described in Attachment A hereto. UPS, Inc. admits, acknowledges and accepts responsibility for the conduct set forth in Attachment A.

In exchange for a non-prosecution agreement, the parties have agreed to the following terms and conditions:

**Non-Prosecution for Criminal Liability**

1. In consideration of the Company's entering into this Agreement and its commitment to: (a) accept corporate responsibility for the conduct described in Attachment A; (b) forfeit \$40,000,000 to the United States; (c) enforce the Compliance Program set forth in Attachment B; and (d) otherwise comply with the terms of this Agreement, the Government agrees not to prosecute UPS, Inc. for (1) the conduct described in Attachment A; or (2) any other conduct relating to the transportation or distribution of controlled substances and prescription drugs for illegal Internet pharmacies from January 2002 through the date of this Agreement that was either the subject matter of the investigation that led to this Agreement or known to the Government as of the date of this Agreement, including but not limited to, conspiracy, 18 U.S.C. § 371, 21 U.S.C. § 846, 18 U.S.C. § 1956(h); distribution of controlled substances, 21 U.S.C. §

841(a)(1); money laundering, 18 U.S.C. §§ 1956 or 1957; and misbranding of pharmaceuticals, 21 U.S.C. §§ 331, *et seq.* This Paragraph does not provide any protection against prosecution for illegal activities, if any, committed in the future by UPS, Inc. or its subsidiaries, nor does it apply to any illegal conduct that may have occurred in the past which is not described in this Paragraph.

#### **Breach of Agreement**

2. It is understood that if, in the two years following execution of this Agreement, the Government determines in the reasonable exercise of its sole discretion, that the Company or any of its employees, officers or directors: (a) has deliberately given false, incomplete, or misleading testimony or information in the investigation that led to this Agreement, (b) has committed any knowing and intentional criminal conduct relating to the distribution of controlled substances or prescription drugs by illegal Internet pharmacies after the date of this Agreement, or (c) has otherwise deliberately violated any provision of this Agreement, including that set forth in Attachment B, the Company shall, in the sole discretion of the Government, be subject to prosecution for any Federal criminal violation of which the Government has knowledge, including a prosecution based upon the conduct specified in Attachment A. Conduct by a UPS, Inc. employee who is not an officer or director will not constitute breach of this Agreement unless that employee acted in the course and scope of his or her employment, received the training concerning this agreement required by the Compliance Program contained in Attachment B, and intended to benefit the company.

3. The Company agrees that it is within the sole discretion of the Government to determine whether there has been a deliberate violation of this Agreement. The Company understands and agrees that the exercise of discretion by the Government under this Agreement is not reviewable by any court. In the event that the Government preliminarily determines that the Company has deliberately violated this Agreement, the Government shall provide written notice to the Company of that preliminary determination sufficient to notify the Company of the conduct that constitutes the breach and shall provide the Company with thirty calendar days from the date of that written notice in which to make a presentation to the Government to demonstrate that no deliberate breach has occurred, or to the extent applicable, that the breach has been cured, or that the Government should, in any event, neither revoke the Agreement nor prosecute the Company. The Government shall thereafter provide written notice to the Company of its final determination regarding whether a deliberate breach has occurred and has not been cured and whether the Government will revoke the Agreement.

4. UPS, Inc. further understands and agrees that any prosecution following such determination may be premised on any information provided by UPS, Inc. and its employees, officers and directors to the Government and any leads derived therefrom. UPS, Inc. agrees that, in any such proceeding, it will not seek to suppress the use of any such information, or any leads derived therefrom, under the United States Constitution, Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(f), or any other rule; that it will not contradict in any such proceeding the Agreed Statement of Facts in Attachment A; and that it will stipulate to the

admissibility of the Agreed Statement of Facts in Attachment A. UPS, Inc. further agrees that it shall not contest the authenticity of documents and materials provided to the Government by UPS, Inc. and/or UPS, Inc.'s subsidiaries in the course of the Government's investigation, but UPS, Inc. otherwise may challenge the admissibility of any such materials in any prosecution of UPS, Inc. By signing this Agreement, UPS, Inc. waives all rights in the foregoing respects.

#### **Tolling of the Statute of Limitations**

5. UPS, Inc. agrees to toll and to exclude from any calculation of time the running of the statute of limitations for any criminal conduct relating to the distribution of controlled substances or prescription drugs by illegal Internet pharmacies for two years from the date of execution of this Agreement. By this Agreement, the Company expressly intends to and hereby does waive its rights to make a claim premised upon the statute of limitations, as well as any constitutional, statutory, or other claim concerning pre-indictment delay. Such waivers are knowing, voluntary, and in express reliance upon the advice of the Company's counsel.

#### **Acceptance of Responsibility**

6. UPS, Inc. accepts and acknowledges responsibility for the acts of its present and former employees, as set forth in the Agreed Statement of Facts in Attachment A. UPS, Inc. further agrees that the factual statements set forth in the Agreed Statement of Facts in Attachment A are accurate. UPS, Inc. condemns and does not condone the conduct set forth in the Agreed Statement of Facts in Attachment A, and has taken steps to prevent such conduct from occurring in the future, including the creation and implementation of the Corporate Compliance Agreement set forth in Attachment B.

#### **Cooperation**

7. During the term of this Agreement, UPS, Inc. will continue to cooperate fully with the Government and the DEA in any ongoing investigation of individuals or entities who may have been involved in the distribution of controlled substances and prescription drugs by illegal Internet pharmacies, including the conduct described in Attachment A. UPS, Inc. agrees that its cooperation shall include, but is not limited to, the following:

- a. timely provision to the Government and the DEA of all non-privileged documents and other materials, including documents and materials located outside the United States (and not otherwise prohibited from disclosure to the Government by foreign law), that the Government and the DEA may request; and
- b. its best efforts upon sufficient notice to make available in a timely and voluntary manner to the Government and/or the DEA all present officers, directors and employees for sworn testimony before a federal grand jury or

in a federal trial and interviews with federal law enforcement authorities. Cooperation under this paragraph will include identification of witnesses not previously identified who, to the knowledge of UPS, Inc., may have material information regarding the matters under investigation.

8. UPS, Inc.'s obligation to cooperate pursuant to the preceding paragraph is not intended to apply if a prosecution by the Government is commenced against UPS, Inc. as a result of a breach of this Agreement.

9. Nothing in this Agreement is intended to request or require UPS, Inc. to waive its attorney-client privilege or work production protections and no such waiver shall be deemed effected by any provision herein.

10. With respect to any information, testimony, document, record, or tangible evidence provided to the Government pursuant to this Agreement, UPS, Inc. consents to any and all disclosures to other government agencies, whether agencies of the United States or a foreign government, of such materials as the Government, in its sole discretion, shall deem appropriate.

#### Notice of Cooperation

11. The Government agrees to bring to the attention of governmental authorities the facts and circumstances relating to the nature of the conduct underlying this Agreement, including the nature and quality of UPS, Inc.'s cooperation and remediation, upon request. By agreeing to provide this information to any such authorities, the Government is not agreeing to advocate on UPS, Inc.'s behalf, but rather is providing facts to be evaluated independently by those authorities.

#### Monetary Payment

12. UPS, Inc. agrees to make the above-described \$40,000,000 payment to the federal government as a result of the conduct described in Attachment A. UPS, Inc. shall pay this sum by certified check or bank cashier's check made payable to the United States of America within five (5) business days of the date of execution of this Agreement by the parties. As a result of UPS, Inc.'s conduct, including the conduct set for the in Attachment A, the parties agree that the United States could institute a civil forfeiture action against certain funds held by UPS, Inc. and that such funds would be forfeitable pursuant to Title 21, United States Code, Section 881. UPS, Inc. hereby acknowledges that the forfeited amount was involved in the conduct described Attachment A. UPS, Inc. hereby agrees that the funds paid by UPS, Inc. pursuant to this Agreement shall be considered substitute *res* for the purpose of administrative forfeiture to the United States pursuant to Title 21, United States Code, Section 881, and UPS, Inc. releases any and all claims it may have to such funds. The total amount paid is a final payment and shall not be refunded should the Government later determine that UPS, Inc. has breached this Agreement and commence a prosecution against UPS, Inc. Further, nothing in this Agreement shall be

deemed an agreement by the Government that this amount is the maximum criminal fine or forfeiture that may be imposed in any such prosecution and the Government shall not be precluded in such a prosecution from arguing that the Court should impose a higher fine or forfeiture. The Government agrees, however, that in the event of a subsequent breach and prosecution, it will recommend to the Court that the amount paid pursuant to this Agreement be offset against whatever fine or forfeiture the Court shall impose as part of its judgment. UPS, Inc. understands that such a recommendation will not be binding on the Court. UPS, Inc. acknowledges that no tax deduction or insurance claim may be sought in connection with this payment.

