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"Transparency and Integrity in Corporate Monitoring"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Monitoring Selection Process Today

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

A. The Regulatory Power And Increasing Use Of Monitors

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

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

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

B. Selection And Appointment

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

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

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

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

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

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

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

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

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

[25] *See id.* at 898.

[26] For example, the GAO reports that one company for which DOJ required a monitor complained that the monitor "had a large number of staff assisting him on the engagement, and he and his staff attended more meetings than the company felt was necessary, some of which were unrelated to the monitor

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

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responsibilities delineated in the agreement." "As a result, the company believe[d] that the overall cost of the monitorship was higher than it needed to be." And "[w]hile the company reportedly tried to negotiate with the monitor over the scope of work and number of staff involved, the company stated that the monitor was generally unwilling to make changes." GAO Testimony, *supra* note 23, at 28.

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

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

[29] *Id.* at 28.

[30] *Id.* at 30.

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

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

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

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

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

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

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

IV. Current Law And The Proposed Legislation

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

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

A. Current Law

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

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

[36] *See id.* at 26.

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

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

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

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

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

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

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

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

B. The Transparency And Integrity Act

1. The Act's Effect

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

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

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

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

[46] *See id.*

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

2. The Act's Benefits

The proposed legislation would have several benefits.

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

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

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

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

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

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

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

[50] 18 U.S.C. § 207(a)(1).

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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