#### **Corporate Compliance Agreement**

13. UPS, Inc. agrees to implement the Corporate Compliance Agreement set forth in Attachment B. UPS, Inc. will begin to implement the measures set forth in Attachment B within thirty (30) days of the date of execution of this Agreement by the parties. UPS, Inc. agrees that it will maintain these measures at least through the term of this Agreement.

#### **Basis for Agreement**

14. The Government enters into this Agreement based upon the following facts and circumstances: (a) UPS, Inc.'s ongoing cooperation with the Government and the DEA since May of 2007; (b) UPS, Inc.'s willingness to accept responsibility for the conduct of its present and former officers and employees; (c) UPS, Inc. has undertaken, and has agreed to undertake, remedial measures to ensure that this conduct will not recur; and (d) UPS, Inc.'s demonstration of compliance with federal drug and money laundering laws.

#### **Statements to the Media and Public**

15. The Company and the Government agree that this Agreement will be disclosed to the public.

16. UPS, Inc. agrees that it will not make any public statement contradicting Attachment A. If the Government notifies the Company that it has preliminarily determined, in its sole discretion, that the Company has made any such contradictory statement, the Company may avoid a finding of breach of this Agreement by repudiating such statement, in a manner satisfactory to the Government, both to the recipients of such statement and to the Government within 48 hours after receipt of notice from the Government. The Company consents to the public release by the Government of any such repudiation. Consistent with the above, the Company may avail itself of any legal or factual arguments available to it in any litigation, investigation or proceeding (not involving the Government), as long as doing so does not otherwise violate any term of this Agreement. This paragraph is not intended to apply to any statement made by any individual in the course of any actual or contemplated criminal, regulatory or administrative proceeding or civil case initiated by any governmental or private party against

such individual.

#### **Term of Agreement**

17. This Agreement shall be in effect for a period of two years from the date of its execution. UPS, Inc. may petition the Government to shorten the term of the Agreement after one year. The Government has sole discretion to determine whether a shorter term is warranted.

#### **Corporate Authority**

18. UPS, Inc. hereby warrants and represents that it is authorized to enter into this Agreement on behalf of itself and its subsidiaries, and that the person signing on behalf of UPS, Inc. has been granted authority by the UPS, Inc. Board of Directors to bind UPS, Inc. and its subsidiaries.

#### **Binding Nature of the Agreement**

19. It is understood that this Agreement is binding on UPS, Inc. and the United States Attorney's Office for the Northern District of California, the United States Attorneys' Offices for each of the other ninety-three judicial districts of the United States and the United States Department of Justice, but that this Agreement does not bind any other federal agencies, or any state or local enforcement or regulatory agencies. The Government will bring the cooperation of UPS, Inc. and its compliance with its obligations under this Agreement, its remedial actions and proactive measures to the attention of such agencies and authorities if requested to do so by UPS, Inc.

#### **Successor Liability**

20. UPS, Inc. agrees that in the event it sells, merges or transfers all or substantially all of its business operations as they exist during the term of this Agreement, whether such sale is structured as a stock or asset sale, merger, or transfer, it shall include in any contract for sale, merger or transfer provisions binding the purchaser or any successor-in-interest thereto to the obligations described in this Agreement. UPS, Inc. expressly understands that the protections provided under this Agreement shall not apply to any acquirer or successor entities unless and until such acquirer or successor formally adopts and accepts this Agreement.

#### **Notice**

21. Any notice to UPS, Inc. under this Agreement shall be given by personal delivery, overnight delivery by a recognized courier service, or registered or certified mail, addressed to the General Counsel of UPS, Inc., 55 Glenlake Parkway NE, Atlanta, GA 30328, with a copy to Eugene Illovsky, Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105.

**Required Signatures, Authorization and Corporate Seal**

22. By signing this Agreement, UPS, Inc.'s duly authorized representative and UPS, Inc.'s counsel acknowledge that the terms set forth above accurately reflect the parties' understanding of the Non-Prosecution Agreement between UPS, Inc. and the Government.

23. Two original copies of this Agreement shall be executed, one of which shall be delivered to the General Counsel of UPS, Inc., and one of which shall be delivered to Kirstin M. Ault, Assistant United States Attorney, Northern District of California.

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Complete Agreement

24. This Agreement sets forth the terms of the Non-Prosecution Agreement between UPS, Inc. and the Government. No promises, agreements, or conditions have been entered into other than those set forth in this Agreement. This Agreement supersedes prior understandings, if any, of the parties, whether written or oral.

25. No amendments or modifications to this Agreement shall be valid unless they are in writing and signed by the Government, the attorneys for UPS, Inc., and a duly authorized representative of UPS, Inc.

**FOR THE UNITED STATES :**

DATED: 3/29/13

MELINDA HAAG  
United States Attorney

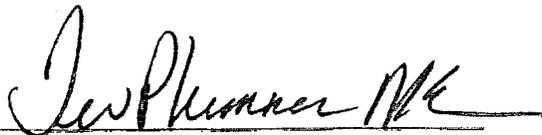


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KIRSTIN M. AULT  
Assistant United States Attorney

**FOR UNITED PARCEL SERVICE:**

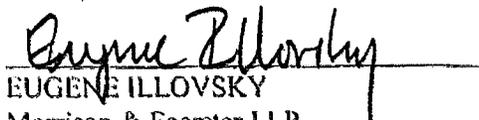
DATED: 3/29/13



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TERI PLUMMER MCCLURE  
Senior Vice President of Legal,  
Compliance and Public Affairs,  
General Counsel & Corporate Secretary

DATED: 3/29/13



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EUGENE ILLOVSKY  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, California 94105  
(415) 268-7000

## Attachment A

### AGREED STATEMENT OF FACTS

1. United Parcel Service, Inc. ("UPS") is a corporation organized under the laws of Ohio and headquartered in Atlanta, Georgia. UPS operates as a common carrier.

2. The provision of UPS's services is governed by the UPS Tariff/Terms and Conditions of Service for Package Shipments in the United States which constitutes part of the shipping contract between UPS and shippers. In relevant part, the UPS Tariff/Terms and Conditions of Service currently states:

#### 3.14 Pharmaceuticals

The shipper shall comply with and shall ensure that each shipment containing pharmaceutical products complies with all applicable federal, state, provincial, and local laws and regulations governing the shipment or tender of shipment of pharmaceutical products.

#### 3.3 Prohibited by Law

No service shall be rendered by UPS in the transportation of any shipment that is prohibited by applicable law or regulation of any federal, state, provincial, or local government in the origin or destination country. It is the responsibility of the shipper to ensure that a shipment tendered to UPS, and any UPS Shipping System entry that the shipper prepares for that shipment, does not violate any federal, state, provincial, or local laws or regulations applicable to the shipment.

3. Beginning in approximately 1999, companies began offering consumers controlled substances and prescription drugs based on the provision of information over the Internet. These companies came to be known as Internet pharmacies. Some Internet pharmacies illegally distribute controlled substances and prescription drugs because customers are allowed to obtain these drugs without a valid prescription authorized by a licensed physician acting within the usual scope of professional medical practice who is providing the drugs for a valid medical purpose. UPS provided transportation and related services to some of those entities.

4. By approximately January 2004, UPS was on notice that many Internet pharmacies operated outside the law. Some of those illegally-operating Internet pharmacies were UPS customers.

5. On five occasions in January 2004 through May 2006, UPS's Corporate Security Manager and a UPS Public Affairs Vice President met with the DEA and other law enforcement agencies to discuss the parcel carrier industry's and UPS's role in assisting federal authorities in

curtailing illegal Internet pharmacies. In one such meeting on June 23, 2005, law enforcement discussed the problem of illicit pharmaceutical sales over the Internet and the traffickers' reliance on key business sectors, especially the express parcel carriers for delivery of packages to customers. The agents further discussed relevant laws controlling the legitimate sales of controlled substances in the United States and possible actions to prevent the illicit use of shipping services by Internet pharmacies.

6. On two occasions, UPS's Corporate Security Manager testified before Congress regarding the illegal sale of controlled substances over the Internet and UPS's efforts to ensure that UPS was not transporting illegally-sold controlled substances and prescription drugs. The first testimony occurred on July 22, 2004, before the Senate's Governmental Affairs Permanent Subcommittee on Investigations and the second on December 13, 2005, before the House of Representatives' Oversight and Investigations Committee on Energy and Commerce. During both sessions, the Corporate Security Manager testified: "It is the clear policy of UPS, as stated in our tariff, that illegal products of any type are prohibited from being transported through our system."

7. On December 13, 2005, the Corporate Security Manager testified before the House Subcommittee on Oversight and Investigations Committee on Energy and Commerce and stated, "We support legislation that would establish clear standards for internet pharmacies. In particular, we support requiring internet pharmacies to be licensed . . . . In addition, we support provisions that would prohibit Internet sales of pharmaceuticals to individuals without a prescription obtained from a practitioner with a qualifying medical relationship, which requires at least one in-person medical evaluation . . . . As a carrier, we can take actions such as those I have described in conjunction with law enforcement agencies, but we do not have the independent ability to judge the validity of a prescription or the legitimacy of a particular drug."

8. A group of five UPS marketing employees within the Southeast Region, one of eight UPS regions, began in approximately 2002 to research business opportunities within the healthcare industry. They identified five distinct sectors that included medical and hospital equipment, laboratories/research, healthcare providers, pharmaceuticals, and hospitals as opportunities for growth in the southeast part of the United States. In 2003, these marketing employees created a dedicated sales team of approximately twelve sales employees, and launched a Southeast Region healthcare marketing initiative to target and win this healthcare business. This team consisted of nine Account Executives and five National Account Executives (collectively "HCAEs"), as well as a marketing supervisor ("Marketing Supervisor"). This group identified Internet pharmacies as a sub-sector within the healthcare industry.

9. In a September 4, 2003 e-mail, a HCAE described opportunities in the Internet pharmaceutical sector, how Internet pharmacies operated, and the high shipping volume and revenue potential present with these accounts. The HCAE noted the importance of winning these accounts from the customer's current carrier.

10. In an email dated December 10, 2003, the Marketing Supervisor received from a Florida marketing and sales employee a copy of a December 4, 2003 Miami Herald news article describing the indictment of a South Florida owner of an Internet pharmacy that sold controlled substances "illegally by not requiring customers to be physically examined by doctors." The employee advised the Marketing Supervisor that if online pharmacies were in violation of state or federal laws, UPS may want to discontinue pursuing the business.

11. On December 16, 2003, an Internet pharmacy owner informed a HCAE that its business was closing "due to the recent policies enacted by the Federal Government", and that "this industry has been flooded with companies that offer easy access to narcotics and other dangerous medications." In response to this email, a marketing manager in the Southeast Region ("Marketing Manager") wrote to the Marketing Supervisor and a HCAE that "it appears that we are making the right decision to remove the on-line pharmacies from the Critical Customer targets."

12. In a December 19, 2003 email, the Marketing Supervisor wrote to the Marketing Manager, "[t]his issue [about illegally operating Internet pharmacies] has also heated up in the press - I heard the end of a report on NPR this week - both UPS and FedEx were brought into question on this issue in the report." The Marketing Supervisor further stated that the Southeast Region healthcare marketing initiative needed to make sure it was only targeting legitimate Internet pharmacies. The Marketing Supervisor also stated in the email that he had learned that the National Association of Boards of Pharmacies ("NABP") had developed a Verified Internet Pharmacy Practice Sites ("VIPPS") program, and that through this program, the NABP certified Internet pharmacies as legitimate, but that the process was new and only 14 Internet pharmacies had been certified. The Marketing Supervisor further stated that NABP also lists "rules of thumb" for identifying whether or not an internet pharmacy is legitimate. The Marketing Supervisor wrote that they would probably want to do their own research on their current customers, and ones UPS planned to target, to determine whether they seemed to be doing anything illicit.

13. In January of 2004, marketing employees in the Southeast Region involved in the healthcare marketing initiative developed a Southeast Region Healthcare Reference Guide (the "Guide") that provided an overview of the healthcare industry based on publicly available information. The Guide stated that illegitimate Internet pharmacies were being shut down by the federal government where no doctor visit was required and/or the drugs were imported illegally.

14. In January of 2004, marketing employees in the Southeast Region provided training about the Southeast Region Healthcare Initiative to Southeast Region Area Sales Managers who supervised HCAEs. This training identified suspiciously-operated Internet pharmacies as those for which there was no valid doctor patient relationship and required only an online or phone consultation with a doctor, the sole means of communication with the consumer was by e-mail, the site did not provide toll-free numbers, the consumer could not contact the pharmacist with questions, and noted that many pharmacies that sold a limited number of

medications (particularly "lifestyle" drugs) were not legitimate. The talking points to the training materials stated that there must be a valid pre-existing doctor-patient relationship, that HCAEs should not target any Internet pharmacy that violated this rule, and that UPS did not want to be targeted as "an enabler of illegal activity."

15. After the training, on January 9, 2004, the Marketing Supervisor forwarded a January 9, 2004 Wall Street Journal article to the HCAEs and their Area Sales Managers stating that, as discussed in the training, the Southeast Region Healthcare Initiative needed to make sure that it was not targeting any online pharmacies that did not require a prescription resulting from a valid doctor-patient examination. The email stated that online pharmacies that fulfilled prescriptions based on a questionnaire only, or a questionnaire and phone consultation with an online pharmacy supplied doctor were not considered legal. This email was forwarded to a UPS Vice President of Sales and several Southeast Region district sales directors.

16. In February of 2004, the Marketing Supervisor requested help in quantifying the sales opportunity from online pharmacies in the Southeast Region, "both legit and not legit," to find out how much revenue UPS would be walking away from if the company decided not to target these businesses. Notes from a March 19, 2004 Southeast Region Healthcare Initiative conference call indicated that the HCAEs were told that they could continue to sell UPS services to Internet pharmacies as long as they did not actively target these businesses. According to the notes of the call, the Southeast Region Healthcare Initiative did not want the HCAEs to target Internet pharmacies in part because they were being shut down by law enforcement and it would be a waste of time and resources to win a customer that would soon go out of business.

17. On June 11, 2004, the Marketing Supervisor conducted background research on two Internet pharmacies for a HCAE in connection with attempting to win their business. The Marketing Supervisor identified one as prescribing drugs based on a phone consultation with a doctor provided by the Internet pharmacy and stated "Our stance has been that if the online pharmacy does not require you to have seen the prescribing doctor in person, we will not support any special [discount] pricing to get the business. If you can win it through regular district pricing or POS, [Point of Sale] that is fine. But, Marketing will not support any pricing appeals."

18. On that same date, a UPS marketing analyst sent an internal memorandum to the South Florida district sales director, an Area Sales Manager and a Southeast Region Marketing Director discussing the Internet pharmacy industry in South Florida and how UPS's revenue had been impacted by law enforcement and competitive activity. According to the analyst, "Most accounts, if not all of the accounts we had have gone out of business due to illegal practice within the pharmaceutical industry." The memorandum listed four Internet pharmacies that were closed due to illegal dispensing of prescription medication and concluded that South Florida's business plan results for 2004 were impacted by these events. When a HCAE attempted to reestablish a shipping account for one of the illegal Internet pharmacies identified in this memorandum, a marketing specialist reminded the HCAE that he could attempt to win the business but could not provide discounted pricing.

19. In February 2005, marketing employees in the Southeast Region provided training to HCAEs. The training materials identified pharmacies that require face-to-face visits as a "best practice." Nevertheless, accounts were established for Internet pharmacies that did not meet this best practice. The training materials instructed the HCAEs that they could expect minimal region and corporate pricing support for Internet pharmacies that did not require face-to-face visits.

20. On May 18, 2005, a marketing analyst sent an email to a HCAE and a marketing employee listing questions for the HCAE to ask a potential Internet pharmacy customer. The email stated that a Florida-based Internet pharmacy was required to have an Internet Pharmacy Permit from the Florida Board of Pharmacy, and that Florida, Kentucky and Nevada had laws specifically regulating internet pharmacies shipping or operating in their states. The email included a suggestion to call the Board of Pharmacy to verify a customer but that "this could however lead to us being a whistle blower on a customer."

21. Appropriate due diligence was not conducted on all accounts UPS employees knew or should have known were being used to ship pharmaceuticals ordered online to determine whether the businesses were operating legally. For example, on August 18, 2005, a UPS sales employee received a sales lead regarding United Care Pharmacy ("UCP"), a customer that had requested a meeting with a UPS representative. Subsequently, the sales employee secured UCP's business after meeting with the customer at the customer's location, and receiving information from the customer about UCP's business model. UCP was a fulfillment pharmacy that filled orders exclusively for Internet pharmacies. This account was established in late September 2005. Although the sales employee knew that UCP was shipping pharmaceuticals for Internet pharmacies, neither the sales employee nor others at UPS conducted research into UCP's business practices. Had UPS employees conducted due diligence on UCP, they would have learned that UCP was not VIPPS certified, was not registered in all states to which it shipped controlled substances and prescription drugs, and would be filling orders for Internet pharmacies based solely upon those pharmacies' customers' completion of an online questionnaire.

22. On September 30, 2005, the Kentucky Bureau of Investigations Drug Unit sent to a UPS district security manager and others a list of illegal pharmacies that shipped to their state. An affiliate of UCP was one of the illegal Internet pharmacies included on this list. UPS shipped packages from this entity into Kentucky after September 30, 2005.

23. In November of 2005, a UPS sales employee for UCP and his immediate supervisor traveled with the owner of UCP to Costa Rica. This trip was approved and paid for by UPS. While in Costa Rica, the sales employee and his immediate supervisor learned about the business model used by Internet pharmacies, including those for which UCP shipped pharmaceuticals. This business model was based on the fulfillment of prescriptions based upon either an online questionnaire or a telephone call where no valid doctor-patient relationship existed. The sales employee and his immediate supervisor established subaccounts under UCP's master account for Internet pharmacies that were located outside of the United States. At least

one of the Internet pharmacies established as a subaccount under UCP shipped from three different locations in the state of Florida.

24. UCP was closed by state law enforcement in March 2006 for illegally distributing controlled substances for Internet pharmacies. UPS shipped packages for various offshore Internet pharmacies under UCP's master UPS shipping account after March 2006. UPS continued to ship packages under UCP's account until April 20, 2007, when a UPS District Controller for the North Carolina District advised the UPS sales employee and his immediate supervisor that UCP's leadership had been arrested and that the account needed to be suspended immediately.

25. On or about August 30, 2005, a UPS Southeast Region security manager received a fax from a group called the Southwest Drug Task Force in Big Stone Gap, Virginia. It stated in relevant part:

We the members of the Southwest Virginia Drug Task Force and other Wise County Virginia law enforcement officials feel a problem exist in our area and in other areas that your company has been made aware of the problem. Our area has been overwhelmed in the past year with pharmaceutical drugs being ordered over the Internet or by phone. Companies such as yours and other companies are in the delivery service business are delivering these drugs into our area.

One problem, which concerns us, is delivery drivers are delivering packages to the same person who is using several different names. Delivery drivers are allowing these packages to be picked up in parking lots, and beside the highway and not making deliveries to the address listed on the package.

We are concerned as to the health and safety of the citizens in this area. We are concerned that these drugs many of which are mind altering pain medication and nerve medication are being misused, and abused by citizens. These citizens then may drive vehicles, and cause accidents.

They may become so addicted these medications they commit property crimes such as larceny, burglary, and robbery to obtain money to pay for these drugs, which are delivered COD by delivery companies.

For that reason we respectfully request steps be taken by your company to help correct this problem. We request your company

suspend all shipments of drugs to subjects, or residences that are suspicious in nature. Your drivers and managers already know who these people and locations are. That drugs be shipped in separate and distinctive packaging. That your company requires proof of identity of any recipient of packages containing drugs. That packages containing drugs not be delivered to any location other than a residence or place of business.

Most of all we request officials of your company join local law enforcement in joint announcements in newspapers, radio and television making the public aware of the fact obtaining drugs over the internet or by phone is not legal. That local law enforcement and your company are joining forces to make sure the public safety is watched after. And anyone who is caught obtaining these drugs will be arrested and prosecuted to the fullest extent of the law. We hope your company will join us in this effort and we can have your company beside us, talking with us as a partner and not being identified as part of the problem.

This fax was circulated to, among others, UPS's Corporate Security Manager and a Vice President of Public Affairs. UPS delivered packages in Virginia shipped by Internet pharmacies after receiving this request from the Southwest Virginia Drug Task Force.

26. UPS offered certain Internet pharmacies C.O.D. Enhancement Services. Through these services, C.O.D. ("Collect On Delivery") payments for thousands of packages shipped to individual Internet pharmacy customers were consolidated and deposited into a UPS bank account and then available funds were electronically transferred to the bank accounts of the Internet pharmacy shippers. In a June 8, 2005 email, the Marketing Supervisor wrote to a Vice President of Sales, a Marketing Manager, and a Business Development Manager at UPS Capital, in relevant part:

UPS Capital did in fact withdraw COD Automatic from three online pharmacy accounts in SFL. They were concerned about the financial risk of serving these pharmacies due to the history of these types of businesses getting shut down by the government. When UPS Capital withdrew the COD Automatic, these accounts withdrew their small package business from UPS. These accounts were producing an average of \$3.5K - \$5K per day before their accounts were closed in May.

[Name Redacted] does not feel that UPS Capital is exposing themselves to a high degree of risk by serving online pharmacy accounts, and he is in favor of continuing to do business with them.

27. UPS, through some of its employees, was on notice that Internet pharmacies violated the law when distributing controlled substances and prescription drugs without a valid prescription. Despite being on notice that such Internet pharmacies were using its services, UPS did not implement procedures to close the accounts of those pharmacies, permitting them to ship controlled substances and prescription drugs from 2003 to 2010.

## Attachment B

### UPS ONLINE PHARMACY COMPLIANCE PROGRAM

The following United Parcel Service, Inc. ("UPS") Online Pharmacy Compliance Program (hereinafter "Compliance Program") has been prepared pursuant to a Non-Prosecution Agreement dated this same date between UPS (the "Company") and the United States Attorney's Office for the Northern District of California ("United States" or "the Government"). Compliance with all the terms and standards of the Compliance Program is a condition of the Non-Prosecution Agreement.

#### I. Applicability and Purpose

A. The Compliance Program applies to the Company's small package transportation service for packages containing prescription drugs shipped by or on behalf of online pharmacies to customers. The purpose of the Compliance Program is to ensure (1) that the Company does not intentionally or knowingly pursue the business of online pharmacies that are violating state and federal laws regarding the distribution of prescription pharmaceuticals and (2) that the Company has established processes for detecting, reporting to law enforcement, and closing the accounts of online pharmacies that it becomes aware are violating state and federal laws regarding the distribution of prescription pharmaceuticals. The terms "online pharmacy" and "OLP" are herein defined as: a) an internet website that permits a consumer to obtain prescription drugs without any written prescription, or b) a pharmacy that provides prescription drugs to consumers where the prescription was issued solely through the completion of an on-line questionnaire, without an in-person medical evaluation. The term does not include those persons or entities excluded from the on-line pharmacy definition pursuant to 21 C.F.R. § 1300.04(h).

B. The Compliance Program is not intended to replace any other United States statute or regulation.

C. This Compliance Program shall be incorporated into the Non-Prosecution Agreement by reference, and compliance with the terms of the Compliance Program will be a condition of the Non-Prosecution Agreement. Deliberate, intentional or knowing failure to comply with any part of this Compliance Program may be a basis on which the Government may seek to revoke or modify the Non-Prosecution Agreement.

D. Any documents required by this Compliance Program shall be provided to the designated signatory for the Government upon request. The Government agrees that such documents will be treated as proprietary records that may contain privileged and confidential commercial or financial information.

E. Any proposed modifications to this Compliance Program must be made in writing

and signed by the Company and the designated signatory for the Government.

F. The Government recognizes that the Company has a contract with the United States Postal Service ("USPS") under which the Company provides domestic air transportation for USPS express shipments and does not pick up from the shipper or deliver to the recipient. The Government acknowledges that the Company has no responsibility for packages tendered to the USPS for which the Company is only providing air transportation services.

## **II. The Compliance Program**

As part of the Compliance Program, the Company shall implement the following requirements:

### **A. Online Pharmacy (OLP) Compliance Officer**

1. Within 60 days of signing the Non-Prosecution Agreement, the Company shall designate an OLP Compliance Officer. The OLP Compliance Officer shall communicate directly and make reports directly to the Chief Executive Officer and the Audit Committee of the Board of Directors on matters relating to this Compliance Program. The OLP Compliance Officer shall be tasked with responsibility for the Compliance Program.
2. The OLP Compliance Officer shall be responsible for coordinating with the Program Auditor, as more fully described below; developing and implementing all of the processes described herein, including those recommended or developed in consultation with the Program Auditor; designing and implementing training programs; ensuring that reports of potentially unlawful activity by OLP shippers are investigated; ensuring that audits and surveys are carried out as required; ensuring that all Company documents and records are properly maintained; and ensuring that all Company reports required under this Compliance Program are made on a timely basis.
3. The OLP Compliance Officer will cause a procedure to be established that requires all officers, managers, and employees of the Company involved in the transportation of prescription pharmaceuticals to notify the OLP Compliance Officer of any violations of applicable requirements of this Compliance Program, and to cooperate fully with the Program Auditor and the United States in carrying out their auditing and oversight functions required by applicable law and this Non-Prosecution Agreement. The Company agrees to not retaliate against any officer, manager or employee solely for making any such report.
4. The OLP Compliance Officer position must be filled by an individual who possesses the authority to ensure full implementation of this Compliance Program,

and who is thoroughly familiar with the requirements of this Compliance Program.

5. The OLP Compliance Officer shall be authorized to access all records, documents, and facilities throughout the Company's organization for the purpose of implementing this Compliance Program.
6. The OLP Compliance Officer shall take all reasonable steps to ensure the employee cooperation during all activities required by this Compliance Program. The Compliance Officer shall ensure that the Program Auditor and any other inspection, auditing or monitoring personnel involved in the auditing of the Company's operations under this Compliance Program has complete unrestricted access to all areas, documentation, personnel and material equipment necessary to perform its function under this Compliance Program. Private locations for one-on-one interviews between employees and various inspection, auditing or monitoring personnel shall be provided, as needed.
7. The OLP Compliance Officer may designate one or more individuals to assist in the execution of his/her responsibilities.
8. Any change in personnel designated as the OLP Compliance Officer must be reported within thirty (30) days to the designated signatory of the Government.

**B. OLP Compliance Officer Responsibilities**

The OLP Compliance Officer is required to cause the following to occur:

1. Develop and provide training regarding OLPs oriented for all employees and managers engaged in the pick-up and delivery of prescription pharmaceutical packages, and relevant sales, security, revenue operations, and any other groups identified by the Company;
2. Develop and provide training regarding OLPs to be included as part of new hire training given to all employees and managers engaged in the pick-up and delivery of prescription pharmaceutical packages and relevant sales, security, revenue operations, and any other groups identified by the Company;
3. Monitor and validate that the training is being given;
4. Develop and implement channels whereby employees can report instances of potentially unlawful activity by prescription pharmaceutical shippers;
5. Develop and implement a process for the investigation of reports of potentially

unlawful activity by prescription pharmaceutical shippers, including anonymous reporting;

6. Review reports of investigation, and where warranted, ensure that appropriate action has been taken and that referrals have been made to law enforcement;
7. Oversee the implementation and operation of the Compliance Program;
8. Act as a principal point of contact for law enforcement and regulatory officials relating to OLP matters.

**C. OLP Compliance Officer Reporting Responsibilities**

1. The OLP Compliance Officer shall make quarterly reports to the Company's Chief Executive Officer concerning compliance with this Compliance Program. Annually, the OLP Compliance Officer shall provide a summary of these reports to the Audit Committee of the Company's Board of Directors. All issues of non-compliance will be communicated, along with any corrective action taken. Copies of these reports will be provided to the designated signatory of the Government. The Government agrees that such reports will be treated as proprietary records that may contain privileged and confidential commercial or financial information.
2. The OLP Compliance Officer shall ensure immediate notification to the designated signatory of the Government of any circumstances whereby the Company fails to provide resources necessary to support this Compliance Program.

**D. Program Auditor**

1. Within thirty (30) days following the signing of the Non-Prosecution Agreement, the Company shall nominate a Compliance Program Auditor ("Program Auditor") who meets the qualifications below to conduct the activities described in this Compliance Program. The nomination shall be made in writing to the signatories below. The Government will notify the Company in writing of its approval or disapproval within thirty (30) days, unless additional time for evaluation is requested in writing. The nominee shall be approved if the Government fails to provide notice within the period. The Government's approval shall not be unreasonably withheld.
2. Qualified candidates for the position must have expertise and competence in the regulatory programs under federal and state laws relating to the distribution and shipment of prescription pharmaceuticals. The Program Auditor shall also have

sufficient expertise and competence to assess whether the Company has adequate systems in place to assess Company compliance with the Compliance Program, correct non-compliance and prevent future non-compliance. The Company and the Government acknowledge that the functions of the Program Auditor may, by mutual agreement, be fulfilled by one or more individuals.

3. The Program Auditor must exercise independent judgment. The Company and the Program Auditor shall disclose to the Government any past, existing or planned future contractual relationships between the Program Auditor and the Company or the Company's parent company, subsidiaries, or affiliated business entities (other than the relationship contemplated by this Compliance Program).
4. If the Government determines that the proposed Program Auditor does not meet the qualifications set forth in the previous paragraphs, or that past, existing or planned future relationships with the Program Auditor would affect the Program Auditor's ability to exercise the independent judgment and discipline required to conduct the Compliance Program review and evaluation, such Program Auditor shall be disapproved and another Program Auditor shall be proposed by the Company within thirty (30) days of the Company's receipt of the disapproval.
5. Within one hundred and eighty (180) days of the signing of the Non-Prosecution Agreement, the Company shall implement all training and reporting processes and procedures discussed in Sections II.E-G, inclusive. One hundred eighty (180) days following the signing of the Non-Prosecution Agreement, the Company shall submit to the Government a written Compliance Program Implementation Certification that describes the steps the Company has undertaken to meet the requirements of this Compliance Agreement.
6. Upon submission of the Compliance Program Implementation Certification, the Program Auditor shall review the Company's implementation of the processes and procedures set forth in Sections II.E-G and the Company's attainment of the goals set forth in Paragraph I.A of this Compliance Program. No later than ninety (90) days following the commencement of such review, the Program Auditor shall generate a Compliance Confirmation Report ("Report") addressing the results of the review. The Report shall be submitted to the Company upon its completion. The Report shall be submitted to the Government fourteen (14) days after submission to the Company.
7. The Report shall present the following information:
  - a. Review scope, including the time period covered by the review;
  - b. The date(s) the on-site portion of the review was conducted;

- c. Identification of the review team members;
  - d. Identification of the company representatives and regulatory personnel observing the review;
  - e. The distribution list for the Report;
  - f. A summary of the review process, including any obstacles encountered;
  - g. Findings, including whether the Company has implemented the processes and procedures set forth in Sections II.E-G and attained the goals set forth in Section I.A of this Compliance Program;
  - h. Recommendations, if any, for measures to improve the processes and procedures undertaken by the Company pursuant to Sections II.E-G and to assist the Company in achieving the goals set forth in Section I.A; and
  - i. Certification by the Program Auditor that the review was conducted in accordance with this document.
8. The Government acknowledges that any processes and procedures recommended by the Program Auditor:
- a. Must be consistent with the Health Insurance Portability and Accountability Act of 1996 (P.L.104-191) ("HIPAA");
  - b. Should not place an unreasonable burden on the ability to ship validly obtained pharmaceuticals to consumers;
  - c. Should not place an unreasonable burden on the ability to ship other goods to consumers; and
  - d. Must be consistent with federal laws applicable to carriers.
9. If recommendations are made in the Report pursuant to section II.D.7.h, the Company will implement such recommendations and notify the Government of implementation; provided, however, if the Company disagrees with a recommendation, it will notify the Government of its disagreement and non-implementation within thirty (30) days of receipt of the Report. The Government will review the recommendation, in consultation with the Company and Program Auditor, and after such consultation, may relieve the Company from implementation. If the Government does not relieve the Company from

implementation, the Company may file a miscellaneous case in the U.S. District Court from the Northern District of California, to seek a determination as to whether the Company must implement the recommendation. The parties consent to proceed before a United State Magistrate Judge in such case, and agree that the Magistrate Judge's decision shall be final and binding upon the parties.

#### **E. Training**

The Company will conduct OLP training for employees, as determined by the OLP Compliance Officer.

1. The training should be offered to employees and managers engaged in pick-up and delivery of prescription pharmaceutical packages and relevant sales, security, revenue operations, and other groups identified by the Company, through channels used to communicate significant matters related to policies, procedures and practices.
2. As part of new hire training, new employees and managers engaged in the pick-up and delivery of prescription pharmaceutical packages and relevant sales, security and revenue operations, and any other organizations identified by the Company, will be given OLP training.
3. Training will be targeted to reflect how different employees may encounter potentially unlawful OLPs.
4. All training shall include, at a minimum, the following elements:
  - a. An overview of OLPs;
  - b. A discussion of "red flags" appropriate to the audience being trained that may be indicative of potentially unlawful OLPs;
  - c. Information on how to report a potentially unlawful OLP to the OLP Compliance Officer;
  - d. A statement consistent with II.A.3 above, that there will be no retaliation solely for making a report of a potentially unlawful OLP.
  - e. Information concerning the existence of the Non-Prosecution Agreement and the general terms of the Compliance Program.
5. Various training methods and materials may be used, such as group presentations; videos; online interactive training modules and internal website publications.

6. Records must be kept of all training, including the dates, locations, names and positions of the participants and attendees, and the substance of the training, including any training materials.
- F. Reports of Potentially Unlawful Activity by OLPs**
  1. All reports of potentially unlawful activity by prescription pharmaceutical shippers reported to the OLP Compliance Officer shall be investigated by the Company. Investigations should typically be completed within 30 days of receipt.
  2. In addition, any issues regarding prescription pharmaceutical shippers that are reported through existing Company reporting channels, such as the Company's Help Line, shall be forwarded to the OLP Compliance Officer for investigation.
  3. Investigations may include one or more of the following elements:
    - a. Internet or other research on the shipper;
    - b. Review of the account's shipment history, volume, credit history, related accounts and other relevant Company information;
    - c. Interviews with Company personnel familiar with the shipper and/or shipments;
    - d. Consultation with federal, state or local law enforcement;
    - e. Site visits to the shipping location;
    - f. Requests for licensure information from the shipper.
  4. If, as a result of the Company's investigation, the Company concludes that the shipper is in violation of the UPS Tariff/Terms and Conditions of Service governing the shipment of pharmaceuticals, the Company will forward the information to local DEA and close the shipper's account.
  5. At the conclusion of an investigation, the OLP Compliance Officer shall ensure that a Summary of Investigation has been prepared. The Summary of Investigation shall include:
    - a. the identity of the person making the report (unless reported anonymously);
    - b. the date the report was made;

- c. a synopsis of the investigation;
  - d. action taken, and, if no action taken, the rationale;
  - e. a statement of whether the matter was reported to law enforcement;
  - f. remedial actions taken to minimize recurrence.
6. Any materials collected or created as part of the investigation shall be maintained with the summary.

**G. Reporting by the Company to Federal Authorities**

The Company will report to local DEA any shipper that the Company believes is delivering controlled substances in violation of the Controlled Substances Act, 21 U.S.C. § 801, et seq., or other laws governing the shipment of pharmaceuticals.

**III. Non-compliance**

This Compliance Program does not in any way release the Company from complying with any applicable state or federal statutes and/or regulations, and does not limit imposition of any sanctions, penalties, or any other actions, available under those state or federal statutes and regulations. The Compliance Program shall be part of the Non-Prosecution Agreement and adherence to it will be an enforceable condition. Deliberate, intentional or knowing failure to comply with any part of this Compliance Program (including but not limited to refusal to pay valid charges for the Program Auditor and failure to provide the Program Auditor access to facilities, personnel or documents as provided in this Compliance Program) may be a violation of the Non-Prosecution Agreement and may be grounds for the revocation or modification of the Non-Prosecution Agreement. Should the Government seek to revoke or modify the Non-Prosecution Agreement based on the Company's refusal to pay valid charges for the Program Auditor and/or its failure to provide the Program Auditor access to facilities, personnel, or documents, and/or as a result of any disagreement regarding any of the provisions of this Compliance Program, the Company shall have the right to contest the reasonableness of such revocation or modification.

**IV. Documentation Available for Inspection**

The OLP Compliance Officer shall ensure that all documentation required by this Compliance Program is maintained and available for inspection by the Program Auditor and a designated representative of the Government.

**V. Term**

This Compliance Program shall be in effect for the term of the Non-Prosecution Agreement.

**VI. Self-enforcement**

The Company further agrees that it will undertake and implement the necessary procedures to ensure that this Compliance Program is diligently complied with by all employees, managers, and other employees during the term of the Non-Prosecution Agreement.

**VII. Revisions/modifications**

The requirements of this Compliance Program, including the dates and time periods mentioned herein, shall be strictly complied with. Should the Company be unable to comply with any of the deadlines, the Company shall immediately notify the designated representative of the Government in writing of the reasons for non-compliance.

**VIII. Reports**

All reports, documents and correspondence required under this Compliance Program to be sent to the Government shall be sent to the following offices:

1. U.S. Attorney's Office  
Northern District of California  
ATTN: Kirstin Ault  
450 Golden Gate Avenue, 11<sup>th</sup> Floor  
San Francisco, CA 94102
2. Drug Enforcement Administration  
ATTN: Deputy Assistant Administrator Office of Diversion Control  
8701 Morrissette Drive  
Springfield, VA 22152
3. Food and Drug Administration – Office of Criminal Investigations  
Special Agent in Charge  
Investigative Operations Division Headquarters  
7500 Standish Place, Suite 250N  
Rockville, MD 20855  
(240) 276-9500

All reports, documents, notices and correspondence from the Government to the Company concerning this Compliance Program shall be sent to the following office:

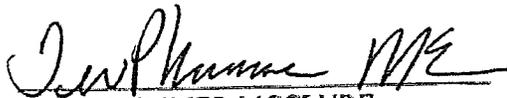
Eugene Illovsky  
Morrison Foerster  
425 Market Street  
San Francisco, CA 94105

IX. Certifications

The Company has read this Compliance Program carefully and understands it thoroughly. The Company enters into this Compliance Program knowingly and voluntarily, and therefore agree to abide by its terms. By her signature below, the corporate representative agrees that she is duly authorized by the Company's Board of Directors to enter into and comply with all of the provisions of this Non-Prosecution Agreement.

DATED: 3/29/13

UNITED PARCEL SERVICE, INC.



TERI PLUMMER MCCLURE  
Senior Vice President of Legal,  
Compliance and Public Affairs  
General Counsel & Corporate Secretary

As counsel for UNITED PARCEL SERVICE, INC., I have discussed with my corporate client and its duly authorized representative the terms of this Compliance Program and have fully explained its requirements. I have no reason to doubt that my client is knowingly and voluntarily entering into this Compliance Program.

DATED: 3/29/13



EUGENE ILLOVSKY  
Counsel for United Parcel Service, Inc.

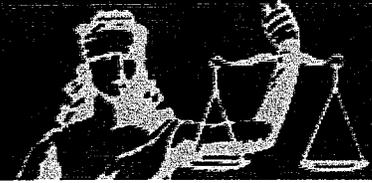
On behalf of the United States, the following agree to the terms of the Compliance Program:

MELINDA HAAG  
United States Attorney

DATED: 3/29/13



KIRSTIN M. AULT  
Assistant United States Attorney



## **UPS Agrees To Forfeit \$40 Million In Payments From Illicit Online Pharmacies For Shipping Services**

FOR IMMEDIATE RELEASE

March 29, 2013

SAN FRANCISCO - United Parcel Service, Inc. ("UPS") and the United States Attorney's Office for the Northern District of California ("USAO-NDCA") entered into a Non-Prosecution Agreement ("NPA") today in which UPS agreed to forfeit \$40 million in payments it has received from illicit online pharmacies and to implement a compliance program designed to ensure that illegal online pharmacies will not be able to use UPS's services to distribute drugs, U.S. Attorney Melinda Haag, Drug Enforcement Administration (DEA) Administrator Michele M. Leonhart, and Food and Drug Administration (FDA) Director of the Office of Criminal Investigations John Roth announced.

UPS has cooperated fully with the investigation and has already taken steps to ensure that illegal Internet pharmacies can no longer use its services to ship drugs. These voluntary improvements will be strengthened by the compliance program UPS will implement as a condition of this NPA.

U.S. Attorney Melinda Haag commented: "We are pleased with the steps UPS has taken to stop the use of its shipping services by illegal on-line pharmacies. Good corporate citizens like UPS play an important role in halting the flow of illegal drugs that degrade our nation's communities. We are hopeful that the leadership displayed by UPS through this compliance program will set the standard for the parcel delivery industry and will materially assist the federal government in its battle against illegal Internet pharmacies."

From 2003 through 2010, UPS was on notice, through some of its employees, that Internet pharmacies were using its services to distribute controlled substances and prescription drugs without valid prescriptions in violation of the law. Internet pharmacies operate illegally when they distribute controlled substances and prescription drugs that are not supported by valid prescriptions. A prescription based solely on a customer's completion of an on-line questionnaire is not valid. Despite being on notice that this activity was occurring, UPS did not implement procedures to close the shipping accounts of Internet pharmacies.

"DEA is aggressively targeting the diversion of controlled substances, as well as those who facilitate their unlawful distribution," said DEA Administrator Michele M. Leonhart. "This investigation is significant and DEA applauds UPS for working to strengthen and enhance its practices in order to prevent future drug diversion."

John Roth, Director of the FDA Office of Criminal Investigations added: "The results of this investigation will prompt a significant transformation of illicit internet pharmacy shipping and distribution practices, limiting the chances of potentially unapproved, counterfeit or otherwise unsafe prescription medications from reaching U.S. consumers. The FDA is hopeful that the positive actions taken by UPS in this case will send a message to other shipping firms to put public health and safety above profits."

Kirstin M. Ault is the Assistant U.S. Attorney who is prosecuting the case with the assistance of Legal Technician Rawaty Yim. The prosecution is the result of an investigation by the Financial Investigative Team of the DEA, with the assistance of the FDA Office of Criminal Investigations. This investigation is part of USAO-NDCA's Health Care Fraud program and was initiated as an investigation with the Organized Crime and Drug Enforcement Task Force. Substantial assistance was provided by the North Carolina Board of Pharmacy.

# **Attachment B**



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## Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*

In the years since the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the goal of the integration mandate in title II of the Americans with Disabilities Act – to provide individuals with disabilities opportunities to live their lives like individuals without disabilities – has yet to be fully realized. Some state and local governments have begun providing more integrated community alternatives to individuals in or at risk of segregation in institutions or other segregated settings. Yet many people who could and want to live, work, and receive services in integrated settings are still waiting for the promise of *Olmstead* to be fulfilled.

In 2009, on the tenth anniversary of the Supreme Court's decision in *Olmstead*, President Obama launched "The Year of Community Living" and directed federal agencies to vigorously enforce the civil rights of Americans with disabilities. Since then, the Department of Justice has made enforcement of *Olmstead* a top priority. As we commemorate the 12<sup>th</sup> anniversary of the *Olmstead* decision, the Department of Justice reaffirms its commitment to vindicate the right of individuals with disabilities to live integrated lives under the ADA and *Olmstead*. To assist individuals in understanding their rights under title II of the ADA and its integration mandate, and to assist state and local governments in complying with the ADA, the Department of Justice has created this technical assistance guide.

### The ADA and Its Integration Mandate

In 1990, Congress enacted the landmark Americans with Disabilities Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>1</sup> In passing this groundbreaking law, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."<sup>2</sup> For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs,

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<sup>1</sup> 42 U.S.C. § 12101(b)(1).

<sup>2</sup> 42 U.S.C. § 12101(a)(2).

or activities of a public entity, or be subjected to discrimination by any such entity.<sup>3</sup>

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act.<sup>4</sup> The title II regulations require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>5</sup> The preamble discussion of the “integration regulation” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . .”<sup>6</sup>

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.<sup>7</sup> The Supreme Court explained that this holding “reflects two evident judgments.” First, “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.” Second, “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>8</sup>

To comply with the ADA’s integration mandate, public entities must reasonably modify their policies, procedures or practices when necessary to avoid discrimination.<sup>9</sup> The obligation to make reasonable modifications may be excused only where the public entity demonstrates that the requested modifications would “fundamentally alter” its service system.<sup>10</sup>

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<sup>3</sup> 42 U.S.C. § 12132.

<sup>4</sup> See 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), reprinted in 42 U.S.C. § 2000d-1. Section 504 of the Rehabilitation Act of 1973 similarly prohibits disability-based discrimination. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”). Claims under the ADA and the Rehabilitation Act are generally treated identically.

<sup>5</sup> 28 C.F.R. § 35.130(d) (the “integration mandate”).

<sup>6</sup> 28 C.F.R. Pt. 35, App. A (2010) (addressing § 35.130).

<sup>7</sup> *Olmstead v. L.C.*, 527 U.S. at 607.

<sup>8</sup> *Id.* at 600-01.

<sup>9</sup> 28 C.F.R. § 35.130(b)(7).

<sup>10</sup> *Id.*; see also *Olmstead*, 527 U.S. at 604-07.

In the years since the passage of the ADA and the Supreme Court's decision in *Olmstead*, the ADA's integration mandate has been applied in a wide variety of contexts and has been the subject of substantial litigation. The Department of Justice has created this technical assistance guide to assist individuals in understanding their rights and public entities in understanding their obligations under the ADA and *Olmstead*. This guide catalogs and explains the positions the Department of Justice has taken in its *Olmstead* enforcement. It reflects the views of the Department of Justice only. For questions about this guide, you may contact our ADA Information Line, 800-514-0301 (voice), 800-514-0383 (TTY).

*Date: June 22, 2011*

## **Questions and Answers on the ADA's Integration Mandate and *Olmstead* Enforcement**

### **1. What is the most integrated setting under the ADA and *Olmstead*?**

The "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."<sup>11</sup> Integrated settings are those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. Evidence-based practices that provide scattered-site housing with supportive services are examples of integrated settings. By contrast, segregated settings often have qualities of an institutional nature. Segregated settings include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.

### **2. When is the ADA's integration mandate implicated?**

The ADA's integration mandate is implicated where a public entity administers its programs in a manner that results in unjustified segregation of persons with disabilities. More specifically, a public entity may violate the ADA's integration mandate when it: (1) directly or indirectly operates facilities and/or programs that segregate individuals with disabilities; (2) finances the segregation of individuals with disabilities in private facilities; and/or (3) through its planning, service system design, funding choices, or service implementation practices, promotes or relies upon the segregation of individuals with disabilities in private facilities or programs.<sup>12</sup>

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<sup>11</sup> 28 C.F.R. pt. 35 app. A (2010).

<sup>12</sup> See 28 C.F.R. § 35.130(b)(1) (prohibiting a public entity from discriminating "directly or through contractual, licensing or other arrangements, on the basis of disability"); § 35.130(b)(3)

### **3. Does a violation of the ADA's integration mandate require a showing of facial discrimination?**

No, in the *Olmstead* context, an individual is not required to prove facial discrimination. In *Olmstead*, the court held that the plaintiffs could make out a case under the integration mandate even if they could not prove "but for" their disability, they would have received the community-based services they sought. It was enough that the state currently provided them services in an institutional setting that was not the most integrated setting appropriate.<sup>13</sup> Additionally, an *Olmstead* claim is distinct from a claim of disparate treatment or disparate impact and accordingly does not require proof of those forms of discrimination.

### **4. What evidence may an individual rely on to establish that an integrated setting is appropriate?**

An individual may rely on a variety of forms of evidence to establish that an integrated setting is appropriate. A reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue. Such assessments must identify individuals' needs and the services and supports necessary for them to succeed in an integrated setting. Professionals involved in the assessments must be knowledgeable about the range of supports and services available in the community. However, the ADA and its regulations do not require an individual to have had a state treating professional make such a determination. People with disabilities can also present their own independent evidence of the appropriateness of an integrated setting, including, for example, that individuals with similar needs are living, working and receiving services in integrated settings with appropriate supports. This evidence may come from their own treatment providers, from community-based organizations that provide services to people with disabilities outside of institutional settings, or from any other relevant source. Limiting the evidence on which *Olmstead* plaintiffs may rely would enable public entities to circumvent their *Olmstead* requirements by failing to require professionals to make recommendations regarding the ability of individuals to be served in more integrated settings.

### **5. What factors are relevant in determining whether an individual does not oppose an integrated setting?**

Individuals must be provided the opportunity to make an informed decision. Individuals who have been institutionalized and segregated have often been repeatedly told that they are not capable of successful community living and have been given very little information, if any, about how they could successfully live in integrated settings. As a result, individuals' and their families' initial response when offered integrated options may be reluctance or hesitancy. Public entities must take affirmative steps to remedy this history of segregation and prejudice in order to ensure that individuals have an opportunity to make an informed choice. Such steps include providing information about the benefits of integrated settings; facilitating visits or other experiences in such settings; and offering opportunities to meet with other individuals with disabilities who are living, working and receiving services in integrated settings, with their

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(prohibiting a public entity from "directly, or through contractual or other arrangements, utilizing criteria or methods of administration" that have the effect of discriminating on the basis of disability").

<sup>13</sup> *Olmstead*, 527 U.S. at 598; 28 C.F.R. 35.130(d).

families, and with community providers. Public entities also must make reasonable efforts to identify and addresses any concerns or objections raised by the individual or another relevant decision-maker.

**6. Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?**

Yes, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.

**7. May the ADA and *Olmstead* require states to provide additional services, or services to additional individuals, than are provided for in their Medicaid programs?**

A state's obligations under the ADA are independent from the requirements of the Medicaid program.<sup>14</sup> Providing services beyond what a state currently provides under Medicaid may not cause a fundamental alteration, and the ADA may require states to provide those services, under certain circumstances. For example, the fact that a state is permitted to "cap" the number of individuals it serves in a particular waiver program under the Medicaid Act does not exempt the state from serving additional people in the community to comply with the ADA or other laws, for example by seeking a modification of the waiver to remove the cap.<sup>15</sup>

**8. Do the ADA and *Olmstead* require a public entity to provide services in the community to persons with disabilities when it would otherwise provide such services in institutions?**

Yes. Public entities cannot avoid their obligations under the ADA and *Olmstead* by characterizing as a "new service" services that they currently offer only in institutional settings. The ADA regulations make clear that where a public entity operates a program or provides a service, it cannot discriminate against individuals with disabilities in the provision of those services.<sup>16</sup> Once public entities choose to provide certain services, they must do so in a nondiscriminatory fashion.<sup>17</sup>

**9. Can budget cuts violate the ADA and *Olmstead*?**

Yes, budget cuts can violate the ADA and *Olmstead* when significant funding cuts to community services create a risk of institutionalization or segregation. The most obvious example of such a

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<sup>14</sup> See CMS, *Olmstead* Update No. 4, at 4 (Jan. 10, 2001), available at <https://www.cms.gov/smdl/downloads/smdl011001a.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> 28 C.F.R. § 35.130.

<sup>17</sup> See U.S. Dept. of Justice, ADA Title II Technical Assistance Manual § II-3.6200.

risk is where budget cuts require the elimination or reduction of community services specifically designed for individuals who would be institutionalized without such services. In making such budget cuts, public entities have a duty to take all reasonable steps to avoid placing individuals at risk of institutionalization. For example, public entities may be required to make exceptions to the service reductions or to provide alternative services to individuals who would be forced into institutions as a result of the cuts. If providing alternative services, public entities must ensure that those services are actually available and that individuals can actually secure them to avoid institutionalization.

#### **10. What is the fundamental alteration defense?**

A public entity's obligation under *Olmstead* to provide services in the most integrated setting is not unlimited. A public entity may be excused in instances where it can prove that the requested modification would result in a "fundamental alteration" of the public entity's service system. A fundamental alteration requires the public entity to prove "that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons with [ ] disabilities."<sup>18</sup> It is the public entity's burden to establish that the requested modification would fundamentally alter its service system.

#### **11. What budgetary resources and costs are relevant to determine if the relief sought would constitute a fundamental alteration?**

The relevant resources for purposes of evaluating a fundamental alteration defense consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities. Similarly, all relevant costs, not simply those funded by the single agency that operates or funds the segregated or integrated setting, must be considered in a fundamental alteration analysis. Moreover, cost comparisons need not be static or fixed. If the cost of the segregated setting will likely increase, for instance due to maintenance, capital expenses, environmental modifications, addressing substandard care, or providing required services that have been denied, these incremental costs should be incorporated into the calculation. Similarly, if the cost of providing integrated services is likely to decrease over time, for instance due to enhanced independence or decreased support needs, this reduction should be incorporated as well. In determining whether a service would be so expensive as to constitute a fundamental alteration, the fact that there may be transitional costs of converting from segregated to integrated settings can be considered, but it is not determinative. However, if a public entity decides to serve new individuals in segregated settings ("backfilling"), rather than to close or downsize the segregated settings as individuals in the plaintiff class move to integrated settings, the costs associated with that decision should not be included in the fundamental alteration analysis.

#### **12. What is an *Olmstead* Plan?**

An *Olmstead* plan is a public entity's plan for implementing its obligation to provide individuals with disabilities opportunities to live, work, and be served in integrated settings. A comprehensive, effectively working plan must do more than provide vague assurances of future

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<sup>18</sup> *Olmstead*, 527 U.S. at 604.

integrated options or describe the entity's general history of increased funding for community services and decreased institutional populations. Instead, it must reflect an analysis of the extent to which the public entity is providing services in the most integrated setting and must contain concrete and reliable commitments to expand integrated opportunities. The plan must have specific and reasonable timeframes and measurable goals for which the public entity may be held accountable, and there must be funding to support the plan, which may come from reallocating existing service dollars. The plan should include commitments for each group of persons who are unnecessarily segregated, such as individuals residing in facilities for individuals with developmental disabilities, psychiatric hospitals, nursing homes and board and care homes, or individuals spending their days in sheltered workshops or segregated day programs. To be effective, the plan must have demonstrated success in actually moving individuals to integrated settings in accordance with the plan. A public entity cannot rely on its *Olmstead* plan as part of its defense unless it can prove that its plan comprehensively and effectively addresses the needless segregation of the group at issue in the case. Any plan should be evaluated in light of the length of time that has passed since the Supreme Court's decision in *Olmstead*, including a fact-specific inquiry into what the public entity could have accomplished in the past and what it could accomplish in the future.

**13. Can a public entity raise a viable fundamental alteration defense without having implemented an *Olmstead* plan?**

The Department of Justice has interpreted the ADA and its implementing regulations to generally require an *Olmstead* plan as a prerequisite to raising a fundamental alteration defense, particularly in cases involving individuals currently in institutions or on waitlists for services in the community. In order to raise a fundamental alteration defense, a public entity must first show that it has developed a comprehensive, effectively working *Olmstead* plan that meets the standards described above. The public entity must also prove that it is implementing the plan in order to avail itself of the fundamental alteration defense. A public entity that cannot show it has and is implementing a working plan will not be able to prove that it is already making sufficient progress in complying with the integration mandate and that the requested relief would so disrupt the implementation of the plan as to cause a fundamental alteration.

**14. What is the relevance of budgetary shortages to a fundamental alteration defense?**

Public entities have the burden to show that immediate relief to the plaintiffs would effect a fundamental alteration of their program. Budgetary shortages are not, in and of themselves, evidence that such relief would constitute a fundamental alteration. Even in times of budgetary constraints, public entities can often reasonably modify their programs by re-allocating funding from expensive segregated settings to cost-effective integrated settings. Whether the public entity has sought additional federal resources available to support the provision of services in integrated settings for the particular group or individual requesting the modification – such as Medicaid, Money Follows the Person grants, and federal housing vouchers – is also relevant to a budgetary defense.

### **15. What types of remedies address violations of the ADA's integration mandate?**

A wide range of remedies may be appropriate to address violations of the ADA and *Olmstead*, depending on the nature of the violations. Remedies typically require the public entity to expand the capacity of community-based alternatives by a specific amount, over a set period of time. Remedies should focus on expanding the most integrated alternatives. For example, in cases involving residential segregation in institutions or large congregate facilities, remedies should provide individuals opportunities to live in their own apartments or family homes, with necessary supports. Remedies should also focus on expanding the services and supports necessary for individuals' successful community tenure. *Olmstead* remedies should include, depending on the population at issue: supported housing, Home and Community Based Services ("HCBS") waivers,<sup>19</sup> crisis services, Assertive Community Treatment ("ACT") teams, case management, respite, personal care services, peer support services, and supported employment. In addition, court orders and settlement agreements have typically required public entities to implement a process to ensure that currently segregated individuals are provided information about the alternatives to which they are entitled under the agreement, given opportunities that will allow them to make informed decisions about their options (such as visiting community placements or programs, speaking with community providers, and meeting with peers and other families), and that transition plans are developed and implemented when individuals choose more integrated settings.

### **16. Can the ADA's integration mandate be enforced through a private right of action?**

Yes, private individuals may file a lawsuit for violation of the ADA's integration mandate. A private right of action lies to enforce a regulation that authoritatively construes a statute. The Supreme Court in *Olmstead* clarified that unnecessary institutionalization constitutes "discrimination" under the ADA, consistent with the Department of Justice integration regulation.

### **17. What is the role of protection and advocacy organizations in enforcing *Olmstead*?**

By statute, Congress has created an independent protection and advocacy system (P&As) to protect the rights of and advocate for individuals with disabilities.<sup>20</sup> Congress gave P&As certain powers, including the authority to investigate incidents of abuse, neglect and other rights violations; access to individuals, records, and facilities; and the authority to pursue legal,

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<sup>19</sup> HCBS waivers may cover a range of services, including residential supports, supported employment, respite, personal care, skilled nursing, crisis services, assistive technology, supplies and equipment, and environmental modifications.

<sup>20</sup> 42 U.S.C. §§ 15001 *et seq.* (Developmental Disabilities Assistance and Bill of Rights Act, requiring the establishment of the P&A system to protect and advocate for individuals with developmental disabilities); 42 U.S.C. § 10801 *et seq.* (The Protection and Advocacy for Individuals with Mental Illness Act, expanding the mission of the P&A to include protecting and advocating for individuals with mental illness)

administrative or other remedies on behalf of individuals with disabilities.<sup>21</sup> P&As have played a central role in ensuring that the rights of individuals with disabilities are protected, including individuals' rights under title II's integration mandate. The Department of Justice has supported the standing of P&As to litigate *Olmstead* cases.

**18. Can someone file a complaint with the Department of Justice regarding a violation of the ADA and *Olmstead*?**

Yes, individuals can file complaints about violations of title II and *Olmstead* with the Department of Justice. A title II complaint form is available on-line at [www.ada.gov](http://www.ada.gov) and can be sent to:

U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
Disability Rights Section – NYAV  
Washington, DC 20530

Individuals may also call the Department's toll-free ADA Information Line for information about filing a complaint and to order forms and other materials that can assist you in providing information about the violation. The number for the ADA Information Line is (800) 514-0301 (voice) or (800) 514-0383 (TTY).

In addition, individuals may file a complaint about violations of *Olmstead* with the Office for Civil Rights at the U.S. Department of Health and Human Services. Instructions on filing a complaint with OCR are available at <http://www.hhs.gov/ocr/civilrights/complaints/index.html>.

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<sup>21</sup> 42 U.S.C. §§ 10805, 15043.